

# Minnesota Joint Physical Child Custody Presumption Study Group Report

January 14, 2009

This page is intentionally left blank.

**Table of Contents**  
**Final Report, Joint Physical Child Custody Presumption Study Group**

<b><u>Page</u></b>	<b><u>Topic</u></b>
5-24	Work and Findings of the Study Group
24-25	Recommendations
29-35	<u>Appendix A</u> : Survey of State Statutes
37-69	<u>Appendix B</u> : Expert Testimony
39-42	Impact on Children, by Mindy Mitnick, Ed.M., M.A.
43-52	Demographic Data—New Realities, by Melissa Froehle, J.D., Minnesota Fathers & Families Network
53-69	Impact of Joint Physical Custody on Parents Who Have Been Abused, by Loretta Frederick, J.D., Battered Women’s Justice Project
71-79	<u>Appendix C</u> : Assessing the Social Science Research, by Jeffrey Edleson, Ph.D, U of M, School of Social Work
80-112	<u>Appendix D</u> : Fiscal Impact of Joint Physical Custody Presumption, by Melissa Froehle, J.D., Jill Olson, J.D., and James Street, J.D.
113-115	<u>Appendix E</u> : Public Hearing Participants
119-153	Public written submissions AGAINST a Presumption of Joint Physical Custody
157-248	Public written submissions FOR a Presumption of Joint Physical Custody
251-286	Public written submissions NEITHER PRO NOR CON OR THAT OFFER A DIFFERENT PERSPECTIVE on a Presumption of Joint Physical Custody

This page is intentionally left blank.



## **Minnesota Joint Physical Child Custody Presumption Study Group Report**

January 14, 2009

### **I. Charge from the Minnesota State Legislature**

In 2008, the Minnesota Legislature directed the state court administrator to convene a Study Group to consider the potential impact of adoption of a joint physical child custody presumption.

Excerpted from Minn. Laws 2008, Chapter 299

#### **Sec. 25. JOINT PHYSICAL CUSTODY; STUDY GROUP.**

(a) The state court administrator shall convene a study group of 12 members to consider the impact that a presumption of joint physical custody would have in Minnesota. The evaluation must consider the positive and negative impact on parents and children of adopting a presumption of joint physical custody, the fiscal impact of adopting this presumption, and the experiences of other states that have adopted a presumption of joint physical custody. The study must consider data and information from academic and research professionals.

(b) In appointing members to the study group, the state court administrator must ensure that the viewpoint of parent advocacy groups, academics, policy analysts, judges, court administrators, attorneys, domestic violence advocates, citizen members who are not associated with a parent advocacy group, and other interested parties are represented. At least one member of the study group must be a representative of the Department of Human Services. The state court administrator must consult with the chairs and ranking minority members of the budget and policy committees in the house and senate with jurisdiction over family law on the composition of the working group. The state court administrator shall report to the legislature on the evaluation of presumption of joint physical custody, the experiences of other states, and recommendations made by the study group no later than January 15, 2009.

Members of the Study Group<sup>1</sup> were appointed in August, 2008, and the Study Group met on September 22, October 27, November 24, and December 15, 2008.

---

<sup>1</sup> The Honorable Kevin Eide served as the chair of the Study Group. The members of the Study Group were: Chad Barthelemy, Citizen Representative; Sharon Durken, Minnesota Kinship Caregivers Association; Jeffrey L. Edleson, Ph.D., University of Minnesota School of Social Work; Ben Henschel, American Academy of Matrimonial Lawyers, Minnesota Chapter; Paul Masiarchin, Minnesota Fathers and Families Network; Jill Olson, Minnesota Department of Human Services; Molly Olson, Center for Parental Responsibility; Irene Opsahl, Legal Aid Society; Glen Palm, Ph.D., Child and Family Studies, St. Cloud State University; Liz Richards, Minnesota Coalition for Battered Women; Judge Heidi Schellhas, Minnesota Court of Appeals; James Street, Southern Minnesota Regional Legal Services; and Pamela Waggoner, Minnesota State Bar Association. The Study Group was staffed by Mark Toogood, Family Services and Guardian ad Litem Manager, and Jodie Metcalf, Manager, Child support Magistrate Program. Nancy

## II. The Status Quo in Minnesota

### A. Statutes Governing Child Custody and Parenting Time

In divorce and parentage proceedings, child custody is decided based on the “best interests of the child” standard, using thirteen factors set forth in statute to make an individualized determination for each child.<sup>2</sup>

Parents also have the option of creating a parenting plan which must include a schedule, address decision making responsibilities, and identify a method of resolving disputes.<sup>3</sup> Parenting plans are reviewed by the court to assure that they are in the best interests of the child or children.<sup>4</sup>

---

Ver Steegh, Vice Dean for Academic Programs, William Mitchell College of Law, served as a nonparticipating reporter, and Jim Hilbert, Center for Negotiation and Justice, William Mitchell College of Law, facilitated two meetings.

<sup>2</sup> Minn. Stat. § 518.17, subd. 1 (2007) provides “The best interests of the child. (a) “The best interests of the child” means all relevant factors to be considered and evaluated by the court including: (1) the wishes of the child's parent or parents as to custody;(2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;(3) the child's primary caretaker; (4) the intimacy of the relationship between each parent and the child; (5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests; (6) the child's adjustment to home, school, and community; (7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity; (8) the permanence, as a family unit, of the existing or proposed custodial home; (9) the mental and physical health of all individuals involved; except that a disability, as defined in section 363A.03, of a proposed custodian or the child shall not be determinative of the custody of the child, unless the proposed custodial arrangement is not in the best interest of the child; (10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any; (11) the child's cultural background; (12) the effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has occurred between the parents or between a parent and another individual, whether or not the individual alleged to have committed domestic abuse is or ever was a family or household member of the parent; and (13) except in cases in which a finding of domestic abuse as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child. The court may not use one factor to the exclusion of all others. The primary caretaker factor may not be used as a presumption in determining the best interests of the child. The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child. (b) The court shall not consider conduct of a proposed custodian that does not affect the custodian's relationship to the child.” See Minn. Stat. § 257.541 (2007) (Custody and parenting time with children born outside of marriage). See also Nancy Zalusky Berg, *The Custody Conundrum*, (1999) (distributed to Study Group members).

<sup>3</sup> Minn. Stat. § 518.1705, subd. 2 (2007) provides: “Plan elements. (a) A parenting plan must include the following: (1) a schedule of the time each parent spends with the child; (2) a designation of decision-making responsibilities regarding the child; and (3) a method of dispute resolution. (b) A parenting plan may include other issues and matters the parents agree to regarding the child. (c) Parents voluntarily agreeing to parenting plans may substitute other terms for physical and legal custody, including designations of joint or sole custody, provided that the terms used in the substitution are defined in the parenting plan.”

<sup>4</sup> Minn. Stat. § 518.1705, subd. 5 (2007) provides: “Role of court. If both parents agree to the use of a parenting plan but are unable to agree on all terms, the court may create a parenting plan under this section. If the court is considering a parenting plan, it may require each parent to submit a proposed parenting plan at any time before entry of the final judgment and decree. If parents seek the court's assistance in deciding the schedule for each

The term “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.”<sup>5</sup> In contrast, the term “joint physical custody” means that “the routine daily care and control and the residence of the child is structured between the parties.”<sup>6</sup> When joint legal or physical custody is sought, in addition to the best interests factors, the court considers the ability of the parents to cooperate, plans for dispute resolution, whether sole custody would be detrimental to the child, and whether domestic abuse has occurred.<sup>7</sup>

“Parenting time” refers to “the time a parent spends with a child regardless of the custodial designation regarding the child.”<sup>8</sup> Parenting time is granted “as will enable the child and the parent to maintain a child to parent relationship that will be in the best interests of the child.”<sup>9</sup> There is a rebuttable presumption that a parent is “entitled to receive at least 25 percent of the parenting time for the child.”<sup>10</sup>

In addition to the parenting time presumption, there are two statutory rebuttable presumptions related to child custody. First, there is a rebuttable presumption that upon request of either or both

---

order an evaluation and should consider the appointment of a guardian ad litem. Parenting plans, whether entered on the court's own motion, following a contested hearing, or reviewed by the court pursuant to a stipulation, must be based on the best interests factors in section 518.17 or 257.025, as applicable.”

<sup>5</sup> Minn. Stat. § 518.003, subd. 3(b) (2007).

<sup>6</sup> Minn. Stat. § 518.003, subd. 3(d) (2007).

<sup>7</sup> Minn. Stat. § 518.17, subd. 2 (2007) provides “In addition to the factors listed in subdivision 1, where either joint legal or joint physical custody is contemplated or sought, the court shall consider the following relevant factors: (a) the ability of parents to cooperate in the rearing of their children; (b) methods for resolving disputes regarding any major decision concerning the life of the child, and the parents' willingness to use those methods; (c) whether it would be detrimental to the child if one parent were to have sole authority over the child's upbringing; and (d) whether domestic abuse, as defined in section 518B.01, has occurred between the parents.”

<sup>8</sup> Minn. Stat. § 518.003, subd. 5 (2007).

<sup>9</sup> Minn. Stat. § 518.175, subd. 1(a) (2007) provides that “In all proceedings for dissolution or legal separation, subsequent to the commencement of the proceeding and continuing thereafter during the minority of the child, the court shall, upon the request of either parent, grant such parenting time on behalf of the child and a parent as will enable the child and the parent to maintain a child to parent relationship that will be in the best interests of the child. If the court finds, after a hearing, that parenting time with a parent is likely to endanger the child's physical or emotional health or impair the child's emotional development, the court shall restrict parenting time with that parent as to time, place, duration, or supervision and may deny parenting time entirely, as the circumstances warrant. The court shall consider the age of the child and the child's relationship with the parent prior to the commencement of the proceeding. A parent's failure to pay support because of the parent's inability to do so shall not be sufficient cause for denial of parenting time.”

<sup>10</sup> Minn. Stat. § 518.175, subd. 1(e) (2007) states “In the absence of other evidence, there is a rebuttable presumption that a parent is entitled to receive at least 25 percent of the parenting time for the child. For purposes of this paragraph, the 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.”

parties, “joint legal custody is in the best interests of the child.”<sup>11</sup> Second there is a rebuttable presumption that joint legal or joint physical custody is not in the best interests of a child if there has been domestic abuse.<sup>12</sup>

There is no statutory preference or presumption for or against awards of joint physical custody. However, historically Minnesota courts preferred not to award joint physical custody based on concerns about lack of routine and stability for children and parental inability to cooperate and resolve disputes.<sup>13</sup> While the courts have not expressly overruled the case law preference, some more recent cases do not recognize it. For example, in 2005 the Minnesota Court of Appeals stated that “[t]here is neither a statutory presumption disfavoring joint physical custody, nor is there a preference against joint physical custody if the district court finds that it is in the best interest of the child and the four joint custody factors support such a determination.”<sup>14</sup> Nevertheless, because old case law disfavoring joint physical custody may continue to impact trial courts’ decisions, some Study Group members expressed concern about the potentially unsettled state of the case law.

#### **B. Lack of Data on Minnesota Child Custody Process and Outcomes**

Lack of data collection concerning Minnesota child custody outcomes posed a major roadblock for the Study Group in completing its work. The Study Group hoped to find information indicating: (1) the frequency of sole and joint physical custody settlements and awards; (2) whether the frequency of sole and joint physical custody awards has changed over time; (3) the rate at which mothers and fathers obtain sole and joint physical custody; (4) whether sole or joint physical outcomes are associated with geographic location, representation by attorneys, settlement or judicial decision, marital status, socioeconomic status, and/or family ethnicity and cultural background; (5) which issues are most likely

---

<sup>11</sup> Minn. Stat. § 518.17, subd. 2 (2007). Joint legal custody may or may not be incorporated into a parenting plan.

<sup>12</sup> *Id.*

<sup>13</sup> See *Kaehler v. Kaehler*, 18 N.W.2d 312, 314 (1945) (“Regularity in the daily routine of providing the child with food, sleep, and general care, as well as stability in the human factors affecting the child’s emotional life and development, is essential, and it is difficult to attain this regularity and stability where a young child is shunted back and forth between two homes.”); *Wopata v. Wopata*, 498 N. W.2d 478, 482 (Minn. Ct. App. 1993) (“Joint physical custody, sometimes referred to as divided custody, is not a favored arrangement . . . A grant of joint physical custody will only be appropriate in exceptional cases”). See also Martin L. Swaden & Linda A. Olup, 14 Minn. Prac., Fam. L. § 6:39 (3<sup>rd</sup> Ed. 2008) (“A long line of early Minnesota cases has established that joint physical custody is not a preferred situation. In earlier years, the court discussed this issue as divided custody. Joint physical custody, because of the divisiveness inherent in such a scheme, was rarely seen to be in the best interests of a young child, and was appropriate only in exceptional cases. More recently, joint physical custody is looked upon less negatively.”)

<sup>14</sup> *Schallinger v. Schallinger*, 699 N. W.2d 15 (Minn. Ct. App. 2005).

to be settled or contested; (6) characteristics of parents involved in contested proceedings; and (7) the frequency of modification and enforcement proceedings associated with sole and joint physical custody outcomes. However, such information is not currently collected and as a result, there is little objective evidence to provide context for individual experiences.

The only relevant Minnesota research found by Study Group members compared custodial outcomes in 1986 and 1999, in the context of study on child support.<sup>15</sup> The authors reported that in 1986, six percent of the cases sampled involved the outcome of joint physical custody but that by 1999, the number of joint physical custody outcomes increased to twenty-three percent.<sup>16</sup> The study is useful in that it documents the trend of increasing use of joint physical custody between 1986 and 1999, but it does not address child custody outcomes between 1999 and the present.

### **C. Perceived Strengths and Weaknesses of the Current System**

As noted, the work of the Study Group was hampered by the lack of current reliable data tracking sole and joint physical custody outcomes in Minnesota. However, in an effort to fulfill its legislative charge, Study Group members drew on personal and professional experience as well as oral and written submissions from the public<sup>17</sup> to identify some aspects of the Minnesota child custody system that function well and some aspects of the system that are problematic for children and parents.

#### **1. Perceived Strengths of the Current System**

- The “best interests” standard is child-focused and promotes individualized consideration of each child’s situation and needs.
- A range of child custody options is available to families. Parents can create parenting plans tailored to meet specific family needs.
- Parents can choose to have joint physical custody.
- Programs such as parenting education and various alternative dispute resolution methods can assist parents in reaching an amicable settlement.
- Many cases involving child custody and parenting time are settled by the parties without significant judicial intervention.

---

<sup>15</sup> Kathryn D. Rettig & Kerry Kriener-Althen, *Consequences of Minnesota Child Support Guidelines for Children of Divorced Parents*, FALL 2003 CURA REPORTER 10, (2003).

<sup>16</sup> *Id.* at 11.

<sup>17</sup> Appendix E contains a list of people who testified at a “Public Listening Session” on October 27, 2008 and written submissions received by the Study Group.

- Recent legislative changes with respect to child support and relocation have reduced parental incentives to seek particular child custody labels.<sup>18</sup>

## **2. Perceived Problems with the Current System**

- “Best interests” determinations require information that is not consistently available due to insufficient court system resources (including risk assessment and factual development).
- Because the “best interests” standard requires individualized application, outcomes can be difficult to predict and are viewed by some parents as involving too much judicial discretion.
- Some parents entering the court system encounter financial, cultural, and linguistic barriers that limit participation.
- Increasing numbers of parents are not represented by counsel.
- Some parents believe that courts may be biased against fathers when making child custody determinations.
- Some parents believe that nonresidential fathers may be discouraged from actively parenting children.
- Some parents believe that courts may be biased against mothers, particularly those who raise concerns about battering and safety issues.
- Some parents believe that use of the best interests standard is an unconstitutional violation of a parent’s right to control the care and upbringing of children.

The Study Group did not intend for the list of perceived strengths and weaknesses to be comprehensive and members did not reach consensus about them. The purpose of the discussion was to exchange views about the functioning of the current system preliminary to exploring potential ramifications of a joint physical custody presumption.

## **III. Joint Physical Child Custody Presumptions**

### **A. What is a Presumption of Joint Physical Custody?**

The legislative charge instructs the Study Group “to consider the impact that a presumption of joint physical custody would have in Minnesota.” The presumption would apply to children whose parents are seeking a divorce, whose parents have cohabited but not married, or whose parents are unmarried and have never cohabited.

---

<sup>18</sup> See Minn. Stat. § 518.175, subd. 3 (2007) (Move to another state) and Minn. Stat. § 518A (2007) (Child Support).

A presumption is generally defined as “[a] legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts.”<sup>19</sup> A rebuttable presumption is “[a]n inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence.”<sup>20</sup> In contrast, a conclusive presumption cannot be overcome by additional evidence.<sup>21</sup> Rep. Tim Mahoney and Sen. Kathy Saltzman provided the Study Group with proposed legislation from the 2007-2008 session which, if passed, would have created “a rebuttable presumption that joint legal and physical custody is in the best interests of the child.”<sup>22</sup> Therefore, Study Group discussions primarily focused on consideration of a rebuttable, rather than a conclusive, presumption.

Joint physical custody is defined under Minn. Stat. §518.003(d) to mean that “the routine daily care and control and the residence of the child is structured between the parties.” For the most part, Study Group members assumed that this definition would continue to apply.<sup>23</sup>

With these assumptions, under a rebuttable presumption of joint physical custody Minnesota courts would assume that structuring routine daily care, control, and residence between both parents is in the best interests of all children. When awarding physical custody, courts would no longer review specific situations of individual children to determine their best interests (unless a parent objects to joint physical custody). The burden of seeking such a best interests determination with respect to custody would shift to an objecting parent who would be required to produce evidence or prove that the arrangement would not be in the child’s best interest.

The Study Group was unable to resolve at least four questions about the meaning of a joint physical custody presumption within the context of Minnesota’s larger legislative scheme. An initial issue concerned *the extent to which the label of joint physical custody would be linked to time spent with children*. Some members believed that children would live with each parent on a nearly equal basis. Others thought that children would spend substantial time living with each parent (perhaps ranging from 35%/65% to 50%/50%). Still others suggested that because

---

<sup>19</sup> BLACK’S LAW DICTIONARY (8<sup>th</sup> ed. 2004).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> S.F. No. 1606, as introduced – 85<sup>th</sup> Legislative Session (2007-2008).

<sup>23</sup> In contrast, the proposed legislation provided by Rep. Mahoney and Sen. Saltzman, S.F. No. 1606, as introduced – 85<sup>th</sup> Legislative Session (2007-2008), defines joint physical custody as “the routine daily care and control and the residence of the child is structured between the parties. Joint physical custody does not require an equal or nearly equal division of time between the parties.”

the statutory definition of joint physical custody does not specify a division of time, the existing rebuttable presumption of 25% time<sup>24</sup> would set a minimum amount of time that each parent would spend with children (unless rebutted).

Study Group members also differed as to *whether and how Minnesota's parenting time statute would intersect with a presumption of joint physical custody*. The statute currently provides that parenting time is awarded "as will enable the child and the parent to maintain a child to parent relationship that will be in the best interests of the child."<sup>25</sup> If a joint physical custody presumption is interpreted to require nearly equal time with each parent, the parenting time statute would arguably no longer apply and a best interests analysis would take place only if sought by a parent objecting to joint physical custody. However, if a presumption required between 25% and 50% time with each parent, some Study Group members thought that a best interests analysis would be used to determine parenting time.

Thus, Study Group members struggled to reconcile whether a joint physical custody presumption would: (1) assume an equal or substantial amount of time spent with each parent even though no specific division of time appears in the definition of joint physical custody; or (2) apply the label of joint physical custody without likely accompanying change in the status quo with respect to time spent with each parent.

Finally, Study Group members questioned what *standard of proof would be required to rebut the presumption*<sup>26</sup> as well as *whether the current additional four joint legal and physical custody factors*<sup>27</sup> *would be eliminated or might be considered for the purpose of rebutting the presumption*.<sup>28</sup>

---

<sup>24</sup> Minn. Stat. § 518.175, subd. 1(e) (2007) contains a rebuttable presumption that a parent is "entitled to receive at least 25 percent of the parenting time for the child."

<sup>25</sup> Minn. Stat. § 518.175, subd. 1 (2007).

<sup>26</sup> The proposed legislation provided by Rep. Mahoney and Sen. Saltzman, S.F. No. 1606, as introduced – 85<sup>th</sup> Legislative Session (2007-2008) does not specify a standard of proof to rebut the presumption.

<sup>27</sup> § 518.17, subd. 2 (2007) provides "In addition to the factors listed in subdivision 1, where either joint legal or joint physical custody is contemplated or sought, the court shall consider the following relevant factors: (a) the ability of parents to cooperate in the rearing of their children; (b) methods for resolving disputes regarding any major decision concerning the life of the child, and the parents' willingness to use those methods; (c) whether it would be detrimental to the child if one parent were to have sole authority over the child's upbringing; and (d) whether domestic abuse, as defined in section 518B.01, has occurred between the parents."

<sup>28</sup> The proposed legislation provided by Rep. Mahoney and Sen. Saltzman, S.F. No. 1606, as introduced – 85<sup>th</sup> Legislative Session (2007-2008) would have repealed the additional four joint legal and physical custody factors currently considered by courts under Minn. Stat. § 518.17, subd. 2 (2007).



	Custody Standard	Parenting Time Standard	Potential Allocation of Time Between Parents
<b>Current Statutes</b>	Case-by-case application of best interests factors <ul style="list-style-type: none"> <li>including additional four factors if joint legal or physical custody is sought</li> <li>including best interests review of parenting plans</li> </ul>	<ul style="list-style-type: none"> <li>Enable parent and child to maintain relationship that will be in best interests of the child (may be restricted after hearing)</li> <li>25% time rebuttably presumed</li> </ul>	25%/75% to 50%/50%
<b>Rebuttable Presumption of Joint Physical Custody</b>	Presumed that joint physical custody is in best interests of children (burden shifts to objecting parent to produce evidence or prove that joint physical custody is not in child's best interest) <ul style="list-style-type: none"> <li>what standard of proof required to rebut the presumption??</li> <li>additional four factors eliminated or considered with respect to rebuttal of presumption??</li> </ul>	If nearly equal time presumed under physical custody presumption, parenting time statute would not apply	Nearly 50%/50%
		If substantial time presumed under physical custody presumption allocation may be determined under parenting time statute: <ul style="list-style-type: none"> <li>Enable parent and child to maintain relationship that will be in best interests of the child (may be restricted after hearing)</li> <li>25% time rebuttably presumed</li> </ul>	35%/65% ?? to 50%/50%
		If joint physical custody label not linked to time allocation, parenting time statute would determine division of time: <ul style="list-style-type: none"> <li>Enable parent and child to maintain relationship that will be in best interests of the child (may be restricted after hearing)</li> <li>25% time rebuttably presumed</li> </ul>	25%/75% to 50%/50%

## B. Survey of Jurisdictions with Joint Physical Custody Presumptions

[Summary of report by Jodie Metcalf]. Jodie Metcalf<sup>29</sup> reported to the Study Group concerning joint custody statutes in other jurisdictions. The focus of the Study Group report is on presumptions of joint physical custody as opposed to presumptions of joint legal custody (which are more common).

The research is complicated by the fact that jurisdictions use different terms for the concepts of joint legal and physical custody and they use graduated approaches. For example it is possible for a

<sup>29</sup> Jodie Metcalf, J.D., Manager, Child Support Magistrate Program. See Jodie Metcalf, Survey of State Laws on Joint Custody, Appendix A.

statute to: (1) declare that there is no presumption either for or against joint physical custody; (2) encourage courts to consider joint physical custody; (3) create a preference for joint physical custody if in the best interests of children; (4) contain a presumption of joint physical custody applicable only in cases where both parents agree to it; or (5) provide for a rebuttable presumption of joint physical custody. Only the latter two examples would qualify as joint physical custody presumptions.

There is only one state that appears to have a presumption of joint physical custody. Idaho statutes contain a presumption that joint custody is in the best interests of children “absent a preponderance of evidence to the contrary” and except in cases involving domestic violence.<sup>30</sup> However, physical custody is to be shared by parents “in such a way to assure the child 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.”<sup>31</sup>

Approximately nine states have adopted presumptions of joint physical custody that apply only in cases where the parents have agreed to such an arrangement.<sup>32</sup>

### **C. Potential Positive and Negative Impacts**

#### **1. Presentations to the Study Group by Minnesota Practitioners**

Three Minnesota practitioners were invited to make brief presentations to the Study Group concerning the potential impact of a joint physical custody presumption on children, fathers, mothers, parents from diverse communities and different socio-economic status, and families who have experienced domestic violence.

##### **a) Impact of Joint Physical Custody Presumption on Children**

[Summary of testimony] Mindy F. Mitnick<sup>33</sup> testified that the one-size-fits-all nature of joint physical custody presumptions is detrimental to children for three reasons.

First, low conflict parents who are best suited for sharing joint physical custody will do so without need of a legal presumption. These are parents with good communication skills, flexible styles

---

<sup>30</sup> I.C. § 32-717B(4) (2007).

<sup>31</sup> I.C. § 32-717B (2007).

<sup>32</sup> Jodie Metcalf, Survey of State Laws on Joint Custody, Appendix A. (Listing California, Connecticut, Maine, Michigan, Mississippi, New Hampshire, Oregon, Tennessee, and Vermont in this category.)

<sup>33</sup> Mindy F. Mitnick, Ed.M., M.A. is a licensed psychologist practicing at Uptown Mental Health Center, Inc., Edina, MN., Testimony in appendix B.

of decision making, and the ability to put the needs of children first, and who also live in geographic proximity to each other. Parental conflict levels are the best predictor of children's post-divorce adjustment and adoption of a joint physical presumption would increase the number of children exposed to high and moderate conflict:

High conflict parents are not suited to the closely involved co-parenting required in joint physical custody. Children in high-conflict situations show heightened aggression, impulsivity, and anxiety, poor social skills and other emotional problems. Adolescents in high-conflict post-divorce families show increased depression, decreased effort in school, social withdrawal, and poorer self-awareness. These children are exposed to role modeling from parents who are unable to separate their own needs from their children's, use their children in their ongoing disputes and, directly or indirectly sabotage relationships with the other parent.<sup>34</sup>

Second, infants and toddlers are at risk under equal or nearly equal parenting time schedules. Research shows that children under six may suffer emotional distress and behavioral disruption and that repeated overnight separations may disrupt primary attachments. With respect to fathers, the quality of father-infant interaction is more significantly associated with attachment security than is the amount of time spent together.

Finally, many never-married parents are not good candidates for sharing joint physical custody, particularly those with no ongoing relationship and/or no history of trust, mutual support, communication, and joint decision making.

#### **b) Impact of Joint Physical Custody Presumption on Fathers**

[Summary of testimony] Melissa Froehle<sup>35</sup> analyzed the implications of adopting a joint physical custody presumption for custodial and noncustodial fathers. Historically proponents urged creation of a joint physical custody presumption in part because the label carried implications for calculation of child support and the ability of the physical custodian to relocate. However, both of these issues have been addressed through recent statutory changes.<sup>36</sup>

Currently the physical custody label may have an impact on parenting time and the meaning of the father's role as parent. Specifically, the custody label may have implications for the following issues.

- *The amount of time a father spends with his children.* It is difficult to predict how adoption of a joint physical custody presumption would affect the amount of parenting time fathers receive

---

<sup>34</sup> *Id.* at 2.

<sup>35</sup> Meslissa Froehle, J.D., Minnesota Fathers and Families Network, Testimony in Appendix B.

<sup>36</sup> See Minn. Stat. § 518A (2007) (child support) and Minn. Stat. § 518.175, subd. 3 (2007) (Move to another state).

because under current law the label of joint physical custody is not tied to a set amount of parenting time. (Regardless of custodial label, there is currently a presumption of 25% parenting time.) Thus, with a presumption, the amount of parenting time could increase, remain the same, or perhaps decrease if heightened conflict causes fathers to “drop out.”

- *The “type” of time a father spends with his children.* The “type” of parenting time has significance for creating a meaningful father-child relationship. While research shows that the quality of time fathers spend with children is more important for child well-being than the quantity of time, fathers may have more overnight parenting time under a joint physical custody arrangement and this could help fathers maintain a meaningful ongoing role.
- *Future modification of parenting time.* With joint physical custody, parenting time could more easily be modified.
- *Compliance with parenting time.* It is difficult to predict whether mothers (who might otherwise be sole custodial parents) would be more likely to comply with parenting time after an award of joint physical custody. One theory holds that with shared physical custody, power differentials are equalized and that non-compliance may decrease.
- *Psychological status of the parents if one is considered to be a “visitor.”* Creation of a presumption of joint physical custody could have a positive psychological impact on fathers in that it might encourage them to stay involved with their children and to pay child support.

Adoption of a presumption of joint physical custody would impact fathers who are or would otherwise be sole physical custodians in the same way it would impact similarly situated mothers.

### **c) Impact of Joint Physical Custody Presumption on Primary Caregivers**

[Summary of testimony] Loretta Frederick<sup>37</sup> discussed the historical trend away from use of presumptions and toward individualized child custody decision making. Joint physical custody works in limited circumstances where the parties are committed to it and the logistics are workable. However, research shows that when parents have the option, eighty percent do not choose joint physical custody. In 1979 California adopted a joint physical custody presumption but changed to a system of awarding joint physical custody in cases of agreement. California judges cited lack of parental cooperation, continuing parental conflict, instability, and logistical difficulties as major problems. Research also indicates that joint physical custody arrangements are not stable (informal changes are common in part

---

<sup>37</sup> Loretta Frederick, J.D., Senior Legal and Policy Advisor, Battered Women’s Justice Project, Testimony in Appendix B.

due to high legal standard for modification of custody) and they increase litigation (in Oregon litigation almost doubled). Joint physical custody arrangements do not provide sufficient continuity for children and may be dangerous for children from high conflict families:

**d) Impact of Joint Physical Custody Presumptions in Cases Involving Domestic Violence**

[Summary of testimony] Loretta Frederick<sup>38</sup> presented information concerning the impact of joint physical custody in cases involving domestic violence. Research shows that contested custody cases frequently involve allegations of domestic violence (50% to 77%). Such cases require a differentiated response including consideration of the severity and frequency of the violence, the pattern of the violence, identification of the primary perpetrator, investigation of parenting capacity, and analysis from the perspective of the child.

Protecting children should be the highest priority. In cases involving coercive controlling violence, the abuser often threatens to harm the children in order to control or punish the victim. This behavior continues after separation or divorce.

Statutory exceptions to joint legal and physical custody presumptions for cases involving domestic violence are ineffective because: (1) victim parents may not understand that the presumption can be rebutted or how to do it; (2) victims fear retaliatory violence for attempting to rebut the presumption; (3) victims may not immediately understand the dynamics of domestic violence and its impact on children; (4) victims may lack evidence of the violence; (5) victims may be unable to afford litigation; (6) victims may be unrepresented; (7) family law professionals frequently fail to identify domestic violence; and (8) there are no proven models for screening and assessing domestic violence in the court context.

No parent should be coerced by a joint physical custody presumption into placing the safety and welfare of children at risk. No abused parent should be placed in danger in order to provide the abusive parent with access to children.

**e) Impact of Joint Physical Custody Presumption on Non-marital Families and Parents from Diverse Communities and Different Socio-Economic Status**

---

<sup>38</sup> Loretta Frederick J.D., Senior Legal and Policy Advisor, Battered Women's Justice Project, Testimony in Appendix B.

[Summary of testimony] Melissa Froehle<sup>39</sup> presented information on unmarried families (including the impact of race and ethnicity) and single-father headed households. Almost 40% of births are non-marital and the increase in non-marital births is largely the result of births to cohabiting couples. Most non-marital children are born to romantically involved parents who desire father involvement. However, cohabiting and visiting relationships tend to disintegrate over time. Yet, in terms of household composition, children born into cohabiting households may not be so dissimilar from children born into married households. Research shows that children born into cohabiting families spend 74% of their childhood years in a two-parent household, as opposed to 88% of children born into married households and 51% born into single-parent households. Rates of cohabitation, as well as non-marital birth, vary significantly by race and ethnicity.

Some barriers to father involvement include poverty, lack of education, and multiple partner fertility. Research shows that low income fathers are initially highly involved with children born outside of marriage but contact with nonresident fathers tends to decline over time. Rates of paternity establishment have soared and 64% of open Minnesota child support cases currently involve non-marital children. Single-father headed households are the fastest growing household type in Minnesota.

## **2. Social Science and Related Literature**

Jeffrey L. Edleson<sup>40</sup> made a presentation to the Study Group entitled “Assessing Social Science Research.” He discussed evidence-based decision making and suggested four questions to consider when evaluating studies. First, identify the purpose and specific aims of the study. Second, ask how the study was conducted, specifically who was studied, how the people were found, what research design was used, and how participants provided information. Third, determine what was found including how data was analyzed, the general findings, and how variation was dealt with. Finally analyze the meaning of the results and the extent to which the data support the conclusions and whether alternative explanations are considered.

Dr. Edleson cautioned that no one study is definitive and readers should be cautious about causal claims. Only studies based on representative samples with replicated findings can be generalized. He urged Study Group members not to expect “black letter truth” from social science.<sup>41</sup>

---

<sup>39</sup> Meslissa Froehle, J.D., Minnesota Fathers and Families Network, Testimony in Appendix B.

<sup>40</sup> Jeffrey L. Edleson Ph.D., University of Minnesota School of Social Work, Appendix C.

<sup>41</sup> See Sandra K. Beeman, *Evaluating Violence Against Women Research Reports*, VAWNET: THE NATIONAL ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN (MARCH 2002) [www.vawnet.org](http://www.vawnet.org); Sarah H. Ramsey & Robert F. Kelly, *Assessing Social Science Studies: Eleven Tips for Judges and Lawyers*, 40 FAM. L. Q. 367 (2006).

Members of the Study Group submitted articles for consideration that were distributed at and between meetings. Below are citations to the articles and brief descriptions of the contents. The list of articles does not represent a comprehensive review of the literature nor does inclusion denote endorsement by the Study Group as a whole. Readers are strongly encouraged to read the articles in their entirety rather than relying on these abbreviated descriptions.

#### 2008

Christy M. Buchanan & Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419 (2008). This article reviews the psychological literature on joint custodial arrangements concluding that low or contained parental conflict levels, ongoing positive relationships and parenting, and economic stability are more closely linked to child well-being than are particular custody arrangements. The author explains that joint physical custody can be an “ideal arrangement” if parents are “cooperative and committed to such arrangements.” However, if parental conflict is high, the child may have poorer psychological functioning. Overall, the quality of the relationship with a parent is a better predictor of child adjustment than is amount of contact. The author consequently disfavors adoption of presumptions of joint physical custody.

Peter G. Jaffe, Janet R. Johnston, Claire V. Crooks, & Nicholas Bala, *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 FAM. CT. REV. 500 (2008). The authors propose screening for risk in domestic violence cases by considering the potency, pattern, and primary perpetrator of the violence. They provide specific parenting plans (and custodial arrangements) with criteria and guidelines for use depending on the results of the screening and assessment.

Jennifer McIntosh & Richard Chisholm, *Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation*, 14 J. FAM. STUD. 37 (2008). The authors explore new data concerning risks for children in shared care and consider this research in the context of the Australian Family Law Amendment (Shared Parental Responsibility) Act of 2006. The authors identify risks of shared care for children in families where parents are immature, less emotionally available, and engaged in high conflict with the other parent. Children are most at risk if they are less than ten years old, are not happy with the arrangement, and find that parents are not available to them.

#### 2007

Joan B. Kelly, *Children's Living Arrangements Following Separation and Divorce: Insights From Empirical and Clinical Research*, 46 FAM. PROCESS 35 (2007). The author surveys empirical and clinical research concerning factors influencing living arrangements as well as children's views and adjustment to various arrangements. She urges adoption of “research-based models of parenting plans” that offer a range of options linked to the age and development of children, the quality of parent- child relationships, and parental interest and investment.

MINNESOTA FAMILIES AND FATHERS NETWORK, *DO WE COUNT FATHERS IN MINNESOTA? SEARCHING FOR KEY INDICATORS OF THE WELL-BEING OF FATHERS AND FAMILIES*, CHILD AND FAMILY STUDIES DEPT., ST. CLOUD STATE UNIVERSITY (2007). The publication contains research on Minnesota fathers including definitions of fatherhood, demographic profile of Minnesota fathers, family structure, barriers to father involvement,

special populations, and fathers' mental and physical health. It also reports the findings of the Minnesota Father Involvement Survey.

*In re The Marriage of Hansen*, 733 N. W.2d 683 (2007). In 1997, the Iowa Legislature provided that courts "may consider" joint physical care of children<sup>42</sup> and in 2004, the Iowa Legislature amended the child custody statutes to state that if either parent requests joint physical custody and the request is denied, specific findings are required explaining why an award of joint physical custody is not in the best interests of the child.<sup>43</sup> The Iowa Supreme Court decided that the Iowa statutes did not constitute a presumption of joint physical care and that the best interests standard remained in effect.<sup>44</sup> After a lengthy review of the social science literature on joint physical custody, the court set forth factors for consideration in awards of joint physical custody including: (1) stability and continuity of care giving; (2) ability of the parents to communicate and show mutual respect; (3) the level of conflict between the parents; and (4) the degree to which parents share an approach to "daily matters."

## 2005

Margaret F. Brinig, *Does Parental Autonomy Require Equal Custody at Divorce?*, 65 LA. L. REV. 1345 (2005). Oregon statutes were amended in 1997 to require courts to consider joint custody<sup>45</sup> and encourage use of parenting plans and mediation. Subsequent empirical research showed that joint custody awards increased and that the amount of child support awards decreased.<sup>46</sup> The number of motions to modify or enforce parenting time or child custody increased (almost doubling) after the statute was implemented.<sup>47</sup> The author also reviews constitutional challenges to use of the best interests standard concluding that none have succeeded, "so far, the answer given by the courts is that, for a variety of reasons, the parental rights must yield to the children's." (p. 1349-50)

Gwyneth I. Williams, *Looking at Joint Custody through the Language and Attitudes of Attorneys*, 26 JUSTICE SYSTEM J.1 (2005). The author explores attorney perceptions related to joint custody.

---

<sup>42</sup> Iowa Code § 598.41(1a) provides, in part, "The court may provide for joint custody of the child by the parties."

<sup>43</sup> Iowa Code § 598.41(5) provides "If joint legal custody is awarded to both parents, the court may award joint physical care to both joint custodial parents upon the request of either parent. Prior to ruling on the request for the award of joint physical care, the court may require the parents to submit, either individually or jointly, a proposed joint physical care parenting plan. A proposed joint physical care parenting plan shall address how the parents will make decisions affecting the child, how the parents will provide a home for the child, how the child's time will be divided between the parents and how each parent will facilitate the child's time with the other parent, arrangements in addition to court-ordered child support for the child's expenses, how the parents will resolve major changes or disagreements affecting the child including changes that arise due to the child's age and developmental needs, and any other issues the court may require. If the court denies the request for joint physical care, the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the child."

<sup>45</sup> Or. Rev. Stat. §107.105 (2007) provides: "When appropriate, the court shall recognize the value of close contact with both parents and encourage joint parental custody and joint responsibility for the welfare of the children."



2003

William V. Fabricius, *Listening to Children of Divorce: New Findings That Diverge From Wallerstein, Lewis, and Blakeslee*, 52 FAM. RELATIONS 385 (2003). The author questioned college students who had grown up in divorced homes concluding the following. "Students endorsed living arrangements that gave them equal time with their fathers, they had better outcomes when they had such arrangements and when their parents supported their time with the other parent, they experienced disagreement between mothers and father over living arrangements, and they gave evidence of their fathers' continuing commitment to them into their young adult years." (p. 385)

Yuri Joakimidis, *Back to the Best Interests of the Child: Towards a Rebuttable Presumption of Joint Residence*, (2003), <http://www.fathersonline.org/resources/back-to-the-best-interests-of-the-child.pdf>. Executive summary of a monograph published by the Joint Parenting Association urging Australian adoption of a presumption of joint residence. The author concludes that joint custody would enhance children's adjustment, strengthen bonds with both parents, boost payment of financial support, benefit mothers and fathers, reduce litigation, and lower parental conflict levels.

U.S. Census Bureau, *Child Mothers and Fathers and Their Support: 2003*, U.S. DEPT. OF COMMERCE (July 2006). In the spring of 2004, on a national basis, 83.1% of "custodial parents" were mothers and 16.9% were fathers. These proportions had not changed significantly since 1994. (p. 2)

2002

Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 16 J. OF FAM. PSYCHOL. 91 (2002). The article abstract states: "The author meta-analyzed studies comparing child adjustment in joint physical or joint legal custody with sole-custody settings, including comparisons with paternal custody and intact families where possible. Children in joint physical or legal custody were better adjusted than children in sole-custody settings, but no different from those in intact families. More positive adjustment of joint-custody children held for separate comparisons of general adjustment, family relations, self-esteem, emotional and behavior adjustment, and divorce-specific adjustment. Joint-custody parents reported less current and past conflict than did sole-custody parents, but this did not explain the better adjustment of joint-custody children. The results are consistent with the hypothesis that joint custody can be advantageous for children in some cases, possibly by facilitating ongoing positive involvement with both parents." (p. 91) For purposes of the meta-analysis, joint physical custody included arrangements involving 25% or more time spent with either parent. Also, joint legal custody and joint physical custody arrangements were not always distinguished from each other.

Federal-Provincial-Territorial Family Law Committee, *Report on Custody and Access and Child Support: Putting Children First* (2002), [http://www.authorityresearch.com/ARTICLES\\_Other/flc2002e.pdf](http://www.authorityresearch.com/ARTICLES_Other/flc2002e.pdf). This Canadian report reviews research and considers challenges facing post-separation families. The authors encourage regular interaction with both parents but recommend against any presumptive model of parenting. Instead the report concludes that "[t]he fundamental and primary principle of determining parenting arrangements must continue to be the best interests of the child." (p. vii)

Donald C. Hubin, *Parental Rights and Due Process*, 1 J. L. & FAM. STUD. 123 (1999). Using a parents' rights analysis, a professor of philosophy asserts that the "best interests" standard is unconstitutional and should be replaced with a presumption of joint legal custody and "a fairly equal division of the children's time between the parents." (p. 147)

Diane N. Lye, *What the Experts Say: Scholarly Research on Post-Divorce Parenting and Child Well-being*, Report to the Washington State Gender and Justice Commission and Domestic Relations Commission (June 1999). The Report provides an extensive review of social science literature<sup>48</sup> on shared parenting and makes the following findings: "The evidence reviewed here does not reveal any particular post-divorce residential schedule to be most beneficial for children. There are no significant advantages to children of joint physical custody, but also no significant disadvantages to children of joint physical custody or of any other post-divorce residential schedule. The weight of evidence does not support the view that higher levels of child-nonresidential father contact are automatically or always beneficial to children. However, the weight of evidence also does not suggest that, absent parental conflict, high levels of child-nonresidential parent contact are harmful to children. Parental conflict is a major source of reduced well-being among children of divorce. Research indicates that joint physical custody and frequent child-nonresidential parent contact have adverse consequences for children in high-conflict situations. Joint physical custody and frequent child-nonresidential parent contact do not promote parental cooperation. Increased nonresidential parents' involvement in their children's lives may enhance child well-being by improving the economic support of children. This conclusion only holds if child support decisions are made independent of residential time decisions, and continuing nonresidential parent involvement does not expose children to continuing parental conflict." (Ch. 4, Summary)

#### **IV. Study Group Discussion of the Impact of a Presumption of Joint Physical Custody**

Based on oral and written testimony, social science and related literature, and professional and personal experience, Study Group members identified potential problems and benefits associated with adoption of a joint physical custody presumption. Study Group members did not reach agreement about the list and it is not necessarily comprehensive. The discussion was complicated by lack of consensus concerning the meaning and operation of a presumption of joint physical custody.

##### **A. Potential Benefits of Adopting a Presumption of Joint Physical Custody**

- A joint physical custody presumption would encourage children's ongoing relationships with both parents, particularly fathers.

<sup>48</sup> The review includes discussion of the California experience with a joint physical custody presumption applicable in cases of parental agreement, citing ELEANOR MACCOBY & ROBERT MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CHILD CUSTODY* (1994). California's history of adoption and repeal is discussed in the summary of the testimony of Loretta Frederick (above) and in Appendix B.

- A joint physical custody presumption would decrease perceived court system bias against fathers.
- A joint physical custody presumption would limit court discretion.
- A joint physical custody presumption might enhance predictability.
- A joint physical custody presumption might decrease perceived variability of outcomes from different jurisdictions.
- A joint physical custody presumption would change the “starting point” for negotiations between parents because the burden of proof would shift to a parent seeking sole physical custody.
- A joint physical custody presumption might decrease litigation.
- A joint physical custody presumption might decrease parental conflict by equalizing power between parents.
- A joint physical custody presumption might enhance children’s relationships with extended family members.
- A joint physical custody presumption might encourage development of a familial relationship when unmarried parents have not had a prior relationship.
- A joint physical custody presumption might increase efficiency and reduce some costs.
- A joint physical custody presumption might enhance parents’ rights.

**B. Concerns about the Impact of a Joint Physical Custody Presumption**

- A joint physical custody presumption would limit the ability of the court to consider the needs of individual children.
- Joint physical custody would be detrimental for children continuously exposed to high levels of parental conflict.
- Joint physical custody might heighten conflict between parents who, for a variety of reasons, are unable to effectively co-parent.
- A joint physical custody presumption would be dangerous for children and victims of domestic violence (battering) because even if exception is made for such cases, courts do not currently have the resources or ability to consistently identify battering or reliably assess risk.
- A joint physical custody presumption would create financial and procedural challenges for low income and unrepresented parents who would be required to carry the burden of proof if they, for any reason, object to joint physical custody.
- Joint physical custody would be impractical for some families such as those where parents live in geographically distant locations, children are very young, and/or parents are not married and have never had an ongoing relationship with each other.
- A joint physical custody presumption might primarily apply to the minority of parents who are unable to agree on parenting arrangements.
- A joint physical custody presumption might increase litigation.

- A joint physical custody presumption might create discontinuities and conflicts with other statutes and programs (private health insurance eligibility, child support “obligor,” Earned Income Tax Credit eligibility, MFIP eligibility, Head Start eligibility, etc.).
- A joint physical custody presumption might result in system-wide confusion stemming from disagreement over the definition and operation of a joint physical custody presumption.
- A joint physical custody presumption may not be an appropriately tailored solution for current problems --lack of Minnesota data makes it difficult to assess issues and generate helpful responses.

## **V. Fiscal Impact of Adopting a Joint Physical Child Custody Presumption**

[Summary of Committee Report] A committee<sup>49</sup> was appointed to compile information concerning potential fiscal impacts of adopting a joint physical custody presumption. The committee report, found in Appendix D, specifically addresses fiscal impacts for families, the Department of Human Resources, and Minnesota Courts.

Families could face decreases in child support awards; higher overall child-rearing expenses resulting from increases in parenting time; eligibility issues with respect to public benefits, public housing, child care assistance, and Head Start; and complications qualifying for Earned Income Tax Credit and Working Family Credit.

The Department of Human Services may incur increases in Minnesota Family Investment Plan (MFIP) costs as well as compromised ability to collect child support arrears.

Minnesota Courts may require additional resources to handle higher numbers of child custody challenges and post-decree motions as well as to deal with procedural and substantive uncertainties concerning application of a physical custody presumption.

## **VI. Recommendations**

Prior to submission of this report, the Study Group arrived at six recommendations. Due to time limitations, the recommendations are not comprehensive and they do not represent the unanimous opinion of all Study Group members.

1. We recommend that the Minnesota Legislature fund the collection and integration of data over several years, either statewide or in several representative counties, that can identify basic

---

<sup>49</sup> Members of the committee were Melissa Froehle J.D., Minnesota Fathers and Families Network; Jill Olson J.D., Minnesota Department of Human Services; and James Street J.D., Southern Minnesota Regional Legal Services. The full report is in Appendix D.

demographic information (including whether the parties were divorced, never married or are third party custodians), the current ordering of sole physical custody with the mother, sole physical custody with the father, joint physical custody, the percentage parenting time awarded to both parents, the award of child support, and the use of agreed upon parenting time plans. This information would be gathered at the conclusion of each paternity, marriage dissolution or post decree proceeding through the filing of a form by the parties or their attorneys. It is hoped that much of this data collection and integration could be done by interested volunteers.

2. We recommend that any statutory changes enacted by the Minnesota Legislature affecting the custody or parenting of minor children increasingly promote and allow for the cooperative agreements between the parties.
3. We recommend that any statutory changes enacted by the Minnesota Legislature affecting the custody or parenting of minor children continue to provide the ability for the court to consider the individual needs of children and families, including the child's support system of extended family members, friends, and community.
4. We recommend that any statutory changes enacted by the Minnesota Legislature affecting the custody or parenting of minor children consider the essential importance of the safety of children and parents.
5. We recommend amending current statutes to make it clear that current law provides no presumption for or against joint physical custody, except in cases of domestic abuse, in which case there would be a rebuttable presumption against joint physical custody.
6. We recommend that, if the Legislature chooses to enact a presumption of joint physical custody, it include a clear definition of the term and how it relates to a determination of parenting time.

## **Appendices**

- A. **Survey of States -- Presentation by Jodie Metcalf, J.D.**
- B. **Testimony of Invited Practitioners**
  - B-1 Mindy F. Mitnick, Ed.M., M.A.,
  - B-2 Melissa Froehle, J.D.
  - B-3 Loretta Frederick, J.D.
- C. **Assessing Social Science Research -- Presentation by Jeffrey L. Edleson, Ph.D.**
- D. **Fiscal Impact**
  - D-1 Committee Report by Melissa Froehle, J.D., Jill Olson, J.D., James Street, J.D.
  - D-2 Presentation by Jodie Metcalf, J.D.
- E. **Public Participation -- Assembled by Mark Toogood, M.S.W.**
  - E-1 List of People Testifying
  - E-2 Compilation of Written Submissions from the Public

This page is intentionally left blank.

# Appendices

This page is intentionally left blank.



## Appendix A

### Survey of States

by Jodie Metcalf, J.D.

This page is intentionally left blank.

**Joint Physical Custody Group  
Survey of State Laws on Joint Custody  
Presented September 22, 2008**

**Preface**

The legislation creating this group states: “The evaluation must consider...the experiences of other states that have adopted a presumption of joint physical custody” The purpose of this Survey is to document laws other states have passed with respect to joint physical custody.

**Disclaimer and Definitions**

This is a review of state laws as found on state websites. It is possible that recently passed legislation could have been missed. No case law has been reviewed, included or considered, this is strictly a review of state laws. There is some discretion in categorizing the various state laws. This list may or may not match lists compiled by others.

A review of state laws revealed that the term “joint custody” is often, but not always, synonymous with what Minnesota calls “legal custody”. “Shared custody” or “shared parental rights and responsibilities” are also often defined or described as essentially equivalent to “legal custody” (e.g decisions about education, medical care, religious upbringing, etc.).

States that have a joint custody presumption often clarify that joint legal and sole physical is considered joint custody or that joint physical does not necessarily mean that the child spends equal or nearly equal time with each parent.

The terms used to describe the time awarded to a parent who has the child less than half of the time varied and included: visitation, parenting time, time-sharing and possessory conservator.

The asterisk (\*) after the name of a state indicates that the laws of that state include a best interest standard. Several states have a presumption and a “best interest” standard, or competing presumptions, or conflicting directives to the court.

**Synopsis**

No state (nor D.C.) has a presumption of equal physical custody. As set out below, eight states and the District of Columbia have a presumption in favor of joint custody (i.e. legal custody). This includes Minnesota. Another three states have laws that require courts to “consider” joint custody in making an award of custody. Nine states require the parties to agree on joint custody before a presumption applies. Of the remaining states, 26 have a best interest of the child standard for determining custody and five have neither a presumption, nor a best interest standard. Twenty-two States have presumptions against joint custody where there is a history of domestic violence, child abuse, sexual abuse, and/or where a parent has been convicted of certain crimes. Another 18 states require courts to consider evidence of domestic violence, child abuse, etc. as part of the “best interest” analysis. At least four states have laws that give a parent that has the child less than half the time a presumptive amount of time with the child: Delaware (standard visitation order), Minnesota (25% presumption of parenting time), Oklahoma (standard visitation order) and Texas (standard possession order).

## States with a statutory “joint custody” presumption

**Florida\*** 61.13(c) 1 The court shall determine all matters related to parenting and time-sharing of each minor child in accordance with the best interests of the child...2. *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* (2b of this same law says the court shall order sole parental responsibility for a minor child to one parent, with or without time-sharing with the other parent when it is in the best interests of the child)

**Idaho** 32-717B(4) *presumption that joint custody is in the best interest of the child* (definition of joint custody says the court may award either joint physical or joint legal or both)

**Louisiana\*** Section 3, Article 131 the court shall award custody in accordance with the best interests of the child.

Article 132 In the absence of an agreement, or if the agreement is not in the best interest of the child, *the court shall award custody to the parents jointly*. (Joint custody is where an order allocates time periods each parent will have physical custody of the child, there may be a domiciliary parent with whom the child shall primarily reside – that parent also makes all decisions affecting the child.)

**Minnesota\*** 518.17, subd. 2 the court shall use a *rebuttable presumption that upon the request of either or both parents joint legal custody is in the best interests of the child* (Presumption of 25% parenting time.)

**New Mexico\*** 40-4-9.1 *presumption that joint custody is in the best interest of the child in an initial custody determination* (an award of joint custody means that each parent shall have significant, well-defined periods of responsibility for the child. Joint custody does not imply an equal division of the child’s time between the parents or an equal division of financial responsibility for the child.)

**Nevada\*** 125.480

1. In determining custody the sole consideration is the best interest of the child.

3. *The court shall award custody in the following order of preference* (unless best interests require otherwise) (a) to both of the parents jointly pursuant to 125.490 or to either parent 125.490 – *presumption if parents agree to joint custody* (where parents have agreed to joint legal custody the court can award joint legal custody without awarding joint physical custody.)

**Texas\*** §153.131 (b) *rebuttable presumption that the appointment of the parents of the child as joint managing conservators is in the best interest of the child*. (§153.135 says Joint managing conservatorship does not require the award of equal or nearly equal periods of physical possession of and access to the child...) Standard provisions for possessory conservatorship.

**Wisconsin\*** 767.41 *the court shall presume that joint legal custody is in the best interest of the child*

**Washington D.C.** *rebuttable presumption that joint custody is in the child’s best interest* (joint custody is not defined, looks like it could be joint legal only)

## States that require the court to consider joint custody

**Alabama\*** Section 30-3-152 *requires court to consider joint custody in every case, but may award any form of custody in the child's best interest (joint custody not defined, specifically says joint physical is not necessarily equal durations of time)*

**Iowa\*** Section 598-41 *On the application of either parent, the court shall consider granting joint custody. If the court does not grant joint custody, the court shall cite clear and convincing evidence that joint custody is unreasonable (joint custody is defined as joint legal custody)*

**Missouri\*** Section 452.375

1. Joint Custody awards each parent significant, but not necessarily equal time
2. The court shall determine custody in accordance with the best interests of the child
5. Prior to awarding the appropriate custody arrangement in the best interest of the child, *the court shall consider the following as follows: (1) Joint physical and joint legal custody; (2) Joint physical with one party granted sole legal custody; (3) Joint legal custody with one party granted sole physical custody; (4) sole custody to either parent or (5) third-party custody.*

## States with a statutory presumption of joint custody (if parents agree)

**California\*** Section 3080 presumption – *if parents agree to joint custody, it is presumed to be in the best interest of the child (joint custody is not defined, sounds like it could be joint legal only)*

**Connecticut** Chapter 815j 46b-56a *same presumption as California (says joint custody means awarding joint legal custody to both parents and providing the physical custody be shared in a way that assures the child continuing contact with both parents)*

**Maine** Section 1653 2 *A presumption that when parents have agreed to shared parental rights and responsibilities the court shall make that award unless there is substantial evidence that it should not be ordered.*

**Michigan\*** Section 722.26a (2) *"If the parents agree on joint custody, the court shall award joint custody unless the court determines...that joint custody is not in the best interests of the child."* (1) *"...At the request of either parent, the court shall consider an award of joint custody and shall state on the record the reasons for granting or denying a request."* (7) *"Joint custody" means an order of the court in which 1 or both of the following is specified: (a) That the child shall reside alternately for specific periods with each of the parents (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child."*

**Mississippi** Section 95-3-24(4) *presumption applies when both parties have agreed to joint custody (joint custody means joint legal and joint physical custody – joint physical custody means that each parent will have significant periods of physical custody)*

**New Hampshire\*** 461-A:5 *presumption that joint decision-making responsibility (i.e. legal custody) is in the best interest of the child where the parents agree to it*

**Oregon\*** 107.169 subd. 4 *When parents have agreed to joint custody in an order or judgment, the court may not overrule that agreement by ordering sole custody to one parent.* Subd. 3 (immediately preceding the language above) says “The court shall not order joint custody, unless both parents agree to the terms and conditions of the order.”

**Tennessee** 36-6-101(2)(A) presumption where parents have agreed to joint custody, otherwise specifically states that neither a preference nor a presumption for or against joint legal, joint physical or sole custody is established.

**Vermont\*** Section 666 presumption – any agreement between the parents which divides or shares parental responsibilities shall be presumed to be in the best interests of the child.

### **States with a “best interest of the child” standard\***

\*Some of the states listed above also use a best interest standard – where there is no agreement, or as a basis for deciding whether joint custody is appropriate. They are marked with an asterisk (\*).

Alaska  
Arizona  
Arkansas  
Colorado  
Delaware (Standard visitation order)  
Georgia  
Hawaii  
Illinois  
Indiana  
Kansas  
Kentucky  
Montana  
Nebraska  
New Jersey  
New York  
North Dakota  
Ohio  
Oklahoma (standard visitation order)  
Pennsylvania  
South Dakota  
Tennessee  
Utah  
Virginia  
Washington  
West Virginia  
Wyoming

## **States that did not have a presumption or a best interest standard**

Maryland  
Massachusetts  
North Carolina  
Rhode Island  
South Carolina

## **Brief Review of presumptive time with the child provisions**

Delaware has standard visitation guidelines: alternate weekends, alternate holidays, mother's Day/Father's Day; child's birthday (alternating years); school breaks (winter and spring), summer vacation (five weeks – 35 days per summer) participation in extracurricular activities should not be interrupted; addresses common issues like late pick up, relocation, etc.

Minnesota §518.175, subd. 1(e) In the absence of other evidence there is a rebuttable presumption that a parent is entitled to receive at least 25 percent of the parenting time for the child.

Oklahoma law asked the Administrative Director of the Courts to create a Standard visitation schedule. Creates "standard" visitation schedules based on child's age birth to five and one schedule for ages 5 to 17.

Texas has "standard possession orders" – one for parents who live less than 100 miles apart and one for parents who reside over 100 miles apart.

This page is intentionally left blank.



## Appendix B

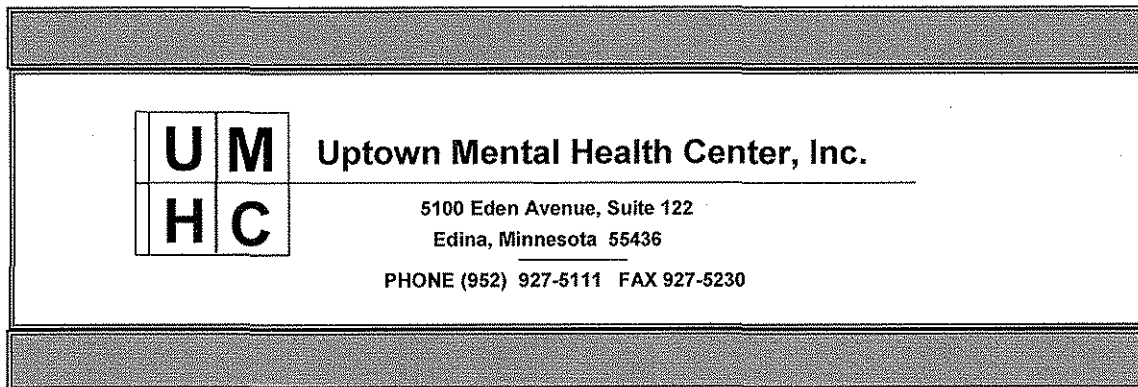
### Testimony of Invited Practitioners

Mindy F. Mitnick, Ed.M., M.A.

Melissa Froehle, J.D.

Loretta Frederick, J.D.

This page is intentionally left blank.



October 27, 2008

Judge Eide and members of the study group:

Thank you for offering me this opportunity to speak with you.

