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Presumption Law in Action: Why States Should Not Be Seduced Into Adopting Joint Custody Presumption

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PRESUMPTION LAW IN ACTION: WHY STATES SHOULD NOT BE SEDUCED INTO ADOPTING A JOINT CUSTODY PRESUMPTION

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ABSTRACT

What custody standard is best for children once their parents separate? Many argue that the answer is simple: equal custody—or a presumption for joint custody—is not only fair to parents but also best for children. A presumption for judges has surface appeal: it provides an equitable sounding starting point. Indeed, many legislators throughout the country are considering new laws that would mandate a presumption for shared custody. However, recent social science research, legal scholarship, and judicial decisions suggest that shared parenting may not always be in a child's best interests. In this paper, I argue against the presumption that shared custody is in a child's best interest. An analysis of recent case law shows that the legal theories supporting presumptions in the law do not justify custodial presumptions in practice. I support this claim by analyzing case law in two of the few jurisdictions with a presumption for joint custody in place. Given the potential for custodial presumptions to harm vulnerable children, we must resist the seductive simplicity of an equal custody presumption and instead focus on what is actually best for children—based on actual, not assumed, facts.

I. INTRODUCTION

Two parents sit in a court-ordered mediation room in order to discuss the custodial arrangement of their two young children. One of the parents recently filed for divorce and they are both in court for a "temporary order" regarding issues relating to the children. The mediator, trying to help these parents reach a compromise about how best to move forward, tells the parents that there is a presumption of joint physical custody and that presumption should be the starting point of the discussion. Counsel represents one of the parents and the attorney clarifies that there is no presumption for joint physical custody but rather only a presumption for joint legal custody.[1]

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1. *See* J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 217 (2014) ("Most states distinguish between joint legal and joint physical custody, allocating to the former the authority of both parents to participate equally in making significant long-term decisions regarding their child's health, education, and welfare.").

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The language we use to understand the relationships between children and their parents continues to develop over time. Over the past several generations, more fathers are participating in child-rearing, and parents are more capable and willing to share custodial responsibility.[2] While custodial norms certainly are changing, however, empirical evidence indicates that mothers are still primarily taking care of their children during marriage even in this age of the "equal marriage"[3] and continue to be the primary caretakers after separation.[4] Nonetheless, most agree it is best for children to have both of their parents in their lives, and we want to encourage safe and active parental involvement after parents separate. There are few more important issues in our culture than the way in which separated parents determine how their children should be cared for after separation. The way in which separated parents figure out co-parenting is a particularly pressing issue in light of the increasing number of fractured and redefined families.

Given the changes in our social custodial norms, state legislatures continue to experience pressure to change the laws applicable to how children should be raised after a divorce or separation.[5] The proposal by some of these lobbying efforts is to require that all parents share physical custody of their children at the time of a divorce or separation.[6] Such a requirement would impose a rebuttable presumption that

2. BELINDA FEHLBERG ET AL., CARING FOR CHILDREN AFTER PARENTAL SEPARATION: WOULD LEGISLATION FOR SHARED PARENTING TIME HELP CHILDREN? 4 (2011).

3. Women still tend to place child-rearing responsibilities before their careers or seek out jobs with flexible schedules. *See* Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 923–24 (2005) (noting that while there is a trend of the "modern father[ ]," it remains "relatively unusual" for fathers to be the primary caretaker of their children in most marriages); DiFonzo, *supra* note 1, at 216 ("A 2013 Pew Research Center study reports that 'the time mothers spend on housework and child care is still about twice that of fathers.'") (quoting Wendy Wang, Parents' Time with Kids More Rewarding than Paid Work—and More Exhausting, PEW RES. CTR. (Oct. 8, 2013), http://www.pewsocialtrends.org/2013/10/08/parents-time-with-kids-more-rewarding-than-paid-work-and-more-exhausting).

4. *See* Cynthia R. Mabry, *Indissoluble Nonresidential Parenthood: Making It More than Semantics When Parents Share Parenting Responsibilities*, 26 BYU J. PUB. L. 229, 231 (2012) (writing that as of 2009 "an overwhelming majority of custodial parents are mothers (82.2%) rather than fathers (17.8%)"); Thoroddur Bjarnason & Arsaell Arnarsson, *Joint Physical Custody and Communication with Parents: A Cross-National Study of Children in 36 Western Countries*, 42 J. COMP. FAM. STUD. 871, 883 (2011) (determining that in a "vast majority" of post-separation families, the children "live in some arrangement with their biological mother . . . rang[ing] from 94% to 99%" of the families experiencing new family arrangements).

5. For example, in July 2015 there were legislative committee hearings in Massachusetts on joint custody presumption bills. Some of these bills seek to completely rewrite the current custody statute to emphasize the rights of the parents over a child's best interest and require that parents share physical custody. Similar bills have been introduced in Massachusetts for several years. There is a strong push, however, "for a complete overhaul of [Massachusetts's] obsolete child custody laws." Ned Holstein, *Divorced Parents Should Share Parenting*, NEWTON TAB (May 6, 2014), http://newton.wickedlocal.com/article/20140506/News/140507959.

6. There has been a national movement over the last several years to push legislatures to require that judges consider joint custody of children. Despite the pressure, legis-

parents are "assumed" to share physical custody at the time the parties separate. As noted in the above case hypothetical, court mediators and personnel also seek to influence how to craft a parenting schedule in which parents co-parent.

Notwithstanding the efforts to amend laws to include a rebuttable presumption for joint physical custody, to date no jurisdiction in the country currently has a presumption for joint physical custody when parents cannot agree to such an arrangement. There are a few jurisdictions, however, that have enacted more than a preference for joint custody or shared parenting. By way of example, both Louisiana and the District of Columbia have enacted statutes which contain a presumption that joint custody is in a child's best interests when the parents are not in agreement.[7] Though there has been a lot written in the legal academy about custody presumption theory since the 1980s, there is insufficient data on joint custody presumption statutes currently in place. I argue that a review and analysis of these two jurisdictions will reveal how the statutes are actually affecting children and families. The analysis in this paper is not based on abstract arguments about what is ideal or not so ideal; rather, the aim is to assess presumption law based on what is happening *in practice.*

While the statutes in the District of Columbia and Louisiana do not explicitly dictate a forced shared custody arrangement (or a joint physical custody directive), I suggest that the use of a statutory presumption in these jurisdictions is problematic nonetheless. My analysis starts from the premise that any kind of forced parenting time put in place by a legislature must be best for children and serve the needs of children first and foremost. What is ideal for parents must be a secondary consideration. That is, statutes cannot be designed to promote parental rights over the best interests of children.[8] I discuss the specific challenges and harms that have emerged in Louisiana and the District of Columbia and question whether this "ideal" type of childcare arrange-

latures across the country are taking these bills under close review. Many jurisdictions are seeing the bills vetoed, while others are seeing statutes amended to consider joint-custody as opposed to mandating it. *See, e.g.*, Opinion, *Our View: Child Custody Bill Requires Thoughtful Consideration*, SALEM NEWS (Mar. 26, 2015, 8:50 PM), http://www.salemnews.com/opinion/our-view-child-custody-bill-requires-thoughtful-consideration/article_bac7778b-a6d8-5f6a-8ceb-b536870cd937.html.

7. Father's rights groups have "'successfully lobbied state legislatures to enact statutes favoring joint custody' arguing 'that joint custody was a more accurate reflection of modern family roles.'" Erin Bajackson, Note, *Best Interests of the Child—A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIMONIAL L. 311, 323 (2013) (quoting Nancy Ellen Yaffe, Note, *A Fathers' Rights Perspective on Custody Law in California: Would You Believe It If I Told You That the Law Is Fair to Fathers?*, 4 S. CAL. INTERDISC. L.J. 135, 139 (1995)).

8. One of the national proponents of "shared physical custody" legislation, Michael Newdow, acknowledges that this type of legislation can be parent-focused rather than child-focused. In an interview with the *New York Times*, Mr. Newdow argues that what is wrong with our current child-centered custody laws is that they rest on the "assumption that you can deprive someone of his or her fundamental parental right simply in order to make a child's life more pleasant." Susan Dominus, *The Fathers' Crusade*, N.Y. TIMES MAG., May 8, 2005, http://www.nytimes.com/2005/05/08/magazine/the-fathers-crusade.html?_r=0. In other words, he complains that "you're taking one person's life [the parent's] and ruining it to make another person's [the child's] better." *Id.*

ment is an experiment gone wrong, in part, because the rights of the parents to joint custody outweigh what is best for children.

In this paper, I apply the main principles that support rebuttable presumptions *in the law* and argue that rebuttable presumptions *in practice* do not lead to good results. I examine joint custody presumptions from an efficiency standpoint, as applied to separating parents when they initiate litigation, and from a social policy perspective, in the context of separating parents experiencing high conflict or domestic violence. Case examples from both jurisdictions warn us about the implications of imposing joint custody and the importance of the language we use when describing custodial relationships. The unclear "joint custody" standard in these two jurisdictions could be interpreted by court personnel and pro se litigants as essentially ordering shared custody to the detriment of what is actually best for a particular child. Also, the presumption for joint custody becomes the "target" for parents at the start of the litigation. This results in imprecise direction, potential manipulation, rushed and uninformed decisions, difficult standards to rebut, and an underlying assumption that a shared parenting arrangement is in a child's best interest when, in practice, this is far from the truth for many families.

II. CUSTODY PRESUMPTIONS: HISTORY AND CONTEXT

The legal definition of a presumption is an "assumption that a fact exists."[9] Presumptions serve as a mechanism by which certain *presumed* facts do not need to be established on behalf of the fact finder (who is a judge in most family law cases). In practice, this means that the existence of the presumed fact (i.e., joint custody is best for children) is assumed at the start of the litigation until the opposing side meets a burden of proof to challenge the existence of that presumed fact.[10]

A. *A Comparative History of Presumption Custody Laws*

Since women gained individual rights in the early 1900s throughout the country, many states never established a statutory custodial presumption of one gender over another. In Massachusetts, for example, a gendered custody presumption was never codified; instead, the state adopted a gender-neutral standard (the "happiness and welfare of such children shall determine the custody").[11] In other states, however, a maternal custody presumption, codified as the "tender years doctrine," presumed that a mother should have primary custody of children during their tender years.[12] In addition to the "tender years" presumption,

9. *Presumption*, BLACK'S LAW DICTIONARY (4th pocket ed. 2011).

10. *See* Joel S. Hjelmaas, *Stepping Back from the Thicket: A Proposal for the Treatment of Rebuttable Presumptions and Inferences*, 42 DRAKE L. Rev. 427, 430–31 (1993).

11. MASS. GEN. LAWS ch. 137, § 7 (2015). *See also* Maritza Karmely & Kelly Leighton, *The Brass Ring of Custody: Toward a Better Solution for Families in Massachusetts*, 93 MASS. L. REV. 373, 377 (2011).

12. JEFFERY M. LEVING & KENNETH A. DACHMAN, FATHERS' RIGHTS: HARD-HITTING & FAIR ADVICE FOR EVERY FATHER INVOLVED IN A CUSTODY DISPUTE 27–29 (1998).

many other states had a "primary caretaker" presumption.[13] While some states did not adopt this caretaker presumption, the history as a primary care parent is often one of the many factors to consider when determining custody in disputed cases.[14]

What ultimately emerged from these custody presumptions in favor of one caretaker over another, given the cultural shift in parenting, was an imprecise "best interests of the child" standard.[15] Custody decisions were no longer based on presumptions, but rather judges were asked to make case-by-case "determinations without presumptions or a clear default position."[16] The Uniform Marriage and Divorce Act promulgated the best interest standard and a five-factored model to consider when determining a child's best interest.[17] This standard allows family court judges to prioritize the welfare of the child over any other arguable compelling factor, such as the rights of either parent to have custody.[18] As one author described, the question of best interests "boils down to a judgment, consisting of many factors, about the likely future happiness of a human being."[19]

Prior to the 1970s, many states had a presumption *against* joint custody and would not authorize joint custody.[20] As a result, historically it was difficult to obtain such a custody order even if the parents agreed to joint custody. One New York case, *Braiman v. Braiman*, was often cited for the proposition that joint custody was not appropriate for most families.[21] However, state courts and legislatures eventually moved away from preventing parents to agree to joint custody and, at this time, most states include statutory provisions permitting that parents can agree to a joint custody agreement so long as the court determines the agreement is in the best interest of the children. In fact, most states have enacted legislation that encourages shared parenting when it is in a child's best interest.[22]

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13. *See generally* DiFonzo, *supra* note 1 (describing the history of presumption laws).

14. *See, e.g.*, 2A MASS. PRAC. *Family Law and Practice* § 62:2 (4th ed. 2013).

15. Maria P. Cognetti & Nadya J. Chmil, *Shared Parenting—Have We Really Closed the Gap?: A Comment on AFCC's Think Tank Report*, 55 FAM. CT. REV. 181, 182 (2014) ("[I]t is fair to say that every state has adopted a 'best interests of the child' approach."). Like the rest of the country, Massachusetts has adopted a "best interest of the child standard" as early as 1865. *See In re* Custody of Kali, 792 N.E.2d 635, 640 (Mass. 2003) ("The 'best interests' standard appeared in our case law at least as early as 1865 . . . .").

16. Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 392 (2008).

17. *See* Bajackson, *supra* note 7, at 311.

18. *See* Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule"*, 41 U. BALT. L. REV. 83, 97 (2011).

19. Alan M. Grosman, *Recent Developments in Custody Law*, N.J. LAW., Mar.–Apr. 1989, at 26 (quoting *In re* Baby M, 537 A.2d 1227, 1260 (1988)).

20. *Cf.* Mathew A. Kipp, *Maximizing Custody Options: Abolishing the Presumption Against Joint Physical Custody*, 79 N.D. L. REV. 59 (2003) (discussing the history of joint physical custody in North Dakota).

21. *See* DiFonzo, *supra* note 1, at 219 (noting that the "Braiman rule" stood for the proposition that there were few families that could participate in a joint physical custody dynamic).

22. *See infra* Part II.C.

Though states began to recognize joint custody options, many states also identified that parents cannot co-parent if there has been a history of domestic violence in the relationship. States started to amend their custody statutes in the 1990s to include a requirement that where there has been a finding of some kind of abuse, the abusive parent should not have custody.[23] Massachusetts, for example, recognized that domestic violence must be a factor in determining child custody as early as 1981,[24] and then adopted a rebuttable presumption against awarding custody to an abusive parent in 1998.[25] This revised custody provision requires a family court judge to consider past or present abuse of a parent or child when issuing a custody order, and if the judge finds by a preponderance of the evidence that abuse has occurred, a rebuttable presumption is triggered indicating that "it is not in the best interests of the child to be placed" in the custody of an abusive parent.[26] As such, there is a rebuttable presumption that it is not in the best interest of a child to be placed in the custody of an abusive parent (presumed fact) if the court finds that "a pattern or serious incident of abuse" has occurred (proven existence of other facts).[27]

While it is now the case that custody statutes are gender neutral throughout the country, many argue that the family court system is biased. "Many men," one author writes, "argue that gender neutrality has never quite been achieved because a maternal presumption . . . seems to 'influence courts.'"[28] This claim does not have empirical support. For example, under current Massachusetts custody law, parents are "equal" and shared parenting is encouraged.[29] However, even with this statutory scheme in place, fathers' rights groups have argued that mothers are unfairly awarded custody over fathers.[30] In order to address this issue, in the late 1980s a committee was established in Massachusetts to study the issue of gender bias. The Committee found that "when fathers actively sought custody of their children, they received either primary or joint physical custody over 70% of the time."[31] This was the case even though they also found that mothers had primary

23. *See* Margaret F. Brinig, Loretta M. Frederick & Leslie M. Drozd, *Perspectives on Joint Custody Presumptions as Applied to Domestic Violence Cases*, 52 FAM. CT. REV. 271, 272 (2014).

