

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

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## I. Introduction

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

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

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

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

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

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

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

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

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

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

Code of Virginia § 20-124.1.

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

## II. Joint Legal Custody

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

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<sup>2</sup> Colo. Rev. Stat. § 14-10-123.

<sup>3</sup> *Id.* at § 14-10-124 (1.5).

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

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

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

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

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<sup>6</sup> *McCann v. McCann*, 173 A.7, 9 (Md. 1934).

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

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

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

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

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

<sup>12</sup> West Virginia Code § 48-1-220 (2009)

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

#### A. Varieties of Joint Legal Custody Determinations

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

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

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<sup>13</sup> West Virginia Code § 48-9-207(c) (2009).

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

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

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

<sup>17</sup> Griffin v. Griffin, 699 P.2d 407 (Colo. 1985).

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

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

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

<sup>19</sup> South Carolina Code § 63-15-210.

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

<sup>21</sup> Conn. Gen. Stat. § 46b-56.

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

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

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

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<sup>23</sup> Conn. Gen. Stat. § 46b-56a(c).

<sup>24</sup> *Id.*, § 46b-56a(d)(3).

<sup>25</sup> *Id.*, § 46b-56a(d)(6).

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

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

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

<sup>27</sup> *Kamal v. Imroz* 759 N.W.2d 914, 918 (Neb. 2009).

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

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

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

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

<sup>29</sup> Ala. Code § 30-3-152(b).

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

<sup>31</sup> Mo. Ann. Stat. § 452.375(5)(1) (West).

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

<sup>33</sup> Mo. Ann. Stat. § 452.375(1)(2).

<sup>34</sup> *Id.*, § 452.375(1)(3).

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

## B. Joint Legal Custody and the Best Interests Standard

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

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

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<sup>35</sup> *Id.*, § 452.375(4).

<sup>36</sup> *Id.*

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

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

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

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

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

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

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

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

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

### C. Joint Legal Custody Presumptions

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

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

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

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

<sup>46</sup> N.M. Statute § 40-4-9.1(A).

<sup>47</sup> *Id.*, § 40-4-9.1(B).

<sup>48</sup> *Id.*, § 40-4-9.1(C).

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

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

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

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

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<sup>49</sup> *Id.*, § 40-4-9.1(E).

<sup>50</sup> *Id.*, § 40-4-9.1(F).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*, § 40-4-9.1(J)(1).

<sup>54</sup> *Id.*, § 40-4-9.1(L)(4).

<sup>55</sup> *Id.*, § 40-4-9.1(J)(2).

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

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

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

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<sup>56</sup> *Id.*, § 40-4-9.1(J)(3).

<sup>57</sup> *Id.*, § 40-4-9.1(J)(4)(a-e).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

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

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

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

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<sup>61</sup> Roeh v. Roeh, *supra*, 746 P.2d at 1018-1021.

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

<sup>63</sup> Tennessee Code § 36-6-101(a)(2)(A)(i).

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

<sup>65</sup> Darvarmanesh v. Gharacholou, 2005 WL 1684050, at \*7 (Tenn. App. 2005).

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

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

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

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

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

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

<sup>69</sup> W. Va. Code § 48-9-207(b) (West).

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

<sup>71</sup> Neb. Rev. Stat. § 42-364(3)(b).

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

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

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

#### D. Joint Legal Custody Preferences and Related Policies

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

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

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

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

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

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

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

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

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<sup>77</sup> Va. Code Ann. § 20-124.2B.

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

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

<sup>80</sup> Kansas Stat. 23-3206 (West).

<sup>81</sup> Ga. Code §19-9-3(a)(1).

<sup>82</sup> Ga. Code §19-9-3(d).

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

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

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

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

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

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

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

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

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

<sup>87</sup> *Id.*, §25-403.02(B).

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

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

### III. Joint Physical Custody

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

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

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

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

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

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

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

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

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

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<sup>93</sup> Braiman v. Braiman, *supra*, 378 N.E.2d at 1021.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>102</sup> Missouri Stat. § 452.375(1)(3).

<sup>103</sup> *Id.*

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

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

<sup>106</sup> Cal. Fam. Code §§ 3002, 3080 (West 1993).

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

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

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

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<sup>107</sup> *Id.*, § 3011.

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

<sup>109</sup> Idaho Code § 32-717B(4).

<sup>110</sup> *Id.*, § 32-717B(2).

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

<sup>112</sup> Louisiana Rev. Stat. 9:335(A)(2)(b).