Have you ever tried on one of those “One Size Fits All” garments? It has always seemed to me that One Size really fits no one very well. More than a decade ago, psychologist Joel Peskay wrote an article for the Family Law bar titled, “One Size Does Not Fit All.” Dr. Peskay advocated for parenting schedules designed to meet the needs of individual children. Although he supported joint physical custody whenever possible, nevertheless he understood that children need parenting plans that support their individual healthy growth and development.

I want to re-affirm the notion that one size does not fit all children of separated parents and make three major points:

- 1) The parents best suited for joint physical custody don’t need a presumption,
- 2) Infants and toddlers are at risk in equal parenting time schedules,
- 3) Never married parents are generally not good candidates for joint physical custody.

#1) We know that children do best with frequent contact with both parents and with access to both parents’ resources, including physical and emotional availability. Low conflict parents negotiate their agreements alone or with professional assistance and typically report the highest satisfaction on follow-up. These parents: have good communication skills, are flexible in their decision-making, are able to put their children’s needs first, and live in geographic proximity. Children are supported in their relationships with both parents and move as easily as possible between homes. Some children

weary of the back and forth as they get older and put their adolescent feet down in one home or the other. Cooperative parents recognize this as a needed step towards independence and these changes are usually agreed upon between the households.

High conflict parents are not suited to the closely involved co-parenting required in joint physical custody. Children in high-conflict situations show heightened aggression, impulsivity, and anxiety, poor social skills and other emotional problems. Adolescents in high-conflict post-divorce families show increased depression, decreased effort in school, social withdrawal, and poorer self-awareness. These children are exposed to role modeling from parents who are unable to separate their own needs from their children's, use their children in their ongoing disputes and, directly or indirectly sabotage relationships with the other parent.

A presumption of joint custody would surely increase the number of children exposed to high and moderate levels of conflict because so many more parents would be required to negotiate the details of everyday life. Conflict, even at moderate levels, can disrupt children's ability to accomplish the developmental milestones of learning to trust, to manage their own impulses, to achieve emotional regulation, and to develop a positive self-concept.

Research from Australia found that high conflict parents who mediated a shared time agreement were not following that schedule by the end of the first year. Most couples had reverted to traditional parenting schedules.

The Australia research group also found that in  $\frac{3}{4}$  of the shared care cases, at least one parent, a year later, reported "almost never" cooperating with the other parent, and about 40% said they were never able to protect their children from the conflict.

Of particular concern is the finding that 1 in 5 of their children showed a high level of emotional distress at the end of the first year and this was more pronounced for children under 10.

You have undoubtedly heard or will hear about the Bauserman meta-analysis – a study of studies – that concluded that children did better in joint custody than in sole custody arrangements. Leaving aside some of the methodological issues with the study, it is essential to know the author's definition of joint custody: this referred to children who spent at least 25% of their time with each parent, but not necessarily an equal split of time. His study does not allow us to know how many of the joint custody cases were agreed to by the parents and how many were imposed on them by a court's decision. Nevertheless, it is not surprising that children who see a parent less than one fourth of the time fared more poorly, as some in this group likely didn't see the parent at all.

Although parental conflict is the single best predictor of adjustment problems following divorce, we might try to hide behind the statement, "Children are resilient." Resilience is not a trait that you either have or don't have but a blend of internal abilities and external supportive circumstances. A child who is resilient before the parents separate may nevertheless become stressed after the separation and have diminished capacity for success. Too many children after separation have to accommodate too many changes in too short a period of time. A child may adapt well, for instance, to a new home, while feeling taxed in other areas, especially in establishing and maintaining interpersonal relationships.

#2) Equal or approximately equal parenting time does not meet the developmental needs of our youngest children. Research from Pruett's study at Yale found that children under 6 in cooperative divorcing families, who had a greater number of overnights with the non-residential parent, also had significantly more emotional distress and behavioral disruption. Children with more caregiving settings were also more likely to show negative effects.

We know that in intact families, the quality of father-infant interaction, not the amount of time they have together, is related to attachment security. With high interparental conflict, amount of time with fathers is negatively correlated with attachment security. Further, the extent to which fathers participate in caregiving activities – changing diapers or giving baths -- is unrelated to the security of the baby's attachment.

There are few studies on the impact of sleeping overnight in different settings. The data currently available suggest that repeated overnight separations present a greater challenge to the development of organized primary attachments than do daytime separations. Without secure attachments children start life on the rockiest of foundations and remain at risk throughout their lives for all forms of emotional and behavioral disorders.

While there is an active professional discussion about whether infants and toddlers can manage one or two overnights away from their primary caregiver in a 7 or 14 day period of time, I am aware of no one who advocates for 50-50 schedules.

Only the most mature, cooperative and flexible separated parents can successfully share physical custody of infants and toddlers without disrupting their attachments to both parents.

#3) Never-married parents are a diverse group – some have lived together and raised children and some created a child without the benefit of an ongoing relationship. These parents often have no history of trusting each other, have had little experience of sharing mutual support, have never worked out a balance of power in their relationship, and may not even see

the child as “ours.” These parents often also have had little or no history of communication or decision-making with each other, and have had little or no discussion about raising a child. Since many of these parents tend to be young and to have young children, the presumption of joint physical custody would add the risks identified for infants and toddlers to the risks of the high-conflict parents.

With equal placement in two homes, I wonder what will happen to these children having different sets of routines and schedules with parents who don't share information with each other. Will we offer services to these parents to assist them in learning the basics of co-parenting? I don't think that is likely, due to the deteriorating economic situation facing government services and because we don't have uniformly available co-parenting programs now.

I want to close with an anecdote while recognizing that the worst way to set policy is based on anecdotes. A child I will call Amy, 11 years old and doing well in all areas of her life, was very sad about her parents' divorce. The only thing they could not agree on was whether she would spend half time with each parent. They wanted me to talk with her to help them in resolving this. Amy was quite clear in her preference for continuity and stability as she knew it: with her mom primarily in charge of her life. She told me that her mother was the one who had always scheduled things for her and it would be too confusing if both parents did that. She really loved her dad and even liked some of his more lenient rules better, but her mom was the one she could talk about problems with. It would be too hard to keep track of her “stuff” and that was something her dad wasn't very good at now. Her mom knew her friends better and was the one who the other parents called to get the girls together. She just didn't want things to change too much. Having two homes and not seeing both parents every day was going to be hard enough.

Amy is not unique: What would have happened if she had to have a 50-50 schedule? She would have made do, but at what price? That One Size Fits All shirt would have been terrible on her.

Thank you again for allowing me to speak with you.

Mindy F. Mitnick, Ed.M., M.A.  
Licensed Psychologist

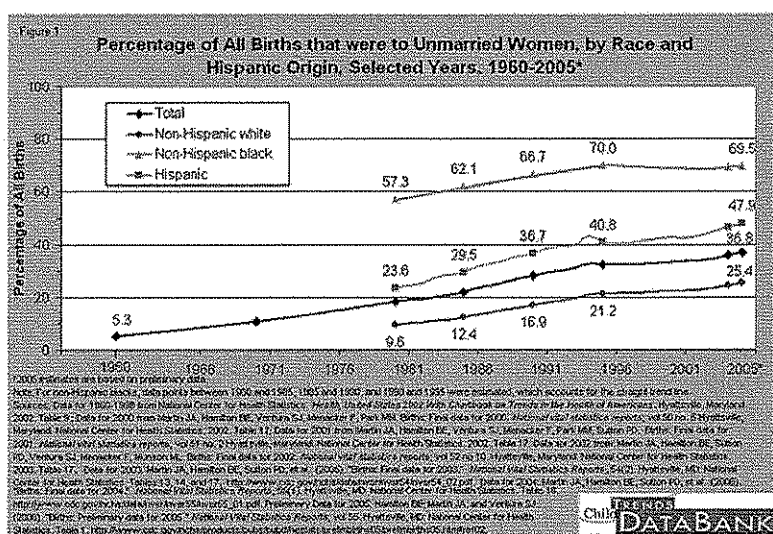
## Demographic Data – New Realities: Family Court is not just for divorcing families

Data on unmarried families, race/ethnicity,  
single-father headed households:

### 14 points to keep in mind

Melissa Froehle, Policy & Program Director  
Minnesota Fathers & Families Network

(1) Almost 40% births are non-marital



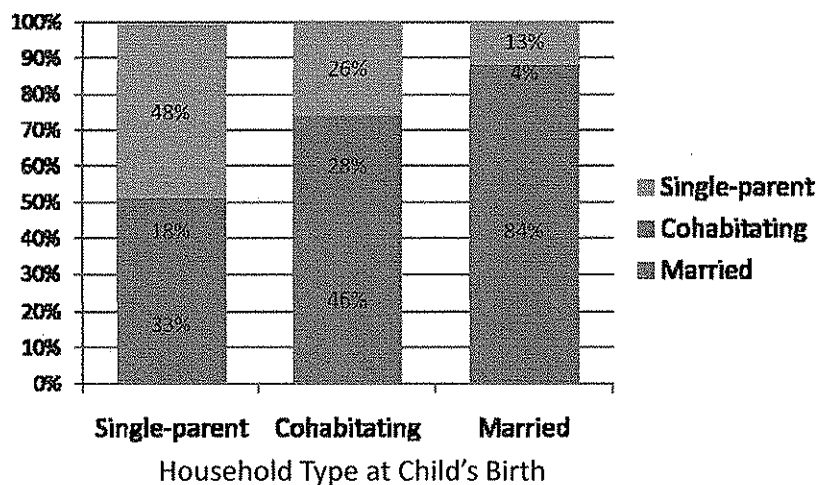
## (2) Increase in non-marital births largely result of births to cohabiting couples

- Largest increase in non-marital births in 1980s and 1990s was to cohabiting couples
- 2 out of 5 non-marital births were to cohabiting biological parents
- Among whites and Hispanics, 1 out of 2 non-marital births were to cohabiting parents (1990s)

-Larry Bumpass and Hsien-Hen Lu. "Trends in Cohabitation and Implications for Children's Family Contexts in the United States." *Population Studies* 54 (2000).

## Expected share of childhood years spent in various households types, 1990-1994

(Bumpass & Lu)





### What does increased childbearing to cohabiting couples mean?

- (3) Point from the chart: children born to cohabiting couples are not so dissimilar from children born to married couples, in terms of time spent with 2 parents in the home
  - Researchers have found that cohabiting relationships are less stable than marriages and that instability is increasing

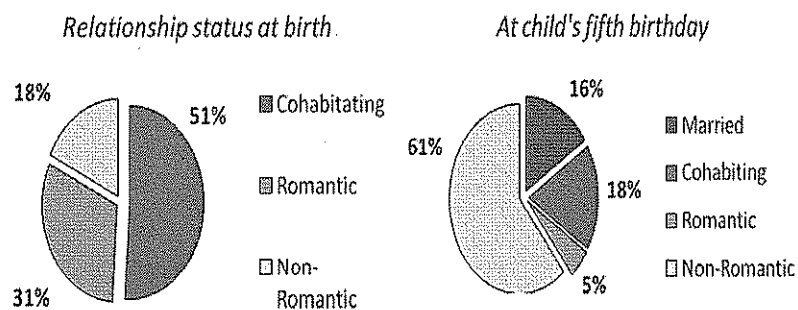
### Fragile Families Research

- Nationally representative of unmarried parents in cities 200,000 or greater (all income levels)
- (4) Most non-marital children are born to romantically involved (or cohabiting) parents (82% romantically involved and 51% were cohabiting)
- (5) Almost all mothers and almost all fathers want the father to be involved (90+++%)

## Fragile Families Research cont.

- (6) Cohabiting and “visiting” relationship families are fragile – romantic relationships tend to disintegrate over time
- At their child’s birth, 4 out of 5 unmarried parents are cohabiting or romantically involved. By the time of the child’s fifth birthday, 3 out of 5 are no longer romantically involved.

### Unmarried at birth of child:



(7) Fragile Families have numerous risk factors/barriers to continued father involvement

- Poverty: 73% of mothers and 56% of fathers were at or below 200 percent of federal poverty guidelines.  
(remember: the guideline to get IFP waived is 125% FPG – Filing fee for custody/parenting time is \$302 plus \$55 motion fee)
- Lack of education: 43% of mothers and 38% of fathers lacked a high school degree.
- “Multiple partner fertility” was common: 59% of mothers and 53% of fathers already had a child with someone else.

Low-income fathers

- (8) Low-income fathers start out highly involved
- 60% of all poor children under the age of two who were born *outside of marriage* lived with both of their natural parents or lived with their mothers and saw their fathers at least weekly.
- (9) This is true, regardless of race, but how it is true is different:
- From the research: Non-black infants experience father involvement primarily through marriage, black infants do so primarily through fragile “visiting” relationships
- (Mincy & Oliver, Urban Institute, 2003)

### (10) Declining father involvement (Fragile Families Research)

- At year one, 87% of *nonresident* fathers have seen their child at some time since the baby's birth, and 63% have seen their child more than once in the past month.
- By year three, 47% of nonresident fathers have seen their child more than once in the past month.
- And by year five, 43% of nonresident fathers have seen their child in the last month while 37% have not seen their child in the last two years.

### Fathers in fragile families

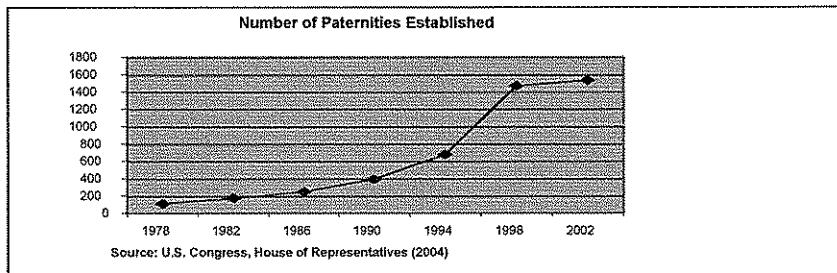
(11) Father involvement in fragile families often includes high levels of father-child interaction.

A study of poor fragile families in Louisiana pre-Katrina found:

- Mothers and fathers of two and three year old children reported high levels of father-child interaction including fathers playing with and feeding children, reading stories, putting children to bed and visiting together with relatives.
- Of fathers who had seen their child in the last year, almost half had the child overnight at least once in the last year.
- A majority of the non-cohabiting fathers had an overnight visit with the child *at least once a week*.

-- (Mincy & Pouncy, Institute for American Values, 2007)

## (12) Paternity establishment rates have soared



- In MN, our best guess is that paternity is established for about 70 percent of children born outside of marriage
- Vast majority sign Recognition of Parentage, which gives the father no custody or parenting time rights

## (13) 64% of open child support cases in MN are to non-marital children\*

- While we don't know what % of custody cases involve unmarried parents, do know as of 6/30/08, of open child support cases in the child support system in Minnesota:
  - 64% involve a child not born during a marriage\*
  - 36% involve a child born during a marriage

## Single-father headed households

- (14) Nationally and in MN, single-father headed households are fastest growing household type
- In 2000, 25% of single-parent households in MN were male headed (mostly fathers) / 75% were female headed
  - In 2030, projection, 30% of single-parent households will be male-headed (approx. 1/3 male v. 2/3 female)
- Data is from state demographers, in MFFN's *Do We Count Fathers in Minnesota?* Report

## Impact on CP and NCP fathers and father involvement of a presumption of joint physical custody

What are the issues we are attempting to address with a presumption, from a father's point of view?

### 3 issues in MN (in my analysis)

1. How custody label affects child support

Goal: Make equitable connection between amount of parenting time/custody label/child support ordered (historical reason)

- Change in child support laws has diminished this issue (label of custody doesn't matter – amount of parenting time does – for calculation of child support under new child support law)

### 3 issues cont.

2. How custody label affects custodial parent moving out of state with children

Goal: To keep children close to both parents, maintain meaningful involvement with noncustodial parent

- Change in law effective 8-1-06 diminishes this issue's effect on JPC, now burden on CP to show move is in child's best interests

### 3 issues cont.

3. Main issue: how custody label affects time with child and meaningful role of parent

- (1) Amount of parenting time
- (2) Type of parenting time
- (3) Changing parenting time (modification)
- (4) Compliance with parenting time/other parent's role
- (5) Psychological impact of "joint physical"



What Will Be the Impact of a  
Joint Physical Custody  
Presumption on Parents Who  
Have Been Abused?  
Their Children?  
What Impact on Primary Caregivers?

Loretta M. Frederick  
Senior Legal and Policy Advisor  
Battered Women's Justice Project

## My Assumptions

- Child custody laws should make children's interests paramount
  - Mothers' (or fathers') interests should *not* be given priority over children's interests in the law
  - Children's stability is paramount, disruption should be minimized
- The impact of the law on both mothers and fathers who are *not primary caretakers* would be similar
- All families are not the same
- All children are not the same
- All domestic violence does not affect children the same way

## The Focus of My Presentation

- Likely effect of the JPC legislation on primary caretakers (most often mothers) *and the children*
- Impact of the JPC presumption on parents (mothers or fathers) who are battered *and their children*

## Trend: Away from presumptions and towards more individualized arrangements

- Tender years
- BIC
- Joint Custody
- Away from Joint Custody
- ALI
  - Approximation Standard: post-separation custody should reflect the parents' pre-separation arrangements
- Domestic violence: the PPPPP approach

## Joint Custody is Not Chosen By Most Parents Who Have the Option

- 80 % of families agreed on custody from the outset
- More than 70% of those agreements were for mother custody
- Joint custody was chosen by only 20% of couples

Eleanor E. Maccoby & Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* 103,300 (1992).

## Joint Custody Works in Limited Circumstances

- Both parents want to do it
- Logistics are workable
- Children's schedules and needs are workable

## California's Experience

- 1979 Joint Custody Presumption
- 1994 JC only where parties agree
- Study: Survey of CA family court judges
  - 2/3 concluded that joint custody imposed under a presumption led to mixed or worse results for children due to
    - lack of parental cooperation,
    - continuing parental conflict,
    - instability caused by moving between household and
    - the logistical difficulties for parents

Thomas J. Reidy, et al., *Child Custody Decisions: A Survey of Judges*, 23 Fam. L. Q. 75, 80 (1989);

See also Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 Fam. L. Q. 201 (1998). (Presumptions pressure judges to order JC in inappropriate cases)

## Wallerstein's Longitudinal Studies

- "Many children find it difficult to adjust to two homes, 2 neighborhoods and have 2 sets of friends.

As one 7 year old I wrote about said to me:

*'Children don't keep 'pointment books. They forget that I am coming and no one invites me to birthday parties or sleepovers.'*

Email from Judith Wallerstein, Oct 24, 2008

## Wallerstein's Longitudinal Studies Impact on Children of Joint Custody

"Another 7 year old who loved to play baseball had to give it up. His coach said, *'Son you have a fine pitching arm but you have to be here'*.

Unless parents can arrange their lives to live close by each other, children in joint custody give up a lot of their extra- curricular activities and feel that they are paying the price of their parents divorce."

Email from Judith Wallerstein, Oct 24, 2008

Research comparing the success of joint physical custody arrangements for (1) parents who initially agreed to joint custody, (2) those who agreed to JC after negotiation and mediation, and (3) those where JC was imposed by court order

- A year following a JC agreement
  - 27% successful in their joint custody efforts
  - 42% maintained JC only under great stress
  - 31% were unable to retain the arrangement
- Children who adapted well were those who had JC agreements negotiated by parents outside the legal system
  - Susan Steinman et al A Study of Parents Who Sought Joint Custody following Divorce: Who Reaches Agreement and Sustains Joint Custody and Who Returns to Court? 24 J Am Acad. Child Psychiatry 554 (1975).

## Joint Custody is not a stable mode of custody

- In a study of 1000 joint custody families
  - Nearly half did not maintain that arrangement over time
  - They experienced informal custodial drift
  - Twice as many children shifted to living predominantly with their mothers as with their fathers

Eleanor E. Maccoby & Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* 168 (1992)

## Joint Custody is not a stable mode of custody

- Joint custody is far less stable after remarriage of either parent than sole custody is
- 80% of divorced men remarry
- Far fewer divorced women remarry

Correspondence with Judith Wallerstein Oct 2008

## Presumptive joint custody will increase litigation

- "[Presumption of joint custody] legislation increased the number of motions to modify or enforce parenting time or child custody... the number did increase significantly (and almost doubled) following enactment of the statute. Most of these motions were to change custody or visitation, not to enforce parenting time... If the desire of the legislation was to make it easier for unhappy parents to enforce their visitation time, its purpose was clearly not met.."

## Presumptive joint custody will increase litigation

- "Mandatory joint custody, or even a movement in that direction, seems to cause a number of other problems that perhaps its proponents did not anticipate. Unfortunately, the biggest winners, at least in Oregon, seem to be not so much the traditionally non custodial parents, but rather the mediators<sup>86</sup> and, slightly less dramatically, the divorce attorneys."

Brinig, Margaret (2005). Does Parental Autonomy Require Equal Custody at Divorce? The University of Iowa College of Law, University of Iowa Legal Studies Research Paper Number 05-13 April, 2005

## JPC is Dangerous to Children in High Conflict Families

- Older children who have frequent contact with their fathers are more poorly adjusted than those in low-conflict families.

– Amato and Rezac (1994 )

- More frequent contact with both parents is associated with higher levels of emotional, behavioral and social problems than for children in sole custody or where parents are cooperative.

– Judith Wallerstein and Janet Johnston, Children of Divorce: Recent Findings Regarding Long-Term Effects and Recent Studies of Joint and Sole Custody 11 Pediatrics in Review, 197, 202 (1990)

## Washington State Report 1998

- JPC in high conflict families is detrimental to children
- JPC does not meet the goal of fostering better communication
- JPC can make matters worse
- "Experts in the field agree that 'one size fits all' approaches to developing post-divorce parenting arrangements are inappropriate and maybe harmful to some families"



"My longitudinal research on the subject shows that children who are court ordered into joint custody in *highly conflicted families* and in those where there has been *domestic violence* are negatively affected and are likely to be more emotionally disturbed as a consequence. It also shows that when both such parents have frequent access to their children, verbal and physical aggression between the parents is likely to increase and their children get caught in the conflict." (emphasis supplied)

Correspondence with Jan Johnston referring to Johnston, M. Kline & J Tschann (1989) "Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access" American J. of Orthopsychiatry 59(4) 576-592.

## Recent Research

- In high conflict cases substantial sharing of care after separation might increase the risk for children...especially with younger children.
- Shared physical care is best determined by the capacity of parents to exercise maturity, to manage conflict and move beyond ego-centric decision making
- "It's so important that judges, etc. understand the psychological and developmental dilemmas presented by frequent transitions between parents who loath each other, and whose availability to the child remains compromised by their pre-occupation with the acrimony." (correspondence from J MacIntosh)
  - Jennifer McIntosh & Richard Chisholm (2008) "Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation" Journal of Family Studies 14, 37

## Intimate Partner Violence and Joint Custody

- Fact: Domestic Violence is common in contested custody cases
- Study of 120 cases referred for child custody evaluations and custody counseling
  - In 56% of cases mothers accused\*
  - In 77% of cases fathers accused
  - In 50% of cases, both parties accused

*\*Child maltreatment, domestic violence, substance abuse which impacted parenting and warranted consideration in custody decision*

Janet R. Johnston Soyoung Lee Nancy W. Oleson Marjorie G. Walters, "Allegations and Substantiations of Abuse in Custody-Disputing Families," Family Court Review, Volume 43, 283-294 (April 2005)

## Substantiations

- 63% of allegations of adult abuse
- 34% of allegations of child abuse
- 24% of allegations of mutual abuse
  
- In one fourth of the cases, abuse allegations were substantiated against both the mother and the father

Janet R. Johnston Soyoung Lee Nancy W. Oleson Marjorie G. Walters, "Allegations and Substantiations of Abuse in Custody-Disputing Families," Family Court Review, Volume 43, 283-294 (April 2005)

There are a lot of contested custody cases that are *also* domestic violence cases.

SO WHAT?

A nuanced response is required:  
Not all IPV is the same  
(Context is everything)

- Atypical, Not Battering "Situational"
- Mental Incapacitation/Pathology
- Generally Violence / Antisocial
- Battering
- Resistive / Reactive to battering  
(self defensive or not)

## Developing a New Framework for A Differentiated Response: The PPP Screening Model

- Potency
- Pattern
- Primary Perpetrator
- Add
- Parenting problems
- Perspective of child

■ Jaffe, Johnston, Crooks, Bala. "Custody Disputes Involving Allegations of Domestic Violence: Towards a Differentiated Response" Family Court Review Vol 46, Issue 3 (July 2008)

## *Options for parenting plans for families where domestic violence is alleged, or has been or continues to be an issue*

- *Co-parenting*
- *Parallel Parenting*
- *Supervised Exchange*
- *Supervised Visitation*
- *Suspended Access*

Janet Johnston 2007

### ***Guiding Principles For Resolving Conflicting Priorities in Custody Decisions***

- **Priority 1.** Protect children
- **Priority 2.** Protect the safety & support the well-being of the victim parent
- **Priority 3.** Respect the right of adult victims to direct their own lives
- **Priority 4.** Hold perpetrators of domestic violence accountable for their abusive behavior
- **Priority 5.** Allow child access to both parents

**Strategy:** Begin with the goal of achieving all five.  
Resolve conflict by abandoning the lower priority.

2007

Janet Johnston

### **Parenting Arrangements after Violence**

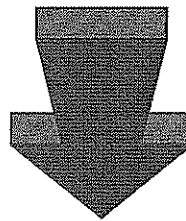
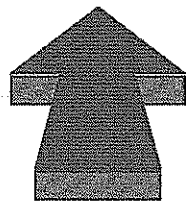
Common Couple  
Aggression  
(No child  
maltreatment or  
special needs)

High Conflict

Potency,  
Pattern,  
Primary  
Aggressor  
(pose risks if  
parents meet)

Abuse of Child  
or Adult Partner)  
(untreated or  
unresolved)

Terrorism/  
Stalking



High ← Evaluated Risk to Children or Caregiver → Low

Co-parenting

Parallel  
Parenting

Supervised  
Exchange

Supervised  
Visits

No Visitation

## Battering/ Coercive Controlling Violence (High PPP)

- Many batterers use threats or attempts to gain custody as tool to control or punish victim
  - 5% of abusers threatened to kill mother during visitation
  - 25% threatened to hurt children
  - Half of 350,000 child abductions occur in context of DV, mostly perpetrated by fathers

## What about a Domestic Violence Exception in the Law?

The exception strategy has been shown to be inadequate to keep children and survivor parents in violent families from being subjected to joint custody

## Problems with relying on a statutory exception

- Many victim parents do not
  - fully understand the abuse and its impact on them
  - understand the impact on their children
- Many victim parents fail to identify abuse
  - lack of evidence
  - embarrassment
  - the potential for retaliatory violence from the batterer that may result from disclosure

## Problems with relying on a statutory exception

- Many victims may be afraid to present evidence of abuse to show the other parent is unfit
  - fear that their allegations will be ignored
  - fear that their allegations will be used against them by batterers
  - Fear that courts will think they are lying to get a “leg up”

## Problems with relying on a statutory exception

- Battered parents will not be able to convince the court that they ARE victims of DV or that it should affect the custody decision
- Victim parents (esp. primary caretakers) less able to afford litigation
- Pro se parents will not know they can try to defeat the presumption and will agree to JPC

## Problems with relying on a statutory exception

- Practitioners (mediators, custody evaluators, attorneys, judges) are frequently unsuccessful at identifying DV
- There are currently no effective models for assessing and screening for DV in court cases



## The Bottom Line

- Joint custody is great for kids only where parents really want it and can handle it
- Coerced or forced JPC will harm children
- Exception for DV will not work to keep those children from being placed in joint custodial arrangements
- No parent should be coerced by law into placing her/his children's safety and welfare at risk
- No abused parent should have to place herself in danger in order to provide the other parent with access to their child
- Child custody laws should make children's interests paramount

This page is intentionally left blank.

## Appendix C

### Assessing Social Science Research

by Jeffrey L. Edleson, Ph.D.

This page is intentionally left blank.

# Assessing Social Science Research

Jeffrey L. Edleson, PhD  
University of Minnesota

## Overview

- ▶ Evidence based decision making
- ▶ Evaluating studies
  - Four questions to consider
- ▶ See Beeman (2002) and Ramsey & Kelly (2006) readings

## Evidence-Based Decisions

- Evidence vs. Authority (Gambrill & Gibbs, Rosen)
  - Education, licensing, standards
  - What leads to positive outcomes?
- Standards of evidence (Gambrill)
  - Multiple levels: clear evidence, promising, unknown, unlikely to be beneficial, ineffective/harmful.
- Multiple sources of evidence
- Origins of EBP in medicine (see Gilgun, 2005)
  - Research evidence & theory
  - Practice wisdom, including professional values
  - Personal knowledge of practitioner
  - What client brings to practice situation

## Four questions to ask

- (1) What is the study about?
- (2) How was the study conducted?
- (3) What was found?
- (4) What do the results mean?

(Adapted from Beeman with Arthur, 2002)

### **(1a) What is the study about?**

- What is the purpose and specific aims of the study?
  - Are the authors up-front about their biases?
- What were the major concepts in the study?
  - E.g., shared custody, joint or sole custody?
  - My research, debate about “exposure to DV”
- How were these concepts defined and then measured?
  - How good are the measures?
  - Do they measure the important factors of the concept?

### **(1b) What is the study about?**

- Examples:
  - Divorce literature often varies on whether it is the divorce itself or parental conflict that is impacting child emotional health.
  - Battered mother’s mental health affects child mental health. Yes, but the intervening variable of father’s violence is often missing in studies.
- Need to be sure all important concepts are present and measured.
  - Example: Conflict Tactics Scales in DV research didn’t originally measure context and impact.

## (2a) How was the study conducted?

- ▶ Who was studied?
  - For example, all families, high conflict, joint custody, sole custody?
- ▶ Where were they found?
  - For example, through courts, family services, from the community?
  - How were they selected, randomly or other means?
  - Importance: How representative are they?
  - Different sources lead to different outcomes.

## (2b) How was the study conducted?

- ▶ What research design was used?
  - Designs aim to rule out other factors that may have actually caused the changes seen.
  - Is there random assignment to differing conditions, comparisons or other controls?
  - Controls are important to rule out other possible explanations.
- ▶ How did participants provide information on measures?
  - For example, from records, paper-pencil questionnaires, interviews by phone or in person?
  - Was there room for *unintended* consequences?



### (3a) What was found?

- ▶ How were the data analyzed?
  - Did the authors attempt to control for multiple factors?
- ▶ What is the GENERAL findings?
- ▶ What about variation?
  - For example, Joan Kelly (2007) argues that there is a continuum of need for child visiting arrangements.
- ▶ There is great variation among child experiences

### (3b) What was found?

- ▶ With-in group differences in DV research:
  - ▶ On *average* children exposed show more problems than those not so exposed
  - ▶ Within the exposed group, many children show no greater problems than comparison children
    - 50% in some samples
- ▶ Argues for a varied approach

## **Between vs. within group**

- Variation in families
- Example of DV:
  - Frequency, severity and chronicity of the violence
  - Child's exposure to the violence
  - Child's own internal capacity
  - Protective and risk factors in a child's environment

## **(4) What do the results mean?**

- What do the authors conclude?
- Do the data support their conclusions?
- Are there alternative explanations to their conclusions?
- Do the authors consider these alternatives?

## Closing

- No one study is definitive.
- Must be based on a representative sample and replicated to be generalized.
- BE CAUTIOUS WITH CAUSAL CLAIMS (Ramsey & Kelly, 2006)
- DO NOT EXPECT BLACK LETTER TRUTH FROM SOCIAL SCIENCE (Ramsey & Kelly, 2006)

This page is intentionally left blank.

## Appendix D

### Fiscal Impact

Submission by Melissa Froehle, J.D., Jill Olson,  
J.D., and James Street, J.D.

Submission by Jodie Metcalf, J.D.

This page is intentionally left blank.

V. Fiscal Impact of Adopting a Joint Physical Custody Presumption

A. Fiscal Impacts- Families. A presumption of joint physical custody presents significant financial impacts to families. The number of families impacted would increase depending on factors such as the amount of time spent with each parent and the number of parenting time exchanges during any given time period. Many of these impacts would be lessened if a presumption of joint physical custody avoids an exact division of parenting time with each parent.

i. Decreased child support awards

The lack of a clear definition of joint physical custody makes the impact on child support awards difficult to predict with clarity. Of particular concern is whether and how the presumption will be treated in a default.<sup>1</sup> The presumption, however, has the potential of decreasing child support awards to families and children potentially in need.

**1. Presumption of Joint Physical Custody that requires an Equal or Nearly Parenting Time Division (45.1% or more to each parent)**

The current child support guidelines calculate child support based on each parent's access regardless of label, so to the extent the access is outlined in the order, the label of "joint physical custody" has no impact on determining the child support awards. See Minn. Stat. § 518A.35. If child support is calculated using a presumption of equal or nearly equal time, both parties are given a significant credit. This credit is based on parenting time they are presumed to be exercising and expenses they are presumed to be incurring while exercising that parenting time, thus reducing the amount of child support paid by the obligor.

A problem is raised in situations where the actual circumstance of the parties does not coincide with the label bestowed on the parties, ie. one parent is not exercising his/her court ordered parenting time. In those cases, one parent will bear the burden of the majority of the child's expenses with a significantly reduced child support award. A presumption of joint physical custody will likely increase the number of joint physical custody awards.

---

<sup>1</sup> This issue exists with married, separated and unmarried parents.

## **2. Presumption of Joint Physical Custody that is not tied to any particular amount of Parenting Time**

The label of joint physical custody does not in and of itself affect the calculation of child support. The actual parenting time ordered for the family would determine what, if any, adjustment occurred. In a scenario where the label of joint physical custody is given that applies to nearly every parenting time situation regardless of the amounts of parenting time allocated, a presumption of joint physical custody would generally have little impact on child support awards.<sup>2</sup>

However, parties who are joint physical custodians may argue that they should not be ordered to pay child support. For the purpose of setting, modifying and enforcing child support the terms “obligor” and “oblige” are used. The statute defines an “obligor” as the person obligated to pay support and the definition further provides that a person with primary physical custody is presumed not to be an obligor. Minn. Stat. § 518A.26, subd. 14.

If both parties are designated as joint physical custodians both parents could argue that they are not an obligor and therefore neither can be ordered to pay support. One parent, again, may be significantly disadvantaged and may be prevented from getting necessary child support because the label and definition of joint physical custody is not compatible with the current child support guidelines. Whether or not courts would accept this argument and whether or not it could become the norm is unknown.

This lack of clarity about who the obligor is could impact the State’s ability to enforce child support orders. Many child support enforcement tools are limited by state and federal law to child support obligors. Because a “primary physical custodian” is presumptively not an obligor under Minnesota law, only limited child support enforcement would be possible. Minn. Stat. § 518A.26, subd. 14.

In general, the current income shares child support model presumes that regardless of the custodial label, unless the parties have equal time, equal incomes and are sharing expenses equally, there will be an award of child support from one party to the other. The guidelines are applied with the goal of getting the same

---

<sup>2</sup>It is uncertain what the purpose of this designation would be and how it would resolve the issue of how default cases would be handled.



proportion of parental income to the child that he/she would have received if his/her parents lived together. This goal may not be attained and necessary support may not get to children if a presumption of joint custody is created and defined in a manner that is not compatible with the current guidelines.

ii. **Increased costs due to increased parenting time.**

If parenting time is increased with a presumption, both parents could incur higher costs of raising the child, depending on the situation of the parties<sup>3</sup>. The magnitude of how much costs would increase would vary depending on the amount of change reflected by the parenting time order. The costs of “infrastructure” – primarily housing, but also furniture and toys – are affected by moderate changes in the amount of contact. The costs of transportation were also included in the study.

A parent who gets more parenting time due to implementation of a presumption of joint physical custody could have increased costs such as food and transportation, while the parent who has less parenting time due to a presumption of joint physical custody could have decreased costs for food and transportation. How much so would depend on the particular situations of the parties.

Increased expenses could offset any benefit of paying less child support, if child support is calculated under Minnesota Statutes Section 518A.36, subdivision 3 (equal parenting time formula). In addition, if child support is calculated under 518A.36, subdivision 3 the party receiving less child support could be hit hard financially as he or she may still be paying the majority of the child’s expenses. A large portion of child related expenses, such as clothing, school lunches, school supplies, field trips, and activities are not directly attributable to parenting time.

For low-income families, the economic impacts will likely be particularly significant, and increased costs for transportation, coupled with low-income parents’ generally less flexible work arrangements, may make multiple visitation exchanges unworkable. In addition, many low-income parents need to find affordable housing, and often do not have the same choices to stay in the same neighborhood or school district as parents with more resources. This is particularly true in rural Minnesota, where a parent may have to move to find employment.

---

<sup>3</sup> A 2004 Canadian report that surveyed the research in this area stated that “a shared custody arrangement is widely believed by researchers to cost more than a sole custody arrangement, but there is little quantitative data on the subject.” See “Child Custody Arrangements: Their Characteristics and Outcomes” Department of Justice Canada (2004), p. 24-28. (showing an increase of parenting time from 20-30% resulted in an increase of 8-12% in costs to the parents)

### **iii. Decreased eligibility for public benefits**

In general, the benefits system is not set-up to accommodate *both* parents in low-income families where the parents live apart but each is significantly involved in parenting the child and providing a home for the child.

For example, as indicated below, if a state agency is unclear about the child's primary household, the parent that applies first for MFIP is the eligible parent. As a result, the other parent, who may have significant, or equal, time with the child is ineligible and must find another way to meet the child's basic needs.

### **iv. Effect on Earned Income Tax Credit (EITC) and Working Family Credit (WFC).**

The Earned Income Tax Credit (EITC) and its Minnesota equivalent, the Working Family Credit (WFC), provide a tax credit for low-income, working people. The amount of the credit varies by income level and number of children a person can claim as a "qualifying child." Persons without a qualifying child are phased out of the EITC at incomes of approximately \$12,000, while families with children are phased out of the EITC at incomes in the mid-to-high \$30,000 range (depending upon the number of qualifying children). Federal law requires that a child live with a parent for more than six months of the year to claim the child for EITC purposes. It cannot be negotiated between the parties and cannot be assigned by the courts. *See, generally*, 26 U.S.C. §32; Minn. Stat. §290.0671 (2008).

It is possible that a presumption of joint physical custody requiring equal parenting time may complicate the determination of a low-income parent's eligibility for the EITC and Working Family Credit. If neither parent can prove that they had the child living with them for more than six months of the year, neither parent is eligible for the EITC and Working Family Credit. If both parents attempt to claim an EITC and Working Family Credit, they would be subjected to audits due to the confusion on this issue. This tax credit is a very important benefit to low-income families.

An example (using 2007 figures): a single parent with 2 children who earned \$17,000 per year would be looking at \$4372 in EITC and \$1179 in Working Family Credit (WFC). For 2007, a single parent with 2 children who earned \$20,000 would be looking at \$3740 in EITC and \$1585 in WFC.

**v. Ineligibility or Decreased Eligibility for Subsidized Housing**

Many kinds of subsidized housing programs, most of which are governed by federal law, require a parent to have physical custody more than 50% of the time to list a child on an application or (if approved) a lease. The same is true for public housing in much of the Twin Cities area. A parent must have physical custody of a child more than 50% of the time in order to add a child to a lease or count that child for purposes of determining the appropriate number of bedrooms for which the family would be eligible.

In one example, one housing authority in the Twin Cities requires a parent to have physical custody at least 75% of the time to place a child on a lease for public housing.

A joint physical custody presumption with equal or nearly equal time impacts a parent's eligibility for public and subsidized housing, the types of housing available and the amount the parent will have to pay for rent. If the children are excluded from the application or the lease because the parent doesn't have the children more than 50% of the time, the parent may only be eligible for a unit that would not have enough bedrooms to accommodate their children, may not be eligible for some kinds of subsidies designed for larger families or may not qualify for units at all. Additionally, rent is calculated based upon the number of people in the household. If a child is excluded because of the joint physical custody label, the parent applying to public or subsidized housing will have to pay more in their rent. Joint physical custody presumptions could also lead to the housing authorities looking solely at the order, erroneously determining that a person has physical custody exactly 50% of the time and denying the housing subsidy, or trying to figure out whether a person has a child with them more than 182.5 days a year.

**v. Child Care Assistance.** A parent is eligible for child care assistance only for child care incurred while the child is living with that parent. However, most providers will not permit part-time child care. As a result, parents sharing joint physical custody would need to find a common child care provider, find a child care provider who permits part-time child care, or cover full-time child care expenses despite using the provider only part-time.

This presents significant problems, especially in cases where parents do not live near each other. If both parents are eligible for child care assistance, the assistance will only pay for the portion of child care while the child lives in that household. The balance of

the expense must be paid by the parent. For the parent who is ineligible for child care assistance, he or she must pay market rate child care, which makes child care prohibitive for many low-I income families.

vi. **Ineligibility for programs such as Head Start.** Head Start programs have many requirements regarding attendance and enrollment. For example, a child may not be enrolled in two Head Start programs at the same time. If parents don't live in the same Head Start enrollment area, they would have to choose where to enroll the child fulltime. Fiscal Impact - State. There are areas where a financial impact to state agencies can be predicted. The exact amount of the fiscal impact could not be determined by this group.

vii. **Other Impacts.**

There are other impacts on families. These include obtaining transportation to schools from different homes, participating in community activities and school enrollment issues.

**B. Increased Minnesota Family Investment Plan (MFIP) costs to the Department of Human Services.**

To be eligible for MFIP, recipients must assign their right to child support to the State, which pays the MFIP. The County, through the County Attorney's office, then works with MFIP recipients to establish child support orders. When child support is paid each month, the child support owed for that month goes directly to the MFIP recipient, but reduces the recipient's MFIP grant dollar for dollar. Collection of child support arrears that accrued while a person received MFIP are retained by the State.

If a parent receives MFIP, he/she is referred to his/her county child support agency and is required to cooperate with the county child support agency in establishing child support. The county typically prepares the child support case using the child support calculator and assumes the child is primarily residing with the recipient unless a court order says otherwise.

However, in those instances in which there is a presumption of joint physical custody that required that the parties share equal parenting time is applied, the amount of child support ordered in these cases would drop dramatically.<sup>4</sup> Because receipt of child support results in a dollar for dollar offset in MFIP payments, lower child support payments will result in higher MFIP payments from the State, and a heavier burden on taxpayers.

---

<sup>4</sup> See examples of the differences in child support awards (included in written submission by Legal Services Advocacy Project) attached as Appendix \_\_\_\_\_.

- i. **Reduced rate of public assistance arrears collection owed to the State.** When establishing a child support order on behalf of a public assistance recipient, the State, through the County and County Attorney, can also seek reimbursement for periods of time public assistance was furnished by the State for the benefit of a child. See Minn. Stat. § 256.87, subd. 1. A parent of a child is liable for the amount of public assistance furnished to and for the benefit of the child, which the parent has the ability to pay, for two years immediately proceeding the commencement of the action. Id. Child Support arrears that accumulate during the time a family is on assistance, are assigned to the State. The primary method the State uses to collect arrearages is to withhold an additional amount equal to 20% of the current monthly child support order until all arrearages are paid. If child support orders are lower due to the presumption, the rate of collection will also be lower as the State's collection is limited to 20% of a smaller amount. This will presumably result in a cash flow issue for the State.

C. **Fiscal Impact – Courts.** There are areas where a financial impact to the courts can be predicted. The exact amount of the fiscal impact could not be determined by this group.

- i. **Increased cost to the Courts due to increased custody challenges.** As indicated below, a presumption of joint physical custody could have a significant impact on child support and other state benefits. This depends especially on whether a presumption is tied to 50/50 or nearly equal parenting time, or if it is not tied to a specific amount of parenting time. A presumption of joint physical custody puts a burden on parents who currently provide primary care of a child if they need to challenge a joint physical custody determination because of its impact on child support, other benefits or because they believe it is not in the best interests of the child.

The court system may face an increased burden from unrepresented parties who may dispute custody if a presumption is enacted. With significant numbers of unrepresented parents and decreasing court resources available to help set a parenting time schedule, the judge (or referee) may need to step in and use hearing time to assist the parties in presenting evidence or testimony to accomplish a schedule.<sup>5</sup> As a result, an increase of custody cases in district court, coupled with significant numbers of

---

<sup>5</sup> Alternatively, the court will order joint physical custody with a general parenting time provision (i.e. “reasonable parenting access” or “parenting time as the parties agree” or “significant parenting time shared between the parties.”) This may likely create post-judgment issues, as discussed in the next section.

unrepresented parties and decreasing court resources, could result in increased costs to the court system.

**ii. Increased costs to the Courts due to the uncertainty in the process of whether and how a presumption of joint physical custody is applied.**

How a presumption of joint physical custody might impact child support and custody orders depends on what route through the court system the case takes.

If the parents are not married, paternity must be established before parenting time and child support can be ordered. In most cases of unmarried parents, paternity is established by the parents signing a Recognition of Parentage and then the county proceeds through the Expedited Child Support Process to establish support. Custody and parenting time is not determined in the expedited process<sup>6</sup>. Under current law, because the Recognition of Parentage does not give any custody or parenting time rights to the father, the custodial mother has sole legal and sole physical custody until a court orders otherwise. Thus, currently, in such cases, an order is issued and the custodial mother receives a child support award under the guidelines as a sole physical custodian.

It is unclear how a presumption of joint physical custody would apply to these types of cases. The Department of Human Services would have to set rules and the Courts would interpret how this would be applied. This lack of certainty would also apply to those cases where the parties do not sign a Recognition of Parentage and the County initiates a paternity action.

Many of these issues apply to parents who are married or married and separated. When parents come before the Court, it is unclear when and how the Court will apply the joint physical presumption. This is particularly true when the Court is addressing child support and temporary custody and parenting time orders.

Another area which will impact the Courts will be the issue of how the Court will handle a case coming before it when one party defaults. It is unclear whether and how a Court would use the joint physical custody presumption when there is little or no evidence available to it. How the Courts implement this may impact on whether there is an incentive for a party to default.

---

<sup>6</sup> There are only very limited exceptions in which the child support magistrate can issue an order regarding custody and parenting time – that is when a paternity action is initiated in the expedited system and (1) the parties agree on the terms of custody and/or parenting time or (2) when the pleadings specifically address these issues and a party fails to serve a response or appear the hearing. Rule 353.01.

- iii. **Increased costs to the Courts due to increased number of post decree motions. An increase in post-decree motions may come from several causes – a significant change in the law alone, confusion over the appropriate modification standard, and unclear underlying custody and parenting time orders.**

A study of Oregon's experience was that legislation encouraging joint physical custody resulted in significantly more (almost double) post decree motions being filed with the Court. Margaret Brinig, *Does Parental Autonomy Require Equal Custody at Divorce?* 65 LA L. Rev. 1345, 1368 (2005). If this same phenomenon occurs with a statutory change in Minnesota, there will be an increased cost to the Court system as it must schedule and consider those motions.

An increase in post-judgment motions could also result from confusion over the appropriate custody modification standard. Under current law, changes in custody require a higher evidentiary standard, such as endangerment of the child or integration into the other parent's household with the parent's consent. *See* Minn. Stat. §518.18. A modification of parenting time, however, is governed by a best-interests standard. *See* Minn. Stat. §518.175. If a presumption of joint custody is adopted and not clearly defined, parents will not know whether future modifications are changes in custody or parenting time. If a presumption of joint physical custody is essentially just a label that could define almost any parenting arrangement, it could be argued that any change is a change of custody; but it could also be argued that any change is a change of parenting time, because the label would not change. This issue may likely need to be resolved by legislation or litigation and resolution by the appellate courts.

Post-judgment motions may also increase due to unclear custody and parenting time orders. Many initial orders, especially where the parties are unrepresented or have few to no resources to help evaluate and establish a custody and parenting time schedule, are established with broad guidelines. Under current law, there are often orders granting joint legal custody and one parent sole physical custody with the other parent's "reasonable parental access". This is done for several reasons: sometimes one party defaults, while in other cases there are not no-cost or low-cost resources such as a Guardian ad Litem, custody evaluator or mediator to assist unrepresented parties to provide more specific information to the Court.

There is no reason to believe that a Joint Physical Custody presumption would create more thoughtful orders. Without specific intervention by the court, or more available court resources, we could expect orders to include such phrases as “joint physical custody as the parties agree.” The consequences to children and parties of such vague language when it relates to custody arrangements are more significant than when it relates to parenting time, and more likely will result with increased motions to court to sort it out later.<sup>7</sup>

---

<sup>7</sup> One study concluded that within a few years of a joint physical custody order, nearly 50% of the parties had reverted to a more traditional sole custody arrangement. This suggests that the presumption would result in a significant difference between the court order and the family’s current arrangement, thereby creating a possibility of increased need to file post decree motions. See “Child Custody Arrangements: Their Characteristics and Outcomes” Department of Justice Canada (2004), p. 20-21; citing California 1992 study.



Prepared by Melissa Froehle, J.D., Jill Olson, J.D., and James Street, J.D.

**CHILD SUPPORT GUIDELINES**  
**OVERVIEW OF OUTCOMES**

Worksheet #1

Parent A (Mom) income = \$35,000/year

Parent B (Dad) income = \$30,000/year

If the parties have equal parenting time, child support = \$80/month

If the parties have not equal parenting time, child support = \$627/month

Worksheet #2

Parent A (Mom) income = \$45,000/year

Parent B (Dad) income = \$22,000/year

If the parties have equal parenting time, child support = \$340/month

If the parties have not equal parenting time, child support = \$785/month

Worksheet #3

Parent A (Mom) income = \$55,000/year

Parent B (Dad) income = \$75,000/year

If the parties have equal parenting time, child support = \$269/month

If the parties have not equal parenting time, child support = \$826/month

Worksheet #4

Parent A (Mom) income = \$55,000/year

Parent B (Dad) income = \$30,000/year

If the parties have equal parenting time, child support = \$348/month

If the parties have not equal parenting time, child support = \$885/month

Worksheet #5

Parent A (Mom) income \$13,524 (federal minimum wage of \$6.55)

Parent B (Dad) income \$13,524

If the parties have equal parenting time, child support = \$0/month

If the parties have not equal parenting time, child support = \$382/month

**\*\* All examples assume 2 joint children**

No nonjoint children, spousal maintenance, etc.

Medical support and child care were not calculated – they are not impacted by the parenting time division.

## Worksheet #1(A)

Equal custody/parenting time (joint)

Parent A (Mom) income = \$35,000/year

Parent B (Dad) income = \$30,000/year

2 joint children

**Support Guidelines Worksheet****Parent A: Mom****IV-D Case Number:****Number of Joint  
Children: 2****Parent B: Dad****Court File Number:****Date: 10/17/2008**

		Parent A	Parent B	Combined
<b>Income</b>	1a. Monthly Income Received	\$2917	\$2500	----
	1b. Child(ren)'s Social Security/Veterans' Benefits Derived From a Parent's Eligibility	\$0	\$0	----
	1c. Potential Income	\$0	\$0	----
	1d. Spousal Maintenance Orders Obligated to be Paid	\$0	\$0	----
	1e. Child Support Order(s) Obligated to be Paid for Nonjoint Child(ren)	\$0	\$0	----
	1f. Monthly Gross Income (1a+1b+1c-1d-1e)	\$2917	\$2500	----
<b>Adjustments</b>	2a. Number of Nonjoint Child(ren) in the Home (Maximum number allowed is 2)	0	0	----
	2b. Deduction for Nonjoint Child(ren) in the Home	\$0	\$0	----
	3. Parental Income for Determining Child Support (PICS)	\$2917	\$2500	\$5417
	4. Percentage Share of Combined PICS	54%	46%	----
	5. Combined Basic Support Obligation	----	----	\$1318
	6. Pro Rata Basic Support Obligation	\$712		----
<b>Basic Child Support Obligation</b>	7. Basic Support Obligation After Parenting Expense Adjustment	\$80		----

Worksheet #1 (B)

Parent B has 75% parenting time; Parent A has 25% parenting time

Parent A (Mom) income = \$35,000/year

Parent B (Dad) income = \$30,000/year

**Child Support Guidelines Worksheet**

**Parent A:** Mom

**IV-D Case Number:**

**Number of Joint Children:** 2

**Parent B:** Dad

**Court File Number:**

**Date:** 10/17/2008

		Parent A	Parent B	Combined
<b>Income</b>	1a. Monthly Income Received	\$2917	\$2500	----
	1b. Child(ren)'s Social Security/Veterans' Benefits Derived From a Parent's Eligibility	\$0	\$0	----
	1c. Potential Income	\$0	\$0	----
	1d. Spousal Maintenance Orders Obligated to be Paid	\$0	\$0	----
	1e. Child Support Order(s) Obligated to be Paid for Nonjoint Child(ren)	\$0	\$0	----
	1f. Monthly Gross Income (1a+1b+1c-1d-1e)	\$2917	\$2500	----
<b>Adjustments</b>	2a. Number of Nonjoint Child(ren) in the Home (Maximum number allowed is 2)	0	0	----
	2b. Deduction for Nonjoint Child(ren) in the Home	\$0	\$0	----
	3. Parental Income for Determining Child Support (PICS)	\$2917	\$2500	\$5417
	4. Percentage Share of Combined PICS	54%	46%	----
	5. Combined Basic Support Obligation	----	----	\$1318
	6. Pro Rata Basic Support Obligation	\$712		----
<b>Basic Child Support Obligation</b>	7. Basic Support Obligation After Parenting Expense Adjustment	\$627		----

**OUTCOME:**

Child support with equal parenting time = \$80/month

Child support with not equal parenting time = \$627/month

## Worksheet #2 (A)

Equal custody/parenting time (joint)

Parent A (Mom) income = \$45,000/year

Parent B (Dad) income = \$22,000/year

2 joint children

**Child Support Guidelines Worksheet****Parent A:** Mom**IV-D Case Number:****Number of Joint  
Children:** 2**Parent B:** Dad**Court File Number:****Date:** 10/17/2008

		Parent A	Parent B	Combined
<b>Income</b>	1a. Monthly Income Received	\$3750	\$1833	----
	1b. Child(ren)'s Social Security/Veterans' Benefits Derived From a Parent's Eligibility	\$0	\$0	----
	1c. Potential Income	\$0	\$0	----
	1d. Spousal Maintenance Orders Obligated to be Paid	\$0	\$0	----
	1e. Child Support Order(s) Obligated to be Paid for Nonjoint Child(ren)	\$0	\$0	----
	1f. Monthly Gross Income (1a+1b+1c-1d-1e)	\$3750	\$1833	----
<b>Adjustments</b>	2a. Number of Nonjoint Child(ren) in the Home (Maximum number allowed is 2)	0	0	----
	2b. Deduction for Nonjoint Child(ren) in the Home	\$0	\$0	----
	3. Parental Income for Determining Child Support (PICS)	\$3750	\$1833	\$5583
	4. Percentage Share of Combined PICS	67%	33%	----
	5. Combined Basic Support Obligation	----	----	\$1331
	6. Pro Rata Basic Support Obligation	\$892		----
<b>Basic Child Support Obligation</b>	7. Basic Support Obligation After Parenting Expense Adjustment	\$340		----

Worksheet #2 (B)

Parent B has 75% parenting time; Parent A has 25% parenting time

Parent A (Mom) income = \$45,000/year

Parent B (Dad) income = \$22,000/year

**Child Support Guidelines Worksheet**

**Parent A:** Mom

**IV-D Case Number:**

**Number of Joint Children:** 2

**Parent B:** Dad

**Court File Number:**

**Date:** 10/17/2008

		Parent A	Parent B	Combined
<b>Income</b>	1a. Monthly Income Received	\$3750	\$1833	----
	1b. Child(ren)'s Social Security/Veterans' Benefits Derived From a Parent's Eligibility	\$0	\$0	----
	1c. Potential Income	\$0	\$0	----
	1d. Spousal Maintenance Orders Obligated to be Paid	\$0	\$0	----
	1e. Child Support Order(s) Obligated to be Paid for Nonjoint Child(ren)	\$0	\$0	----
	1f. Monthly Gross Income (1a+1b+1c-1d-1e)	\$3750	\$1833	----
<b>Adjustments</b>	2a. Number of Nonjoint Child(ren) in the Home (Maximum number allowed is 2)	0	0	----
	2b. Deduction for Nonjoint Child(ren) in the Home	\$0	\$0	----
	3. Parental Income for Determining Child Support (PICS)	\$3750	\$1833	\$5583
	4. Percentage Share of Combined PICS	67%	33%	----
	5. Combined Basic Support Obligation	----	----	\$1331
	6. Pro Rata Basic Support Obligation	\$892		----
<b>Basic Child Support Obligation</b>	7. Basic Support Obligation After Parenting Expense Adjustment	\$785		----

**OUTCOME:**

Child support with equal parenting time = \$340/month

Child support with not equal parenting time = \$785/month

## Worksheet #3 (A)

Equal custody/parenting time (joint)

Parent A (Mom) income = \$55,000/year

Parent B (Dad) income = \$75,000/year

2 joint children

**Child Support Guidelines Worksheet****Parent A:** Mom**IV-D Case Number:****Number of Joint  
Children:** 2**Parent B:** Dad**Court File Number:****Date:** 10/17/2008

		Parent A	Parent B	Combined
<b>Income</b>	1a. Monthly Income Received	\$4583	\$6250	----
	1b. Child(ren)'s Social Security/Veterans' Benefits Derived From a Parent's Eligibility	\$0	\$0	----
	1c. Potential Income	\$0	\$0	----
	1d. Spousal Maintenance Orders Obligated to be Paid	\$0	\$0	----
	1e. Child Support Order(s) Obligated to be Paid for Nonjoint Child(ren)	\$0	\$0	----
	1f. Monthly Gross Income (1a+1b+1c-1d-1e)	\$4583	\$6250	----
<b>Adjustments</b>	2a. Number of Nonjoint Child(ren) in the Home (Maximum number allowed is 2)	0	0	----
	2b. Deduction for Nonjoint Child(ren) in the Home	\$0	\$0	----
	3. Parental Income for Determining Child Support (PICS)	\$4583	\$6250	\$10833
	4. Percentage Share of Combined PICS	42%	58%	----
	5. Combined Basic Support Obligation	----	----	\$2236
	6. Pro Rata Basic Support Obligation	\$939		----
<b>Basic Child Support Obligation</b>	7. Basic Support Obligation After Parenting Expense Adjustment		\$269	----

Worksheet #3 (B)

Parent B has 75% parenting time; Parent A has 25% parenting time

Parent A (Mom) income = \$55,000/year

Parent B (Dad) income = \$75,000/year

**Child Support Guidelines Worksheet**

**Parent A:** Mom

**IV-D Case Number:**

**Number of Joint Children:** 2

**Parent B:** Dad

**Court File Number:**

**Date:** 10/17/2008

		Parent A	Parent B	Combined
<b>Income</b>	1a. Monthly Income Received	\$4583	\$6250	----
	1b. Child(ren)'s Social Security/Veterans' Benefits Derived From a Parent's Eligibility	\$0	\$0	----
	1c. Potential Income	\$0	\$0	----
	1d. Spousal Maintenance Orders Obligated to be Paid	\$0	\$0	----
	1e. Child Support Order(s) Obligated to be Paid for Nonjoint Child(ren)	\$0	\$0	----
	1f. Monthly Gross Income (1a+1b+1c-1d-1e)	\$4583	\$6250	----
<b>Adjustments</b>	2a. Number of Nonjoint Child(ren) in the Home (Maximum number allowed is 2)	0	0	----
	2b. Deduction for Nonjoint Child(ren) in the Home	\$0	\$0	----
	3. Parental Income for Determining Child Support (PICS)	\$4583	\$6250	\$10833
	4. Percentage Share of Combined PICS	42%	58%	----
	5. Combined Basic Support Obligation	----	----	\$2236
	6. Pro Rata Basic Support Obligation	\$939		----
<b>Basic Child Support Obligation</b>	7. Basic Support Obligation After Parenting Expense Adjustment	\$826		----

**OUTCOME:**

Child support with equal parenting time = \$269/month

Child support with not equal parenting time = \$826/month

## Worksheet #4 (A)

Equal custody/parenting time (joint)

Parent A (Mom) income = \$55,000/year

Parent B (Dad) income = \$30,000/year

2 joint children

**Child Support Guidelines Worksheet****Parent A:** Mom**IV-D Case Number:****Number of Joint  
Children:** 2**Parent B:** Dad**Court File Number:****Date:** 10/17/2008

		Parent A	Parent B	Combined
<b>Income</b>	1a. Monthly Income Received	\$4583	\$2500	----
	1b. Child(ren)'s Social Security/Veterans' Benefits Derived From a Parent's Eligibility	\$0	\$0	----
	1c. Potential Income	\$0	\$0	----
	1d. Spousal Maintenance Orders Obligated to be Paid	\$0	\$0	----
	1e. Child Support Order(s) Obligated to be Paid for Nonjoint Child(ren)	\$0	\$0	----
	1f. Monthly Gross Income (1a+1b+1c-1d-1e)	\$4583	\$2500	----
<b>Adjustments</b>	2a. Number of Nonjoint Child(ren) in the Home (Maximum number allowed is 2)	0	0	----
	2b. Deduction for Nonjoint Child(ren) in the Home	\$0	\$0	----
	3. Parental Income for Determining Child Support (PICS)	\$4583	\$2500	\$7083
	4. Percentage Share of Combined PICS	65%	35%	----
	5. Combined Basic Support Obligation	----	----	\$1547
	6. Pro Rata Basic Support Obligation	\$1006		----
<b>Basic Child Support Obligation</b>	7. Basic Support Obligation After Parenting Expense Adjustment	\$348		----



Worksheet #4 (B)

Parent B has 75% parenting time; Parent A has 25% parenting time

Parent A (Mom) income = \$55,000/year

Parent B (Dad) income = \$30,000/year

**Child Support Guidelines Worksheet**

**Parent A:** Mom

**IV-D Case Number:**

**Number of Joint  
Children:** 2

**Parent B:** Dad

**Court File Number:**

**Date:** 10/17/2008

		Parent A	Parent B	Combined
<b>Income</b>	1a. Monthly Income Received	\$4583	\$2500	----
	1b. Child(ren)'s Social Security/Veterans' Benefits Derived From a Parent's Eligibility	\$0	\$0	----
	1c. Potential Income	\$0	\$0	----
	1d. Spousal Maintenance Orders Obligated to be Paid	\$0	\$0	----
	1e. Child Support Order(s) Obligated to be Paid for Nonjoint Child(ren)	\$0	\$0	----
	1f. Monthly Gross Income (1a+1b+1c-1d-1e)	\$4583	\$2500	----
<b>Adjustments</b>	2a. Number of Nonjoint Child(ren) in the Home (Maximum number allowed is 2)	0	0	----
	2b. Deduction for Nonjoint Child(ren) in the Home	\$0	\$0	----
	3. Parental Income for Determining Child Support (PICS)	\$4583	\$2500	\$7083
	4. Percentage Share of Combined PICS	65%	35%	----
	5. Combined Basic Support Obligation	----	----	\$1547
	6. Pro Rata Basic Support Obligation	\$1006		----
<b>Basic Child Support Obligation</b>	7. Basic Support Obligation After Parenting Expense Adjustment	\$885		----

**OUTCOME:**

Child support with equal parenting time = \$348/month

Child support with not equal parenting time = \$885/month

## Worksheet #5 (A)

Equal Custody/Parenting time (Joint)

Parent A (Mom) income \$13,524 (federal minimum wage of \$6.55)

Parent B (Dad) income \$13,524

2 joint children

**Child Support Guidelines Worksheet****Parent A:** Mom**IV-D Case Number:****Number of Joint  
Children:** 2**Parent B:** Dad**Court File Number:****Date:** 10/23/2008

		Parent A	Parent B	Combined
<b>Income</b>	1a. Monthly Income Received	\$1127	\$1127	----
	1b. Child(ren)'s Social Security/Veterans' Benefits Derived From a Parent's Eligibility	\$0	\$0	----
	1c. Potential Income	\$0	\$0	----
	1d. Spousal Maintenance Orders Obligated to be Paid	\$0	\$0	----
	1e. Child Support Order(s) Obligated to be Paid for Nonjoint Child(ren)	\$0	\$0	----
	1f. Monthly Gross Income (1a+1b+1c-1d-1e)	\$1127	\$1127	----
<b>Adjustments</b>	2a. Number of Nonjoint Child(ren) in the Home (Maximum number allowed is 2)	0	0	----
	2b. Deduction for Nonjoint Child(ren) in the Home	\$0	\$0	----
	3. Parental Income for Determining Child Support (PICS)	\$1127	\$1127	\$2254
	4. Percentage Share of Combined PICS	50%	50%	----
	5. Combined Basic Support Obligation	----	----	\$867
	6. Pro Rata Basic Support Obligation	\$434		----
<b>Basic Child Support Obligation</b>	7. Basic Support Obligation After Parenting Expense Adjustment	\$0		----

## Worksheet #5 (B)

Parent B has 75% parenting time; Parent A has 25% parenting time  
 Parent A (Mom) income \$13,524 (federal minimum wage of \$6.55)  
 Parent B (Dad) income \$13,524

## Child Support Guidelines Worksheet

Parent A: Mom

IV-D Case Number:

Number of Joint  
Children: 2

Parent B: Dad

Court File Number:

Date: 10/23/2008

		Parent A	Parent B	Combined
<b>Income</b>	1a. Monthly Income Received	\$1127	\$1127	----
	1b. Child(ren)'s Social Security/Veterans' Benefits Derived From a Parent's Eligibility	\$0	\$0	----
	1c. Potential Income	\$0	\$0	----
	1d. Spousal Maintenance Orders Obligated to be Paid	\$0	\$0	----
	1e. Child Support Order(s) Obligated to be Paid for Nonjoint Child(ren)	\$0	\$0	----
	1f. Monthly Gross Income (1a+1b+1c-1d-1e)	\$1127	\$1127	----
<b>Adjustments</b>	2a. Number of Nonjoint Child(ren) in the Home (Maximum number allowed is 2)	0	0	----
	2b. Deduction for Nonjoint Child(ren) in the Home	\$0	\$0	----
	3. Parental Income for Determining Child Support (PICS)	\$1127	\$1127	\$2254
	4. Percentage Share of Combined PICS	50%	50%	----
	5. Combined Basic Support Obligation	----	----	\$867
	6. Pro Rata Basic Support Obligation	\$434		----
<b>Basic Child Support Obligation</b>	7. Basic Support Obligation After Parenting Expense Adjustment	\$382		----

**OUTCOME:**

Child support with equal parenting time = \$0/month  
 Child Support with not equal parenting time = \$382/month

This page is intentionally left blank.