24. *See* Kelly v. Kelly, 425 N.E.2d 760, 760–61 (Mass. App. Ct. 1981).

25. MASS. GEN. LAWS ch. 208, § 31 (2015); 17B MASS. PRAC. *Prima Facie Case—Proof and Defense* § 55.16 (5th ed. 2005); MASS. GEN. LAWS ch. 208, § 31A (2015).

26. MASS. GEN. LAWS ch. 208, § 31A (2015).

27. *Id.*

28. Bajackson, *supra* note 7, at 315.

29. MASS. GEN. LAWS ch. 208, § 31 (2015). In 1855, the legislature amended the custody statute to require that absent misconduct, "in making an order or decree relative to the custody of children . . . the rights of the parents . . . [were] held to be equal." MASS. GEN. LAWS ch. 137, § 7 (2015).

30. Dugan Arnett, *In Mass. and Elsewhere, a Push for Custody Reform*, BOS. GLOBE (Aug. 1, 2015), https://www.bostonglobe.com/metro/2015/07/31/massachusetts-and-elsewhere-push-for-child-custody-reform/Xh4NOwx2qWyZ12VMuYPf9J/story.html.

31. Karmely & Leighton, *supra* note 11, at 377 (citing Mass. Supreme Judicial Court, Gender Bias Study Comm., *Gender Bias Study of the Court System in Massachusetts*, 24 NEW ENG. L. REV. 745, 750–52 (1990)).

physical custody of children most often following divorce. The Report does not include findings of bias in favor of women or against men; there only is a comment on the effect of the *perception* of bias in favor of women: "Reports indicate, however, that in some cases perceptions of gender bias may discourage fathers from seeking custody."[32]

Other states have conducted more recent studies on gender bias in their court systems. In North Dakota, for example, a committee on Gender Fairness Implementation issued a report in 2007.[33] As part of this assessment, surveys were distributed to approximately 450 judges, attorneys, and judicial system employees.[34] The Commission concluded that there were no "clear instances of bias in the application of legal doctrine in domestic cases."[35] Indeed, when asked about custody proceedings, the majority of both of female and male attorneys did not believe there was gender bias present, expressing a view that judges give fair and individualized consideration to fathers seeking custody.[36] Similar to the findings in the Massachusetts study, regardless of whether there is bias in favor of either women or men in custody disputes, there was a *perception of bias.*

B. *Joint Custody Presumptions: Background and Debates*

As there has been a shift toward accepting joint custody decisions by parents in the latter part of the twentieth century, more and more states started to consider whether to codify a presumption for joint custody. In 1979, California became one of the first states to enact a statutory presumption that joint custody was in the best interests of the child.[37] As one writer noted, "[f]athers' rights groups pushed for, and succeeded in getting, legislation stressing the importance of joint custody" in California.[38] These groups sought to have presumptions for joint parenting time in place regardless of whether the parents could co-parent and would agree to such an arrangement.[39]

Several studies were conducted after this presumption legislation was put in place in California and found that, in part, there were negative consequences of imposing joint custody on parents who were not in

32. *Id.*

33. Gender Fairness Implementation Comm., *Gender Fairness in North Dakota's Courts: A Ten-Year Assessment*, 83 N.D. L. REV. 309, 313 (2007).

34. *Id.* at 316.

35. *Id.* at 334.

36. *See id.*

37. *See* Nancy K. Lemon, *Joint Custody As a Statutory Presumption: California's New Civil Code Sections 4600 and 4600.5*, 11 GOLDEN GATE U.L. REV. 485, 487 (1981) ("Joint custody, whether legal or physical, is statutorily authorized in only a few states, and is presumed to be in the child's best interests only in California.").

38. Nancy K. D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV 601, 604 (2001). *See also* Charlotte Germane et al., *Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence*, 1 BERKELEY WOMEN'S L.J. 175, 180–82 (1985).

39. North Carolina was the first state to enact joint custody legislation in 1957. But the push for joint custody legislation "began in earnest in 1979" when California enacted a joint custody statute. Ellie J. Spielberger, *Whose Rights Matter Most? Fathers' Rights, Joint Custody, and Domestic Violence*, 4 U. PA. J.L. & SOC. CHANGE 55, 60 (1997).

agreement about such a custodial arrangement; this was particularly true when parents were in conflict.[40] As a result of social science research, the joint custody statute was first amended in 1989 to clarify that the law established "neither a preference or a presumption for or against joint legal custody, joint physical custody or sole custody . . . ."[41] California then amended the statute in 1994, replacing the statute and providing for joint physical custody only when both parents agree to such a parenting plan.[42] The legislature was able to learn from this social experiment, took the necessary step to rectify the problem, and clarified that there was no mandate for or presumption of joint custody.

The joint custody presumption codified in California sought to encourage co-parenting and shift away from the legal norm that had been in place which prevented parents from sharing custody. Unfortunately, the vague statutory declaration that joint custody was in a child's best interests was interpreted to go further than simply only suggesting joint custody as an option for parents. Family court judges were pleased that the legislature clarified that the law did not include a custodial presumption because "over two-thirds of California judges found that imposition of joint custody under the operation of the presumption led to mixed or worse results for the children . . . ."[43] Similarly, in New Jersey, joint custody was authorized by case law for the first time in 1981, and the court's decision "opened the joint custody floodgates."[44] Judges in New Jersey began to impose joint custody on parents and "were spared the wrenching pain of deciding" who should be awarded custody. Within a few years, the judges recognized that joint custody was not for most parents and "reconsider[ed] the wisdom of joint custody awards and [made] such awards less frequently."[45]

Since California's passage of—and then repeal of—a forced shared custody presumption, there have been many efforts throughout the country to pass legislation that would mandate joint custody in most cases. There has been extensive scholarship in this area focusing on the theoretical pros and cons of joint physical custody presumptions. The advocates for a joint physical custody presumption argue there are a number of benefits to such a presumption including the predictability of custody case outcomes,[46] the elimination of perceived gender bias in

40. *See infra* notes 236–38 and accompanying text.

41. June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV. 1091, 1139 (1999) (quoting MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 92–93 (1994)).

42. Carbone, *supra* note 41, at 1139–40.

43. Lila Shapero, *The Case Against a Joint Custody Presumption*, 27 VT. B.J. 37, 37 (2001) (citing Thomas J. Reidy et al., *Child Custody Decisions: A Survey of Judges*, 23 FAM. L.Q. 75, 80 (1989); Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM. L.Q. 201 (1998)).

44. Grosman, *supra* note 19, at 27.

45. *Id.*

46. *But see* Suzanne Reynolds & Ralph Peeples, *When Petitioners Seek Custody in Domestic Violence Court and Why We Should Take Them Seriously*, 47 WAKE FOREST L. REV. 935, 943 n.48 (2012) (citing Margaret F. Brinig, *Unhappy Contracts: The Case of Divorce Settlements*, 1 REV. L & ECON. 241, 249–61 (2005)).

family court,[47] the likelihood that fathers will pay child support if awarded joint custody, and setting forth the "ideal" of co-parenting after separation.[48] One of the more significant arguments in support of joint physical custody presumptions is the undisputed social science evidence that children benefit when both of their parents are actively involved in their lives in a healthy and productive way.[49] Some commentators argue that custody awards should reflect the idyllic norm that parents share rights and responsibilities of their children.[50] They contend that shared or joint physical custody is intended to influence parental roles and that parents will eventually co-parent.[51] If a legal reform in custody law creates a custodial obligation on the more absent parent (usually the father) at the time of separation, he will be more active after the parties separate.[52]

While the arguments in favor of joint physical custody presumptions are rational and arguably pro-child because each argument supports co-parenting on some level, there are a number of scholars and social scientists that have discussed the likely problems with shared physical custody presumptions as well. For example, some note the concern that most families who agree to a post-separation agreement do not choose a joint physical custody arrangement for their children.[53] Others contend that joint custody presumptions focus on parents' rights to custody rather than crafting a parenting plan that works best for a particular child.[54] Many argue that it is not financially feasible for most families because parents would have to maintain two homes—which is expensive—and this means fewer resources for children.[55] Another concern is that most parents cannot judicially enforce a parenting plan of joint physical custody. That is, if a parent is

47. *See* Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U.L. REV. 403, 407–09 (2005).

48. *See* Stephanie N. Barnes, Comment, *Strengthening the Father-Child Relationship Through a Joint Custody Presumption*, 35 WILLAMETTE L. REV. 601, 624–25 (1999).

49. *See id.* at 627 ("Researchers suggested that the possibility of joint custody may actually keep a child's parents from divorcing. This phenomenon, considered a 'bonding strategy,' occurs because fathers 'permit themselves to grow more attached to children when they do not fear a complete break with them on divorce. With the increased emotional ties, divorce becomes less likely.'") (quoting Margaret F. Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393, 393 (1998)).

50. *See* Holly Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27, 27 (1985).

51. *See id.* at 32–33.

52. It is interesting that given these persuasive arguments, joint physical custody is not the norm in our society when separating parents divide up their parenting time at the time of separation.

53. *See* Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLAMETTE L. REV. 467, 476 (1999) ("A joint custody rule represents a judgment by the state that both parents should have equal caretaking roles with respect to children. While this norm . . . might make sense to many of us in our individual lives, it is not the choice many families have exercised and should not be imposed as a general standard.").

54. *See* Greenberg, *supra* note 47, at 406–09.

55. *See* Margaret F. Brinig, *Does Parental Autonomy Require Equal Custody at Divorce?*, 65 LA. L. REV. 1345, 1369 (2005).

awarded parenting time for half of the week and then later does not take responsibility of the child during his or her parenting time, courts will not enforce the parenting plan through a contempt action.[56]

The most consistent and well-documented concern about joint physical custody presumptions is its impact on high-conflict families.[57] The overwhelming majority of family law matters involving custody—about ninety percent of the cases—are resolved before trial.[58] Of the remaining cases that are not resolved, thereby forcing the parties to seek redress in the courts on the issue of child custody, research suggests there is usually animosity between the parties, and these are the very parents who will likely be ordered to presume joint custody.[59] "[T]he impact [of shared custody] is more critical for the 10 percent of contested custody cases involving parents who are unable to resolve their disputes short of trial."[60] In general, researchers have been reluctant to advocate for a shared custody presumption given the problems associated with imposing such a presumption on high-conflict families. As one researcher described this issue, "[w]hile studies in the early 1980's reported about the devastating effects of *divorce*, subsequent studies warned about the devastating effects of *conflict*. For those marriages characterized by high-conflict, children fared better after divorce."[61]

Custody presumptions, like most presumptions, are rebuttable—this means that the presumed fact has not been established as a matter of law.[62] Rebuttable presumptions can be overcome if there is refuting

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56. *Cf. id.* at 1361; *see also infra* notes 189–94 and accompanying text.

57. *See* DIANE MERCER & MARSHA KLINE PRUETT, YOUR DIVORCE ADVISOR 203 (2001) ("[H]igh contact with both parents coupled with high conflict is not in children's best interests. There is no ambiguity about this.").

58. Dorothy R. Fait, Vincent M. Wills & Sylvia F. Borenstein, *The Merits of and Problems with Presumptions for Joint Custody*, 45 MD. B.J. 13, 16 (2012) (noting that approximately ninety percent of custody cases settle and the minority ten percent of litigated custody cases usually represent cases that have high conflict between parents).

59. *See* Christy M. Buchanan & Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419, 439 (2008) (describing that presumptions are not appropriate for high conflict families).

60. Hardcastle, *supra* note 43, at 201. Generally, most state laws regarding custody will acknowledge some type of joint custody—they are usually referred to as presumptions, preferences, or an option for joint custody. Courts either approve a joint custody parenting plan or may order joint custody; joint custody may be a preferred option (but not required); or the court presumes joint custody unless one of the parents seeking sole custody rebuts the presumption. *Id.* at 203.

61. Suzanne Reynolds, Catherine T. Harris & Ralph A. Peeples, *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1676 (2007). *See also infra* notes 235–52 and accompanying text.

62. Presumptions in the law that are not rebuttable are called "conclusive" or "irrebuttable." In this case, "[n]o evidence is allowed to challenge or dispute the presumed fact." 14B MASS. PRAC. *Summary of Basic Law* § 10.22 (4th ed. 2006). *See also* Margaret Martin Barry, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U.L. REV. 767, 776 n.34 (1997) (quoting 9 WIGMORE ON EVIDENCE § 2491(3) (3d ed.) ("A presumption does not have any probative value, but merely provides the fact-finder with a conclusion in the absence of proof to the contrary.").

evidence.[63] While all rebuttable presumptions are a legal fiction about the existence of a fact, certain custody presumptions are "true evidentiary presumptions" and other types of presumptions are more of an effort to shift the burden of proof.[64] Statutory joint custody presumptions (i.e., a presumption that joint custody is in a child's best interest) do not require that a party establish a qualifying fact.[65] As noted by Professor Ver Steegh and Judge Gould-Saltman, this is not a "true" presumption that "requires a predicate showing of facts that are logically linked to a resulting assumption or conclusion. (*If* fact X, *then* conclusion Y.)."[66]

When a state's law mandates that parties shall be awarded joint custody in most cases, the presumption dictates that a judge will order the parties to have joint custody unless the party opposing joint custody presents sufficient evidence to rebut the presumption.[67] The fact that two people have a child together is sufficient to trigger the presumption that joint custody is in a child's best interests. A presumption against placing a child with an abusive partner, on the other hand, is a "true" custody presumption because it "compels a certain result (sole custody) upon the showing of a predicate fact (the domestic violence)."[68]

Though there has been much written about the theories behind rebuttable presumptions for shared custody, this issue has not been flushed out by many studies regarding the families on which a presumption of joint custody was imposed by a court due to a presumption in the law.[69] And there is reason to believe that presumption laws have an effect on whether parents share custody or not. Professor Judith Greenberg cites to research that when parents were able to reach an agreement without court or mediation intervention, the parents agreed to joint custody in twenty percent of the cases. However, the number of joint custody orders shot up to forty percent when there was court or mediation involved. Greenberg noted that "[i]t may be that courts and mediators, who are faced with parents with strong, conflicting positions on how to handle custody, resort to what they see as a compromise: split the child."[70] As such, there is reason to believe that there will be more joint custody awards as a result of statutory presumption laws.

63. A rebuttable presumption is more than an inference because with a rebuttable presumption the judge is "compelled to find the ultimate fact unless evidence of the nonexistence of the ultimate fact has been introduced." Hjelmaas, *supra* note 10, at 431 (quoting Addison M. Bowman, *The Hawaii Rules of Evidence*, 2 U. HAW. L. REV. 431, 433 (1981)).

64. *See* Brinig, Frederick & Drozd, *supra* note 23, at 272.

65. *See* Nancy Ver Steegh & Dianna Gould-Saltman, *Joint Legal Custody Presumptions: A Troubling Legal Shortcut*, 52 FAM. CT. REV. 263, 266 (2014).

66. *Id.*

67. Fait, Wills & Borenstein, *supra* note 58, at 15.

68. Brinig, Frederick & Drozd, *supra* note 23, at 271.

69. Most research in this area is based on families who have selected a joint custody arrangement on their own. Buchanan & Jahromi, *supra* note 59, at 427.

