Presumptive Joint Physical Custody Group

Report under House File 1262

This paper considers the impact of a proposed bill, House File 1262, which sets forth a presumption of joint custody in divorce situations. The current study group was created after a February 28, 2008 hearing on the proposed bill. Upon questioning by the legislative committee considering the bill, none of the supporters or opponents of the bill had data from other states on the effects of creating a presumption of Joint Physical Custody, or information regarding whether other states had adopted such a rule. This led to a proposal to delete the entire text of the bill and replace it with the current text calling for this study group. Specifically, the Supreme Court designated this group:

> to consider the impact that a presumption of joint physical custody would have in Minnesota. The evaluation must consider the positive and negative impact on parents and children of adopting a presumption of joint physical custody, the fiscal impact of adopting this presumption and the experiences of other states that have adopted a presumption of joint physical custody. The study must consider data and information from academic and research professionals.

This paper thus considers these and other issues.

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I. Executive Summary

As evidenced by the intense public interest in the hearings regarding House File 1262 during the 2008 Legislative Session, divorce – and the custody of children after divorce – remains a highly emotional and divisive issue. Divorce touches the lives of many Minnesotans. In 2000, according to an April/May 2002 report by the Minnesota Legislative Commission on the Economic Status of Women, some 15,888 marriages were dissolved. In that same year, only about twice that number of marriages occurred. Divorce is a profoundly personal event for the families involved. Yet, divorce and child custody are also matters of important public policy. The Legislature, and in turn Minnesota's courts, must set the rules on divorce, covering everything from how property is shared to how children are raised. The legislature and courts must also establish the procedures for making those decisions.

In the 2008 Legislative Session, Representative Tim Mahoney proposed a bill that would have amended certain portions of Minnesota Statutes section 518, the part of the Minnesota Statutes that governs the dissolution of marriages. Among other things, House File 1262, as originally introduced, would have changed Minnesota's current judicial presumption that "joint legal custody" is in the best of interests of the child after a divorce to state that "joint legal and physical custody" is in the child's best interests (emphasis added). In light of our review of the recordings of many hours of testimony given to the Legislature in past legislative sessions and our survey of the 168 pages of written testimony offered to this Committee, we believe it is important to state clearly what the proposed law would do – and what it would not do.

This Committee should understand that Minnesota can already be counted among the states that have a judicial presumption in favor of "joint custody." Contrary to the assertions of some, the law would not move Minnesota in a radical direction out of the so-called "best interests" camp and into the "joint custody" camp. Section 518.17, subd. 2 is clear that, except in cases involving domestic violence, "[t]he court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child." Under current Minnesota law refers "joint legal custody." That term is defined elsewhere in section 518 to mean "that both parents have equal rights and responsibilities, including the right to participate in major decisions determining the child's upbringing, including education, health care, and religious training."

House File 1262 in its original form would have required that joint physical custody also be a judicial presumption in divorce. That is a significant change, to be sure, but it is not a radical change. Indeed, in practice the new language may have little day-to-day impact on the lives of many post-divorce families. Specifically, regardless of whether there is an express presumption for joint physical custody, section 518.175 sets out fairly explicit rules on "parenting time." ("Parenting time" is the modern version of what used to be called "visitation.") In 2006, section 518.175 was amended to state that "[i]n the absence of other evidence, there is a rebuttable presumption that a parent is entitled to receive at least 25 percent of the parenting time for the child." Thus, regardless of whether a parent is granted "joint physical custody" (and absent special circumstances), he or she already has a presumption that the child will spend a significant amount of time at his or her home.

This Committee should also understand what House File 1262 would not do. Contrary to the impression held by some, this bill would not have mandated that courts equally divide the time spent at the two parents' homes. As discussed below, the draft legislation included a proviso to the definition of "joint physical custody" that expressly disavowed that interpretation.

In addition to understanding the proposed bill, this Committee has been charged with researching the experiences of other states that have adopted a presumption of joint physical custody. This paper, which reflects our review of several 50-state surveys of divorce statutes, our reading of the statutes themselves, a review of case law and law review articles and e-mail exchanges with law professors, attempts to offer some insights. Not surprisingly, we cannot offer sweeping conclusions. Just as in Minnesota, there is a great variety of opinions from legal scholars on how well or poorly presumptions in favor of joint custody work in practice. And, just as in Minnesota, there is a great deal of murkiness about what is meant by the term "joint custody" as it is used in the 50 states and the District of Columbia. In some jurisdictions, "joint custody" may include physical custody, explicitly or implicitly; in others, it may have the more narrow meaning of "joint legal custody."

Despite the lack of clarity, after our review we can probably state with confidence at least two things. First, it appears fairly clear that joint legal and physical custody works very well in post-divorce families where both parents are cooperative and respectful of each other and both parents want joint custody. For these families, a judicial presumption of joint legal and physical custody is probably helpful and efficient. Second, it appears fairly clear that joint legal and physical custody can be a dangerous arrangement in families where one of the parents (usually, but not always, the father) is violent and abusive. For these families, presumptions of joint custody add conflict to an already difficult situation. (Minnesota, like most states with a joint-custody presumption, has a carve out for such situations, but it should be noted that legal scholars debate the practical value of such carve-outs.)

It is far harder to say with confidence one way or the other how well presumptions of joint legal and physical custody serve the best interests of the child in those cases where the divorcing parents are hostile, angry, and uncooperative – precisely the kinds of cases that are likely to land in Minnesota's courts because the parents cannot reach agreement. Proponents of joint custody presumptions contend that a legal presumption reduces parental conflict because there is less to be gained by casting the other parent in a poor light. Skeptics argue that conflicts actually escalate, to the detriment of the child, because the parents are compelled to reach mutual decisions on difficult topics after their marriage has failed. The reality may well be that, in certain situations, both groups are right.

In any event, the proposed change to Minnesota's statutes governing presumptions and joint custody would probably do little to alter the reality for many post-divorce families, given the current statutory scheme. Under current Minnesota law, parents already have a rebuttable presumption to share in at least 25 percent of the child's days and weeks, whether or not the parent also has "joint physical custody." As a practical matter, there is probably little difference between time spent with a child under the banner of "parenting time" versus time spent with a child under the name of "joint physical custody." That is not to say that the proposed legislation is without real meaning. In smaller but important ways, as discussed below, it would continue to move Minnesota on a path favoring joint custody.

II. Legislative Intent

The bill creating this study group is House File 1262 (and its corresponding Senate File 1606). This bill as originally proposed by Representative Mahoney would have created a judicial presumption of joint physical custody of children in a divorce. A similar bill has been proposed by Representative Mahoney each year since 2000. As last proposed, the bill specifically defined "joint physical custody" more narrowly than in previous iterations, as discussed below. At the first hearing on the bill (before the House Committee on Public Safety and Civil Justice on February 28, 2008), Representative Mahoney took care to point out the more limited definition of term "joint physical custody" in his bill.

At the February 28, 2008 hearing on the bill, supporters and opponents of the bill had the opportunity to voice their opinions. Both supporters and opponents treated the language of the bill, and, more explicitly, the presumption of joint physical custody, as meaning a presumption that each parent would receive 50 percent of the parenting time.[1] We note that such meaning is contrary to the clear definition articulated in the bill.

a. Assertions of Supporters of the Bill

Supporters generally made the following assertions:

- That Minnesota law currently creates a presumption for sole physical custody (with no parenting time for the other parent).
- That the majority of other states have a presumption for joint physical custody.
- That such a presumption would reduce conflict between spouses over the children.

b. Assertions of Opponents of the Bill

Opponents generally made the following assertions:

- That Minnesota law currently permits a 50/50 split of parenting time where the parents can agree to this.
- That the only effect of the legislation would be to force such an arrangement on parents who could not agree on a split of parenting time (often due to domestic violence).
- That, in families where domestic violence has occurred, requiring a significant amount of contact between the parents increases the chances of further violence.
- That a presumption of joint physical custody would not decrease litigation. More specifically, that the presumption would increase litigation because litigation would be required to avoid a 50/50 split.

III. Current Minnesota Law

With widely divergent positions taken regarding Minnesota's current statute regarding custody in divorce situations, an initial inquiry relates to the language of Minnesota's current statute.

Minnesota law, prior to introduction of House File 1262 sets a presumption that joint legal custody is in the best interests of the child. Minnesota Statutes section 518.17 discusses Custody and Support of Children on Judgment. Subdivision 1 sets a best interests framework for custody disputes in Minnesota, stating that "[t]he best interests of the child' means all relevant factors to be considered and evaluated by the court" and specifically enumerating thirteen factors. Subdivision 2 sets forth factors to consider when joint custody is sought and specifically states:

> The court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child. However, the court shall use a rebuttable presumption that joint legal or physical custody is not in the best interests of the child if domestic abuse, as defined in section 518B.01, has occurred between the parents.
>
> If the court awards joint legal or physical custody over the objection of a party, the court shall make detailed findings on each of the factors in this subdivision and explain how the factors led to its determination that joint custody would be in the best interests of the child.