## Child Support Fact Patterns

High, Middle and Low Income Examples

### High Income

- Pat earns \$50,000 per year  
(\$4167/mo)
- Chris earns \$75,000 per year  
(\$6250/mo)
- Combined Income \$125,000 per  
year (\$10,417/mo)

### High Income – cont'd

- Combined basic support for 2 joint children is \$2,153 per month
- Pat's share is 40% or \$861 (\$758 after PEA)
- Chris's share is 60% or \$1,292 (\$1,137 after PEA)

### High Income –cont'd

- If equal custody, take \$2,153 times .75, result is \$1,615
- Pat's 40% share is \$646
- Chris's 60% share is \$969
- $\$969 - \$646 = \$323$  to be paid from Chris to Pat

## High Income – cont'd

Pat:

primary custodian = \$5,459

50-50 custodian = \$4,490

other parent is primary = \$3,409

## High Income – cont'd

Chris:

primary custodian = \$7,008

50-50 custodian = \$5,927

other parent is primary = \$4,958

## Middle Income

- Sam earns \$50,000 per year (\$4,167/mo)
- Kim earns \$25,000 per year (\$2,083/mo)
- Combined income \$75,000 per year (\$6,250/mo)

## Middle Income – cont'd

- Combined basic support for two joint children is \$1,433.
- Sam's share is 67% or \$960 (\$845 after PEA)
- Kim's share is 33% or \$473 (\$416 after PEA)



## Middle Income – cont'd

- If equal custody, take \$1,433 times .75, result is \$1,075
- Sam's share is 67% or \$720
- Kim's share is 33% or \$355
- $\$720 - \$355 = \$365$  to be paid from Sam to Kim

## Middle Income – cont'd

Sam:

primary custodian = \$4,583

50-50 custody = \$3,802

other parent is primary = \$3,322

## Middle Income – cont'd

Kim:

primary custodian = \$2,928

50-50 custody = \$2,448

other parent is primary = \$1,667

## Low Income

- Mike earns \$20,000 per year  
(\$1,667/mo)
- Andy earns \$25,000 per year  
(\$2,083/mo)
- Combined income \$45,000 per year  
(\$3,750/mo)

### Low Income – cont'd

- Combined basic support for 2 joint children is \$1,077
- Mike's share is 44% or \$474 (\$417 after PEA)
- Andy's share is 56% or \$603 (\$531 after PEA)

### Low Income – cont'd

- If equal custody, take \$1,077 times .75, result is \$808
- Mike's 44% share is \$356
- Andy's 56% share is \$452
- $\$452 - \$356 = \$96$  to be paid from Andy to Mike

## Low Income – cont'd

Mike:

primary custodian = \$2,198

50 -50 custodian = \$1,763

other parent is primary = \$1,250

## Low Income – cont'd

Andy:

primary custodian =\$2,500

50-50 custodian = \$1,987

other parent is primary = \$1,552

## Appendix E

### Public Participation: List of People Testifying and Compilation of Written Submissions

Compiled by Mark Toogood, M.S.W.  
and Study Group Staff

This page is intentionally left blank.

Minnesota Child Custody Presumption Study Group  
List of Speakers at Public Listening Session  
October 27, 2008

<u>Name</u>	<u>Organizational Affiliation (if any)</u>	<u>Focus of Testimony</u>
1. Julie Moylan		Domestic violence
2. Joan Lucas	American Academy of Matrimonial Lawyers	Best interests
3. Lance Johnson	Child Speak	Best interests
4. John Mazzitelli		Best interests
5. Tom James		Domestic violence
6. Donna Dunn	MN Coalition Against Sexual Assault	Best interests
7. Les Jobst	Fathers 4 Justice	Fathers
8. Leigh Ann Olson	MN Coalition for Battered Women	Mothers
9. Todd Harris	Center for Parental Responsibility	Fathers
10. Kathrun Eagle	Domestic Abuse Intervention Programs	Domestic violence
11. Quincy Boyle	Employment Action Center	Diverse communities
Anthony Kane		
John Corliss		
12. Charlie Hurd	National Coalition of Free Men	Best interests
13. Joseph Field	Private attorney	Fathers
14. Troy Molde		
Nancy Lazarayn		Best interests
15. Tami Peterson	MSBA Family Law Section	Best interests

This page is intentionally left blank.



# **Written Submissions to Joint Physical Custody Study Group**

## **Hard Copy Version with Names of Submitters**

**(Updated -w- names on January 6, 2009)**

Compiled by Study Group Staff

Submission Against Joint Physical Custody

This page is intentionally left blank.

# **Written Submissions AGAINST a Presumption of Joint Physical Custody**

This page is intentionally left blank.

Compiled by Study Group Staff

Presumptive joint custody is completely a disastrous move. Many children are primarily raised by one parent (majority of the time the mother) even in 2 parent homes. Those children develop a close bond to that parent. By presuming that joint custody is best for that child you are only considering what the parent wants. Tearing that child away from the parent for great lengths of time is ridiculous.

Many times one or both parents put the child/ren in the middle and make them play messenger. This causes hurt feelings to the other parent and the child. This is a great example of why joint custody doesn't work. 2 people that get a divorce probably do not get along or they would have stayed married. Joint custody opens up the opportunity to argue about many many things. Sole custody allows one parent to make decisions for the best of the children. There cannot be any hold ups on testing for children as only one parent has to agree.

Joint custody is not in the best interest of children or of parents.

--Tanya Hare

---

To: Joint Custody Study Group, Minnesota State Court Administration

From: Domestic Abuse Committee of the Minnesota State Bar Association's Family Law Section  
(Submitted by Hon. Mary Louise Klas (ret.), DA Committee member)

Date: November 14, 2008

Re: Commentary on Joint Custody Presumption Proposal

I am a member of the Domestic Abuse Committee of the Minnesota State Bar Association's Family Law Section and have been delegated the task of submitting its comments on the proposed joint physical custody legislation.

The Domestic Abuse Committee's mission is to "assess and provide commentary (to the Section and others) on the effect of any proposed policy or law on victims or perpetrators of domestic violence and their children. The committee seeks to determine what family lawyers in Minnesota can do to prevent domestic violence by engaging in best practices no matter whether they are representing the victims or representing the perpetrators of domestic violence."

In exploring the subject of a joint custody presumption, we examined the social science literature related to this issue as well as our own experiences as practitioners. We have concluded that there are many reasons to oppose a presumption.

1. Should there be a change in Minnesota's custody laws to favor a presumption of joint physical custody?

No. In order to serve the best interests of children, joint physical custody should be reserved for cases where the arrangement is in the best interests of the child and where both parents agree to it. The proposed custody presumption would increase the number of families with joint physical custody. Joint custody has long been known to be inimical to the interests of children in families where domestic violence has occurred. Minnesota's legal custody statute recognizes this reality.

Submission Against Joint Physical Custody

Because it would primarily be applied to contested cases, most of which involve domestic violence, child abuse or serious substance abuse, the proposal would result in more children from abusive homes being placed in harmful custodial arrangements. For these and other reasons detailed below, the Domestic Abuse Committee of the Family Law Section of the MSBA opposes a presumption in favor of joint physical custody.

2. What are the pros and cons of the state adopting a presumption of joint physical custody in law?

A. A history of domestic violence is common in contested custody cases and therefore, the presumption will primarily be applied in domestic abuse cases.

Our experience as family law practitioners shows that while many couples reach agreement through negotiation, assisted or otherwise, a large number of the cases which are highly conflicted (and which are, therefore, far more likely to be subject to the proposed presumption) are those which involve allegations of domestic or child abuse or maltreatment.

Research on this issue is remarkably consistent and demonstrates that the majority of contested custody cases have a history of domestic violence. For example, in her seminal book about "high conflict" divorce, Janet Johnston, one of the nation's leading researchers and writers on child custody, cited a study which found that among custody litigants referred to mediation, "[p]hysical aggression had occurred between 75% and 70% of the parents . . . even though the couples had been separated. . . [for an average of 30-42 months]." Furthermore, "[i]n 35% of the first sample and 48% of the second, [the violence] was denoted as *severe* and involved battering and threatening to use or using a weapon."<sup>1</sup>

B. Joint Physical Custody Is Not Appropriate in Most Cases Involving Domestic Abuse.

Because joint custody, especially court-ordered joint physical custody, is rarely appropriate in abuse cases, a presumption would create many ongoing problems for adult victims and children alike.

In our experience, many abusive parents do not simply detach from their victims after divorce. Instead, they use their access to the children as a means to continue to harass, punish or even assault their former partners and, sometimes, the children. Joint physical custody necessitates more contact and more cooperation between the parents than sole custody. It is exactly that increased engagement that can be quite dangerous for both victim parents and the children.

Ample research supports our experience. A large study done in Washington State in 1998 reported that joint physical custody in high conflict families is detrimental to children, does not meet the goal of fostering better communications, and can even make the situation worse for children in those families. In fact, experts in the field agree generally that 'one size fits all' approaches to developing post-divorce parenting arrangements are inappropriate and maybe harmful to some families. Johnston, Kline and Tschann's longitudinal research on the subject shows that children who are

---

<sup>1</sup> Janet R. Johnston, "High-Conflict Divorce," *The Future of Children*, Vol. 4, No. 1, Spring 1994, 165-182) citing Depner et al., "Building a uniform statistical reporting system: A snapshot of California Family Court Services," *Family and Conciliation Courts Review* (1992) 30: 185-206.

court-ordered into joint custody in highly conflicted families and in those where there has been *domestic violence* are negatively affected and are likely to be more emotionally disturbed as a consequence. It also shows that when both such parents have frequent access to their children, verbal and physical aggression between the parents is likely to increase and their children get caught in the conflict.<sup>2</sup>

C. A presumption will hand to parents who are perpetrators of domestic violence a very effective tool with which to continue their controlling and punishing behavior long after separation.

The threat to obtain joint physical custody, made viable by a joint custody presumption, will be used by many abusive parents to gain tactical advantages in custody and child support negotiations. The result will be to force the protective/dissenting parent to settle for lower child support awards and other conditions detrimental to the children.

D. Joint physical custody is not appropriate, even in non-violent families, unless the parents agree and the child will be able to thrive under those conditions.

Parents who are not cooperative from the outset do not have a good prognosis for developing successful joint custody arrangements over time. Research comparing the success of joint physical custody arrangements for (1) parents who initially agreed to joint custody, (2) those who agreed to joint custody after negotiation and mediation, and (3) those whose joint custody was imposed by court order showed that the more court involvement, including mediation, the less successful were the joint custody arrangements. A year following a joint custody agreement, **only 27% were successful** in their joint custody efforts. The children who adapted well were those who had joint custody agreements negotiated by parents outside the legal system.<sup>3</sup>

Judith Wallerstein, who is among the most respected psychologists doing *longitudinal* research on children of divorce, concludes, "(c)hildren raised in joint custody arrangements that result from a court order in the wake of bitterly contested divorces seem to fare much worse than children raised in traditional sole custody families also torn by bitter fighting." Furthermore, she asserts that "there is no evidence that joint custody is best for all, or even for most, families." See *Second Chances: Men, Women and Children a Decade After Divorce*, Judith Wallerstein, Houghton Mifflin (1996), pp. 271-273.

In their 25-year follow-up on the study, Wallerstein, Blakeslee and Lewis again stated that joint custody is not only *not* a magic bullet, but may be positively harmful to some children. See *The Unexpected Legacy of Divorce; A 25-year Landmark Study*, Hyperion (2000), at pp. 217-219.

In another study, psychologists who did longitudinal research on 2,500 children over 30 years concluded, "(i)t is the quality of the relationship between the non-residential parent and child rather than sheer frequency of visitation that is most important. . . . Moreover, visits from an

---

<sup>2</sup> Johnston, M. Kline & J Tschann (1989) "Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access". *American J. of Orthopsychiatry* 59(4) 576-592.

<sup>3</sup> Susan Steinman et al, *A Study of Parents Who Sought Joint Custody following Divorce: Who Reaches Agreement and Sustains Joint Custody and Who Returns to Court?* 24 *J Am Acad. Child Psychiatry* 554 (1975).

alcoholic, abusive, depressed, or conflict-prone parent do nothing for a troubled child, except possibly make the child more troubled." <sup>4</sup>

E. A presumptive joint custody law will increase litigation.

Instead of lessening conflict between parties, such a presumption is likely lead to more post-decree litigation. Abusive parents will use the law as a club with which to force their partners to agree to joint physical custody. Abusers are also more likely to litigate the matter than under current law. Both factors will result in even more court orders for joint physical custody. But because such arrangements will often not work for the children, post decree litigation will be necessary in ongoing efforts to clean up the mess. A surge in custody litigation and post-decree motions will cause a significant increase in expenditures by the courts, the parties and, in the end, the children.

The experience in California, which moved *away* from presumptive joint physical custody after several years, demonstrated that post decree litigation had increased under operation of the presumption. Another study (in Oregon) of the effect of joint custody showed that "[presumption of joint custody] legislation increased the number of motions to modify or enforce parenting time or child custody... the number did increase significantly (and almost doubled) following enactment of the statute. Most of these motions were to change custody or visitation, not to enforce parenting time... If the desire of the legislation was to make it easier for unhappy parents to enforce their visitation time, its purpose was clearly not met." And "(m)andatory joint custody, or even a movement in that direction, seems to cause a number of other problems that perhaps its proponents did not anticipate. Unfortunately, the biggest winners, at least in Oregon, seem to be not so much the traditionally non-custodial parents, but rather the mediators and, slightly less dramatically, the divorce attorneys." <sup>5</sup> \

F. A statutory exception for domestic violence cases will not suffice to keep those cases from being forced into joint custody arrangements.

Many victims of domestic violence, even when asked, do not disclose the fact of the abuse to their attorneys. Fear, embarrassment and a desire to move on and away from the violence are only some of the reasons.

In another segment of cases, abuse cannot be proven even if alleged because there exists no evidence beyond the testimony of the victims.

Increasingly, family law litigants are *pro se*. Unrepresented victims of domestic abuse will not understand that the presumption does not apply in their cases; they will stipulate to joint physical

---

<sup>4</sup> *For Better or for Worse; Divorce Reconsidered*, E. Mavis Heatherington and John Kelly Norton (2003), at p. 134.

<sup>5</sup> Brinig, Margaret (2005). Does Parental Autonomy Require Equal Custody at Divorce? The University of Iowa College of Law, University of Iowa Legal Studies Research Paper Number 05-13 April, 2005



custody under pressure or threat of violence or loss of custody. Their abusers are more likely to have the financial ability to hire attorneys to litigate the issue. Under those circumstances, even though the arrangement will not be in their children's interests, victims will capitulate.

#### Conclusion

The proposed legislation would radically change Minnesota law for no valid reason and despite ample evidence that it would harm children. Minor children who have lived with a parent who uses violence, threats and coercion to control and intimidate the other parent have enough to worry about without being forced to live with a high level of contact and conflict between their parents. Adult victims of abuse need safety and separation, not danger from and increased engagement with their former partners. Backed by research and experience in other states, there is ample evidence to show that children would be hurt by such a joint physical custody presumption. And the children who would be most hurt would be the children with parents who are physically or emotionally abusive.

The Domestic Abuse Committee thanks the Joint Custody Study Group for its consideration of these concerns and strongly urges its members to convey them to the Legislature.

---

This is the written testimony on behalf of the Domestic Abuse Intervention Programs. Findings of abuse as defined by M.S.A. § 518B.01 only occur in small percentage of dissolution and custody cases.

This presumption leaves the burden of proving domestic abuse on the victim at a time when she is mostly likely to be concerned for the safety of herself and her children, she is in a transition period in her life, and she is not likely to have information or evidence to prove that domestic abuse occurred.

This presumption may have negative impacts on victim's seeking protection orders. It means that all victim's with children need to seek a finding of abuse, which requires a hearing (in some cases this is a huge burden) and district court judges may become even less willing to award temporary custody through protective orders because of the joint physical custody presumption. Additionally, there are concerns about victims who receive protective orders without findings and how they will be expected to navigate presumptive joint custody.

This presumption gives unidentified batterers a court sanctioned mechanism for further abusive and control over their partner.

Victims may fear to leave abusive relationships if they know that their batterer will have joint physical custody and an avenue to harass and control them after they leave the relationship.

Joint custody awards typically require that parents cannot move or leave the state with the child. This means that victims may be forced to choose between their having their children some of the time or being free from violence and control.

Some battered women end up with criminal charges or protective orders against them because batterers as a result of domestic violence. A criminal charge or an OFP with a finding would exempt them from this presumption, to what end?

This presumption would mean that a parent seeking a change of custody must show that the other parent is a danger to the child. One custodial parent can harm and harass the other without actually being a threat to the child or children. This concern is heightened in domestic violence cases, but present in all cases where parents are antagonistic towards each other in the process of separation or child rearing.

This presumption will create an increase in false reporting to child protection in an attempt to show the other parent is a danger to the joint child(ren).

Differences in definitions of and expectations about what joint physical custody means can create problems and arguments that lead to unreasonable arrangements that are not in the best interests of the child and increased litigation to settle the disputes. Allowing this presumption to take effect during paternity actions is practically an invitation for ongoing, bitter litigation about the manifestation of the presumption of joint custody.

This presumption ignores the actual best interest of the child(ren) and doesn't even provide inquiry into those interests.

This presumption has the potential to eliminate child support obligations under the current child support guidelines, which could have drastic impacts on children.

Joint physical custody works only in a small amount of cases where the parents have exceptional communication skills and a high level of cooperation. These factors are not present in the majority of cases.

--Katherine Eagle  
Domestic Violence Response Team  
Family Crimes Unit

---

Please keep in mind that parental/custodial issues arise in different contexts. Private family law attorneys deal with dissolution actions in which both parents arguably have established strong emotional relationships with their children.

Most child support offices, however, deal with parental/custodial issues arising from an adjudication of paternity, either by signing a recognition of parentage, or through a more formal judicial adjudication.

My experience with these latter kinds of cases after 14 years of practice in the child support area is that in the majority—even vast majority—of cases the male parent shows tragically little interest in their child beyond the strictly financial issue of child support.

Yes, statistics show that a parent is more likely to pay support when they have a relationship with their child, but this should not translate into an assumption that a male parent whose connection with a child is merely biologic should have presumptive physical custodial rights.

On the other hand, much could be done to make access to a child through the establishment of parenting time easier than it is today, particularly in the ironic situation where a male parent actually finds little or no reward in acting proactively by signing a recognition of parentage.

Thomas P. Kelly

Senior Assistant County Attorney

---

Dear Study Group:

I am submitting this statement in opposition to a presumption for joint physical custody.

I am the father of two and an attorney who has been in practice since 1986. I represent men and women nearly equally. I have appeared in about 30 of the Minnesota Counties. I do not limit my work to any specific location or issue, aside from having my practice focused on family law for the past ten years.

There are some counties such as Anoka, where the results are perceived by the bar to be varied from the results we can accomplish in other counties, especially with respect to joint physical custody. In most instances, including some in Anoka, parents who should get joint physical custody can get joint physical custody. I have persistently heard rumor around the practicing bar that Anoka refuses more joint physical custody plans than they should. I sat at the public hearing last year on this issue when it was decided to undertake this study.

There was testimony from people from Anoka favoring a presumption of joint physical custody. For this reason, I would discount testimony about Anoka County as I believe Anoka is not representative on this issue. Assuming for the sake of analysis that such rumor is true, and that cases meriting joint physical custody do not get it, the tail should still not wag the dog, and we should not pass state wide presumption over one or two counties. Self reporting of cases, and what that custody arrangement should be, is inherently unreliable. Custody of a child should turn on what is best for the child, as opposed to what the *parents think* is best for the child.

Parents see from the perspective of their subjective relationship to their child. This may be too intense a connection to be intellectually neutralized. A judge's objectivity is needed. I suggest that testimony from individuals about their own case, or that of their significant other, where we do not also hear from the opposing parent, should be discounted for subjective bias. We should not adopt a presumption for all future cases based upon people's partial perspective of their individual cases. Determining custody is the process of dividing parenting duties. Joint responsibility for the result of parenting does not mean absolute equality in all duties. Intact parenting teams often include individuals with focused and unique skills and duties but always with an interest in the ultimate success of the team effort.

The goal is properly raising the child. *It is not sharing the child equally as if the child were a chattel.* The custody inquiry needs to see if the team can still act as a team to achieve the parenting goal. People believe that joint physical custody implies nearly equal time for each parent. Although joint physical custody is not always equal time, it implies more than traditional parenting time, yet traditional time schedules may be best for children more often than any other schedule.

The focus should be on children and a presumption that parents should have nearly equal time erroneously focuses upon parents. Children are least culpable and least capable to endure hardship, so if anyone should receive less than perfect results the adult should shoulder injustice before the child should. A good system may still have some imperfect results. Maybe an incremental approach will help us to achieve an appropriate balance. I suggest that judicial affirmation of joint physical custody arrangements contained in stipulated parenting plans should not be withheld without specific and detailed judicial findings on the 17 statutory joint custody factors.

-- Glen A Norton  
Attorney

---

Having practiced family law for 13 years and been a judge for over 24 years, I am not in favor of a presumption of joint physical custody. Although I believe joint physical custody is appropriate in many cases, I believe it is not in a majority of the cases. It really needs to be addressed in each case when it is requested. For joint physical custody to work, the parents need to be able to work together in the best interest of the children. I think we need evidence that they can do so, or have been doing so, before we should even approve joint physical custody. I don't think we should have a presumption which shifts the burden to a party opposing joint physical custody to prove it won't work.

--Bernard Borene

---

With respect to a presumption of joint custody, I think this is a very bad idea. Unless people agree to joint physical custody, they are not candidates for it. To presume that it is in a child's best interest would be to presume divorcing couples have an extremely high level of cooperation. Extremely high levels of cooperation rarely exist in divorce cases. The fact that they cannot cooperate is one of the reasons they are getting divorced.

Second, from a support standpoint, unless both couples work and have very good incomes, providing two good homes in the same neighborhood, and providing a standard of living similar to what the child had prior to her parent's divorce, is impossible. I think this "presumption" is parent focused and not child focused. Most children that I have dealt with want to stay in the family home and have their life continue with the least amount of disruption. They want their parents not to fight about them or about money. The child's focus is not an equal division of his/her time between the parents. It is about surviving the divorce and having the same home, school and friends as before the divorce. The usually want to see both parents a good amount of time, but not if it disrupts their school, activities or peer relationships.

It is hard enough maintaining this for children with the new child support guidelines. With a presumption of joint physical custody the fighting between parents would increase, more children would be caught in the middle, and the standard of living for the children (the ones we are supposed to be watching out for) will go down. Some parents will be happier. One would have to question their motivation.

The current law allows the judge to assess the entire situation for each child in the family and make decisions appropriate for each child. It works relatively well for the children. So why would we change it?

Thanks , Kathleen M. Newman, Attorney

---

Hi. I'm a volunteer mediator with Community Mediation Services. I previously worked as a judicial law clerk for several years in Wright County, so I dealt with many custody cases in the past. I'm also a mother of two.

I'd like to add brief comments regarding the question of whether there should be a change in Minnesota laws that would create a presumption of joint physical custody. My understanding is that children do better with the consistency of being in one home most of the time, with a predictable schedule of visitation, in a substantial amount, with the other parent. Unless there are studies showing otherwise, I think this is how the system should be set up, in the best interests of the children.

-- Laura Johnson

---

1. Should there be a change in Minnesota's custody laws to favor a presumption of joint physical custody?

Clearly and unequivocally, NO.

Custody issues are difficult enough when the parties are cooperative. Requiring a presumption of joint physical custody may very well result in one parent simply taking the position that joint custody is my right, and I don't have to cooperate with you on anything. I'll parent the child the way I want when the child is with me, and you go ahead and do your thing when the child is with you.

I have a very troubling case several years ago. The children were teenagers. The parents each sought sole physical custody of the children. When asked if the Court could not grant them sole custody, would they want joint custody or sole custody in the other parent. Each said joint custody. I was hopeful that the parents would cooperate once the court proceedings were over. I was wrong.

The children were subjected to emotional distress of being in joint physical custody with parents who did not agree to that arrangement for about 18 months before it was back before me and I could rectify my mistake.

I have no problem with a law that requires a judge to set forth his or her reasons why joint custody is not appropriate in a particular case, but I do have a serious issue with requiring a presumption of joint physical custody. (The parents' failure to agree on a joint parenting arrangement would have to be a valid reason to reject joint physical custody.)

2. What are the pros and cons of the state adopting a presumption of joint physical custody in law?

See comments to Number 1, above.

Minnesota law has, and ought to continue, to hold that the best interests of the child(ren) ought to be the primary determining factor in determining custody issues. I would challenge anyone to produce scholarly studies that show that joint physical custody is, *per se*, in the best interests of the child. My experience as a trial judge for over 20 years would belie any such study.

While I have no desire to testify or appear at any hearing, I am certainly willing to supplement these remarks in any appropriate way.

Judge Thomas G. McCarthy

---

I oppose a presumption of joint physical custody. Such a presumption is not in the best interests of children. Over my years on the bench I have found that most parents do not get along well enough to have such an agreement which is why they are no longer married or living together. Children are not served well by an agreement which requires every decision to be jointly made and presumes that children should spend equal amounts of time with each parent. Parents often live many miles apart which does not allow such an arrangement to work. Further it brings additional conflict into the lives of children. A significant number of joint physical custody agreements have ended up back in court because parents do not agree. I believe such a presumption will cause more contested custody cases. Typically one parent has been the primary parent caring for the children. It is also inappropriate for cases in which domestic violence is an issue. A presumption of joint physical custody is designed more to meet the emotional needs of a parent who can claim they did not "lose" custody than it is to ensure children's needs are protected. --Judge Lois Lang

The label of "custody." The first thing I do in an ICMC is try and eliminate that title and talk about time with the kids. Parents seem to accept that much better and are then more likely to be able to reach an agreement that they feel is really in the best interest of the children

Few parents are able to agree on enough important factors, however, to have any kind of true joint custody—at least as that term used to be defined. Some are, however, and seem to do a good job. Sadly, however, I also think the percentage that do are much fewer.

--Judge Benson

---

Having practiced in the field of family law for many years I can assure you there are VERY FEW people who get along well enough to handle a joint physical custody arrangement. By making this the presumed arrangement, you are sacrificing the kids just so the parent can get that label in the final paperwork. This is a bad idea.

--Judge Mary Leahy

---

Joint physical custody is certainly an ideal situation for children (that is having both parents continue in the parenting process on a roughly equal basis), however, it is only ideal when both parents have the willingness and fortitude to put aside the obvious issues that brought them to the dissolution in the first place, and proceed with a high level of communication and cooperation. My personal observations are that the percentage of parents, who fall into this category, is significantly lower than 50% and may be more in the range of 10%-25%. By making joint physical custody the norm, (i.e. presumption), we are doing a disservice to more parents and children than the present criteria does. My perception and experience is that an insufficiently thought through joint custody agreement produces more, not less, confrontation, litigation, and hardship for the children. I would strongly oppose instituting the joint physical custody presumption.

Judge Ryshavy

---

Joint custody is just another label that causes parents to get fixated on getting something out of their custody fights. The real issue is hardly ever custody itself. It's about parenting time and the opportunity to be a part of the children's lives. Other states do have a presumption of joint custody (California, for example) but I don't know how their systems work. Any presumption is not going to change the reality that Judge \_\_\_\_\_ so aptly describes.

- Judge Birnbaum

---

I have a couple in front of me this afternoon who got divorced in '04 and this will be the third parenting time assistance motion I've heard since the divorce. Sadly, I have a number of couples like that whom I see on a regular basis on post-dissolution motions. Joint legal custody is totally inappropriate for these couples. I would be opposed to any legislation that would limit a judge's authority to make these kind of decisions on an individual case by case basis.

--Judge Terry Walters

---

I write to oppose any change in the Statute to reflect a presumption of Joint Physical Custody in family cases. To give a brief background, I practiced in the family law area for 15 years and have spent 14 years thereafter as a District Court Judge, handling numerous/hundreds/thousands of divorce/custody/visitation cases. To be blunt, joint physical custody rarely works in the real world. It sounds great for the parents (mostly for the Dads) and to the politicians, but it simply does not work except in about 5% of the cases...

If there is any prior physical abuse, the parents cannot/should not be required to cooperate in a joint parenting scheme because of the imbalance of power issues;

Most couples get a divorce or separate, if not married, because they cannot communicate in the first place or refuse to do so;

Parents have to have almost identical ideas and philosophies about raising children or else their parenting styles will be completely different and inconsistent with each other....the kids figure this out easily and start playing the parents against each other. I have had many who ran to the other parent when the discipline got too tough with the other. Kids need CONSISTENCY. Such children often end up in front of us Judges with attitude/Chips issues, truancy, chemical or criminal issues. The children simply do not know where they live and have no center in their lives. Check out the long term study in California about JPC ! The more often they switch the kids, the more difficult it is for them. I get many couples who request jpc in pro se dissolution cases(it is the latest fad) and when I ask them about the joint custody factors they rarely meet any of the criteria...some barely talk to each other(some not at all) and are not capable of joint parenting even if they truly wanted this. Many of these cases involve females (mostly) who wish to placate their stronger(either physically or emotionally) male partners...Both parents usually fail to understand what is required and usually change this designation after it is explained to them. There has to be almost an equal emotional balance of power in the parents' relationship before this ever works...;

There are/can be issues later with jpc...what happens if one of the parents moves?

Especially out of state?!

What school does the child attend if the parents live in two different school districts?!

Children usually have a stronger attachment/bond with one parent and this can be disrupted if forced to spend time equally with both parents;

I would say the majority of parents that I see in Court are poor parents in terms of their ability to care for and properly raise kids...to assume that both will be now jointly involved in co-parenting would bring the quality of parenting down and would give the parent with little or no skills/desire to parent much more authority and control than they should have (or ever did during the marriage);

As the kids age in their teens, they often end up calling the shots in these arrangements re: who they spend time with, recreation, vehicles,etc....this results in spoiled, self-centered,entitled children...some parents resort to bribery to ingratiate themselves with their own children...;

Finally, someone has to make difficult decisions about raising these kids...who is going to do this if the parents disagree?...Judges....which will increase an already overloaded Judicial system...do you really want us to decide where the kids go to school, which Doctor to use, whether Sally should join YO volleyball, etc....??? ;

I could go on with the difficulties. Most Judges that I know would be in agreement with my position, I believe. The bottom line is that this whole idea has probably been proposed by people(politicians) who have NO experience dealing with these issues on a daily basis...Several constituents probably complained with anecdotal information about an aberration in their own divorce and they are now caught up in changing the parenting label (without understanding the realities of such a change). Thank you for reading this.

Judge David R. Battey

Alexandria, MN



The nature of my concern is about changing the custody laws in the state of Minnesota to presumptive joint physical custody, *specifically in the cases of domestic violence*. My specific case involves my infant son receiving a brain injury from his father while I was out of the house for 20 minutes (13 years ago). Due to the complexity of this "case", my ex husband was never prosecuted for this assault. While I have always had supervised visitation (or supervised him myself) in place since that time: he still retains joint legal custody: something that should have been terminated a long time ago. He has not seen the children in 5 years, since the court jailed him for non-payment of child support.

If there were a presumption of joint physical custody at the time of my divorce, my children would have been placed in direct physical danger; possible abduction (he holds foreign passports on the children) possibly death. He is a non- citizen or resident of the US.

--Julie Ann Moylan

---

I am an attorney and single mother of 2 children. I had joint custody with my first child and sole custody with my 2<sup>nd</sup> child. Joint custody was very difficult for my son and me and I dread the thought of families being forced into a joint physical custody situation. Joint custody should only be an option, not mandatory, for parents who get along well enough to make joint custody work, which I believe is the exception.

---

Dear Members of the Joint Physical Custody Study Group

Hello, I would like to provide oral testimony to the Joint Physical Custody Study Group because I feel that my case meets the criteria you are looking for and that my experience will be of value to the study group as they deliberate the impact of presumption of joint physical custody and its impact on children.

I was divorced in 2002 and was awarded joint legal custody and sole physical custody of my then four year old daughter Mikayla. Mikayla's father, John, had a parenting time schedule from 7:30 a.m. until noon on Mondays, Wednesdays, and Fridays.

He would then drop her off at daycare on those days and I would pick her up around 5pm after work. He also had parenting time every other weekend from 9:00 a.m. on Saturday until 5:00 p.m. on Sundays. This schedule changed often because his work schedule kept changing. John had over 50% of the parenting time and spent more quality time with our daughter. A lot of my time spent with Mikayla was when she was sleeping during the night. I "agreed" to this custody parenting time arrangement because I felt I had no choice. John's plan was to watch her every day until he went to work & find someone to watch her for 3-4 hours each day. He wanted to pull her out of daycare & I didn't feel that was a good plan. Mikayla was in a private home being cared for and she loved it there. I wanted to prepare her for school and since she was an only child, I thought it would be good for her to socialize with other children since I was a stay-at-home-Mom for almost four years of her life. I "agreed" to this plan and that is how it was determined we'd have "joint legal custody."

At the first temporary relief hearing, the judge/referee made it clear that the father would have unsupervised parenting time. The custody evaluator recommended this arrangement. My attorney advised me this would be the outcome if we went to trial. Despite a well documented history of domestic violence and threats to abuse me and my child, my ex-husband was allowed to have unsupervised visitation with our daughter. The court and custody evaluator were aware that my ex-husband had threatened to kill me and our daughter. There were OFP'S and filed police reports. This information did not affect the custody/parenting time decisions. It was clear to me that the domestic violence and threats to harm me and our daughter had no impact on the court. Two years later my child was murdered at the hands of my ex-husband on September 5, 2004 during his parenting time. My experience illustrates that the current statutory exception for domestic violence with joint legal custody does not work. Having a presumption of joint legal custody has more of an impact on the family court than the evidence of violence. My personal story can help inform the study group about the power of presumptions and the ineffectiveness of having exceptions or exclusions for domestic violence.

-- Leigh Ann Olson



#### The Relationship between Child Support Enforcement and Parental Access

The belief that increasing a father's access to his children will lead to better compliance with child support orders is not supported by research. In fact, it seems to be a good example of wishful thinking. This belief is also a loud and clear recognition that mothers suffer financially post-divorce.

Child support enforcement and fathers' access to their children are related. Enforcing child support generally increases demands for paternal access and involvement in parental decision making. While many view this effect as positive, it comes at the rather steep price of increased parental conflict. The positive effect of the amount of child support payments on conflict supports concern that strict enforcement of child support may increase children's exposure to conflict between parents. The potential harm to children's well-being of increased exposure to conflict must be weighed against the benefits of increasing fathers' child support contributions, and hence children's economic security.<sup>6</sup>

But while enforcement of child support increases the likelihood fathers will seek more involvement with their children, the reverse is not true. More parental access does not lead to better support

---

<sup>6</sup> Seltzer, Judith A., Sara McLanahan and Thomas L. Hanson, "Will Child Support Enforcement Increase Father-Child Contact and Parental Conflict after Separation?"

NETWORK ON THE FAMILY AND THE ECONOMY

<http://www.olin.wustl.edu/macarthur/working%20papers/wp-mclanahan1.htm>

awards or willingness to pay them. So why do people persist in believing that increasing contacts with children will result in better compliance with child support? Initially, researchers simply asked fathers to explain their child support arrearages. In response, 23% of fathers responded that the reason was lack of visitation. Digging deeper, researchers explored relationships between visiting and paying child support using longitudinal studies. They concluded that increases in visitation have no effect on changes in child support.<sup>7</sup>

Fathers who regularly pay their child support are more likely to have regular contact, not necessarily more frequent contact. Regarding child support payment compliance, researchers Maccoby and Mnookin found "a strong relationship between compliance behavior and a father's having some contact with his children. Frequency of contact did not matter as much as the fact that contact was continuing to occur."<sup>8</sup> These same researchers also observed that child support awards tended to be lower when joint custody was awarded, assuming that fathers' increased time would relieve some of the financial burden on mothers. This assumption, however, fails to account for the frequent "mother drift" occurring in joint custody arrangements as time goes on. In fewer than half the children in families electing joint custody (in the Maccoby and Mnookin's Stanford study) were spending more than three or four nights with their fathers in a typical two week period.

<sup>1</sup> Maccoby, E. E., & Mnookin, R. H. (1992). *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY*. Cambridge, MA: Harvard University Press., pages 263-264.

-- Stephanie Avalon, Resource Specialist



To: Joint Custody Study Group  
Minnesota State Court Administrator

From: The Battered Women's Justice Project  
Minneapolis, MN

The Battered Women's Justice Project (hereinafter BWJP) is a non-profit, national resource center that provides training and assistance for legal and justice system personnel, policymakers, battered

---

<sup>7</sup> THE LINK BETWEEN VISITATION AND SUPPORT COMPLIANCE, Laura Wish Morgan with Chuck Shively of the Department of Social & Health Services, Washington State.  
<http://childsupportguidelines.com/articles/art200012.html>

women, their advocates, and others engaged in the justice system response to domestic violence. The BWJP promotes systemic change within community organizations and governmental agencies engaged in the civil and criminal justice response to domestic violence, in order to hold these institutions accountable for the safety and security of battered women and their children. The BWJP is an affiliated member of the Domestic Violence Resource Network, a group of national resource centers funded by the U.S. Department of Health and Human Services and other support since 1993. The BWJP also serves as a designated technical assistance provider for the Office on Violence Against Women of the U.S. Department of Justice. Given our work across the country on issues involving custody and domestic violence, the BWJP respectfully submits the following comments for the Study Group's consideration.

1. Should there be a change in Minnesota's custody laws to favor a presumption of joint physical custody?

No. As the purpose of any custody consideration is to determine what is in the best interests of children, the answer to this question must be no. Joint physical custody is only in the best interests of children when both parents clearly demonstrate a willingness and ability to parent cooperatively. This conclusion has been supported by research as well as by the experiences of states that have experimented with such presumptions. Therefore, physical custody determinations must be made on a case-by-case basis, and should not be undermined or prejudiced by a presumption.

2. What are the pros and cons of the state adopting a presumption of joint physical custody in law?

Because joint physical custody succeeds only when informed and willing parents choose it, any benefits of joint physical custody are inapplicable in cases where parties are compelled to share physical custody.<sup>9</sup> There are many serious problems with presumptive joint custody statutes, which have been seen in other states that utilize them.<sup>10</sup> The BWJP discusses below only those problems related directly to the application of such a presumption to families where domestic violence is an issue.

---

<sup>9</sup> Ironically, very few divorcing and cooperative parents choose a joint custody arrangement. In a 1992 study by Eleanor E. Macoby and Robert H. Mnookin, of the 80% of divorcing parents who reached their own custody agreements, 70% of them agreed to a mother-custody situation and only 20% opted for a joint custody arrangement. Eleanor E. Macoby & Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* 103, 300 (1992).

<sup>10</sup> In a 1989 study among California judges, researchers found that two-thirds of family court judges concluded that the imposition of joint custody under a presumption actually led to worse results for children due to lack of parental cooperation, ongoing parental conflict, instability caused by moving between households and logistical difficulties for parents. Thomas J. Reidy, et al., *Child Custody Decisions: A Survey of Judges*, 23 Fam. L. Q. 75, 80 (1989); See also Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 Fam. L. Q. 201 (1998) (presumptions pressure judges to order joint custody in inappropriate cases).

A. Joint custody is particularly inappropriate in domestic abuse cases, as children's needs and parental access issues are quite distinct, necessitating individual, careful and unprejudiced consideration.

Forcing ongoing contact, especially the substantial contact required in joint physical custody situations, between an abused parent and batterer creates a multitude of problems and risks for families. Joint physical custody determinations give batterers the substantial ability to continue to harass, threaten, monitor, stalk, and emotionally and physically abuse their victims. Batterers will be able to continue to exert power and control over their victims' lives. Joint physical custody also gives batterers ample opportunity to continue to use their children as the conduits of their abuse and harassment, subjecting their children to inappropriate, stressful and possibly violent behavior. *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*, Lundy Bancroft and Jay Silverman, Sage Publications, 2002. A 1989 study of post-divorce parents in joint custody arrangements, where domestic violence was identified, indicated that children in these situations were negatively affected and more likely to be emotionally disturbed.<sup>11</sup> Johnston, M. Kline & J Tschann (1989) *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, Am. J. Orthopsychiatry 59(4) 576-592. A presumption of joint physical custody will greatly increase the numbers of families in Minnesota who would be subject to this ongoing conflict and danger.

Cutting-edge research by child custody experts and academics in the United States promotes a differentiated response to custody cases involving domestic abuse. This current approach advocates valuing the safety of the child over all other considerations, and applying differentiated parenting plans after careful consideration of the safety issues a particular case presents. *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, Peter G. Jaffe, Janet R. Johnston, Claire V. Crooks, and Nicholas Bala, Family Court Review, Vol. 46, No. 3, July 2008. In accordance with this research, while joint custody is a laudable goal, it is also the first goal to be sacrificed in the best interests of the child, especially in light of the court's need to keep children and abused parents safe. *Id.* Therefore, a generalized presumption is absolutely contrary to the best thinking in the field.

A joint custody presumption would be applied primarily to such abuse cases because most contested custody cases involve domestic violence, child abuse or serious substance abuse.

Ironically, while joint physical custody is least tenable in cases involving abuse, a joint physical custody presumption would disproportionately be applied to abuse cases, as these cases represent the majority of contested custody cases. Many studies have demonstrated that allegations of abuse are very common in contested custody cases. For example, in a study of 120 contested cases in California, allegations of child abuse, domestic violence, or serious substance abuse were made against mothers in 56% of families and against fathers in 77% of families. A significant proportion of those allegations were substantiated. *Allegations and Substantiations of Abuse in Custody-Disputing Families*, Janet R. Johnston, Soyoung Lee, Nancy W. Oleson, Marjorie G. Walters, Family Court Review, Volume 43, Issue 2, 283-294, April 2005. Of these contested cases where

---

<sup>11</sup> See also, Jennifer McIntosh & Richard Chisholm (2008), Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation, Journal of Family Studies 14, 37

such allegations arise, the largest proportion involves “battering” (coercive controlling violence). Such statistics indicate that any presumption of joint custody will necessarily impact cases involving domestic abuse. This presumption creates a major hurdle for already-vulnerable parents and their children.

C. Creating an exception or exemption for domestic violence cases from any joint custody presumption will not succeed in keeping these inappropriate cases from resulting in a joint custody determination,

The experiences of other states informs us that exceptions do not succeed in excluding domestic violence cases from the operation of a presumption (*e.g.*, Wisconsin, where there is a presumption in favor of joint physical “placement” of the child subject to a statutory exception for domestic violence cases). There are numerous reasons why such exceptions or exemptions fail to achieve their expected goals.

*Many victims of domestic violence fear reprisal for disclosing domestic violence.* Many batterers threaten their victims that if they disclose domestic violence, the batterer will hurt or kill the children or the victims. Some victims worry that disclosing domestic violence in the family court setting will trigger the involvement of child protective services.

Many victims might be afraid to disclose domestic violence for fear that they will not be believed, and appear unnecessarily uncooperative or vindictive, or misconstrued as an “unfriendly parent” under Minnesota law<sup>12</sup>. They fear that their allegations will be ignored by the court or that the judge will think that the allegation is nothing more than a strategic maneuver to obtain some kind of advantage in the custody case. In fact, attorneys might counsel their clients to not disclose domestic violence, for fear of triggering these misconceptions by the court. Victims also fear, justifiably, that any allegations of violence they bring to the court’s attention will be used against them by their batterers, either in the custody case or in other arenas of their lives.

Many battered parents very reasonably fear that despite indications of even very elevated battering and danger to themselves and their children, they will not be able to convince the court of the existence of the violence and how the ongoing danger will affect a custody determination. Family Court practitioners (mediators, custody evaluators, attorneys, judges) are frequently unsuccessful at identifying domestic violence or seeing its relevance to post-separation parenting. A recent study of custody cases in Washington State showed that 75% of cases had criminal or other documentation of abuse that was ignored or dismissed by court practitioners. Washington State Parenting Act Study: Report to the Washington State Gender and Justice Commission and Domestic Relations Commission, Diane L. Lye, June 1995. A 1997 survey of psychologists who serve as custody evaluators found that 90.6 percent would not consider an allegation of physical abuse of a child by a parent grounds for recommending custody to the other parent. Marc J. Ackerman and Melissa C. Ackerman, “Child Custody Evaluation Practices: A 1996 Survey of Psychologists,” Family

---

<sup>12</sup> Minnesota Statute § 518.17, subd.1 (a)(13)

Law Quarterly 30 (1997): 565. The most significant challenge, however, is that there are currently no effective models for assessing and screening for domestic violence in court cases.<sup>13</sup>

Additionally, many victim-parents fail to identify their experiences as abusive or actionable by the court, especially if efforts at criminal justice involvement have been unsuccessful. Furthermore, because of the private nature of most domestic violence, many victims cannot prove that it has occurred (or prove the impact on their children) by augmenting their own testimony with the collateral evidence some courts require. There is also the very real embarrassment that victim-parents endure when having to share such violent and intimate details about their relationship with the court. Finally, and not to be minimized, any efforts to share such information with the court presents the very real potential for retaliatory violence from the batterer.

Finally, a legal presumption of physical custody will be particularly difficult for indigent and pro se victim-parents to overcome, because they will lack the resources to overcome such a presumption despite the existence of substantial violence and danger. Establishing presumptions and fighting against attempts to rebut them are often sophisticated, evidence-laden processes. Parties without financial resources, and without adequate representation, are at a distinct and dangerous disadvantage in such a system.

### 3. Conclusion

In conclusion, a legal presumption for joint physical custody is not in the best interests of children, especially when there is domestic violence in the home. Children from violent homes will be disproportionately and dangerously impacted by such a presumption, as will victim-parents of domestic violence, who would face an almost insurmountable legal hurdle when seeking protection and stability from Family Court. The experiences of other states, as well as the experiences of victims of domestic violence, overwhelmingly demonstrate that a legal exception or exemption would not relieve or even mitigate the issues raised by such a presumption.

---

I am submitting this statement on behalf of the Family Law Section of the Minnesota State Bar Association. The Family Law Section is opposed to a presumption for joint physical custody. The Family Law Section believes it is necessary for courts to analyze contested custody cases utilizing each statutory factor to determine what is in the best interests of the children. It is necessary for judges to address each family on an individual basis. The effect of a presumption in favor of joint physical custody will emphasize efficiency and expediency over the individualized analysis needed to determine what is in the best interests of the children in each family.

Although the current law provides a presumption of joint legal custody, it also requires that the court must consider four additional factors when either joint legal or joint physical custody is

---

<sup>13</sup> The closest thing to such a model would be the court system in Connecticut which is piloting a triage system designed to identify which cases are best for which kinds of dispute resolution methods. However, that tool and those procedures are not designed to screen for domestic violence specifically. Some jurisdictions have domestic violence screening built into their mediation or ADR intake processes, but these screenings fail to identify many cases and are not conducted early enough in the process to effectuate an exception for domestic violence in a joint custody presumption statute. There are many national organizations (including the National Council of Juvenile and Family Court Judges, Praxis International, the Association of Family and Conciliation Courts and the Battered Women's Justice Project) as well as many national child custody experts that are in the early stages of designing domestic violence screening and assessment processes for use by courts. However, such products are not anywhere near completion at this time.

sought. This provision in the law is for good reason: it mandates the court to assess the parents' ability to work cooperatively as regards to co-parenting children before deciding whether to award joint custody. Family law practitioners have all had the experience of requests regarding joint legal custody failing to receive any analysis by the Court. If a parent contests the presumption, it is almost futile. The result is the award of joint legal custody when it was not necessarily best for the child. It would be a disservice to children to create the same risk as regards physical custody. If the law is changed to include a presumption favoring joint physical custody in all cases, then in situations in which parents do not work cooperatively, children will be thrown into an even more stressful parenting arrangement. Placing a child in the middle of dueling parents is never in a child's best interests. Further, if a presumption of joint physical custody were to become the law, recall that although a presumption is rebuttable, it is far too onerous for a person of average means to challenge a presumption. The cost and time involved is an almost insurmountable challenge. No one can deny there are problems within our family law system. It is common for parents to feel like they are not being heard. In many cases parents, especially fathers, may feel marginalized and want more time with their children. At the same time, just as many mothers feel marginalized when confronted with demands for more time with the children when the other parent's past involvement in the children's lives was minimal. This is particularly so when the parents are not married to one another. A presumption of joint physical custody would inadvertently gloss over situations in which the parents do not work collaboratively as regards to raising of their children. There needs to be change, but treating each case the same is not the answer.

The best interests of the children are served best when the Courts perform an analysis utilizing each statutory factor on a case by case basis when physical custody is disputed. Each family is different, each child is different, and each family deserves individualized attention to ensure that the best interests of the children are being met. A presumption does not promote analysis, but allows for a method to circumvent it even if that is not the intention. In conclusion, the Family Law Section of the Minnesota State Bar Association opposes a presumption in favor of joint physical custody because it is not in the best interests of children.

--Tami Peterson

Minnesota Association of Custody Resolution Specialists (MACRS)

---

Dear Joint Physical Custody Study Group,

MACRS would like to briefly respond to the questions being considered by the study group on the possibility of joint physical custody being the presumptive statute in Minnesota.

The MACRS board is composed of private and public professionals working with the children and parents involved in custody and parenting time disputes. We are family law attorneys, custody evaluators, mediators, guardian ad litem, and parenting consultants.

Two questions were posed, and we have responded with one statement addressing both parts:

1. Should there be a change in Minnesota's custody laws to favor a presumption of joint physical custody?
2. What are the pros and cons of the state adopting a presumption of joint physical custody in law?

Submission Against Joint Physical Custody



It is our belief that Minnesota should NOT adopt a presumption in favor of joint physical custody. While the active involvement of both parents in a child's life is critical, and should be given significant weight in any parenting time decision, many other factors are also critical to children's well-being. Families struggling with chemical addiction, mental health issues, power imbalances, and domestic abuse all warrant caution, as do families with distance between their households, poor conflict resolution skills, very young children, and children having physical, emotional, or education struggles themselves. An equal or near equal sharing of time between households requires consideration of all these factors to ensure a positive environment for children. The issue is complex and a sweeping assumption that equal or near equal time with parents trumps all other factors does a disservice to our children.

In many respects labeling physical custody in any form is problematic and inhibits peaceful resolution of these issues for families. We encourage the study group to consider eliminating physical labels entirely, and instead focus on applying best interests factors to parenting time schedules that allow consideration of each family's unique needs and circumstances.

Respectfully, Minnesota Association of Custody Resolution Specialists  
2008 Board of Directors

Kay Kraus Co-chair Private/Minneapolis	Jennifer Livingston Rojer Co-Chair Hennepin County	Lynn Johnston Secretary Todd County
Brad Dawson Membership Todd County	Angie Banga Treasurer Private/Minneapolis	Carol Breimhorst Director Rice County
Susan DeVries Director Private/St. Paul	Doneldon Dennis Director Private/Mendota Heights	Heather Feikema Director Private/Albert Lea
Robert Sierakowski Director Ramsey County	Jacquelin Sebastian Director Private/Duluth	

---

Mark; thank you again for permitting me to speak to the committee. I want to reiterate my opposition to the creation of a presumption in favor of joint physical custody. At a time when custody rarely becomes a battle any longer this step would dramatically increase litigation and harm to families.

Nancy Berg, Attorney at Law

---

From: Range Women's Advocates

Regarding: Presumptive Joint Custody

I am writing in regards to the debate of father's receiving a legislative right to presumptive joint custody. I am a domestic abuse survivor and my abuser was my former husband, the father of my daughter. During our marriage, I was under the complete dominance of this man. He controlled every aspect of how I looked, acted, dictated where I could go, whom I could talk to, among many other things. I finally left him in May 2008, when he threatened to kill me with a gun.

We were officially divorced December 13, 2006, but the power and control still continues to this day due to him receiving joint physical and legal custody. I was pressured into 'giving' my ex-husband joint physical and legal custody by a mediator whom we went through for our divorce (mediation should never be considered when domestic abuse is a factor). When you are the victim of such a powerful control, nobody really knows the lasting effects it has on your life. Not only did I feel pressure from the mediator to make this decision, but the looks, and subtle actions of my abuser forced me into my situation today.

Giving my abuser the power of joint physical and legal custody has forced me to live my life under his reign. My daughter is now 5 years old and he still tells me when I can/can't see my daughter (even though I am her primary residence). Controls the phone and doesn't allow me to talk to her when she is in his care as a way he can still 'punish' me (it was written in our divorce decree, under our parenting plan, that phone contact with other parent is a must), Tells me how to take care of her (his way of course), what activities she will take part in (I have no say, or very little), and most of all -allows him to have more frequent access to me on a more consistent basis.

I would like to see a stop to the presumptive custody. I feel that I am trapped under his reign for the next 13 years, and for it to only get worse as she gets older. I am strongly against it.

Thank you for your time.

---Sasha Anderson  
Program Coordinator  
Range Women's Advocates

---

Dear Joint Custody Study Group Members,

I am an attorney and mother of two. I have experienced both joint physical custody and sole physical custody as the custodial parent. I submit this letter in strong opposition to a presumption of joint physical custody. I believe such a presumption is inappropriate and detrimental to families involved in custody disputes.

Every case in family court is unique. The feasibility of joint physical custody must be examined on a case by case basis. It takes *exceptional* circumstances and individuals to make joint physical custody work. Both parents have to be truly able to "co-parent." Unfortunately, this is not the situation in most custody cases. A couple usually separates and goes to court *because the parties cannot get along*. It would be ideal if parents could overlook the problems and hostilities that led to the

Submission Against Joint Physical Custody

separation in order to make joint physical custody work, but this is a lot to expect from human beings. In those cases, where the parents can co-parent, they would most likely agree to joint custody anyway, and a presumption would not be necessary. If the parents cannot agree to joint physical custody, requiring them to rebut such a presumption places an unnecessary burden on everyone involved.

Parents who have joint physical custody should have similar parenting philosophies, should live near one another, and should be able to provide everything the children need in each home and for every transition (e.g. homework, band instruments, etc.). They should be able to cooperate regarding extra-curricular activities, such as music lessons or sports. In my own situation, my son had to drop out of band at school, because he could not remember to bring his instrument back and forth between both houses, and his father would not bring it to him. Also, my daughter cannot be involved in some activities she would like, because her father will not bring her to them during "his time."

It is very important for children to have a "home base," i.e. one place they can call "home." They should have one home where they spend most of their time, one address to give out to friends and write down on forms, one home where they have their closest friends and most of their "stuff," near their school, in one neighborhood. There's no question that divorce or separation is detrimental to children in some way, regardless of the outcome. The real harm comes when the noncustodial parent disappears from the child's life. There is no reason a noncustodial parent cannot be an involved and loving parent, having frequent contact with the child(ren) without having half the time and requiring the child to bounce back and forth between the parents.

Too often child custody battles turn into mudslinging contests and parents compete to try to "out-parent" the other. In my opinion, the most important question is: who is the primary parent? This should not be a question of who is the "better" parent, but rather, who does the child look to the most to meet his/her daily needs? This also should not be about mothers' rights or fathers' rights, but rather, what is in the best interests of the child(ren). Unless there are abuse and/or chemical dependency issues, the parenting arrangement that was acceptable between the parents during the marriage/relationship should be acceptable after divorce or separation. This is fair to everyone.