70. Greenberg, *supra* note 47, at 405.

C. *The Joint Physical Custody Presumption "Movement"—What's [Really] Happening?*

Proponents for shared or joint physical custody argue that these legislative presumptions are sweeping the nation.[71] Articles and websites cite to several states as having presumption statutes in place. Articles vary, citing to between six and twenty states.[72] For example, in her article, *"Best Interests" of Minnesota: Adopting a Presumption of Joint Physical Custody,* Nicole Schave states that joint physical custody is a national movement and goes on to argue in favor for a joint physical custody presumption statute in Minnesota.[73] Groups seeking to enact joint physical custody legislation cite to this "movement" as a powerful advocacy point in many jurisdictions.[74]

Given that custody laws are different in every jurisdiction and the terminology varies, there are several complex issues at play. For example, certain statutes have clear definitions about what is meant by "joint custody" or "shared custody" while others do not. Some jurisdictions mandate that there is a presumption for joint custody, but only when the parents agree to this arrangement.[75] Other jurisdictions, such as New Mexico, require the "trial court to engage in an intricate weighing of numerous statutorily required and fairly detailed factors."[76] Most jurisdictions will not require a joint custody arrangement as a presumption, but rather indicate that joint custody is "favored."[77] Other jurisdictions have attempted new, varied approaches to encourage joint parenting when appropriate.[78]

What is further complicated in the scholarship on joint custody is the interplay and often misuse of the terminology.[79] Certain states are considered joint custody states, but an analysis of the states' statutes and case law indicates that there is no presumption in place for joint physical custody but rather for joint legal custody. Iowa, for example, is often referred to as a joint custody presumption state. Indeed, Iowa Governor Tom Vilsack was thought to have signed a presumptive joint

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71. Arnett, *supra* note 30.

72. *See generally* Barnes, *supra* note 48; Greenberg, *supra* note 47; Shapero, *supra* note 43.

73. Nicole M. Schave, *"Best Interests" of Minnesota: Adopting a Presumption of Joint Physical Custody,* 33 HAMLINE J. PUB. L. & POL'Y 165 (2011).

74. Arnett, *supra* note 30 ("About 20 states are considering measures that move toward more equal custody arrangements for parents following divorce or separation . . . .").

75. *See, e.g.*, Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce,* 1987 WIS. L. REV. 107, 120 n.38 (1987) (noting that as of 1987, "[t]hirteen states have some form of joint custody presumption or preference, at least if both parties agree").

76. DiFonzo, *supra* note 1, at 223.

77. *Id.* at 218 (noting that in 2013, Arkansas "amended its child custody laws to indicate that joint custody is 'favored'").

78. *See, e.g.*, H.R. 35, 61st Leg., Gen. Sess., 2015 Utah Laws 18 (adding parent-time schedule amendments to Utah's divorce statute).

79. Melissa A. Tracy, *The Equally Shared Parenting Time Presumption—A Cure-All or a Quagmire for Tennessee Child Custody Laws?,* 38 U. MEM. L. REV. 153, 178 (2007).

custody law in May 2004.[80] However, a review of the state's custody statutes and case law confirm that there is in fact no presumption law in place. In *In re The Marriage of Hansen*, the Supreme Court of Iowa reviewed the history and progression of legislative amendments in 1997 and 2004.[81] The court concluded that the new legislation "did not create a presumption in favor of joint physical care."[82] If the legislature in Iowa wanted to create a rebuttable presumption, the court found, it would have enacted a law that included the word "presumption" because "it is clear that the Iowa legislature knows how to enact substantive standards in family law matters."[83] The court went on to emphasize that "[p]hysical care issues are not to be resolved based upon perceived fairness to the *spouses*, but primarily upon what is best for the *child*."[84]

Florida also has been identified as a presumption state.[85] Interestingly, however, it was the case that Florida had a presumption *against* joint physical custody until the recent past.[86] Called "rotating custody," Florida's Supreme Court first announced a presumption *against* joint physical custody in *Phillips v. Phillips*.[87] To rectify the presumption against joint custody, the Florida Legislature enacted section 61.121 of the Florida Statutes in 1997, which provided that "the court may order rotating custody if the court finds that rotating custody will be in the best interest of the child." In *Schwieterman v. Schwieterman*, the court confirmed that "there is no presumption under current Florida law for or against any particular time-sharing schedule . . . ."[88] The "Legislature abolished the concept of custody and replaced it with parenting plans and time-sharing. . . . *There is no presumption for or against the father or mother of the child or for or against any specific time-sharing schedule* when creating or modifying the parenting plan of the child."[89]

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80. Trish Wilson, *Solomon's Solution*, ALTERNET (Apr. 21, 2005), http://www.alternet.org/story/21836/solomon's_solution.

81. 733 N.W.2d 683 (Iowa 2007).

82. *Id.* at 683.

83. *Id.* at 692.

84. *Id.* at 695.

85. Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 851 (1998) (identifying Florida as having the "strongest joint custody presumption, requiring shared parenting responsibility whether or not the parties agree to it unless the court finds such an arrangement detrimental to the child").

86. Texas also is considered a presumption state. Critz v. Critz, 297 S.W.3d 464 (Tex. App. 2009) (finding that section 153.131 of the custody statute contains no language that indicates a legislative intent that a parental presumption applies to the issue of primary custody *apart from* the determination of joint managing conservatorship); *id.* at 472 ("The title to section 153.131 is 'Presumption That Parent to be Appointed *Managing Conservator*.'"). Conservatorship in Texas is simply a designation of who has the right to make certain decisions regarding a child.

87. Charlee Perrow, *The Origin and Evolution of Florida's Presumption Against Rotating Custody: A Guideline for Florida Judges*, 30 FLA. ST. U.L. REV. 503, 505–06 (2003).

88. 114 So. 3d 984, 986–87 (Fla. Dist. Ct. App. 2012).

89. *Id.* It is interesting that the legislature and judges went back and forth about this "rotating custody" issue in Florida. This suggests that the policy makers (legislatures) are forcing through laws that adjudicators or fact finders (judges) recognize cannot work in the context of custody disputes.

In various states that have reviewed bills requiring a rebuttable presumption of joint custody, many have chosen instead to amend their respective statutes to encourage shared parenting.[90] For example, in 2012, Arizona amended its child custody laws to encourage shared parenting arrangements. A year later, Arkansas amended its child custody laws to state that joint custody is favored. In 2015, South Dakota passed legislation requiring courts to consider an award of joint custody.[91] Other jurisdictions are seeing these bills vetoed. An Illinois bill creating a presumption of at least thirty-five percent parenting time for each parent stalled in committee. Similarly, a 2013 Michigan bill mandating shared parenting did not make it past the judiciary.[92] Short of mandating joint custody, several jurisdictions are instead creating guidelines for judges to consider when granting joint physical custody. A presumption that child custody should be split 50-50 between parents has been pushed in South Dakota; in response, the state bar association is "sponsoring its own shared parenting bill, which would establish statewide guidelines for judges to consider when granting joint physical custody."[93]

Rather than a "movement" for joint physical custody, there is actually very little evidence of joint parenting time mandates in the law. Without question there are certain unmistakable trends in custodial statutes that have developed in the past several years. Joint parenting is increasing and should be encouraged when it is appropriate for the children and, in particular, when parents can agree and comply with a joint custody arrangement. Many jurisdictions, like Massachusetts, have amended their custody statutes to allow both separating parents to have "frequent and continued contact" with their children to the extent that such contact is in the children's best interest.[94]

As noted earlier, there are a few jurisdictions, including Louisiana and the District of Columbia, that have a rebuttable presumption that "joint custody" is in a child's best interest. Under the rebuttable presumption law in Louisiana, absent an agreement of the parties, "the court shall award custody to the parents jointly; however, if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent."[95] Louisiana law lists out twelve factors that the trial court judge is

90. It is important to remember, however, that while Iowa and Florida do not technically have statutes requiring the imposition of a joint custody presumption, judges and litigators in those jurisdictions may, nonetheless, interpret the law as requiring joint custody. Perception is a powerful concept in family law dissolution litigation.

91. William A. Winter & Michael P. Boulette, *Custody and Parenting Time: Minnesota Amendments Codify Compromises*, BENCH & B. MINN. (Oct. 8, 2014), http://mnbenchbar.com/2014/10/custody-and-parenting-time-minnesota-amendments-codify-compromises/.

92. *Id.*

93. Jonathan Ellis, *Shared Parenting Could Be New Divorce Outcome*, USA TODAY (Jan. 27, 2014, 8:29 PM), http://www.usatoday.com/story/news/nation/2014/01/27/shared-parenting-could-be-new-divorce-outcome/4950111/.

94. MASS. GEN. LAWS ch. 208, § 31 (2015).

95. LA. CIV. CODE ANN. art. 132 (2015).

required to consider in order to determine what is in a child's best interest.[96] In addition to presuming that joint custody is in the child's best interests unless shown to the contrary by clear and convincing evidence, there is also a requirement to "designate a domiciliary parent."[97] Further, the statutory scheme includes a rebuttable presumption "that no parent who has a history of perpetrating family violence shall be awarded sole or joint custody of children," and that the "presumption shall be overcome only by a preponderance of the evidence that the perpetrating parent" has committed a domestic violence offense.[98]

Like Louisiana,[99] the District of Columbia child custody statute includes a presumption of joint custody. However, the statute enacted in 1996 to amend the jurisdiction's custody law does not define physical custody. The legislative history indicates that this was intentional to give judges more flexibility to determine what is in a child's best interest.[100] The statute provides that there "shall be a rebuttable presumption that joint custody is in the best interest of the child or children" except if there has been an intrafamily offense—an instance of child abuse or neglect or where parental kidnapping has occurred.[101] Also, there is a rebuttable presumption that joint custody is not in the best interest of the child or children if a judicial officer finds by a preponderance of the evidence that any of these situations occurred with the children. In determining custody, the statute indicates that the "best interest of the child shall be the primary consideration," and to determine the best interest of the child, the statute lists out several factors to consider.[102]

Each jurisdiction includes a standard with which to rebut the presumption for joint custody. In the District of Columbia, the presumption may be rebutted by a preponderance of the evidence and is specific about what is required to overcome the presumption (must be rebutted by a judicial finding that either an intrafamily offense occurred, there was child abuse or neglect, or parental kidnapping).[103] In Louisiana, however, the presumption must be rebutted by clear and convincing evidence.[104] In addition, each jurisdiction includes an analysis of what is in a child's best interest. As one scholar notes, "[since all] states continue to frame the custody resolution norm in terms of the

96. LA. CIV. CODE ANN. art. 134 (2015).

97. LA. STAT. ANN. § 9:335(B)(1)–(2) (2015).

98. LA. STAT. ANN. § 9:364 (2015).

99. Kenneth Rigby, *1993 Custody and Child Support Legislation*, 55 LA. L. REV. 103, 138 (1994) (describing the value of the statutory amendment that would "simplify and expedite custody and child support determinations").

100. Hutchins v. Compton, 917 A.2d 680, 682 (D.C. Cir. 2007).

101. D.C. CODE § 16-914 (2015) (stating that an "[i]ntrafamily offence" includes "interpersonal, intimate partner, or intrafamily violence").

102. *Id.*

103. Fait, Wills & Borenstein, *supra* note 58, at 15.

104. *Id.* (explaining that in the District of Columbia, "the presumption may be rebutted only upon a judicial finding by a preponderance of the evidence that: 1) an intrafamily offense has occurred; 2) child abuse or child neglect has occurred; or 3) parental kidnapping has occurred").

best interests of the child . . . presumptions, preferences, and the other legal terms are subservient to that hallmark custody standard."[105] Based on the analysis below, I question whether the "best interests" focus is actually subservient to the "joint custody" determination because there has been problematic case law interpreting these statutes that mandate joint custody. That a presumption for "joint custody" and a "best interest" analysis are supposed to work in tandem during the custodial deliberation does not appear to be the case; instead the focus seems to be on a parent's right to joint custody.

III. PRESUMPTIONS IN PRACTICE: PROBLEMS IN THE APPLICATION OF THE REBUTTABLE PRESUMPTION

Rebuttable presumptions that impose shared parenting on parents who cannot agree to this arrangement are based on the assumption that it is in a child's best interest to spend time with parents relatively equally to the extent possible. Of course this sounds reasonable; children unquestionably benefit from having both of their parents actively involved in their lives whenever safe and feasible. When parents separate, we would like to assume that it is probably the case that both parents will continue to remain in their children's lives on a relatively equal basis.[106] Indeed, the most common basis for a presumption in the law is that the presumed fact *logically* or *probably* follows the establishment of other facts. As one writer described, "[t]he rationale for [many] presumptions is based on the high probability that if a particular basic fact exits, the resultant fact also exists . . . ."[107] While more parents are co-parenting as compared to twenty years ago, it is still the case that there is one primary custodial parent in most cases because parents generally are not making decisions on their own to share physical custody of their children.[108]

Rather than being based on probability, joint custody presumptions are either based on an "efficiency" argument because joint custody is fair for parents and best for children, or on what society dictates is ideal and should be promoted from a social policy standpoint.[109]

105. DiFonzo, *supra* note 1, at 217–18.

106. Greenberg, *supra* note 47, at 403 ("[V]oters in Massachusetts voted overwhelmingly in favor of a measure that would require courts, in most situations, to give divorcing parents shared physical and legal custody of the children.").

107. 14B MASS. PRAC. *Summary of Basic Law* § 10.22 (4th ed. 2006); *see, e.g.*, C.C. v. A.B., 550 N.E.2d 365 (Mass. 1990) (explaining that presumption in family law based on probability includes the legal presumption that a child born in a "lawful wedlock is legitimate").

108. *See supra* notes 2–4 and accompanying text.

109. There are three main reasons for why rebuttable presumptions arise in the law generally. The probability rationale, the most common basis for a presumption in the law, provides that the presumed fact *logically or probably* follows the establishment of other facts. *See* 14B MASS. PRAC. *Summary of Basic Law* § 10.22 (4th ed. 2006). A second basis for an evidentiary rebuttable presumption is based on a rationale of efficiency. *See* Hjelmaas, *supra* note 10, at 435. A third basis for rebuttable presumption in the law is based on a social policy rationale. Both legislators and judges codify certain rebuttable presumptions—even though not necessarily *probable* or based on *efficiency*—in order to further a socially desirable policy. *See id.*

Indeed, most of the arguments in support of joint custody presumptions fall into one of these two justifications. However, imposing shared parenting on families who do not agree to this arrangement based on either an efficiency or social policy theory has proven, in practice, to lead to alarming results in the jurisdictions with joint custody presumptions in place.

A. *Compromised Solutions: Custody Decisions Should Not Be Automatic and Without Sufficient Evidentiary Inquiry*

Proponents in favor of joint custody or forced shared parenting argue that these types of presumptions allow for predictability while taking discretion away from family court judges. And, arguably, it makes the decision easier for judges when there is a legislative mandate for shared parenting time in place. It provides judges a guideline to follow. An "automatic" rule determined by the legislature that parents are to share custody in most cases can be seen as not only "fair" but also "efficient." New York Judge Felicia K. Shea observed, "[j]oint custody is an appealing concept. It permits the court to escape an agonizing choice, to keep from wounding the self-esteem of either parent and to avoid the appearance of discrimination between the sexes."[110]

One of the arguments in favor of presuming that "joint custody" is in a child's best interest starts from the premise that children are better off if they are with both of their parents after separation. As a result, it is *efficient* for a trier of fact to make presumptions about parenting. Though it is not difficult to imagine the kind of available evidence to establish the best parenting plan for a particular child, the efficiency rationale tells us that a judge does not need to inquire about parenting facts in the first place. It is automatically the case that joint custody is best when parents decide to separate. This is the default rule all things being equal.

However, while children and their parents need swift resolution and stability once they separate, this default rule should not outweigh the necessary best interest analysis for the sake of efficiency. A rebuttable presumption for forced shared parenting is especially problematic if it is imposed for efficiency purposes, because, in practice, this forced parenting dynamic is more often than not put in place at the start of the divorce case. In fact, a custody presumption based on efficiency is *particularly dangerous for children* since, in most cases, this presumed fact of joint custody will be imposed at an early stage of the proceedings and before a family court judge has been presented with any evidence at all.[111]

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110. Wilson, *supra* note 80. An example of this type of presumption in the family law context in Massachusetts and many other jurisdictions is the rule that courts are to presume that the child support amount determined by the state's child support guidelines is the presumptive child support amount for a particular family. COMMONWEALTH OF MASS., OFF. OF THE CHIEF JUST., CHILD SUPPORT GUIDELINES 2 (2013), http://www.mass.gov/dor/docs/cse/guidelines/2013-child-support-guidelines.pdf.