Under current Minnesota law, the presumption is for "joint legal custody." That term is defined in Minn. Stat. Section 518.003, subd. 3(b) to mean "that both parents have equal rights and responsibilities, including the right to participate in major decisions determining the child's upbringing, including education, health care, and religious training." Minnesota courts have distinguished "joint legal custody" from "joint physical custody."[2] Other courts have noted that there is not a presumption for or against joint physical custody.[3]

Minnesota law further sets a presumption that each parent will receive at least 25% of the parenting time. Minn. Stat. section 518.175 discusses parenting time. Subdivision 1, part (1) states:

> In all proceedings for dissolution or legal separation, subsequent to the commencement of the proceeding and continuing thereafter during the minority of the child, the court shall, upon the request of either parent, grant such parenting time on behalf of the child and a parent as will enable the child and the parent to maintain a child to parent relationship that will be in the best interests of the child.

We note that "parenting time" is the modern version of what used to be called "visitation." Subdivision 1(e) further states:

> In the absence of other evidence, there is a rebuttable presumption that a parent is entitled to receive at least 25 percent of the

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

The language regarding the presumption of at least 25 percent parenting time was added to Minnesota law by an amendment in 2006 in what constituted a major overhaul of family law. Discussion in the bill regarding this provision was limited to the fact that the House has passed such language in the previous year and therefore was being included in that bill.

Current Minnesota law also has a so-called "carve-out" from the presumption of joint custody in cases where domestic violence has occurred. Minn. Stat. Section 518.17, subd. 2 states: "The court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child. *However, the court shall use a rebuttable presumption that joint legal or physical custody is not in the best interests of the child if domestic abuse, as defined in section 518B.01, has occurred between the parents*." (emphasis added). As discussed below, domestic violence carve-outs are a common approach to a difficult problem.

IV. Proposed Bill

A. Statutory Language

This study group was formed in light of House File 1262, as introduced. The 2nd engrossment of that bill led to the language directing the study group. The bill, as introduced, included the following changes from current legislation (for the purposes of clarity, deleted text has been omitted):

1. Minnesota Statutes (2006), section 518.003, subdivision 3(d), is amended to read:

> (d) "Joint physical custody" means that the routine daily care and control and the residence of the child is structured between the parties. Joint physical custody does not require an equal or nearly equal division of time between the parties.

2. Minnesota Statutes (2006), section 518.17, subdivision 1(a)(13), is amended to read:

> (13) except in cases in which a finding of domestic abuse as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child. The court may not use one factor to the exclusion of all others. The primary caretaker factor may not be used as a presumption in determining the best interests of the child. The court must make detailed

findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child. The court must make detailed findings regarding the rationale for a deviation from the rebuttable presumptions in subdivision 2.

3. Minnesota Statutes (2006), section 518.17, subdivision 2, is amended to read:

Subd. 2. **Rebuttable presumptions in child custody disputes.**
(a) The court shall use a rebuttable presumption that joint legal and physical custody is in the best interests of the child.
(b) Notwithstanding paragraph (a), the court shall use a rebuttable presumption that joint legal or physical custody is not in the best interests of the child if domestic abuse, as defined in section 518B.01, has occurred between the parents or by a parent against the child who is the subject of the matter before the court.

4. Minnesota Statutes 2006, section 518.1705, subdivision 3, is amended to read:

Subd. 3. **Creating parenting plan; restrictions on creation; alternative.**
(a) The court shall adopt a parenting plan proposed by both parents unless the court makes detailed findings that the proposed plan is not in the best interests of the child.
(b) If both parents do not agree to a parenting plan, the court shall create a parenting order on its own motion unless the court:
(1) makes detailed findings that use of a parenting order is not feasible; or
(2) finds that a parent has committed domestic abuse against a parent or child who is a party to, or subject of, the matter before the court.
(c) If an existing order does not contain a parenting plan, the parents must not be required to create a parenting plan as part of a modification order under section 518A.39.
(d) A parenting plan must not be required during an action under section 256.87.
(e) If the parents do not agree to a parenting plan and the court does not create a parenting order on its own motion, orders for custody and parenting time must be entered under sections 518.17 and 518.175 or section 257.541, as applicable.

5. Minnesota Statutes (2006), section 518.1705, subdivision 4, is amended to read:

Subd. 4. **Custody designation.** If the parenting plan or order substitutes other terms for legal and physical custody and if a designation of legal and physical custody is necessary for enforcement of the judgment and decree in another jurisdiction, it must be considered solely for that purpose that the parents have joint legal and joint physical custody.

B. Presumption

The bill thus sets forth, at section 518.17, subdivision 2(a), "a rebuttable presumption that joint legal and physical custody is in the best interests of the child."

Minnesota Statutes section 518.17, subdivision 2 previously stated "The court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child." Accordingly, the proposed language moves the presumption from one of "joint legal custody" to one of "joint legal and physical custody" but does not newly introduce the idea of a presumption.

C. Joint Physical Custody under the Proposed Bill

As noted, the bill creates a presumption that joint legal and physical custody is in the best interests of the child. The bill, at section 518.003, subdivision 3(d), specifically states that "Joint physical custody does not require an equal or nearly equal division of time between the parties."

The limited meaning given to "joint physical custody" seems to be in alignment with the current Minnesota statute creating a rebuttable presumption that each parent should be awarded at least 25% of parenting time.

D. Domestic Violence Carve Out

The bill, at section 518.17, subdivision 2(b), makes a carve out for domestic violence by creating a rebuttable presumption that joint legal and physical custody is not in the best interests of the child if domestic abuse has occurred between the parents or by a parent against the child who is the subject of the matter before the court. The current Minnesota statute, at section 518.17, subdivision 2 already states: "However, the court shall use a rebuttable presumption that joint legal or physical custody is not in the best interests of the child if domestic abuse, as defined in section 518B.01, has occurred between the parents." Accordingly, the new bill does not newly introduce a domestic violence carve-out from a presumption of joint, legal or physical, custody.

VI. Other States

As part of our research, we looked at other states to evaluate the trends in child custody statutes and the effect of various provisions in the statutes.

A. The National Trend Favors Joint Custody, but Judicial Presumption Remains a Minority Rule

Historically, state statutes governing child custody stated that custody was to be decided based on the "best interests of the child." What constitutes "best interests," however, varies greatly. A relatively recent trend is for states to set out, in its statutes, a rebuttable judicial presumption that joint custody is in the best interests of the child. In other words, the courts are directed to assume, as a starting point, that joint custody is the preferred custody arrangement, unless that presumption is rebutted by evidence offered by the parent opposing joint custody.

A number of states have taken this approach. Although there appears to be a trend towards favoring joint custody, a rebuttable presumption in favor of joint custody is not the majority rule. In our research, we determined that somewhere between nine and twelve states have true judicial presumptions for joint custody.[4] Another dozen or so states could be characterized as have a preference for joint custody; that is to say, these statutes include provisions that favor joint custody, but they include no judicial presumption that joint custody is in the best interests of the child. At the other end of the spectrum, we estimate that some nineteen states express no preference or judicial presumption for a particular form of custody.

According to the American Bar Association website, several states, including California, Connecticut, Maine, Michigan, Mississippi, Nevada, Tennessee, Vermont, and Washington, adopted laws in favor of joint custody, but only when the parents agreed to it.[5] Other states, including the District of Columbia, Florida, Idaho, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, New Hampshire, New Mexico, and Texas, have laws favoring a presumption for joint custody. It is worth noting that the American Bar Association considers Minnesota to have, under current laws, a presumption for joint custody.

Attached as appendices are tables summarizing custody statutes in the 50 states and the District of Columbia with analysis of whether the state is a preference state or a presumption state as well as the state definition for joint physical custody. As an additional aid, we have reproduced the text of some of these statutes below to illustrate points along the spectrum.

1. Montana Had a Presumption for Joint Custody, Which Directed Courts to Allot Time between Parents as Equally as Possible

Previously, Montana had what we determined to be among the most aggressive positions in favor of joint custody. In particular, it coupled a presumption for joint custody with a directive to the courts to allot time equally between parents. See Mont. Code Ann. § 40-4-224, repealed Sec. 39, Ch. 343, L. 1997.

This provision of the statute enacted in 1981, however, was repealed in 1997. The statute now no longer refers to joint legal or physical custody but provides instead that "[b]ased on the best interest of the child, a final parenting plan may include . . . provisions for . . . a residential schedule specifying the periods of time during which the child will reside with each parent . . . ." Mont. Code Ann. § 40-4-234(2)(c). Moreover, it states that "frequent and continuing contact with both parents . . . is considered to be in the child's best interests." Id. at 40-4-212(1)(l). We reproduce the statute's original language here, nevertheless, to illustrate a position, which we believe would now be viewed as being on the extreme end of the spectrum.

MONTANA: Title 40, Chapter 4, Part 2. Support, Custody, Visitation, and Related Provisions

40-4-224. Joint custody -- modification -- consultation with professionals

> (1) Upon application of either parent or both parents for joint custody, the court shall presume joint custody is in the best interest of a minor child unless the court finds, under the factors set forth in 40-4-212, that joint custody is not in the best interest of the minor child. If the court declines to enter an order awarding joint custody, the court shall state in its

decision the reasons for denial of an award of joint custody. Objection to joint custody by a parent seeking sole custody is not a sufficient basis for a finding that joint custody is not in the best interest of a child, nor is a finding that the parents are hostile to each other. However, a finding that one parent physically abused the other parent or the child is a sufficient basis for finding that joint custody is not in the best interest of the child.

(2) For the purposes of this section, "joint custody" means an order awarding custody of the minor child to both parents and providing that the physical custody and residency of the child shall be allotted between the parents in such a way as to assure the child frequent and continuing contact with both parents. The allotment of time between the parents must be as equal as possible; however;

(a) each case shall be determined according to its own practicalities, with the best interest of the child as the primary consideration; and

(b) when allotting time between the parents, the court shall consider the effect of the time allotment on the stability and continuity of the child's education.