--TEDDY COPLEY

---

I am against a presumption in favor of (or against) joint custody. I have been practicing Family Law for 25+ years. I have also been a mediator of Family Law cases for 17+ years.

-- Dan O'Connell

---

It is in the best interest of all children to have ONE permanent home. While the other parent has the legal right to see the children for Parenting Time, it is not in the best interest of the children to leave their home of origin for extended periods of time. This can be especially difficult for children under the age of 10. My child wakes up in the middle of the night, calling for me in the hallway. He doesn't know where he is. I tell him, "It's Okay, honey, your home with mommy," as I put him back to bed. He does not remember this in the morning when I ask him about it. Having to leave his home for extended overnight periods of time have left him frightened and confused. A presumption of joint custody is NOT in the best interest of the children, and it can be just as emotionally devastating for their mother. Children under 10 years old belong with their mother except in the extreme situations of Abuse, Addiction, or Neglect. After the age of 10, child's preference of residence should be heard and acknowledged by MN statute and they should have some voice in the decision as to where they live. A presumption of Joint Custody is not in the best interest of any child under the age of 10.

--Ellen Stanley

---

As a survivor of domestic violence and the mother of four sons who continues to be stalked by the father 17 years after divorcing him - the youngest child is now 25 years old - the concept of Minnesota adopting a presumption of joint physical custody is frightening. In joint custody, both parents must agree on multiple decisions affecting the children. When domestic violence is present, it not only jeopardizes victim safety, it also creates an unequal balance of power. Intimidation rather than mediation would be the settlement process with decisions affecting the children. From personal experience I can guarantee that the best interests of the child will not be the first consideration of the abusive parent. Presumptive joint custody would provide the abusive parent unlimited opportunity to use the children and put them in the middle (pumping them for information, defending the non-abusive parent's character and judgment, ridiculing the parenting skills and competency of the victim (undermining her parental authority; she will lose empowerment), make it much easier to harm or kill the victim, instill insecurity and uncertainty in a child's life (fear and anxiety because they have seen the abusive parent inflict harm on the non-abusive parent), jeopardize the child's safety (without mom to batter, the children will become the victims), be disruptive to a child's daily living schedule and increase instability rather than provide a stable nurturing home environment. It is a well known fact that children fare better with structure and consistency in rules and behaviors. An abusive parent is not predictable in temperament or behaviors. Presumptive joint custody when abuse is present also provides more opportunities for the children to learn the abusive attitudes and unhealthy violent behaviors of the abusive parent which will result in continuing the cycle of generational violence. Presumptive joint custody would be harmful to the child's growth and development.

--Barbara Booten

---

When domestic violence is present, it not only jeopardizes victim safety, it also creates an unequal balance of power. Intimidation rather than mediation would be the settlement process with decisions affecting the children.

From personal experience I can guarantee that the best interests of the child will not be the first consideration of the abusive parent. Presumptive joint custody would provide the abusive parent unlimited opportunity to use the children and put them in the middle (pumping them for information, defending the non-abusive parent's character and judgment, ridiculing the parenting skills and competency of the victim (undermining her parental authority; she will lose empowerment), make it much easier to harm or kill the victim, instill insecurity and uncertainty in a child's life (fear and anxiety because they have seen the abusive parent inflict harm on the non-abusive parent), jeopardize the child's safety (without mom to batter, the children will become the victims), be disruptive to a child's daily living schedule and increase instability rather than provide a stable nurturing home environment. It is a well known fact that children fare better with structure and consistency in rules and behaviors. An abusive parent is not predictable in temperament or behaviors. Presumptive joint custody when abuse is present also provides more opportunities for the children to learn the abusive attitudes and unhealthy violent behaviors of the abusive parent which will result in continuing the cycle of generational violence. Presumptive joint custody would be harmful to the child's growth and development.

I can't possibly illustrate the trauma my children and I went through because there father was abusive, a man who refused to obey the law, a man's whose self-interests were more important than the best interests of his children, and a man who harasses my grown children today about my whereabouts. He consistently tries to manipulate them or trip them up to reveal my address, which even after 17 years, I try to keep confidential. Since the children have left home, I have moved four times in five years.

Here is my story:

I filed for divorce in December 1989 in the State of Iowa. He entered anger management classes; we reconciled; he landed a teaching job in Alaska in June 1990; we planned to start over and re-locate. He left for Alaska in August 1990, the house went on the market, I was supposed to join him when the house sold....but I couldn't forget the trauma he caused just before he left when he had physically assaulted me in front of the children for three hours. We were in the van returning from a short trip to Minnesota, he hit me repeatedly in my left arm—the pain was horrific—while the kids cried in the back seat in their seatbelts. The boys were age 5-12.

This incident reinforced my first decision to file for divorce, and when I realized after he left for Alaska, that I was no longer walking on eggshells, that I finally felt safe, I went through with the divorce. I had no control over our oldest son because he would burst into terrible rages, just like his father. He intimidated his brothers, causing injuries and discord. He was becoming a carbon copy of his abusive father. I thought my younger three sons would have a better chance at becoming emotionally healthy and better adjusted adults if they could live in a home environment free of violence and agreed to let our oldest son live with his father.

What followed after that decision to go through with the divorce was to see my abuser's threats to "ruin me and see I had nothing" come to fruition, and keep us in family court for 10 more years. He refused to pay child support, pled the privacy act to avoid income disclosure, wouldn't cooperate

with "pleadings and discovery," contested child support each time a child left home, refused to pay his half of uninsured medical bills, refused to assign medical benefits to doctors so I was faced with more than \$20,000 in medical bills (all related to the children).... He cashed all insurance checks and kept them. What I didn't know then is how traumatic it was on my children to see me struggling as I tried to keep up with court appointments, hearings and court preparation. I was attempting to go to college, working two part-time jobs and I ended up mortgaging my home to pay attorney fees. (The house was my only asset settlement and I owned it free and clear). Now, I owe more on the house than what was originally paid for it.

During those two years prior to the divorce trial, a horrific chain of events affected both me and my children. He attempted to kidnap the children, steal the mini-van (he already had three vehicles in his possession), threatened the lives of family members and friends, chased me in a school bus with a gun (he drove bus and taught school), broke into the house on several occasions, threatened my life, assaulted me in a department store parking lot, ripping the sleeves out of a heavy tweed wool coat as he dragged me into his van....this same coat he concealed when he removed it from the family home. My second son told me that his dad had taken it. This coat was my only winter coat. He also broke into the home on Christmas Day while I was traveling to the State of Minnesota (so he could see the kids before returning to his Alaska teaching job) and he trashed the house, emptied it of all our possessions, including all my clothing. The only thing he left was the Christmas tree and the few wrapped presents. To this day, my sons dread the Christmas holiday because of the chaos and fear that surrounds what should be a beautiful family gathering.

Again, while the divorce was in progress, he more than once showed up at the house claiming he wanted to see the kids (violating a restraining order). Police arrived on the scene and let him stay, telling me that since he was already in the house, I had violated the order so it was no longer in effect. He had let himself in shortly before I arrived home from work. After the police left, he harassed me the entire time while I talked on the phone to a friend, ignoring our sons who were sitting in the living room for an hour, not moving an inch. The police came back after an hour and he told them I had harassed him and he didn't have a chance to visit with his kids. They believed him and thought he had the right to visit the kids. Without police protection, I was scared and frightened and told police I would go upstairs this time so he could visit the kids. The police left again. I went upstairs, locked the bathroom door and drew a bath. I no sooner had stepped into the bathtub, when he broke through the door and the nightmare that followed I can hardly repeat. His behavior was despicable. He tried to rape me, screaming obscenities at me. I was screaming for him to get out and leave me alone. The children were running upstairs and tried to help and he yelled threats at them, sending them running back downstairs. The phone rang, he answered. It was my sister and she panicked when she heard his voice on the phone. She couldn't understand how he could be in the house when I had a restraining order. She called the police and this time when they arrived, they politely told him he had to leave.

Once the divorce was finalized, visitation was ordered to occur once a year during Christmas vacation (Dec. 26 through Jan. 2), at the home of the paternal grandparents. During these annual visits, our sons became agitated around Thanksgiving time, dreading the trip to Minnesota. They didn't want to go but I forced them because I didn't want to go to jail for not complying with the court order. It took a month to get their temperaments back to normal...they were angry because

the entire time they spent at the paternal grandparents, they were forced to defend me (my honor, my parenting skills). They were put on the defensive because of negative and derogatory remarks made by their father and his family. By the way, my ex and the boys' father never heard from him all year...he ignored their birthdays, their graduations, and any other holiday or important event. If he called our home, and the boys answered, the phone was always handed to me...to harass and threaten me. The boys were exposed to my constant fear...he wouldn't leave me alone.

The last time I was in court, in 2001, he started calling the house, repeatedly. The boys were grown and living in other states; I was alone. He had no reason to call me. We had just been to court over parental obligation for post-secondary educational support. I called the police because I feared for my safety and the officer stayed with me for three hours (until I heard from my oldest son). I had called my oldest son in Nebraska and asked him if he could email or call me "discreetly" when his father arrived. I knew he was going there after court and it was a three hour drive from the Iowa town I lived in. This is just one example of how the children still remain in the middle when a parent is an abuser.

Please for the sake of all separated and divorced families, let there not be a presumption for joint physical custody, particularly in cases of domestic violence. If that would have happened to me, I would have went into the victim witness program for my safety. The fear of further contact with my ex-husband is so great that I am in the process again of safety planning. Our oldest son is getting married in 2009. He will be 31 years old. I am tempted not to go because my ex will be there. Even with the police being notified, even with my children around me, they are again put in the position of protecting me. They know what he is capable of. I have raised my children to be independent and respectful of women; I remind them daily not to let attitudes and behaviors they saw as children affect how they treat women, or anyone for that matter. I currently am the program coordinator for a domestic violence program in northern St. Louis County. I work with battered women and their children every day of my life. I don't believe that a father's right to see or visit his children (or have joint physical custody) should take precedence over the safety of the mother and the children. When will the children stop being "in the middle?" When will the children stop witnessing the violence, the threats, the danger? I firmly believe that when a father has harmed the mother, he has no rights to parent or visit his children. In my opinion, he has lost those rights.

---

This is a very bad idea.

In addition to 18 years of involvement in chips matters as a county attorney, I had over 20 years of divorce practice and was the father of a blended family, raising two children my wife brought to the marriage (at ages 4 and 6) in addition to the two more we had together. The main thing that made it work in our case was the fact that my wife had full physical and legal custody. I have seen many more cases where some misguided attempt at joint custody led only to chaos. Joint physical custody only works in rare instances when the parents want it to work, are getting along well enough to allow it to work, and mature enough to deal with the issues that arise as adults, with the best interests of the children at heart. Sadly, such cases are rare. Joint physical custody too often becomes a continuing war with the children in the middle. It is unstable for the children, who need

ONE home to count on, and not a confusing schedule of when they live where. It is naïve to think parents will stay in the same school district, not start second families or make any other change which affects the kids. In my years of divorce practice it was rare to see clients who had a reasonable chance of making such an arrangement work. Kids need to live in a stable home, not out of a suitcase.

Joint physical custody should be an option available for certain cases. Let the litigants, attorneys and judges decide when that is. Legislating a presumption in favor of joint physical custody would be foolish, doomed to failure and simply more legislative meddling in family business.

Boyd Beccue  
Kandiyohi County Attorney

---



ABBOTT MEDIATION & LAW OFFICE  
ELLEN A. ABBOTT, ATTORNEY AT LAW

510 MARQUETTE AVENUE, SUITE 200  
MINNEAPOLIS, MINNESOTA 55402  
TELEPHONE 612-259-4404  
FACSIMILE 612-342-2685

ellen.abbott@mnadr.com

QUALIFIED NEUTRAL UNDER  
RULE 114, MINNESOTA  
GENERAL RULES OF PRACTICE  
FAMILY AND CIVIL, ALL ROSTERS

TO: Joint Custody Study Group

FROM: Ellen A. Abbott 

DATE: November 14, 2008

1. Should there be a change in Minnesota's custody laws to favor a presumption of joint physical custody?

No. While there is no definition of "joint physical custody" provided by the Study Group, it is my belief that those proposing it, as well as attorneys, custody evaluators and judicial officers, would read it to mean a starting point of equal time with the children from which parents would have to argue. Whether it is that definition or some other definition, there should not be a presumption of joint physical custody.

2. What are the pros and cons of the state adopting a presumption of joint physical custody in law?

I am providing these comments in the following context. I have been practicing family law for almost 25 years. I have seen family law from the almost every vantage point possible. I started as a child abuse and neglect prosecutor and later represented juveniles in delinquency cases and served as a guardian ad litem. I represented parents involved in abuse and neglect cases. I have represented both wealthy and poor people and those in-between -- mothers, fathers, aunts, uncles and grandparents. I was a Special Assistant Attorney General in charge of the Texas child support system. Later I served as a family court referee and was a Friend of the Court in Michigan, an office which is responsible

Ellen A. Abbott Comments to Joint Physical Custody Study Group  
Page 1 of 5

for all custody studies and child support services and provides post-judgment conciliation. I have also been an educator, teaching Family and Gender Issues in Law at Hamline University and serving as an adjunct clinical faculty member directing a family law clinic program for the University of St. Thomas Law School. Since 2000 I have been a full-time provider of alternative dispute resolution. Half of my practice is mediation and the other half is parenting consulting, parenting time expediting with a smattering of early neutral evaluations, arbitrations and other processes designed for individual cases. Beginning this fall I was chosen to serve as one of the 12 state-wide mediators in the Court of Appeals Family Law Mediation Pilot.

The majority of my work over the past eight years has been problem solving with parents. In my mediation work, I see parents who get along very well as well as parents who cannot in any meaningful fashion co-parent. The majority of my parenting consulting and parenting time expediting caseload is, by definition, parents who have much difficulty getting along and making decisions for their children. Outlined below are the primary reasons that a joint physical custody presumption would be both unwarranted and unwise public policy.

Based upon my experience the vast majority of divorce cases settle relatively easily. The parents are able to decide what is best for their children without resort to a custody study, a trial or any other evaluative measures. Only in a small portion of cases is there any major dispute. The breadth of my experience and the number of people I have worked with allows me to state with a high degree of certainty that a presumption of joint

Ellen A. Abbott Comments to Joint Physical Custody Study Group  
Page 2 of 5

physical custody will not reduce the number of disputes in divorcing families and will not help children and may even be harmful to some children. There is a certain population of cases in which there will always be disputes. Starting with a presumption of joint physical custody will simply not resolve the disputes in those cases. Rather, highly contentious individuals will use the presumption as a way in which to play out their disagreements.

Although parents are getting a divorce, it may or may not be in the children's best interest to change the families' responsibilities as they relate to their children. The pre-existing reality of life for the children in the specific family should be the starting point in determining disputed custody and parenting time, not some artificial, unrealistic presumption. If the father was a stay-at-home dad primarily responsible for the children while the parties were married, then that fact should be the starting point for determining what schedule would best meet the children's needs, taking into consideration the changing realities for the parents as a result of their separation. On the other hand, if the father has historically been absent during several days every month or works very long hours and has had limited contact with the children, or has never lived with the children, that fact should be the starting point for determining what schedule would best meet the needs of the children. Rather than a presumption of joint physical custody, there should be no presumption. If the parents cannot determine what arrangement should be implemented for the care of their children on their own, the court should be called upon to make a decision that is specific to the family before it, not based upon an artificial

presumption that does not apply to that family and that a parent is then forced to overcome, probably at great expense.

It is my opinion that the majority of my work is the result of parents inappropriately having joint *legal* custody. Parents "settle" for joint legal custody because their attorneys tell them that they have to because of this existing presumption. As a result, children are harmed. A parent, for example, argues over which dentist the children should go to, because he or she *can* argue about it because they have joint *legal* custody. Another parent stops a child from participating in soccer or dance because the parents cannot agree and are required to agree because of joint *legal* custody. These are the types of disputes that consume families engaged in conflict, usually to the detriment of the children. Rather than every case having a presumption about custody, when parents cannot agree and the matter is put before a judicial officer, the judicial officer should be required to make specific findings for that family, not based upon artificially imposed presumptions about what the family life has been.

Placing a presumption of joint physical custody in the law is not about children, it is about parents. A joint physical custody presumption is not about making life better for children, it is about making a parent feel better or moving cases through a system. The bulk of the cases I have been involved in are contested or "high conflict" cases because the parents are high conflict. That pattern of behavior in most of these cases existed long before the parties' separation. A presumption will do virtually nothing in most cases except perhaps exacerbate the level of conflict that exists.

Ellen A. Abbott Comments to Joint Physical Custody Study Group  
Page 4 of 5

It is important to children that, short of incapacity, untreated mental illness of a parent or physical abuse, both parents be involved in the lives of their children. For most cases in the family court system, parents have worked out a way to be reasonably involved. A "one size fits all" presumption does not make sense for children. While it may make some parents feel better and may make some cases settle, in cases where the parents cannot decide, the court should fashion a plan for the children that makes sense for the specific family in front of it, utilizing available professionals to guide the court. Creating a presumption of joint physical custody is using a meat cleaver when a scalpel is required.

I will leave it to child experts to discuss the very real harm that can come to children, young and older, from a joint physical custody (equal, or almost equal) schedule.

This page is intentionally left blank.

# **Written Submissions to Joint Physical Custody Study Group**

## **Hard Copy Version with Names of Submitters**

**(Updated -w- names on January 6, 2009)**

Compiled by Study Group Staff

This page is intentionally left blank.



# **Written Submissions FOR a Presumption of Joint Physical Custody**

Compiled by Study Group Staff

Submission For Joint Physical Custody

This page is intentionally left blank.

Joint Custody Study Group,

I am glad to see that this issue is being studied by our state. I believe that a presumption of joint physical and legal custody is in the best interest of the vast majority of children and parents. In the vast majority of cases, both parents, even when the child is born to unmarried parents, are capable, willing, proud and loving parents who are equally fit to have custody of their children. With a presumption of joint custody, children will benefit from a more even amount of time spent at each of their homes to build strong relationships with both of their parents. Parents and children will benefit from the fairness and balance of "power" inherent in joint custody because it will encourage cooperation. The current system allows one parent to actively make cooperation and co-parenting difficult in order to state that joint custody is not feasible and full custody should remain with (or be transferred to) themselves.

Both parents should be allowed an equal say in how their child is raised and should be allowed to support the child both monetarily and emotionally. In the current system it is more common that one parent is assigned the responsibility for monetary support of the child and the other for the emotional support, or day-to-day parenting, of the child. In most cases at this time it is the father who is assigned the monetary support and is allowed only a little time to provide emotional support. Monetary support of a child when that parent only occasionally gets to spend significant amount of time with their child builds resentment about paying child support and makes it difficult for that parent to build a quality relationship with their child. Monetarily supporting a child is natural when that child is living with you on a regular basis. A joint custody situation would allow both parents to be both monetary and emotional support for their children. Both parents would be allowed the time to provide the day-to-day parenting that is so important to the child's development.

I understand that in cases of documented domestic violence this presumption is likely not valid. However, I caution that at this time it is quite easy for one parent to file domestic abuse charges against another parent and have those charges stand even if no violence occurred. False allegations of domestic abuse are common, and the charges are often upheld in court because no physical evidence is needed to document such charges. I encourage you to consider how to ensure that the presumption of joint custody, in its exception for cases of domestic violence, differentiates between actual domestic violence and misuse of the current laws regarding domestic abuse in order to gain full custody of a child.

I strongly encourage you to recommend a presumption of joint physical and legal custody. In my experience I believe that it will better encourage the full involvement of both parents in their children's lives.

-- Lisa Tilman

Regarding a presumption of joint physical custody

A strong presumption of joint physical custody of children should be the law. Since parental rights are "the oldest of fundamental liberties" according to the U.S. Supreme Court, the burden of proof should be on the parent or other parties who want to take away that right.

Since anger is the NORMAL response to injustice, the current de facto presumption of mother custody of children is promoting domestic violence including thousands of domestic abuse related suicides each year. Each year about 5000 men are driven to suicide by abusive women using the gender biased court as their weapon of choice. The Duluth Wheel of Abuse is a good description of how women act in custody fights.

Women's groups claim domestic violence sky rockets at the time of a breakup. This is logical and to be expected. At the time of a breakup, every man knows the woman will use her female privileges to strip the man of his children, assets, future income, civil liberties and anything else dear to him.

Anger is the normal response to such catastrophic losses. The courts amplify the anger by refusing to punish, or worse, rewarding women for perjury and other misconduct. Men know this to be the case since they have all heard the horror stories of other men. If you want to make a man angry, there is no surer way than to harm his kids.

Suicide rates of divorced men triple but those of divorced women do not, indicating that it is men's treatment by the courts that is the primary causative factor of the increase. The number of lives lost to family court related suicides is four times that of women's lives lost to domestic violence. How happy would you be if your children were taken away from you? Would you be angry at the kidnappers??

THOSE WHO OPPOSE JOINT PHYSICAL CUSTODY HAVE CREATED AN EPIDEMIC OF FATHERLESSNESS. Minnesota Courts and the Legislature have made clear that the alternative to a presumption of joint physical custody is a presumption of mother custody. The true cost of opposing joint physical custody is over 100 billion annually - all the costs of father absence to children and society.

Most child abuse is committed by mothers, especially single mothers. Judges who issue orders of protection based on unsubstantiated or minimal abuse are erring on the side of child abuse. The non-related men that single mothers bring into the household are the greatest threat of child sexual abuse. Such men are also much more likely to abuse or kill the children than the natural father.

Being raised in a mother headed household is the primary risk factor for child poverty. Custodial fathers are much more willing to financially support their children than mothers who are more likely to go on welfare instead. Welfare queens tend to raise welfare queens.

Mother headed households produce most of our criminals, drug abusers and academic failures. Children raised in such homes tend to earn less money as adults thereby reducing tax revenues to the state.

Submission For Joint Physical Custody

Sole custody arrangements promote conflict and often bankrupt the parties at the expense of the children. The money that would have been available to help the children instead is spent on legal bills.

The fact that the parties do not cooperate should not be a reason to deny equal parenting time. The current bias in the courts gives women an incentive to be uncooperative. The court can order parallel parenting. To reduce conflict the law should require that a detailed parenting plan be written spelling out decision making provisions, parenting time and penalties for obstructing it. If advisable, a neutral location for child transfers should be designated to protect men from false allegations of abuse. Unless it is clear that it will not work, the court should order 50/50 parenting time in cases where the parties can't reach an agreement. Women should no longer be rewarded for deliberately being uncooperative. If the court does not order 50/50, it should be required to state why the parent deprived deserves to have his/her parental rights diminished.

The current presumption of sole custody to mom of children born out of wedlock should be changed to require automatic joint custody once recognition of parentage form is signed, with a requirement that a parenting plan be implemented within 3 months. Men who have no money cannot afford to hire an attorney to fight for custody when it would be in the children's best interest to NOT live with mom. Mom can almost always get a free attorney. All she has to do is make a false allegation of abuse or refuse to get a job. Such options are rarely available to men.

To reduce child poverty, create a presumption of custody of children to the parent who is not on welfare. If women were not "burdened" with custody, they would find it easier to seek and maintain full time employment. Women would be less likely to have children out of wedlock if they knew the state would not reward their irresponsible behavior with automatic sole custody and a monthly check. It is not in society's best interest to encourage mother headed households, since every major social pathology is linked to fatherlessness.

My husband has a 13 year old son who, barring a miracle, will probably not graduate from high school. Mom was granted custody originally as a reward for having a child out of wedlock. **3 lawyers told my husband a man cannot get custody over a mother's objections** without proving the mother palpably unfit. He fought for custody anyway because he knew of her substance abuse problems. 2 years later, out of money and hope, he gave up the fight.

He filed for a reversal of custody in 2005. The Guardian ET Litem appointed was so incompetent and biased that Anoka County cancelled her contact, but not before she did irreparable damage to the case. The GAL dismissed all of our allegations as unsubstantiated even though corroborating evidence existed but swallowed all of the mom's lies. She did not contact any references or attempt to verify any allegations. To make matters worse, Judge Donald Venne repeatedly delayed the case for his own personal convenience. (vacations, continuing education etc.) After 2 years, we could not afford to continue. At our attorney's advice, we reluctantly agreed to a worthless settlement not knowing that mom was arrested last year for 5th degree drug possession (felony) and driving under the influence of **methamphetamine**.

In spite of the mom's continuing drug problems, we cannot afford another custody fight. So the child will spend the rest of his childhood with a druggie mom because of the gender biased courts that insist that children belong with their mothers.

In 2002, my husband filed a constitutional challenge of Minnesota's child support laws because of our firm belief that the primary reason women demand sole custody instead of joint custody is money. At the time his parenting schedule was every weekend from Friday afternoon until Sunday night, 2 evening per week and 4 weeks in the summer. Even though my husband had de facto joint physical custody, he could not get the title since that would require mom to support her child instead of living off of him.

Since mom has refused to work since 2000, Randy has paid for all of the child's expenses in both households, including de facto alimony to a deadbeat mom. In a published decision, the Minnesota Appeals Court ruled that custodial parents essentially have no duty to financially support their children since they provide services. In this case (*Strandmark v Starr*), the noncustodial parent clearly paid everything and provided more services than the freeloader mom. Yet his "services" were not grounds for reducing child support. The change in the child support laws does not make things fairer. The parent with the title gets the time and the money.

Although my husband has de facto joint custody, the child is being harmed because of the legislature's and court's refusal to hold women to an adult standard of accountability. The money needed to provide for the child's special needs has instead been diverted to pay legal fees and the living expenses of a freeloader mom who is rewarded for refusing to work instead of punished. Had there been a presumption of joint physical custody at the time of the breakup, the mom would not have been able to exploit the child for profit nor would my husband have been forced to spend tens of thousands on legal fees.

-- Barbara Starr

---

#### Implications of Presumptive Joint Physical Custody for Minnesota families:

Yes, I believe there should be a change in Minnesota's custody laws to favor the joint physical custody. The impact on the children to spend near equitable time with both parents, witness both parents contributing monetarily to their well being and diminish the opportunity for parents to involve the child in a custody battle can only benefit the children of divorce in Minnesota.

Currently, I believe the system impacts children adversely by presuming only one parent can have physical custody. This leads to a greater number of custody cases by presuming one parent cannot share physical custody and leaving this presumed non-custodial parent to challenge for equal time in our court system. These challenges negatively affect the children involved since many children need to be questioned about mom and dad before a decision is reached. Currently, when one parent is "awarded" custody, the negative effects of this decision begin in the relationship between the child and the non-custodial parent. These effects will leave different impressions on the children according to their age and developmental status from the ability to make strong bonds with younger children to a view through the

eyes of older children that one parent does not want to spend more time with them or there must be a "reason" they cannot stay with this parent more often.

Unless there is a history of domestic violence, claims of child abuse or substantiated claims of abuse, neither parent should enter the court on unequal footing with the other parent. This equates to walking into a courtroom guilty and needing to prove innocence.

By the state presuming sole physical custody it is also expecting a lower level of interaction both emotionally and physically from the non-custodial parent. It is extremely difficult and many times legally impossible for a non-custodial parent to give the same amount of time to their child after a divorce.

I believe that by both parents entering divorce proceedings with the presumption they will be giving equal time to their children, the disengaging of the child by the non-custodial parent will diminish greatly. If this changes, there will be a presumption by the state that both parents will equally share in the raising of the child.

I would be glad to speak further on this subject if you would like.

Chris Olson

B.A. Human Services / Family Studies

Co-parenting mediator - Community Mediation Services

---

#### Presumptive Joint Physical Custody- A Real Life Study

I am the divorced father of two children; a 20 year old son who is a junior at a Big Ten university and a 17 year old daughter who is a senior in a public high school in Twin Cities. I understand that the State Court Administrator is evaluating the merits of a change in Minnesota law to include a presumption that all children should be in the joint physical custody of both their mother and father. I applaud both the Legislature and the Court Administrator for recognizing the importance of such a presumption under Minnesota law.

#### Circumventing a discriminatory system:

I was divorced over 11 years ago. I watched as other committed and engaged fathers wound their way through the maze of family court in an attempt to offer their children the benefits of their continuing engagement after the divorce. Invariably, following various court-mandated evaluations and hearings, the father was awarded "visitation" which was a code word for custody granted to the children's mother with limited opportunity to allow their children the benefits of a fatherly touch to their upbringing. Likewise, my own attorney advised me that as professional, working father I had almost no chance of being awarded joint physical custody of my own children. This was unthinkable to me. My attorney helped me to find the solution. I sought my ex-wife's approval to participate in a mediated resolution of our divorce. This did not necessarily guarantee me the opportunity to negotiate a joint physical custody arrangement for the benefit of my children,

but it did offer me the opportunity to acquire joint physical custody by offering to purchase this option. Said another way, I offered (and ultimately agreed) to pay child support and spousal maintenance far in excess of Minnesota guidelines and additionally to cover virtually all of my children's extra-curricular activity costs in order to be awarded the privilege of participating in my children's future. Although I have observed that virtually none of the approximately \$280,00 of "child support" I have paid to my children's mother has been expended for the benefit of my children, I come to view this child support as a means of ensuring my children receive the emotional, moral and physical support they need from their father. In other words, it is the support (i.e. money) I pay to allow my children to have my support.

While have accepted that this inequity in our family law has cost me over a quarter of a million dollars, I am troubled to think how this system would work for a father who does not have the means to pay the ransom to ensure his children receive the benefits of a fatherly touch. **This is discrimination of two kinds. First, our system that consistently presumes that children are best served by a custodial mother discriminates against fathers who truly want to remain active in their children's development. Secondly, it discriminates against the father who cannot afford to pay the ransom that is necessary to circumvent the system as I was able to do.**

A true story of the benefits that joint physical custody can bring the children:

Following my divorce, I moved into the neighborhood of my ex-wife in order to make it easier for my children to walk between our houses, ride the same school bus from each home and maintain the same friends and routines at each home. The children have alternated one-half of each week between my home and their mother's home for over a decade. This arrangement has allowed me and my ex-wife to form substantive parental bonds with the children and to maintain active roles in their lives. Many friends and neighbors have commented to me on how well the children have been raised and how happy they seem. **I don't have a literal control group to compare my children to, but my own real-life study allows me to conclude that my children are doing as well socially and academically as any of their friends who have parents that remain married.** It should not come as a surprise to anyone that an engaged father improves the chances of raising well-adjusted children. That is why a presumption of joint physical custody is in the very best interest of the children.

Engage the Disenfranchised:

The time has come to stop treating fathers as the presumed non-custodial parent. Although our law does not carry this presumption, the courts and processes used by the courts have evolved to make mothers the presumed custodial parent. This only increases the disenfranchisement of fathers and reduces the chances that a child will grow up to be well-adjusted. **What can the harm be in inviting fathers to share in the responsibility and joy of raising their children as an equal with their children's mother?** Certainly a court can proceed to overcome this presumption of joint physical custody where facts and circumstances warrant. There is a very real possibility that the extent of involvement from Minnesota's fathers in the upbringing of their children will increase



substantially when the State finally recognizes their importance by adopting a law that acknowledges their equal standing with mothers.

-- Ralph Weinberger

---

To: Joint Custody Study Group

I am writing in support of you passing the PRESUMPTIVE JOINT PHYSICAL CUSTODY bill. Having witnessed a family member – and a terrific father – go through an expensive and extended custody process only to have sole custody granted to the mother, I feel strongly that the state should start with a shared custody approach. The current system grants mothers sole custody 90% time, a statistic certainly not reflective of a fair and open evaluation process. An alternative approach could be to start with 50-50 shared custody, thereafter providing sole custody only in cases where a given parent is proven to be unfit. -- Eric Jackson

---

I am a retired social worker. I have worked as a counselor with Lutheran Social Service and two mental health centers in Minnesota for over 35 years.

I strongly support presumptive joint physical joint custody. All men (persons) are equal before the law - or at least should be. Under the present system it appears that males are considered guilty unless proven innocent, and even then don't have equal rights.

With presumptive joint physical custody, the assumption is one of equality. The custody then gets to be worked out through mediation and cooperation.

Marriage, to be good, needs to be based on mutual respect and cooperation. When conditions are such that the marriage is to be dissolved, this, too, needs to be done with as much mutual respect and cooperation as possible. Where this is not present it is detrimental to the children.

Through shared custody, children have the most opportunity to grow up with a healthy self-concept and a positive identification with both mother and father.

Retired  
Sanford C. Fuglestad, Retired  
Social Worker, LSS

---

Please approve the bill for **Presumptive Joint Physical Custody**.

Who is qualified to make a decision that will affect a child for the rest of their lives?

Parents brought their children into this world together. They have decided to divorce.  
Now the children are without what we call "family/home" through no fault of their

Submission For Joint Physical Custody

own. The decision of what is going to happen to this family needs to be made with joint physical custody for the parents. They children need the love and support of BOTH parents.

Shouldn't a father have the same right to be with his children, and provide love and care as the mother? A father brings an emotional and physical love to a child that only a father can do.

Should a father be unjustly deprived of his children, and yet have to provide income to his ex-wife without strings attached? Why not each parent takes care of expenses for themselves and their children when they are with them? They did decide together to divorce and live separately, so that should put the same responsibility on each parent divorcing.

I am writing as a mother of two divorced sons. We could site many different examples of why fathers should have **Presumptive Joint Physical Custody** of their children. In each of our cases they worked through a mediator and worked out property, assets, and custody of the children - in both cases they have joint physical custody of the children.

In many, many cases the fathers are doing a better job of child care. Our fathers - CAN, AND DO - as well in raising their children.

Let's give them that acknowledgement - approve the **Presumptive Joint Physical Custody** bill.

Retired First Grade Teacher

---

This is my testimony: My name is (grandmother) and I am in favor of changing Minnesota's custody laws in favor of the presumption of Joint Physical Custody.

I come from a broken home. At the age of 15 my parents were divorced. Although my three siblings and I were chose to live with our mother - we were all four grateful that we were allowed to have free access and contact without father whenever we choose to. The courts did not decide when or how often we could see our father - we did. And it worked, without government intervention to dictate or restrict access to either parent. I just want to add that our parents did not get along with each other; they fought like cats and dogs. I am no stranger to domestic abuse. I understand its impact. On week-ends our father would drink and mother would get mad and violent and they would fight, throw things and have knockdown, drag out, mother would call the police and have daddy locked up. The next day she would go down and withdraw the warrant. She was not really afraid of daddy but she told the police she was. After the divorce we could call daddy for rides or to just come and take us places or do things with him. He was even invited to come to our house for family dinners and for holidays & celebrations.

I believe this is what children need for parents to co-operate with each other for the sake of their children. Parents should not be allowed and encouraged to use their children to hurt one another, which is exactly what is happening when the courts assign one parent as sole custodian. I also believe that when one parent insists on sole custody they are inflicting abuse on their child/children themselves. Children are a little of both parents and therefore, when one parent is devalued, one half of them is being devalued and this compromises who they are and their self esteem, affecting them for a lifetime.

Submission For Joint Physical Custody

Each time there is a divorce it not only effects the two people who are divorcing and their child/children but all the family members - grandparents (such as myself and my husband-we have not been allowed to see our granddaughter for three years. Before the divorce we saw her weekly and we were the only ones allowed to sit with her and she went on many vacations with us), Aunts, Uncles, cousins, friends and friends of the family are all affected. Anyone who would not take sides with the mother of our granddaughter has been alienated from her (our granddaughter's) life. Our granddaughter has actually been turned against us, to the point that when we tried to go to a volleyball tournament to watch her play, she came over to us and asked us to leave.

We had not made any kind of contact with her; we were just sitting in the audience watching the game.

When we got home there was a telephone message from our ex-daughter-in-law telling us we had caused our granddaughter to lose the game for her team and that if we ever did this again (go to watch her) she (our ex-daughter-in-law) would file for an Order for Protection from us. We know in family court an OFP is far too easy to get, even with no valid reason or evidence, which only serves to further alienate the children from family who love them.

Currently my husband and I are actively involved in the "Center for Parental Responsibility" (CPR) and working to see the laws of MN changed to a presumption of Joint Physical Custody unless one parent is proven unfit.

We do not want to see other children and their families go through this pain and suffering caused by the current policies and practices in family court, which minimize and marginalize not only fathers, but one entire set of family. I believe from my own experience that this law passing is in the best interest of our children. All Children.

Thank you for your help and attention to this urgent matter and let's bring this to pass.

---

Hello,

I am a 33 year old woman married to a wonderful man that has 2 daughters. My husband has full legal and no physical custody of his kids. He and the girls' mom were not married. So after they split up (she moved out on him to move in with a man that she had been cheating with for over 6 months) she threatened that he would only see his kids every other weekend and be paying her a lot of money in child support. Unfortunately, after he petitioned the court for custody, and has spent thousands of dollars in court trying to gain joint custody that is pretty much what has happened. His original attorney on the case told him "the law says the mom will get full custody, so you might as well just give up". So he pretty much did. Until he met me and I gave him the courage (and financial support) to fight for what his daughters want and deserve. Again, after spending thousands of dollars on attorney's fees, he only gets to see his kids 2 afternoons a week and every other weekend. It is SO sad because his daughters ask every time they're here to stay longer or not have to go back to their mom. We call every time to ask their mom, and get yelled at screams- NO. We've paid for mediation and she won't budge. I'm convinced that she is afraid to allow her

daughters to spend more time with their father because she is afraid she'll lose out on her child support (which is her only source of income).

There absolutely needs to be changes in the legislation to allow fathers to have Joint Custody- if that is what the children need and deserve. We need to make a change so more children do not have to be "forced" to live with their mom- because that is what the law says.

Please- let me know if there is ANYTHING I can do to help this change be made!!!!

-- Tonya Fuller

---

A congregation member approached us as her pastors and asked us to write in support of a presumptive joint custody policy. She is a grandmother who is grieving the fact that her son does not have equal access to his children after his divorce. While we understand that custody issues involve many aspects that need to be taken into consideration, including the safety of the child, instances of domestic violence, and the overall fitness of the parent we also see the pain of extended family members who are deeply affected by a loss of relationship with children as a result of divorce and a non-custodial parent. We ask that you would consider the implications on extended family members as well when you study whether or not presumptive joint physical custody should be awarded. We will pray for your group as you work on this very important study.

In Christ,

Rev. Rev. Timothy Ehling  
Rev. Kathryn Skoglund  
Trinity Lutheran Church  
220 South 13th St  
Montevideo, MN 56265

---

1. I believe that there should be a change in Minnesota's custody laws to favor joint physical custody. Particularly with the new child support guidelines focusing on parenting time percentages, allowing parents to claim "joint custody" of their child(ren) makes sense, and can be a psychological aide to getting custody matters resolved. In conjunction with this, I would also eliminate the concept of "joint legal custody," which is already essentially useless and confusing - the term is not adequately defined so as to be meaningful, and other aspects of Minnesota law deal with (a) which parent makes the final decisions regarding school, medical care, etc.; and (b) both parents having access to school, medical, law enforcement, etc., records of a minor child.

2. As stated above, I believe that joint physical custody would greatly assist in resolving custody matters, since the child support guidelines deals with parenting time percentages, not labels. Further, I believe that this is meaningful to minor children to know that their parents are still "sharing" them, instead of being in the custody of one parent and "visiting" the other.

Matthew P. Franzese  
Leuthner Law Office

---

Submission For Joint Physical Custody

I don't have a lot of experience in cases like this (and I have to miss this month's CJI meeting because of CMCC training) but I think I would be in favor. Right now the mother has automatic rights from birth and the father has to fight through a lot of red tape for his right. I know plenty of children born out of wedlock who would be better off with their dad, but the law currently only recognizes the mother.

– Kameron Genz, Social Worker

---

To: Joint Custody Study Group

As an educator with over thirty years experience working with young children and parents, I am writing to endorse a change to Minnesota's custody laws to favor a presumption of joint physical custody. I have three reasons why I believe such a change would improve the lives of children, families, communities, and society at large.

1. There is overwhelming evidence that father absence is harmful to children and extremely expensive for society (see *The One Hundred Billion Dollar Man*, Nock and Einhoff, National Fatherhood Initiative, 2008). The corollary to the downside of father absence is that children who have involved fathers do very well on measures of schooling, employment, and social relationships. We need to be doing everything we can to discourage father absence and encourage the healthy involvement of men in children's lives.
2. A large part of the the problem of father absence is that when parents split up, the courts' de facto decision regarding child custody is to presume that children are better off with one primary parent, and that parent is almost always the child's mother. This judicial decision encourages father absence in the lives of their children.
3. Changing Minnesota's laws to a presumption of joint physical custody is no panacea for children and families, but it is a small and important step in allowing for more positive father involvement. In order to substantially improve father child relationships through the court system, additional resources should be allocated. Two areas that come to mind are the lack of training and support for guardian ad litems, and the lack of professional standards in child custody evaluations. There is much work to be done in order to make social service and court systems more father friendly.

I sincerely hope the Joint Custody Study Group will do the right thing by advocating for a change in our laws to favor a presumption of joint physical custody. Children, families, and society will be the beneficiaries of such a decision.

From: --Lowell Johnson

---

ATTN; JOINT CUSTODY STUDY GROUP:

IT HAS BEEN BROUGHT TO OUR ATTENTION THAT JOINT CUSTODY HAS A DISCRIMINATION PROBLEM AGAINST FATHERS. PRESENTLY, FATHERS HAVE LITTLE OR UNEQUAL VISITATION TIME FOR THEIR CHILDREN. THIS TIME SHOULD BE EQUALIZED.

COMPARATIVE TIME SHOULD AND CAN BE EQUALIZED. I REALIZE THAT FATHER'S WITH CRIMINAL RECORDS OR ABUSIVE BACKGROUNDS VISITS SHOULD BE CURTAILED. HOWEVER, THE OTHER FATHERS SHOULD NOT BE PUNISHED BECAUSE OF THE IMPROPER ACTS OF THOSE PREVIOUSLY MENTIONED.

WE STRONGLY SUPPORT EQUAL VISITATION RIGHTS FOR FATHERS & MOTHERS.

THANKS YOU FOR YOUR CONSIDERATION.

--DARRELL & MARGARET HANNEMANN

---

Attention: Joint Custody Study Group

Please support the PRESUMPTIVE JOINT PHYSICAL CUSTODY bill and return justice to families - children, fathers and mothers. The present system is biased and antiquated. Criminals warrant due process of the law. So unless a parent has been proven to be a criminal, should the rights of parenthood be taken away? Should officials be held accountable for wrong decisions?

Please, remove political and governmental strings from the lives of children and fathers. Fathers and children have been victims of the discrimination of Minnesota courts for too many years. Too many MN fathers have been reduced to "visitor" and deprived of the very meaning of the word father.

As a grandfather, I yearn for more time with my three grandsons of divorce and my son and his sons deserve your support of the PRESUMPTIVE JOINT CUSTODY bill.

Sincerely,

David W. Stageberg, retired educator

---

I am writing as a married mother of two sons (20 and 18). In the last few years, my brother in law from Wisconsin and a male friend of ours from Minnesota went through divorces. It makes me very concerned about the future of my boys - the laws in Minnesota really scare me. I don't know if it would ever hold up in court, but if my boys get married and live in Minnesota, I will suggest they write a pre-nuptial agreement about the custody of their future children in case they ever get divorced. We learned a lot about the court system in Minnesota during our friends divorce process and are very disgruntled with the statistics.

For convenience, I will call my brother in law, WI, and our friend, MN. Both divorces were very similar. They both had very controlling spouse who knew how to work the system. The only blessing for WI is that he lived in a state that presumes joint custody. Because his ex-wife had no other choice in trying to get more time with the children, she tried to convince the custody

Submission For Joint Physical Custody

evaluator that he was abusive and an alcoholic. Even though it was a very ugly divorce, he still ended up getting his boys half the time.

MN on the other hand had a wife who was very intelligent. She knew if she could show the custody evaluator and guardian ad litem that she and MN couldn't get along well enough to share the kids, odds were very high she would get custody because of our Minnesota divorce laws (I think I saw a statistic that said 95% of the time the women get custody). She coached the children and told them what to say to the guardian. She made up stories of how unsafe the father was.

After spending a lot of time with the boys, the guardian's final report said they should share the kids 50/50, but the mother should have custody. The custody evaluator, on the other hand, believed all the stories the mother made up so MN's attorney said they better settle out of court as the judge will listen to the custody evaluator. In the end, he sees his 3 boys every other weekend and 1 night a week. During a 7 day stretch every other week, he sees them for 3 hours on Wednesday night (when they are scheduled to go to church and now the oldest had guitars lessons – which were purposely scheduled during Dad's time by Mom). So during his 3 hours that week, all he does is transport them to their activities. She purposely gave him Wednesday night visitation as she knew it would limit the time with their dad. The boys continually ask to see their father more and ask why they can't live with him every other week. Shouldn't it be about the children?

MN is a wonderful father and spends a lot of time mentoring our 2 boys. He is so lonely and upset about not being able to spend time with and mentor his own sons. The system is broken and needs to be fixed. How would you feel if MN was your son?

--Maribeth

---

#### Attention : Joint Custody Study Group:

Both father and children have a constitutional right to have equal access which would be possible by way of presumptive joint physical custody. Fathers and mothers should be innocent until proven guilty of criminal activity.

It is a travesty that fathers get sole physical custody in only about 8% of custodial cases and then neither fathers nor their children have earned the discrimination of the divorce industry. Children that loose contact with their fathers will have a more difficult time adjusting as they do not have a good frame of reference for their own identify and this puts them in a constant search for meaning and understanding for their futures.

As the grandparent of three grandchildren of divorce. I am aware of the problems of divorce for them and their father. The father pays his child support and all other incidental expenses. The divorce decree states the father and mother are to pay half of the dental, medical expenses and school fees. Mother doesn't pay her share and "says she doesn't have to pay." A father should not be deprived unjustly of his children and yet provide income without any accountability. I know fathers deprived of their children and such a large percentage of their income they are reduced to poverty.

Too many officials, political powers and government controls add to the problems of family. Please rescue children and fathers from exploitation by the divorce industry and pass the PRESUMPTIVE JOINT PHYSICAL CUSTODY bill.

---

Minnesota laws should be changed to favor the presumption of joint physical custody.

Much has been written about not favoring joint physical custody in cases of domestic violence. As a woman who endured years of domestic violence from my former husband, I disagree.

The problem with the current law is it encourages men and women to fabricate domestic violence against the other parent as a way to influence or obtain sole custody. The current law encourages parents to lie and falsify information. Courts are left trying to decide which parent is lying less. Courts are also left trying to determine which of the two parents is more likely to protect the best interests of the couple's minor children despite lying about domestic violence.

To further complicate the issue for Minnesota Courts, family law judges rely upon custody evaluators, Guardians ad Litem, parenting consultants, parenting time expeditors, court-appointed psychologists, chemical assessors, and children's therapists to determine which parent abused the other. These experts are not trained in domestic violence or questioning procedures to obtain truthful information on which the Court may rely.

In my own case, the man who abused me for years gained sole custody of our two minor children by claiming that I abused him and obtaining an Order for Protection (OFP) against me. The court services professionals all believed him that I was bipolar and abused him by refusing to take psychosomatic medication. I was a stay-at-home mother at the time. However, our two children, ages 3 and 6, were taken away from their mother and left in the sole care, custody, and control of the man who abused me mentally, emotionally, and physically for over 20 years.

Minnesota's family law system of justice is broken. The presumption of joint custody would improve the family court system. Women who allege domestic violence would not automatically lose custody which is what happened to me. Men who falsify claims of domestic violence would not automatically be granted custody which is what happened to my former husband.

The problem is the Courts are not examining what is best for children by talking to the children. The courts rely on people not trained in the law, not trained in evidence, not trained in civil procedure, and not trained in domestic violence to determine which parent is lying or the lesser of two evils.

Judges know what intent is and how to determine intent from criminal law. The same methods for finding intent in criminal cases should be applied in family law cases involving claims of domestic violence by either husbands or wives. Courts need to make judicial findings of intent by husbands and wives whenever allegations of domestic violence are raised.

Feel free to call or e-mail if you need any further information.

Sincerely,

Susan A. Yager

Attorney at Law

---



This email is my comment regarding "joint physical custody" presumption as your study group considers the question.

I used to be opposed to presumptions of joint custody. I always felt that absent an agreement between the parents, joint physical custody was likely to fail. I used to believe that children needed stability and a safe relationship with one parent, more than they needed a relationship with both parents. I am now more open to a presumption of joint physical custody. These are my reasons:

1. When I was still a state senator, I chief authored the current "income shares" child support law. It took 3 years and several re-drafts to finally pass the law. During the process, I came to believe that the family law system was unfair toward fathers with respect to determining their future relationships with the kids. There was a common belief that fathers only wished to have custody of their kids because it would lower their child support. Indeed, under the old "Hortis-Valento" formula the amount of custody did determine the child support owed. I'm sure that that was the motivation for many fathers to request custody. Many threatened to litigate physical custody in order to leverage lower child support payments. When the current child support law was passed in 2006, it included a presumption that each parent was entitled to 25% of the total parenting time. This was significant since 25% was quite a bit more time than the normal "every-other weekend and two weeks in the summer" which was quite normal for non-custodial parents to receive for visitation. Current law, in MS 518.175 Subd 1 (e) states:

*(e) In the absence of other evidence, there is a rebuttable presumption that a parent is entitled to receive at least 25 percent of the parenting time for the child. For purposes of this paragraph, the 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.*

The above language was a compromise from the House of Representatives' position (passed by the entire House I believe) that there should be a 50% presumption. When I negotiated with some of the groups advocating for the 50% presumption, and told them that I couldn't negotiate a child support bill in the Senate which gave a parenting time based reduction in child support and a presumption for equal parenting time, They told me that fathers wanted TIME with their kids more than they wanted a child support formula which resulted in lower child support payments. That message came though clearly from the hundreds of phone calls that my Senate office received from fathers while the bill moved thru committee. I am now convinced that most fathers want a presumption of equal parenting time because they want a more meaningful relationship with their kids.

2. Since the 25% parenting time presumption took effect ( On Jan.1,2007) I haven't heard of an increase in litigation regarding custody or parenting time. Therefore, the current presumption must be working. I believe that each parent's expectations will conform to whatever the law allows. What consequences might occur if a greater presumption of parenting time was passed into law (say between 40 and 50%)?

a. Currently, there is no effect on child support obligations if the non-custodial parent has between 10 and 45.0 % of the parenting time. (45.1% is considered "equal" time under the law) Therefore, the 25% parenting time presumption that currently exists could be increased to 45.0 % without affecting the amount of child support paid by the "non-custodial" parent. This would give dads (non-custodial parents) more time with their kids, but might be unfair to them financially. Currently, if the non-custodial parent has 40% of the parenting time, they still only get a 12% reduction in child support to cover expenses for when the kids are with them. The 12% discount allowed in current law was also a legislative compromise. It should have been closer to 18% based upon the financial analysis. Most states give substantially more "parenting time discounts". Our child support is modeled after Oregon's law. In Oregon, there are 8 or 9 levels of parenting time discounts, based upon the amount of time a parent has with the children. We created the single parenting time (expense) discount for parenting time between 10-45% , hoping that there would be less "fighting" and litigation about custody and parenting time. Mothers were encouraged to allow increased parenting time to non-custodial fathers because it wouldn't reduce child support. The new law also eliminated the distinction between "custody", "visitation" and "parenting time" (see MS 518A.36 below) and eliminated the Hortis-Valento rule prospectively. I believe that the new law is working, and reducing litigation, in that regard.

#### **518A.36. Parenting expense adjustment**

*Subdivision 1. General. (a) The parenting expense adjustment under this section reflects the presumption that while exercising parenting time, a parent is responsible for and incurs costs of caring for the child, including, but not limited to, food, transportation, recreation, and household expenses. Every child support order shall specify the percentage of parenting time granted to or presumed for each parent. For purposes of this section, the percentage of parenting time means the percentage of time a child is scheduled to spend with the parent during a calendar year according to a court order. Parenting time includes time with the child whether it is designated as visitation, physical custody, or parenting time. The 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 where the child is in the parent's physical custody and under the direct care of the parent 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.*

To be fair, the parenting time discount should be increased if the actual parenting time is increased because both households would incur basic "fixed" costs for housing, utilities, transportation, clothing, etc.

b. If the presumption was increased to between 45.1% to 50%, then the current child support law presumes a different formula. Generally, the parent with the higher income will pay 1.5 times the difference in guideline child support. This would be fair, but only if each parent actually cared for the kids equally. Sometimes, actual practice differs from what the decree states.

### 3. My Opinion:

I support increasing the parenting time presumption to between 40-45.0 %. Each parent should be presumptively entitled to at least this amount of parenting time with their kids if all things are equal, regardless of whether the parents agree to a parenting plan. The parenting time discount should be increased from 12% to 30% if the amount of parenting time is between 30% and 45.0 %. ( the 12% discount would still apply to parenting time between 10 and 29.9%) This presumption would give more parenting time to the non-custodial parent who is truly sincere about having more time with their child. It would also increase the parenting time support discount to compensate the non-custodial parent for the "transitory" expenses which follow the kids (food, entertainment, travel, clothing, etc.) By establishing two tiers of "parenting expense" discount, the law would still discourage litigation, while increasing children's time with both parents.

One example of how 40% of parenting plan would be structured as follows:

- a. Every-other weekend (Friday night to Monday morning ) = 78 nights
- b. 43 days (about 1/2) of each summer vacation
- c. Equally divide school year break and holiday time ( about 15 nights)

Total = 146 nights = 40% of the total parenting time

We should eliminate the distinction between the labels of "physical custody" and "parenting time". Labels in this area of the law are important. We have effectively eliminated the concept of "visitation" already and that is a good thing in my opinion. Parents don't "visit" their kids, they raise and care for them. Except for inter-state compact issues, the label of "physical custodian" is not necessary any longer. Each parent should receive "Parenting Time" with their kids in the future.

The 40% presumption could be rebutted by:

- a. abandonment or prolonged neglect of the kids by a parent;
- b. abuse or domestic assault by one parent toward the other parent or the kids
- c. past criminal history
- d. significant non-payment of child support
- e. Parental incapacity or disability which affects the parent's ability to care for the children;
- f. incompatibility with step families
- g. preference of the child if age 12 or older
- h. significant differences regarding religion or educational upbringing
- i. Other factors in courts discretion which affect the best interest of the children.

My proposal would not increase litigation and might even reduce it by reducing the marginal benefit of litigating over 5 to 10% more parenting time. Both parents would know that they won't be marginalized with respect to raising their kids. This proposal also allows flexibility for parents to craft parenting plans within the 30 to 45 % time frame.

Thanks for your consideration.

Judge Tom Neuville

To: Joint Custody Study Committee in Minnesota (2 pgs.) November 7, 2009

Re: Joint Physical Custody Needs to be The Presumptive Standard in Minnesota

My son Max was born on October 23 ,2004. My fiancé decided to end our relationship and moved out of my home in September 2005, taking Max and her other son, at the time age 3, with her. She houses them in one bedroom / 800 square feet home.

Thus began my nightmare experience with the Minnesota (Carver County) "family court" system, in my attempt to simply be responsible for parenting my own son. I discovered that as an unmarried father, I had to file suit to gain joint legal custody and that the mother is given full physical custody "as a matter of course.

I was told by my \$300/hr. family law attorney that the presumption was that physical custody goes to the mother "because the judges say 'I ain't never seen the calf (child) follow the bull (father)'". While it is certainly true that a newborn needs the feeding and care from its mother, there is also no doubt that a child needs TWO parents in order to have the best chance to succeed and be happy. All statistics and studies bear that out.

Instead, the "family court" in Carver County has pitted my son's mother against me by immediately intervening in my parenting rights motion, for child support (Judge ) despite the mother's gainful employment and salary of \$85,000 ( I make a \$60,000 base salary). I have spent \$15,000 on two different attorneys just to establish my parenting rights and a parenting plan, and to contest over-collection of support by Carver County (up to 50% of my net pay at one time, and there are "no refunds"!).

This has resulted in setting forth the typical and not sufficient every other weekend and one midweek evening with my son (now four years old) which the mother views as my "privilege", to be controlled and granted or denied at her whim. If I protest, she will claim "harassment" or "abuse" – the ultimate weapon for women in "family court".

This, of course leads to more court involvement as I currently try to seek redress for her willful denial of parenting time and her unwillingness to contribute to my son's transportation for the parenting time. This is extremely negative financially.

As a fit and loving father, I can provide the love, structure, discipline and support that only a father can provide – yet the State assumes my function to be limited to just (4) weekend days and four midweek evenings per month, for which I am asked to PAY the mother!

In addition, my parents (married 53 years), are deprived of spending time with their grandson, as are my siblings and their children (my nieces and nephews) with their nephew / cousin. All because of the State's terribly WRONG presumption for the mother's physical custody, which is unconstitutional under the equal protection laws.

I believe when both parents are fit and loving, the child deserves, and society is better served, when they are EQUALLY present in a JOINT PHYSICAL CUSTODY.

There are other issues relevant to this consideration:

Submission For Joint Physical Custody

No-fault divorce: This law allows women to leave a marriage for any reason, whether the husband wants to split or not, and by virtue of the present presumption for mother's sole physical custody, be virtually assured of not only custody of the children, but an immediate payday in the form of child and spousal support. This law has done more to destroy the fabric of families and, therefore our society, than any other.

Statistics show that women leave marriages and relationships in greater number than men – for reasons such as “feeling unloved” or “unfulfilled”. This puts a lie to the old saw that men “abandon” their families for trophy wives, etc.

No longer are the support and custody laws being implemented against the largely minority, inner city clientele of the low wage or unemployed, the often absent fathers. The middle class of employed and fit parents is increasingly being terribly disserved (abused) by these ill-fitting “policies”.

The divorce “industry”: This is a terrible and insidious outgrowth of the “family court” system, which is set up to profit by pitting parents against each other, and taking kids away from fit, willing, loving fathers. It includes a growing number of parenting “expeditors”, guardians, psychological consultants, etc. All needing to be paid by people (fathers) just wanting to parent their child(ren), which is a fundamental liberty under our Constitution. Yet this system operates with no oversight, and only those trapped in it can understand the true vileness of it.

The radical feminist agenda and the liberal bar association wants this system to remain largely unexamined (by its cohorts in the liberal mainstream media) and to grow, assuring continued employment for its many members, and to further it's (negative) influence on the society. This includes the resulting systemic devaluation of the father in our society, relegating him to a source of funding for their terrible machine and for the women (mother's) who profit from it. Even in the face of the terrible statistics for children who grow up in single parent (mother) households – crime, chemical abuse, etc. We need reform!

Standards for “fit” parenting: It is virtually impossible (standard of proof) for a father to gain custody of his child(ren) by alleging an unfit mother, yet the court presently ASSUMES the father is essentially “unfit” by awarding sole physical custody to mothers 95% of the time. This is a terrible and unfair supposition by the court which is demonstrably negative to the best interests of children.

I urge the legislature to immediately reform the law, with a standard of joint physical custody, unless the parents mutually agree OTHERWISE, or are proven to be unfit.

-- Brian Maginnis

---

1) Presumption of joint physical custody: yes, this should be considered.

2) Pros & Cons:

Pros:

1) Gives the child access to more equal parenting by each parent.

2) allows more permanency and stability in the child's life.

3) allows more involvement of both parents in medical and education information and decisions.

Cons:

1) could cause more parental fighting, arguing and control by one or by both.

-- Alice Snater

GAL

---

To: Joint Custody Study Group

We write imploring you to consider justice, act wisely and vote favorably; please pass the PRESUMPTIVE JOINT PHYSICAL CUSTODY bill.

Statistics clearly bear out the fact that fathers experience discrimination in child custody cases. In over 90% of the custodial cases mothers are granted sole custody.

Research has documented time and again that the detrimental effect of divorce on children is exacerbated when one parent is removed or marginalized from the children's lives. Our nephew, the father of 3 sons, has only limited visitation rights in spite of the fact that he was an able, primary care-giver of his sons before divorce. His children, as well as he, long to see this changed so they can have equal time together.

It is hard for us to believe that fathers can be deprived of their children, their home and their salary without any constitutional protection. Who in the name of law and government is qualified to recommend taking a child from his or her loving father? Minnesota needs to change how they settle custody cases; fathers and mothers should have equal time with their children. After living in Minnesota for 60 years, we now live in Wisconsin where mothers and fathers get 50-50 in custody cases and it works well.

Please pass the PRESUMPTIVE JOINT PHYSICAL CUSTODY bill.

-- Carolyn & Richard Jackson

---

Submission For Joint Physical Custody

As grandparents and parents of a divorced son, we know the bias of the court system. The judge, lawyers, custody investigator etc. are all on the same team to discredit the father and favor the mother. It's not what is best for the child but about monetary rewards for "the team" and the state. Please address this with honor, truthfulness, and justice and support the Presumptive Joint Custody bill. Thank you.