111. FEHLBERG ET AL., *supra* note 2, at 6 ("[C]o-parenting [ ] is not necessarily the product of shared commitment to its ethos but may represent an uneasy compromise or

1. Temporary Order Hearings Are Not Evidentiary, They Are Based on Allegations Only

When the parties have minor children, most separating families request "temporary orders" to be put in place.[112] This is different than most civil cases where the parties to a lawsuit wait for their requested relief for a long period of time. Family cases involving children are distinct because parents need some direction from the court early on in the process if they cannot decide on their own. In Massachusetts, for example, parties usually do not wait until the final divorce trial before obtaining an order from the court about the family status quo. This is because "in most cases, the parties need some intervention of the court right away, whether to determine temporary custody, set a [parenting time] schedule, or decide on the proper amount of child support."[113] As a result, in most cases parties file a motion (or request) for "temporary orders" and schedule the motion for a hearing before a family court judge. The hearing normally is scheduled within a few months of the filing of the divorce complaint. On the day of the temporary order hearing, litigants are required to meet with a probation officer (also called a family service officer) and if the parties are not able to reach an agreement, they present their arguments to a judge. These hearings are not evidentiary hearings—rather, in most cases, they are based on representation or allegations by counsel or the litigants.

Not surprisingly, Louisiana and the District of Columbia have a similar procedure for obtaining interim relief. In Louisiana, a Petition for Divorce and Determination of Incidental Matters is available to the moving party at the time of filing for a divorce. Incidental matters in this petition may include the determination of custody of minor children. At any time a party may choose to move for a request for the determination of custody during the preliminary stages of the divorce proceeding.[114] This petition is a sworn statement, similar to a complaint that requires the moving party to enter all requests for which they are seeking relief. After the petition is filed and before any evidence is presented, counsel for the parties or the litigants themselves will present their argument to the court. At this point, still before any evidence has been presented, the Louisiana court may "order the parties to mediate their differences in a custody or visitation proceeding."[115]

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deadlock in a context where neither parent has managed to assert authority over the other.").

112. *See* Richard E. Miller, *Child Custody Cases in Vermont: What Is the Best Interest of the Child?*, 35 VT. B.J. 30, 38 n.8 (2010) ("Among the first determinations in divorce cases involving children is an order by the family court for temporary custody . . . .").

113. DIERINGER ET AL., FAMILY LAW ADVOCACY FOR LOW AND MODERATE INCOME LITIGANTS 250 (2d ed. 2008), http://www.masslegalservices.org/system/files/library/Chapter+09+Final.pdf. *See also* Reynolds & Peeples, *supra* note 46, at 950 ("[A] number of states passed statutes and changed local rules in order to facilitate the entry of temporary custody orders . . . .").

114. LA. CIV. CODE ANN. art. 105 (2015).

115. LA. STAT. ANN. § 9:332 (2015).

Similar to Louisiana, a party in the District of Columbia who seeks temporary custody during the preliminary stages of a divorce will file a motion with the court.[116] The District of Columbia's rules govern the court process in domestic relations proceedings.[117] The parties are required to provide substantial marriage information, along with a financial statement. The parties will present their arguments at a temporary order hearing, where the judge will consider the statements and arguments without any evidence. Before a trial on the merits, the judge will enter an order, in accordance with section 16-914 of the District of Columbia Custody of Children Statute, detailing the temporary care and custody of their children pending the final determination of those issues.

Motion hearings by definition in family law matters are not evidentiary hearings. In other words, "judges are faced with a dilemma regarding how to structure temporary custody and visitation, given that it may be months before the calendar is free for an actual evidentiary hearing, so the temporary order is usually based only on allegations."[118] Joint custody presumptions, however, are put in place at this early stage even though there is no evidentiary proof about what is best for a particular child. This can result in harmful interim orders on a temporary basis before the custody issues can be fairly flushed out at trial before an impartial judge.

A distressing example in the District of Columbia of a problematic temporary order was evident in *Araya v. Keleta*, in which the parties were awarded joint physical custody on an interim basis even though domestic violence was at issue.[119] The father filed for divorce in May 2009 and filed a motion for sole legal and physical custody. At the temporary orders stage, just after the father filed for divorce, the parties were ordered to share physical custody with each parent, and were allotted fifty percent parenting time. This temporary order was in place for approximately a year. The trial was held over several days over a year later from July 2010 to January 2011. The ruling after trial amended the initial temporary custody order that had been in place. The trial judge wrote that it would have been ideal for him to have "a fuller record than was available to him at the time of the temporary custody order."[120] After the evidentiary hearing the court found that "the husband hit the wife 'so forcefully in her stomach as to cause [her] pain and apprehension of miscarriage.'"[121] The judge concluded that because of the husband's abusive behavior, it was in the best interests of the children for the mother to have sole physical custody and the father to have unsupervised parenting time.

The legislative history detailing the passage of presumptive custody statutes indicate that such bills are justified when passed because the

116. D.C. SUPER. CT. R. DOM. REL. 3 (2015).
117. D.C. SUPER. CT. R. DOM. REL. 4 (2015).
118. Lemon, *supra* note 38, at 664.
119. 65 A.3d 40 (D.C. Cir. 2013).
120. *Id.* at 47.
121. *Id.* at 45.

presumption is "rebuttable." Supporters of the presumption bill in the District of Columbia, for example, argued that "since the presumption was to be rebuttable, it would be easily overcome by *evidence* that indicated that joint custody was not in the best interest of the child."[122] In other words, the presumption "would stand only so long as there was no evidence that suggested an alternative custody arrangement was in the best interest of the child."[123]

Given how quickly temporary order hearings are scheduled in many courts, it may be difficult for litigants to find an attorney prior to the interim order hearing date to help them understand the difference between allegations and properly introduced evidence. Indeed, litigants in family law matters may not be able to secure counsel by the time of the evidentiary hearing—likely scheduled more than six months after the temporary orders hearing.[124] Regardless, at least the litigants at a trial usually are not appearing for the first time at court with no notice about what will be decided; with some exposure to the process at the temporary orders stage, they have a better sense of how the "system" works by the time of the evidentiary hearing. For example, they will have some indication from the court system about what type of evidence they will need to bring with them to court in order to persuade the family law judge to rule in their favor at a trial on the merits, and to rebut any statutory presumptions. A parent could bring witnesses to testify on his/her behalf or present certified records at the evidentiary hearing. This way the judge is able to assess evidence other than the typical "he said/she said" type of allegations that often occurs at a temporary orders hearing.

In practice, an initial custody decision would often be determined at the temporary order stage based on representation of the parties as opposed to a careful consideration of evidence properly admitted at trial. In an efficient effort to resolve a family's disagreement, joint custody is often considered a compromise position at the early stage of a case. This should not be a substitute for a necessary analysis of a child's best interests. At times, judicial efficiency may cause additional harm to children because judges may fail to invest the time and attention necessary.[125] As discussed above, rebuttable presumptions are a presumption of fact and "is a substitute for testimony or evidence, and has the force of proof until it is overcome by contradictory evidence."[126] Given the importance of parenting responsibilities, parents "should have an onus on them to prove to the court that they could manage shared

122. Barry, *supra* note 62, at 775 (emphasis added).

123. *Id.* at 776.

124. *See infra* notes 133–36 and accompanying text.

125. Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U.J. GENDER SOC. POL'Y & L. 163, 180 (2009); Greenberg, *supra* note 47, at 405 ("It may be that courts and mediators, who are faced with parents with strong, conflicting position on how to handle custody, resort to what they see as a compromise: split the child.").

126. JACOB A. STEIN, TRIAL HANDBOOK FOR DISTRICT OF COLUMBIA LAWYERS § 21:1 (2013 ed.).

parenting in the event that any judge would consider such an option . . . ."[127]

One Louisiana Court of Appeals decision noticed the importance of the distinction between temporary orders and final orders. In *Ventura v. Rubio*, the appellate court found that there was an issue at the trial court level that orders intended to be interim in nature had actually been written as a final judgment.[128] The court determined that this was an important procedural problem that had to be rectified because litigants in family matters must have "timely and appropriate adjudication of the issues."[129] Some families awarded joint custody at the interim stage of the case in this jurisdiction did not have the procedural opportunity to conduct an evidentiary hearing. Without question this led to confusion and a lack of oversight about what is in a child's best interest.

Temporary orders with a set default that joint custody is best for children presents a problem of instability for children who need stability more than ever. "A custodial arrangement that involves shuttling the child between different homes, churches, lifestyles, and socioeconomic situations and subjects the child to inconsistent rules, regulations, methods of discipline, and styles of parenting invites continual instability."[130] If a legal system is going to put a child through this, then parents should have to make an evidentiary showing that this type of transition is in a child's best interest rather than presume it is.

2. Presumptions Further Exacerbate Problems: Self-Representation and Unclear Terminology

Starting with an automatic order as vague as "joint custody" at the temporary orders stage is confusing for pro se litigants unfamiliar with how such so-called flexibility works in the context of a joint custody legal culture. Unfortunately, this is now the case for families in some jurisdictions such as Louisiana and the District of Columbia.[131] In *Hutchins v. Compton*, the court noted that the "Council of the District of Columbia specifically" did not define the "terms 'sole physical custody' or 'joint physical custody,' intending to maximize the trial court's 'flexibility in determining which type of custodial arrangement would be in the child's best interest.'"[132] Recall that this so-called flexibility occurs at the temporary order stage and in the context of *allegations* rather

127. Peter Jaffe, *A Presumption Against Shared Parenting for Family Court Litigants*, 52 FAM. CT. REV. 187, 187 (2014); *see also* FEHLBERG ET AL., *supra* note 2, at 11 ("[S]hared time orders . . . made by judges [are] a compromis[ing] solution between warring parents.").

128. So. 2d 880 (La. Ct. App. 2001).

129. *Id.* at 891.

130. Elissa P. Benedek & Richard S. Benedek, *Joint Custody: Solution or Illusion?*, 136 AM. J. PSYCHIATRY 1540, 1541 (1979).

131. Soon after the presumption statute was enacted in the District of Columbia, Professor Margaret Barry wrote a compelling article warning practitioners and litigants about the potential dangers associated with the new custody presumption law. Barry, *supra* note 62, at 772.

132. 917 A.2d 680, 682 (D.C. Cir. 2007).

than *evidence*. Flexible standards may work for families with the resources to hire lawyers, behavioral experts, medical experts, etc., to help determine what is best for a particular family. But this is not the case for a majority of separating parents who do not have any reason to understand how to interpret and apply a presumption for "joint custody" other than to think that the legal system is mandating that they share custody of their child.

The statistics on pro se representation in family law litigation is staggering.[133] When the joint custody statute was passed in the District of Columbia, pro se litigants totaled approximately fifty percent.[134] In Massachusetts, the Boston Bar Association conducted a survey in 1997 and determined that the "Massachusetts Probate and Family Court reflects the national trend of burgeoning pro se litigation in family law cases . . . . [L]itigants are more likely to appear without counsel than with counsel."[135] The percentage has increased since that time, with numbers as high as eighty percent nationally.[136]

One of the most distressing consequences of a presumption for shared custody at the time of the initial custody order is the detrimental effect on pro se litigants and their children. In the District of Columbia and Louisiana (and other jurisdictions with a mandate of shared parenting or "joint custody"), it is likely that a pro se litigant may not be able to rebut the presumption for joint custody at the temporary orders stage. In *Araya*, the mother had counsel to argue for her and yet a temporary order was put in place for one year that permitted a shared physical custody arrangement that was not in the children's best interests.[137]

In addition, the substance or language of a court order is important for the sake of clarity for individuals without counsel. In both Louisiana and the District of Columbia, a family court judge is likely to incorporate the term "joint physical custody" in the temporary order given the presumptive language in the statutes *but not actually* order

133. Reynolds, Harris & Peeples, *supra* note 61, at 1634–35 ("National studies have reported the trend toward pro se appearances in family law matters, and this trend has carried over to custody disputes."). Their study suggests that "we should try to make sure that parties have counsel." *Id.* at 1684.

134. Barry, *supra* note 62, at 793 n.101 ("In 53% of all cases in the Family Division of the Superior Court, one or both of the litigants are *pro se*.").

135. BOS. BAR ASS'N, TASK FORCE ON UNREPRESENTED LITIGANTS, REPORT ON PRO SE LITIGATION 8 (1998), https://www.bostonbar.org/prs/reports/unrepresented0898.pdf ("[I]n over two-thirds of the cases examined, one or both of the litigants were pro se.").

136. "In our states, more than 80% of the litigants appear without lawyers in matters as important as . . . child custody and child support proceedings." *Support for Self-Representation Litigants*, JUST. INDEX (Nov. 2014), http://www.justiceindex.org/findings/self-represented-litigants/; *see also* Reynolds & Peeples, *supra* note 46 (citing John M. Greacen, *Framing the Issues for the Summit of the Future of Self-Represented Litigation*, *in* THE FUTURE OF SELF-REPRESENTED LITIGATION: REPORT FROM MARCH 2005 SUMMIT 19, 23 (2005)) (stating that sixty to ninety percent "of family law cases now involve at least one self-represented litigant").

137. Araya v. Keleta, 65 A.3d 40 (D.C. Cir. 2013).

joint physical custody.[138] That is, in both Louisiana and the District of Columbia, the language used to describe the parenting time in these jurisdictions is not consistent with "joint physical custody."[139] Cases in each jurisdiction include awards of "joint physical custody" that are more comparable to the more "traditional" parenting schedule in which one parent is the primary custodial parent. For example, in *Estopina v. O'Brien*, a District of Columbia trial court ordered that the father have weekend parenting time and that the mother have primary physical custody.[140] The father appealed, claiming that the court failed to apply the rebuttable presumption of joint custody. The appellate court affirmed the lower court's ruling and held that this arrangement constituted "joint physical custody."

In order to assist pro se litigants, judges and court personnel should make a concerted effort to call joint physical custody what it is and stop using this phrase to describe a parenting plan in which the parents are not in fact co-parenting. As it is in place now, it is unclear what to expect when anticipating a joint custody decision. The standard is "flexible" at a time when rules of evidence are not in place, and "vague" when the court does not have enough data. There is understandable confusion for the litigants needing to understand and incorporate unclear terms when considering what should be the starting point—equal responsibility (decision-making) and/or equal or nearly equal time.

Though many parents are able to settle their custody disputes on their own and without court intervention, the court personnel (judges, mediators, and staff) serve an essential role in assisting litigants in the determination of whether a compromise is possible and if so, aid them in reaching an agreement. And this is especially true at the temporary order stage when litigants are just starting to become familiar with the alleged facts and law in their case. Each litigant gathers information as the process proceeds, and the system provides guideposts and benchmarks that hopefully assist the parents in making informed choices. This type of negotiation, bargaining in the "shadow of the law," is an important step for parties seeking to reach a custodial resolution.[141]

As noted above, the very families who cannot resolve their own parenting plans are the ones likely to be forced to share custody with a presumption in place. Pro se litigants will not know or have reason to understand the nuanced difference between actual implementation of joint physical custody and other "parenting time" options at the tempo-

138. The concept of "joint custody" lacks a standard definition. *See* Benedek & Benedek, *supra* note 130, at 1540.

139. *See, e.g.*, Stephens v. Stephens, 822 So. 2d 770, 778 (La. Ct. App. 2002) ("[O]nly if it can be shown that a fifty-fifty shared physical custody arrangement is, in fact, both feasible AND in the best interest of the child can [a joint physical custody] order be implemented.").