2. Idaho has a Presumption for Joint Custody and Directs Courts to Explain Denial of Joint Custody

Idaho is one of many states that has a presumption for joint custody and also requires Courts to explain any decision to deny joint custody.

IDAHO: Title 32, Chapter 7, 32-717B. Joint custody.

(1) “Joint custody” means an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with both parents.... If the court declines to enter an order awarding joint custody, the court shall state in its decision the reason for denial of an award of joint custody.

(2) "joint physical custody" means an order awarding each of the parents significant periods of time in which a child resides with or is under the care and supervision of each of the parents or parties.

(4) Except as provided in subsection (5), of the section, absent a preponderance of the evidence to the contrary, there shall be a presumption that joint custody is in the best interest of a minor child or children.

(5) There shall be a presumption that joint custody is not in the best interests of a minor child if one (1) of the parents is found by the court to

be a habitual perpetrator of domestic violence as defined in section 39-6303, Idaho Code.

Section 1 of S.L. 1982. ch. 311 reads: "Policy statement. It is the policy of this state that joint custody is a mechanism to assure children of continuing and frequent care and contact with both parents provided joint custody is in the best interest of said children."

3. District of Columbia has a Rebuttable Presumption that Joint Custody is in the Best Interest of the Child

The District of Columbia likewise sets forth a rebuttable presumption in favor of joint custody.

D.C. Code 16-911. Alimony pendente lite; suit money; enforcement; custody of children. (a)(5) and 16-914. Retention of jurisdiction as to alimony and custody of children. (a)(2)

> Unless the court determines that it is not in the best interest of the child, the court may 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 regardless of marital status. There shall be a rebuttable presumption that joint custody is in the best interest of the child or children, except in instances where a judicial officer has found by a preponderance of the evidence that an intrafamily offense as defined in D.C. Code section 16-1001(5), an instance of child abuse as defined in section 102 of the Prevention of Child Abuse and Neglect Act of 1977, effective September 23, 1977(D.C. Law 2-22;D.C. Code 6- 2101), an instance of child neglect as defined in section 2 of the Child Abuse and Neglect Prevention Children's Trust Fund Act of 1993, effective October 5, 1993 (D.C. Law 10-56; D.C. Code 6- 2131), or where parental kidnapping as defined in D.C. Code section 16-1021 through section 16-1026 has occurred....

4. California Provides a Strong Preference for Joint Custody.

California was the first state in the nation to authorize joint custody by statute.[6] However, California does not have a general presumption favoring joint custody. The presumption that joint custody is in the best interests of the child is only applicable if both parents agree.

CALIFORNIA: Family Code Section

> 3040. Order of preference.
>
> (a) Custody should be granted in the following order of preference according to the best interest of the child as provided in Sections 3011 and 3020:

(1) To both parents jointly pursuant to Chapter 4 (commencing with Section 3080) or to either parent. In making an order granting custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent, consistent with Section 3011 and 3020, and shall not prefer a parent as custodian because of that parent's sex. The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

. . . .

(b) This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child.

3080. Presumption of joint custody.

There is a presumption, affecting the burden of proof, that joint custody is in the best interest of a minor child, subject to 3011, 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.

3082. Statement of reasons for grant or denial.

When a request for joint custody is granted or denied, the court, upon the request of any party, shall state in its decision the reasons for granting or denying the request. A statement that joint physical custody is, or is not, in the best interest of the child is not sufficient to satisfy the requirements of this section.

5. Michigan directs Courts to Consider Joint Custody at the Request of Either Parent and to Explain Reasons for Granting or Denying such Request

Michigan requires courts to consider joint custody at the request of either parent but does not articulate a presumption for joint custody. If joint custody is not awarded, Michigan requires courts to state why.

MICHIGAN: Chapter 722.26a, Sec. 6a. (1) In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request.

6. Nebraska has a Best Interests of the Child Standard with no Presumption for Joint Custody

Nebraska requires courts to consider whether joint physical custody is in the best interests of the child but provides neither a preference nor a presumption for or against such custody.

> NEBRASKA: Chapter 42, sec. 364 (2) In determining legal custody or physical custody, the court shall not give preference to either parent based on the sex of the parent and, except as provided in section 43-2933, no presumption shall exist that either parent is more fit or suitable than the other. Custody shall be determined on the basis of the best interests of the child, as defined in the Parenting Act. Unless parental rights are terminated, both parents shall continue to have the rights stated in section 42-381.
>
> (3) Custody of a minor child may be placed with both parents on a joint legal custody or joint physical custody basis, or both, (a) when both parents agree to such an arrangement in the parenting plan and the court determines that such an arrangement is in the best interests of the child or (b) if the court specifically finds, after a hearing in open court, that joint physical custody or joint legal custody, or both, is in the best interests of the minor child regardless of any parental agreement or consent.

B. Presumptions Against Joint Custody in Certain Situations Are Common

Somewhere between 16 and 22 states have presumptions against joint custody where there is a history of domestic violence, child abuse, sexual abuse, and/or where a parent as been convicted of certain crimes. As noted above in Section III, Minnesota is among those states with such a "carve out." The reasons for this are discussed more fully below with respect to Domestic Violence Carve Outs.

VII. General Opinions on Statutory Provisions

A. Impact of Presumptions in Child Custody

Courts and commentators are conflicted over whether joint physical child custody is a desirable legal presumption. On the one hand, deeply embedded notions of constitutional equality convince many that parents should be treated equally and, therefore, should presumptively receive equal time with their children after a divorce.[7] On the other hand, the longstanding principle of the "best interest of the child" stresses the uniqueness of child custody determinations, and, therefore, discourages any presumption as demeaning the importance of case-by-case assessments.[8]

1. Advantages of Presumptions

One of the primary arguments in favor of a presumption for joint custody is that it enhances the degree of predictability and uniformity of judicial decision-making.[9] The best interests of the child standard standing alone, it is argued, gives too much judicial discretion and

allows judges to consider inappropriate factors.[10] In contrast, the decision-maker constrained by presumptions has less leeway to base decisions on personal experiences or prejudices.[11] Those opposing these presumptions contend that these assertions are overly simplistic.[12]

Supporters of a presumption for joint custody assert that joint custody does, in fact, create the best situation for children. Many assume that fathers will lose out under the "best interests of the child" standard.[13] Because research tends to show that children of divorce fare better when they have good relationships with both parents,[14] those arguing in favor of presumptions argue that the best interests of the child are best served by a presumption of joint custody.

A final argument in favor of a joint custody presumption is that, provided that the statute includes a rebuttable presumption of joint custody, joint custody statutes do address the unique characteristics of each situation — including addressing the best interests of the child. For example, when the District of Columbia was deciding whether to adopt a statute in favor of a joint custody presumption, proponents of the legislation made the following arguments:

> "A presumption does not mean that a judge cannot do something else."[15]
>
> "This is not a mandatory requirement. It's merely a presumption. . . . The trier of facts can look at all of the facts and make a decision that it's not in the best interests."[16]
>
> "[I]t's clearly a bill that is talking about doing what's in the best interests of the child. That is the standard. That's the way it was and that's the way it will continue to be under [the amendment that would make joint custody presumptive]."[17]
>
> "[J]udges are wise, and what we are saying is, 'Here, you people with the wisdom look. We're giving you the direction we want you to go in, but if it's not in the best interests of the child, then don't award joint custody.' "[18]

Courts, similarly, have loosened the potentially strict confines of joint custody presumptions by requiring very little rebuttal evidence. As one commentator notes, for example, the Supreme Court of Montana has found that a simple lack of cooperation between parents can rebut the presumption[19] and has even held that "'[t]here is no mandate that joint custody must be awarded even if both parents are found to be fit and proper.'"[20] Accordingly, despite opponents' arguments to the contrary, other commentators believe that because the presumption of joint custody is rebuttable, it is flexible enough to allow judges to address the unique situations presented in each case and adopt solutions that truly are in the child's best interest.

2. The Problem with Presumptions

Many courts and commentators have likewise spoken out against a presumption for joint custody, arguing that any presumption requires application of uniform principles to unique situations. Perhaps most often quoted is Justice White's commentary on the issue of presumptions in child custody cases:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.[21]

Commentators thus argue that no uniform principle can adequately address the issue of the best interests of the child, because the best interests of the child will, by necessity, vary from case to case. Accordingly, these commentators criticize the application of a presumption for joint custody as catering to judicial economy over the best interests of the child. Another court observed:

> For even if the presumption had some indeterminable validity, in unspecifiable circumstances, it could serve no purpose other than to save time. But this saving of time is accomplished at the price of tremendous legal and logical confusion, and accompanied by an intolerable risk of unnecessary error. . . . A court in a child custody case acts as parens patriae. It is not enough to suggest that the task of deciding custody is a difficult one, or that the use of a presumption would result in a correct determination more often than not. A norm is ill-suited for determining the future of a unique being whose adjustment is vital to the welfare of future generations. Surely, it is not asking too much to demand that a court, in making a determination as to the best interest of a child, make the determination upon specific evidence relating to that child alone. . . . [M]agic formulas have no place in decisions designed to salvage human values.[22]

In an attempt to demonstrate the flaw in applying a presumption in all cases, courts and commentators point to the fact that joint custody can negatively affect a child in situations in which the relationship between the parents is particularly hostile.[23] One commentator has noted that while "there is considerable research support for the benefits of having both parents constructively involved in children's lives," there is "no scholarly support for near-blanket presumption that 50/50 custody arrangement is in children's best interests."[24] These advocates note that although "[j]oint custody may be a fine (and even the optimal) solution if desired by both parents who are willing to work hard towards it success,"[25] the opposite is likely true where the relationship between the parents is hostile.[26] Certainly many parents would agree that joint custody is not the ideal situation for their child.[27] Attempting to make a 50-50 joint custody arrangement work in such situations, it is argued, can have a detrimental effect on the child's best interests.[28] For these reasons, some courts and commentators argue that a blanket presumption of 50/50 joint custody should be disfavored.