-- Philip and Florine Iverslie

---

#### Written testimony to Joint Physical Custody Study Group

Submitted by Charlie Hurd representing the National Coalition of Free Men Twin Cities Chapter.  
November 6, 2008

I am a retired K12 Library Media Technology teacher, and a city councilmember from Mankato. The National Coalition of Free Men is the largest nationwide organization devoted to men's issues such as discrimination against men in the military draft, education, health care, family law, and at domestic abuse shelters. We recently won a case against the state of California to make domestic abuse services available to men as well as women. Unfortunately, this type of discrimination continues in Minnesota.

I would like to tell my own story of shared parenting. In 2002, I separated from my wife of nearly 10 years, and we began to practice shared parenting with our son, who was eight at the time. Our divorce proceedings took more than two years and were very expensive, bitter and stressful. Contentious issues during the divorce process included, child custody, child health care, child discipline and upbringing, religion, child support, and the division of marital and premarital assets. Early on, I encouraged shared parenting, because I knew it was what my son wanted. However, each parent considered going for sole custody at some point in the process. Ultimately we both realized that this was a waste of time and money, and that the sole custody determination process would do damage to both of us and our son. Looking back, I only wish that there had been a presumption of 50/50 shared physical custody and shared parenting, so we both could have avoided the stress and expense involved in considering sole custody.

It is unfortunate that the current system encourages sole custody and does so little to encourage shared parenting agreements. There are huge economic and social incentives for one parent to go for sole custody. Imagine that you can get the children and a financial payout that can last for the next 20 years. It's hard for even the most principled person to resist this temptation. One parent can easily veto shared parenting under current law. And what lawyer would discourage a client from going for sole custody if there was a reasonable chance of getting it?

In spite of the incentives to go for sole custody, we chose to mediate and create a shared parenting plan, because it was the best option for all of us in the long run. Most of our shared parenting plan is common sense, if your common sense puts the child first and is based on fairness to all. Here are some of the details of our shared parenting plan.

#### **Time Sharing**

We chose every other week, with one day in the middle of the week with the other parent. We now

share a week at a time, at our son's request. Holidays are switched back and forth every year, unless you agree to always have a certain holidays.

**Medical Issues**

Except for emergency situations, medical decisions are made together.

**Health Insurance**

One of us carries it, the other parent contributes half of the cost.

**School**

Our son continued in the same school. He has kept his school friends and familiar school.

**Expenses**

Each parent maintains a household and covers all expenses while the child lives in the household. Anything that goes back and forth between houses is a shared expense. These include for example, musical instruments, clothing, sports expenses, community education classes, and school supplies. Shared expenses are equalized between parents every two months.

**Child Support**

There is none.

**Transportation**

The parent who has the child, delivers the child to the other parent when it is time to switch.

**Disagreements**

We use a step-by-step process that begins with discussion, goes through to mediation and finally the court if necessary. Once our original agreement was finalized, we have never even gone to the mediation step.

In summary, our shared parenting plan has worked out well for all of us in spite of a very contentious divorce process. My ex has used the extra time that she now has, to socialize more, get more education and work more at her business. She is economically independent and is not burdened with child support. I've had more spare time, and have used that time to become an elected official. I'm not burdened by child support, and I get to spend quality time with my son a week at a time.

My son is now a freshman in high school. He has several friends, gets good grades, has a good relationship with both parents and participates in several extra-curricular activities. There is no cost of involvement by the government in our families, just as it was before we were divorced.

The National Coalition of Free Men is very concerned about the bias of this study group against a presumption of joint physical custody. From our analysis of the group members, and the organizations that they represent, it is clear that most of you benefit from the adversarial nature of our current system. Lawyers and judges, the five of you, would see less work and monetary gain if we adopted shared parenting. Domestic abuse advocates would have less to do if we had a system that encouraged cooperation, rather than conflict and denigration of one parent. It's odd that four members have close connections to the domestic abuse cause, when Representative Mahoney points out that domestic abuse is not a concern of this study or the law? Psychologists and



academics would have less to study and advocate for if there were less conflict and less cases for which to testify. Child support collection bureaucracies would definitely be shrinking, rather than growing if the government were kept out of the business of income redistribution. There also seems to be a heavy concentration of members who deal with families in poverty, rather than average families.

If this study group was to be fair, why don't you have an independent economist, rather than a child support collection bureaucrat? Why aren't there any collaborative law experts or mediation experts in the group? I know that several of the study group members are actively against shared parenting. Shouldn't there be at least one academic representative and one lawyer who is an advocate for shared parenting? Why wasn't there any oral expert testimony from academic experts, lawyers and judges who are in favor of joint physical custody? I counted at least eight who testified in opposition on October 27 at the Judicial Center. Why are only studies in opposition to joint physical custody sent out electronically to group members before meetings. Why aren't there any legislators in the study group, so there can be someone in the group who actually represents and protects the average people of Minnesota?

---

To Whom it may concern,

Listed below is a letter that provides my point of view and case history for the joint custody legislation being considered. I strongly believe that a presumption of joint custody for two fit parents with approximately equal parenting time is in the best interests of the children. I also strongly believe that the MN family court process is seriously broken and needs to be replaced with one that puts the interests of the children and parents before the lawyers, case workers and judges.

My testimony will reflect the impact on the best interests of the children and the financial impact of adopting joint physical custody. A summary of my testimony is listed below:

Minnesota's current law favoring sole physical custody to one parent (where both parents are presumed fit) is blatantly against all common sense and the best interests of the children. Study after study shows that children of divorce are best off when both parents are actively involved in the upbringing of their children. Minnesota's current laws are similar to the "Separate but Equal" doctrine of the 1950's. On the surface it appeared lawful and non-discriminating but in actual practice the "Separate But Equal" doctrine and today's Minnesota presumption for sole physical custody have led to wide scale discrimination.

Judges in Minnesota have far too much discretionary power to choose winners and losers in family courts. Many Judges are not family law experts and view family law as a nuisance and not worthy of their time. Once adversarial lawyers and Judges are involved the damage to the children and to the family finances far outweigh any benefits. Judge Bruce Petersen (the highest ranking Judge in Hennepin family court) agrees that the Minnesota family court system is broken and causes much more damage to families.

I am a father of 3 children divorced in 2006 after a lengthy 2 year custody battle. The custody evaluator recommended that I be granted sole physical and sole legal custody of our 3 children with approximate equal parenting time. Despite this the Judge granted the children's Mom sole physical and joint legal and awarded Mom 75% of the parenting time. The MN appeals court denied my

Submission For Joint Physical Custody

motion for reversal saying it was in the Judge's discretion. A Parenting Consultant was appointed with the full authority of the court and after many months of meetings with both parents and thousands of dollars, increased my parenting time to 42%. My ex wife continued to deny both court and parenting consultant ordered time. Two subsequent motions were presented to the same Judge providing the Parenting Consultant's very descriptive letters showing my ex wife was denying parenting time and failing to abide by the PC's directives. The Judge denied both motions without hearing any evidence stating "I am not wasting the Court's time on these issues". The Parenting Consultant has recently quit ( because the Judge refused to do anything) and the children and our family are in chaos. The two experts (Custody Evaluator and Parenting Consultant ) who spent many countless hours with both the parents and the children agreed that approximate equal time was best for the children. The Judge who spent no time with the children and almost zero time with the parents continues to believe he knows more than the experts.

Since the separation date on August 20, 2004 we have spent over \$250,000 on attorney fees. Both sides are as committed as ever to protect their rights to be parents to our children. Our oldest child starts college next fall and despite her being an honor roll student there is no money to support her in college because of the countless battles in court. Our youngest child is 9 and the motions and attorney fees will likely continue until she is 18 and even longer due to the Judges inability to provide a fair solution.

I am a loving Dad who adores my 3 children. I am remarried and am a great father to all 5 of our children. I have an MBA from the University of MN, I coach my children's sports teams and stay active with the children's school, religious and health needs. We live less than 1 mile from ex wife 's house and the kids easily move back and forth between houses and enjoy the friendships of their step siblings.

Our children's future and our lives have been ruined by one 64 year old Judge in Carver County who believes he knows more than the experts he's appointed. This Judge presumably was following the current law that says one parent is the winner. A presumption of Joint Physical Custody would have eliminated 90% of our family court hearings and motions and allowed both my ex wife and I and our children to move on with our lives and provide for the future education of our children.

-- Richard Shea

---

I am a family law practitioner and have been since 1994. I am in support of a presumption of joint physical custody for many reasons. The research that I have read regarding the effect it has on children to have a fractured relationship with one parent illustrates quite strongly that it is bad for children. When parents want to raise their children and are prevented from doing so by being given a modest 4 overnights and 4 weeknight evenings per month as the antiquated schedule of every other weekend brings, it negatively impacts a child's relationship with his or her noncustodial parent.

Although it has been widely believed that somehow joint physical custody requires more cooperation than sole physical custody, I think that belief is suspect on its face. Parents who feel excluded, out of the loop, or unfairly treated by the system are more likely to be antagonistic with

the other parent. Joint physical custody would relieve that source of conflict. Also, people that are in conflict are in conflict. Their parenting time schedule does not change that.

Children that are from broken homes have been dealt a bad blow. The answer is not to marginalize one of their parents in the name of "stability and consistency". This position has always confounded me. It defies common sense. When children are accustomed to living with two parents, they see each other every day. Stability and consistency would be keeping the children in contact with both people they have been living with all their lives as much as possible. Instead we have taken one of the people they are used to seeing every day and imposed a visit for only 8 days each month, and in those counties where they still don't even grant midweek overnights, four of those days are really just a few hours in duration.

I have not read any proposals on language, but I would suggest that the presumption be made based upon people living together for some period of time during the child's life and not on marital status. Children don't get to choose whether their parents marry. They don't see a difference when their parents live together whether they are married or not. In other words, I do not think we should treat paternity cases differently than marriage dissolution cases. We should treat people differently based upon what the child has experienced in his or her daily life. Making this change would be a huge step in the system being more child focused, which is where it ought to be.

I could go on and on. I also know there is judicial economy to consider and this may have a positive impact on that. However, I think the primary reason to do so is for children.

-- Linda Allen

---

There should be a presumption of joint physical custody in Minnesota Statutes.

Any other presumption promotes acrimony between parents and needlessly extends legal battles for custody. Any presumption could be rebutted with arguments of the existence of domestic abuse or that the best interests of children dictate other than joint custody (similar to the current presumption of joint legal custody).

The existing framework is confusing to parties who are good parents and adept at co-parenting. They frequently wonder why they need to **prove** their fitness as a parent when it has never been questioned in the past.

-- Richard A. Stebbins  
Attorney

---

I am writing to express my views on the proposed presumption of joint physical custody. By way of background, I have been a practicing family law attorney for nineteen years, eleven in private practice and eight working in the child support system. During those nineteen years, I have represented moms, dads, and the public authority and, occasionally, a grandparent or other interested third party. I am also a child of divorced parents.

I have come to believe that it is in the best interests of children to begin with a rebuttable presumption of joint physical custody. I believe that there is still a win/lose mentality with regard to custody labels and that mentality is fostered by the defacto presumption against joint custody in our current law. (Technically, there is no presumption, but a party wishing to be awarded joint physical custody has additional burdens with regard to proof such as presenting evidence that the parties can get along....) What I see in the present law is an incentive for some parents to create conflict and then argue to the court that the parents can't get along so joint custody should not be ordered. I believe that a presumption in favor of joint physical custody benefits children as it assumes the positive—that parents can and will work together for the sake of the child—as opposed to assuming the negative unless a party can show otherwise.

I have found that parents with joint labels seem to have fewer post-decree issues, though, to be fair, I have not kept hard data on this issue.

I would suggest that the presumption be a rebuttable presumption, and that the presumption could be rebutted based on some of the following criteria:

The parents had never resided together. (I think children of divorcing parents who have lived together and raised the children together are in a very different situation than a child of a one-night stand for example);

There has been significant (as opposed to one-time situational) domestic violence between the parents;

A parent has significant chemical or mental health issues that make sharing responsibility inappropriate; or,

The parents simply cannot agree on anything and have no history of ever working together well for the children. (Note—the legislation would have to be crafted in a way so as not to motivate a party to behave badly)

I understand that there is a perception that divorced parents cannot co-parent well, but I have seen hundreds of cases that disprove that fact. To be fair, as a family law litigator, I have also seen hundreds of cases that show some parents can't get along no matter what. I think that we either have to assume the worst, unless a party can prove the best, or assume the best unless a party proves the worst. I believe that children's interests are served by creating an expectation in the law that the parents will co-parent. As a parent myself, I find that children tend to live up or down to our expectations of them. I think the same is true of most people, including family law litigants. I also believe that a presumption in favor of joint custody will serve to reduce litigation overall, though, to be fair, the cases that are tried if a presumption is created will likely be really tough, awful cases.

I hope this perspective is helpful. Thank you for seeking comments on this important topic.

Dana K. McKenzie  
Attorney at Law  
Wolf, Rohr & McKenzie, P.A.

Dear Sir or Madam:

I believe the Legislature should change Minnesota custody laws to favor a presumption of joint physical custody when there are not issues of drugs, violence or alcoholism. If the parties cannot agree to joint physical custody, the courts should draw lots between the parents. Currently, the Minnesota Legislature has set custody policy using the standard of the "best interests of the child." Unfortunately, the Minnesota judiciary has undermined this indeterminate standard for decision-making, to make this a policy that amounts to a presumption of physical custody for the mother. The unfortunate result of giving physical custody solely to the mother is that it causes children to lose respect for the father because the children soon learn the father doesn't have much power to discipline them, and doesn't have any control over his custodial relationship with them.

Very truly yours,

John P. Mazzitelli Attorney

---

Written comments:

1. Should there be a change in Minnesota's custody laws to favor a presumption of joint physical custody? **Yes, I believe it would be helpful.**
2. **Reasons:** As a mediator for almost 14 years, and an additional 10 years in the court system, I have seen many heart wrenching arguments over sole physical versus joint because of fear of one parent having more control and the other parent being forced out of the life of a child, whether the fears are justified or not. I have also seen a great deal of manipulation factors created by the presumption of sole physical with one parent.

When parents are wrapped up in the legal aspects of who receives the sole physical terminology, while important, it is not as important as parents focusing on concerns, issues, and what makes sense in regards to parenting time. If there was the presumption, parents may have one less thing to argue about and clear the way to more productive problem solving.

The presumption of joint physical may have the effect of negating the negative effects the new child support guidelines have had on parenting time negotiations. The new child support guidelines, while excellent and much fairer, have created roadblocks in negotiating parenting time schedules. Again, if there was the presumption of joint physical, it may have the effect of helping parents focus on what is important, which is quality time with their children while capitalizing on as much quantity as working schedules will allow, in the best interests of their children rather than the one extra overnight that will tip the scale to 45.01%.

On the other hand, it may bring about less accountability with parents assuming an entitlement of a straight 50-50 in actual parenting time rather than parents focusing on maximizing time in the best interests of children, if one parent is more available than the other. A parenting schedule that makes the most sense may not be quantitative enough to reflect joint.

Submission For Joint Physical Custody

However, I believe: (1) it will make it easier for parents to better negotiate parenting schedules that balance home life, work and play if the presumption is put into place, and (2) it will allow both parents to be treated equal in value in the lives of their children unless there are safety, drug or alcohol concerns.

I am hoping that the legislature will seriously consider the presumption.

Lois Warner, Mediation Works North

---

Attention to: Joint Custody Study Group

It is time to return constitutional rights to fathers and children - and sometimes mother. It is a travesty that fathers get sole physical custody in only about 8% of custodial cases. Social workers and research tell us the prognosis for children of divorce is improved when there is presumptive joint physical custody and joint legal custody. Separation from a parent is an injustice to children. Too often fathers are allowed only a minimal or minor role in their children's lives. Accused criminals have the right to due process of the law, but fathers can be deprived of their children, home, and salaries without any constitutional protections. Incredible.

As the grandparent of three grandsons of divorce, I am well aware of the horrors of divorce for them and their father, and the paternal extended family. Recently, my ten year old grandson, during one of their three hour visits with Dad, remarked as they were rushing to get to Mom's house, "I told Mom, I do not understand why we can't spend half the time with you and half the time with Mom and you could keep your money and Mom could keep hers and we could visit between houses."

Mom responded, "It's just the way it is."

With the wisdom of a child the judicial system could and should be changed!

**Please, pass the Presumptive Joint Physical Custody bill.**

-- Phyllis Stageberg

---

I am writing to offer a few comments regarding joint physical custody. In our jurisdiction, a Judge in District Court intermittently orders the parties in dissolution cases to work with the local social services agency to complete a custody study. I am a social worker employed by Aitkin County Health and Human Services, and over the past 11 years, those custody studies have usually been assigned to me.

I have noticed that, in the past, I was more likely to approach the issue of joint physical custody as the "third option." By that I mean that my recommendations for physical custody seemed to lean toward one parent or the other, and much effort was spent working out an appropriate schedule for parenting time for the non-custodial parent. Certainly, there are many cases where this is absolutely the best option for the children.

Over the years, however, my evaluation process has shifted toward making joint custody the "first option" if at all possible. In those situations where couples opt to end their marriage (and there is

Submission For Joint Physical Custody

no evidence of domestic violence, child maltreatment, or active chemical abuse), I look for ways for both parents to equally and consistently share the joys and responsibilities of child rearing as often as possible. I begin my evaluation with the assumption that both parents have the desire and ability to provide appropriate parenting to their kids, and it usually becomes apparent in a short while if that is, or is not, the case.

When one parent is "awarded" physical custody of the children, it seems to reinforce the idea that the kids are possessions, and that they "belong" to one party or the other. Angry, and emotionally distraught individuals tend to use the kids as tools of manipulation, revenge or vindication, and it is just unfair! It is my frequent observation that kids just want to have access to both their parents, and some regularity about how that happens.

If parents know that joint custody is the presumption they may spend more energy thinking about how to make that work for them rather than placing so much focus about "winning" the custody battle. Parents might also be more willing to work out an acceptable arrangement between themselves prior to going to trial if they are aware of the joint custody presumption.

Children deserve better treatment than they normally get in divorce situations, and the custody evaluator may be the only independent voice calling out for what is in their best interest. I would support statutory language that would support the presumption of joint physical custody.

Thank you providing a platform for my thoughts. ---- Rae Zahn, Social Worker

---

As a Sovereign Citizen of the state of Minnesota I am in contract, in fact compact, with the other Citizens of this state by virtue of our state constitution. My concerns are directly related to the members of the committee (and this state) being ignorant to the unalienable rights contained within unalienable Natural Law. This ignorance has brought us into a state of chaos in our families, our courts, state and country.

The "impacts" upon the People, that this committee is seeking to evaluate, are the symptoms and not the problem.

I am uniquely qualified to speak to this committee. My former name is Johnson, and I wrote the prevailing arguments in the Minnesota Court of Appeals and Supreme Court cases *Johnson vs. Murray*. This case deals with custody and parental rights. Justice Paul Anderson authored the opinion in the Minnesota Supreme court case, and I have had many discussions with Justice Anderson concerning the issues that this committee is considering. I will be sharing these discussions during my testimony.

Additionally, I have worked for nearly two decades in legislative intent research, assisted various non-profit organizations, personally brought children out of gangs and am currently a journalist and civil activist. As a victim of assault from my own father, and the failure of redress for those injuries I am as well qualified to address the concerns of domestic abuse. My hope is that the information that I will share with the committee, both orally and in writing, will give the committee the necessary tools to bring justice back to the People.

---

It should be automatically granted for fathers who seek and want equal opportunity and visitation. Do they not have the basic inalienable rights- are we not all created equal- so why is it then that a mother is automatically granted sole physical custody? Even at the fathers protest? Too many times a mother (primary physical care giver) takes rights away "just because" bitter, anger etc. With Joint- unable to do so. Makes her responsible financially as well- child is 'half' hers so she should be supporting half as well! All responsibilities should be equally divided. If mother chooses NOT to work, then fathers should get automatic tax deduction regardless of since he and state are sole providers? or is on welfare system- father should not be carrying the burden for her choices, or inability. If she cannot provide for herself and is manipulating the system....Too many are taking advantage. Fathers become just a wallet. That is not fair!!!!

It took two to make the child it takes two to raise the child. PERIOD! When one parent or the other is denied basic rights on that parent's belief that the other parent has no rights based on the 'primary care givers.' If mother drags to court for bogus she should be made to pay all fees, eyes...both parents held accountable for THEIR child. One parent should never be denied (unless violence type situations) especially when unsubstantiated claims- usually by a mother- Parental Alienation does exist. Fines should be stiffer and collected, awarded to the injured party. If penalties higher, would they not be less likely to perpetrate bogus denial of visitation? If joint custody automatic- less likely for bogus denial visitation.

I can testify to alienation syndrome or whatever you want to call it. Parent using child as a weapon as if personal property. Wouldn't joint custody defray them from? Holding both parties accountable for the child THEY made together? Not make the fathers pay through the nose while the mothers live off welfare? There has got to be a way for fathers to have their rights automatically and I think Joint Custody seems to be the way for those battling just to see their children fairly and equally without having to go to court all the time. Wasting tax payer's dollars for violating simple civil rights, human rights because of gender biased courts? Hennepin county and Wright county are the worst or are all judges biased still? That only a mother can raise without the father? something that should be so simple for the majority. Especially if mother has physical disabilities, health issues- joint should be automatic, just in case?

I am writing on my husband's behalf about a vindictive, controlling, manipulative, narcissistic, hypocrite of an ex wife who has used child, placed in middle of adult situations, used child as weapon to control, alienation of me- this family as well. (since she found out about me) We have no money for attorneys to fight her. Was recently awarded all medical even though on state aide, plus- financial stress of unnecessary braces. Visitation set verbally of which she constantly violates on her whim. Usually based on money. Even though have cell phones, gets hair done, nails done etc. Drives back and forth to cities for doctor appointments. Uses child support for HER bills. She has doctors note she cannot work, but yet has worked for cash under the table. Claiming disability while working as a babysitter.

--Teresa Braun



Best interests of children are best served by maintaining, as much as possible, the type of close, shared parenting relationship that existed before the divorce. Common sense & research both support this joint custody/shared parenting arrangement between kids & parents.

I'm in a position right now where this hits me hard, I'm going through a divorce right now, most people would tell you it is a no brainer that we both should have joint physical custody of our children, our evaluator said this week that there is no way she would recommend that because we cannot communicate in her eye which explains why my wife will not even look at me, because it is to her benefit. I'm very involved in the raising of our children; I'm also at school on a regular basis and have a very good relationship with her teachers and staff.

The other thing is I bought my house 4 years before we got married and would like to continue live and raise our children there. The evaluator ask me last week what was more important to me my children or my house, I said the kids but the house is where we have always lived and I grew up in the neighborhood my whole life. Our kids are 4 and 9 years old. I know deep down inside both kids need both parents and it is not right that it takes two people to make them and the system thinks only one is needed to raise them.

-- Mike Campbell

---

#### Regarding a presumption of joint physical custody

A strong presumption of joint physical custody of children should be the law. Since parental rights are " the oldest of fundamental liberties" according to the U.S. Supreme Court, the burden of proof should be on the parent or other parties who want to take away that right.

Since anger is the NORMAL response to injustice, the current de facto presumption of mother custody of children is promoting domestic violence including thousands of domestic abuse related suicides each year. Each year about 5000 men are driven to suicide by abusive women using the gender biased court as their weapon of choice. The Duluth Wheel of Abuse is a good description of how woman act in custody fights.

Women's groups claim domestic violence sky rockets at the time of a breakup. This is logical and to be expected. At the time of a breakup, every man knows the woman will use her female privileges to strip the man of his children, assets, future income, civil liberties and anything else dear to him. Anger is the normal response to such catastrophic losses. The courts amplify the anger by refusing to punish, or worse, rewarding women for perjury and other misconduct. Men know this to be the case since they have all heard the horror stories of other men. If you want to make a man angry, there is no surer way than to harm his kids.

Suicide rates of divorced men triple but those of divorced women do not, indicating that it is men's treatment by the courts that is the primary causative factor of the increase. The number of lives lost to family court related suicides is four times that of women's lives lost to domestic violence. How happy would you be if your children were taken away from you? Would you be angry at the kidnappers??

THOSE WHO OPPOSE JOINT PHYSICAL CUSTODY HAVE CREATED AN EPIDEMIC OF FATHERLESSNESS. Minnesota Courts and the Legislature have made clear that the alternative to a presumption of joint physical custody is a presumption of mother custody. The true cost of opposing joint physical custody is over 100 billion annually - all the costs of father absence to children and society.

Most child abuse is committed by mothers, especially single mothers. Judges who issue orders of protection based on unsubstantiated or minimal abuse are erring on the side of child abuse. The non-related men that single mothers bring into the household are the greatest threat of child sexual abuse. Such men are also much more likely to abuse or kill the children than the natural father.

Being raised in a mother headed household is the primary risk factor for child poverty. Custodial fathers are much more willing to financially support their children than mothers who are more likely to go on welfare instead. Welfare queens tend to raise welfare queens.

Mother headed households produce most of our criminals, drug abusers and academic failures. Children raised in such homes tend to earn less money as adults thereby reducing tax revenues to the state. Sole custody arrangements promote conflict and often bankrupt the parties at the expense of the children. The money that would have been available to help the children instead is spent on legal bills.

The fact that the parties do not cooperate should not be a reason to deny equal parenting time. The current bias in the courts gives women an incentive to be uncooperative. The court can order parallel parenting. To reduce conflict the law should require that a detailed parenting plan be written spelling out decision making provisions, parenting time and penalties for obstructing it. If advisable, a neutral location for child transfers should be designated to protect men from false allegations of abuse. Unless it is clear that it will not work, the court should order 50/50 parenting time in cases where the parties can't reach an agreement. Women should no longer be rewarded for deliberately being uncooperative. If the court does not order 50/50, it should be required to state why the parent deprived deserves to have his/her parental rights diminished.

The current presumption of sole custody to mom of children born out of wedlock should be changed to require automatic joint custody once a recognition of parentage form is signed, with a requirement that a parenting plan be implemented within 3 months. Men who have no money cannot afford to hire an attorney to fight for custody when it would be in the children's best interest to NOT live with mom. Mom can almost always get a free attorney. All she has to do is make a false allegation of abuse or refuse to get a job. Such options are rarely available to men.

To reduce child poverty, create a presumption of custody of children to the parent who is not on welfare. If women were not "burdened" with custody, they would find it easier to seek and maintain full time employment. Women would be less likely to have children out of wedlock if they knew the state would not reward their irresponsible behavior with automatic sole custody and a monthly check. It is not in society's best interest to encourage mother headed households, since every major social pathology is linked to fatherlessness.

My husband has a 13 year old son who, barring a miracle, will probably not graduate from high school. Mom was granted custody originally as a reward for having a child out of wedlock. 3

**lawyers told my husband a man cannot get custody over a mother's objections** without proving the mother palpably unfit. He fought for custody anyway because he knew of her substance abuse problems. 2 years later, out of money and hope, he gave up the fight.

He filed for a reversal of custody in 2005. The Guardian ad Litem appointed was so incompetent and biased that Anoka County cancelled her contact, but not before she did irreparable damage to the case. The GAL dismissed all of our allegations as unsubstantiated even though corroborating evidence existed but swallowed all of the mom's lies. She did not contact any references or attempt to verify any allegations. To make matters worse, Judge Donald Venne repeatedly delayed the case for his own personal convenience. (vacations, continuing education etc.) After 2 years, we could not afford to continue. At our attorney's advice, we reluctantly agreed to a worthless settlement not knowing that mom was arrested last year for 5th degree drug possession (felony) and driving under the influence of **methamphetamine**.

In spite of the mom's continuing drug problems, we cannot afford another custody fight. So the child will spend the rest of his childhood with a druggie mom because of the gender biased courts that insist that children belong with their mothers.

In 2002, my husband filed a constitutional challenge of Minnesota's child support laws because of our firm belief that the primary reason women demand sole custody instead of joint custody is money. At the time his parenting schedule was every weekend from Friday afternoon until Sunday night, 2 evening per week and 4 weeks in the summer. Even though my husband had de facto joint physical custody, he could not get the title since that would require mom to support her child instead of living off of him.

Since mom has refused to work since 2000, Randy has paid for all of the child's expenses in both households, including de facto alimony to a deadbeat mom. In a published decision, the Minnesota Appeals Court ruled that custodial parents essentially have no duty to financially support their children since they provide services. In this case (*Strandmark v Starr*), the noncustodial parent clearly paid everything and provided more services than the freeloader mom. Yet his "services" were not grounds for reducing child support. The change in the child support laws does not make things fairer. The parent with the title gets the time and the money.

Although my husband has de facto joint custody, the child is being harmed because of the legislature's and court's refusal to hold women to an adult standard of accountability. The money needed to provide for the child's special needs has instead been diverted to pay legal fees and the living expenses of a freeloader mom who is rewarded for refusing to work instead of punished. Had there been a presumption of joint physical custody at the time of the breakup, the mom would not have been able to exploit the child for profit nor would my husband have been forced to spend tens of thousands on legal fees.

I would favor a change in Minnesota's custody laws to favor a presumption of joint physical custody. This would put both parties on an even playing field as they enter the courtroom. Hopefully this law would eliminate some of the biases of judges, guardian ad litem, social workers and others who have significant input into ultimate decisions. It would be important to establish specific guidelines as to overcoming the presumption. Naturally issues of primary caretaker,

domestic violence, finances, home setting for the children, maturity and psychological make-up of the parties, preferences of the children should be taken into consideration in overcoming the presumption. I am a retired county attorney and family law practitioner for 32 years. I plan on having dinner with my former law partner and a retired judge in a few weeks and will discuss this subject further.

---

RE: Joint / Equal Physical & Legal Custody

I am a 70 year old widower who was married for 34 years to the same woman, only to lose her to breast cancer seven years ago. My wife and I were blessed with three great and beautiful children during our marriage, a son and two daughters. All three children were brought up to be loving, law abiding citizens and a credit to society.

I will never forget the day my oldest daughter, who was a fit, loving, nurturing mother, came to me and told me that she and her husband, who was a fit, loving, nurturing father, had decided to divorce. They had two beautiful children together; a daughter, who had special needs, and a son. My daughter told me that her women friends were pressuring her to take revenge against her husband and hire an attorney to handle her best interests in their divorce and take her husband "to the cleaners", obtain full legal and physical custody of the children, limit her husband to visitation every other weekend, that as a woman, she could get anything she wanted, all she had to do was tell the judge her husband was an unfit father, etc. I listened carefully, and with horror, to what my daughter was telling me her women friends had told her; I could not believe what I was hearing, this could not possibly be my daughter telling me this; she knew better; she was not brought up this way. I also observed the pain and anguish my daughter was feeling; I saw the tears, which told me she did not want to be going through this; and I sensed that she did not really want the marriage to end; that she was concerned for the children; but that marriage counseling had not worked; and then she asked me if I knew of a good attorney. I told my daughter it would be in both her and her husband's best interests to keep the "divorce machine", that her women friends were pressuring her into, out of their divorce. By the divorce machine, I mean the lawyers, judges, referee's, magistrates, Department of Human Services, the child custody evaluators, the County Attorney's office involving Title IV-D child support collection, and the women's advocates, because **all** of these people have a **personal financial interest** in their divorce, **it's their livelihood**; and all this "divorce machine" would do is create incredible conflict between her and her husband when both she and her husband were going through enough pain by deciding to divorce; it's all about the people in the "divorce machine" keeping and trying to justify their job's at the expense of divorcing parents and their children, all under the disguise of "best interest of the child." I suggested to my daughter that, if divorce was their final decision, that she and her husband sit down together and work out the terms of the divorce fairly, each with respect for the other, and not generate any conflict between them; to split the property right down the middle; to share jointly / equally in the legal and physical custody of their two children, that the children needed both a loving mother and father in their lives equally, and especially now if they were divorcing; to share equally in the expense of raising and supporting the children, and to work out a schedule where the children would be with each of them an equal amount of time. I told my daughter that if she tried to keep the children away from their fit, loving father, she would be creating great conflict between her and her husband, making both her and her husband miserable and angry with each other for absolutely no reason at all, and there would be court battle after court battle and hundreds of thousands of dollars pilfered from them by the lawyers representing them as well as other's in the "divorce

machine”, and that, when the children got older and started asking questions as to why they couldn’t see or spend more time with their father, she would live to regret doing anything to keep the children away from their father, and the children may even kick her out of their lives for her having done such a terrible thing. Both my daughter and her husband worked outside of the home.

My daughter’s husband had a much better paying job than my daughter, however his job was more demanding of his time, which left him with less time to spend with the children, but he could see and take the children anytime he wanted. Because my son-in-law would have less time available to spend with the children, and because he made substantially more income than my daughter, he and my daughter worked out a plan whereby he would pay for more of the children’s expenses than my daughter as well as some of my daughter’s household expenses. When my daughter and her husband had all the details worked out on their own, I referred them to a lawyer who drew up their divorce decree and had it approved by a judge. It worked beautifully! My daughter and former husband would go Christmas Shopping together for the children for Santa; spent holidays together, birthday’s, take trips with the children together as mom and dad, etc., and in cases where there was a conflict, they worked it out together. Unfortunately, I lost this daughter two years ago to melanoma cancer. Her former husband has the children full time now and he has done an absolutely super job raising these kids; he is an excellent father, and I have the greatest respect and admiration for him. I cannot begin to imagine what the life of my two grandchildren and their father would be like today if either my daughter or her husband had involved the “divorce machine.” Before my daughter died, she said to me, “Dad, I cannot begin to tell you how much I love you; I could not have gone through the divorce and this stupid cancer without you, and how much I appreciate our talk when I told you about getting divorced and the things you said to me to make me think and keep me from getting involved with the family court system.”

It breaks my heart to this day; and I cannot even begin to imagine what my daughter’s life would have been like if she and her husband had involved themselves and their children with the “divorce machine” or what the children’s and their father’s lives would be like today after the death of my daughter. I thank God every day that my daughter and her husband handled their divorce the way they did **“for the REAL benefit of their children.”**

I realize that not all divorce cases involve two fit, loving parents; that some cases involve one or both parents as abusive, or they have some other issues. However, the percentage of those cases should be small compared to the number of cases involving two fit, loving parents. It is absolutely ridiculous to believe that all men are bad and all women are good; what does make sense is that an equal number of men and women are bad. Just because parents decide to divorce, does not mean they divorce their children. For the “divorce machine” to remove a fit and loving parent from a child’s life, or place a limit on how much time a fit and loving parent can spend with their children is a national tragedy, and I would suggest that it is a violation of a fit, loving parents constitutional rights for a judge to issue such an order; that while a judge may have the “power” to issue such an order, he / she does not have the “authority” to do so under the Constitution of the United States and / or the Bill of Rights.

I encourage the State of Minnesota and the family court system to support joint / equal physical and legal custody of children as the standard in ALL divorce cases, EXCEPT where there is PROVEN, not hearsay, but **PROVEN EVIDENCE** of child abuse, neglect or a threat to the child’s safety. I would suggest that in cases where divorcing parents have become involved in the “divorce machine” that judges call both parents into a conference room, without attorneys, and tell these parents that **they** need to work things out together, that, even though they are divorcing, they are going to be in each other’s lives for the rest of their lives because of the children, and let these parents know that equal / joint physical and legal custody of the children will be the court’s decision. By doing this judge /

parent "sit-down" conference, it may make some parents rethink divorcing and try to work out their differences themselves outside of the "divorce machine" or even to rediscover each other and the reason they got married in the first place, and possibly decide to stay married instead of divorcing. Isn't it worth a try? If it hasn't been tried, no one can say "it won't work" except those who have a personal financial interest in keeping the conflict in divorce for their own personal financial gain. Again, I highly encourage you to support joint / equal physical and legal custody of children as the standard in ALL divorce cases except as I have outlined above.

---DARREL NICHOLS

---

Mark,

I am Jeffrey Alan Galema and I miss my children very much. I am currently homeless. For the first time in over 20 years I do not have medical or dental insurance. I was the primary caregiver of my children for almost 11 years until they were taken away from me and I was removed from our home. I do not know how much more involved a father can be in the lives of his children, yet they still took them away with only unsubstantiated allegations. The judge from the family court system did not want to hear my story, investigate her allegations or talk to my witnesses; one even had a doctorate in psychology and had witnessed me with my children in my own home and his. My calls to Crow Wing County Social Services were not returned. There are no programs or help out there for men who have been mistreated by the system. It has been six months and the process of evaluation has not started. I had no idea there was such injustice in the justice system.

I was taken away from my children and virtually removed from their life with unsubstantiated allegations, but no matter what I will always be their caregiver whenever and wherever they need me. The burden I carry is insignificant to the one that has been placed on them. As I have told them, I have always lived my life allowing nothing to be more important than them and they will continue to be the focus of my life. I will continue to do all I can for my children so I can provide them the path to live their dreams and become whatever it is they aspire to be.

I loved my wife dearly, trusted her completely and worked together with her for over twenty years. I accepted her as she was in spite of our completely different upbringing. We managed to agree on how most things should be handled and I kept complete transparency on how the home and finances were handled. We have put together a great deal of family wealth through hard work, sacrifice, tight budgeting and doing as many projects/repairs as possible. I gave her the freedom to do whatever was necessary to further her career and get beyond her past. We went to counseling as a couple and read the book Allies in Healing together. I gave up my career, lived with the stigma of being a stay home father, and put my dreams and ambitions on hold trying to do what was right for our family. My ambitions are living a sustainable life on a small farm where I know where our food comes from and drag racing and restoring 60s and 70s muscle cars. I never wanted a divorce.

We were able to have one parent stay home with the children from the time they were very young by moving to Northern Virginia when my wife was promoted to management at ICMA Retirement

Submission For Joint Physical Custody

Corporation. We converted a run down house into a very nice home there. It was 3600sq.ft. and had 4 bedrooms, 3 bathrooms, an executive office, 5 car garage with an automotive shop and lift, a great patio, deck and a pond on 13 acres. Every square inch of that home inside and out had been redone by the time we sold it. We had a small orchard, garden, grapes, berries and 2 10-12 bird flocks of chickens. We had a local source for organic milk and meat. We had all the wood we could burn for heat and most of the fence posts placed to create a horse pasture, because Naomi wanted horses. We had good friends, The Boxwood School, where I volunteered and an UU church we attended, where I taught religious education classes to children. Things were just coming together. I had just started drag racing again, something I had not done for almost 15 years. After the shop was ready, we purchased a 1971 Chevy Camaro Z-28 that I could restore when the children were in school. It was a way to bring some extra income into the home. We had a good life there; I did not want to move. One day out of the blue, my wife mentioned she wanted to get a divorce. I asked her to tell the children because I thought they should know. She was not happy and began swearing in front of all of us. It was the first time my children had heard such language. Not long after that she wanted to move to Brainerd, MN claiming she was recruited by a headhunter for a VP position in sales at Bisys. I would learn much later, that she was aggressively seeking other employment in late 2004. I believe she was asked to leave ICMA RC.

January 1, 2005 my wife left for Minnesota. She was in charge of finding us a house and enrolling the children in school. I asked for a house in the country with a garage on 40 acres with lots of trees and some open land. I did not want a property that needed as much work as the last one, so we could spend more time with the children as they were getting older. I was in charge of finishing the projects on the home and getting it ready for sale along with caring for the children, volunteering at Boxwood, taking the children to martial arts classes and all other household duties. We listed the home as summer began. We got an early offer, but it was a contingent sale and the offer fell through. My wife had not yet found a home in MN, so we talked about our options of buying something less expensive to protect our savings and cash flow. My wife found a house she loved just before it was time to start the new school year. It was huge, over 4000 sq.ft. on 15 acres with about 2.5 acres of trees, a hip roof barn, an old pole shed with only a roof used for hay storage, a dilapidated 1 car garage from 1940, two other old out buildings, and a Central Boiler.

We still did not have a contract on our home in VA, when we moved to Brainerd, MN. My wife, her mother and the children moved my car, the plants and the cats to MN two weeks before school started. I stayed behind to be there when the movers left, repaint a room, finish a small project and do a final cleaning of the property. I moved the 1967 Camaro on the car trailer pulled by the 1986 Chevy P/U to MN. I arrived at our new home on Labor Day weekend. I had not lived with my wife for nine months and was looking forward to being with her and doing some family bonding. To my surprise, her brother Niles and his family were there. . No one was watching the children, when I drove into the driveway. His children were riding their bicycles and running into my children. I was not very happy. I had worked 18 hour days for nine months to get to this point and all I wanted was to spend some quality time alone with my family so we could start bonding again. I went in to the house and asked my wife what was going on. I asked her to make her brother control his children, because I did not like watching mine being hurt by them. My children do not act like that and had always been in an environment where they were monitored, included and protected. My

wife did nothing. She did not even discuss it with her brother. We went boating with them that afternoon. We filled the gas tank on their van and boat and bought all the food for the day. It was hard to be with such mean children all day in such a small space. The next morning I again asked my wife to speak to her brother about his children. She started an argument with me instead. Her brother and his family left early that day.

It was a hard winter. The VA house had not sold. We were paying three mortgages. My wife had overpaid for our new house and it had a first and second mortgage on it. Our new house was a struggle because it had so many problems. We had a hard time keeping it warm enough, because it was short on insulation, had single pane windows, drafty doors and the heat exchanger was not sized properly for the house. The Central Boiler allowed us to burn wood for heat, but created a lot of work finding and cutting wood the first winter. We finally did get a contract, but it required the subdivision of the property. It was another big project to get property subdivided in VA while living in MN. I was able to get it done in about four months with a lot of help from our realtor. In March we closed on the front half of our property in VA and put the back lot up for sale.

The one bright spot was our children. Mrs. Paula Rossum told us she wished all new students could be like Kassie. She had nothing but great things to say about her. Mr. Nate Macejkovic told me we should have more children because they were so wonderful to have in his class. He had both Katie and Kassie. Mrs. Swanson and Mrs. Faust told us that Kristi was a great help in the classroom, because she already knew what to do and how to act.

After three years, the house is almost livable, but it still has some big issues. There is now a 30' x 45' x 12' three stall garage with a lift that I built mostly myself. The old pole shed 55' x 70' x 12' has been enclosed and converted into a horse barn. I hauled in a sand floor and redid the drainage with the bobcat. The fences have been repaired and gates installed. The roof, insulation, windows, doors and heat exchanger have been upgraded. Some remodeling and other repairs have been done in the house. When the back lot in VA sold we had netted over \$550,000.00 from that property.

Late 2007, my wife was given an actionable review by her company and given sixty days to make it right. At the end of sixty days, she was asked to resign or be fired. My wife resigned and got a good severance package. I supported her completely and believed what she told me. I listened sympathetically to her stories of what had happened and comforted her. I told her I did not think she would have to go back to work. I thought we could limit our short term spending and begin remodeling and flipping lake properties. Prices were coming down and I thought we could wait until next year and find a real bargain. She has wanted a lake property since she got the job in Brainerd. Our plan was always to buy a lake cabin and use it for 3-5 years while we remodeled it and sell it and do it again. In the mean time with the shop almost finished, I could start doing mechanic work out of it and restart the restoration of the 1971 Camaro Z-28, which we could sell. We had a huge garden plot we did not have time to use with so many other priorities that I would love to have planted. All I needed from her was to do more around the house. We were at the point all people would love to be, where we controlled our own lives. We had capital to work with and the knowledge, tools and facilities required to be self-sufficient. We would be able to spend time doing the important things like spending lots of time with the children and working together for the



best interests of our family. Our children could receive all of the love, attention and support they ever needed. There would always be someone home for them. My wife had other plans.

After the OFP was started (April 2008), I learned many things about my wife from the papers she left behind. My life partner, the woman I was married to, confided in and trusted completely never truly existed in the way she was presented to me. She had kept a divorce file at her work for years. She had been stealing money from the family for longer than I would have ever believed. I found bank receipts and money orders totaling \$19,000.00 from 1999. I have found receipts of personal trips she took with colleagues using family money. One time renting a Hummer in Nashville, TN and taking it on an overnight stay in Alabama. In 2005, Naomi withdrew a \$41,000.00 cashiers check in her name from our joint account at MidMinnesota Credit Union months before I arrived at our new home in Minnesota. I learned she had her own P.O.Box 152 in Brainerd since she has lived there. She has never shown me a payroll receipt from Bisys claiming she did not get a paper copy. The deposits into our joint checking account do not add up to the income shown on our tax returns. She forged my name on the 2007 State and Federal returns. I found a copy of checks she wrote to her brother Niles totaling \$6000.00 from her personal Mid Minnesota CU checking account before I arrived in MN. I found she had 10+ credit cards in her name, when we had always agreed to have only one, which I paid off monthly. I learned of three other separate bank accounts she never told me about. I was overwhelmed with grief and hurt beyond belief, but I knew I had to keep it together and do what was right for the children. I agreed to the OFP with no finding of guilt, once I was told by my attorney the judge said he was going to sign off on the OFP regardless of what my witnesses or I said. He was going to put the children on the stand and I did not want that to happen. Their situation was already extremely difficult for them. I did not want them to be ripped apart by the attorneys. I did not want them to believe for the rest of their lives that they were the reason their parents had gotten a divorce. I wanted them to be back in their home no matter what.

I have learned that even being the primary caregiver for my children for almost eleven years has no bearing in the family court process. I have been torn away from my children on mere allegations, which have never been substantiated or even investigated. They no longer have someone to walk them down to the bus each day or a papa waiting at the end of the driveway for their return home from school. The person who made all of their favorite meals and all natural chocolate chip cookies for them cannot provide food for them unless it comes from a restaurant. Their menu has completely changed. Their schedule is nothing like it was. We no longer get to do special projects together. We are barely allowed to interact with each other and the children are afraid to say anything about their lives to me. We used to talk about everything together. They knew they could ask me anything without consequence and I would tell them the truth. Now they are afraid to talk to me. They have been told I am a dangerous man. The time they spent in the Women's Shelter caused extreme behavior from the children. Kassie talked very fast and was extremely nervous. Kristi was very clingy and unhappy. Katie was withdrawn and unable to concentrate. They were unable to sleep, tormented by the other children and their schoolwork suffered. The way they interact with each other has changed and not for the better. They used to get along very well and now they pick at each other and insult one another. At the time in their lives when their choices and decisions become more permanent and critical they will be left home alone and unsupervised after school and during the summer while the single parent is at work. Even the best children can

be tempted to make bad decisions when the parents are not around. I have been instrumental in making my children who they are. I pray I can continue to be a big part of their life and help them separate right from wrong and do what is right. I know after the divorce is final, the attorneys, judges, guardians, and mediators go away. All that is left is a father, a mother and the children who must live with what has been done to them.

---

It seems to me only logical that there should be a presumption of joint custody in all ways. If a family with two parents breaks up it would be unjust to initially assume either parent is better able to provide a healthy home for the offspring. In Kandiyohi County, there seems to be a knee-jerk assumption by court appointed guardians that mothers are most believable and best able to have custody. I have seen tragic implications in the lives of three young boys.

It must be difficult to at best to rule on family issues, but unequal distribution of a child's time with his or her parents sends an undeniable message to the child from the state that one parent is the better parent. Does the state want to send that message to children weighted by historical prejudice in favor of mothers?

There must be more analytical ways to determine the best interest of children in divorce cases.

Thank you.

Suzanne Napgezek

---

#### **THINKING CLEARLY ABOUT PRESUMPTIVE JOINT PHYSICAL CUSTODY**

by Tom James<sup>1</sup>

Few proposals for family law reform evoke as much emotion as the presumption of joint physical custody. Unfortunately, discussions of this subject frequently tend to devolve into referenda on the relative value of men and women to their children. Women's advocates staunchly defend sex role stereotypes that cast women as natural child-nurturers and men as violent, inept and generally unsuited for the responsibility of child-rearing. Men's advocates respond by pointing to the higher incidence of child abuse and neglect on the part of mothers. Men are accused of being motivated by the desire to control women, of seeking joint custody simply as a means of continuing a pattern of abuse of women. Women are accused of being motivated by the desire for money, viz., higher child support, and power, viz., sole or ultimate decision-making rights in all parenting matters.

Nothing good has ever come from deciding issues on the basis of emotion, stereotypes and self-serving analyses. Moreover, I have to believe that the members of this Study Group are earnestly interested in carrying out the task the legislature has assigned to them, namely, assessing the impact a presumption of joint physical custody would have and whether the legislature should enact such a presumption into law in Minnesota or not. In view of the enormous body of conflicting information that has been published on this subject, that is certainly no enviable task.

The purpose of this submission is to help the Group perform its assigned task, by providing it with critical information and a nonpartisan framework for analyzing the issue. I begin by clarifying the meanings of key terms pertinent to the subject. I then define the current state of Minnesota custody

law relevant to the presumptive joint physical custody issue, with a brief review of how we arrived at this point. Finally, I compare and contrast the current judicial preference for sole custody with the proposed rebuttable presumption of joint physical custody, emphasizing their relative impacts on: (1) domestic violence; (2) exposure of children to parental conflict; (3) litigation; (4) mediation; (5) child support; (6) child development; and (7) constitutional law.

1 Tom James is an attorney-mediator in private practice in Cokato, Minnesota. He received his J.D. degree from Southwestern University School of Law in Los Angeles, California; a Bachelor of Arts degree in Philosophy from the University of California at Berkeley; and a certificate in family mediation from Hamline University Dispute Resolution Institute. He is also a member of Prevent Child Abuse Minnesota. This article ©2008 Tom James.

## **I. Definitions**

### **Custody**

In its broadest sense, custody means possession of a person or thing for safekeeping. In the family law context, it means possession of a person, usually a child, for the purpose of providing care for that person. BLACK'S LAW DICTIONARY 168 (2nd ed. 2001.)

### **Physical vs. legal custody**

In many states, custody means both the physical possession of a child and the right to make decisions concerning the child's care and upbringing. In Minnesota and several other states, however, the law makes a distinction between two kinds of custody: legal and physical. Legal custody means the right to determine the child's upbringing, including education, health care and religious training. Physical custody and residence means the routine daily care and control and the residence of the child. MINN. STAT. §518.003, subd. 3.

### **Sole vs. joint custody**

Custody, whether legal or physical, may be either sole or joint.

Sole legal custody means that only one of two or more parties has the right to determine a child's upbringing with respect to education, health care and religion.

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." Ibid.

Sole physical custody and residence means "the routine daily care and control and the residence of the child." Id.

Joint physical custody "means that the routine daily care and control and the residence of the child is structured between the parties." Id.

In theory, a judge can make an award of any combination of these things to either or both parties<sup>2</sup> to a custody proceeding. The most common combinations, however, are: (1) joint legal custody to both parties and sole physical custody to one party; (2) sole legal custody and sole physical custody to one party; and (3) joint legal custody and joint physical custody to both parties.

2 In some cases, there may be more than two parties to a custody proceeding. For example, in some cases, there may be, in addition to the child's two parents, a grandparent or another individual who is seeking custody of the child. The definitions set out in Section 518.003 do not differ in any material respect in such cases.

### Parenting time

Parenting time is a relatively new term in Minnesota family law. It was adopted by the Minnesota legislature in the year 2000 to take the place of the older "visitation" concept. Laws 2000, c. 444, art. 2, §§ 26 to 31, subds. 1, 1a 2, 3, 6, and 8. Parenting time "means the time a parent spends with a child regardless of the custodial designation regarding the child." MINN. STAT. §518.003, subd. 5. Thus, unlike the old terminology, under which the custodial parent was said to have custody and the noncustodial parent was said to have only visitation rights, under the new statute both the custodial and the noncustodial parent have parenting time. When the child is with the custodial parent, that is the custodial parent's parenting time. When the child is with the noncustodial parent, that is the noncustodial parent's parenting time.

## II. Current Minnesota Law

### THE JOINT LEGAL CUSTODY PRESUMPTION

Current Minnesota law recognizes a legal presumption in favor of joint legal custody. In cases where domestic abuse has occurred between the child's parents, there is a legal presumption against joint legal custody.

The court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child. However, the court shall use a rebuttable presumption that joint legal or physical custody is not in the best interests of the child if domestic abuse, as defined in section 518B.01, has occurred between the parents.

MINN. STAT. §518.17, subd. 2.

If neither party objects to an award of joint custody, and there is no evidence of domestic violence between the parents or of inability to cooperate, then the court must make an award of joint legal custody to the parties. If there is evidence of domestic violence, and the court makes a finding that domestic abuse has occurred between the parties, then the court must make an award of sole legal custody unless persuasive evidence is introduced to show that joint legal custody is in the child's best interests in that particular case. *Ibid.*

If either party objects to an award of joint legal custody, then the court may order it only if it makes written findings concerning the presence or absence of domestic abuse, and also concerning the parties' ability to cooperate. This is true irrespective of whether either party has alleged domestic abuse or not. *Id.* Additionally, if a parent objects to an award of joint custody, then the court must provide a detailed explanation of how an award of joint custody will be in the child's best interest in that particular case. *Id.* In other words, the presumption takes the place of specific findings of facts on whether joint custody is in a child's best interest in a specific case if and only if neither party objects to it. If there is an objection, then the party seeking joint custody has the burden of producing evidence to support a finding that joint legal custody is in the child's best interests in the particular case at hand.

Minnesota's presumptive joint legal custody presumption, then, is of the "hostile parent veto" variety. That is to say, a party who does not want the presumption to be operative in his or her case need only voice an objection ("veto") and the presumption no longer supplants the need for detailed findings of facts.

The power to veto the operation of the presumption, however, must not be confused with the power to veto joint custody. Objecting to joint custody does not divest the court of the power to make an award of joint custody to the parties. A court can still make an award of joint legal custody over a party's objection, provided the necessary fact findings for an award of joint legal custody can be made even without the benefit of the legal presumption. *Zander v. Zander*, 720 N.W. 2d 360 (Minn. App. 2006), review denied.

#### *JOINT PHYSICAL CUSTODY*

Unlike joint legal custody, Minnesota law has no legal presumption in favor of joint physical custody. There is a legal presumption against joint physical custody, however, if domestic violence has occurred.

In *Schallinger v. Schallinger*, 699 N.W.2d 15 (Minn. App. 2005), the Court of Appeals wrote:

There is neither a statutory presumption disfavoring joint physical custody, nor is there a preference against joint physical custody if the district court finds that it is in the best interest of the child and the four joint custody factors support such a determination.

*Ibid.* at 19. The Court of Appeals sometimes paints with too broad a brush. Minnesota's custody statute does, in fact, contain a legal presumption against joint physical custody if domestic abuse has occurred between the parents. See MINN. STAT. §518.17, subd. 2 (stating that "the court shall use a rebuttable presumption that joint legal or physical custody is not in the best interests of the child if domestic abuse, as defined in section 518B.01, has occurred between the parents.") The Court's statement is correct, however, in cases where no domestic abuse has occurred between the parties. In those cases, there is no legal presumption concerning whether joint physical or sole physical custody is in children's best interests.

Although the statute does not articulate an express presumption against joint custody, it does contain language making a court's power to award joint physical custody much more limited than its power to make awards of sole custody. A party seeking an award of sole custody must persuade the court that the thirteen "best interests" factors set out in subdivision 1 of Section 518.17 weigh in favor of an award of custody to that party. A party seeking an award of joint physical custody likewise must prove that the thirteen "best interests" factors set out in subdivision 1 of Section 518.17 weigh in favor of the kind of custody award he or she is seeking.<sup>3</sup> In addition, though, he or she must also allege and prove that:

- (1) the child's parents have the ability to cooperate in the rearing of their children;
- (2) the parents have a dispute resolution method in place and are willing to use it;
- (3) an award of sole custody would be detrimental to the child; and
- (4) no domestic abuse has occurred between the parents.

MINN. STAT. §518.17, subd. 2.

It is because of these latter requirements that it is much more difficult to obtain an award of joint physical custody from a court than an award of sole physical custody -- even when joint physical custody is what both parents earnestly, knowingly and voluntarily desire. Although these four

factors must be “considered” in every case in which either joint legal or joint physical custody is sought, parties seeking joint legal custody have the benefit of a presumption that joint legal custody is in their child’s best interests, thereby negating the need to present evidence in support of factor number (3). That is, they don’t need to find and present evidence to the court that sole legal custody would be harmful to their children. Without the benefit of a presumption that joint physical custody is in children’s best interest, however, parents seeking joint physical custody must persuade the court not only that joint physical custody would be beneficial to their children, but also that an award of sole physical custody to one of them would actually be harmful to their children. Ibid. Consequently, it is not only possible, but it is also quite common, for courts to deny joint physical custody to parents even when they both agree that it is what

The thirteen “best interest” factors set out in subdivision 1 of Section 518.17 are: “(1) the wishes of the child’s parent or parents as to custody; (2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference; (3) the child’s primary caretaker; (4) the intimacy of the relationship between each parent and the child; (5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child’s best interests; (6) the child’s adjustment to home, school, and community; (7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity; (8) the permanence, as a family unit, of the existing or proposed custodial home; (9) the mental and physical health of all individuals involved; except that a disability, as defined in section 363A.03, of a proposed custodian or the child shall not be determinative of the custody of the child, unless the proposed custodial arrangement is not in the best interest of the child; (10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child’s culture and religion or creed, if any; (11) the child’s cultural background; (12) the effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has occurred between the parents or between a parent and another individual, whether or not the individual alleged to have committed domestic abuse is or ever was a family or household member of the parent; and (13) except in cases in which a finding of domestic abuse as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child.” MINN. STAT. §518.17, subd. 1. 5 they want and desire for themselves and their children. “Presumptions” vs. “preferences” In Schallinger, supra, the Minnesota Court of Appeals indicated that there is neither a statutory “presumption” nor “preference” against joint physical custody if the “best interest” factors and the four additional statutory factors described above support the conclusion that joint physical custody is in a child’s best interest in a particular case. This is true, however, only because the preference for sole custody is already built into the statute. It appears in factor number (3). To obtain an award of joint physical custody, the statute requires a party to prove, inter alia, that sole physical custody would actually be harmful to his child in this particular case. By contrast, a party seeking sole physical custody of children is not required to prove that joint physical custody would be harmful to the child. In other words, the statute allows the court to assume, without proof, that sole physical custody normally is beneficial to children, and that joint physical custody normally is not. If a party can present adequate evidence to persuade a court that the assumption is not appropriately applied in a

particular case -- that is, evidence that sole physical custody would actually be harmful to a child in a particular case -- then the court may consider making an award of joint physical custody in that particular case. Otherwise, it may not. In this way, the statute embodies a preference for sole physical custody, without officially rising to the level of an evidentiary presumption affecting the burden of proof.

#### Unmarried parents

The legislature has also expressed a preference for sole custody in the context of unmarried parents. In cases where the parents of a child are not married to each other, the legislature has expressly adopted the maternal preference doctrine, legislatively awarding sole legal and physical custody of children to their mothers in those cases. Minn. Stat. §257.75, subd. 3. This is true even if the parents have signed a valid recognition of parentage having the same force and effect as a judgment of paternity. *In re the Custody of J.J.S.*, 707 N.W. 2d 706 (Minn. App. 2006.) Under Section 257.75, an adjudicated father has no rights of custody at all -- whether joint or sole -- and, indeed, no right at all to have access to or to exercise parenting time with his child, unless and until he files a petition in court and presents sufficient evidence to persuade a judge that allowing the child to have contact with his father will be in the child's best interests. Once the parties are before the court on a properly filed custody motion, and the father has established a prima facie case that allowing the child to have contact with his father would be in the child's best interests, then the court is supposed to apply the same "best interests" analysis that it applies to married parents to decide custody and parenting time issues. *Ibid.*

#### Sex of parent as a decisional factor

As noted, discrimination on the basis of sex is explicitly permitted under Minnesota law when the discrimination is practiced against unmarried fathers, even if paternity has been conclusively established. Once a court case is commenced, however, courts are not supposed to decide custody cases solely on the basis of sex.

MINN. STAT. §518.17, subd. 3 provides:

In determining custody, the court shall consider the best interests of each child and shall not prefer one parent over the other solely on the basis of the sex of the parent.

A common misconception about that statutory proscription is that it prohibits Minnesota courts from deciding custody cases on the basis of the sex of the parent. A careful reading of the provision reveals that it only prohibits the making of decisions solely on the basis of sex. In *Linderman v. Linderman*, 364 N.W. 2d 872 (Minn. App. 1985), the Court of Appeals reviewed a custody order in which the district court expressly stated a preference for awarding custody to mothers, as part of the decisional process that led to the award of custody to the mother in that case. The Court of Appeals refused to reverse and remand for gender-neutral findings. Rather, the Court of Appeals affirmed the trial court's decision, stressing the word "solely" in Section 518.17, subd. 3 and noting that the trial court "had considered several child custody factors" in addition to the sex of the parents.