140. 68 A.3d 790 (D.C. Cir. 2013).

141. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

rary orders stage. Parents will feel forced to reach an agreement at the temporary orders stage based on the understandable pressure from court mediators who are trying to help the parties reach an agreement. "Because divorce bargaining and negotiations occur 'in the shadow of the law,' presumptions, or the lack of presumptions, play a pivotal role in negotiations."[142] Pro se litigants representing themselves will not understand the distinction between the "joint custody" statutory language and what a judge might in fact order. Imagine the consequence if there were a presumption for "joint physical custody" in these jurisdictions? The battle would be more intense and more complex.

To call a parenting plan in which one parent has the parties' child for a majority of the week a "joint physical custody" arrangement suggests that legislators are more concerned about parents' rights to their children rather than framing the issue as one that is child focused.

In the anecdote at the start of this Article, the mediator, meaning to do well and to help the two litigants in the mediation session, told the litigants that there is a presumption of joint physical custody.[143] The client had the benefit of a lawyer who could gently interject that there is no such presumption. As noted above, there is a large number of family law litigants who are not represented by counsel, and the number of pro se litigants continues to increase year after year. We can only imagine how often pro se litigants are given an incorrect legal standard that suggests a co-parenting arrangement as they are negotiating a temporary order agreement in an effort to encourage compromise.[144]

Family dynamics and relational definitions are too important to be uncertain at the temporary order phase of divorce cases.[145] Pro se parties will typically rely on the language of the statutes to guide them through the often-confusing family court proceedings and also rely on court personnel when reaching agreements in the early stages of their case. Without an experienced attorney to advise and clarify how custody statutes are actually applied in practice, many pro se litigants will not be able to fully understand what a joint custody presumption truly entails. As a general matter, we should encourage using appropriate and accurate language to describe parenting relationships.

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142. Elrod & Dale, *supra* note 16, at 390 (footnote omitted).

143. *Id.* at 408 ("Although some were skeptical, research indicates that when parents mediate parenting plans or custody disputes, they reach settlement 50% to 85% of the time whether mediation is voluntary or court mandated.") (quoting Joan B. Kelly, *Trends in Interventions for Separated Parents and Children*, *in* SPRING CLE CONFERENCE COMPENDIUM MATERIALS 53 (2008); Robert E. Emery et al., *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 25 (2005)).

144. Elrod & Dale, *supra* note 16, at 408 ("Court-mandated mediation, however, may be inappropriate, and even dangerous, in high-conflict cases where the imbalance of power is too great . . . .").

145. Tracy, *supra* note 79, at 179 ("Most joint custody studies examine families and children in joint custody schemes that were voluntarily entered into by agreement, rather than imposed by such a statutory presumption. Therefore, there is little data showing how the custody arrangements worked when one parent opposed the joint custody arrangement.") (footnote omitted).

The words used to describe parenting relationships affect how parents see themselves and their respective roles in their child's life. Accurately describing the parental relationships we use in family law matters will assure that both parents will understand the degree of responsibility necessary when co-parenting. This is significant in family law cases because appropriate language will encourage parents to focus on what is best for their children.[146]

A number of appellate courts, in fact, have modified forced alternating physical custody orders because, after careful analysis, it was determined that the orders were not in the best interest of the children.[147] For example, in *Wilson v. Craig*, a divorcing couple in District of Columbia with three minor children reached an agreement for joint physical and legal custody in which the time the children resided with father would gradually increase until reaching an alternating week-schedule.[148] One year after the agreement, the mother sought to modify the parenting time and a court-appointed forensic evaluator determined that "continuing the [ ] joint custody agreement was not a workable recommendation based on the high conflict between the parents."[149] The evaluator, Dr. Bruce Copeland, further found that "[f]orcing a shared arrangement under these conditions was associated with risk and poor childhood outcome . . . ."[150] In a case from Louisiana, *Evans v. Lungrin*, the court of appeals affirmed the trial court's four-month alternating child custody schedule, finding that "neither party proved by clear and convincing evidence that sole custody was in the best interest of the child."[151] However, the Supreme Court of Louisiana concluded that the trial court's "award of four-month, alternating, split *physical custody* to plaintiff and defendant [wa]s not in the best interest of the child."[152]

In each of these cases, the parties and the trial courts were more focused on finding a way to make joint custody work rather than develop a custodial arrangement that was focused on the children's best

146. Failure to accurately describe a joint custody parenting schedule can have unintended consequences. For example, in Rivero v. Rivero, 216 P.3d 213 (Nev. 2009), the Supreme Court of Nevada found that clarity is important in family law matters. In this case, the parents reached an agreement for "joint physical custody" of their minor child that included a five-day (with mother), two-day split (with father) of the child's time with each parent and no award of child support. The mother brought a motion to modify, seeking sole physical custody and child support arguing, in part, that the father was not spending time with the child. The Supreme Court defined "joint physical custody" because definitions "will provide much needed clarity and certainty in child custody law." *Id.* at 221.

147. *See In re* Marriage of Hansen, 733 N.W.2d 683, 701 (Iowa 2007) (citing cases in which appellate courts have not affirmed shared physical custody awards).

148. 987 A.2d 1160, 1161–62 (D.C. Cir. 2010).

149. *Id.* at 1162.

150. *Id.* (internal quotation marks omitted).

151. 708 So. 2d 731, 734 (La. 1998).

152. *Id.* at 739.

interests. Child custody legislation must focus on what is best for children and not what is best for parents.[153]

3. Judges Are Likely to Rubber Stamp Temporary Orders

For the pro se litigants and parents represented by counsel, most temporary order agreements (whether by agreement between the parties or through court-mandated mediation) more often than not are "rubber-stamped" by judges. This is the case for several reasons.[154] First, judges have very crowded dockets and are frequently too busy to review each and every interim agreement and discuss them in any detail with the litigants. For example, in Massachusetts, because "fifty family court judges managed 164,525 new filings in fiscal year 2009," the judges "are often focused on making proceedings as brief as possible and on finding ways for parties to settle their differences."[155] There is no question that the lack of judicial resources is a very real problem with respect to the temporary orders that go into place if there is a rebuttable presumption for joint custody in place.

Second, judges generally want litigants to reach an agreement on their own rather than have the parents argue before them regarding how best to divide custodial responsibilities. Using presumptions will increase the likelihood that family court judges will "readily accept joint custody without examination, with the result that judges are more likely to grant joint custody in cases where the parties are hostile and conflicted."[156] As one commentator noted, "When settlement is the goal, the burden is on the more reasonable or less powerful party to concede . . . ."[157] Moreover, if there is an agreement in place at the temporary order phase of the case, the "status quo" parenting plan established at that time often will become the final order of the court.[158] That is, the

153. Benedek & Benedek, *supra* note 130, at 1542 ("[D]uring the course of a custody hearing, one parent, while demonstrating virtually no understanding of what the disposition might entail, waved a newspaper article lauding joint custody as though this evidence should determine the issue. Episodes such as this illustrate the importance for attorneys . . . to make parents who may have vague ideas about joint custody understand the essence of the concept."). This may be why parties are reaching temporary agreements, which inevitably become final judgments, to include what the parties believe must include joint custody.

154. Ariel Ayanna, *From Children's Interests to Parental Responsibility: Degendering Parenthood Through Custodial Obligation*, 19 UCLA WOMEN'S L.J. 1, 28 (2012) ("The vast majority of child custody arrangements are never litigated, but rather are agreed to in private parenting plans. These plans are almost always rubber-stamped by judges, based on the rationale that private agreements are preferable to court impositions.") (citing Am. Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & POL'Y 1, 7 (2000)) ("Chapter 2. assumes that parental agreement is, generally speaking, good for children, and that it is difficult for courts to accomplish meaningful review that is likely to improve measurably those agreements.").

155. Margaret Drew & Marilu Gresens, *Denying Choice of Forum: An Interference by the Massachusetts Trial Court with Domestic Violence Victims' Rights and Safety*, 43 SUFFOLK U.L. REV. 293, 319 (2010).

156. Hardcastle, *supra* note 43, at 206.

157. Drew & Gresens, *supra* note 155, at 319.

158. Cognetti & Chmil, *supra* note 15, at 182 (noting that the status quo often becomes the final order).

temporary order usually becomes the basis for the court's permanent custody order and the parties would have to demonstrate a change in circumstance to modify the final order.[159] As a result, if parents are focused on their right to parenting time instead of what is in their children's best interest, many temporary orders will then become the permanent custody order *without the benefit of a best interest of the child analysis at all.*

When parents separate, cannot determine on their own what is in their children's best interests, and seek redress in the court system, there should not be a default custody rule that applies in most cases. Complicated custodial issues should not be automatic and without adequate evidentiary inquiry. This is particularly true for the large percentage of families navigating the legal system without representation who need clear guidelines for how to think about focusing on their children's best interests rather than fighting over a presumed fact of joint custody. Statutes must use well-defined terminology at the start of each case because that language may influence how litigants move through their divorce and separation process.[160]

Jurisdictions that mandate joint custody should look to jurisdictions such as Massachusetts, which has been on the forefront of best practices, statutory custody standards, and case precedent—all of which have been consistently child-focused.[161] The custody statute, for example, warns against a presumption for or against joint physical custody.[162] Family court judges are not constrained to target joint custody as a preliminary matter and instead can focus on the best interests of the children rather than the parents' right to joint custody.[163] Massachusetts's courts recognize that children are the main focus.[164] For example, in *Carr v. Carr,* the appellate court rejected the argument that a child's best interests must be based on "the least intrusive interference

159. Miller, *supra* note 112, at 38 n.8.

160. Karmely & Leighton, *supra* note 11, at 377.

161. Some proponents of amending the custody laws in Massachusetts contend that the current custody law is outdated and antiquated. This could not be further from the truth. *See* Miller, *supra* note 112, at 32 ("In Massachusetts, each parent is *required* to submit a shared custody implementation plan, and the court may modify, grant, or reject the plan.").

162. The custody statute in Massachusetts has a clear statement about presumptions in the context of joint physical custody. "[T]here is no presumption of temporary shared physical custody and at the trial on the merits there shall be no presumption of or against shared legal or physical custody." MASS. GEN. LAWS ch. 208, § 31 (2015).

163. For example, in Franco v. Mudford, 772 N.E.2d 601 (Mass. App. Ct. 2002), the Supreme Judicial Court affirmed a trial judge decision not to continue the parties' temporary order agreement to share physical and legal custody of their child because there was significant animosity and acrimony between the parties, and therefore sole custody was in the child's best interests.

164. Massachusetts courts have identified the significance of relying on properly introduced evidence rather than representation by counsel. Pedersen v. Klare, 910 N.E.2d 382, 387 (Mass. App. Ct. 2009) (reversing lower court's contempt finding, in part, because matter was before the court in a motion session and the trial "judge did not hear any evidence on the point other than representation of the father's counsel").

with parental rights."[165] Further, the Supreme Judicial Court ("SJC") understands the level of commitment required of a shared physical custody arrangement. In *Mason v. Coleman*, the trial court denied a mother's request to move out of the Commonwealth when the parents shared physical custody of their children.[166] The mother appealed and the SJC affirmed the trial court's denial of her request to relocate out of state. In so holding, the SJC found that a parent who has been awarded joint physical custody must be willing "to subordinate personal preferences to make the relationship work."[167]

4. Children Are Financially Harmed When Co-Parenting Reverts to Sole Parenting

In a small subset of cases, parents seeking joint physical custody of their children are able to work cooperatively to reach a custody outcome. However, for another subset of parents—those fighting for joint custody of their children—a judicially sought or imposed outcome can often result in parents reverting back to a one-parent custody dynamic.[168] In my legal experience, I can recall several examples of cases in which an opposing side sought shared parenting time at the temporary order stage, only to reduce his or her actual parenting time as the case proceeded. It also has been the case that litigants and his or her counsel fought for a shared parenting plan and, within a year of a final judgment, the parenting plan was not followed but rather the children resided primarily with the parent who maintained primary residential responsibility. This phenomenon is consistent with many of my colleagues practicing family law. Professor Mason writes that few parents maintain a joint physical custody arrangement, and that "inevitably the child soon drifted into spending most time with one parent, usually the mother."[169]

Research in California and Australia confirms this is the case. In one of the most well-known studies of the California experience, very early research in this area examined the relationship between the legally decreed order of joint physical custody and the children's actual residence. The researchers found that when joint the parents agreed to physical custody arrangements and when they were imposed upon the parents, a majority of the parents who shared physical custody reverted to a traditional model where the child resided, for the most part, in the

165. 691 N.E.2d 963, 964 (Mass. App. Ct. 1998). Several states, such as Colorado, are in the process of reassessing their custody laws and have "moved away from parental *rights* to parental *responsibilities*." Mary Ann Mason, *The Roller Coaster of Child Custody Law Over the Last Half Century*, 24 J. AM. ACAD. MATRIM. L. 451, 466 (2012) (emphasis added).

166. 850 N.E.2d 513 (Mass. 2006).

167. *Id.* at 518.

168. *See* Susan Steinman, *The Experience of Children in a Joint Custody Arrangement*, 51 AM. J. ORTHOPSYCHIATRY 403 (1981). Interestingly, a study found that one-third of parents who *agreed voluntarily* to joint custody arraignments actually reverted back to a sole custody arraignment for a variety of logistical reasons. *Id.*

169. Mason, *supra* note 165, at 458.

mother's residence.[170] Indeed, "in the only study which included a sample of joint custody arrangements that were ordered or strongly influenced by a court, *none* of the families with court-imposed or court-influenced joint custody were found to be 'successful' one year after the arrangement began."[171] The authors concluded that the "degree to which the court influenced the joint custody arrangement was negatively related to outcome."[172] In one study "in which parents voluntarily agreed to joint custody, one-third had changed arrangements to sole custody, citing problems such as children feeling conflicting loyalties between parents and logistical difficulties."[173]

More recent research confirms that, even when many custody arrangements begin working as ordered, a variety of factors lead to such arraignments reverting back to a one-parent dynamic. In Australia, "experience with equal time or near-equal shared care indicates these arrangements tend to be short lived. Findings of [a] 2010 study . . . demonstrated that such shared care arrangements often revert to a pattern of one parent with primary care within a few years of the initiation of shared care."[174] In fact, "[o]ver time, the pattern of care often reverts to the more common situation of primary care by one parent, usually the mother."[175] In compiling the data, the study noted that "[i]t appears that most parents did not persist with a shared care arrangement for an extended period of time."[176] The research in Australia indicates that many mothers report that children primarily reside with them even though there is a so-called shared custody arrangement.[177]

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170. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY (1992). In many cases,

> When one turns from the initial decision to compliance with it and modification of it over time, some new developments are found. Not surprisingly, the most conformity occurs with a sole residential custody decision. However, when the decision called for joint physical custody, the child in fact often lived with only one parent, most likely the [ ] mother.

Robert L. Stenger, *Book Review*, 32 U. LOUISVILLE J. FAM. L. 675, 679–80 (1994) (reviewing MACCOBY & MNOOKIN, *supra* note 170). *See also* Janet R. Jeske, *Issues in Joint Custody & Shared Parenting*, 68 BENCH & B. MINN. 20, 21 (2011).

171. Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 507 (1988) (citing Susan B. 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, 558 (1985)).

172. *Id.*

173. Shapero, *supra* at note 43, at 37 (citing Steinman, *supra* note 168).

174. Jeske, *supra* note 170, at 21 (citing BRUCE SMYTH ET AL., CARING FOR CHILDREN AFTER PARENTAL SEPARATION: WOULD LEGISLATION FOR SHARED PARENTING TIME HELP CHILDREN? (2011)). *See also* JUDY CASHMORE ET AL., SOC. POL'Y RES. CTR., SHARED CARE PARENTING ARRANGEMENTS SINCE THE 2006 FAMILY LAW REFORMS (2010), https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyLawSystem/Documents/SharedCareParentingArrangementssincethe2006FamilyLawreformsreport.pdf.