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

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

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

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

<sup>114</sup> Ga. Code Ann., § 19-9-6(6) (West 2011).

<sup>115</sup> Utah Code § 30-3-10.1(2) (West).

<sup>116</sup> *Id.*

<sup>117</sup> Minn. Stat. § 518.175(1)(e).

<sup>118</sup> *Id.*

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

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

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

<sup>120</sup> W.Va. Code § 48-9-206(a).

<sup>121</sup> *Id.*, § 48-9-206(a)(1-8).

<sup>122</sup> Texas Family Code § 153.134(b)(1)

<sup>123</sup> *Id.*, § 153.134(b)(2) & (b)(4).

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

## B. Recent Unsuccessful Legislative Measures Regarding Joint Physical Custody

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

Other recent unsuccessful legislative efforts include the following: A bill mandating a joint custody presumption and providing that “the child resides alternately for specific and substantially equal periods of time with each parent” was introduced in the Michigan legislature in 2005.<sup>129</sup> Several unsuccessful measures have been introduced in the Maryland legislature in

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<sup>124</sup> *Id.*, § 153.002.

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

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

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

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

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

recent years with the aim of creating a statutory preference for or rebuttable presumption of joint legal and physical custody.<sup>130</sup> In 2011, a bill introduced in the Alabama Senate would have required the court to order “equal parenting time with each of the two fit parents ...”<sup>131</sup> A similar bill had been introduced in the Tennessee Legislature in 2010.<sup>132</sup> In 2012, a bill was introduced in the Utah Legislature to create a presumption for both joint legal and joint physical custody.<sup>133</sup> Only the joint legal custody presumption was enacted into law.<sup>134</sup> On Jan. 15, 2013, a bill was introduced in the Nebraska legislature providing for “a rebuttable presumption that each parent is entitled to at least forty-five percent of the annual parenting time.”<sup>135</sup>

#### IV. Parenting Plans

Development of a parenting plan is a significant family law mechanism created in response to the “persistent dissatisfaction with the traditional adversarial divorce process” and intended to encourage “models emphasizing self-determination and problem solving approaches.”<sup>136</sup> In the last generation, family courts have moved “towards a philosophy that

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

<sup>131</sup> Alabama S.B. 196 (2011 Session).

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

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

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

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

<sup>136</sup> **Error! Reference source not found.**, *Family Court Reform and ADR: Shifting Values And Expectations Transform The Divorce Process*, 42 Fam. L.Q. 659 (2008). Within the last decade, several alternative dispute resolution (ADR) approaches have emerged to assist in the resolution of child custody disputes. See Daniel J. Pickar & Jeffrey J. Kahn, *Settlement-Focused Parenting Plan Consultations: An Evaluative Mediation Alternative To Child Custody Evaluations*, 49 Fam. Ct. Rev. 59, 59-60 (2011) (discussing collaborative divorce, parenting coordination, impasse-directed mediation for high-conflict divorces, early neutral evaluation, mediation-arbitration, and meditative evaluations). Without a cooperative problem-solving approach, “[p]arents involved in litigation

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

Many state statutes require a parenting plan as part of the process of obtaining joint custody.<sup>141</sup> Additionally, some state courts may require the parents to submit a plan to implement a joint custody order.<sup>142</sup> Some jurisdictions have instituted parenting coordination programs “to provide a child-focused alternative dispute resolution process ...”<sup>143</sup> In Florida, the parenting coordinator has a variety of duties, including “assist[ing] the parents in creating or implementing a parenting plan by facilitating the resolution of disputes between the parents by

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move from being the decision-makers in matters pertaining to their children, to risking the disempowerment that can occur when a third party decides their children's future.”) *Id.* at 59.

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

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

<sup>139</sup> *Id.*, Wash. Stat. § 26.09.184(1)(e) & (4).

<sup>140</sup> *Id.*, Wash. Stat. § 26.09.184(5) & (6).

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

<sup>142</sup> *See* ELROD, *supra*, at § 5:10 n.2.

<sup>143</sup> Florida Stat. § 61.125(1).

providing education, making recommendations, and, with the prior approval of the parents and the court, making limited decisions within the scope of the court's order of referral.<sup>144</sup>

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

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

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

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<sup>144</sup> *Id.*

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

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

Florida Stat. § 61.13(2)(b).