Under current Minnesota law, then, sex discrimination is allowed prior to the commencement of a custody proceeding with respect to unmarried fathers, and it is allowed against both unmarried and married fathers once a custody proceeding is commenced, provided the court also looks at some of the “best interest” factors set out in subdivision 1 of Section 518.17 when rendering its decision.<sup>4</sup>

### **III. Historical Background**

To understand the current state of Minnesota custody law, it is helpful to understand its historical origins and development.

Marital fault as the original decisional basis

A common misstatement about custody law in Minnesota is that it was originally patriarchal, that is, that Minnesota custody law originally favored fathers. This is certainly not an illogical conclusion one could draw from other known facts about early American law. Early common law treated children as chattel (property.) At the same

<sup>4</sup> In theory, subdivision 3 of Section 518.17 would also permit a court to refuse custody to a woman on the basis of her sex, so long as the court also reviews some of the “best interests” factors in the course of practicing the discrimination. I am not aware of any published cases in which this issue has been addressed, however, probably due to the fact that historically courts have elected to discriminate against fathers rather than mothers in custody cases, as discussed in the next section of this paper. <sup>7</sup> time, it treated a married couple as a single juridical person.<sup>5</sup> In addition, early American law discriminated against women by declaring the husband the manager of the property belonging to that unified juridical “person.” A married woman could not hold a valid title to property in her own name separate from her husband.<sup>6</sup> Since a married couple was treated as a single legal “unit,” with the man being the legally recognized manager (custodian) of the unit’s property, and since children were treated as property, it would seem logical to infer that courts must have awarded custody of children to fathers in every case. Logical as that may seem, it was not, in fact, the way custody law developed in very many American states. It is not the way custody law developed in Minnesota.

The earliest decisional basis for custody cases in Minnesota, as in most other American states, was not patriarchy; it was marital fault.<sup>7</sup>

The same thing cannot be said about England. At one time in England’s history, its common law did grant fathers a superior right to custody of their children. *King v. DeManeville*, 102 ENG. REP. 1054, 1055 (K.B. 1804.)

A few American states followed the early English rule of law in this respect, but the laws of most jurisdictions in the United States have always authorized awards of child custody to mothers as well as fathers. Bishop, J., *COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE* 518, 520 (1852). Rather than decide cases on the basis of sex, early American courts decided child custody cases on the basis of marital fault, with the innocent spouse being the one presumptively entitled to sole custody of the children. *Ibid.* (“The children will be best taken care of and instructed by the innocent party.”) See also *Reiland v. Reiland*, 160 N.W. 2d 30 (Minn. 1968)(recognizing that “it is usual to award custody of children to the innocent spouse,” but holding that a court may apply a



preference for maternal custody in cases involving children of “tender years” even if the mother is the one who is at fault for the breakup of the marriage.)

The “best interests of the child” standard

Though marital fault was the decisional basis for custody in the territorial law of Minnesota during the first part of the nineteenth century, it was very early supplanted by

5 The early common law concept of the juridical unity of husband and wife was abolished in Minnesota in the nineteenth century. Laws 1887, c. 207. See now MINN. STAT. §519.01 (“Women shall retain the same legal existence and legal personality after marriage as before, and every married woman shall receive the same protection of all her rights as a woman which her husband does as a man.”)

6 This rule was abolished in the nineteenth century with the passage of Married Women’s Property Acts. Minnesota’s Married Women’s Property Act is now codified in MINN. STAT. §519.02. It derives from Laws 1869, c. 56, §1.

7 This is evident, as well, from the wording of Minnesota’s first divorce statute, which codified the power of courts, in divorce cases, to determine which of the two parents shall have custody of the children. Comp. Stat. 463 (1855). Had it been the rule that custody of children was routinely granted to fathers because children were regarded in law as their property, then this provision of one of Minnesota’s earliest laws would not have made any sense and there would not have been any reason for its existence. For an early Minnesota decision acknowledging the importance of deciding, on the facts of each case, which of two parents - mother or father - should be awarded custody of children in a divorce, see *True v. True*, 6 Minn. 458 (1861.) 8 consideration of what sort of custody arrangement is in a child’s best interests, irrespective of which parent’s conduct had provided the grounds for the divorce. In a particularly high-profile case in the 1840’s, a woman named Ellen Sears d’Hauteville sought custody of her infant son notwithstanding she was the one who was found to have been at fault for the breakdown of the marriage. Her argument was that children of tender years have a special need for their mothers that fathers cannot fulfill, and that this need should be regarded in law as outweighing any marital misconduct on the mother’s part. Her argument succeeded, and courts began turning their attention to making custody decisions on the basis of a determination of what is in their best interests.<sup>8</sup> By the turn of the century, marital fault had been supplanted by the “best interests” standard as the decisional basis for custody cases. *Jacobs v. Jacobs*, 136 Minn. 190, 161 N.W. 525 (Minn. 1917)(describing as a “universal rule” that “custody of the children may be awarded to the wife...if for their best interest, although the husband has been guilty of no misconduct.”)<sup>9</sup>

The “best interests of the child” standard has been expressed in a variety of ways. In *Jacobs*, the Court put it this way: “the court...will place the interests of the children above the rights of either parent, and will make such provision for their care and custody as will best secure their future welfare.” *Ibid.*, 136 Minn. at 195. See also *State v. Greenwood*, 87 N.W. 489 (Minn. 1901)(“in controversies between parents as to their custody, the welfare of the children will be given controlling consideration by the court”); *State v. Galson*, 156 N.W. 1 (Minn. 1916)(“the first if not the only consideration is the welfare of the child”); *Hervey v. Hervey*, 230 N.W. 479 (Minn.

1930("the main and controlling consideration is the welfare and best interests of the child"); State ex rel. Larson v. Larson, 252 N.W. 329, 332 (Minn. 1934)("the welfare of the child is the prime consideration in determining to whom the custody shall be given"); State ex rel. Price v. Price, 2 N.W. 2d 39 (Minn. 1942)("the best interests of the child is the paramount consideration"); Kaehler v. Kaehler, 18 N.W. 2d 312 (Minn. 1945)("The primary consideration in determining custody is the welfare of the child, and to this welfare the selfish and unselfish desires of the parents must be subordinated, without regard to which parent is to blame in making a divorce necessary"); French v. French, 53 N.W. 2d 215 (Minn. 1952)(same); Fish v. Fish, 159 N.W. 2d 271 (Minn. 1968)("overriding consideration in custody proceedings is the child's welfare.")

#### MATERNAL PREFERENCE AND THE "TENDER YEARS" DOCTRINE

In addition to heralding a shift of focus in custody cases from marital fault to child's best interests, the Sears d'Hauteville case also heralded the beginning of the maternal preference in American custody law; that is, the judicial belief that custody of children ordinarily should be placed in the custody of their mothers rather than their fathers,

8 For a full account of the Sears d'Hauteville case and the judicial shift of focus to what is in children's best interests, see Grossberg, M., A JUDGMENT FOR SOLOMON (1997).

9 "The children are not responsible for the unfortunate differences which have caused the estrangement and separation of the parents and ought not to suffer therefrom. Their rights do not depend upon the degree of culpability of one or the other parent, and their needs must be provided for whether the existing conditions have been brought about by the fault of one or the other or of both parents." Ibid. 9 unless the mother is demonstrated to be utterly unfit to parent. In cases involving the custody of very young children, the maternal preference became known as the "tender years" doctrine.

The "tender years" doctrine was formally enacted into law in England in 1839, by the Talfourd Act of 1839. ACT TO AMEND THE LAW RELATING TO THE CUSTODY OF INFANTS, 2 & 3 VICT., c. 54 (1839). Minnesota courts started applying the maternal preference and "tender years" doctrines shortly thereafter. See, e.g., Flint v. Flint, 63 Minn. 187, 65 NW 272 (1895).

The "tender years" doctrine has been expressed in a variety of ways. Some examples: Volkman v. Volkman, 185 N.W. 964 (Minn. 1921)("Ordinarily children who are so young [6 years old] are best off if left in the care of their mother"); Larson v. Larson, 223 N.W. 789 (Minn. 1929)("Where the mother is a fit person to have the custody of the child and is able to properly care for it, the general rule is that a child of tender years should have the care of the mother"); Menke v. Menke, 6 N.W. 2d 470 (Minn. 1942)("Ordinarily, the mother, if a fit person, is given custody of a child of tender years"); Johnson v. Johnson, 27 N.W. 2d 289 (Minn. 1947)("Almost without exception we have held that...the custody of very young children should be awarded to the mother"); Meinhardt v. Meinhardt, 111 N.W. 2d 782, 784 (Minn. 1961)("[O]ther things being equal, the welfare of children of tender years is best served by their being left in the care of their mother"); Borchert v. Borchert, 154 N.W. 2d 902 (Minn. 1967)("a bad wife does not necessarily mean a bad mother, and...children of tender years are normally better off with the mother than with the father"); Fish v. Fish, 159 N.W. 2d 271 (Minn. 1968)("ordinarily it is better to leave children of tender years with their mother");

Hansen v. Hansen, 169 N.W.2d 12 (Minn. 1969) (“custody of young children should be awarded to the mother unless doing so would be detrimental to their welfare”)

In Eisel v. Eisel, 110 N.W. 2d 881, 884 (Minn. 1961) the Minnesota Supreme Court explained the rationale for the “tender years doctrine” as follows:

The supervision of the daily routine of a child of this age normally is looked after with greater attention and consideration by the mother, whose natural love promotes concern, care, and sacrifice which may never occur to others not so closely bound. To deny a child of this age his mother's love and care may lead to emotional disturbances, permanently inimical to his well-being. Because of this, on many prior occasions we have interfered where the trial court has taken a child of tender years from the mother's custody.

The development of the maternal preference doctrine has been explained as follows:

Courts tended to interpret the best interest standard through a cultural lens that focused on women's and men's [supposed] essential differences. Judges adopted 10 presumptions based on gender stereotypes that reflected the division of labor in the middle-class family. The welfare of children...was linked to the nurturing, stay-at-home mother. Influenced by the same cultural norms, mothers retained custody in the vast majority of divorces.

Woodhouse, B., Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard, 33 FAM. L. Q. 815, 818 (1999)

The maternal preference is sometimes described as being limited to children of “tender years,” but courts have extended it to cases involving older children, too.<sup>10</sup> State ex rel. Price v. Price, 2 N.W. 2d 39 (Minn. 1942) (“girls of whatever age”); Eisel v. Eisel, 110 N.W. 2d 881 (Minn. 1961) (“mother is ordinarily the proper person to have custody of a minor child.”) In Eisel, the child was 8 years old and had been in the father's custody for four years. After a four-year absence, the mother decided she was ready to start parenting, so she petitioned for custody. Although there was no proof that the father was a bad parent, the court nevertheless transferred custody to the mother anyway. It based its decision entirely on the maternal preference doctrine alone, declaring that “children should have as much of the companionship of their mother as possible, there being no satisfactory substitute for her care; that such care is indispensable; that nothing is so helpful to an infant as her love.” Ibid. (citations omitted.) By taking custody away from the father solely on the basis of maternal preference, the Court effectively declared that fathers, by contrast, are dispensable.

See also Rice v. Rice, 231 N.W. 795, 796-97 (Minn. 1930) (“as between the father and the mother the mother should be preferred....[C]ustody of a child should be awarded the mother, even though the home, the comforts, the financial and educational advantages be humble, meager, and poor”); Wallin v. Wallin, 187 N.W. 2d 627 (Minn. 1971) (“a mother is entitled to the custody of her children unless it clearly appears that she is unfit....”)

An adjunct to the maternal preference doctrine and its subset, the “tender years” doctrine, is the presumption that mothers are fit to have the care and custody of their children. Hansen, *supra*; Lindberg v. Lindberg, 282 Minn. 536, 163 N.W. 2d 870. To prevail, therefore, a father seeking custody of his children was required to prove not only that the children's best interests would be

served by placing them in his custody, but also that the mother was completely unfit to be a parent - and for reasons other than being the one at fault for the breakup of the marriage. For example, a father seeking a divorce on the basis of the wife's adultery, cruelty and/or mental illness would be barred from being awarded custody of the children unless, in addition to those things, he was also able to prove: (1) that the mother was completely unfit to be a parent; and (2) that placement of the children in his custody would be in their best interests. Because there

10 In England, the maternal preference was extended to older children by legislative enactment. ACT TO AMEND THE LAW AS TO THE CUSTODY OF INFANTS, 36 & 37 VICT., c. 12 (1873)(extending the maternal preference to children over the age of 7 as well as children under the age of 7.) In America, it was generally the courts, not the legislature, that effected the extension. 11 was no comparable "paternal preference," mothers did not have to prove a father unfit before they could be awarded custody of their children. Since mothers were presumed to be fit parents without necessity for proof, and the "tender years" doctrine established a presumption that the best interests of children is served by being placed in their mother's custody, the only thing a woman needed to do to establish her right to sole custody of a child was appear and identify herself as the child's mother. The only thing she had to do to establish grounds for a modification of custody was appear and state that she is now ready and willing to assume custody, irrespective of how long she was gone, the reasons for her absence, and the attachments the child may have formed with the custodial father in the interim.

By the 1970's, the maternal preference and its subset, the "tender years" doctrine, had become the decisional basis for custody in every American state, including Minnesota.

### **The need for a gender-neutral standard**

With the advent of the women's movement of the 1970's, sex stereotypes of all kinds came under fire. Two important U.S. Supreme Court cases during that decade, *Reed v. Reed*, 404 U.S. 71 (1971) and *Orr v. Orr*, 440 U.S. 268 (1979) held that the Equal Protection Clause of the 14th Amendment prohibits states from discriminating on the basis of sex. Although the issue has never been addressed in Minnesota, the courts of other states, applying the rationale of *Reed v. Reed* and *Orr v. Orr*, have ruled that sex-based custody laws and rules of decision are unconstitutional. See, e.g., *Devine v. Devine*, 398 So. 2d 686 (Ala. 1981); *Pusey v. Pusey*, 728 P. 2d 117 (Utah 1986.)

In Minnesota, the legislature was quicker to act on the problem of sex discrimination in custody decisions than the courts were. In 1969, the Minnesota legislature added a provision to its basic custody law, declaring that custody of children is no longer to be decided solely on the basis of sex. Act of June 6, 1969, ch. 1030, §1, 1969 Minn. Laws 2081 (now codified at Minn. Stat. §518.17, subd. 3.)

Divested of the benefit of a century of judicial precedent founded on the maternal preference as the principal decisional basis in custody cases, courts had to find some other basis for deciding what kind of custody arrangement is in children's best interests.

### *THE "PRIMARY CARETAKER" PRESUMPTION*

Submission For Joint Physical Custody

The judiciary responded to the legislature's disapproval of their maternal preference doctrine by attempting to re-cast the basis of custody decisions in a way that would appear to be gender-neutral. Hence, the primary caretaker presumption.

The primary caretaker presumption holds that a child's best interests are normally served by placing the child in the care of the party who has been the child's primary caretaker. It developed out of the work of Joseph Goldstein, Anna Freud and Albert Solnit. In their 12 influential book, *Beyond the Best Interests of the Child*<sup>11</sup>, they postulated that children need a single, primary attachment figure, and that they will suffer harm if their relationship with this individual is disrupted. In *Pikula v. Pikula*, 374 N.W. 2d 705, 713 (Minn. 1985), the Minnesota Supreme Court expressly adopted the "primary caretaker" presumption as the principal decisional basis for custody decisions in Minnesota.

Neither mother's advocates nor father's advocates were happy with the primary caretaker standard, however. Women's advocates argued that it penalized women who chose to enter the workforce rather than be stay-at-home moms. Father's advocates, meanwhile, complained that it allowed too much room for the operation of bias and prejudice about the extent of men's involvement in parenting, and they also began to question the soundness of the theory underlying the primary caretaker presumption, that children need only a single attachment figure.

Responding to all of these concerns the legislature, in 1989, amended Section 518.17 to expressly prohibit courts from using the primary caretaker factor to the exclusion of all other factors. Act of May 25, 1989, ch. 248 §2, 1989 Minn. Laws 834, 836, codified at Minn. Stat. §518.17 (Supp. 1989). The courts complied with this directive, rendering written decisions containing findings of facts showing that they considered the other "best interest" factors set out in Section 518.17, subd. 1. Notwithstanding their consideration of those other factors, however, they continued to apply a presumption that the best interests of children are normally served by placing them in the sole custody of the parent who has been their primary caretaker. At the next session, the legislature amended the statute yet again to make it absolutely clear to the judiciary that the primary caretaker factor set out in subdivision 1 of Section 518.17 may not be used as a presumption in determining what kind of custody arrangement is in a child's best interest. Act of May 3, 1990, ch. 574, §13, 1990 Minn. Laws 2123, 2132, codified at Minn. Stat. §518.17 (1990).

#### *THE JUDICIAL PREFERENCE FOR SOLE PHYSICAL CUSTODY*

The primary caretaker presumption, founded as it was on the theory that children benefit the most from having a single attachment figure, dovetailed nicely with the traditional hostility that Minnesota courts have had to the concept of joint physical custody. That hostility has been expressed in a variety of ways over the years. It has never expressly been elevated to an evidentiary presumption affecting the burden of proof, but the courts have long expressed a "preference" for determining that awards of sole custody, rather than joint custody, are in children's best interests.

The judicial preference for sole physical custody and against joint physical custody has been expressed in a number of cases. See, e.g., *McDermott v. McDermott*, 255 N.W. 247 (Minn. 1934) ("As a general rule, divided custody of...a child is not for its best interest, and, if the mother is a fit and proper person and able to and does properly care for the child, she should have its custody and care"); *Menke v. Menke*, 6 N.W. 2d 470 (Minn.

11 Goldstein, J., Freud, A. and Solnit, A., BEYOND THE BEST INTEREST OF THE CHILD (1973). 13 (1942) (“Part-time or divided custody of a child is not desirable”); Kaehler v. Kaehler, 18 N.W. 2d 312, 314 (Minn. 1945) (“divided custody of a child of...tender years is not desirable. Regularity in the daily routine of providing the child with food, sleep, and general care, as well as stability in the human factors affecting the child’s emotional life and development, is essential, and it is difficult to attain this regularity and stability where a young child is shunted back and forth between two homes”); Brauer v. Brauer, 384 N.W.2d 595 (Minn. App. 1986) (“Joint physical custody, because of the divisiveness inherent in such a scheme, can rarely be in the best interests of a young child, and it is appropriate only in exceptional cases”); Peterson v. Peterson, 393 N.W. 2d 503 (Minn. App. 1986) (“joint physical custody is not a preferred situation”); Wopata v. Wopata, 498 N.W. 2d 478, 482-83 (Minn. App. 1993) (“Joint physical custody, sometimes referred to as divided custody, is not a preferred arrangement” and will only be allowed in “exceptional cases.”)

#### IV. Impact of Presumptive Joint Physical Custody

To assess the impact of presumptive joint physical custody it is necessary to identify the point of reference from which the impact is measured. Assessments of the impact of joint physical custody on children following a divorce or separation of their parents are of little use if they fail to differentiate between the impact of joint physical custody, on one hand, and the impact of the divorce or the separation itself, on the other hand. Accordingly, the only measurements of any ultimate relevance are not between families with joint physical custody and intact families, but between divorced or separated families with joint physical custody and those with sole physical custody arrangements.

#### Domestic Violence

Under current law, there is a rebuttable presumption against joint custody if domestic violence has occurred between the parties. It appears that the legislature intends to retain this presumption, so that the only issue related to domestic violence for this Group to consider is the impact that a presumption of joint physical custody would have on domestic violence in cases in which no domestic abuse has occurred between the parties.

The only pertinent inquiry regarding domestic violence, then, is whether joint physical custody will likely cause parents who have not been violent toward each other in the past to start becoming violent toward each other after joint custody is ordered.

Traditionally, the principal argument against presumptive joint physical custody has been that men who seek joint custody are generally abusive by nature and are seeking joint custody primarily for the purpose of exerting control over their former partners so they can continue a pattern of abuse against them. If the desire of the Group is to generate 14 recommendations for legislation that can withstand constitutional scrutiny, then sexist generalizations<sup>12</sup> like these should not be given credence.

Is it true, though, that some men (and some women) might use joint physical custody as a means for exerting continuing control over their former partners, just as they use violence as a means for exerting continuing control. Possibly, but again, the relevant comparison is between parents with sole physical custody and those with joint physical custody. To perform that analysis, it is necessary to ask, “Might some men (and some women) use their right to parenting time as a means for exerting continuing control over their former partners?” Both questions can be answered in the affirmative. It is precisely because of the heightened risk of domestic violence against the custodial

parent by the noncustodial parent that visitation exchange centers have been established. It is also why courts frequently order exchanges to occur in a public place -- sometimes even a police station -- if the parties cannot afford or do not have access to a visitation exchange center.

The concern that joint physical custody may be used by domestic abusers as a means of continuing a pattern of abuse against their former partners is ameliorated by the fact that the proposed legislation exempts from its operation those cases in which domestic abuse has occurred between the parties. If domestic abuse has occurred, then the presumption would be that joint physical custody is not in the children's best interests. If domestic abuse has not occurred, then it would be logically impossible for it to "continue" unless one assumes that domestic violence occurs in every relationship and that some victims simply don't have the resources to prove it.

To say that a party should not have to prove that domestic violence has occurred between a couple effectively shifts the burden to the other party to prove that it hasn't occurred. Presumptions in the law are appropriate when an inference is so highly probable from a given fact that it is reasonable and time-saving to assume the truth of the inferred fact unless the other party disproves it. Cleary, et. al., MCCORMICK ON EVIDENCE (3rd ed. 1984). The inference that domestic violence has occurred, however, is not so highly probable from the fact that a couple has entered into a relationship and had children together that it should be inferred in every case without proof. The assumption that domestic violence occurs in every relationship in which children are produced is not supported by either logic or the social science research. Measures of the incidence of domestic violence vary according to the definition of domestic violence employed and the willingness of victims to report. Even when very liberal definitions of domestic abuse are used, under circumstances highly conducive to reporting, though, the results obtained do not support a conclusion that domestic violence occurs in the majority of relationships, much less in every relationship. To the contrary, the responsible research in this field reveals that domestic violence occurs in fewer than one-half of married and dating couples.

It is probably true that some victims of domestic violence do not have the resources to litigate. Unmarried fathers should be able to sympathize with this concern because many

12 For more information about sexism in domestic violence research and policy, see James, T., DOMESTIC VIOLENCE: THE 12 THINGS YOU AREN'T SUPPOSED TO KNOW (2003.) 15 of them frequently lack the resources to prepare, file and present the necessary evidence in court to support a petition for the right to have any contact with their children at all. More to the point, it is not only alleged victims of domestic abuse who do not always have the necessary resources to litigate. Women increasingly are being alleged to be the perpetrators of domestic abuse themselves, and many of them do not have the resources to defend themselves against unfounded claims of abuse. If the intent of the Study Group is to advance the interests of women, then it will need to consider the impact the assumption that domestic violence occurs in all or almost all relationships would have in terms of these women's ability to defend themselves.<sup>13</sup>

The statute says that when domestic violence has occurred between the parents, the presumption in favor of joint physical custody disappears and is replaced by a presumption that an award of sole custody to the victim parent is in the child's best interest. Curiously, there is no presumption, under

current law, about joint legal or physical custody when child abuse has occurred. Section 518.17 only imposes a presumption when domestic violence has occurred between the parents. In addition, although the effect on a child of one parent's violence toward the other is listed as one of the "best interest" factors, the effect on the child of child abuse is not. Section 518.17, subdivision 1a requires courts to consider evidence of false allegations of child abuse, but there is no language in the statute requiring or permitting courts to consider evidence of truthful allegations of child abuse in determining what kind of custody arrangement is in a child's best interest. A strict application of rules of statutory construction, specifically, *expressio unius est exclusio alterius* (whatever is omitted from a statute is understood to be excluded)<sup>14</sup> would mean that truthful evidence of child abuse should not be considered in determining what kind of custody arrangement is in a child's best interest. Of course, a resourceful litigant can usually find a way to sneak evidence of child abuse in indirectly, through one of the other factors (such as the one about the child's interrelationship with a parent or other people.) In making its recommendations concerning presumptive joint physical custody, the Group may wish to consider whether it might be appropriate to extend the existing presumption against joint physical custody in cases in which domestic violence has occurred between the parents, to cases in which domestic child abuse has occurred. If the purpose of Minnesota custody law truly is to advance and protect children's best interests, then that would be the logical thing to do.

The Group possibly might be concerned that creating a presumption in favor of joint physical custody may increase the number of cases in which joint physical custody is awarded, thereby reducing the power of courts to impose restrictions on a noncustodial parent's parenting time for the protection of children from harm. To the extent the harm stems from witnessing domestic violence between the parents, this concern is already addressed in the existing statutory presumption favoring sole custody when domestic abuse has occurred between the parents. In other cases, if the harm rises to the level of

13 It will also need to re-examine the assigned purpose of the Study Group, which is not to explore ways to advance the interests of members of one sex over another, but to study the potential impact of presumptive joint physical custody on children.

14 See generally AM. JUR. 2d, Statutes, Language of Statute, General Presumptions, Implications, and Inferences, Rule That Expression of Particular Matters Implies Exclusion of Others 16 endangerment or impairment of the child's health or emotional development, then grounds for a modification of custody would exist under Minn. Stat. §518.18, so a change to sole custody could be pursued. Moreover, under current law, a court has the same power to impose restrictions on a joint custodian's parenting time as it has to impose restrictions on a noncustodian's parenting time. This was not true prior to 2001, when the relevant statute (MINN. STAT. §518.175) only provided for the imposition of restrictions on a "noncustodial parent's" visitation. That statute, however, has since been rewritten. References to "noncustodial" parent have been deleted from the statute and the statute now authorizes restrictions on any parent's "parenting time." Laws 2000, c. 444, art. 2 §§26 to 31, in subds. 1, 1a, 2, 3, 6 and 8; Laws 2001, c. 51, §8. At the same time, a new term was introduced into Minnesota custody law -- "parenting time." Its meaning is broader than visitation. It "means the time a parent spends with a child regardless of the custodial designation regarding the



child." MINN. STAT. §518.003, subd. 5 (emphasis added.) Under the new laws, then, a court can impose the same kinds of restrictions, conditions and limitations on a joint custodian's parenting time as it can impose on a noncustodial parent. Accordingly, the enactment of presumptive joint physical custody would have no impact on the power of a court to fashion remedies for the protection of children from harm.

There is some reason to believe that joint custody may actually have a tendency to decrease domestic violence rather than intensify it, if it has any impact at all. Researchers have found that joint custody parents experience less overall stress in their lives. Luepnitz, D., A comparison of maternal, paternal and joint custody: Understanding the varieties of post-divorce family life, 9 J. OF DIVORCE 1 (1986). Joint custody generally tends to ease the emotional and financial strain of raising children alone. Folberg, J., JOINT CUSTODY AND SHARED PARENTING (1984). By contrast, sole custody awards have the effect of generating feelings of inadequacy, often with the result that parents begin to feel awkward or ill at ease with their children and resentful of the other parent. Donnelly, D. and Finkelhor, D., Does Equality in Custody Arrangement Improve the Parent-Child Relationship?, 54 J. OF MARRIAGE AND THE FAM. 837, 838 (November, 1992), citing Stewart, J., Schwebel, A. and Fine, M., The impact of custodial arrangement on the adjustment of recently divorced fathers, 9 J. OF DIVORCE 55 (1986). Overall, parents who are awarded joint physical custody experience less emotional loss, depression, grief, role discontinuity and, significantly, anger. Steinman, S., The Experience of Children in a Joint-Custody Arrangement: A Report of a Study, 5 AM. J. ORTHOPSYCHIATRY 403, 404 (1981); Steinman, S., Joint Custody: What we know, what we have yet to learn, and the judicial and legislative implications, 16 U.C. DAVIS L. REV. 739 (1983).<sup>15</sup>

15 See also Guidubaldi, J., MINORITY REPORT AND POLICY RECOMMENDATIONS OF THE UNITED STATES COMMISSION ON CHILD & FAMILY WELFARE 9-10 (July, 1996) ("To expect fathers to continue to provide for the child's well-being [only] through child support payments...neglects the father's capacity to contribute directly to the child's well-being and may promote anger, resentment and a sense of 'taxation without representation.' For many fathers, the orientation is that of a second class citizen placed outside the child's mainstream, useful only as a source of continued financial support.")<sup>17</sup>

Because joint custody treats both parents as equals, rather than as victor and vanquished, joint custodial parents tend to treat each other with more respect and less resentment. Of course, there are always some exceptions to the rule. On the other hand, research has shown that while at least half of parents in sole custody situations actively try to sabotage the other party's relationship with their children, most joint custody parents do not. Wallerstein, J. and Kelly, J., SURVIVING THE BREAKUP 125 (1980).

#### Exposure to Conflict

The enactment of a presumption in favor of joint custody naturally raises two questions: (1) Does joint custody expose children to parental conflict? and (2) Is exposure to parental conflict harmful to children? In addressing these issues, it is important to keep in mind that the relevant comparison is not between joint custodians and intact families, but between joint custodians and sole

custodians. Accordingly, the appropriate inquiry is more precisely framed as: (1) Does joint custody expose children to more parental conflict than sole custody does? and (2) Is exposure to parental conflict more harmful to children whose parents share joint custody than to children in sole custody situations?

When reviewing research studies on this subject, it is also important to keep in mind that in many states, the term custody includes both legal and physical custody. Minnesota law already recognizes a presumption in favor of joint legal custody. MINN. STAT. §518.17, subd. 2. The only issue for the consideration of this Study Group is whether Minnesota law should recognize a presumption in favor of joint physical custody, as well.

Failure to understand these distinctions can lead to erroneous conclusions about the impact of joint physical custody. For example, it is often said that because joint custody requires parents to cooperate in the rearing of their children, more frequent communication between the parents is required than in sole custody situations. The premise here is that parents will need to communicate with each other quite frequently if decisions about the child's upbringing, education, health care, religion and so on, must be made by them together rather than by one parent alone. That point could be relevant in states that do not differentiate between legal and physical custody. Minnesota is not one of those states, though. In Minnesota, it is only those parents who share joint legal custody that will have a need to communicate with each other about the child's upbringing, education, health care and religion. Decision-making responsibility is what legal custody is about; it is not what physical custody is about.<sup>16</sup>

A related notion is that joint physical custody requires parents to communicate more frequently with each other because they will need to work out a schedule for exchanging the child between the two residences. The situation of joint physical custodians is no different here, however, from that of the sole custodian. If, as is frequently the case, a

<sup>16</sup> It has been observed that heightened exposure to parental conflict is actually a better argument against joint legal custody than joint physical custody. The Minnesota legislature, however, has already deemed presumptive joint legal custody to be in children's best interest; and it has not directed the Study Group to re-examine that decision. <sup>18</sup> court awards one party sole physical custody and the other party "reasonable parenting time," then the parties will need to communicate with each other to work out a schedule for exchanging the child between the two residences.

It is sometimes suggested that because Section 518.003 defines joint physical custody as an arrangement in which a child's residence is "structured between" the parties, joint physical custodians are required to work out their own schedule for exchanging the child without court involvement. The argument is then made that the need to work out a schedule between themselves requires frequent communication, thereby exposing children to more parental conflict. The premise of this argument, however, is not true. Minn. Stat. 518.175, subd. 1(c) provides: "Upon request of either party, to the extent practicable an order for parenting time must include a specific schedule for parenting time...." Again, the term "parenting time" means the time a parent spends with a child, regardless of the custodial designation. Accordingly, courts have the same power under Section 518.175 to impose a specific schedule for parenting time in joint physical custody situations as they

do in their sole physical custody orders. Just like sole custodian/visitors who are frequently arguing with each other over what “reasonable parenting time” means, so joint custodians who are having difficulty working out a schedule on their own can ask a court to issue an order for parenting time that includes a specific schedule.

Finally, it is frequently suggested that joint physical custody creates more opportunities for the expression of conflict simply because it requires more frequent contacts between the parents for purposes of exchanging the child between the parties. This notion is based on a misconception about what joint physical custody means. In Minnesota, joint physical custody does not mean an absolutely equal division of time, or even a substantially equal division of time. *Davis v. Davis*, 631 N.W. 2d 822 (Minn. App. 2001.) In *Blonigen v. Blonigen*, 621 NW 2d 276 (2001), the Minnesota Court of Appeals concluded that even an arrangement where a child spends the entire school year with one parent, and alternate weekends and a period of time in the summer with the other parent, can qualify as joint physical custody. Apart from the label, the every-other-weekend-plus-extended-time-in-the-summer arrangement described in *Blonigen* was not different in any material respect from the standard parenting time schedule allotted to noncustodial parents.

Moreover, even in situations where joint custodians are allotted more nearly equal time, the frequency of exchanges does not necessarily have to be any greater than in sole custody situations. A liberal joint physical custody arrangement wherein the parents exchange the child every other week for physical custody would not entail a greater number of exchanges than a sole physical custody arrangement wherein the parents exchange the child every other weekend for parenting time.

From my experience both as an attorney and as a mediator, I have observed more frequent and intense conflict in sole custody situations than between joint custodians. This observation has some support in the social science research, as well. See, e.g., . Bauserman, R., Child adjustment in joint-custody versus sole-custody arrangements: A meta-analytic review, 16 J. OF FAM. PSYCHOLOGY 91, 98 (2002). See also Schepard, A., Taking Children Seriously: Promoting Cooperative Custody After Divorce, 64 TEX. L. 19 REV. 687 (1985); Carbone, J., The Missing Piece of the Custody Puzzle; Creating a New Model of Cooperative Parental Partnership, 39 SANTA CLARA L. REV. 1091 (1999); King, V. and Heard, H., Nonresident father visitation, parental conflict and mother’s satisfaction: What’s best for child well-being? 61 J. OF MARRIAGE AND THE FAM. 385 (1999).

#### Litigation

A fear is sometimes expressed that awards of joint custody will result in increased post-decree litigation, i.e., more frequent returns to court. The premise here is that because joint custodians must make decisions jointly, there will be many more opportunities for disagreement than is the case with respect to sole custodians and visitors, so joint custodians will have more occasion to request judicial resolution of issues than sole custodians and visitors have.

Again, it is important to remember that Minnesota law distinguishes between legal and physical custody. Making decisions about a child’s upbringing is a feature of legal custody, not physical custody. Since sole custodians, joint custodians and visitors all have the same right to ask a court to order a specific parenting time schedule, the enactment of presumptive joint physical custody should have no different impact on post-decree litigation than the current judicial preference for sole physical custody has.

By contrast, the tendency of the “best interest” standard, operating in tandem with a judicial preference for sole custody, to encourage litigation is obvious. The standard encourages litigation because of its ambiguity, both with respect to the meanings of broad terms employed in the

enumerated factors, and with respect to the manner in which courts are expected to balance them, that is, how the various factors are supposed to be weighted relative to one another. No standard for that is given in the statute. The ambiguity encourages litigation and conflict between parents. Emery, R., Changing the Rules for Determining Child Custody in Divorce Cases, 6 CLINICAL PSYCHOL.: SCI. & PRAC. 323-27 (1999); Emery, R., Otto, R. and O'Donohue, W., A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System, 6 PSYCHOL. SCI. PUB. INT. 1, 5-6, 19 (2005); see also Mnookin, R. and Kornhauser, L., Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950, 969-70 (1979). When reviewing reports on the impact of joint custody on litigation, the Group should take into consideration the research addressing the tendency of sole custody to generate litigation. See, e.g., Ilfeld, Ilfeld and Alexander, Does Joint Custody Work? A First Look at Outcome Data of Relitigation, 139 AM. J. PSYCHIATRY 62 (1982); Ferreiro, B.W., Presumption of Joint Custody: A Family Policy Dilemma, 39 FAM. REL. 420, 422 (1990); Shepard A., Taking Children Seriously: Promoting Cooperative Custody After Divorce, 64 TEX. L. REV. 687, 717 (1985).

#### Mediation

While the enactment of presumptive joint physical custody should not have any significant impact on post-decree litigation, it could have a significant impact on 20 mediation. The current judicial preference to award custody to only one of two parents creates powerful incentives for parents to litigate rather than mediate.

In my experience as a mediator, I have yet to meet a parent who, if given a truly meaningful choice, did not want to have custody of his or her children. My experience has been that parents -- fathers, in particular -- who say they are willing to agree to allow the other parent -- usually, the mother -- to have sole custody of their children really only do so because they have at least a basic understanding of the historical place of the maternal preference in Minnesota law and of the judicial resistance to joint physical custody. When I ask a parent if, putting the potential costs and risks of losing in court aside, they would prefer to have some kind of physical custody of their children -- whether sole or joint -- the universal answer is "yes." All too frequently, parents agree to forego sole physical custody simply because they do not believe they have any other viable choice. In this respect, the resulting Agreement, if one is reached, is essentially an adhesion contract. It is not avoidable on that basis, however.<sup>17</sup>

Another observation I can make from my experience as both a mediator and an attorney is that few things unravel nearly completed mediated agreements quite effectively as the judicial preference for sole custody. In more than one case, I have helped two parties who were in agreement on joint custody work out a mediated agreement and sent them each off to have it reviewed by independent counsel of their own choosing, only to have one or both parents (usually, but not always the mother) return with a request to change the arrangement from joint to sole custody. Perhaps to a greater extent in the past than today, attorneys seem to tend to advise mothers not to agree to joint custody because they could get more money (child support), perhaps an advantageous position with respect to occupancy of the homestead, and a greater share of decision-making authority with sole custody. Attorneys advise their clients against joint physical custody for reasons having to do

with the interests of the parent who is their client rather than what is in the best interest of the child.

When the parties return to me after consulting with their attorneys and inform me that they have changed their minds and now want sole custody for themselves, the process is transformed from a cooperative one to an adversarial one. Their attorneys correctly advise them that to “win” sole custody, each will have to establish that he or she is more valuable to the children and that the other parent is more harmful to the children. Parents who had been focused on trying to figure out ways to work together for the benefit of their children shift their focus to trying to figure out ways to denigrate and impugn each other. They report to the court that they have not been able to work out an agreement through mediation. They then schedule their cases for adversarial proceedings involving ever-increasing levels of humiliation, aggravation and frustration. In this process, one or the other party eventually succumbs, one way or another. The champion emerges

17 An adhesion contract is one between two parties with unequal bargaining power that the party with the weaker bargaining power signs because he has no real choice about the terms. It is “voluntary” in the sense that it is not signed under force or duress. Under certain circumstances, however, a court may refuse to enforce such a contract if it involves a sale of goods covered by the Uniform Commercial Code, on the grounds that enforcing such agreements would be unconscionable. 21 with the title “custodial parent” proudly emblazoned on his or her chest, and the vanquished parent must throw himself or herself at the mercy of the court and the other parent for whatever bones of “parenting time” they are generous enough to throw.

In my experience, I have observed that beginning a mediation session from a baseline of equality and shared parenting responsibilities fosters a shift from the parties’ own selfish interests to those of their child. This observation is supported by the research literature suggesting that presumptive joint custody encourages mature behavior and discourages divisive, childish conflict between parents. Potash, Marlin S., Psychological Support for a Rebuttable Presumption of Joint Custody, 4 PROB. L. J. 17 (1982). The sole custody preference has the opposite effect.

Mindful of the fact that equality of parenting privilege will be the cornerstone of court decisions, parents are likely to be far more cooperative in pre-trial mediation, and may avoid litigation all together. If on the other hand, either of the potential litigants forecasts an advantageous position in court, their involvement in meaningful mediation may be severely compromised, and the efforts of even the most skilled mediators may be thwarted.

Guidubaldi, *supra* n. 15, at 8.

The adversarial system is ill-suited for the resolution of custody and parenting time disputes. The enactment of a legislative presumptive in favor of joint physical custody will not prevent all couples from litigating their problems, of course. It would, however, remove a significant incentive to litigate, while at the same time sending a clear message to parents that they are each equally

valuable and important to their children. It is to be expected that not all parents will hear that message. The Group, however, should consider whether this might nevertheless be a more positive message to communicate to parents than what is currently being communicated to them by the judicial preference for sole custody.

The Group should also consider the long-term benefits to be had from legislative enactments that have the effect of encouraging parties to mediate rather than litigate custody and parenting time issues. In one long-term study, researchers demonstrated the positive impact of a few hours of mediation, in comparison to the adversarial process, twelve years after the divorce. Emery, R., Sbarra, D. and Grover, T., *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 30-31 (2005). Parents assigned to mediation have been found to be more likely to settle cases without litigation, to settle more quickly, to be more compliant with making child support payments, to use alternative dispute resolution processes for the resolution of post-decree problems, and to express satisfaction with both the resulting court orders and the process.

*Ibid.* at 26-28. Children of parents who have resolved their cases through mediation had more contact with the nonresidential parent over the long term, with no concomitant increases in interparental conflict. *Id.* at 30-31. 22

#### Child Support

Prior to the adoption of Income Shares child support guidelines in Minnesota in 2006, Minnesota's child support laws provided an extremely strong financial incentive to seek sole physical custody of one's children. To begin with, an award of sole physical custody shielded the party acquiring that label from liability for the payment of child support to the other parent. Payment of child support was the exclusive responsibility of noncustodial parents. The amount of that obligation in any particular case was calculated on the basis of percentage guidelines that took only the noncustodial parent's income into consideration and ignored the need of noncustodial parents to provide for their own support and for the needs of their children during their parenting time with them. In those days, only joint custodians received the benefit of having both parents' incomes, and the amount of time they each spend with the child, taken into consideration. *Hortis v. Hortis*, 367 N.W. 2d 633 (Minn. App. 1985); *Valento v. Valento*, 385 N.W. 2d 860 (Minn. App. 1986). Under the new statutory child support guidelines, both parents' incomes are taken into consideration, as is each parent's need to allocate some portion of his or her income to self-support and to parenting time expenses. MINN. STAT. §§518A.34, 518A.36, 518A.42. Consequently, the new guidelines greatly reduce financial incentives for seeking either sole or joint physical custody.

In assessing the potential impact of presumptive joint physical custody on either the calculation or the enforcement of child support, it is important to read the actual language of the new child support guidelines very carefully. I have observed a tendency among some of my colleagues to view the new guidelines as creating a new definition of joint physical custody under which parents are joint physical custodians if they each have parenting time with the child at least 45.1% of the year. The new guidelines do, in fact, establish a different method for calculating child support in such cases than in cases in which one or the other parent has less parenting time than that. But the new

guidelines neither require nor assume anything about how much parenting time qualifies as joint physical custody. The new guidelines do not alter the definition of joint physical custody at all.<sup>18</sup>

Similarly, some child support officials and attorneys may be under the mistaken impression that if two parties share joint physical custody and one of them stops spending much time with the children, then the other party will not be able to obtain an upward modification of child support to reflect her increased share of parenting time expense without also modifying the custody designation. This could be a significant concern, given that the legal standard for modification of custody is rather onerous, normally requiring proof of endangerment or impairment. MINN. STAT. §518.18. This concern, however, is based on a misunderstanding of Minnesota law.

<sup>18</sup> Both before and after the enactment of the new child support guidelines, the legislature has defined joint physical custody as meaning simply that the child's residence is structured between the parties. No change has been made to that definition. MINN. STAT. §518.003 (2008). <sup>23</sup>

Modification of child support is governed by MINN. STAT. §518A.39. The grounds for modification of support appear in subparagraph (a), which provides, in its entirety, as follows:

The terms of an order respecting maintenance or support may be modified upon a showing of one or more of the following, any of which makes the terms unreasonable and unfair: (1) substantially increased or decreased gross income of an obligor or obligee; (2) substantially increased or decreased need of an obligor or obligee or the child or children that are the subject of these proceedings; (3) receipt of assistance under the AFDC program formerly codified under sections 256.72 to 256.87 or 256B.01 to 256B.40, or chapter 256J or 256K; (4) a change in the cost of living for either party as measured by the Federal Bureau of Labor Statistics; (5) extraordinary medical expenses of the child not provided for under section 518A.41; (6) a change in the availability of appropriate health care coverage or a substantial increase or decrease in health care coverage costs; (7) the addition of work-related or education-related child care expenses of the obligee or a substantial increase or decrease in existing work-related or education-related child care expenses; or (8) upon the emancipation of the child, as provided in subdivision 5.

As can be seen, there is no requirement that a parent provide proof of entitlement to a change of custody before he or she can be granted a modification of child support. As far as increased or decreased parenting time is concerned, subparagraph (2) specifically provides that increased or decreased need of either the obligor or the obligee is grounds for modification of child support. If there is a substantial change in the amount of time a child spends with a parent, it will either increase or decrease the cost of that parent's parenting time. That is to say, it will increase or decrease his or her need.

Subparagraph (b) of Section 518A.39 provides, in pertinent part:

It is presumed that there has been a substantial change in circumstances under paragraph (a) and the terms of a current support order shall be rebuttably presumed to be unreasonable and unfair if: (1) the application of the child support guidelines in section 518A.35, to the current circumstances of the parties results in a calculated court order that is at least 20 percent and at least \$75 per

month higher or lower than the current support order or, if the current support order is less than \$75, it results in a calculated court order that is at least 20 percent per month higher or lower....

As can be seen, there is nothing in the statute requiring a party seeking a modification of child support to prove, in addition to a change of circumstances of the kind described in 24 Section 518A.39, that grounds for modification of custody under Section 518.18 also exist.<sup>19</sup>

Given that Minnesota's new Income Shares child support guidelines have only recently been enacted, there has not been a great deal of time for the development of judicial precedent interpreting them. If there is concern about possible judicial grafting of additional requirements onto the child support modification statute in the future, though, then the Group should consider whether these can be addressed proactively by means of an appropriate amendment to the support modification statute. For example, a provision could be added to Section 518A.39 expressly stating that a party need not establish grounds for modification of custody or parenting time in order to obtain a modification of child support on the basis of increased or decreased need. Another possibility would be to amend Section 518A.39 to add "substantial change in parenting time, whether or not the change is effected pursuant to Section 518.18."

A concern is sometimes expressed that children may be adversely affected by joint physical custody because the amount of child support ordered and paid by one parent to the other in such cases is typically lower than in sole custody situations. Again, in Minnesota, the calculation of the amount of child support is no longer tied to the custody label. What matters now is not the label but the actual amount of time each parent spends with the child. Accordingly, the adoption of presumptive joint physical custody as the preferred label for parenting time arrangements should have no impact on the amount of child support ordered.

Even if the custody label did have an impact on the amount of child support ordered, however, research shows that fathers who have more contact with their children provide more supplementary and in-kind support of their children in addition to their court-ordered child support payments. Pearson, J. and Thoennes, N., *Supporting Children After*

*Divorce: The Influence of Custody on Support Levels and Payments*, 22 FAM. L.Q. 319, 321 (1988); Farbricius, W. and Braver, S., *Non-child Support Expenditures on Children by Nonresidential Divorced Fathers*, 41 FAM. CT. REV. 321 (2003). It has also been observed that 30% of mothers with sole physical custody report a total absence of child support payments over a twelve-month period, while the percentage of mothers reporting complete non-payment of child support in joint physical custody cases was zero (0%.) Pearson, J. and Thoennes, N., *Supporting children after divorce: The influence of custody on support levels and payments*, 22 FAM. L. Q. 319, 329 (Fall, 1988).<sup>20</sup>

<sup>19</sup> There have been cases that have held that a change of custody can be a sufficient reason for a modification of child support, see, e.g., *Buntje v. Buntje*, 511 N.W. 2d 479 (Minn. App. 1994), but I am not aware of any case that has held that modification of custody is a necessary condition for modification of child support. Such a holding would be contrary to the clear language of Section 518A.39.

<sup>20</sup> "On the average, sole custody mothers reported receiving 63 percent of what they were owed. For joint legal/maternal residential custody and joint residential custody parents, the percentages



were 81 and 95 percent, respectively. Phrased somewhat differently, 31 percent of the mothers with sole custody and 20 percent of those with joint legal/maternal residential custody reported receiving no more than half of what they were owed. There were no instances in which fathers with joint residential custody were reported to have met less than half of their support obligation. Thus, when child support was ordered in a case calling for joint residential custody, this obligation was typically met.” Ibid. at 330. 25 [M]others with joint residential custody [are] significantly better off than their counterparts with sole custody....[T]he best payment patterns [are] exhibited by those with joint residential and joint legal arrangements. Patterns for absent fathers with sole maternal custody arrangements [are] the least favorable....

Ibid. at 329, 335.

Accordingly, if at some point in time in the future the legislature decides to once again tie child support to the custody label, then the impact of presumptive joint custody on children’s financial well-being arguably can be expected to be positive, or at least not negative. Child Development Research comparing the impact of joint physical custody arrangements and sole physical custody arrangements on children generally show better outcomes for the joint custody children than for the ones in sole custody situations.

Children in joint custody generally have closer attachments to both parents than children in sole custody arrangements do. See, e.g., Buchanan, C., Maccoby, E. and Dornbusch, S., *ADOLESCENTS AFTER DIVORCE* 264(1996); Luepnitz, D., *A Comparison of Maternal, Paternal, and Joint Custody: Understanding the Varieties of Post-Divorce Family Life*, *J. DIVORCE* (Spring 1986) at 1, 4–5. Joint custody fathers tend to maintain more continuing contact and greater involvement with their children over time than noncustodial fathers. Arditti, J., *Differences Between Fathers with Joint Custody and Noncustodial Fathers*, 623 *AM ORTHOPSYCHIATRIC ASSOC.* 186, 187 (1992); Ferreiro, B.W., *Presumption of Joint Custody: A Family Policy Dilemma*, 39 *FAM. REL.* 420, 421 (1990). Closeness to both parents, in turn, predicts more positive adjustment outcomes for children. Buchanan, Maccoby and Dornbusch, *supra*. “In many ways, joint physical custody is the ideal arrangement for children because they still have two parents very much involved in their lives.” Emery, R., *THE TRUTH ABOUT CHILDREN AND DIVORCE: DEALING WITH THE EMOTIONS SO YOU AND YOUR CHILDREN CAN THRIVE* 176 (2004). This is consistent with research showing that joint custody children experience fewer loyalty conflicts than do sole custody children. Buchanan, Maccoby and Dornbusch, *supra* at 221-226, 258; see also Buchanan, C., Maccoby, E., and Dornbusch, S., *Caught Between Parents: Adolescents’ Experience in Divorced Homes*, 62 *CHILD DEV.* 1008 (1991).

Parents with joint physical custody report less inter-parent conflict than do parents in sole custody situations. Ibid. at 64-65. The significance of this particular research finding, however, must be considered in light of the possibility that the couples studied in them already had a greater willingness to cooperate than sole custody couples do, as reflected 26 in their decision to share joint custody. On the other hand, there does not appear to be any evidence that sharing physical custody necessarily leads to increased conflict between parents. See Kelly, R. and Ward, S., *Allocating Custodial Responsibilities at Divorce: Social Science Research and the American Law Institute’s Approximation Rule*, 40 *FAM. CT. REV.* 350, 361–62 (2002).

A number of research studies have found a positive correlation between joint custody and children's psychological well-being. Some examples: adolescents in joint custody have fared better on tests of emotional, behavioral and academic functioning than did adolescents in the sole custody of a mother or a father. Buchanan, Maccoby and Dornbusch, *supra*. A number of research studies have observed better outcomes for joint custody children in relation to self-esteem, emotional adjustment, behavioral and divorce-specific adjustment. Bauserman, *supra*. Differences between sole and joint custody children in relation to academic achievement are not as significant. *Ibid.* at 97; see also Breivik, K. and Olweus, D., *Adolescents' Adjustment in Four Post-Divorce Family Structures: Single Mother, Stepfather, Joint Physical Custody and Single Father Families*, J. DIVORCE & REMARRIAGE (May 2006) at 99, 118.

It is often hypothesized that joint physical custody of very young children is not likely to be good for them because young children need the security of a primary attachment figure and consistent routines. See, e.g., Emery, *supra* at 178-85. However, what research exists on this issue actually tends to support the opposite conclusion. Infants in intact families typically tend to form attachments to both their mother and their father, at least when they are raised in homes in which both their mother and their father are present and have frequent contact with them. Moreover, even infants have been observed to adjust well to spending regular time in another home, as many do in day-care, including overnights in a nonresidential home. *Ibid.* at 178-80. There is also some research showing that overnight stays in a nonresidential home do not harm children as young as three years of age, and are actually positively associated with better adjustment of children as young as four years of age. Pruett, M., Ebling, R. and Insabella, G., *Critical Aspects of Parenting Plans for Young Children: Interjecting Data into the Debate About Overnights*, 42 FAM. CT. REV. 39, 54-55 (2004). Regular overnights with a second parent helps preserve that parent's commitment to the child and the child's attachment to that parent. Emery, *supra* at 181-82; Kelly and Ward, *supra* at 359.

Research shows that children tend to adjust better to their parents' separation or divorce when joint physical custody is awarded than when an award of sole custody is made to one parent with visitation to the other. See, e.g., Ferreiro, B., *Presumption of joint custody: A family policy dilemma*, 39 FAM. RELATIONS 420 (1990); Glazer, S., *Joint custody: Is it good for the children?* 39 EDITORIAL RES. REP. 58 (1989); Pearson, J. and Thoennes, N., *Custody after divorce: Demographic and attitudinal patterns*, 60 AM. J. OF ORTHOPSYCHIATRY 233 (1990); Wolchik, S., Braver, S. and Sandler, I., *Maternal versus joint custody: Children's postseparation experiences and adjustment*, 14 J. OF CLINICAL CHILD PSYCHOLOGY 5 (1985); Shiller, V., *Loyalty Conflicts and Family Relationships in Latency Age Boys: A Comparison of Joint and Maternal Custody*, 9 J. DIVORCE 17, 37 (1986). It might be feared that switching between households will confuse children, or that children will experience loyalty conflicts in joint custody situations. The research, however, does not bear this out. To the contrary, "One of the most important predictors of child adjustment following divorce appears to be the amount of contact the child has with the out-of-home parents" Donnelly and Finkelhor, *supra* at 838; cf. Tschann, J., Johnston, J., Kline, M. and Wallerstein, J., *Family process and children's functioning during divorce*, 51 J. OF MARRIAGE AND THE FAM. 431 (1989).

Unfortunately, the concept of location-engendered stability (one home, one bed) has been incorrectly overemphasized...without due consideration for the greater significance to the child of the emotional, social and cognitive contributions of both parent-child relationships. Living in one location (geographic stability) ensures only one type of stability. Stability is also created...by the predictable comings and goings,...consistent and appropriate care, affection and acceptance from both parents.

Bauserman, *supra* at 97.

Financial considerations are sometimes deemed relevant to discussions about presumptive joint custody because a child's well-being and development can be affected, at least to some extent, by his or her material comfort. It is sometimes suggested that joint custody entails more expense because it means that two households must be maintained, instead of one.<sup>21</sup> The difficulty with this notion is that it assumes that only one parent needs to have a home and that children will never have overnight stays with the nonresidential parent. No one may care that a noncustodial father is living in a cardboard box, but people should care about it if there is a child sleeping in it with him. The additional cost of maintaining two households instead of one applies in every situation in which parents do not live together; it is not unique to joint physical custody situations. Whether a parent is only a "visitor" parent or a joint custodian, he or she is still going to have to provide a room for the child on those occasions when the child is either in his care or participating in an overnight "visit" at his home.

It is also sometimes suggested that presumptive joint custody will impoverish women because it will incline them to bargain away their property and child support rights in order to "retain" custody.<sup>22</sup> See, e.g., Polikoff, N., *Custody and visitation: their*

21 See, e.g., Melli, M. and Brown, P., *The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence*, 31 HOUS. L. REV. 543, 554 (1994); Hardcastle, G., *Joint Custody: A Family Court Judge's Perspective*, 32 FAM. L. Q. 201, 210, 212 (1998); Ahrons, C., *Joint Custody Arrangements in the Post-Divorce Family*, 6 J. OF DIVORCE 185, 202 (1980); Singer, J. and Reynolds, W., *A Dissent on Joint Custody*, 47 MD. L. REV. 497 (1988); Patterson, *The Added Cost of Shared Lives*, FAM. ADVOC. 10 (Fall, 1982).

22 It is not uncommon for commentators and judges to use the term "retain" in reference to maternal custody and the term "award" in reference to paternal custody, even in the context of an initial custody determination. This betrays a belief that mothers have a superior, natural right to custody of their children, while for fathers it is something more akin to a gift or privilege to be bestowed by a legislator or a judge 28 relationship to establishing and enforcing support, in 2 IMPROVING CHILD SUPPORT PRAC. (1985). Of course, this kind of suggestion proceeds on the sexist notion that sole custody should always be awarded to the mother. Even if the terms were gender-neutralized, however, the argument still wouldn't be any stronger, because parents can be equally inclined to -- and, in fact, often do -- bargain away their property and child support rights in order to secure custody rights even when the courts apply a preference for awarding sole custody.

only upon those who are able to demonstrate their worthiness. This is an example of how the maternal preference, although no longer explicitly applied by name, continues to operate sub silentio.

In addition to ensuring material well-being in the nonresidential parent's home as well as in the residential parent's home, there are a number of other ways that joint physical custody contributes to the financial well-being of children. To begin with, by removing a significant incentive for litigating initial custody determinations (see *infra*), the thousands of dollars that many parents currently spend fighting for sole custody could be applied to other things, such as a college education fund for their children. Next, requiring both parents to share child-care responsibilities can be expected to free up more time for each of them to devote to their careers and professional development, rather than forcing either of them to be relegated to the role of full-time homemaker. Joint physical custody arrangements can also decrease the need for paid child-care, thereby making more money available to both parents to spend directly on their children.

Moreover, as one pair of researchers put it: "we found no evidence that joint custody was harmful to the economic interests of women and children." Pearson and Thoennes, *supra* at 325, 335.

#### CONSTITUTIONAL LAW

In a long line of cases, the United States Supreme Court has held that a parent's right to the custody and care of his or her own children is a fundamental right that cannot be taken from a parent except upon proof that depriving the parent of the right is the least drastic means of achieving a compelling government interest. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder"); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Troxel v. Granville*, 530 U.S. 57 (2000); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Skinner v. Oklahoma*, 316 U.S. 535 (1941) ("rights...to raise one's child have been deemed 'essential'" and "far more precious than property rights" and are "basic civil rights.") See also *Carson v. Elrod*, 411 F. Supp. 645, 649 (E.D. Va. 1975) ("No bond is more precious and none should be more zealously protected by the law as the bond between parent and child"); cf. *Quillon v. Walcott*, 434 U.S. 246, 255 (1978). It has been said that "the interest of a parent in the companionship, care, custody and management of his children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" *Stanley v. Illinois*, *supra*, quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring.) The right of a parent to the care, custody and nurture of his or her children "is of such character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and such right is a fundamental right protected by [the First] Amendment and Amendments 5, 9 and 14." *Doe v. Irwin*, 441 F. Supp. 1247 (D.C. Mich. 1985.)

When a fundamental right is implicated, a legislative classification is presumed unconstitutional and is subjected to strict scrutiny, with the burden on the party seeking to uphold the statute to demonstrate that it is narrowly tailored to achieve a compelling non-discriminatory interest that cannot be achieved by any less drastic means. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *City of*

Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989); Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972); Hunter v. Erickson, 393 U.S. 385, 89 S. Ct. 557, 21 L. Ed. 2d 616 (1969); Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 31 (1977). . If legislation discriminates with respect to a fundamental right, the party seeking to justify the discrimination must show that the legislation is drawn with precision and narrowly tailored to serve a compelling, non-discriminatory objective. If there is another reasonable way to achieve the statutory objective with a lesser burden on fundamental rights, the State must choose the less drastic means. Plyler v. Doe, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); Dunn v. Blumstein, supra.

Minnesota appellate courts have not yet chosen to address the apparent inconsistency of the legal tradition of depriving one or the other of two parents of his or her fundamental rights as a parent, under the rubric of “awarding” one or the other parent sole custody. The Minnesota Court of Appeals had an opportunity to address this issue in *In re the Custody of J.S.S.*, 707 N.W.2d 706 (Minn. App. 2006) a case challenging the constitutionality of a Minnesota statute that gives all unmarried mothers sole legal and physical custody of their children and denies all unmarried fathers the right of access or parenting time with their children unless and until the father initiates a proceeding in court and proves that the child will benefit from having contact with his father. The United States Supreme Court had held, in *Stanley v. Illinois*, supra, that the parental rights of unmarried fathers are just as much fundamental rights as are the parental rights of married parents of either sex, and that statutes purporting to deny them that right without a prior hearing violate the Due Process and Equal Protection Clauses of the 14th Amendment. The U.S. Supreme Court specifically ruled that the fact that a statute provides a procedure by which a parent can regain custody a child is not enough to save a statute that categorically denies parental rights to an entire class of persons prior to any hearing.<sup>23</sup> This point was brought to the attention of the Minnesota Court of Appeals

<sup>23</sup> “[W]e reject any suggestion that we need not consider the propriety of the [statute] because Stanley might be able to regain custody of his children [through the commencement of legal proceedings.] The suggestion is that if Stanley has been treated differently from other parents, the difference is immaterial and not legally cognizable for the purposes of the Fourteenth Amendment. This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone. Cf. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). Surely, in the case before us, if there is delay between the doing and the undoing petitioner suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation.” *Stanley v. Illinois*, supra. 30 31 both in the Appellant’s written brief and during oral arguments. APPELLANT’S BRIEF AND APPENDIX, *In re the Custody of J.S.S.*, Docket No. A04-2477. In its written decision, however, the Court simply chose to ignore *Stanley v. Illinois* and the argument that parents’ rights of custody are fundamental rights, without even mentioning them. Instead, it applied the intermediate level of scrutiny that is applied in Equal Protection cases in which no fundamental right is implicated. In this way, the Court of Appeals was able to conclude that the sex discrimination practiced by the legislature in its enactment of the sole maternal custody statute (MINN. STAT. §257.75) served the important government interest of facilitating the collection of child support. Because the intermediate standard (unlike the standard that applies when a fundamental right is implicated)

does not require a court to consider less drastic means that could have been taken to achieve that goal, the Court of Appeals' thereby avoided having to address the point that joint custodians are not exempt from child support obligations.