175. CASHMORE ET AL., *supra* note 174, at x.

176. *Id.* at 19.

177. As one researcher described, "many non-residential fathers tend to gradually disengage from the lives of their children as times goes by." Bjarnason & Arnarsson, *supra* note 4, at 872.

Of course this type of behavior has negative consequences on the parties' children because they are not spending the ideal quality time with their other parent. However, this also leaves the custodial parent essentially with sole residential responsibility and with less child support because the support order initially put in place was based on a shared custody court order.[178] The child support order is more likely than not established at the temporary orders stage. In practice, this would amount to an order put in place for shared parenting time and a support order consistent with this parenting schedule, but then the parents revert back to a one-parent care model. Despite the court order, the parties decide on their own to have the child live primarily with one parent.[179] This would lead to an enormous discrepancy between the child support ordered at the time of the temporary court order because the parties and the court were anticipating a joint custody arrangement, and what is actually happening in a particular family. As a result, the child would not be adequately supported.[180]

This trend of reverting to one parent as the sole custodian is particularly problematic for children living in low income families.[181] Since 1990, child support in all jurisdictions has been determined by a presumptive guideline formula.[182] In Massachusetts, as in many states, there is a rebuttable presumption that the amount of the child support order is determined by the application of the Child Support Guidelines.[183] In 2013, the Massachusetts's Child Support Guidelines were amended to further align child support with parenting time allocated to each parent.[184] For low-income families who have few resources to support their children with an accurate guideline formula amount, the

178. Elrod & Dale, *supra* note 16.

179. Benedek & Benedek, *supra* note 130, at 1541 ("[T]he existence of a sole custody award does not ordinarily preclude an 'informal' joint custody arrangement; nor does an award of joint custody prevent parents from lapsing into patterns typical of sole custody.").

180. Elrod & Dale, *supra* note 16, at 399 ("Shared residency awards that have the effect of reducing child support can create financial burdens for the child and the residential parent. Securing shared residential custody sometimes has become an effective strategy for those who wish to avoid or decrease their child support payments.").

181. Mason, *supra* note 165, at 458 ("Very few parents could sustain an arrangement in which the child actually resided with each parent[ ] about one-half of the time. Inevitably the child soon drifted into spending most time with one parent, usually the mother. Child support, however, was usually configured differently for joint custody. A mother could find herself with effective sole custody but less support than a sole custodian.").

182. Jo Michelle Beld & Len Biernat, *Federal Intent for State Child Support Guidelines: Income Shares, Cost Shares, and the Realities of Shared Parenting*, 37 FAM. L.Q. 165 (2003).

183. Under Massachusetts law, the court must issue written findings that the guideline amount would be unjust or inappropriate and in the best interest of the child if there is a departure from the guidelines. MASS. GEN. LAWS ch. 119A, § 13(c) (2015).

184. Given that there is a presumption that the guidelines will apply in all child support cases, the 2013 Guidelines amendment, which provides a parent with between thirty-three and fifty percent of the parenting responsibility a way to measure the reduced order, is a benefit to those parents. OFF. OF CHIEF JUST., CHILD SUPPORT GUIDELINES 7 (2013), http://www.mass.gov/dor/docs/cse/guidelines/2013-child-support-guidelines.pdf. However, a parent who has more than sixty-seven percent must seek a deviation to obtain additional support, because the Guidelines do not include an instruction as to how

adjustment to revert back to one-parent primary custody clearly harms the children who have even fewer financial resources available to them.

Of course, the worst-case scenario in terms of how a presumption of joint custody is applied is if a family court judge awards joint custody to a parent who is *not involved at all* in the lives of his or her children.[185] Unfortunately, there is at least one example of this type of case in Louisiana where the court ordered an automatic joint custody award to a family in which one parent was not even a party to the case. In *Snowton v. Snowton*, the mother filed for divorce and child custody. The father did not answer the complaint and was found in default.[186] The trial court ordered joint custody of the minor child.[187] The appellate court, citing to the joint custody presumption statute, stated that "[g]enerally, a court must order joint custody unless there is (1) parental consent to sole custody, (2) a history of family violence, or (3) clear and convincing evidence that sole custody is in the child's best interest."[188] It is hard to imagine a more compelling case to overcome the clear and convincing standard rebutting the joint custody presumption than a parent who does not participate in the family law matter. Regrettably, the court followed the automatic or default rule, forcing joint custody on a parent who did not appear to want to participate in his child's life.

Regardless of whether a child reverts back to a one-parent household after a shared custody order is put in place or whether a court order imposes shared parenting on litigants who are minimally involved in the lives of their children, the parent left with parental responsibility is forced to manage the situation with very little legal recourse. That is, the sole custodial parent cannot force the other parent to take parental responsibility of his or her child. This is in contrast to other areas in family law in which a parent does not comply with a court order; the aggrieved party can file a complaint for civil contempt to enforce many types of court orders. For example, a contempt action is a common practice in most jurisdictions against parents who do not pay court-ordered child support or against parents who withhold children from the other parent who is entitled to parenting time.

Louisiana Law Review published an article in 1982 that highlighted the dilemma caused by the passage of the vague "joint custody" statute in the state and noted that courts "unfortunately have little effective enforcement power" over a joint custody agreement or order.[189] The author went on to suggest that since courts use "the contempt power to enforce visitation provisions," it is possible that contempt relief "will

to determine that additional amount. *Id.* at 6. In this way, one could argue that the trend is mainly a benefit to payors.

185. Greenberg, *supra* note 47, at 429 ("Although the evidence is far from conclusive, mothers may trade away other rights such as child support in order to maintain custody. This is particularly true in situations involving domestic violence where the abuser may be litigating custody as a means of scaring his ex-partner and showing her that he can still retain control over her life.").

186. 22 So. 3d 1111 (La. Ct. App. 2009).

187. *Id.*

188. *Id.* at 1113.

189. Lois E. Hawkins, *Joint Custody in Louisiana*, 43 LA. L. REV. 85, 114 (1982).

also be a viable enforcement tool when applied to joint custody."[190] This has not turned out to be the case. I am not aware of any jurisdiction that permits a custodial parent to enforce a parenting time order (i.e., file for contempt) against the joint custody parent who does not take on his or her parental responsibility of parenting time.[191]

Holding a parent responsible for his or her failure to take on custodial responsibility is not a new concept. For example, Professors Nancy Dowd and Karen Czapanskiy "have criticized the law's failure to support or sanction [parents'] nurturing or lack thereof, noting how the law does not sanction [parents] for failure to spend time with their children even after they have agreed to do so in a custody" agreement.[192] In Massachusetts, for example, parents who choose not to exercise court-ordered parenting time cannot be held in contempt for not exercising their parenting time under a court order or agreement incorporated into a judgment.[193] In practice, it is not surprising that judges will not order the "specific performance" of parental responsibility or force parents to comply with his or her parenting time when that parent does not want to spend time with his or her child despite an agreement or court order requiring such parenting time. A parent might feel resentful, angry, or distracted with his or her child and, unfortunately, most children will know that her parent does not want to be with her. If the child is an infant, the parent may not tend to the ongoing needs of the child (feeding, diaper change, etc.).[194]

Some rebuttable presumptions make sense in certain contexts and laws need to change with the times. For example, the conclusive presumption that children born of the marriage was changed with DNA testing.[195] There was a time that scientific evidence could not establish with any certainty whether a child born during the course of a marriage was in fact the child of another biological father. However, efficiency in family law practice is misplaced when a child's safety and security are in the balance. Joint custody presumption law "cannot be viewed as a

190. *Id.* at 115.

191. Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1444 (1991) ("[N]othing happens to a parent who fails to provide care during a time period when that parent is supposed to be providing residential care . . . .").

192. *See* Maldonado, *supra* note 3, at 922 n.371 (citing Czapanskiy, *supra* note 191, at 1437; Nancy E. Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523, 526 (1996)).

193. Mary H. Schmidt et al., *Marital Agreements*, *in* A PRACTICAL GUIDE TO ESTATE PLANNING IN MASSACHUSETTS § 12.3.3 (Jon E. Steffensen ed., 2013) ("As a matter of public policy, the court will not permit the parties to dictate that provisions related to children (custody, visitation, child support) survive the judgment.").

194. O'Connell v. Greenwood, 794 N.E.2d 1205, 1208 (Mass. App. Ct. 2003) ("[O]rders for joint custody . . . cannot succeed without a true commitment to collaboration rarely produced by the hammer of contempt. . . . [T]he child's best interest . . . are likely better served by ending the joint custodial arrangement . . . [rather than] forcing the parties into a cooperative relationship they appear incapable of maintaining.").

195. C.C. v. A.B., 550 N.E.2d 365, 371 (Mass. 1990) ("The advances of modern science make determinations and exclusions of paternity much more accurate than was ever historically possible. In this context we think it preferable that a putative father in the plaintiff's position to be able to produce the evidence he has on the issue of paternity.").

short-cut to custody decision-making since it raises far more questions than it answers."[196]

Custody or parenting time presumptions make more complicated the confusing, unique, and emotional issue of parenting. And because the presumption often goes into effect at the temporary orders stage—again, before an evidentiary hearing—this is potentially dangerous for children. "It is important to do it 'right' the first time and the challenge is that 'right' depends on the unique facts, needs, and circumstances of each individual family."[197] As noted by Judge Hardcastle,

> the greatest impact of joint custody legislation on the judicial process concerns the pretrial negotiation between the parties. Joint custody legislation places pressure on litigants to negotiate a joint custody arrangement. . . . Many agreements will be made for joint custody simply because the parents are unable to agree on anything else.[198]

A court should not indiscriminately apply any standard in the interest of administrative efficiency because it may sacrifice a child's welfare.

B. *Social Policy Must Be Based on Children's Welfare When There Are Competing Social Policies*

Given that we see shared physical custody in only a minority of cases, the push to presume joint custody as the starting point is, in part, in order to encourage a desired social policy.[199] Some might argue that making an assumption about a certain type of fact has the potential to affect social change. In other words, a particular legal result of shared parenting is appealing from a public policy perspective because we want parents to co-parent, and a joint physical custody presumption in the law is the best way toward this social reform in parenting. Joint custody is associated with an increase in time spent with each parent and this supports the development of more positive relationships with both parents.[200] For divorces in general, we, as a society, think it is best to do what is "fair," and for custody, in particular, we should focus on the "ideal" result that all parents can put aside their conflict in order to focus on what is best for their children. We all know people do just that; despite the animosity between the parties at the time of separation, they were able to put those feelings aside in order to focus on what is best for their children. Research conducted by Arditti and Madden-Derdich reveals "for men, joint custody appears to represent a psychological benefit."[201]

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196. Barry, *supra* note 62, at 768.

197. Jeske, *supra* note 170, at 21.

198. Hardcastle, *supra* note 43, at 201, 217–18.

199. An additional basis to support rebuttable presumptions, in addition to having an efficient system, is for the purpose of social policy. Both legislators and judges codify certain rebuttable presumptions—even though not necessarily *probable* or based on *efficiency*—in order to further a socially, desirable policy. *See* Hjelmaas, *supra* note 10.

200. Buchanan & Jahromi, *supra* note 59.

201. Joyce A. Arditti & Debra Madden-Derdich, *Joint and Sole Custody Mothers: Implications for Research and Practice*, 78 FAM. SOC'Y 36 (1997).

An example of a rebuttable presumption in the family law context is the "marriage validity presumption." Here, the judge is to draw a legal inference that a marriage is valid (presumed fact) if it can be shown that a marriage ceremony had been performed (proven existence of other fact). If litigants can establish that a marriage ceremony took place, then it makes sense to presume the marriage is valid because it is best as a matter of social policy. This family law presumption is not controversial. It is based on common sense and is reasonable. It illustrates that there are circumstances in the family law setting where using a rebuttable presumption is not only practical but judicious. In this example, as in many other examples in the family law context, the public policy justification is not outweighed by other competing social reform policy arguments. However, from a social policy standpoint, we should not force co-parenting and shared responsibility at the time of divorce or separation if there is any risk that a joint custody award will lead to a bad result for children. The public policy analysis should favor doing what is best for children.

Social science research confirms that we should not encourage co-parenting if a parent has a history of abuse or the family experiences high conflict. For example, if a judge concludes that a parent has been abusive, then it makes sense to presume that the abusive parent should not have custody.[202] While most jurisdictions have codified a rebuttable presumption that abusive parents should not be awarded custody, this so-called safety mechanism is often not sufficient to protect children from abusive parents.[203] The problem is further exacerbated

202. Jacqueline Syrnick, *Shifting the Burden: An Argument for a Rebuttable Presumption Against Visitation During a 209A Restraining Order Proceeding*, 43 NEW ENG. L. REV. 645, 670 (2009) ("[A] simple burden-shifting mechanism to protect the safety of the child . . . is reasonable because 'it is perfectly appropriate to demand that a parent who has exposed a child to violence and abuse . . . provide solid evidence of changed behavior and attitude before being allowed to resume contact with the child.'") (citation omitted).

203. As of 2014, according to the American Bar Association Commission on Domestic & Sexual Violence, the following eighteen jurisdictions have a rebuttable presumption that it is not in the best interests of the child for a parent who has committed domestic violence to have custody: Alabama, Arizona, Arkansas, California, District of Columbia, Florida, Hawaii, Idaho, Massachusetts, Minnesota, Mississippi, Nevada, Oklahoma, Oregon, South Dakota, Texas, Wisconsin, and Wyoming. The following five jurisdictions have a rebuttable presumption that a domestic violence offender will not be awarded custody: Alaska, Delaware, Iowa, Louisiana, and North Dakota. The following four jurisdictions state that the effect of domestic violence on the child is *considered as a factor* in determining the best interests of the child: Colorado, Connecticut, Kentucky, and New Hampshire. The following twenty-one jurisdictions state that domestic violence against a family member, regardless of whether it affected or was witnessed by the child, is a *mandatory factor* when determining the child's best interests: Georgia, Illinois, Indiana, Maine, Maryland, Michigan, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and West Virginia. Montana has the same as a *discretionary factor*; Virginia states that it is a *factor*; and Kansas states that violence against a family member, regardless of whether it affected or was witnessed by the child, is a *mandatory factor* to be considered when determining the child's best interests. AM. BAR ASSOC., COMM'N ON DOMESTIC & SEXUAL VIOLENCE, JOINT CUSTODY PRESUMPTIONS AND DOMESTIC VIOLENCE EXCEPTIONS (2014), http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Charts/2014%20Joint%20Custody%20Chart.authcheckdam.pdf.

when courts have to contend both with a rebuttable presumption for joint custody and a rebuttable presumption against custodial awards to an abusive parent.