B. Impact of Joint Custody

1. Fiscal Impact to States of a Presumption of Joint Custody Is Unclear

Legislatures differ greatly on the fiscal impact, if any, of adopting judicial presumptions in favor of joint custody.

In a proposed bill in Maryland, the foreseeable financial impact was thought to be roughly zero. The Maryland bill wanted courts to first consider an award of joint legal custody and approximately equal physical custody for each parent. If the court did not award joint legal custody or approximately equal physical custody, the court had to make a written finding stating the reasons why.[29]

By contrast, in an initiated measure in North Dakota, the state and local fiscal impact was expected to be considerable. In the North Dakota initiated measure, the court would be heavily involved. Parents would retain joint legal and physical custody unless a parent had been denied custody by being declared unfit by clear and convincing evidence. The court would require parents to develop a joint parenting plan, to facilitate production of a parenting plan if the parents could not agree, and to provide that parents who previously have not had a fitness hearing may petition the court for one at any time. In this case the cost of the measure, if enacted, was expected to be substantial.[30]

2. Fiscal Impact to Parents Is Unclear

There is little data available regarding the fiscal impact a presumption would have on the parents and/or child. There is a considerable amount of heavily cited research stating that parents who see their children regularly are more likely to pay child support.[31] There is concern, however, that, for parents who are living at or below the poverty line, losing sole-custodial parent status could disqualify the parent from receiving public assistance.[32]

3. Some Studies Have Concluded that Children in Joint Custody Arrangements Fare Better

a. Many Commentators Offer Evidence that Children in Joint Custody Arrangements Are Better Adjusted

Commentators have opined that children in joint custody arrangements are better adjusted than those in sole custody arrangements. The reason for this, however, is not uniformly agreed upon as being because of the joint custody arrangement *per se*. Some conclude that these children may be better adjusted because they have the kind of parents who are inclined to enter into joint custody arrangements and are more likely to cooperate after the divorce. The better relationship between the parents, rather than the legal arrangement, may be the reason studies find benefits to joint custody.[33] And it should be noted that some studies find no difference between children in a joint custody arrangement and children in a sole custody arrangement.[34]

One researcher conducted a metanalysis of the literature in 2002, and concluded that children in joint custody arrangements were better adjusted than children in sole custody arrangements.[35] That research attempted to address problems in past attempts to analyze the research. A number of scholars consider it a well-supported proposition that joint custody is better for children than sole custody, at least when there is not high-conflict between parents. Many researchers, and others in the field, however, continue to call for better research studies that have larger sample sizes, take place over a longer period of time, and are better controlled

than past research studies. Absent this type of research, many in the field are wary of saying how a custody arrangement affects children.[36]

b. Joint Custody May Not Be Preferable When Parental Conflict Is High

Some studies have found that residential instability may be stressful for some children. When divorced parents remain in a high-conflict situation after divorce, some studies have found that sole-custody is better for children than joint custody, while other studies have found that joint custody is no worse than sole custody, except perhaps in extreme cases of conflict between parents, where sole custody may be preferable.[37]

VIII. Effect of Domestic Violence Carve Out

A. Joint Custody in Families Involving Domestic Violence

There is general agreement that joint custody can be dangerous in families where there is a pattern of domestic violence. Separation and divorce is widely recognized to be the most dangerous time in an abusive relationship.[38]

The risks to women and children if joint custody is awarded to a batterer can be significant. First, a batterer's continued access to his victim and children facilitates further abuse.[39] Second, abusers, who by definition seek to control their victim, can seek joint custody not out of genuine concern for the children but as a tool to manipulate their victims at precisely a time when, due to divorce, they are losing control.[40] Further, abusers are likely not fit parents due to their propensity for violence.[41] Finally, "[c]hildren living under joint custody arrangements often experience familial conflict and chaos. In joint custody situations, children may learn that battering is acceptable because a batterer can still have custody of his children despite his violent behavior."[42]

In addition to these negative impacts, commentators opine that the central purpose of joint custody is not served in an abusive family. "The capacity to communicate and reach shared decisions is central to the success of any joint custody arrangement. Studies have shown that, without cooperation between the parents, joint custody arrangements are doomed to fail."[43]

B. Statutes to Prevent Abusers From Obtaining Custody

Despite widespread agreement that joint custody is not desirable in cases involving domestic abuse, the mechanics of preventing abusers from obtaining custody are no simple matter. Some states merely require that courts weigh evidence of domestic violence as a factor in the best interests standard.[44] Other states create rebuttable presumptions—either against custody for the abuser or against joint custody—where there is evidence of domestic abuse.[45]

1. Efficacy of Presumption Against Awarding Custody to Abusers

a. Overview

Some commentators endorse presumptions against awarding custody to abusers as adequately protecting victims and children.[46] The merits of these presumptions include that they "imply that parents who have an abusive relationship cannot engage in the shared decision making required by joint custody" and concede "that joint custody may lead to future violence between the parents because of the frequent contact and communication necessary to carry out this type of custody arrangement."[47] In not awarding joint custody because of one parent's abuse, courts tend to focus on whether parents will be able to cooperate with each other in making decisions concerning their children and only consider violence insofar as it may hinder the parents' ability to work together. [48]

For many commentators, however, presumptions against awarding custody to abusers are insufficient to combat the pervasive problem of domestic abuse. Such presumptions present legal and administrative problems with respect to both creation and application. The definition of domestic violence, the level of proof required to establish a finding of domestic violence, the types of evidence that meet that burden, and the effect of findings in other courts and proceedings all present questions for the legislatures and courts that could all significantly affect the efficacy of such a statute.[49] Commentators also cite the difficulty of proving domestic violence based on a combination of factors including systemic judicial bias, pervasive under-reporting, and the psychological dynamic in abusive relationships.

For these reasons, many commentators argue that the presumptions, despite their intent to protect the families of abusers, do not work.[50]

b. Case Law

A review of case law in states that have adopted a presumption that custody should not go to an abuser sheds light on the efficacy of such a provision in general. Courts are inconsistent, both within and among jurisdictions, in assessing which factual scenarios constitute abuse within the statutory meaning. A sampling of cases from several states illustrates the difficulty in proving or addressing domestic violence in custody proceedings.

Cases in Louisiana, North Dakota, and Oklahoma all established abuse against a child's mother by the child's father but held either that such abuse did not trigger the statutory presumption against awarding custody to the father or did not rise to the level of a pattern of abuse.[51] In contrast, in another case, the North Dakota Supreme Court has held that a single act of domestic violence may invoke the presumption against awarding custody to an abuser.[52]

c. The Dynamics of Abuse and the Judicial System

Unfortunately, problems with a presumption against custody to an abuser arise out of the conflict between the dynamics of abuse and the dynamics of the judicial system.

An initial problem with the presumption is that it often is not triggered unless it is raised by the abuse victim. Deciding whether to raise the issue of domestic violence and the issues that

can come with it is not a trivial matter. "Deciding whether to raise domestic violence to rebut a joint custody presumption creates a dilemma for the victim, who must continually assess the risks to his/her safety as well as assess how the court will view an abuse allegation first raised in a custody conflict."[53] Specifically, the juxtaposition of the roles of mother and of battered wife involve conflicting stereotypes that often result in detriment to the mother:

> In essence, battered women with children must show contrasting personalities to the court. On the one hand, battered women need to portray themselves as resourceful and effective parents when they appear in custody litigation. Yet, if they convey this image too well, a court may disbelieve the stories of violence because it does not see the stereotypically helpless and economically dependent battered woman." [54]

In view of the possibility of such an untenable situation, a woman may justly fear to bring domestic violence, with the stereotypes and images of bad mothering it can conjure, into an already contentious proceeding.