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

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

### A. Domestic Violence Presumptions

States have frequently enacted a statutory presumption against awarding legal or physical custody to a parent found to have perpetrated domestic violence.<sup>148</sup> Joint custody can be quite problematic in families with a history of domestic abuse.<sup>149</sup> For example, a Texas court may not award joint custody if credible evidence is presented of a “history or pattern” of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child.<sup>150</sup> An Arizona statute provides for “a rebuttable presumption that an award of sole or joint legal decision-making to the parent who committed the act of domestic violence is contrary to the child's best interests.”<sup>151</sup> Nor in some states may a court approve a joint custody parenting plan if one of the parties is a domestic abuser.<sup>152</sup>

Recently, domestic violence scholars have “increasingly have come to believe it is wrong to treat all domestic violence as having the same potential relevance to custody decisions.”<sup>153</sup>

The range and detail of this literature is beyond the scope of this Memorandum, but it is

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

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

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

<sup>150</sup> Tex. Fam. Code § 153.004(b).

<sup>151</sup> Ariz. Rev. Stat. § 25-403.03(D).

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

<sup>153</sup> ELLMAN, *ET AL.*, *supra* at 642.

important to note that the inter-relationship among child custody, presumptions, and domestic violence is quite complex.<sup>154</sup>

#### B. The Tender Years Presumption and the Primary Caretaker Factor

The “tender years” doctrine affords a preference to the mother of a child of tender years in determining custody.<sup>155</sup> The doctrine is largely but not entirely an anachronism, having been either repealed by statute<sup>156</sup> or eliminated by case law.<sup>157</sup> A handful of jurisdictions have retained it in an attenuated form.<sup>158</sup> Even in jurisdictions that have parted ways with the doctrine, courts may still consider a child’s age in connection with the other evidence in a case in deeming whether “the emotional ties between a child and one particular parent may be stronger because of the child’s age.”<sup>159</sup> Despite the abolition of the presumption, “there remains among some judges a tendency to prefer that custody of young children be placed in the mother.”<sup>160</sup> A relic of the common law, it seems that the tender years doctrine is forgotten but not gone.

While the tender years presumption has formally fallen into desuetude, states will weigh the primary caretaker’s role in child rearing as a factor in making custody determinations in

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

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

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

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

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

<sup>159</sup> *Cherradi v. Lavoie*, 662 So.2d 751, 753 (Fla. App. 1995).

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

varying degrees. At one time, two state supreme courts experimented with a primary caretaker *presumption*,<sup>161</sup> only to have their state legislature enact statutes rejecting the rule.<sup>162</sup> Some states have a primary caretaker *preference*. The Oregon statute, for example, lists “[t]he preference for the primary caregiver of the child, if the caregiver is deemed fit by the court” as one factor among several considerations to be weighed in the best interests calculus.<sup>163</sup> The South Carolina Supreme Court has stated that while “there is no rule of law requiring custody be awarded to the primary caretaker, there is an assumption that custody will be awarded to the primary caretaker.”<sup>164</sup>

Most jurisdictions will consider the fact that one parent served as the child’s primary caretaker until the parents separated as one factor in the best interests calculus.<sup>165</sup> Both legislatures and courts have concluded that “[t]he fact that one parent has successfully been the primary care parent in the past obviously speaks to the issue of that party’s continued ability to

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

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

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

<sup>164</sup> *Patel v. Patel*, 599 S.E.2d 114, 120 (S.C. 2004).

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

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

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

exercise care of the child in a custodial situation.”<sup>166</sup> Some statutes more generally include “the prior involvement of each parent in the child’s life” as a factor for the court to consider.<sup>167</sup> With regard to joint legal custody, the Texas statute directs the court to consider, *inter alia*, “whether both parents participated in child rearing before the filing of the suit.”<sup>168</sup>

## VI. Conclusion

No clear consensus has emerged among the states regarding how joint custody is defined, how it is awarded, or how precisely joint physical and joint legal custody interact. All insist that the child’s best interest is of paramount concern. The principal effect of this fundamental doctrine upon joint custody determinations is to cut against presumptions and preferences in favor of broad judicial discretion applied with close attention to the facts of each case. In terms of the predictability of legal rules this state of affairs is hardly satisfactory, but whether greater precision is preferable to a case-by-case determination is an open question. The emerging trend everywhere is to nudge contending parents out of the litigation framework and into a frame of mind in which they focus on crafting a parenting plan to map out the future welfare of their children.

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

<sup>167</sup> D.C. Code § 16-914(a)(3)(I).

<sup>168</sup> Texas Code § 153.134(a)(4).