1. The Battle of the Presumptions: Cases Confirm That Domestic Violence Is Undermined When There Is A Competing Joint Custody Presumption

In both the District of Columbia and Louisiana, there are examples of cases where the presumption for joint custody outweighed the presumption against abusive parents obtaining custody of a child. For example, in *Lewis v. Lewis*, a Louisiana trial court ordered joint custody despite finding that there was "uncontroverted evidence that proved that [the father] had severely abused [the mother] . . . ."[204] The judge stated during the lower court hearing, "[l]et me tell you what the bottom line is here, counsel. He beat her up. Okay, I accept that. . . . He beat her up. I'm convinced of that. So let's press on to something else."[205] During the trial, the mother "testified that the children were present during almost every one of [the] violence episodes." The lower court held that it was in the best interest of the children that the parties have joint custody and that they primarily live with the father. The appellate court reversed and ordered that the mother have sole custody and that the father have supervised parenting time.[206]

What happened in this case was that there were two competing rebuttable presumptions in play at the trial court level: the children's father had to overcome the *preponderance of the evidence* standard to rebut the domestic violence presumption, but the mother had to overcome the *clear and convincing* standard to establish that sole custody was in the best interest of the children. The social policy behind domestic violence presumptions is based on the hope that a perpetrator of domestic violence should have to overcome a presumption to protect the safety of children. In the *Lewis* case, however, the judge appeared more concerned about applying the presumption for joint custody and the rights of the parents to joint custody because the judge determined that the mother's high burden of clear and convincing evidence to rebut the joint custody presumption had not been met.[207] In Louisiana, the clear and convincing standard is defined as requiring "a party to prove the existence of a contested fact is highly probable, or more probable than its non-existence."[208] As one Louisiana court described it, clear and convincing evidence is applied in civil cases only in exceptional circumstances "where there is thought to be special danger of deception, or where the court considers that the particular type of claim should be disfavored on policy grounds."[209] As a result of this

204. 771 So. 2d 856, 858, 860 (La. Ct. App. 2000).
205. *Id.*
206. *Id.* at 859–60, 862.
207. *Id.* at 858.
208. Talbot v. Talbot, 864 So. 2d 590, 598 (La. 2003).
209. Succession of Henry Lyons, 452 So. 2d 1161, 1165 (1984) (citing MCCORMICK ON EVIDENCE § 340(b) (2d ed. 1972)).

high standard, a secondary source in Louisiana identifies that it is "difficult to obtain sole custody."[210]

N.C. v. P.F. is an example of a trial court judge in the District of Columbia who undermined the significance of the domestic violence impact on children and instead focused on the parents' right to custody of the parties' minor children.[211] In this case, the mother testified about the physical abuse throughout the marriage and the lower court judge determined that the father had committed "intrafamily offences." As a result, the lower court found that the joint custody presumption was not triggered. Unfortunately, the court then engaged in disingenuous review and analysis of the domestic violence and its consequences in the family.[212] According to the lower court judge, domestic violence was not an issue in this case in terms of the best interest of the child analysis for a few reasons as stated by the judge: (1) the mother did not present expert testimony that the domestic violence directly affected the children; and (2) the judge determined that the son was not afraid of the father. In one example, the mother testified that one of her sons woke up during an incident of physical abuse and "pleaded with his father to go back to bed during the second assault." The lower court judge concluded from this testimony that "a reasonable conclusion could be made that the child was not afraid of his father."[213]

The trial judge conducted a disingenuous analysis of the two presumptions (the joint custody presumption and the domestic violence presumption) in this case. In order to trigger the domestic violence presumption in a child custody case, the abuse survivor must demonstrate that there has been intramarital abuse. Once this evidence of abuse is accepted by the court, there is no presumption of joint custody. Then, according to the judge in *N.C. v. P.F.*, the parties each must establish why he/she is entitled to sole custody.[214] This is an unfortunate standard regarding the burden of proof necessary to establish which parent should be awarded sole custody (again, after the court found domestic violence had occurred): "[t]he parent seeking sole custody bares the ultimate *burden of persuasion* that sole custody would be in the best interest of the minor child or children."[215] As such, the joint custody presumption had the effect of forcing the parents, a survivor and an abuser, to each persuade the judge to award sole custody after the judge found abuse had occurred.

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210. 1 LA. PRAC. *Louisiana Divorce* § 7:62 (2015 ed.).

211. No. DRB 130-05, 2009 WL 2980778 (D.C. Super. Ct. May 14, 2009).

212. *Id.* at *4.

213. *Id.* at *9. "Studies show that over 85% of children in families in which there is domestic violence have been witness to it" and that children "witness about half of the incidents of domestic violence." Greenberg, *supra* note 47, at 412 (citing Cynithia Grover Hastings, *Letting Down Their Guard: What Guardians Ad Litem Should Know About Domestic Violence in Child Custody Disputes*, 24 B.C. THIRD WORLD L.J. 283, 308 (2004)).

214. It is not clear from the record of this case whether the mother had an attorney during the underlying trial, but it is clear she was indigent because she ordered transcripts for her appeal based on her indigency status. This judge denied her request. A legal aid lawyer stepped in to help with her appeal.

215. *N.C.*, 2009 WL 2980778, at *3.

It is difficult for most domestic violence survivors to meet a "burden of persuasion" standard to establish sole custody. There are a number of reasons victims are not able to present a persuasive argument for why they should be awarded sole custody of their children in a custody matter when forced to litigate against their abuser. Victims "have a tendency to react in ways that make the violence invisible."[216] Victims often do not have police or medical records, nor do they have witnesses who can testify about what occurred. Additional reasons victims are not persuasive when describing the domestic abuse include, but are not limited to, their own shame or guilt about the abuse, making efforts to undermine the abuse in order to preserve the relationship between their children and the abuser, and an ongoing fear of abuse because the abuse often escalates at the time of separation.[217] Furthermore, there are forms of abuse such as emotional and psychological abuse that "do not constitute domestic violence, and therefore do not raise the presumption against custody."[218] As such, for example, "more than a dozen years after New York's passage of such a [domestic violence presumption] law, practitioners' observations are that batterers are still disproportionately likely to be awarded custody."[219]

Further, joint custody rebuttable presumptions and domestic violence rebuttable presumptions do not operate in the same way because joint custody presumptions are not "true" evidentiary presumptions while domestic violence presumptions are "true" evidentiary presumptions. The survivor has to meet a higher burden to rebut the true evidentiary presumption (if fact *x*, then conclusion *y*). There are examples of cases in which this distinction is clear and the resulting trial court orders focused more on the parents' rights than the consequences of domestic abuse.

In *Nguyen v. Le*, the mother filed an appeal with the Court of Appeals of Louisiana arguing that the trial court failed to apply the presumption against an abusive parent obtaining custody.[220] The appellate court affirmed the lower court's order of joint custody, finding that the mother failed to establish a history of domestic violence and further failed to rebut the clear and convincing standard that joint custody was in the children's best interest. This finding was affirmed even though

216. Greenberg, *supra* note 47, at 415.

217. *Id.* (citing Edna Erez, *Domestic Violence and the Criminal Justice System: An Overview*, 7 ONLINE J. ISSUES NURSING (2002), http://www.nursingworld.org/MainMenuCategories/ANAMarketplace/ANAPeriodicals/OJIN/TableofContents/Volume72002/No1Jan2002/DomesticViolenceandCriminalJustice.html). This is in sharp contrast to abusive spouses who courts often find "to be sympathetic and convincing in their denials" of domestic violence. Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U.J. GENDER SOC. POL'Y & L. 657, 690 (2003).

218. Lisa Bolotin, *When Parents Fight: Alaska's Presumption Against Awarding Custody to Perpetrators of Domestic Violence*, 25 ALASKA L. REV. 263, 280 (2008).

219. Amy Barasch, *Gender Bias Analysis Version 2.0: Shifting the Focus to Outcomes and Legitimacy*, 36 N.Y.U. REV. L. & SOC. CHANGE 529, 550 (2012) (noting that batterers are "still disproportionately likely to be awarded custody"); Reynolds & Peeples, *supra* note 46.

220. 960 So. 2d 261 (La. Ct. App. 2007).

the appellate court found there was domestic violence in the marriage. The court further noted that one incident does not "constitute a 'history' of family violence; the serious consequences of the presumption, *the curtailment of parental rights, militates against* an expansive interpretation of the [domestic abuse] statute."[221]

In *Jordan v. Jordan*, an appellate court in the District of Columbia affirmed a trial court order of joint custody despite a finding by the trial court that the father had committed intrafamily offenses.[222] The trial judge wrote that in "deciding whether the [presumption against joint custody] has been rebutted" he looked at the "totality of the circumstances" and

> with the things being as they are and the, frankly, emotional damage that [the girls] are suffering, combined with the efforts [the father] has taken to rectify the conduct that led to that inappropriate behavior on his part—and let there be no doubt that it was inappropriate—rebuts the presumption.[223]

The mother's appeal was based, in part, on the trial court's failure to discuss the presumption that was triggered once the judge concluded that intrafamily offenses took place. The appellate court acknowledged that the trial court did not discuss the domestic violence presumption—even though it had been triggered according to the statute—but went on to find that the trial judge "weighed the evidence of domestic violence . . . ."[224]

In each case above, the courts minimized the significance of the domestic abuse presumption because this "true" presumption is more difficult to establish as compared to a joint custody presumption. Nonetheless, these courts conducted a thorough analysis of the parents' rights to custody and whether the joint custody presumption had been rebutted.

2. High-Conflict Parents Should Not Be Forced to Co-Parent

One of the main conclusions from the social science research conducted after California enacted a joint custody presumption was that children are harmed when the conflict between parents continue throughout and after the divorce.[225] Similar to the cases described above with domestic violence, the joint custody statutes in place in Louisiana and the District of Columbia have proven not to account for the high-conflict families coping with custody litigation.

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221. *Id.* at 265 (citing Simmons v. Simmons, 649 So. 2d 799 (La. Ct. App. 1995)) (emphasis added).

222. 14 A.3d 1136 (D.C. Cir. 2011).

223. *Id.* at 1144.

224. *Id.* at 1147–48; Conner, *supra* note 125 ("Unless our trial judges listen to and heed the message our appellate courts send on review, we merely place a bandaid on a bullet wound. As a result, we must provide the trial judge with a clear definition of abuse and an understanding of the weight to be accorded to evidence of domestic violence.").

225. *See* Steinman, *supra* note 168 (forcing joint physical custody arrangements on high-conflict families is not in a child's best interest because it is actually detrimental to the child).

In *Ysla v. Lopez*, the District of Columbia court found that the parents' inability to communicate and cooperate did not necessarily preclude an award of joint custody.[226] While it was clear that the parents could not cooperate, "it was absolutely plain to the court that . . . no parent could want any child more than these two." And yet, the court was limited by the statutory presumption of joint custody when analyzing the recently amended custody law.

> Unlike *Taylor* [Maryland case],[227] which identified the parents' ability to communicate and reach joint decisions as the most important factor in determining whether joint custody is appropriate . . . the statute does not rank any of the listed factors. To the contrary, the statute presumes that joint custody is in the best interest of the child except in cases of domestic abuse and similar intrafamily offenses.[228]

In *Griffith v. Latiolais*, a lower court in Louisiana awarded joint custody including alternate weekly physical custody.[229] The parents were also ordered to attend co-parenting counseling sessions. The mother appealed. The appellate court held that the trial court abused its discretion in awarding joint custody. The court cited to the joint custody statute, and that "to the extent it is feasible and in the best interest of the child, physical custody of a child should be shared equally between two parents." The court also found that "if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court *shall* award custody to that parent."[230] The appellate court noted: the "trial court found factually that . . . [father's] motivation for filing the suit was not [child's] best interest, but jealousy; and that [father] was engaged in a continuing campaign to discredit [mother] and influence the trial court decision without regard to the dishonesty of his tactics or the falsity of his assertions."[231] The appellate court concluded that the primary discussion in the trial court's reasons for judgment centered on the parents' character strengths and faults, and "while those facts must play a part in the ultimate decision on custody, [son's] best interest is the paramount consideration."[232]

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226. 684 A.2d 775 (D.C. Cir. 1996).

227. Taylor v. Taylor, 508 A.2d 964, 966 (Md. 1986) ("This dynamic and emotionally charged field of law is unfortunately afflicted with significant semantical problems, described by one writer as a 'frightful lack of linguistic uniformity.' The inability of courts and commentators to agree on what is meant by the term 'joint custody' makes difficult the task of distilling principles and guidelines from a rapidly growing body of literature and case law. What one writer sees as an amorphous concept another sees as a structured legal arrangement. While it is clear that both parents in a joint custody arrangement function as 'custodians' in the sense that they are actually involved in the overall welfare of their child, a distinction must be made between sharing parental responsibility in major decision-making matters and sharing responsibility for providing a home for the child.") (footnote omitted).

228. *Ysla*, 684 A.2d at 780.

229. 32 So. 3d 380 (Lt. Ct. App.), *aff'd in part, rev'd in part*, 48 So. 3d 1058 (La. 2010).

230. *Id.* at 394 (emphasis added).

231. *Id.* at 393.

232. *Id.* at 394.

The father appealed and the Supreme Court of Louisiana reversed the appellate court's order of sole custody to the mother. The Supreme Court held that "the burden on the parent seeking sole custody is to demonstrate that the granting of custody to that parent alone will be in the best interest of the child."[233] While the Supreme Court agreed that "some of father's behavior could have had a detrimental effect on the child . . . it appears the court of appeal awarded sole custody . . . based mostly on father's behavior toward mother."[234] As such, the Supreme Court reinstated the trial court's award of joint physical custody.

In these cases, the joint custody presumption led to shared parenting despite findings that the cases involved high conflict. This case law confirms that the focus on custody presumptions takes away from the correct focus on what is the best parenting plan for children. Parents fight about what "title" they are assigned by the trial judges. If a trial court judge does not order joint custody, parties appeal claiming that the judge erred in not awarding "joint custody" under the joint custody presumption of the jurisdiction.

3. Recent Social Science Research Confirms That Joint Custody Is Not Good for High-Conflict Parents

It makes sense that a forced shared custody presumption movement began at a time when divorce laws and parenting structures were evolving in the 1970s. There was a convergence at that time of no-fault divorce with women entering the workforce and California was one of the first jurisdictions to suggest that our society was ready for a change when it enacted joint custody legislation in 1979.[235] But, as aforementioned, California learned from social science research that there were serious problems associated with imposing forced shared parenting time on parents that could not co-parent.[236]

One major study conducted by Eleanor E. Maccoby and Robert H. Mnookin established, for example, that imposing joint custody on conflicting parents does not lead to future co-parenting.[237] California judges also determined that imposing joint custody on non-cooperative parents was problematic. Social science research confirmed the assessment of the joint custody presumption in California and led to the state amending the statue by 1994. "The most commonly cited reasons were poor parental cooperation, instability created by shifting the child from

233. Griffith v. Latiolais, 48 So. 3d 1058, 1068 (La. 2010).

234. *Id.* at 1071.

235. Janet M. Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 DUQ. L. REV. 265, 268 (2002).

236. Prior to the research based on the California experiment on joint custody, Elizabeth Scott and Andre Derdeyn's research discussed the "troublesome . . . evidence that the very few families with court-ordered joint custody that have been studied are experiencing considerable conflict." Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 487 (1984).

237. Shapero, *supra* note 43 (citing MACCOBY & MNOOKIN, *supra* note 170, at 300).

home to home, distance between the parental homes, and acrimony and revenge between the parents."[238]

Recently, there has been an unmistakable change in the parenting structure of families. Joint custody *can* be an appropriate custody arrangement with positive benefits for certain children and families, and more jurisdictions have passed legislation to encourage shared parenting. There have been numerous studies detailing the benefits of joint custody that prompted an increase in joint custody legislation and rulings.[239] Proponents in favor of forced shared custody often refer to these studies and claim that such research supports the need for a custodial presumption. Has social science research revealed that there is current support for mandates of joint custody?

Though studies that reveal positive results for children after divorce have been heavily relied upon by advocates for joint physical custody legislation, the flaws within the research continue to be well-established. Often times, joint physical custody studies only look at families *who have elected to enter* into a joint custody agreement and, therefore, have the capacity and motivation to sustain the joint physical custody arrangement.[240] The joint physical custody families who have been frequently studied are the families who are most cooperative and committed to making the joint custody arrangement successful.[241]

Children and parents are understandably expected to experience a certain degree of grief when going through a divorce. It is the case that "[s]ocial science research over five decades has demonstrated that children's lives are altered by even the most amicable of divorces."[242] However, more recent social science research has confirmed that children are harmed when forced into a shared parenting dynamic with parents who cannot co-parent. This is especially true in cases in which the families experience domestic violence,[243] and there are recent studies demonstrating that forcing a joint custody relationship between high-conflict parents is detrimental for children.