Another consideration in deciding whether to raise domestic violence is the relative weight given to the issue versus the problems involved with establishing the issue. Some commentators opine that there is an inherent skepticism against assertion of domestic violence allegations and that these allegations are often discounted as not relevant to the parent-child relationship. One commentator identified three neutral-seeming tenets that courts invoke in response to domestic violence, all of which serve to mask the seriousness of domestic violence claims: "first, a skepticism toward the plausibility of the allegations; second, an assumption that the truth may be unknowable, but that in any case the problem is mutual; and third, an assumption that any past domestic violence is ultimately irrelevant to the future-oriented custody decision."[55]

Further, the best-interests standard typically focuses on the parent-child relationship and ignores the relationship between the parents; judges must therefore be educated about the negative effects of spousal abuse on children even where the child is not physically harmed.[56] In a striking example, a New York Supreme Court Justice granted custody to a man who had strangled his wife to death, on the grounds that there was no threat of harm to the children.[57] This phenomenon comes in part from courts' tendency to view divorce and custody cases and something separate from domestic violence, "as though domestic violence is not an issue in divorce and custody cases."[58]

Commentators thus assert that, when coupled with the problems of proving domestic violence, it often may not be worth raising the issue. Problems of proof are inherent in domestic violence. "Proof of domestic violence is extremely difficult because of the nature and effects of the violence itself."[59] Some have argued that women may make fraudulent claims of domestic abuse to strengthen their position. [60] Contrary to this argument (and perception in many courts), many scholars contend that fraudulent claims of domestic abuse are rare.[61] Moreover, courts' customary modes of assessing witness credibility based on demeanor can be misleading in cases of domestic violence, where "[m]any batterers also exhibit a smooth and charming persona in public and when it is in their interest," whereas "battered women, particularly those who have made it to court, are often angry or emotional."[62]

"Studies of gender bias in the courts document how courts too often disbelieve credible evidence of domestic violence and discount its seriousness."[63] The Massachusetts Gender Bias study found that courts "consistently held mothers to higher standards of proof than fathers."[64] Similarly, a Massachusetts study found that abused woman "were commonly treated as 'hysterical and unreasonable,' with 'scorn, condescension and disrespect,' and were prevented from being heard in court."[65]

The problems associated with proving domestic violence can be exacerbated by the common scenario of the domestic violence having not previously been reported. Domestic violence is often underreported, perhaps "hidden by a woman's attempt to protect herself (and often her children) by her not making accusations or by her downplaying any violence."[66]

For these and other reasons, "[c]ourts often award joint custody to batterers."[67] "In one study, fifty-nine percent of the judicially successful fathers had physically abused their wives; thirty-six percent had kidnapped their children. A recent article estimated that at least one half of all contested custody cases involved families with a history of some form of domestic violence; in approximately forty percent of those cases, fathers were awarded the children irrespective of their history of violence."[68]

C. Interaction with Joint Custody Presumptions

In states with both joint custody presumptions and domestic violence presumptions that govern custody cases, commentators have opined that the joint custody presumption "almost always win[s] over the [domestic violence] factor or even a [domestic violence custody presumption, to the detriment of battered mothers and children."[69] This lattermost complaint could perhaps be somewhat assuaged by legislation explicitly stating that the joint custody presumption would not apply where there is evidence of domestic violence.[70]

> Redress through a prohibition of joint custody when there is evidence of abuse helps women who can prove domestic violence, but for women who are unable to produce evidence that meets burden of proof requirements, or women who do not want to come forward in court with such evidence, there is no redress. While joint custody encourages the rhetoric, at least, of equal participation by both parents, in reality it may hinder abused women seeking custody.[71]

Notwithstanding good legislative intent, put simply, "[t]he power structure in a domestically violent relationship weighs in favor of the batterer. The presumption of shared parenting would further tip the power scale in favor of a batterer at a time when the victim is most vulnerable to the batterer's coercive tactics."[72]

IX. Conclusion

Divorce and custody law has undergone a profound transformation in the past century. At the end of 1800s, many courts continued to apply Roman-era concepts that children were property and were presumed to belong to the father after a divorce. The 20th Century saw a dramatic swing in the other direction. The rise of the "tender years" doctrine — a presumption that young children fared best with their mother — led to system where, only 40 years ago, mothers overwhelmingly were granted sole custody of children after divorce. Joint custody emerged as a popular alternative to sole custody, starting in the early 1980s, in response to that reality. While courts sometimes ordered joint custody under their equitable powers prior to that date, California was the first state to authorize joint custody as a matter of statute in 1980, and other states quickly followed. The recognition that joint custody was a viable option for post-divorce families led many state legislatures, Minnesota's included, to establish a judicial presumption that joint custody is in the best interests of the child. Based on our review of the scholarly materials, some nine to twelve states have adopted a presumption in favor of joint custody (whether legal or physical). While presumptions in favor of joint custody are not universal, there is a clear trend toward creating statutory preferences for joint custody (despite concern by some critics that they may exacerbate conflict in hostile divorces.) Minnesota is part of this trend. The proposed legislation is not, therefore, a radical departure, but it is another significant step down a path that favors joint custody over sole custody.

[1] We have characterized the positions of supporters and opponents based on our review of recordings from the hearings.
[2] *See, e.g., Rosenfeld v. Rosenfeld*, 529 N.W.2d 724, 726 (Minn. Ct. App. 1995) (discussing both); *In re Marriage of Rubey v. Vannett*, 2007 WL 1412749 (Minn. Ct. App. May 15, 2007) ("The Minnesota Supreme Court does not read a presumption of joint physical custody into the statute"). Some cases have noted that "joint physical custody" is not a preferred custody arrangement. *Id*. at 726 ("[j]oint physical custody is not a preferred custody arrangement due to the instability, turmoil, and lack of continuity inherent in such an arrangement and is not generally in a child's best interest"); *Moss v. Abdussayed*, 2007 WL 93092, at *3 (Minn. Ct. App. Jan. 16, 2007) ("[j]oint physical custody is disfavored"); *In re Custody of J.J.S.*, 707 N.W.2d 706, 711 (Minn. Ct. App. 2006) (noting caselaw that demonstrates joint physical custody is disfavored).
[3] *See, e.g., Schallinger v. Schallinger*, 699 N.W.2d 15, 19 (Minn. Ct. App. 2005) ("There is neither a statutory presumption disfavoring joint physical custody, nor is there a preference against joint physical custody if the district court finds that it is in the best interest of the child and the four joint custody factors support such a determination."); *Miller v. Berens*, 2006 WL 1891789, at *2 (Minn. Ct. App. July 11, 2006).
[4] Observers come to different conclusions because of the nuances of the various statutes. Based on our review of the statutes, we concluded that 9 states have a judicial presumption for joint custody, 16 states have a preference for joint custody, and 2 more states could arguably fall in either category. The balance of the jurisdictions have no preference for any particular form of custody.
[5] American Bar Association Commission on Domestic Violence, http://www.abanet.org/domviol/docs/Custody.pdf.
[6] Prior to 1980, courts were frequently skeptical of joint custody arrangements. For a discussion of the early history of joint custody and California's role, 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. 489 (1981).
[7] The argument, while persuasive in principle, has been rejected. *See Arnold v. Arnold*, 679 N.W.2d 296 (Wis. 2004), *cert. denied*, 125 S.Ct. 112 (2004) (rejecting father's argument that physical custody award of 102 days, i.e., less than 50% of the year, deprived him of a fundamental liberty interest in equal participation in the raising of his children).
[8] *See generally* Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 457-58 (1984) (arguing against a presumption of joint physical custody).
[9] *See* K.T. Bartlett, *Preference, Presumption, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project*, 36 FAM. L.Q. 1, 24-25 (2002) ("The principal motivation for greater determinacy in these areas has been the desire to check the discretion of decision-makers and to make them more accountable. This is a concern about the power of judges. This concern exists in family law cases."); *id.* at 17 ("Generalizations cannot be avoided: Whether in the context of specific rules designed before a specific conflict arises or discretionary rules allowing the greatest flexibility at the time of a specific conflict, a case is decided by generalizations. The question is who makes those generalizations and when—judges, at the time of custody decision, or rule makers, in advance.").
[10] *See id.* ("The best-interests standard does little to constrain or steer judges; it encourages parents to contents custody; and it leaves children vulnerable to the effects of both.").
[11] *See id.* at 22 (noting that presumptions "prohibit decisions-makers from taking into account of a number of prohibited factors, including race, sex, religion, sexual orientation, extramarital sexual conduct, and the economic circumstances of the parties.").
[12] *See* Lyn R. Greenberg, Dianna J. Gould-Saltman & Robert Schnider, *The Problem with Presumptions: A Review and Commentary*, 3 J. CHILD CUSTODY 139, 150 (2006) ("Tying the hands of decision-makers merely creates another poor model for decision-making, as it results from generalizations about classes of people, parenting patterns and events, without considering the individual circumstances of children and families.").
[13] Scott, *supra*, at 462 ("Despite the almost universal application of a theoretically sex-neutral best interest of the child standard to resolve custody disputes, both women and men seem to believe that mothers are more likely to prevail under a best interest standard, and that if the law favors joint custody, fathers obtain a legal advantage.").
[14] Scott, *supra*, at 459 ("There appears to be a correlation between positive postdivorce adjustment by children and the extent of continued contact with the father."); Greenberg, *supra*, at 152 ("[M]ost children benefit from [fathers' continued] involvement." (citations omitted)); Robert F. Kelly & Shawn L. Ward, *Allocating custodial Responsibilities at Divorce: Social Science Research and the American Law Institute's Approximation Rule*, 40