It is unfortunate when courts choose to ignore higher court precedents. Disobedience to the rule of law erodes public confidence in the judiciary and, if left unbridled and unchecked, foments distrust and rebellion -- initially by members of the disadvantaged classes, but eventually by all members of society when they come to realize that governments of men and not of laws are as unjust to them as they are to the less fortunate.

### ***Concluding Remark***

Finally, I would like to suggest to the Group that at a time when women and men are both working outside the home in roughly equal numbers, it may be appropriate to consider whether it makes sense any longer to relegate one parent to "stay-at-home care-provider" status and the other to "visitor" status. Perhaps the time is ripe to consider whether our custody laws should be updated to reflect modern realities rather than outmoded sex role stereotypes,<sup>24</sup> and the benefits that may be realized by the enactment of laws that recognize the equal value, dignity and fundamental rights of both parents and children.

24 The notion that fathers are incapable of nurturing children is no longer viable. Both experience and social science research show that they are indeed capable. See, e.g., Gasser, R. and Taylor, C., Role adjustment of single parent fathers with dependent children, 25 FAM. COORDINATOR 397-401 (1976); Gersick, K., Fathers by choice: Divorced men who receive custody of their children, in G. Levinger and O. Moles, eds. DIVORCE AND SEPARATION: CONTENT, CAUSE AND CONSEQUENCES (1979); Hanson, S., Divorced Fathers with Custody, in P. Bronstein and C.P. Cowan, eds., FATHERHOOD TODAY: MEN'S CHANGING ROLE IN THE FAMILY (1988); Chang, P. and Dienard, A., Single-Father Caretakers: Demographic Characteristics and Adjustment Processes, 52 AM. J. OF ORTHOPSYCHIATRY 236 (1982); Orthner, D. and Lewis, K., Single-Father Competence in Child-Rearing, 13 FAM. L. Q. 27; Warshak, R., Father Custody and Child Development: A Review and Analysis of Psychological Research, 4 BEH. SCI. AND THE L 185 (1986).

Addenda to written submission of Tom James, "Thinking Clearly About Presumptive Joint Physical Custody"

To the end of the first full paragraph on page 30, insert footnote 25.5:

It is sometimes suggested that parental custody rights are "fundamental rights"

only when a third party (i.e., someone other than a parent) challenges a parent's

right to custody. See, e.g., Brinig, M., Does Parental Autonomy Require Equal

Custody at Divorce? 65 LA. L. REV. 1345 (2005). This approach reduces the U.S. Supreme Court's classification of parental rights as "fundamental rights" to mere obiter dictum. It is true that legal digests of the law tend to group third-party custody cases together under a subheading separate from inter-parent custody cases, with the result that "fundamental rights" language typically

appears in the former digest category rather than the latter. However useful the distinction may be to legal digest editors, however, it is not especially significant from a constitutional perspective. No court has ever held that the “fundamentalness” of a right depends on the context in which it is asserted. The “compelling government interest,” “necessity” and “less drastic means” analysis will produce different outcomes in different contexts, but that does not change the essential character of the right itself. See generally Hubin, D., Parental Rights and Due Process, 1 J. OF L. AND FAM. STUDIES 123 (1999).

To footnote 23 on page 28, add:

See also Pruett, Kyle D., FATHERNEED (2003) for research showing that infants are “prewired” for attachment to both men and women, and explaining the lifelong benefits of early attachment to both parents. On the other hand, it is not clear that attempts to “force” attachment are beneficial for children. For example, it is doubtful that attempts to coerce attachment between a one-, two- or three-year-old infant and a parent who has been completely absent from the child’s life, by requiring the child to start spending an equal amount of time with each parent, would be successful. This concern, however, relates to the construction of parenting time schedules, not the designation of child custody arrangements as “joint” or “sole.” Again, under Minnesota law, joint physical custody has to do with the essential character of the parenting time, not the amount of it. MINN. STAT. §518.003, *supra*; Blonigen, *supra* (holding that even the classic visitation schedule of every other weekend with additional time in the summer can qualify as a joint physical custody arrangement, because Minnesota’s definition of joint physical custody is not time-dependent.) Accordingly, the enactment of a joint physical custody presumption would not result in requiring less-involved or absent parents to spend more time with their children. The Group should also bear in mind that the legislative proposal is for a rebuttable presumption. Since abandonment demonstrates the most extreme form of child neglect, evidence of a parent’s complete and voluntary absence from a child’s life should be admissible to rebut the presumption, just as evidence of inability or unwillingness to properly care for a child should be admissible to rebut the presumption. In those cases, it may be in a child’s best interest not to permit the parent to have either legal or physical custody. Finally, in thinking about these kinds of concerns, the Group should keep in mind that courts have ample power to fashion orders to protect children from harm while helping them establish or re-establish relationships with an absent parent. See MINN. STAT. §§518.175, 176. The proposal for a rebuttable presumption of joint physical custody would not alter those powers.

---

As a member of the Sovereign People of the state of Minnesota, I appear before you in propria persona, as a sovereign.

The question that the legislature has brought to this study group is to determine how a presumption of joint custody would affect the People of the state.

This question was brought because of the pressure of the People to require that our family law statutes comply with Natural Law, and for the legislature to codify that already contained within Natural Law and our common law.

To those unfamiliar with law, you must first understand Natural Law.

There is a Creator that made "all of this".

There are certain Laws by which this creation operates.

I don't care if you are an atheist.

You still accept and comply with Natural Law.

The mere fact that you do not go into a lake and try to breath water proves that you acknowledge there are natural laws, which we all must abide by.

In our constitutions we the People secured to ourselves those unalienable rights contained within unalienable Natural Law.

There is a series of building blocks.

Natural Law is the foundation

Common law rests upon Natural Law.

Our constitutions upon Natural and common law.

Then the statutes upon the constitution.

You have been asked to evaluate the consequences of the presumption of joint custody.

Natural Law and common law already contain this presumption, as every parent has the right of custody to his or her child.

Our constitutions secure the rights of parents to custody of their children under liberty, and even under the Ninth Amendment of the federal constitution.

The United States Supreme Court has repeatedly declared the rights of parents being a liberty interest secured by our constitution. The stare decisis of *Troxel vs. Granville* clearly affirms what is an unalienable right; the custody of parents over their children is a protected liberty interest.

You have been asked to study what will happen if we comply with our constitutions. What will happen if we obey the law?

Justice.

Justice for those that are parents.

Justice for those that are children.

Justice for those that have been beaten and assaulted.

We have already declared that we secured our right to custody of our children, under the liberty clause and the Ninth Amendment. We already declared to be secure in our persons, and that no one would assault and beat us.

What the government has done is that it has covered for the criminals.

Instead of holding people accountable for their actions, it has created loopholes, programs and study groups.

Submission For Joint Physical Custody



When someone has been assaulted, we the People declare that assault is a violation of our law, and the perpetrator must be brought before a jury.

An assault upon one of us is an assault upon all of us. There is a fallacy that is being sold to us. That fallacy is Domestic Abuse. Even the police dread going on a call to investigate a fight between a man and a woman. A bar room brawl is preferred.

When a married couple with children file for dissolution of that marriage, they enter the courtroom with their liberty rights intact. Accordingly, they each have the 100% right to parent their children.

But the court is told that this marriage, this contract between the parties is to be dissolved. Property and liberty interests are at stake. Because the interests at stake are secured by our constitutions, the action must be an action at law. Meaning only a jury can decide the disputed claims.

What are the consequences if the People, the Legislature and the courts actually abided by our constitutions? What would happen if this study group sent a message back to the Legislature that under the law, the presumption of joint custody already exists?

People would have to grow up and act like Citizens.

They will have to act responsibly or have their rights removed.

If parents choose to dissolve their marriage, and cannot do so as adults, then the judge would be restrained to do only one action, call the jury to adjudicate the liberty and property interests of the parents.

Those creating children will need to act as true parents, acting in the best interest of their children, or a jury will be asked to remove their parental rights.

The police would know we are serious, that we demand are laws be upheld.

There would no longer be domestic abuse.

Assault is assault.

Men found by a jury to have beaten women and or children would be jailed.

It would not matter if the woman fears testifying.

Because the crime of assault is a crime against all of us, neighbors and family members would know that a criminal would be brought to justice, and they would come forward.

There would no longer be government-sponsored programs for battered women, or court ordered psychological exams, anger management classes, custody evaluators and guardian ad litem.

Many of the people in this room would lose their jobs, even those that are members of this study group.

With every right comes a responsibility. People have the right to contract in marriage. When people who seek dissolution of their marriage contract refuse to act responsibly, then jury will decide the liberty and property interests.

People will think twice before entering into a marriage contract. And resolve their disputes as adults, instead of requiring the judges to babysit them in divorce court.

The consequences are upon us for our violations of Natural Law.

Abiding by the law will bring us justice.

Thomas Jefferson said, "When the government fears the People, there is liberty, but when the people fear the government there is tyranny."

My final words to you are that you must comply with Natural Law.

Send a simple message back to the Legislature.

The presumption of joint custody is already contained within our law.

STOP violating the LAW, and uphold the law the People secured in our constitutions.

--Nancy Lazaryan

---

#### PRESENTERS BACKGROUND

Prefers to remain as anonymous as possible to protect children and family from retaliation

Chemical Engineer From WSU

IT Systems Architect GE, State of NY and UofM

Six Sigma Certified

Was published in a ChE scientific journal as an undergrad

In 2000 was recognized as part of project with a plaque in the Smithsonian for making technological advances in computing technology

Non-Custodial parent of 2 children and primary provider for 5 other children, 7 total

Owner of [UPRO.us](http://UPRO.us), A United Media Consultant for Peoples Rights Groups and Parental Rights Groups Collectively Across the Globe and largest online parental rights social network

[myspace.com/helpmedaddi](http://myspace.com/helpmedaddi)

My motivation comes from my children's silenced cries for help and restoring Natural Law

Ex wife almost died because I couldn't get the necessary Medical Care in time before the brain damage set in

Never been convicted of a crime

Still fighting the system and ex to be with my kids without bi-proxy abuse

#### SCIENTIFIC DATA ANALYSIS OF PSYCHOLOGICAL RESEARCH

Real observational data consists of at least 3 data points.

Holding something constant or having a control group to determine correlations

Repeatability

Scientist's interpolate-mean they try to predict values in between the extreme data end points.

Scientists don't extrapolate-meaning when they go beyond the data end points otherwise their analysis isn't given much credibility.

Submission For Joint Physical Custody

Probability and Statistics of the data-standard deviations, confidence levels, propagation of error, averages etc, are they stated in any report. Scientists don't just look up values they verify.

Peer review, just because it's published doesn't mean the rest of the scientific, legal or medical world has to accept or agree with their conclusions.

Real scientists don't hide their data; they show propagation of error, standard deviations and confidence intervals which are the basics for any scientific report.

The State is biggest employer of psychological degrees.

What level of math is required for one of these degrees-Algebra

Psychology is a science created out of philosophy which is foundational to the freedom of individual thought

When psychology is used in legislative or legal sense, the psychological industry has the power to take away the individuality of the individual by grouping citizens into subjective categories of fortunate and less fortunate.

Ethical rules taught from a class at Metropolitan State University by Mark Matthews in Psychology- "Maximizing Welfare...when likely to produce the greatest net welfare for all. Secrecy is taken as guilt," These are major contradictions to our legal system and right to an individual trial before just taking something from someone.

Things that a parent would usually be uplifted and rewarded for, can be used against an innocent or unsuspecting parent. Like serving in the military, being a dedicated worker, being religious, being a business traveler, being accused as being difficult for questioning the process.

The psychological industry in essence acting as an arm of the State and has empowered themselves to become the judge of facts in a community where they are given more credibility than any other emerging science.

Professionals suggest that they should not get involved in custody cases and have an affidavit in my case that suggests it's out of their ethical standards for any psychologist to make custody determinations. Dr. Gilbertson in Blaine.

How much credibility can this industry have in making an accusation over a sovereign entity and should their testimony even be allowed in our court rooms?

## LAW

"We know that the Law is good if it is used as it should be used. It must be remembered, of course, that laws are made, not for good people, but for lawbreakers and criminals... for those who lie and give false testimony or who do anything else contrary to sound doctrine." 1 Timothy 8-10.

## SOVEREIGN AND ARTIFICIAL ENTITIES AND SUBJECT STATUSES

What is a sovereign entity? We the People and our compact for a corrupt free government.

What is an artificial entity? Subjects, slaves, Corporations, Non-Profits, States, Federal Government, except the living constitution

Submission For Joint Physical Custody

Who or what is subjected to an artificial entities rule? It's subjects

Is the Family a sovereign entity? Yes 9<sup>th</sup> Amendment

Is each Parent is a sovereign entity? 1-8 Cont Amendments

All citizens are not sovereigns. True

Are all sovereigns citizens? Yes

What laws are above a sovereign? Natural Law

What is Natural Law? Inherent laws of nature for human existence or survival or laws given to us by our Creator and can't be legislated away. Abolition of slavery and the Civil War were about Natural Law.

Is Natural law protected in our constitution? Natural Law 9<sup>th</sup> Amendment and 1<sup>st</sup> Amendment

Is the State of MN or an agency of the state a sovereign entity? No, if so then that would put the state above the people and so the people would become subject of the state with two masters, the State and Federal government.

Legislature, Executive, Judicial are not sovereign entities, they are artificial entities created by the People

#### JURISDICTION

There are protections for jury trials in 4 places of our Constitutions? 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 14<sup>th</sup> Amendments of the US Constitution and MN Constitution Article 1, section 4

Originally what charges did a sovereign have to be indicted for, before having their life, liberty or property taken from them? Felony

What body was then able to indict? Grand Jury

What did Blakely v. Washington 2004 in the Supreme Court say about who has a right to limit or remove a liberty right? Must be a jury!

Since when did the states have an occupational right to practice law? They don't!

9<sup>th</sup> Amendment Since 1791-Intended for our inalienable rights like marriage, the family protection and parental rights- Griswold v. Connecticut 1965

**14<sup>th</sup> Amendment**-Did this protection bring the sovereign down to the subjects or did it bring the subjects up to the People? State and Federal government are not above the People.

The rights guaranteed by the constitution must not be abridged by legislation.

Does immunity apply when the subject matter is out of the states jurisdiction and a litigant didn't expect the judge to have that kind of authority? No they are not immune. Furthermore, when any officer of the court knowingly operates to deny due process they are not immune.

What will happen if this study group renders an opinion from the Judicial branch for a case not yet heard? Absolute Injustice

Submission For Joint Physical Custody

Who has authority to limit or remove a person's life, liberty or property? JURY

#### BURDEN OF PROOF

What burden of proof is required to limit or remove a liberty interest? Beyond a Reasonable Doubt.

How does *Troxel v Granville* a 2000 US Supreme Court Case define parental rights? "...perhaps one of the oldest fundamental liberty interests recognized by this court."

Burden lies too heavily on the one telling the truth when not beyond a reasonable doubt standard

Can the Psychological science have any degree of certainty for the beyond a reasonable doubt standard and not mistakenly interject corruption and violate due process of law?

The relief time or exhaustive grievance process is in violation of the people's constitutional right to a speedy trial.

Innocent until proven guilty standard also applies

#### DUE PROCESS

Non-Voidable Evolving Law of the Land=Due Process Without Corruption

New Legislative Statutes-The assumption is new statutes are to help our justice system to become more efficient, a more perfect justice and allow for a better way of doing things, while yet still preserving justice and due process without corruption for the people, that's the intent in allowing states to make new laws.

Must still adhere to the Constitutions intent in order for it to be called due process otherwise officials are operating outside their jurisdiction when they collude with others to prevent sovereigns from exercising their constitutional rights.

The Constitutional protections were in place to prevent abuse of power, system wide corruption or special interest rule.

If the law of the land was the same before as after a legislative change then there shouldn't be any complaints for the innocent in receiving reasonable due process.

#### CONSTITUTION

It's a Living Document-Changes over time

Protections for the People

Can't just read the words literally-must understand the intent

***In interpreting the Constitution, "real effect should be given to all the words it uses."***

Myers v. United States, U.S. 52, U.S. 151. **Griswold v. Connecticut**

One of the constitutions intents was to protect the citizens from corruption or mob rule. During the times when due process challenges first started occurring from the states, the Supreme Court talked about corruption as if corruption was in the distant past like the Pre-Declaration of Independence and colony days, and talked about corruption as an unlikely scenario because the right of a jury trial almost guaranteed due process of law without corruption.

Submission For Joint Physical Custody

Married families and parental rights are contained within the 9<sup>th</sup> Amendment, and it further protects the sovereign right of the People when the 14<sup>th</sup> Amendment of equal protection was enacted. Even with a special Amendment, these specially protected classes of citizens have fewer rights than any other group of citizens which is repugnant to the constitution.

14<sup>th</sup> Amendment did not make the people subjects of any governmental rule without due process of law because these rights were still contained within the 9<sup>th</sup> Amendment.

Search and seizures-Must know exactly what is contained in object or information being sought after. No more witch hunts.

What was the purpose of a jury? Another protection for the sovereign to be free from government corruption.

Does the constitution distinguish a difference between life, liberty or property? No they are all treated the same.

The brown eyed people can't all get together and make rules against the blue eyed people.

#### GENERAL ARGUMENT:

State has no right to interfere with an agreement that was entered into by two parties so long as they don't make their own law and the agreement was equitable and fair at the time of the contract. No-Fault, means we don't care what the reasons are but the courts must still recognize the pacts parents may have made in the past.

Parental Rights are Liberty

Constitutional protections apply once the nature of the enforcement becomes criminal

A presumption of JPC is already implied to be consistent with due process

Only a separate independent jury tribunal has power over our liberty interests when transferring from equity to criminal.

An enforcement act knowingly denying a person of their due process rights and a subject objects to the enforcement agent's errors, the enforcement agent will no be longer immune if they continue knowingly trying to deny a subject of their due process rights because that is not the intent of allowing the law of the land to change by legislation.

#### CONCLUSION-What Can Be Done NOW:

Focus on the healing. This means everyone's perspective of due process on the Study Group needs to start changing NOW and understand the distinction between the two courts! Depending on the circumstances, when a public official or legislature operates outside their jurisdiction, they are not necessarily immune!

Let's give the legislature some positive direction for them to start fixing the problems on their own by restoring the public's confidence in making it right.

This will restore the integrity of the State if done right.

Submission For Joint Physical Custody

Let's restore the authority of the People back over government and special interest rule. We as a society **owe it to our future generations**, namely our children to fix this NOW!

Imagine how much integrity could be restored if the healing started now and how much faster the healing will take effect in society!

Report back to the legislature "The judicial branch does not have jurisdiction over the subject matter nor does it have authority to render a legal opinion at this time."

Supplemental Information:

Perham v. J.R.

...the presumption that a parent is acting in the best interests of his child must be a rebuttable one, since certainly not all parents are actuated by the unselfish motive the law presumes.

*Pierce v. Society of Sisters*, U.S. 510

The child is not the mere creature of the State;  
those who nurture him and direct his destiny have  
the right, coupled with the high duty, to recognize  
and prepare him for additional obligations.

See 1 W. Blackstone, Commentaries \*452-453; 2 J. Kent,  
Commentaries on American Law \*203-206; J. Schouler, A  
Treatise on the Law of Domestic Relations 335-353 (3d ed.  
1882); G. Field, The Legal Relations of Infants 63-80 (1888).

It is cardinal with us that the custody, care and  
nurture of the child reside first in the parents,  
whose primary function and freedom include  
preparation for obligations the state can neither  
supply nor hinder.

BLAKELY v. WASHINGTON 2004

"The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours,"" *Blakely v. Washington* 542 U.S. 296 (2004) 111 Wash. App. 851, 47 P.3d 149 citing 4 *Blackstone*, Commentaries, at 343, "rather than a lone employee of the State."

Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. See Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted

Submission For Joint Physical Custody

in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed. 1981) (describing the jury as “secur[ing] to the people at large, their just and rightful controul in the judicial department”); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed. 1850) (“[T]he common people, should have as complete a control ... in every judgment of a court of judicature” as in the legislature); Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson 282, 283 (J. Boyd ed. 1958) (“Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative”); *Jones v. United States*, U.S. 227, 244—248 (1999). *Apprendi* carries out this design by ensuring that the judge’s authority to sentence derives wholly from the jury’s verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene.

First, the Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury’s traditional function of finding the facts essential to lawful imposition of the penalty.

#### HUNT v. RHODES 1828

Mr. Justice WASHINGTON delivered the opinion of the [supreme] Court [of the United States].

Equity may compel parties to perform their AGREEMENTS, when fairly entered into, according to their terms; but it has NO power to make agreements for parties, and then compel them to execute the same. The former is a legitimate branch of its jurisdiction, and in its exercise, is highly beneficial to society. The latter is WITHOUT its authority, and the exercise of it would be not only an USURPATION of power, but would be HIGHLY mischievous in its consequences. HUNT v. RHODES, 26 U.S. 1, 1 Pet. 1, 7 L.Ed. 27 (1828)

#### Hurtado v. California 1884

Upheld that while the procedures at which due process may be administered or modified, the intent of the constitutional ideals and protections unless otherwise modified and ratified remain constant without separating life, liberty or property. The intent of the provisions were to protect the citizen from special interest or subjective guilt and by removing the safeguards that protect the citizen from system wide corruption would be a denial of due process by any standard.

...before the adoption of our Constitution had it been in the power of government to put the subject on trial for his life whenever a justice of the peace, holding his office at the will of the crown, should certify that he had committed a capital crime. That such officers are, in some of the States, elected by the people, does not add to the protection of the citizen, for one of the peculiar benefits of the grand jury system, as it exists in this country and England, is that it is composed, as a general rule, of a body of private persons, ***who do not hold office at the will of the government, or at the***



**will of voters.** In many, if not in all, of the States, civil officers are disqualified to sit on grand juries. In the secrecy of the investigations by grand juries, the weak and helpless -- proscribed, perhaps, because of their race, or pursued by an unreasoning before the adoption of our Constitution had it been in the power of government to put the subject on trial for his life whenever a justice of the peace, holding his office at the will of the crown, should certify that he had committed a capital crime. That such officers are, in some of the States, elected by the people, does not add to the protection of the citizen, for one of the peculiar benefits of the grand jury system, as it exists in this country and England, is that it is composed, as a general rule, of a body of private persons, **who do not hold office at the will of the government, or at the will of voters.** In many, if not in all, of the States, civil officers are disqualified to sit on grand juries. In the secrecy of the investigations by grand juries, the weak and helpless -- proscribed, perhaps, because of their race, or pursued by an unreasoning

...the general principles of public liberty and private right which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the States themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury.

(Prior to Declaration of Independence) forbade that any person should be required to answer for his life except upon indictment or presentment of a grand jury. And we have seen that the people of the original States deemed it of vital importance to incorporate that principle into our Constitution not only by requiring due process of law in all proceedings involving life, liberty, or property, but, by specific and express provision, giving immunity from prosecution, in capital cases, except by that mode of procedure.

To these considerations may be added others of very great significance. When the Fourteenth Amendment was adopted, all the States of the Union, some in terms, all substantially, declared, in their constitutions, that no person shall be deprived of life, liberty, or property, otherwise than "by the judgment of his peers, or the law of the land," or "without due process of law." When that Amendment was adopted, the constitution of each State, with few exceptions, contained, and still contains, a Bill of Rights enumerating the rights of life, liberty and property which cannot be impaired or destroyed by the legislative department.

Any proceeding otherwise authorized by law which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law.

...but the law itself, as a rule of conduct, may be changed at the will or even at the whim of the legislature, unless prevented by constitutional limitations.

It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.

No individual or body of men has a discretionary or arbitrary power to commit any person to prison; no man can be restrained of his liberty, be prevented from removing himself from place to place as he chooses, be compelled to go to a place contrary to his inclination, or be in any way imprisoned or confined unless by virtue of the express laws of the land.

U.S. SUPREME COURT

*BALDWIN v. NEW YORK*, 399 U.S. 66 (1970)

399 U.S. 66

BALDWIN v. NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 188.

Argued December 9, 1969

Decided June 22, 1970

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring in the judgment.

The Constitution guarantees a right of trial by jury in two separate places but in neither does it hint of any difference between "petty" offenses and "serious" offenses. Article III, 2, cl. 3, provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," and Amendment VI provides that "[i]n all criminal prosecutions, the accused shall [399 U.S. 66, 75] enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." Thus the Constitution itself guarantees a jury trial "[i]n all criminal prosecutions" and for "all crimes."

U.S. SUPREME COURT

*BOYD V. UNITED STATES*, 116 U.S. 616 (1886)

Boyd v. United States

Argued December 11, 14, 1886

Decided February 1, 1886

116 U.S. 616

Search and seizure of a man's private paper to be used in evidence for the purpose of convicting him of a crime, recovering a penalty, or of forfeiting his property is totally different from the

Submission For Joint Physical Custody

search and seizure of stolen goods, dutiable articles on which the duties have not been paid, and the like, which rightfully belong to the custody of the law.

The things here forbidden are two -- search and seizure. And not all searches nor all seizures are forbidden, but only those that are unreasonable. Reasonable searches, therefore, may be allowed, and if the thing sought be found, it may be seized.

U.S. SUPREME COURT

GRISWOLD V. CONNECTICUT, 381 U.S. 479 (1965)

GRISWOLD V. CONNECTICUT

No. 496

ARGUED MARCH 29-30, 1965

DECIDED JUNE 7, 1965

381 U.S. 479

...privacy in the marital relation is fundamental and basic -- a personal right "retained by the people" within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States.

---

October 21, 2008

RE: Joint Physical Care

Testimony to Committee on Joint Physical Care

Greetings to the members of the Joint Physical Care Study Group.

Congratulations on the decision to consider legislation on what could perhaps be the greatest civil rights issue of the 21st century; a child's right to be parented by both parents. As a member of the Iowa House Of Representatives for 12 years, children and family issues dominated my tenure.

Being Chairman of the House Human Resources Committee, I had extensive back ground on the problems facing children and family.

Early on in my career, I accepted the conventional public perception that the problems faced by children of divorce were usually because of deadbeat parents, usually the father. However, after several years on the Child Support Recovery Advisory Committee and working on individual constituent cases, it became apparent, even obvious to me that the problems were more systemic than personal.

Submission For Joint Physical Custody

Divorce, visitation, custody, and child support issues are perhaps the nastiest issues a legislature deals with as it cuts across party lines, and affects virtually every family in some way. The conclusion I came to was that it was the "Tender Years Doctrine" followed by the courts throughout the United States that was the biggest single contributor to the problem experienced by children of divorce. The Courts are quite simply 30 years behind the times and demonstrate a sexist assumption towards both men and women.

American families are no longer Ward and June Cleaver. For instance, recently it was reported that Iowa had more children in day care per capital than any other state. Not your typical assumption about the state of Iowa. In Iowa as in Minnesota and the rest of the nation, the fact is that children are JUST AS LIKELY to have a father equally responsible for their daily care as the mom. In most households, and specifically two income households, men share child rearing and other household responsibilities equally.

Current court policy towards assuming that Mom is the nurturer and that as long as Dad shows up every other week with ball and glove in hand is both unrealistic and sexist. The fact is that Moms and Dads are both nurturers; just in different ways and children need BOTH nurturing styles.

The crucial importance of Dad's involvement in their children's lives is well documented and it is especially true of girls. It is crucial to their development and health that young girls learn from her father that you can have a successful relationship with a member of the opposite sex without that relationship being a sexual one. That single lesson is being learned by fewer and fewer girls (and boys) to tragic consequence.

Joint Physical Care as a presumption, or even an emphasized option, requires the court to get up to speed with our culture. The emphasis must be on the children's' right to access and nurturing by BOTH parents. In my work on child support issues, it became very obvious that the more involvement that Dads had with their children, the better the children did and more willing they were to pay their support obligation.

Joint Physical Care takes those positive aspects one step further.

Anecdotally, I believe that JPC has been a real success in Iowa. Many people have contacted me since my retirement and thanked me for my efforts on this issue. Yes, Iowa's court system is still for the most part hostile to the law but those judges with courage enough to consider it, grant it, and enforce it, have also told me that once the attorneys in their judicial district know it is on the table, work out differences in the divorce settlement much better, and there is much more cooperation between the parties in honoring the decree.

And the children win.

Thank you for this opportunity to share my experience, and I will be happy to be of any assistance in the passage of this important, even landmark legislation.

Daniel J. Boddicker

IOWA STATE REPRESENTATIVE

Submission For Joint Physical Custody

---

I am a father who has laid in bed at night and cried himself to sleep. I know, men aren't supposed to have emotions and that is exactly why laws need to be rewritten. All I have in this world is my son. Every waking moment he is not with me is spent in anticipation, of when I get to see him again. I read Parenting Magazine, which is designated to women, but I read it anyway. A reality in law is that fathers aren't nurturers and judges traditionally side on the women's side, with a father choice of every other weekend. Lets face it what are the numbers of Women's Advocates vs. Father Advocates.

You see, I am a father who has been accused of giving my son protective hugs in court. My father gave me hugs, and now the action of giving a hug is under attack if you are a father. Can I be any clearer why their needs to be a change in custody.

Second, Judges need to be held accountable. I was just in magistrate court and a female judge curled her nose at me and sarcastically said, "Mr. Jacobsen, really, I don't have time for you, I have other cases that need to be heard today. I wanted to say excuse me, I have only asked two questions, and as a citizen of these United States I am guaranteed a right to a fair hearing. Did I mention that I was the only male in the court room of 8 people. How do you think the decision came out? Although, I have always made my child support payments on time, laser beams were being shot out of every ones eye's as to say "dead beat DAD. I don't have any rights!

Minnesota can take the lead in providing fair court decisions, and stop leaving fatherless children. As a teacher in Minnesota Correctional Institution, I have seen plenty of fatherless children who don't know proper boundaries.

Sincerely,

Chad Jacobsen

---

The Judicial and Family Court System – The Federal, State and County vs. The Non Custodial Father – Perspective from a Black Custodial Mother

Toya Allen

Black and Latino men are the chief victims of this country's HIJACKED Judicial and Family Court System. Whenever Black and Latino Fathers, Grandfathers, Brothers, Uncles and Sons have spoken out against gender biased child custody designations and partisan child support orders, every attempt is made to marginalize their voice. Significant energy and scrutiny is expended to determine their felony record, incarceration history and mental health. Because this system is becoming increasingly corrupt, White Men across multiple income levels are beginning to experience this same repressive existence. The HIJACKED Judicial and Family Court System has created common ground for fathers of all races and income levels by its repressive and discriminatory practices.

A Black or Latino man's level of education, employment history or position within the community has no relevance when he appears in front of our biased criminal or family court system. Education

Submission For Joint Physical Custody

and employment are only important when Child Support Judges such as Magistrate Maria K. Pastoor are given the opportunity to abuse their discretion by inputting incomes of fathers to maximize child support versus using actual historical data. The only method to overturn a court order where judicial discretion has been abused (i.e. Allen v. Thompson) by a judge, such as Child Support Magistrate Maria K. Pastoor; is to appeal the ruling to the next level of judicial authority – which takes significant time and money, something many of these men do not have.

I was a single mother from the birth of my Black son in November 2004 to the date I married his father in March 2007. You do not need to be an educated Black Woman employed as a manager within Corporate America to know that you can unfairly extract an inflated child support obligation from the father of your child by using the federal Title IV-D within the family court system. The system is so biased; based on precedent you can maneuver the parental visitation schedule to your liking with guaranteed immunity to felony prosecution under MN Statue 609.26. The Federal Title IV-D program, originally intended to provide child support collection tools for single mothers who were on public assistance (i.e. welfare, section VIII housing, etc). It has been updated to allow the participation of six figure salary single mothers, like me, for the one time charge of only \$25.00.

In the case of child custody; parental consultant contractors and custody evaluators employed by the county do a great job creating the image that child custody is not predetermined in advance and that they are going to make a decision that is in the best interest of the child. If you are the single mother and you do not represent a risk to your child by way of violence or drugs; it is a slam dunk that you will be named the SOLE PHYSICAL CUSTODIAN 90% of the time. The process has nothing to do with your level of education, employment, annual income or parental commitment. Equal suitability and qualifications always equals victory for the race and gender that has the power.

In the case of child support; similar to Jim Crow, the family court system doesn't attempt to pretend who it wants to win. All of the power players within the child support family court system are focused on continuing this deadly cycle to remain employed in this dangerous web. The Child Support Magistrates/Judges provide the biased and binding court order muscle, Assistant District Attorneys provide the legal counsel muscle and Child Support Enforcement officials provide child support payment collection muscle (with the power to garnish, suspend drivers license and incarcerate). The level of "Power High" felt by a single mother who has given birth out of wedlock against the father is intoxicating. For only \$25.00 to become a part of Title IV-D, a single mother is provided with a support team that includes the judge, the jury and the executioner.

Although in most of these cases, rape or incest has not occurred, the HIJACKED Judicial and Family Court System has predetermined that the single mother is the victim and the single father is the villain. The county created affidavits and legal position always represent the single mother who by default 90% of the time has been designated as the SOLE PHYSICAL CUSTODIAN of the child – yes, the county and the state are on the same side as the mother versus the father who is responsible for assembling his own legal team (assuming he has the financial resources to do so).

Of our own free will, prior to court involvement, Horace Allen and I signed and notarized two mutually agreed upon contracts that were identical in structure and format; one was for child custody (Exhibit 22) and the other was for child support (Exhibit 23). A child custody hearing was

held in front of Judge Hooten and the child custody contract that signed by Horace Allen and myself was upheld and a court order was issued that mimicked our contract in its entirety.

Unfortunately for Horace Allen and the many non-custodial fathers that have come before him and will come after him, the child support family court system acted in my best interest and declared the mutually agreed upon child support contract as null and void. Listed below are the details from my experience in the child support family court system to defend my accusation that the system has been HIJACKED by people who have a vested interest and maintaining its status quo regardless of its long term effects on the social and public safety fabric of our communities.

Horace Allen resided in Atlanta, GA. I resided in the city of the hearing; Shakopee, MN.

Magistrate Maria K. Pastoor had an axe to grind against Horace Allen given her previous court order was reversed by the State of MN Court of Appeals due to "abuse of discretion".

Assistant D.A. Miriam Wolf indicated to me it would be to our advantage if the motion was heard in front of Magistrate Maria K. Pastoor given her prior history with Horace Allen.

The original mutually agreed upon hearing date was scheduled for 04/28/06. My legal team consisting of Leslie Swenson, child support officer, and Assistant D.A. Miriam Wolf had the hearing date continued to May 19, 2008 without the mutual agreement of Horace Allen.

Horace Allen indicated via fax and priority mail that 04/19/06 would not work (Exhibit 24) along with providing alternative dates in both June and July (Exhibit 24). Rather than choose a date after May 19, 2006 based on Horace Allen's request; out of bad faith, hate and spite Scott County Family Court MOVED the hearing date "up one week" to May 12, 2006.

The 05/12/06 hearing date was important for two reasons; 1) Child Support Magistrate Maria K. Pastoor would be judge, 2) Horace Allen would be unable to submit responsive pleadings within the 14 day legal time limit (a requirement used by Child Support Magistrate Maria K. Pastoor against Nikki Thompson during a remanded hearing on 12/09/05 - Exhibit 26).

As a Pro Se litigant, Horace Allen never requested a hearing date change over ten hearings since 2003. Was he not entitled to at least schedule change or continuance?

Child Support Magistrate Maria K. Pastoor's finding of fact stated that because the telephone and fax numbers were not on the letterhead that Horace Allen used to request alternative hearing dates, Scott County Family Court System had no means by which to communicate with him.

In his Motion for Review, Horace Allen provided telephone and fax confirmation records that showed inbound and outbound telephone and fax communication between himself and the Scott County Family Court System. Horace Allen's contact information was also on file.

My legal team was allowed to submit an affidavit. Horace Allen was prevented from submitting an affidavit within the legal time limit based on the date he was notified of the 05/12/06 hearing date. This legal fact was in Horace Allen's Motion for Review that was rejected by Judge Young.

Child Support Magistrate Maria K. Pastoor ruled the child support contract between Horace Allen and I was invalid. This is in direct contradiction to the child custody agreement with the identical format and structure that was deemed valid six months later by Judge Hooten.

Submission For Joint Physical Custody

Magistrate Maria K. Pastoor was provided with the discretion to avenge her prior court order that was reversed by the Court of Appeals, by ruling the child support contract was invalid and the 05/12/06 hearing date that prevented Horace Allen from submitting an affidavit was legal.

Child Support Magistrate Maria K. Pastoor provided me with a child support order that was almost \$1,000.00 more per month than Horace Allen and I previously agreed to. My child support order was more than child support order of \$1,268.00 for his older son.

Horace Allen submitted a Motion for Review to be given his day court and the ability to submit an affidavit. I submitted a Motion for Review to correct a clerical error that would provide me with several hundred dollars of additional child care reimbursement.

Horace's Motion for Review was denied and my Motion for Review was approved. A trial was held shortly thereafter, the clerical error was corrected and Horace Allen was immediately invoiced for the total child support and child care obligation in question.

To add insult to injury, Child Support Magistrate Maria K. Pastoor complimented me for my performance after the hearing was completed, a gesture she never extended to Horace Allen. Based on the evidence presented, the same biased family court system that allows Black single mothers the ability to utilize federal, state and local governments to apply discriminatory child support and child custody leverage against the father of their children is the brethren of the biased criminal court system that is incarcerating and marginalizing Black men at record rates.

Government Sanctioned Marital Status; Single Motherhood – Why Title IV-D is Destroying Black and Latino Communities and Threatens to Destroy Communities of all Ethnicities –

Toya Allen

---

I am a former single mother who is married to the father of our three year old son. The status of single motherhood is currently being glorified by women in the entertainment industry; "a mom with a baby is the new sheik." In some cases the photos of their children born out of wedlock can fetch millions of dollars in exchange for exclusive publishing rights. Their reality of single motherhood is similar to my previous reality; the challenges associated with finances, education, employment and care giver options are not applicable given their available resources. If you are a single mother that has given birth to a child out of wedlock and you are NOT dependent on welfare, food stamps, section VIII housing or subsidized child care for the survival of you and your child; this article DOES NOT apply to you. Although my annual six figure compensation does not compare to the seven or eight figures for single mothers within the entertainment industry, the truth is that neither of us are or were dependent on public assistance funded by tax payers.

My definition of single motherhood by choice does not apply to women with children as a result of rape, incest, accidental death or war; but to those (including myself) that made the conscious decision to have an unprotected sexual relationship without being married, you have to become accountable for 1) your life, 2) your child's life and 3) their relationship with their father. Despite my son's level of exceptional intelligence, handsome features and fearless approach to life, the statistics clearly show that without the participation of his father in his life he would have had to

Submission For Joint Physical Custody



endure against insurmountable odds in the areas of; life expectancy, college graduation, professional employment, gang participation, drugs and eventual incarceration within the \$50 Billion prison industrial complex. Single mothers and their young Black and Latino men must toil against these alarming facts everyday. The horrifying statistics in each of these areas (40% high school graduation rate, 30% college graduation rate, 50% real unemployment rate and a 44% incarceration rate) make every single mother unconsciously say to themselves everyday "is today going to be my son's turn to become another statistic."

Communities of color have to come to the realization that despite the fact that Bill Bennett chose inappropriate words to describe the societal outcomes from single motherhood, at the end of the day his words were foundationally accurate. The statistics involving Black and Latino men raised by single mothers is not only earth shattering, but it continues to increase despite improved sexual education and contraception choices that only require monthly or quarterly intervention for 99% prevention of an unplanned pregnancy. The time for action is now and the time for talking was yesterday. The phrase "Single Mother" is referred to by the media, government officials and advocates of communities of color as if it were the result of some type of "airborne virus" such as the FLU. The reality is that the same manner in which unmarried women become a single mothers is the same manner in which people contract HIV; "unprotected sex". Anybody can write about this subject of single motherhood, but for the originator of the text to carry any real influence within communities of color, they must represent the population, the problem and the solution. Similar to HIV, single motherhood is a lifestyle choice that unfortunately people of color have incorrectly made 66% of the time. Unlike HIV, it is required that the man choose not to wear a condom and the woman not demand that one is required to enter her temple.

The decision making process for sexual interaction between two unmarried people consists of three tiers; 1) no birth control is used based on the age, physical and financial health of the participants to support the outcome, 2) no condom is used as a form of birth control based on the age, physical and financial health of the participants to support the outcome or 3) a condom is successfully used as a form of birth control regardless of the variables in the equation. People should be held accountable for their consent to options 1 or 2 and their decision to do so should not be supported by governmental public policy or funded by tax payer dollars. Nation building needs to start at home.

Government programs, such as Title IV-D, should be dissolved immediately because they provide guaranteed employment for public sector executives and their employees in support of single mothers who refuse to become accountable for the consequences of having unprotected sex as unmarried women. How is it possible to assign liability to two uninsured motorists if you can not properly discern who is at fault? Is it not logical to conclude that both parties are at fault and both parties should be held financially liable for their actions? Is it also not logical to conclude that the government does not have the right to determine fault or financial liability in this matter?

Single mothers who are mentally stable, do not abuse or sell drugs are designated as the sole physical custodian of their children 90% of the time. After the single mother is designated as the sole physical custodian, she is then recognized as the victim and not at fault for the circumstances relative to her choices regarding sexual interactions or partners. When paternity has been established, the father of the child (the other uninsured motorist) is then recognized as the villain.

The single mother is provided with the resources of the county, the state and the federal government against the villain, the child's father, in preparation of a child support hearing. A hearing is held in front of a Child Support Magistrate to determine the monthly child support obligation of the father based on his income or some cases inputted income (what the court says he is capable of making) and not the actual cost of raising the child. How do we define this process as equal accountability?

As a prior single mother who has first hand experience with the biased processes within the Scott County Family Court System; the manner in which these processes are completed would put the Jim Crow and Apartheid discriminatory economic and political systems to shame. The child custody and child support processes ignores the historical fact that boys and girls raised without fathers, regardless of their race or ethnicity, are destined for a lifetime of being dependent on the system (i.e. welfare, mental health, housing, education, employment services, incarceration, etc).

The solution is very simple when children are born out of wedlock; joint physical and legal child custody should become a presumption at birth and child support should be eliminated as a weapon or punishment to be used against either parent. In regards to child custody, a parental plan should be created to 1) detail parental time for the mother and father, 2) the development process for the child and to 3) recognize and enforce the parental laws that govern the municipality. In regards to child support, when the child is in the care of the mother they are responsible for the development, feeding and clothing of the child and when the child is in the care of the father then they are responsible for the development, feeding and clothing of the child. The more parental time that is requested and granted by either parent, the more burden they must accept in the areas of development, feeding and clothing.

If the father chooses to not be involved in his child's life, it is the mother who must accept responsibility for 1) choosing an unacceptable sexual partner, 2) not to utilize birth control on a daily, monthly or quarterly basis and 3) to not protect herself against HIV by demanding that a condom be used before allowing a sexual partner to enter her temple. If this level of social and financial accountability is not required, the vicious social, public safety and incarceration cycle is fertilized and a permanent underclass is perpetuated. The government must discontinue its public policy of making unmarried women today's small winner and tomorrow's BIG LOSER.

---

**ATTACHMENT TO PRESENT ORAL TESTIMONY  
TO JOINT PHYSICAL CUSTODY STUDY GROUP  
LISTENING SESSION**

1. Should there be a change in Minnesota's custody laws to favor a presumption of joint physical custody?

Yes. As an African American male, I think there should be a change in Minnesota's custody laws to favor a presumption of joint physical custody. If it is your responsibility as a parent to help pay for you child's well being then you should be able to play a more direct role as a parent/ role model.

2. What are the pros and cons of the state adopting a presumption of joint physical custody in law?

It isn't fair to the child to raise them with only one parent making most or all of the decisions of how the child lives when you have two willing parents wanting to have equal or close to equal time in their life. I think rights should be taken away for doing wrong and not because you are the father. This is basically stating that you are not a fit parent because you're the father. This is a huge issue in the African American community because a lot of these kids end up in jail because their fathers are missing by fault of the system. Guilty by default so now you have to be treated as if you have committed a crime. For example, if you are in jail, you can't see your children as often as you would like, if at all and chances are, you have to pay restitution towards someone or something that you have done wrong to. As a father, in system such as Minnesota's, you can't see your child as often as you would like and you have to give your money to someone else to control what they want to spend on your child instead of being able to make those choices together. Financially we are taxed on those funds that we give; chances are we can't claim the child on taxes and the other parent doesn't claim the money that is given to them. This may force the father in a lower tax bracket and improving the other parents; while you struggle.

A. CONS:

- Confusion for the child
- More fighting between parents
- Bad grades in school
- The child not getting to know the other parent
- Child being forced to grow up faster

10/20/2008 10:15AM

- The child not wanting to see the non-custodial parent because they are not used to their rules or them as a person since they don't see them often.
- Custodial parent controlling when they think you should spend time with your child.
- The child gets to know the custodial parents family more than the non-custodial.
- Waiting a couple of weeks to find out your child has been hurt and gone to the hospital for any illness.

**B. PROS: (As a custodial parent you get to.....more often. :)**

- Spend more time with you child
- Watch them grow into mature, responsible adults
- Instill you views and rules in them
- Go to doctors visits
- Show them who you are to where they are comfortable spending time with you.
- Help them with their school work
- Love them and know them
- Do more things because most of your money isn't being sent to the custodial parent
- Take them on more vacations
- Change their diapers
- Watch them learn how to ride a bike
- Not worry about if the other parent is keeping you from any events such as school games, plays, birthday parties or baptism
- Mediation can be used to handle differences instead of spending thousands of dollars through court for a simple solution.

10/20/2008 10:15AM

---

# **Written Submissions to Joint Physical Custody Study Group**

## **Hard Copy Version with Names of Submitters**

**(Updated -w- names on January 6, 2009)**

**Compiled by Study Group Staff**

Submission Neither For or Against Joint Physical Custody

This page is intentionally left blank.

**Written Submissions THAT  
ARE NEITHER PRO NOR CON  
OR THAT OFFER A  
DIFFERENT PERSPECTIVE  
on a Presumption of Joint  
Physical Custody**

Compiled by Study Group Staff

Submission Neither For or Against Joint Physical Custody

This page is intentionally left blank.



Dear Study Group Members:

As a psychologist who has done therapy with children and adults and conducted custody evaluations for over 25 years and now often serves as a Parenting Consultant or Parenting Time Expediter, I have come to believe that if there are to be presumptions at all regarding "custody" of children following a dissolution of a marriage or the break-up of a relationship between the parents of minor children, there should be a presumption for joint physical custody just as there is a presumption for joint legal custody. What would make more sense to me, however, if the goal is to serve the best interests of the children and be fair to the adults involved, would be to eliminate the concept of "custody" and provide parents with an order (preferably an agreement) that specifies a parenting time schedule, a plan for how they are to make decisions regarding their child or children, and a budget that covers all of the child-related expenses.

I was fortunate to be able to attend the ABA/APA joint conference in Chicago last spring, *Reconceptualizing Child Custody: Past, Present, and Future - Lawyers and Psychologists Working Together*. The major take-home message from that conference seemed to be that empirical findings point to the benefit for children of divorce to have as much quality time as possible with both of their parents (assuming that neither adult is abusive, seriously mentally ill, or chemically dependent). I would note that this is consistent with my understanding of the professional literature. Our research seems clear that following a dissolution or parental break-up, it is best for children to have access to the resources that both their mother and father can provide. While this does not mean that so called "50/50" schedules are always best, it does mean that all kinds of individual differences (involving each adult and each child) need to be considered and that there is no single standard that should be imposed on all families. Children (like other humans) require consistency and predictability in their lives in order to feel secure and to develop to the best of their potential in terms of their competencies, their relationships, and their sense of self. But this does not translate for most youngsters to the need to wake up on weekdays from early September through early June in only one bed when they have two loving and capable parents who live in homes that are not far from their school.

From my perspective, "custodial" arrangements that foster children's ability to receive the best that each of their parents has to offer and to approximate what they would have had had the adults remained together serve their interests. The "cons" of such an approach include the expense to our system (in terms of time and money) arising from cases wherein mother and father don't agree. I see no logical reason, however, as to why having a presumption of joint and legal custody would create more problems than the current statute does for families who are poor or come from specific cultural backgrounds or whose lives have been marked by domestic abuse. If our goal is to do the best we can as a community for the children involved, such factors should be considered regardless of some legal starting point. A central problem, I know, is to how to separate the financial consequences related to having two child-friendly households from other concerns. Far too often under present law, I have seen one parent (typically, but not always, the mother) argue for restricting the other parent's time with their children out of economic need or for one of the adults (typically, but not always, the father) demand equal time with the children so as to limit his child support obligation.

Submission Neither For or Against Joint Physical Custody

Thank you for considering my perspective. I regret that I did not know about your group's interest in input and such limited time to respond. Good luck!

Susan Phipps-Yonas, Ph.D., L.P.

Ph.D., L.P.

---

In response to your questions:

1. Minnesota should completely discard the term "physical custody" and only look at how parenting time will be structured.
2. The meaning of the term "physical custody" is beyond me, at this point, in light of the 2007 changes to the child support laws. Significant modification of parenting time requires the same standard as a motion to modify either sole or joint physical custody, making the label attached to physical custody even more meaningless. To move a child's residence to another state, one must comply with specific statutory requirements. All that placing a label on physical custody seems to accomplish is an increase in animosity between parents and greater expense in litigation.

In the end, what is important to both children and their parents is the amount of time they get to spend together and, ideally, a cooperative and supportive relationship between the parents.

Ron Cayko, Attorney

Fuller, Wallner, Cayko, and Pederson

---

I do not think there should be any presumptions. Let the facts determine what is best for the children and the parties.

James Schlichting, Attorney, PLLC

---

My main concerns regarding the presumption for joint physical custody are the following:

How do two people who cannot communicate regarding the time of day share joint physical custody of children? There is a real difference between making the "big" decisions (school, religion, health) vs. the "day to day" decisions. What burden of proof needs to be met to overcome the presumption?

If there is a presumption for joint physical custody, how do you differentiate between parents in an abusive relationship and those that are not? Doesn't the presumption have to apply to everyone? If not (and the legislation does differentiate in the case of domestic abuse), are you asking the Court to have an evidentiary hearing on that issue first and then a second evidentiary hearing once there is a decision whether the presumption applies? Are you going to get more people making false allegations of domestic abuse?

Submission Neither For or Against Joint Physical Custody

And if all of this attached to child support, it makes it all the more difficult for the children, the parents and the justice system. The current child support statute cannot necessarily be fairly applied (poorly written legislation) so how does the court (be it magistrate or judge), apply it when there is a presumption of joint physical custody? Do you assume 50/50 time?

These are the issues right off the top of my head. I'm sure that others who have thought for a longer period of time on this issue have more.

Heather Sweetland  
(Judge-Duluth)

---

I think that any time we create a presumption, we change parents' expectations. In the past, mothers fought for custody because they were afraid others would see them as "bad" mothers if they didn't have custody. With a presumption of joint physical custody, fathers may fight for joint physical for fear having less than that will label them as "bad" fathers. We might well see an increase in litigation totally unrelated to the best interests of children.

A presumption is an artificial construct that has little to do with real life. Today, we start by looking at the way a family operated before the divorce to find the historical parenting arrangement. If that arrangement has worked well, or, if the family has developed a new plan that is working, it makes no sense to superimpose a presumptive arrangement.

Please think long and hard before changing to a presumption.

Mary Davidson  
Retired District Court Judge  
Hennepin County

---

I believe we are getting hung up in the labels. Neither parent should be given a label they can dangle over the other parent's head. Each parent has a moral obligation, and a right, to parent their child. All we should do, assuming the parties are unable to do so, is to structure the time periods during which each parent is required to supervise the child/children.

--Judge Christian Casey

---

My recommendation is actually quite simple. It is to eliminate the physical custody label all together. Since the legislature has already reduced its importance with the child support and move away changes, it really has become less significant. If the parties are required to include a parenting time schedule, the label becomes unnecessary. Worrying about the physical custody label causes a great deal of conflict both in terms of the parties being able to disengage & the Court time involved.

--Angie Banga

Submission Neither For or Against Joint Physical Custody

---

Area I wish to address at the listening session:

How joint custody can work wonderfully if you have responsible parents. If you have an irresponsible parent it does not matter what you have, they can make life a living hell. I have no concern with a presumption of joint custody as the standard for divorcing parents. There is no reason not to do it. In cases involving other issues such as domestic abuse etc, joint may not be appropriate. For most people it is.

I had joint custody of my now adult children. I was divorced in 1988 due to restless penis syndrome. Other than Child support we have never been to court regarding our children. In 1996, I separated from my second husband due to alcoholism and drinking with co-worker who just happened to be social workers where I worked. (Yes I can prove this) My step son dies in his care. He was 5 year old. Two months later, my ex- provided alcohol to minors exposed himself while videotaping his party. I have a copy of the tape.

He was given joint legal custody. We have been in court for 12 years. We will be in court for the next 6.....if I live that long. He now has custody of our 15 year old daughter as he is more fun than I am.

Providing Joint custody is not the issue. The issue at hand is when things continue for over a year in the court system and a GAL is appointed, they are qualified, competent and really look at all the facts. 40 hours of training is not enough. Judges need to be better educated on child development and teen behavior. Many judges have children and "get it". I of course have the only judge who has never been married and has no children. (We don't think he is gay)

---

To Joint custody study group,

I believe there should be a change in Minnesota custody laws to favor a presumption of joint physical custody, based on an individual evaluation of the parents and children by a trained professional. I think a child benefits from the active involvement of both parents.

A potential problem in adopting a presumption of joint custody may be the inability of one or both parents to carry out their parental responsibility, in which case custody should be denied.

Mediator

"What are the Implications of Presumptive Joint Physical Custody for Families in Minnesota?"

The question of a "**presumptive**" joint physical for families is problematic. As a group of mediators and therapists, we definitely support a **change of policy regarding physical custody**. To that end, we oppose Presumptive Joint Physical Custody for Families for the following reasons:

The legal adversarial process does not serve the best interests of children and families, because it sets parents up to compete to win advantage in regards to the future parenting of their children. Parents ending a marriage each have equal "rights" to their children. However, the issue becomes a

Submission Neither For or Against Joint Physical Custody

contest when couched as “rights” rather than responsibilities and obligations, which are the hallmarks of parenting.

The label “custody” is archaic referring to “immediate charge and control (as over a ward or a suspect) exercised by a person or an authority.”<sup>1</sup> It does not address the complex needs of children and the importance of their relationship to each parent after a divorce.

The definition of Physical Custody is inadequate for the scope of parenting. What are the present implications of **Joint Physical Custody**? Does this mean half time parenting, or shared parenting? What are its limitations right now? In our opinion the label is misunderstood by parents, and professionals, and is not in the best interests of children when it causes more confusion than answers.

From the children’s perspective, the **Presumption of Joint Physical Custody** may further expose them to parental conflict and/or significant parenting by an impaired parent.

**Our Recommendation** is for a Rebuttable Presumption that every parent is capable of participating in separate parenting and has the right to be significantly involved in the day-to-day lives his or her child(ren). When there is an allegation that a parent is not capable, the issue of separate parenting of the children will be addressed through the professional services of a licensed family therapy practitioner to perform a Family Assessment and determine the capability of each parent to separately parent the children. Those parents who are willing to follow the recommendations of the assessment may have prescribed parenting responsibilities until they have successfully met the recommendations of the assessment.

Whether never married or divorced, the vast majority of parents are capable of separate parenting. This presumption acknowledges and respects the existence of a spectrum of different parenting styles, abilities, and preferences without prejudice.

A capable parent:

is able to provide appropriate food, clothing and shelter;

is current on financial obligations relating to the children;

consistently respects the other parent and follows the parenting plan;

communicates on a regular basis with the other parent in an effective, constructive and non-threatening manner;

supports and encourages the relationship between the child(ren) and the other parent;

is able to reach parenting agreements independently or with the assistance of a professional third party (such as a therapist).

An incapable parent<sup>2</sup>:

---

<sup>1</sup> <http://www.merriam-webster.com/dictionary/custody>

<sup>2</sup> Mandatory professional Family Assessments (not custody evaluation) for all family members impacted by an accusation of either parent being incapable to parent.

Submission Neither For or Against Joint Physical Custody

is actively chemically dependent;  
suffers from a significant and pervasive mental illness;  
is unable to control rage and acts with physical force against the other parent and/or the child(ren)  
(physically abusive behaviors);  
shows chronic disrespect for the other parent and/or the parenting plan (emotionally and  
psychologically abusive behaviors);  
refuses to communicate directly with the other parent;  
refuses specified treatment after assessment.

The existence of any one or a combination of the above “incapable parent” elements may require  
the completion of a family assessment.

Proposed New Statutory Requirements:

Mandatory Divorce and Parenting Education.

Abolish “Pocket Filing” of all family law matters to remedy the following:

drawn out process

delays commencement of court supervision and of time limits

creates stress between parents by placing them in an adversarial posture through service of  
Summons and Petition

delays receipt of information about alternative, less adversarial decision-making processes

allows attorneys to engage in unsupervised management of the case

majority of States require immediate filing after service of process

Divorce Education becomes mandatory for everyone getting a divorce in Minnesota, whether or not  
they have children, and whether or not there is conflict about parenting

Court filing NOT allowed without verification of completion of the **divorce and** parenting  
education.

Mandatory Parenting Plans which include but are not limited to:

a definition of parental decision making authority;

parents agreements about their future relationship;

a schedule of parenting time;

a holiday schedule;

communication protocols;

agreement about resolving parental conflicts;

plan to address future move of a parent;

Submission Neither For or Against Joint Physical Custody

a statement of child support obligations; and

a statement about how shared expenses will be managed (i.e. uninsured medical/dental, daycare, extra-curricular activities, etc.).

We would recommend that the State Court Administrator convene an open forum for discussion of this issue to include invitations to all professionals working primarily with divorcing couples and families.

Erickson Mediation Institute

---

I'm a family law attorney for 30 years.

The joint physical custody presumption is another in a long line of proposals which are meant to engage fathers: the joint legal custody presumption was supposed to do the same thing, the parenting plan legislation likewise. These are unfortunately panaceas.

Here are some potential reforms which could actually improve our laws:

# A domestic abuse process that gives the court more options. Right now the court only has a hammer. Sometimes a hammer is needed, but often situations require a more individualized approach.

# 1 Funding for parenting plans. The parenting plans are not used because they cost the participants more than they can afford. The public would benefit from funding individual family plans.

# 2 Soften endangerment standard. When kids become teenagers, it is sometimes best for them to switch parental homes. This should be done on different considerations than whether harm exists, such as whether the change is sought by the child to evade discipline or whether it is actually in the child's best interests.

# 3 Require six month separation before granting divorces with children. Give people a chance to regroup emotionally before being forced to make life-shaping decisions. Obviously, there must be exceptions for potential irreparable harm.

# 4 Re-evaluate the child support bureaucracy. It is not pure evil as some of its opponents have charged, but it does function inconsistently. The mission is unclear. If the problem is lack of funding for staff, then a cost/benefit analysis needs to be done.

Based on my experience with fathers who are my clients, these are reforms that address issues they have raised and are more pointed toward their concerns than a presumption of questionable value.

On the next page I have devised a chart which attempts to sort out the implications of a joint physical custody presumption. The chart makes sense to me—not so sure anyone else will get it, but I hope you do.

The upshot of it is that while some children may benefit from such a presumption, others will suffer. The net result is unknown. The claim that this will reduce litigation or will benefit children in all cases is not supported.