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238. Hardcastle, *supra* note 43.

239. Bjarnason & Arnarsson, *supra* note 4, at 871 ("Children in non-intact families who maintain close relations with their nonresident fathers have in particular been found to be emotionally better adjusted . . . .") (citations omitted); *see also* Susan Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739, 741 (1983). For example, Susan Steinman performed a study from 1978 to 1980 on families who elected to have joint physical custody without a court order. Steinman suggests that children acquire three main benefits from this kind of joint custody arrangement: a clear message that they were loved and wanted by both parents, a sense of importance within the family and that their parents made an effort to care jointly, and access to both parents with psychological permission to be with and love both parents. *Id.* at 746–47.

240. Buchanan & Jahromi, *supra* note 59, at 427.

241. *Id.* at 425.

242. Elrod & Dale, *supra* note 16 (citations omitted).

243. *See* JENNIFER S. ROSENBERG & DENISE GRAB, INST. FOR POL'Y INTEGRITY, SUPPORTING SURVIVORS: THE ECONOMIC BENEFITS OF PROVIDING CIVIL LEGAL ASSISTANCE TO SURVIVORS OF DOMESTIC VIOLENCE 15 (2015), http://policyintegrity.org/documents/SupportingSurvivors.pdf.

Research has confirmed what we knew from the research conducted in California: most experts believe that there is potential for harm when parents cannot get along or are hostile towards each other.[244] Mindy Mitnick, a licensed psychologist in Minnesota, while addressing the Minnesota Joint Physical Child Custody Presumption study group, explained that children with experience in high-conflict situations show increased aggression, impulsivity, poor social skills, anxiety, and other emotional problems.[245] Furthermore, children in "high conflict post-divorce families show increased depression, decreased effort in school, social withdrawal, and poorer self-awareness."[246]

Jennifer McIntosh and Richard Chisholm, in an article that focuses on the psychological effects of joint physical custody on children with high-conflict parents, summarized a study that found when a child makes frequent transitions between parents in conflict, the child focuses his energy on trying to find comfort and emotional safety in each environment.[247] Another study provided concerning data. In four of the shared custody cases in the study, the parents reported never speaking to the other parent and it was the children's job to convey messages between parents. This clearly puts negative psychological strain on the children.[248]

A study performed by Christy M. Buchanan, Eleanor E. Maccoby, and Sanford M. Dornbusch revealed that as the conflict between parents increased, the children in a joint custody arrangement had a higher probability of feeling torn between the two parents and, therefore, had a higher probability of loyalty conflicts.[249] Loyalty conflicts are linked to poor psychological functioning.[250] In short, there are numerous studies that show that parental conflict is harmful to a child forced into joint custody and any benefit that a child may receive by spending substantial time with his parents may be diminished.[251]

Families that elect on their own to enter into a shared parenting arrangement see most of the psychological benefits while an increase in conflict in parental relationships shows evidence of negative psychological effects. Different family circumstances and experiences will dictate whether or not joint custody is an appropriate arrangement for children post-divorce. Buchanan and Jahromi agree, concluding that a presumption of joint physical custody is not appropriate because courts are more likely to deal with parents in relationships characterized by

244. Buchanan & Jahromi, *supra* note 59, at 427.

245. Mindy F. Mitnick, *Impact on Children*, *in* MINNESOTA JOINT PHYSICAL CHILD CUSTODY PRESUMPTION STUDY GROUP REPORT 39, 40 (2009), http://www.leg.state.mn.us/docs/2009/mandated/090065.pdf.

246. *Id.*

247. Jennifer McIntosh & Richard Chisholm, *Cautionary Notes on the Shared Care of Children in Conflicted Parental separation*, 14 J. FAM. STUD. 37, 39 (2008).

248. *Id.*

249. Buchanan & Jahromi, *supra* note 59, at 427 (citing CHRISTY M. BUCHANAN ET AL., ADOLESCENTS AFTER DIVORCE (1996)).

250. *Id.*

251. Fait, Wills & Borenstein, *supra* note 58, at 16.

high conflict and hostility that would impede on the cooperation necessary for a successful joint physical custody arrangement.[252]

When discussing custody presumptions, there are competing social policies: keeping children safe from unworkable and likely harmful co-parenting plans versus mandating an "ideal" co-parenting arrangement on most families.[253] Social scientists helped us understand that presuming a fact about shared physical custody was more complicated than what we as a society hoped would be the case. Recent social science research supports that children placed in high-conflict family disputes are harmed, while there is no research to support that imposing joint custody on all parents regardless of the context of that particular family is best for children. "The belief that parents who are otherwise unwilling to cooperate will somehow be inspired to do so because of joint custody reflects magical thinking."[254] Case law cited in this article confirms that judges will impose joint custody when statutorily mandated to consider such a presumption and that it is difficult to rebut the presumption. This leads to potential negative psychological effects on children.[255]

There has been an unmistakable trend toward seeking to pass joint physical custody presumption legislation. This trend is based, in part, on the social policy argument that the best interest of the child is served when both parents are involved in the child's life. With the evidence discussed above that joint physical custody can be psychologically detrimental to many children, the joint physical custody presumption trend is concerning. There is no evidence that children in high-conflict families are helped by a presumption of joint physical custody.[256] In contrast, the "level and intensity of parental conflict is now thought to be the most important factor in a child's postdivorce adjustment and is the single best predictor of a poor outcome."[257]

A joint physical custody presumption, therefore, would not be in the best interest of the child in families with high conflict—the majority of litigated custody cases.[258] "While joint custody has many merits, it may not be appropriate *or attainable* for all families."[259] Indeed, it is dangerous to assume "that because joint custody works for some fami-

252. Buchanan & Jahromi, *supra* note 59, at 439.

253. *See* ROSENBERG & GRAB, *supra* note 243, at 4 ("[O]ver their lifetimes: 9.4% of women have been raped by an intimate partner, 24.3% of women have experienced severe physical violence from an intimate partner, 48.8% of women have experienced at least one instance of psychologically aggressive behavior from an intimate partner . . . .").

254. Benedek & Benedek, *supra* note 130, at 1542.

255. Fait, Wills & Borenstein, *supra* note 58 (referencing three studies examining joint custody).

256. Buchanan & Jahromi, *supra* note 59, at 434.

257. Elrod & Dale, *supra* note 16.

258. Fait, Wills & Borenstein, *supra* note 58, at 16. Steinman concludes that joint custody is not an easy arrangement, nor is it for everyone. Steinman, *supra* note 239, at 748.

259. Denise Donnelly & David Finkelhor, *Who Has Joint Custody? Class Differences in the Determination of Custody Arrangements*, 42 NAT'L COUNS. FAM. REL. 57, 60 (1993) (emphasis added); Hardcastle, *supra* note 43, at 205 (stating that the concept of joint physical custody "seems fair to parents, but [the] fairness to children is less obvious").

lies, that it should work for all. Any policy that fails to take into account the vast differences which exist in U.S. families today should be questioned."[260] We *hope* that parents can co-parent emotionally, financially, logistically, etc. We *learned*, however, that forcing parents to co-parent when they cannot is not good for children. Any social policy that harms the most vulnerable children is not good child custody policy.

Disputed custody matters are fact-driven and unique to the children and adults involved, and the law in the majority of jurisdictions such as Massachusetts permit judges to craft custody arrangements that best suit each individual family. This is particularly true for cases involving domestic violence. *Custody of Vaughn* was a powerful declaration by the Supreme Judicial Court in 1996 that domestic violence is exceptionally relevant in conducting a custodial analysis.[261] Here, the court reversed and remanded a physical custody award to a parent who had been abusive during the marriage. The court concluded:

> that physical force within the family is both intolerable and too readily tolerated, and that a child who has been either the victim or the spectator of such abuse suffers a distinctly grievous kind of harm . . . . Quite simply, abuse by a family member inflicted on those who are weaker and less able to defend themselves—almost invariably a child or a woman—is a violation of the most basic human right, the most basic condition of civilized society: the right to live in physical security, free from the fear that brute force will determine the conditions of one's daily life.[262]

On the one hand, we want to encourage co-parenting for the sake of children. However, another competing social policy to keep in mind is that not all families fit into a co-parenting relationship. This applies to families in which a parent is abusive or in a high-conflict family. Professor Maldonado wisely determined that, "so long as parents and society in general are opposed to joint physical custody, it is unlikely that the law can create a norm of shared physical custody."[263] Instead, legislatures have been pressured to enact legislation in certain jurisdictions that provides for undefined presumptions of joint custody in the hopes that these amendments will appease the voting public. Regrettably, they may not understand the practical effect of joint custody presumptions and unmistakable consequences behind such powerful presumptions in the law.

IV. Conclusion: What Can We Learn From Joint Custody Presumption Law in Practice

The bills and statutes which contain a presumption that "joint physical custody" or "joint custody" is in a child's best interest certainly sound good to legislatures and the average voter. Unfortunately, the public perception of this complicated issue is confused by the rhetoric

260. Donnelly & Finkelhor, *supra* note 259, at 60.
261. 664 N.E.2d 434 (Mass. 1996).
262. *Id.* at 595.
263. *See* Maldonado, *supra* note 3, at 999.

surrounding a parent's right to parent. These types of presumptions force parents to co-parent at the start of their case and when they are litigating for parenting responsibility. Therefore, they have an ongoing conflict of interest in working through what is in fact best for their children. This paper demonstrates that, *in practice*, there are problems when a rebuttable presumption for shared custody is applied for efficiency reasons or to further a public policy. The custody presumptions in Louisiana and the District of Columbia pressure parents and the court system to focus on joint custody; shared custody becomes the target or the goal that parents and judges champion. That is, litigants and judges tend to find arguments to support joint custody (however defined in that particular case) rather than focus on what is in fact best for the children.[264] Based on the analysis in this paper of "joint custody" statutes, the problems with joint custody presumptions will only become exacerbated by a stronger and fiercer presumption for "joint physical custody."

This article is written with legislatures in mind. Elected officials are often pressured by ongoing efforts to file non-binding referenda and bills that would mandate a joint custody presumption of some kind; then, they are pressured to pass such bills into law. Elected officials must remember that all jurisdictions now permit parents to agree to a shared parenting agreement if the parents are able to determine for themselves that this arrangement is best for their children. Also, the majority of custody statutes go further than simply allowing shared parenting; most statutes encourage shared custody.[265]

Thankfully, despite what the proponents of joint custody presumption legislation argue, there is no "movement" to force parents to share physical custody of their children. As a result, legislators should not be seduced into rewriting the custody laws to include a presumption for shared parenting. States, such as Massachusetts, that specifically include in their custody statutes a provision that there is no presumption for or against joint physical custody should not be unduly influenced by the rhetoric of an idealistic way of parenting.[266] Instead, we must focus on what is best for children and "engage in the difficult work of putting flesh on the bones of best interest."[267]

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264. *See, e.g.*, Matthews v. Matthews, 633 So. 2d 342 (La. Ct. App. 1993) (reversing trial court's order for sole custody to mother, despite father having recently been released from prison and a doctor's position that joint custody was not in a child's best interest). The appellate court reiterated on a few occasions that "joint custody is presumed to be in [a child's] best interest" and found that the mother had not met her burden of proving that sole custody was in the best interest and noted that the trial court's award of sole custody was based on "some type of psychological report concerning the minor child." *Id.* at 345–47.

265. For example, in 1989 the custody section of the Massachusetts's divorce chapter was entirely rewritten with text similar to the current version that included a procedure for submission and adoption of "shared custody implementation plans." 1989 Mass. Legis. Serv. 689 (West).

266. MASS. GEN. LAWS ch. 208, § 31 (2015).

267. Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 832 (1999).

Rather than mandate joint custody on all parents at the start of their case, I have three suggestions that can further clarify custody laws, provide reasonable guidelines, and assist the many pro se litigants navigating the probate and family court system to pursue co-parenting if it is best for their children.

First, change the language we use in family law matters. Changing the terminology litigants use to refer to their relationships with their children will go a long way in clarifying the legal standards and responsibilities of parenting. For example, Washington replaced the "traditional" custody framework with terms such as "parenting functions" and "residential schedules" in 1987.[268] A study reviewing this overhaul found that the new terminology had a positive effect on parents and caused them to focus on their children at an earlier point in the divorce process. This resulted in better communication and less conflict around parenting.[269] States that continue to use inflammatory terminology, such as "visitation" and "custody," should consider revising their statutes and introducing terms such as "parenting time" and "residential responsibility" in order to reduce the family's tension, because as seen from the Washington experience, small linguistic changes can influence how family court litigants approach parenting issues.

Second, codify factors that are used to determine the best interests of a child. In order to better guide litigants in how best to determine what is in a child's best interest, states should incorporate a list of factors in their custody statutes. For example, while factors have developed through case law in Massachusetts when considering best interests, these factors have not been codified. Such factors should be listed out clearly and in such a way as to assure that both parents and judges are looking at how best to maintain a stable and safe environment for children—particularly during the temporary orders phase of a divorce case. As other jurisdictions have determined, stability and quality of parenting time is more important than the quantity of time.[270] When considering what factors to list, states should include as a factor an approximation principle at the time of the temporary orders, as adopted by the American Law Institute.[271] This factor would encourage parents to preserve the current parenting schedule between the parents to the extent possible in order to transition their children into a new parenting dynamic that will continue to evolve.

Third, develop a screening tool for use at the temporary orders phase. Attorneys and parents can benefit from a list of criteria that

268. Jane W. Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. MICH. J.L. REFORM 65, 77–79 (1990).

269. *Id.* at 137–38.

270. *See In re* The Marriage of Hansen, 733 N.W.2d 683, 695 (Iowa 2007) ("There is . . . growing support for the notion that the quality, and not the quantity, of contacts with the non-custodial parent are the key to the wellbeing of children").

271. Barnes, *supra* note 48, at 617 (noting that although the ALI advocates maintaining a child's relationship with each parent, it does not support a joint custody presumption). Instead the ALI advocates the approximation principle. *Id.*

includes the characteristics needed to maintain a joint custody relationship between parents. A joint custody criteria list would serve as a mechanism at the temporary order phase for parents to determine whether a co-parenting relationship is possible within their particular family.[272] This type of tool could be a resource for court personnel to use with all litigants, but pro se litigants in particular. Researchers have suggested that it is "possible to identify components of a potentially successful joint custodial arrangement."[273] As applied, parents would have to understand that they need to consider the best parenting arrangement based on what they know is safest for their children. The court and the litigants should acknowledge early on in this process that participating in a co-parenting discussion does not mean that a judge will order joint custody if they do not believe it is best. Further, a parent should not agree to engage in a discussion of joint parenting just for the sake of compromise. However, parents may not necessarily understand what is needed for such an arrangement, and a "checklist" could help in that discussion.

There are several problems when courts impose a presumption that parents must co-parent at the time of separation. These laws often force parents into an unworkable parenting plan because the co-parenting requirement is based on an ideal that shared custody is in a "child's best interest." Mandated rebuttable presumption custody laws are based on flawed reasoning; it is not in fact in a child's best interest to force parents to co-parent when they are not able to do so. Not all families fit into a co-parenting model of childcare and, therefore, we should not force such a relationship on families who are not capable of shared parenting. Obviously we want to encourage safe and "fair" parenting arrangements, but any relationship between parents and their children should not be forced or encouraged if the relationship is not consistent with a child's best interest.

272. Brinig, *supra* note 55, at 1363 ("[O]ne of the empirical questions that should be asked before equal joint custody is presumed is whether it can be shown to be in the child's best interests.").

273. Benedek & Benedek, *supra* note 130, at 1542–43 (suggesting a checklist, including but not limited to, a desire for joint custody, commitment to focus on their child's best interests, predisposition to honor their agreement, and cooperation).