FAM. CT. REV. 350, 3622 (2002) (mentioning two large studies finding that in the absence of conflict, more frequent contact with noncustodial parents is associated with better psychosocial adjustment of children (citations omitted)).
[15] Transcript of the Twenty-first Meeting of the Council of the District of Columbia, at 261, Dec. 5, 1995 (statement of Councilmember John Ray)) (as quoted in Barry, Margaret Martin, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U. L. REV. 767, 775-76 (1997)).
[16] *Id*. at 160.
[17] *Id*. at 162 (statement of Councilmember Harold Brazil).
[18] *Id*. at 266, Dec. 5, 1995.
[19] Barry, Margaret Martin, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U. L. REV. 767, 776-77 (1997) (citing *In re Marriage of Jacobson*, 743 P.2d 1025, 1027 (Mont. 1987)).
[20] *Id*. (quoting *In re Marriage of Dunn*, 735 P.2d 1117, 1119-20 (Mont. 1987)).
[21] *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972).
[22] *Bazemore v. Davis*, 394 A.2d 1377, 1381-82 (D.C. Ct. App. 1978) (citations and quotations omitted).
[23] Greenberg, *supra*, at 146 ("[P]redictable results do not necessarily equate to support of children's best interest.").
[24] Greenberg, *supra*, at 162 (citing P.R. Amato & Gilbreth, *Nonresident fathers and children's well-being: A meta-analysis*, 61 J. MARRIAGE AND THE FAM. 557 (1999); J.B. Kelly, 2000)); *accord* Brining at 20 (noting that results showing positive results from joint custody could be skewed because they were highly unlikely to have been ordered under presumptive or mandatory equal custody statutes and, therefore, "[a] mandatory joint physical custody situation, particularly an equal one, rather than an arrangement worked out by the particular parents in the individual cases, is likely to be much less successful").
[25] Brining, at 24.
[26] *Dalton v. Dalton*, 858 S.W.2d 324, 326 (Tenn.Ct.App.1993) (noting "the unworkability of joint custody because of the recalcitrance of one or both parents"); *Braiman v. Braiman*, 378 N.E.2d 1019, 1021 (N.Y 1978) ("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."); *Constance v. Traill*, 736 So. 2d 971, 975 (La. Ct. App. 1999) ("We are not persuaded from the record, viewed in its entirety, that the trial court erred in finding that equal sharing of physical custody between the parents was not in the best interest of these two young girls …."); Greenberg, *supra*, at 151 ("When high conflict families are assigned to 50-50 custody situations without any decision-making structure in place, the result may be long-term, intractable conflict that has a profound effect on children's lives."); Scott, *supra*, 457 ("Joint custody legislation purports to realize this goal [of the best interest of the child] by encouraging both parents to remain actively involved in their child's life. Two important assumptions are implicit in the recent trend: first, that parents will be able to cooperate in raising their child, regardless of whether or not they freely decided upon joint custody, and second, that the harm to the child caused by any interparental conflict will be outweighed by the benefit of continuing a parent-child relationship with both parents. Both of these assumptions are problematic. The first has no empirical support and is questionable as a general proposition. Substantial doubts about the second are raised by the growing body of social science research on divorce and interparental conflict.").
[27] *See Murray v. Murray*, 2000 WL 827960 (Tenn. Ct. App. 2000). ("The parties are equally unhappy with the decision of the trial court, and both agree that joint custody is not in the best interest of the children. Interestingly, the trial judge himself stated at the conclusion of the May 12 hearing that 'there is no way that joint custody is going to continue to work in this case. I don't think it ever really operated or worked,' and 'joint custody is an onerous burdensome method of raising children between divorced people. It rarely really works.'").
[28] Greenberg, *supra*, at 145 ("Certainly, it is well established that prolonged exposure to parental conflict is harmful to children." (citations omitted)); James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 911 (2003) (noting that a "retreat" from joint custody "reflects a growing perception that 'true' joint custody, whether physical or legal, though it can be beneficial to children, often is not in a child's best interests, particularly when it is involuntarily imposed on parents and/or when there is a high degree of conflict between the parents."); *Beck v. Beck*, 432 A.2d 63 (1981) ("The necessity for at least minimal parental cooperation in a joint custody arrangement presents a thorny problem of judicial enforcement in a case such as the present one, wherein despite the trial court's determination that joint custody is in the best interests of the child, one parent (here, the mother) nevertheless contends that cooperation is impossible and refuses to abide by the decree.").
[29] Maryland General Assembly, Fiscal and Policy Note, HB 1158, 2003 Session.

[30] North Dakota Legislative Council, Report submitted to the North Dakota Secretary of State (October 3, 2006).
[31] *E.g.*, Sarah Glaser, *Joint custody: Is it good for the children?,* CONG. QUARTERLY'S EDITORIAL RESEARCH (1989) (Children in joint custody may benefit materially, as child support is paid fully 75% of the time, compared to 46% in solo custody arrangements.).
[32] Gary Crippen & Stuhlman, Sheila, *Minnesota's alternatives to primary caretaker placements: Too much of a good thing?* 28 WM. MITCHELL L. REV. 677, 691 (2001) ("If society has a genuine interest in promoting shared parenting, financial considerations should be addressed for parents living at or below the poverty level. Otherwise, the ideal of equally-shared parenting is effectively eliminated because only one parent can receive benefits and the parents cannot afford to maintain two separate homes.").
[33] E.E. Maccoby, C.M. Buchanan, R.H. Mnookin & S.M. Dornbusch, *Postdivorce Roles of Mothers and Fathers in the Lives of their Children*, 7 J. FAM. PSYCHOL. 24 (1993) (finding that couples with joint physical custody, compared to those who receive sole-custody, are better educated and have higher incomes; and that couples who request joint custody may be relatively less hostile, and fathers may be particularly committed to their children prior to divorce).
[34] J.B. Kelly, *Current research on children's postdivorce adjustment: No simple answers*, 31 FAM. AND CONCILIATION CTS. REV. 29 (1993).
[35] Bauserman, *supra*, at 97 n.5 ("[C]hildren in joint custody are better adjusted, across multiple types of measures, than children in sole (primarily maternal) custody. This difference is found with both joint legal and joint physical custody and appears robust, remaining significant even when testing various categorical and continuous qualities of the research studies as moderators.").
[36] E.g. Bauserman, *supra,* at 99. ("A major shortcoming of many of the studies reviewed was inadequate reporting of statistical results. . . . Larger sample sizes would also be valuable in future research. . . . A further need exists for longitudinal research to assess the relative advantage of joint over sole custody across time. More follow-up studies reporting on the same sample over time, beyond adolescence and into adulthood, are needed.")
[37] Bauserman, *supra,* at 99 ("It is important to recognize that the results clearly do not support joint custody as preferable to, or even equal to, sole custody in all situations. For instance, when one parent is clearly abusive or neglectful, a sole-custody arrangement may be the best solution. Similarly, if one parent suffers from serious mental health or adjustment difficulties, a child may be harmed by continued exposure to such an environment. Also, some authors have proposed that in situations of high parental conflict, joint custody may be detrimental because it will expose the child to intense, ongoing parental conflict.").
[38] The Harvard Law Review Association, *Battered Women and Child Custody Decisionmaking*, 106 HARV. L. REV. 1597, 1611 (1993) ("Up to seventy-five percent of reported domestic assaults may occur after the separation of the batterer and his wife."); D. Lee Khachaturian, *Domestic Violence and Shared Parental Responsibility: Dangerous Bedfellows*, 44 WAYNE L. REV. 1745, 1772 (1999) ("[O]ne of the best opportunities batterers have to continue their abusive tactics, and one of the most vulnerable times for victims and their children, is during custody proceedings."); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5-6 (1991) ("At the moment of separation or attempted separation – for many women, the first encounter with the authority of the law – the batterer's quest for control often becomes most acutely violent and potentially lethal." (foonotes omitted)); 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, 682-83 (2003); James Martin Truss, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1172-73 (1995); Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1, n.33 (2001).
[39] Amy B. Levin, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*, 47 UCLA L. REV. 813, 838 (2000).
[40] Margaret Martin Barry, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U. L. REV. 767, 801 (1997); Levin, *supra*, at 838; Mahoney, *supra*, at 44 (citing a study of divorce in which "one third of the women interviewed reported their husbands threatened to seek custody as a ploy in postseparation negotiations, usually because they sought financial gains"); Meier, *supra*, at 685-86.
[41] *See* Levin, *supra*, at 838.
[42] *Id.*; *cf.* Khachaturian, *supra*, at 1760-61 ("Awarding joint custody to a parent who beats his or her spouse is just one of the subtle ways that the legal system tells a child that beating an intimate partner is an available, accceptable, and legally sanctioned option."); Meier, *supra*, at 698.
[43] Barry, *supra*, at 782-83.
[44] Levin, *supra*, at 828.