-- Bruce Kennedy,  
Attorney

---

Submission Neither For or Against Joint Physical Custody

Minnesota Joint Custody Study Group

I am writing to comment on the impact of a presumption of joint physical custody. I have been involved in providing custody mediation and evaluation services in family court cases for twenty years. During that time, I have witnessed a steady increase in the number of cases in which both parents are equally involved in parenting their children. For these families a joint physical custody arrangement represents the best option for maintaining stability and continuity in the children's lives. The shift toward shared responsibility for parenting, while adding to the difficulty of resolving contested custody issues, has clearly benefited children and families.

A statutory presumption for joint physical custody would have the positive impact of endorsing shared parenting as an ideal for all families. Another potential benefit of such a presumption would be to change the nature of contested custody cases. Custody cases are far too often focused on what is bad about each parent, rather than what is good about each parent. I would suggest that, if enacted, the statute require parents to demonstrate how they have been positively involved in their children's lives in the past and how each is prepared to share responsibility for meeting their children's needs in the future.

While recognizing the potential benefits of a joint custody presumption, I do not believe these benefits outweigh the potential harm to children and families. I am concerned that a presumption of joint physical custody reflects a focus on the rights of parents over the best interest of children. I am concerned that joint physical custody is equated with a parent's right to claim an equal share of time with the children, rather than a parent's equal responsibility for meeting their children's needs.

The current best interest standard emphasizes maintaining continuity and stability for children. Such an emphasis is consistent with promoting their secure and healthy development. The presumption of joint physical custody seemingly disregards the history of the parent-child relationship and past child-rearing practices. Making an award of joint physical custody irrespective of past parent-child relationships can seriously jeopardize a child's sense of security. Further disruption can be created by the logistics of a joint physical custody arrangement. This disruption includes adjusting to two homes instead of one, many times with some distance between homes and discrepancy in how well the child's needs are accommodated. Finally, rather than having the desired intent of reducing conflict between parents, it has been my experience that an award of joint physical custody to parents who lack the ability to work cooperatively often has the disastrous consequence of exacerbating the conflict while placing children squarely in the middle of it.

Tom Adkins, Maureen Walton,

Washington County Family Court Services

Submission Neither For or Against Joint Physical Custody



---

I am weighing in on the presumption of joint physical custody, having been in practice for 30 plus years, most of them in family law. I don't know if there is research data, but it would be interesting to know the number of households that actually have a joint arrangement, where parents do all the parenting by taking opposite shifts for work, etc. It seems to me that a change in presumptions would need to be founded on socio economic data that would support such a change.

In practice, it seems to me that there is one parent who is more or less "in charge" and it is still the case that many mothers take "Mommy jobs" so that they maintain the flexibility of schedules to allow them to be there before and after school for the kids. A presumption doesn't really recognize this; on the other hand for those who do truly work opposite shifts, etc, the presumption for sole physical custody does not really recognize them.

The problem for families is to re-organize after dissolution; what might have been the case during the marriage may not work after the dissolution, simply because there are now two households -- so even if there was a certain style of parenting during the marriage, the fact is that the child will now have two homes, no matter what the custodial arrangement, before the dissolution or after the dissolution.

The label of joint or sole custody is not as important as is the description of what is to occur in parenting, after the dissolution. People who want to manipulate the facts to get a financial gain in the area of child support, etc., will do it no matter what the label is. People who want to posture by being a good parent for six months just before filing for divorce will still do that, regardless of the presumption.

Mary Sherman Hill

[maryshermanhilllaw.com/attorney](http://maryshermanhilllaw.com/attorney)

---

I facilitate court mandated co-parenting education classes in the metro area, and have since 1999. I work for Storefront and MJ Divorce Education.

It is my observation that there are many good, decent, capable, loving dads who are fighting for every crumb of parenting time they can get. They are not satisfied with the "one night a week and every other weekend scenario", nor should they be. They miss their kids terribly. They perceive the courts to be against them, and the moms to have the power. Perhaps their assessment is accurate.

I understand and share concerns about a presumption of joint physical custody due to concerns about safety of the child. From the anecdotal evidence I hear, I believe there is a great deal more family violence occurring than we have any formal documentation of. I think those with an OFP are a tiny tip of the iceberg.

Therefore, how would we sort out whether a child would be in danger?

Submission Neither For or Against Joint Physical Custody

1. Use professionals skilled in working with children (not trained volunteers) who know how to screen for domestic violence.
2. Have them ask the children how they feel about being alone with the other parent. (I was raised in a violent home. Nobody asked me anything when my parents divorced, and believe me, I would have told them I was afraid of dad.)
3. Make no presumptions. Evaluate each case on an individual basis. We cannot make presumptions where safety may or may not be an issue.
4. Utilize resources such as Mary McGowan, [@msn.com](mailto:@msn.com), specialist in family violence issues. She does a lot of training. I have attended it and she is fabulous. I can give you more contact information.
5. Refer questionable offenders to treatment for domestic violence, not to anger management. Family violence is about control, not anger.
6. Find out from the kids how they feel about more shuffling between homes in order to spend more time with the other parent. They may get sick of living in a revolving door, and we should consider how they would like their parenting time arrangement to be. We don't have to follow it, but we should at least hear it. Kids can come up with creative, wonderful ideas, and they know what they want.

Marilyn P. Groenke

MJ Divorce Education

- 
1. Should there be a change in Minnesota's custody laws to favor a presumption of joint physical custody?

I propose an alternative: no presumption of either sole or joint custody, rather custody characteristics will be determined during the course of the marriage dissolution process. The process could readily provide for non-appearance of a party and domestic abuse.

I cannot perform, at this late date, a literature review of the social science and legal research other proponents in this exercise will cite to bolster their positions, let alone other state's experiences with the issue. I know, however, from some exposure to the research in the past, that the literature is extensive, at times deeply impassioned, and trended towards strongly favoring a presumption for sole custody.

This is ultimately a public policy decision, fueled by research, experience and, not least in any measure, desired societal goals, however amorphous and contested. Custody laws and policies have a long history of dramatically different, adjudicated outcomes. This history encompasses the cores of gender politics and economics, including gender stereotyping negatively affecting both genders, but always serving power interests. That said, I would also accept that the historical proponents would sincerely claim to have the best interests of children at heart, as then defined, or as their voices were variously empowered. The "tender years" doctrine, which I contend we are still

Submission Neither For or Against Joint Physical Custody

struggling with here, though it is officially dead, exploited both women and men for evolving economic structures; supporting and adding to deeply stereotyped, and dangerous roles (to life and limb, actually) for all genders and their children. It continues to do so in its highly vitiated remnants that insidiously survive in all of us and the "system," and the presumption of sole custody.

Children's "best interests" will always be contested territory (encompassing the entire generational span) until-but don't hold your breath for this one-there is "heaven on earth." Their best interests, as well as the best interests of their parents and grandparents, are unavoidably the subjects of social experimentation driven by constantly evolving social policy-can't get around it. Life is a petri dish with a sieve for a "protective" lid. The presumption of sole custody is an ongoing social experiment.

It is time for this social experiment to struggle with devising a legal structure that will foster-at the get go- each divorced parent having as much time as possible with their children; that will, in fact further develop and inculcate this expectation. Such a structure will lead the current, acted out social reality, but what legal structure doesn't if it is called into existence?

This is a necessary part of the attack on men taking on the gender stereotype of the absentee, uninvolved, peripherally involved, "good time, weekend, daddy," father role. Though it is changing, men have for too long bought into a role that divests them of really integrating their emotions and intellects into the lives of their children, and women, because so much else was taken away from them, have accepted this as their especial domain.

I am not a bleary visioned and smarmy idealist. As a family law attorney, I have interviewed fathers who have insisted on joint custody or even sole custody, yet, in response to my questions concerning their previous involvement in their children's lives, I have been able to say, without hesitation, 'no way, not with that behavior record.' I have dealt with fathers who want joint custody for solely economic reasons, and with mothers, who make obvious economic, not best interest, calculations in asking for sole custody, and resisting joint custody. I have discovered lies by both parents as the dissolution process reveals a clearer, though never crystal clear picture of the truth. I have seen fathers with (relatively) uncontested, deeper, past involvement in their children's lives, diminished to a discouraging parody in what is still too often, effectively a presumption of sole custody in the mother. At heart, I believe most custody disputes are as much about unresolved (the parties would not be divorcing if otherwise) emotional, mental, and spiritual conflicts of the parents, as about the children. The roots of the conflicts were laid before the arrival of the children, but usually become enmeshed with serious parenting issues, and continue to be played out, to some degree, post-dissolution, no matter the custody designation.

By causing for no presumption of any designated custody status at the outset, perhaps those rancorous parents might just begin by asking, "where do we go from here in raising our kids?"

Further questions.

1. How does the current presumption of sole custody continue to propagate stereotypes for both genders, that are inimical to the best interests of children?

Submission Neither For or Against Joint Physical Custody

I base this question, in part, on the following. We have moved from a presumption of permanent spousal maintenance, to such a presumption only after a fairly specific analysis of factors. This change came about because of changing social, political and economic expectations for the divorced parties; the change has also reinforced those expectations going forward. We are still struggling with how to deal with the fact that women are, overall, more economically disadvantaged than men, post-dissolution. I contend that the policy driving the expectations is the right policy and its imperfect implementation needs to be reformed.

2. How does the presumption of sole custody actually foster a rich field for greater conflict, of sometimes a very ugly nature, between divorcing parents, causing them to “gear up” in preparation?

3. Would a joint custody or no custody status presumption be too costly to administer by the judicial system.

Concededly, perhaps so.

---Paul E. Price

---

## CREATING A PRESUMPTION OF JOINT PHYSICAL CUSTODY FOR FAMILIES IN MINNESOTA

Submitted by

Barbara L. Nafstad

Hamline University School of Law

Student 2L

Family Law

There is no doubt today that parenting roles have become blurred from what they were 20 years ago. This stems from societal changes where the majority of households have both spouses working or involved in some type of career, and it takes both to manage the routine daily needs of the children. As of 2000 in Minnesota, 51.3% of Minnesota households had two working spouses.<sup>3</sup>

As a result of the increase in duo income households across the country, some state legislatures have adopted a presumption of joint physical custody in the case of divorce and other legislatures have adopted the option to choose joint physical custody over sole physical custody with visitation rights.<sup>4</sup> Minnesota currently has the option to seek joint physical custody where the court considers relevant factors in making a determination: 1) the ability of parents to cooperate in the rearing of their children; 2) methods for resolving disputes regarding any major decision concerning the life of the child, and the parent’s willingness to use those methods; 3) whether it

---

<sup>3</sup> 2000 Census, State of Minnesota

<sup>4</sup> 46 Cath. U. L. Rev. 767

Submission Neither For or Against Joint Physical Custody

would be detrimental to the child if one parent were to have sole authority over the child's upbringing; and 4) whether domestic abuse, as defined in section 518B.01 has occurred between the parents.

The Minnesota legislature has proposed a bill for an act: "Creating a presumption of joint physical custody; requiring the use of parenting plans in certain cases; modifying custody designations for parenting plans that use alternative terminology; amending Minnesota Statutes 2006, sections 518.003, subdivision 3; 518.17, subdivisions 1,2; 518.1705, subdivisions 3, 4." As stated by State Representative Tim Mahoney in his letter to the Joint Physical Custody Working Group Members: "our goal is to establish laws under which children are awarded substantial parenting time with both parents; both parents have the opportunity to be actively engaged in their children's lives; families have flexibility to meet the changing needs of children, parents and extended families".<sup>5</sup>

The legislature has directed the courts to develop a plan to conduct a more comprehensive study of family court under Minn. Laws 2008, Chapter 299 Sec. 26. The focus of this working group is solely the issue of joint physical custody; "to consider the impact that a presumption of joint physical custody would have in Minnesota"<sup>6</sup>.

The overall goal of this paper is to consider all of the information provided to the Joint Committee, research of law reviews and treatises, and comments from various representative groups on their views of this issue.

The main focus of this paper will be to determine whether the bill will actually encourage parties and their attorneys to engage in a joint custody arrangement using a parenting plan that is designed to be responsive to the children's needs.

While no one would disagree that public policy favors consistent contact between a child and the divorced parents, there are exceptions when joint physical custody should not be allowed. Such instances are: 1) intense animosity between the spouses; 2) inability to cooperate; 3) evidence of child or spousal abuse; and 4) threats of parental kidnapping.<sup>7</sup> But aside from these types of instances, a presumption of joint physical custody may work well if the parties cooperate in comprehensive parenting plans designed to meet the present and future needs of the children.

The evolution of custody law is rooted in various doctrines, cases and legislative history. Before the twentieth century, custody was awarded to the father because children were considered property that would add value to the family wealth. Then the tender years doctrine took over where the custody of a young child should be awarded to the mother because "nothing can be an adequate substitute for a mother's love."<sup>8</sup> In Minnesota, all of that changed in the decision of *Pikula v. Pikula*<sup>9</sup> where the Court modified the assumption of looking at the primary caretaker in awarding custody, to where the primary parent is gender neutral. As a result, points were added up for and against

---

<sup>5</sup> Mahoney, Tim. Minnesota House of Representatives, *Letter to Joint Physical Custody Working Group Members*, dated October 10, 2008.

<sup>6</sup> Id.

<sup>7</sup> Child Custody Prac. & Proc. § 5:13

<sup>8</sup> Berg, Nancy Zalusky, "The Custody Conundrum", Custody 2000.

<sup>9</sup> *Pikula v. Pikula*, 374 N.W. 2d 705 (Minn. 1985).

each party to determine who was the primary parent based on a list of factors. The problem was there was no consideration of the emotional attachment of the child to each parent.<sup>10</sup> This led to the 1990 amendment to Minn. Stat. 518.17 to Subd. 1(a): "the court may not use one factor to the exclusion of all others...."<sup>11</sup> Then the Parenting Plan Statute went into effect in 2001 as a result of a Minnesota Supreme Court Parental Cooperation Task Force where parenting plans could be created in lieu of an order for child custody.<sup>12</sup> But this plan is only ideal for parties who have the maturity to place their children's interests before their own. So if there is no genuine commitment to the parenting plan by either or both parties, the matter is back in the courts to determine the custodial determination.<sup>13</sup> Subsequently, there have been two legislative attempts to create a presumption of joint physical custody in Minnesota which have failed.<sup>14</sup> Now we come to the third attempt to respond to the needs of families in today's society dealing with custody issues.

Recently, a joint physical custody study group meeting was conducted on October 27, 2008 which consisted of 12 members from parent advocacy groups, citizen members who are not associated with a parent advocacy group, academics and policy analysts, judges, court administrators, attorneys, domestic violence advocates, and other interested parties.<sup>15</sup> Public testimony was also presented in which each speaker had five minutes to present their position for or against the proposed bill. What is shocking about this testimony is that overall there was very little support for or against this bill that was actually on point. Here is a recap of their testimony.

Julie, whose son received a brain injury due to domestic assault says she was opposed to the presumption of joint physical custody. Joan from the American Academy of Matrimonial Lawyers opposed the bill because the multifaceted standards already in place are serving us so why change it. A presumption would not serve the families. Lance from Child Speak was in favor of the bill and says: "We treat children as chattels – we should let the children speak. In the medical field, children have the right to make medical decisions to have operations, to stay alive or not. Children need witnesses to stand up for them and not be controlled by parents' decisions. Stop focusing on the conflict and focus on the children's choice. Heal our Children and remove this from the courts. Will children have a future and a right to be heard? The answer is in your hands."

John, a retired attorney in favor of the bill says that he has joint physical custody and it takes two parents to do the job. According to John, once the divorce process starts the lawyers take over and the first thing they ask for is the children, house, maintenance, and attorneys fees. A presumption of joint physical custody would give incentive to parents to agree on shared parenting from the start. Tom, a domestic violence attorney/mediator who supports this bill says that "when children are involved, you see parents acting badly and they think they have to act this way in order to get sole custody of their kids. The current preference for sole custody brings about this behavior from a mediator's viewpoint. In addition, under the new guidelines, support payments are considered

---

<sup>10</sup> Berg, Nancy Zalusky, at 4.

<sup>11</sup> Minn. Stat. § 518.17 Subd. 1(a)

<sup>12</sup> Minn. Stat. § 518.1705

<sup>13</sup> Berg, Nancy Zalusky; Addendum at 2.

<sup>14</sup> See Legislative History, H.F. No. 1262.

<sup>15</sup> H.F. No. 1262, 2nd Engrossment - 85th Legislative Session (2007-2008) Posted on Mar 31, 2008

from both parents. So the label doesn't make that much difference as far as support and maintenance payments." Donna from the Minnesota Coalition of Sexual Assault, who is opposed to the bill, says that it is not in the best interests of the children when incidents of violence are involved. Les from Fathers for Justice in favor of bill says that currently limited visitation for fathers is awarded in 94% of the cases. Children deserve to have equal access to their parents. Leigh from the Minnesota Coalition of Battered Children opposes the bill because her ex-husband was abusive to her and after they divorced, her ex-husband used parenting time with their daughter to put her between her parents. There was a joint legal custody (not physical) arrangement. Spouse subsequently shot daughter and himself. Leigh pleads that domestic violence should be taken into consideration and we must prioritize personal safety. Todd, Center for Parental Responsibility, in favor of the bill, states that in courts of custody most fathers are guilty before proven so. "Why would you take a parent from a child? Fathers want to feel like a parent and not a part time babysitter. If parents can agree, money will be saved and no need for mediation." Katherine, Domestic Abuse Intervention Program from Duluth, says there are 400 domestic reports per year in the city with a population of 87,000 which means there are lots more unreported cases out there. Her concern is that the exceptions for domestic violence are not broad enough so a presumption of joint physical custody is opposed. Quincy, Employment Action Center, Young Dad's Program, supports the bill and says their mission is to be with their children. "We want a fair shake and this Program of Fathers is a movement of men in a positive direction for our children." Use of Parenting Agreement Worksheet from Washington County Community Corrections, Family Court Unit is highly recommended to meet the needs of their children when they parent apart. Charlie, National Coalition of Free Men, practiced shared parenting with his 8 year old son. He stated that courts do too little to support shared parenting agreements which are based on common sense and very detailed with disagreements being handled by a step by step process including mediation and court, if necessary. Charlie's parenting agreement has worked well and he has never had to work through disagreements by going to mediation. Joseph, a private attorney, is in favor of bill stated that there is "complete devastation and needless pain in presumption against joint physical custody. The way it is set up now joint physical custody will not be allowed without an evaluation. This instantly sets up the parties to become warriors against each other which makes it almost impossible to get an agreement for joint physical custody. Troy, a father of three children who shares parenting half time, is grateful because he would not have had that time without the option of a joint physical custody situation. Woman (name unknown) from Sovereignty of People of MN in favor of the bill pleads for "a paradigm shift." She says that "the family law statute should finally coincide with our natural laws. Natural law is the foundation upon which common law sits upon which the constitution sits upon which statutes are made. We ALREADY have the natural law right to custody of our children, mother and father." (Emphasis added). She cites Troxel v. Granville, referring to a protected liberty right.<sup>16</sup> Tami, on behalf of the

---

<sup>16</sup> 530 U.S. 57 (2000). The issue in this case was whether the Washington statute, which allows any person to petition for a court-ordered right to see a child over a custodial parent's objection if such visitation is found to be in the child's best interest, unconstitutionally interferes with the fundamental right of parents to rear their children? In a 6-3 decision delivered by Justice Sandra

Minnesota State Bar Association, Family Law Section, who is opposed to a presumption in favor of joint physical custody, says that “the presumption does not allow for the analysis even though it would be rebuttable but costly. Each party deserves to have their case analyzed.”

It wasn't until I started reading through some of the materials provided that support or oppose this proposed law that I realized based on the testimony, it nearly all came down to the views between men's rights groups and those concerned about domestic violence.<sup>17</sup> I began to wonder why the issue of a presumption of joint physical custody got lost throughout this testimony? Why has this issue been up before the legislature twice and both times failed?

This is what directed my focus to whether the bill adopting a presumption of joint physical custody will actually encourage parties and their attorneys to engage in parenting plans designed to be responsive to the children's needs. Licensed Psychologist, Mindy F. Mitnick,<sup>18</sup> presented a report to the study group that states: “the parents best suited for joint physical custody don't need a presumption.”<sup>19</sup> In her letter she states that children do best with frequent contact with both parents but this only occurs in situations where there is low conflict, parents work through disagreements, with or without professional assistance, and these parents have good skills at communicating, are flexible and are able to put their children's needs first.<sup>20</sup> So maybe the approach for this bill is wrong. What if the issue of custody was completely eliminated from the statute and replaced with a presumption of joint parenting? That seems more in line with the best interests of the child at least as a foundation from which to create a parenting plan. It has been suggested throughout the materials and the oral testimony that parties want to be parents not custodians of their children. In the executive summary of the Joint Parenting Association, it is stated that: “The current winner-loser system is irrational. The typical custody dispute involves two fit and loving parents who each want to avoid being cast out of the role of parent and into the role of visitor”.<sup>21</sup>

If this proposed bill has failed twice maybe the wise direction to take would be to eliminate custody altogether and substitute parenting. Judge Dorothy Beasley, Georgia Court of Appeals stated in a 1993 decision:

Although the dispute is symbolized by a “versus” which signifies two adverse parties at opposite poles of a line, there is in fact a third party whose interests and rights make of the line a triangle. That person, the child who is not an official party to the lawsuit but whose well-being is in the eye of the controversy, has a right to shared parenting when both are equally suited to provide it. Inherent in the express public policy is a recognition of the child's right to equal access and

---

Day O'Connor, the Court held that the Washington Statute violated the right of parents, under the due process clause of the Constitution's Fourteenth Amendment, to make decisions concerning the care, custody, and control of their children.

<sup>17</sup> Brinig, Margaret. Does Parental Autonomy Require Equal Custody at Divorce? 65 La. L.Rev. 1345 (2005).

<sup>18</sup> Uptown Mental Health Center, Inc.

<sup>19</sup> Mitnick, Mindy, Letter to Judge Eide and members of the study group. Dated October 27, 2008.

<sup>20</sup> Id.

<sup>21</sup> Joakimidis, Yuri, *Towards a Rebuttable Presumption of Joint Residence*, Joint Parenting Association, 2<sup>nd</sup> Edition.



opportunity with both parents, the right to be guided and nurtured by both parents, the right to have major decisions made by the application of both parents' wisdom, judgment and experience. The child does not forfeit these rights when the parents divorce.<sup>22</sup>

From a child's point of view, a child doesn't choose to have his/her parents divorce. From a child's point of view, a child's best interests should include a child's wishes and concerns. Typically in this situation, that would be "I still want to have my mom and dad" and "will they both take care of me"?

The goal of the legislators, "to establish laws under which children have substantial parenting time with both parents where both parents have the opportunity to be actively engaged in their children's lives and families have flexibility to meet the changing needs of children, parents and extended families"<sup>23</sup>would be best served by a revision of the proposed bill. The proposed bill would state: "A bill for an act relating to family law, creating a presumption of joint parenting, requiring the use of parenting plans and modifying parenting roles where necessary in accordance with the best interests of the child guidelines under Minnesota Statutes §518.17, subd. 1." By using this terminology, the state is designating the parties as parents rather than custodians and given the benefit of respect for being accountable parents after divorce.

Even if every situation concerning the best interests of the child is not the same, the Court could diminish its role in determining custody and create a presumption that parties who divorce will assume parenting roles based on a comprehensive parenting plan that is flexible for the future needs of the child(ren). If that is unsuccessful based on the best interest of the child factors, then the Court can interfere to secure the best interests of the child. This way, the process of parenting after divorce commences from a perspective of a more positive solution for children and parents rather than an adversarial one.

---

November 12, 2008

Hon. Kevin Eide and Joint Custody Study Group Members

Minnesota Judicial Center

FAX 651-296-6609

[@courts.state.mn.us](mailto:@courts.state.mn.us)

Dear Judge Eide and members of the Joint Physical Custody Study Group:

The following are comments submitted on behalf of the seven Minnesota regional legal services programs (Legal Services) in response to the Request for Comments Regarding Joint Physical Custody posted on October 10, 2008. The family law work of Legal Services is restricted to low-income persons. Legal Services programs represent or advise thousands of clients across

---

<sup>22</sup> In Interest of A.R.B., 433 S.E.2d 411 (Ga.App.1993).

<sup>23</sup> Mahoney, Tim. Minnesota House of Representatives.

Submission Neither For or Against Joint Physical Custody

Minnesota each year in a variety of matters including contested custody and dissolution, orders for protection, paternity, child support and motions to modify custody or parental access matters. Legal Services attorneys represent mothers, fathers, and sometimes children in these matters. Thus, our comments focus on the experiences of low-income Minnesotans.

As an initial comment, the meaning of joint physical custody was unclear. It was not clear from the information posted whether comments should assume that a presumption of joint physical custody is (1) equal or virtually equal parenting time between the parents; or (2) a label that may be unrelated to the division of parenting time. Since we have concerns with both assumptions, we address both.

There are families and children that benefit from joint physical custody arrangements. It is our experience that typically those families involve parents who have low conflict, can communicate regarding parenting decisions, have resources to make joint physical custody a workable option, and effectively resolve disputes. Our concern is primarily with a *presumption* of joint physical custody. Based upon our experiences working with Minnesota families, we have several important concerns:

Courts need discretion to make decisions in the best interests of children in each family. Implementing a presumption directly contradicts and diminishes that ability.

Where families have high conflict, particularly involving the children, joint physical custody arrangements can be harmful to children - sometimes with tragic results.

Even in families with low conflict, joint physical custody may not be a viable option. For low-income families, factors ranging from an inability to find employment and affordable housing to transportation limitations create significant barriers to joint physical custody.

A presumption of joint physical custody creates important systemic legal impacts to low-income families, the court system and other agencies. These impacts include availability and accessibility to conflict resolution tools, increases in default custody and/or child support actions, incentives to negotiate parenting time against child support, increasing motions to modify custody and parenting time, impacts to the juvenile court system, and the impact of such a change on appeal standards.

Courts Need Discretion to Make Determinations in the Best Interests of Children.

Under current Minnesota law, district courts make decisions regarding custody and parenting time by evaluating the thirteen "best interest" factors set forth at Minnesota Statutes, section 518.17 (2008). If joint custody is sought, the courts must evaluate additional factors, focusing on parental cooperation, the impact on the child, and whether domestic abuse is present. *Id.* Evaluation of specific factors requires the courts to use a consistent approach, yet look specifically at the situation and needs of each family.

A presumption, on the other hand, begins with a legal conclusion, and places the burden on the challenging party to overcome that conclusion. A presumption of joint physical custody begins the custody discussion by assuming that equal parenting time is in a child's best interests. We have several concerns with the "one-size-fits-all" approach presented by a presumption.

Submission Neither For or Against Joint Physical Custody

First, a presumption by its nature assumes that one outcome is best for all families. It will likely discourage a thorough evaluation of the best interests factors, and does not recognize the diversity of Minnesota families or the individual needs of children in a particular case.

Second, a presumption presents additional challenges for the significant numbers of pro se litigants. Understanding how to present evidence to overcome a presumption can be challenging for a pro se litigant. This would be even more critical for parents who face domestic violence issues or may have limited language, educational or other abilities.

Joint Physical Custody may be harmful to children in high-conflict families.

There is significant research showing that equal parenting time can have a harmful impact on children of high-conflict families. This is particularly true where children are the subject of or directly exposed to the conflict.<sup>24</sup> The most apparent signs of negative effects are found in children who felt caught in the middle of their parents' disputes, where they felt loyalty conflicts, "torn" or "caught" between their parents.<sup>25</sup>

Sadly, we have found similar results in cases where joint physical custody was ordered in high conflict cases. One example is a case from northern Minnesota, where the parents had two children. An alternating-week schedule was ordered, despite the parents' ongoing conflict. The conflict did not relent after the dissolution order. The parties' daughter felt caught in the middle. She told her counselor and others that she felt responsible for keeping the peace between her parents, and felt responsible for their behaviors, yet still hoped her parents might reconcile. Approximately six years after the divorce, their 11-year-old daughter hung herself. What makes this situation even more tragic is that following their daughter's suicide, a three-year court battle ensued over the parties' remaining child, a then-10-year-old son. Today, their son functions primarily on his own, virtually ignoring both his parents.

This tragic story illustrates how joint physical custody orders for high-conflict families can have disastrous results. For this family, the frequent contact required to parent two children on an equal basis led to more and more conflict. The parents fought frequently, and had no clarity as to who should make decisions or how to work together to make decisions.

III. Even in families with low conflict, joint physical custody may not be a viable option due to the realities of the parties' situations.

For many low-income families, limitations economic struggles may not make equal parenting time a viable option. While all families differ, these are concerns for a significant portion of low-income Minnesotans.

*Housing.* In higher income families where parents choose equal physical custody, parents may consider and choose to live within the same neighborhood, school district, or city. However, for many low-income families, parents may not have that choice. Some parents may need to move in with friends or family, and others will move to communities with affordable housing. While parents

---

<sup>24</sup> "Child Custody Arrangements: Their Characteristics and Outcomes" Department of Justice Canada (2004), p. 33-34.

<sup>25</sup> *Id.*

would likely prefer to stay within a child's neighborhood, and purchase a home or rent an apartment that will give a child his or her own space, that is not always realistic.

*Child care.* It would be a false assumption to conclude that for many low income parents, divided parenting time would lead to a savings of child care costs. In many low-income families, both parents work, thus requiring child care. Most licensed child care providers, for business reasons, most do not give "part time" rates, and thus a parent must pay full time child care costs regardless of whether the child is in the parent's home full time.

A related issue is the impact on Head Start eligibility. It has been our experience that the Head Start program requires attendance four days a week at the same child care. Where this is not possible (or the parties cannot agree on one common provider), the child becomes ineligible for this program.

*Employment.* Many low-income people work more than one job, and have jobs with little flexibility. In joint physical custody situations, there are scheduling changes that require flexibility, which may make multiple parenting time exchanges very, very difficult. In addition, many of our clients, particularly in outstate Minnesota, have limited employment options. One parent may need to move from the city, county, or area of the state in order to find or accept regular employment. This is particularly true in cases with parents who are students.

*Transportation.* In situations where parents do not live in the same town, multiple car trips may add significant expense that one or both parties cannot afford. Even in families where both parents have a working vehicle, the price of gas and other vehicle costs makes more frequent trips very expensive. Similarly, frequent parenting time exchanges assumes safe, reliable vehicles - which is often times not available to one or both parents. The breakdown of one parent's vehicle can create a ripple effect of tense, problematic communications which negatively impact the coparenting relationship and consequently the children. For families where one or both parents do not have a working vehicle, public transportation options may be limited or nonexistent. This is particularly true in outstate Minnesota.

Transportation issues also extend to school bus transportation. There are several school districts, including St. Paul and St. Cloud, which will only pick up children at one residence. As a result, where children are dividing time during the school year between two homes, one parent will have a significant burden regarding transportation to and from school.

*Public Benefits.* For most public benefits programs, a joint physical custody order may make one or both parents ineligible for assistance, even though the child resides with them for a significant amount of time. For families living near, at, or below the poverty level, public assistance provides the basic necessities. These benefits include:

*Public and Subsidized Housing.* Many kinds of subsidized housing programs, most of which are governed by federal law, requires a parent to have physical custody more than 50% of the time to list a child on an application or (if approved) a lease. The same is true for public housing in much of the Twin Cities area. A parent must have physical custody of a child more than 50% of the time in order to add a child to a lease or count that child for purposes of determining the appropriate number of bedrooms for which would be eligible for.

Submission Neither For or Against Joint Physical Custody

However, one housing authority in the Twin Cities requires a parent to have physical custody at least 75% of the time to place a child on a lease for public housing. As a result, if neither parent has physical custody of a child at least 75% of the time, neither of them can include the child on the lease nor lease application.

A joint physical custody presumption impacts a parent's eligibility for public and subsidized housing, the types of housing available and the amount the parent will have to pay for rent. If the children are excluded from the application or the lease because the parent doesn't have the children more than 50% of the time, the parent may only be eligible for a unit that would not have enough bedrooms to accommodate their children, may not be eligible for some kinds of subsidies designed for larger families or may not qualify for units at all. Additionally, rent is calculated based upon the number of people in the household. If a child is excluded because of the joint physical custody label, the parent applying to or in public or subsidized housing will have to pay more in their rent. Joint physical custody presumptions could also lead to the housing authorities looking solely at the order, erroneously determining that a person has physical custody exactly 50% of the time and denying the housing subsidy, or trying to figure out whether a person has a child with them more than 182.5 days a year.

*Child Care Assistance.* A parent is eligible for child care assistance only for child care incurred while the child is living with that parent. However, most providers will not permit part-time child care, so either a common child care provider is necessary or, if a child is only in a child care part-time while with one parent, that parent must cover full-time child care expenses.

This presents significant problems, especially in cases where parents do not live near each other. If both parents are eligible for child care assistance, the assistance will only pay for the portion of child care while the child lives in that household. The balance of the expense must be paid by the parent. For the parent who is ineligible for child care assistance, he or she must pay market rate child care, which makes child care prohibitive for many low-income families.

*MFIP (Cash Assistance)* Minnesota law specifically discusses eligibility for MFIP when there is a custody order. See Minn. Stat. §256J.15 (2008). Essentially, regardless of the physical custody label used in the order, the public authority looks at the child's primary residence to determine which household is the child's household for purposes of eligibility. If a child spends equal time in each home, only one parent's home may be considered the child's "home." DHS policy provides that if a child spends equal time in each home, the parent who applies first receives assistance.<sup>26</sup> As a result, if there are two low-income parents and the child spends significant time with each parent, one parent will not receive assistance to help cover the child's needs, and will be forced to find another way to cover the child's expenses.

#### Tax Implications – Earned Income Tax Credit and Working Family Credit.

The Earned Income Tax Credit (EITC) and its Minnesota equivalent, the Working Family Credit, provide a tax credit for low-income, working people. The amount of the credit varies by income level and number of children a person can claim as a "qualifying child." Persons without a

---

<sup>26</sup> DHS Manual.

qualifying child are phased out of the EITC at incomes of approximately \$12,000, while families with children are phased out of the EITC at incomes in the mid-to-high \$30,000 range (depending upon the number of qualifying children). Federal law requires that a child live with a parent for more than six months of the year to claim the child for EITC purposes. It cannot be negotiated between the parties and cannot be assigned by the courts. *See, generally, 26 U.S.C. §32; Minn. Stat. §290.0671 (2008)*

If a presumption of equal parenting time is implemented, neither parent will be eligible for the EITC or the Working Family Credit because neither parent will have the child residing with them for *more* than half of the year. This tax credit is a very important benefit to low-income families, and an equal time presumption would essentially eliminate this benefit.

#### Legal Impacts Associated with a Presumption of Joint Physical Custody.

A presumption for equal parenting time will significantly impact the legal process and the courts. While not necessarily limited to low-income persons, since low-income persons have fewer resources to expend in court, it will likely impact them disproportionately. Those impacts include:  
Child Support.

In cases of equal parenting time, an alternate child support formula is used. This formula reduces child support amounts significantly. However, both households have increased costs, including transportation, housing, and food. The parent who is paying less child support does not see a significant reduction in expenses, as there are increased transitory costs in addition to fixed costs. The parent who receives less child support also has increased transitory and constant costs. In addition, it has been our experience that one parent will likely bear the burden of additional costs such as clothing and school supplies. As a result, a presumption results in increased expenses and dramatically reduced child support for many more families.

The process of determining child support will also be dramatically impacted if a presumption of equal time is adopted. This is particularly true in the Child Support Expedited Process, or IV-D process. If a presumption is in place, the initiating party, which in most cases is the county child support office, must presume that there will be equal parenting time, and request the drastically reduced child support amount, without regard to the parties' actual situation. The burden would shift to a primary custodian to file an Answer and Counter-Petition for both child support and custody. Unless or until an Answer is filed, there would likely be no information regarding what parenting time schedule is in the child's best interests. Complicating this situation even further is that proceedings in the Expedited Process are brought before a Child Support Magistrate, who does not have jurisdiction to determine custody or parenting time. As a result, even if the proper action is brought by the primary custodian, the magistrate will have to either set child support based upon an inaccurate presumption, thus drastically reducing child support, or send the entire matter to district court, which delays receipt of child support altogether.

Submission Neither For or Against Joint Physical Custody

It is also important to recognize that a presumption of joint physical custody may impact child support enforcement remedies. Many child support enforcement tools are limited by state and federal law to child support obligors. Under Minnesota law a custodial parent is presumptively not an obligor in most cases, and thus only limited enforcement is possible. *See* Minn. Stat. §518A.26, Subd. 14 (2008). If both parents have equal physical custody, they are both obligees and only limited child support enforcement is available.

#### Defaults.

A presumption of equal parenting time also has the potential to significantly increase default orders. In many low-income families, there are very few assets to divide. As a result, if a parent who would likely be a non-custodial parent under an analysis of the best interests factors is served with an action presuming equal parenting time and significantly less child support, there is very little incentive to respond. In fact, if that parent sought counsel, there would probably be an obligation to advise the parent that it is in his or her best interests to not respond and permit the matter to proceed by default. The person would save significant fees (including filing fees) and be exposed to little risk. Additionally, if the default order is a legal fiction and the parent does not utilize the equal parenting time, the burden to modify the agreement falls to the other parent.

#### Negotiating Parenting Time against Child Support.

In those cases where a primary parent files an action challenging the presumption of joint physical custody, parents with few assets may face two choices (1) try and overcome the presumption, which, if lost, will result in less child support, more costs, and significantly more contact (and potentially conflict) with the other parent; or (2) try to negotiate a settlement on the two primary issues in the case – custody and child support. Given limited resources and the potentially drastic and long-lasting risks of challenging the presumption, many parents will at least consider offering reduced child support in exchange for a more favorable parenting time schedule as the preferable option. Not only is this contrary to the public policy of encouraging decisions that focus on the best interests of the child, but it is a significant step backwards from one of the primary public policy goals of the new child support guidelines – to de-link issues of physical custody and child support as much as possible.

#### Access to Mediation/Conflict Resolution.

A key assumption often made in support of a presumption of joint physical custody is that the parties will have access to professional services to evaluate and resolve any conflict that exists or might arise between the parents. In fact, current Minnesota law requires that the court evaluate the parties' methods for resolving disputes and likelihood of using them before ordering joint physical custody. *See* Minn. Stat. §518.17, Subd. 2 (2008). Frequent professional services utilized include psychologists or counselors, mediators, parenting time consultants, and Guardians Ad Litem. However, these resources are rarely free or even affordable, so they are essentially unavailable to low-income families. As a result, parties have no assistance to help resolve family conflict. Escalating conflict often leads to parties utilizing the courts and resorting to law enforcement intervention.

#### Appeals.

Submission Neither For or Against Joint Physical Custody

A presumption of joint physical custody will have significant ramifications to family court appeals. Under current law, district courts take testimony, evaluate evidence, and make decisions in the best interests of a child. Upon appeal, significant discretion is granted to the district courts – a custody determination will not be overturned unless the appellate court determines that the findings are “clearly erroneous” to the point that the appellate court has a “definite and firm conviction that a mistake was made.” See Matson v. Matson, 638 N.W.2d 462, 465 (Minn. App. 2002); Sefkow v. Sefkow, 427 N.W.2d 203, 210 (Minn. 1988). However, if a presumption is enacted but not applied in a particular case, the discretion to the district court is reduced, and the standard becomes whether the district court’s findings are sufficient to overcome the presumption. In some cases, the standard required to overcome the presumption is stated in the statute. See Minn. Stat. §518.17, Subd. 2 (requiring court to make findings about how joint custody would be in the best interests of a child and explain how those factors are in the best interests of a child). Essentially, this shifts the focus away from the district court’s unique ability to make decisions after hearing and seeing witnesses and reviewing evidence, and instead opens physical custody determinations to an easier standard of attack on appeal. As a result, appeals may be encouraged in cases where the court rejected the presumption of joint physical custody – which may lead to the most contentious, conflicted cases being appealed. If more cases are reversed on appeal, this will also lead to more hearings at the trial court level.

#### Modification and Post-Judgment Motions.

A presumption of joint physical custody, whether for equal parenting time or regardless of parenting time, has a significant impact on modification. Under current Minnesota law, custody can be modified only by (1) agreement; (2) integration into the parent’s home with the other parent’s consent; (3) endangerment of the child’s well-being; or (4) a parent wishes to move out of state, and meets the statutory requirements to move the child’s residence. See Minn. Stat. §518.18 (2008). A modification of parenting time, however, is a much lower standard – the court may approve a change if it is in the child’s best interests and would not change the child’s primary residence. See Minn. Stat. §518.175, Subd. 5 (2008) These are distinctly different modification standards.

If a presumption of joint physical custody is adopted, it will be unclear whether a parent is seeking to modify custody or parenting time – and as a result, which standard applies. For parents with a presumption of equal parenting time, it is assumed that any parenting time change outside the range of “equal” (which would need to be defined) would in fact be a change of physical custody and require a higher evidentiary showing. As a result, parents who discovered that equal parenting time was unworkable would likely only be able to modify their agreement (and resulting child support order) upon agreement or a showing of endangerment. In cases where the change has created conflict, the parents may not agree how to resolve the issue, and unless “endangerment” is met, may not be able to modify their order.

On the other hand, the situation only becomes more complex if a presumption of joint physical custody without regard to parenting time is incorporated. In these cases, parents may have a broad range of parenting time arrangements under the umbrella of “joint physical custody.” This would essentially limit the higher standard related to a change of custody to only cases where the child’s

Submission Neither For or Against Joint Physical Custody



primary residence changes wholesale (similar to a reversal of which parent is the custodial parent), as almost any other arrangement could be argued as a change of parenting time under the best interests standard, rather than a change of custody under the endangerment standard. Both of these possibilities create significant confusion about modification motions and the distinction between a “change of custody” and a “change in parenting time,” which will be difficult for attorneys, and especially pro se litigants, to understand.

A presumption of joint physical custody could also trigger a significant number of post-trial motions (or post-order motions). These could be triggered by a variety of issues – ongoing conflict between the parties, changes in parenting time as schedules change and a presumption becomes unworkable; and in some cases, a tool for one party to continue harassment of the other party. Research has shown that in states where joint physical custody was encouraged, post-judgment motions **nearly doubled**.<sup>27</sup> In a time of increasing pro se litigants and decreasing court resources, this could be a significant issue impacting family law.

#### Juvenile Court.

Under Minnesota law, when a child becomes the subject of a juvenile court proceeding, the distinction of a custodial parent is significant. It determines who is a party to the proceeding (as opposed to a “participant”) and who is entitled to counsel. See Minnesota Rules of Juvenile Protection Procedure, Rules 21 and 22. It is our experience, although counties vary, that most courts do not automatically make a non-custodial parent a party at the beginning of the proceeding, unless the parent asks for party status. Most courts do make the non-custodial parent a party if an issue of termination of parental rights arises.

#### Enacting a Presumption Unrelated to Parenting Time.

An alternate approach to a presumption of equal parenting time is a presumption of a joint physical custody label that applies regardless of parenting time. While this alternative does lessen some of our concerns, it still creates significant impacts. Some impacts are the same as a presumption of equal parenting time, but additional concerns include:

#### Impact on High-Conflict Families.

In high conflict families, a presumption of joint physical custody regardless of the division of parenting time may still create significant conflict. It has been our experience that when families either do not have parenting time schedules that are specific or comprehensive enough to meet their needs, or do not understand how the label “joint custody” interacts with the custody and parenting time order, there is significant confusion and/or conflict created between the parents. This happens in families with low conflict, and is even more exaggerated between parents with high conflict. In high-conflict families, the lack of specific schedules or understanding about the lines and methods of communication only serve to continue, and in some cases, intensify, the conflict. Unfortunately, children are often exposed to the parents’ disagreements and conflicts over what the

---

<sup>27</sup> Margaret Brinig, Does Parental Autonomy Require Equal Custody at Divorce? 65 LA L. Rev. 1345 (2005)

schedule means, or what the term “joint physical custodian” means in terms of custody and parenting time.

Impact on Families Without High Conflict, but Where Joint Physical Custody May Not Be a Viable Option Due to the Realities of the Parties’ Living and Economic Situations.

When families do not have high conflict, a presumption of physical custody without regard to parenting time still has a significant impact on their lives. In some respects, the impacts on their lives regarding housing, transportation, employment, and access to public benefits may be the most significant barriers that a presumption poses to low-income families.

Housing, Employment and Transportation.

Generally, a presumption of joint physical custody unrelated to parenting time has a lesser impact than an equal time presumption with regard to housing, employment and transportation. However, the amount of impact is proportional to the amount of parenting time - the greater the amount of parenting time, the more these issues are a factor. For example, if a family has a parenting time arrangement that approaches equal time, but is not considered equal, the family will still have significant costs – both fixed costs such as housing, clothing and school supplies, and transitory costs that may become more or less expensive for one parent or the other depending upon the amount of parenting time, such as transportation costs. However, it is important to note that the more parenting time that is exercised, the more duplication of some costs that is necessary to have a child living in two households.

Public Benefits.

Public benefits will have the same impact on low-income families regardless of whether the presumption is for equal time or not, as most agencies look at the actual time spent between households, regardless of the custodial label. For those families with equal or nearly equal parenting time, the parent who has the child for a significant time but is not eligible for public benefits will have significantly increased costs, with significantly decreased assistance options.

Significant Legal Impacts

Child Support Enforcement.

As noted above, many provisions and tools used to collect child support are limited by state law (which is restricted by federal law) to child support “obligors.” A custodial parent is presumed not to be an obligor, except in limited circumstances, and as such, only very limited enforcement tools are available. If both parents are joint custodians, regardless of parenting time, it is unclear whether state and federal law would permit enforcement against a parent who has significantly less parenting time and accordingly owes a child support obligation. As a result, there may be a restricted ability to enforce child support against a parent who is labeled as a “joint physical custodian.” It should also be noted that this may incent some potential obligors to push for the label of joint custodian (or, conversely, for potential obligees to push against the label of joint custodian).

Access to Mediation/Conflict Resolution.

Submission Neither For or Against Joint Physical Custody

As noted above, many low-income parents do not have access to mediation and/or conflict resolution tools, including mediators, parenting consultants and Guardians Ad Litem. A presumption of joint physical custody, regardless of parenting time, still accentuates the problems that can result with a lack of mediation and/or conflict resolution tools. When parents are initially determining custody and parenting time issues, they may have a very general parenting time arrangement, and not have the thorough discussions about what the schedule and the term “joint custodian” means. When parents receive an order from the court that is not agreed-upon, they are probably even less likely to understand what the order means. As a result, as parties go forward, their misunderstandings about the agreement and/or order may lead to continuing disagreement and/or conflict. However, they do not have tools in place to resolve disagreements short of returning to court, and in cases of severe conflict, involving law enforcement.

#### Modification and Post-Judgment Motions.

When parents do not have initial custody and/or parenting time orders that they understand, significant confusion and/or conflict can result, including confusion about what the term “joint physical custodian” means. For low-income parents, the only real option for clarification and conflict resolution is the court.

However, for parents without access to legal counsel, a presumption of joint physical custody without regard to parenting time makes the process for requesting modification even more complex. Many parents will not understand the difference between a post-judgment motion for a change of parenting time and a change of custody, which have very different legal standards. In fact, for quite a period of time, there will likely be many attorneys (and perhaps judges) who are unclear as to the appropriate standard in these cases. While this standard may be extremely confusing, it will likely not stop post-judgment motions from being filed, even if they are the wrong motion. In those cases, parents will expend significant energy and expense, only to be told that they have filed the wrong motion. This may very well result in significant frustration for families, particularly those who do not have the resources to pay for filing fees or an attorney to assist them. If parents are able to file the correct motion, it may be heard after a significant delay – and in the meantime, the conflict that precipitated the motions continues.

#### Conclusion

We acknowledge there are cases where joint physical custody, even cases of equal parenting time, can be appropriate and beneficial for a child. Current law grants parents and courts discretion to provide for joint physical custody, whether equal time or not, in appropriate cases. Our concern is with a *presumption* of joint physical custody. We believe it is vitally important to preserve the focus on a child’s best interests by requiring courts to focus on the needs of children in both initial determinations and modifications, while also considering and accommodating the individual needs of families. When presumptions are enacted, they tend to override judicial discretion, and may reflect the realities of some – but not nearly all- families. This is particularly true of the low-income families we serve. They have additional struggles and challenges, and overall, a presumption of joint physical custody would have a disproportionate negative impact on them.

We recognize the testimony presented at the public hearing regarding the significant feelings of some parents who feel marginalized from their child's lives after a family court proceeding. We also understand the lasting change and emotional consequences that separation or divorce can bring. However, there has not been sufficient research or evidence presented that the best resolution to alleviate this feeling of marginalization is to implement a presumption of joint physical custody; nor does there appear to be significant research indicating that the time a parent spends with a child correlates with the strength of parent-child bonding or parent-child relationship. In fact, the majority of research literature shows no relationship between the general type of custodial arrangement and child outcomes (assuming there is not high conflict).<sup>28</sup>

We are also very concerned about the systemic impacts of a presumption, and ask the Study Group to consider the collateral and unintended consequences that a presumption could bring. Given the current economic and state budget situation, we are increasingly concerned about increasing costs to not only other state agencies and the courts, but how those costs have very real impacts to low-income families.

Finally, the financial impacts for low-income families cannot be overstated. Many families who were married or living together were struggling to make ends meet prior to their separation or divorce that precipitated the custody and/or child support order. After separation, low-income families will have to find a way to pay for necessities. By impacting the family's ability to access public benefits, and increasing the cost of transportation, housing and availability of employment, many low-income families and their children will fall deeper into poverty. In addition, given limitations on transportation, housing, employment and other issues, well-intended parents who may have low conflict may find that a presumption of equal parenting time is not "doable" for their family situation, yet lack the resources to overcome the presumption.

Thank you for the opportunity to comment on this very important issue.

Sincerely,

Melinda Hugdahl

Staff Attorney  
Legal Services Advocacy Project

---

Office on the Economic Status of Women

Legislative Coordinating Commission  
Minnesota State Legislature

Date: Friday, November 14, 2008

To: Joint Physical Custody Study Group Members

From: Amy Brenengen, Director

---

<sup>28</sup> "Child Custody Arrangements: Their Characteristics and Outcomes" Department of Justice Canada (2004), p. 31.

Office on the Economic Status of Women (OESW)

Re: Presumptive joint physical custody; observations and financial implications for women

Thank you for the opportunity to share our observations with your study group. The Office on the Economic Status of Women (OESW) is part of the Legislative Coordinating Commission at the Minnesota State Legislature. We exist to provide information to the legislature to help assess the impact of their work on the economic status of women in our state.

Our Office understands and supports the presence of both parents' involvement in raising children. We understand that the determination of custody can be a very tenuous and difficult proceeding for both parties and most importantly the children.

This memo presents three concerns we wish to raise to the study group regarding a presumption of joint physical custody: the constraints of available data and information, the impact of a presumption of joint physical custody on low-income single women with children, and the systemic barriers in pursuing custody and child support adjustments under a presumption of joint physical custody.

Constraints of available data and information

Making sound fiscal observations as it pertains to a presumption of joint physical custody is difficult due to the limited availability and existence of data. As you are aware from the information presented to your group in previous testimony, there is no conclusive evidence that either supports or opposes a presumption of joint physical custody.

After a review of academic research, a logical second place to look for answers would be the experience of the families within the family court system in Minnesota. Such a review would enable us to understand the strengths and limitations of the current system. But here as well, there is no information collected, making an assessment of the current statute and its ramifications not possible.

Of particular interest, and where the most learning could occur, would be an analysis of the impact of the most recent reforms made within the custody and child support areas of statute. These reforms offer a flexible framework for determining custody. We believe having options benefits all of those impacted within the custody determination process, including women, but most importantly, the children.

The impact of a presumption of joint physical custody on low-income single women with young children

In July, our Office completed a brief on women and poverty in Minnesota (<http://www.commissions.leg.state.mn.us/oesh/fs/WomenPov.pdf>). Data shows that low-income single women with children under the age of five are one of the most concentrated segments of the poor in our state. The poverty rate is much higher among women in this category than men in this circumstance. As quoted in the brief, "The economic well being of single-parent households is often highly dependent on support from non-custodial parents. Child support is an invaluable contributor to the economic well-being of children and families. Most single-parent households

Submission Neither For or Against Joint Physical Custody

with ordered support are headed by women. As of January 31, 2008, 88.5 percent of child support obligees who receive child support services in Minnesota are women.” Our brief also commented upon the fact that there is a wide variance in how child support is collected.

It is difficult to predict how a presumption of joint physical custody would play out with regards to child support payments and collection. Much of this depends on how closely these elements would be linked within statute, and whether or not there would be a “percentage of custody” associated with the presumption (i.e. 50/50, 40/60, 30/70, etc.) Yet, we cannot ignore the high percentage of women who are currently receiving child support, many of them who are relying on it as a significant source of income.

We would hope that a presumption of joint physical custody would reduce the financial responsibility for women. However, we caution against a simple assumption that “custody is shared therefore expenses are shared.” Certain flexible household costs, such as food, might be reduced with shared physical custody, but fixed costs such as shelter and utilities would remain. There will also likely be increased costs associated with shared parenting such as transportation. Further, if a presumption of joint physical custody proves to be unsatisfactory for the mother (or father), modification to the order will be necessary. The process for modifying and filing post-judgment motions is complex in the current system, and it is not clear how this process would work under a designation of “joint physical custodian.” Our comments in point number three below elaborate on these concerns.

Finally, it is clear that there are limitations even within the current system, such as variances in how support is determined and enforced, that impact the economic status of low-income single women with children. We urge the study group and the courts to use this opportunity to re-examine these practices and strive for consistency throughout the state as the law – current or future – is implemented.

Systemic barriers in pursuing custody and child support adjustments under a presumption of joint physical custody.

We are familiar with an issue that is relevant to the work of this study group: the impact of cost-of-living adjustments (COLA's) on spousal maintenance orders. On a regular basis, we speak with women who are in the process of submitting COLA's. We also hear from women who are pursuing modifications to spousal maintenance support due to specific incidents, such as emancipation of a child or retirement. They find our Office because we provide a simple workbook that helps them calculate and submit their COLA. We have found that the women who contact our office usually have no where else to turn for support. They have limited resources and have attempted to navigate the county or legal system on their own with no success as pro se litigants. There are often complications or specific considerations in their cases where legal help is necessary, yet they are unable to obtain it due to financial limitations. In other cases, they are just above the income requirements for pro bono assistance programs – or, these programs do not offer support for post-order requests. Though women may qualify and rightly deserve an adjustment, the difficulty of the process – financially, technically, and emotionally – prevents them from pursuing the adjustment.

Submission Neither For or Against Joint Physical Custody

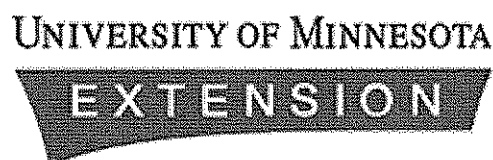
(I also note that we have received calls from men for this service and provided information to them as well.)

Our experience with spousal maintenance raises a final concern. In cases where parenting time is not exercised according to the order after an award of joint physical custody, the parent who cares for the child more than half the time will not only bear a disproportionate amount of the cost of raising the children, but will also have the burden to modify the child support and/or custody agreement. An expensive and laborious process will not be possible for many women. As in the case of spousal maintenance, we believe there will be parents who have a legitimate right to modify their custody arrangement, but will not pursue this due to system constraints, and the expense required to obtain help in navigating the system.

### Conclusion

Many of our points above reflect concern with the system as a whole, and to that end, we welcome the opportunity to work with the courts to determine a more effective system by which to serve our families in Minnesota.

It is true that the issues this study group addresses do not “belong” more to one gender than another. Each gender has its own unique issues and concerns. We do not see this solely as women’s issue or a mother’s issue, yet it is also not only a family issue or a father’s issue. We appreciate the opportunity to bring our perspective to the discussion.



### Joint Legal and Physical Custody

It's all about learning to co-parent

**Parents Forever** is a 12 hour divorce education program approved by the MN Supreme Court and offered in 65 counties around the state. This program is an initiative of the University of Minnesota Extension.

In our experience with offering this program to parents over the past 10 years, co-parenting is one of the critical concepts parents need to understand. Developing a co-parenting relationship, especially when you are hurt, scared and lack trust for the other parent takes practice and doesn't happen magically.

In considering a presumption of joint physical custody for MN families experiencing family transition, we encourage the task force to incorporate a strong parent education requirement that will help parents understand the dynamics of a functional co-parenting relationship and support them in creating a parenting plan to help make the co-parenting relationship work.

Submission Neither For or Against Joint Physical Custody

We are in the process of updating our teaching resources. One of the topics we are strengthening in our work with parents is the concept of co-parenting. The following excerpt from the Parents Forever – Impact of Divorce on Children curriculum describes the co-parental relationship and the factors that parents need to understand if it will work for them.

If you have further questions, feel free to contact any of us:

Minnell Tralle, Program Leader, Family Relations – [@umn.edu](mailto:@umn.edu)

Rose Allen, Extension Educator, Family Relations – [@umn.edu](mailto:@umn.edu)

Ellie McCann, Extension Educator, Family Relations – [mccan023@umn.edu](mailto:mccan023@umn.edu)

Jo Musich, Extension Educator, Family Relations – [@umn.edu](mailto:@umn.edu)

\*\*\*\*\*

We toss around the term co-parenting – it's a wonderful concept, but what does it mean?

When two or more people raise a child, they need to find a way to work together. This involves negotiating roles, setting expectations and supporting each other in the task of parenting. This is referred to as co-parenting.

Divorce, separation and family transition requires parents to re-negotiate the rules in order to co parent in different homes. If parents are considering joint physical custody and either/or joint legal custody – keep in mind that this will only work if parents are able to develop a functional co-parenting relationship.

What is co-parenting?

It's working together to raise your child or children. How well parents do this makes a big difference in their child's well being. A good co-parenting relationship means:

Both parents support each other in their efforts to raise their child

Both parents work to reduce conflict, and focus on the needs of the child

Both parents are actively involved with parenting and building a relationship with their child

Both parents share in the work of caring for their child.

When parents are able to cooperate and share care for their children, the children do better.

Here's what we know:

When parents have a good co-parenting strategy, infants and toddlers develop more secure attachments – a foundation for building relationships and learning about the world around them

How parents co-parent provides a model for how children learn about relationships and cooperation.

Submission Neither For or Against Joint Physical Custody



There is a connection between a good co-parenting relationship and better parenting practices.

Basically, having two involved parents benefits a child, no matter what the family form.

What is the difference between the co-parenting relationship and the relationship between the parents?

It is important to look at co-parenting separate from the relationship between the parents – be it romantic, friendly, distant or conflicted.

It is possible for healthy co-parenting to exist even where there is difficulty in the relationship between the parents. It is also possible that parents who have a good relationship with each other to have a less than satisfactory co-parenting relationship.

Co-parenting doesn't mean that you always agree. Co-parents who disagree but find ways to cooperate and support each other do well and grow in their parenting and relationship skills.

On the other hand, where there is regular opposition from a critical, dogmatic or inflexible partner, parents tend to get stuck in their own individual approaches to parenting and not coordinate or support each other.

What works to build a strong co-parenting relationship?

Healthy communication

A positive regard for the other parent

Agreement between parents on child rearing issues

The ability to compromise and negotiate

Both parties are able to separate issues with other parent from issues about caring for the child

What undermines the co-parenting relationship?

Conflict between parents

Focusing disagreements with the other parent around the child – putting the child in the middle of parental conflict

Undermining the other parent by siding with a child in an effort to be the favorite parent or creating loyalty conflicts

What happens over time when co-parenting is not aligned?

The primary caregiver becomes disillusioned with the less involved parent – includes them less in care of the child – dismisses their importance to the child, puts the other parent down with family members and with the child, practices gate keeping by restricting access to the child.

What happens to the other parent?

Submission Neither For or Against Joint Physical Custody

They feel excluded, don't learn how to care for the child, and don't feel able to contribute, grow tired of the tension and conflict with the other parent. In many cases they withdraw and drift away.

How can parents avoid this happening?

It is important that both parents understand their importance to their child. Despite their differences they must learn to work through the disagreements and respect the need for the child to have access and a relationship with both parents.

References:

Carlson, Marcia J., McLanahan, Sara S. (June 2006). Strengthening Unmarried Families: Could Enhancing Couple Relationships Also Improve Parenting? *Social Science Review* (June 2006) 297-321.

Grable, Sara, Crnic, Keith, Belsky, Jay. Family Processes and Child and Adolescent Development. *Family Relations*, Vol 43, No. 4 (Oct, 1994) pp 380-386.

McHale, James P. and Kuersten-Hogan, Regina. (July 2004). Introduction: The Dynamics of Raising Children Together. *Journal of Adult Development*, Vol. 11, No 3, July 2004.

McHale, James P., Kuersten-Hogan, Regina and Rao, Nirmala. (July 2004) Growing Points for Co-parenting Theory and Research.. *Journal of Adult Development*, Vol. 11, No 3, July 2004.

---