[45] *Id.*; *see generally* Jack M. Dalgleish, Jr., *Construction and effect of statutes mandating consideration of, or creating presumptions regarding, domestic violence in awarding custody of children*, 51 A.L.R. 5TH 241 (1997).
[46] *See* Stephanie N. Barnes, *Strengthening the Father-Child Relationship Through a Joint Custody Presumption*, 35 WILLAMETTE L. REV. 601, 617 & n.102 (1999); Tonia Ettinger, *Domestic Violence and Joint Custody: New York Is Not Measuring Up*, 11 BUFF. WOMEN'S L.J. 89 (2002-2003); Khachaturian, *supra*, at 1749 (arguing that "if a legislature imposes a presumption of [joint custody], then there must be a corresponding presumption that, upon evidence of domestic violence, SPR is not in the best interests of the child"); Lynne R. Kurtz, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALB. L. REV. 1345 (1997); *see also* Levin, *supra*, at 836 ("Professionals seeking to safeguard the interests of battered women and their children favor statutes that create a rebuttable presumption against awarding custody to batterers.").
[47] *Id.* at 829.
[48] Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1075 (1991).
[49] *See* Weithorn, *supra*, at 16.
[50] Renee Beeker, *The Illusion of Protection*, DOMESTIC VIOLENCE REP. (May 1, 2006); *see also* Meier, *supra*, at 667, 673-74 (noting that even in states that have adopted presumptions against custody to batterers, trial courts "appear to be granting custody to alleged batterers more often than not").
[51] Dalgleish, *supra*, at §6 (*citing Simmons v. Simmons*, 649 So. 2d 799 (La. Ct. App. 1995)). Similarly, a North Dakota court found that a husband's attempting suicide, making sexual advances to the wife while they were separated, and leaving the wife at a rest area in another state did not constitute domestic abuse. *Ternes v. Ternes*, 555 N.W.2d 355 (N.D. 1996); *Cox v. Cox*, 613 N.W.2d 516 (N.D. 2000); *Brown v. Brown*, 867 P.2d 477 (Okla. Civ. App. 1993).
[52] *Krank v. Krank*, 529 N.W.2d 844 (N.D. 1995); *see also Helbling v. Helbling*, 532 N.W.2d 650 (N.D. 1995) (holding that a finding of domestic violence invoked the rebuttable presumption that ouweighed any other factors and precluded custody for the abuser); *Schumacher v. Schumacher*, 598 N.W.2d 131 (N.D. 1999).
[53] Lila Shapero, *The Case Against a Joint Custody Presumption*, 27 VT. BAR J. 37, 37 (2001).
[54] *Id.* at 48-49; *see also* Beeker, *supra* ("[W]hether to raise the abuse poses another Catch 22 for battered women; if they do not raise it they are seen as in denial or unwilling to protect their children, and they risk losing custody of their children to the state. In some states they risk losing custody to the state when they do seek protection in the family courts because they exposed their children to the abuse."); Cahn, *supra*, at 1083-86 (identifying "myths" that impede courts from properly addressing domestic violence, including "the general belief that if the women was seriously abused, then she would leave, [and] if she stays, then the abused did not occur"; courts' tendency to dismiss the seriousness of allegations of abuse and blame the victim for allowing it to continue; and courts' belief that "women are fabricating allegations of abuse either to gain an advantage in legal proceedings or to be vindictive").
[55] Meier, *supra*, at 681.
[56] Levin, *supra*, at 1361-62; *see* Shapero, *supra,* at 37.
[57] Levin, *supra*, at 1364.
[58] Meier, *supra*, at 672.
[59] Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403, 415 (2005).
[60] *See, e.g.*, Fineman, *supra*.
[61] *Battered Woman*, *supra*, at 1619; Meier, *supra*, at 683.
[62] *Id.* at 690-91.
[63] Barry, *supra*, at 800 (emphasis added).
[64] Meier, *supra*, at 687.
[65] *Id.* at 672.
[66] Martha Albertson Fineman, *Domestic Violence, Custody, and Visitation*, 36 FAM. L.Q. 211, 217 (2002).
[67] Mahoney, *supra*, at 78.
[68] *Id.* at 45 (footnotes omitted).
[69] Beeker, *supra*.
[70] *See id.*
[71] Cahn, *supra*, at 1067-68.

[72] Khachaturian, *supra*, at 1774.

APPENDIX A

STATE CUSTODY STATUTES:

PREFERENCE OR PRESUMPTION ASSESSMENT

STATE	DEFINITION
Alabama	Preference/Presumption State It is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage. Joint custody does not necessarily mean equal physical custody. Ala. Stat. § 30-3-150. The court shall in every case consider joint custody but may award any form of custody which is determined to be in the best interest of the child. Ala. Stat. § 30-3-152(a). If both parents request joint custody, the presumption is that joint custody is in the best interest of the child. Joint custody shall be granted in the final order of the court unless the court makes specific findings as to why joint custody is not granted. Ala. Stat. § 30-3-152(c). Rebuttal presumption against joint custody in instances of domestic violence [A] determination by the court that domestic or family violence has occurred raises a rebuttable presumption by the court that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of domestic or family violence. Notwithstanding the provisions regarding rebuttable presumption, the judge must also take into account what, if any, impact the domestic violence had on the child. Ala. Stat. § 30-3-131.

STATE	DEFINITION
Alaska	Preference State If a parent or the guardian ad litem requests shared custody of a child and the court denies the request, the reasons for the denial shall be stated on the record. Al. Stat. § 25.20.100 Rebuttal presumption against joint custody in instances of domestic violence There is a rebuttable presumption that a parent who has a history of perpetrating domestic violence against the other parent, a child, or a domestic living partner may not be awarded sole legal custody, sole physical custody, joint legal custody, or joint physical custody of a child. Al. Stat.§ 25.24.150(g).
Arizona	No preference or presumption In awarding child custody, the court may order sole custody or joint custody. This section does not create a presumption in favor of one custody arrangement over another. . . . Ariz. Rev. Stat. Ann. § 25-403.01 (A) (2008). No joint custody if there is domestic violence Joint custody shall not be awarded if the court makes a finding of the existence of significant domestic violence pursuant to section 13-3601 or if the court finds by a preponderance of the evidence that there has been a significant history of domestic violence. Ariz. Rev. Stat. Ann. § 25-403.03 (A) (2008).
Arkansas	Preference State When in the best interests of a child, custody shall be awarded in such a way so as to assure the frequent and continuing contact of the child with both parents. Ark. Code Ann. § 9-13-101(b)(1)(A)(i) (2008). To this effect, the circuit court may consider awarding joint custody of a child to the parents in making an order for custody. Ark. Code Ann. § 9-13-101(b)(1)(A)(ii) (2008) Rebuttal presumption against joint custody in instances of domestic violence There shall be a rebuttable presumption that it is not in the best interest of the child to be placed in the custody of an abusive parent in cases where there is a finding by a preponderance of the evidence that a pattern of abuse has occurred. Ark. Code Ann. § 9-13-101(c)(2) (2008).

STATE	DEFINITION
California	Preference/Presumption State Cal. Fam. Code § 3040 provides "[c]ustody should be granted in the following order of preference according to the best interest of the child as provided in 3911: (1) To both parents jointly pursuant to Chapter 4 (commencing with 3080) or to either parent. In making an order granting custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent, subject to 3011, and shall not prefer a parent as custodian because of that parent's sex." Cal. Fam. Code. § 3080 creates a presumption, affecting the burden of proof, that "joint custody is in the best interest of a minor child, subject to Section 3011, 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." Domestic Violence: Cal. Fam. Code § 3011 provides "[i]n making a determination of the best interest of the child . . . shall . . . consider . . . (b) Any history of abuse by one parent or any other person seeking custody against any of the following . . . ."
Colorado	Preference State The general assembly finds and declares that it is in the best interest of all parties to encourage frequent and continuing contact between each parent and the minor children of the marriage after the parents have separated or dissolved their marriage. In order to effectuate this goal, the general assembly urges parents to share the rights and responsibilities of child-rearing and to encourage the love, affection, and contact between the children and the parents. Colo. Rev. Stat. § 14-10-124(1) (2007).
Connecticut	No preference or presumption
Delaware	No presumption or preference generally Rebuttal presumption against joint custody in instances of domestic violence Notwithstanding other provisions of this title, there shall be a rebuttable presumption that no perpetrator of domestic violence shall be awarded sole or joint custody of any child. Del. Code Ann. tit. 13, § 705A (2008).

STATE	DEFINITION
District of Columbia	Presumption State Presumption defeated by evidence of domestic violence There shall be a rebuttable presumption that joint custody is in the best interest of the child or children, except in instances where a judicial officer has found by a preponderance of the evidence that an intrafamily offense as defined in D.C. Code section 16-1001(5). DT ST (2001) § 16-914(a)(2).
Florida	Preference State 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) (2008) Rebuttal presumption against joint custody in instances of domestic violence Evidence that a parent has been convicted of a felony of the third degree or higher involving domestic violence, as defined in s. 741.28 and chapter 775, or meets the criteria of s. 39.806(1)(d), creates a rebuttable presumption of detriment to the child. If the presumption is not rebutted, shared parental responsibility, including visitation, residence of the child, and decisions made regarding the child, may not be granted to the convicted parent. Fla. Stat. § 61.13(2)(b)(2) (1997).
Georgia	Preference State Georgia recognizes a preference for joint custody by caselaw. In Court of Appeals of Georgia, Case No. A93A0698, 7/2/93 IN the INTEREST of A.R.B., a child, presiding Judge Dorothy T. Beasley, in an unanimous opinion, stated: "Although the dispute is symbolized by a 'versus' which signifies two adverse parties at opposite poles of a line, there is in fact a third party whose interests and rights make of the line a triangle. That person, the child who is not an official party to the lawsuit but whose wellbeing is in the eye of the controversy, has a right to shared parenting when both are equally suited to provide it. Inherent in the express public policy is a recognition of the child's right to equal access and opportunity with both parents, the right to be guided and nurtured by both parents, the right to have major decisions made by the application of both parents' wisdom, judgment and experience. The child does not forfeit these rights when the parents divorce." The A.R.B. case was subsequently heard by the Supreme Court of Georgia, which upheld the Court of Appeals' finding that, according to public policy of Georgia, joint custody was in the best interests of children when both parents are fit.

STATE	DEFINITION
Hawaii	No preference or presumption Rebuttal presumption against joint custody in instances of domestic violence In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that family violence has been committed by a parent raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence. Haw. Rev. Stat. § 571-46(a)(9) (amended as of July 1, 2008).
Idaho	Presumption State Except as provided in subsection (5), of the section, absent a preponderance of the evidence to the contrary, there shall be a presumption that joint custody is in the best interest of a minor child or children." Idaho Code. § 32-717B(4) (1996). Section 1 of S.L. 1982. ch. 311 reads: "Policy statement. It is the policy of this state that joint custody is a mechanism to assure children of continuing and frequent care and contact with both parents provided joint custody is in the best interest of said children. Presumption against joint custody in instances of domestic violence There shall be a presumption that joint custody is not in the best interests of a minor child if one (1) of the parents is found by the court to be a habitual perpetrator of domestic violence as defined in section 39-6303, Idaho Code. Idaho Code. § 32-717B(5).
Illinois	No preference or presumption No domestic violence presumption Unless the court finds the occurrence of ongoing abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986 [750 ILCS 60/103], the court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child. There shall be no presumption in favor of or against joint custody. 750 Ill. Comp. Stat. 5/602(c) (2008).
Indiana	No preference or presumption No domestic violence presumption. See Ind. Code § 31-17-2-8(7) (2008)

STATE	DEFINITION
Iowa	Preference State The court may provide for joint custody of the child by the parties. The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents after the parents have separated or dissolved the marriage, and which will encourage parents to share the rights and responsibilities of raising the child unless direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result from such contact with one parent. Iowa Code § 598.41(a) (2008). Presumption against joint custody in instances of domestic violence Notwithstanding paragraph "a", if the court finds that a history of domestic abuse exists, a rebuttable presumption against the awarding of joint custody exists. Iowa Code § 598.41(b) (2008).
Kansas	Preference State Kan. Stat. Ann. § 60-1610(4) provides "[t]he court may make any order relating to custodial arrangements which is in the best interests of the child. The order shall include but not be limited to, one of the following, in the order of preference: (A) Joint custody. The court may place the custody of a child with both parties on a shared or joint-custody basis. In that event, the parties shall have equal rights to make decisions in the best interests of the child under their custody." Domestic Violence: "In determining the issue of child custody, residency and parenting time, the court shall consider all relevant factors, including but not limited to: (vii) evidence of spousal abuse; (viii) whether a parent is subject to the registration requirements of the Kansas offender registration act, K.S.A. 22-4901, et seq., and amendments thereto, or any similar act in any other state, or under military or federal law; (ix) whether a parent has been convicted of abuse of a child, K.S.A. 21-3609, and amendments thereto; (x) whether a parent is residing with an individual who is subject to registration requirements of the Kansas offender registration act, K.S.A. 22-4901, et seq., and amendments thereto, or any similar act in any other state, or under military or federal law; and (xi) whether a parent is residing with an individual who has been convicted of abuse of a child, K.S.A. 21-3609, and amendments thereto."

STATE	DEFINITION
Kentucky	Preference State Kentucky recognizes a preference for joint custody by caselaw. In Chalupa v. Chalupa, Kentucky Court of Appeals, No. 90-CA-001145-MR; (May 1, 1992), Judge Schroder, wrote for the majority: "A divorce from a spouse is not a divorce from their children, nor should custody decisions be used as a punishment. Joint custody can benefit the children, the divorced parents, and society in general by having both parents involved in the children's upbringing.... The difficult and delicate nature of deciding what is in the best interest of the child leads this Court to interpret the child's best interest as requiring a trial court to consider joint custody first, before the more traumatic sole custody. In finding a preference for joint custody is in the best interest of the child, even in a bitter divorce, the court is encouraging the parents to cooperate with each other and to stay on their best behavior. Joint custody can be modified if a party is acting in bad faith or is uncooperative. The trial court at any time can review joint custody and if a party is being unreasonable, modify the custody to sole custody in favor of the reasonable parent. Surely, with the stakes so high, there would be more cooperation which leads to the child's best interest, the parents' best interest, fewer court appearances and judicial economy. Starting out with sole custody would deprive one parent of the vital input.
Louisiana	Preference State Court to determine custody. A. If there are children of the marriage whose provisional custody is claimed by both husband and wife, the suit being yet pending and undecided, custody shall be awarded in the following order of preference, according to the best interest of the children: (1) [t]o both parents jointly...; (2) [t]o either parent. La. Civ. Code Ann. art. 131 (1999). In the absence of agreement, or if the agreement is not in the best interest of the child, 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. La. Civ. Code Ann. art. 132 (1999). Presumption against joint custody in instances of domestic violence There is created a presumption that no parent who has a history of perpetrating family violence shall be awarded sole or joint custody of children. La. Rev. Stat. Ann. § 9:364(A) (2008).

STATE	DEFINITION
Maine	Presumption State (where both parent agree in open court) The Legislature finds and declares that it is 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. Me. Rev. Stat. Ann. tit. 19, § 1653(1)(C). When the parents have agreed to an award of shared parental rights and responsibilities or so agree in open court, the court shall make that award unless there is substantial evidence that it should not be ordered. Me. Rev. Stat. Ann. tit. 19, § 1654(2)(a).
Maryland	No preference or presumption
Massachusetts	No preference or presumption Rebuttable presumption against joint custody in instances of domestic violence A probate and family court's finding, by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent. Such presumption may be rebutted by a preponderance of the evidence that such custody award is in the best interests of the child. Mass. Gen. Laws ch. 208, § 31A (2008).
Michigan	Limited Preference State Mich. Comp. Laws § 722.26a(1) provides "[i]n custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. In other cases joint custody may be considered by the court. The court shall determine whether joint custody is in the best interest of the child by considering the following factors:" Domestic Violence: Mich. Comp. Laws § 722.23 allows a court to consider domestic violence as a factor of what is in the best interests of the child.

STATE	DEFINITION
Minnesota	Presumption State Minn. Stat. § 518.17 provides "[t]he court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child. If the court awards joint legal or physical custody over the objection of a party, the court shall make detailed findings on each of the factors in this subdivision and explain how the factors led to its determination that joint custody would be in the best interests of the child." Domestic Violece: Minn. Stat. § 518.17 provides "[h]owever, the court shall use a rebuttable presumption that joint legal or physical custody is not in the best interests of the child if domestic abuse, as defined in section 518B.01, has occurred between the parents."
Mississippi	Preference State Mississippi Code Ann. § 93-5-24(5)(c) provides "[c]ustody shall be awarded as follows according to the best interests of the child: (a) Physical and legal custody to both parents jointly pursuant to subsections (2) through (7). (b) Physical custody to both parents jointly pursuant to subsections (2) through (7) and legal custody to either parent. (c) Legal custody to both parents jointly pursuant to subsections (2) through (7) and physical custody to either parent. (d) Physical and legal custody to either parent.

STATE	DEFINITION
Missouri	Preference State The general assembly finds and 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, except for cases where the court specifically finds that such contact is not 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 resolution. In order to effectuate these policies, the court shall determine 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. Mo. Rev. Stat. § 452.375(4) (2003). Prior to awarding the appropriate custody arrangement in the best interest of the child, the court shall consider each of the following as follows: (1) Joint physical and joint legal custody to both parents. . . ; (2) Joint physical custody with one party granted sole legal custody. . . ; (3) Joint legal custody with one party granted sole physical custody; (4) Sole custody to either parent; or (5) Third-party custody or visitation. . . . Mo. Rev. Stat. § 452.375(5) (2003).
Montana	Presumption State Upon application of either parent or both parents for joint custody, the court shall presume joint custody is in the best interest of a minor child unless the court finds, under the factors set forth in 40-4-212, that joint custody is not in the best interest of the minor child. . . . Mont. Code Ann. § 40-4-224(1) (2008). Presumption rebutted by evidence of domestic violence However, a finding that one parent physically abused the other parent or the child is a sufficient basis for finding that joint custody is not in the best interest of the child. Mont. Code Ann. § 40-4-224(1) (2008).
Nebraska	No preference of presumption

STATE	DEFINITION
Nevada	Presumption State (where parents have agreed in open court) There is a presumption, affecting the burden of proof, that joint custody would be in the best interest of a minor child if the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage. Nev. Rev. Stat. § 125.490(1). Rebuttable presumption against joint custody in instances of domestic violence Except as otherwise provided in NRS 125C.210 and NRS 125C.220, a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody of a child has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. Nev. Rev. Stat. § 125C.230.
New Hampshire	No current statutory language on child custody could be found. Repealed in 2005, N.H. Rev. Stat. § 458:17 provided "except as provided in subparagraph (c), in the making of any order relative to such custody there shall be a presumption, affecting the burden of proof, that joint legal custody is in the best interest of minor children: (a) Where the parents have agreed.... If the court declines to enter an order awarding joint legal custody, the court shall state in its decision the reasons for denial of an award of joint legal custody."
New Jersey	Preference State The Legislature finds and declares that it is in 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. N.J. Rev. Stat. § 9:2-4 (2008).
New Mexico	Presumption State There shall be a presumption that joint custody is in the best interest of a child in an initial custody determination..... N.M. Stat. Ann. §§ 40-4-9.1(A) (2008).
New York	No preference or presumption

STATE	DEFINITION
North Carolina	Limited Preference State N.C. Gen. Stat. § 50-13.2 provides "[j]oint custody to the parents shall be considered upon the request of either parent.
North Dakota	No preference or presumption
Ohio	Preference State Ohio Rev. Code Ann. § 3109.04(D)(1)(c) provides "[w]henever possible, the court shall require that a shared parenting plan . . . ensure the opportunity for both parents to have frequent and continuing contact with the child, unless frequent and continuing contact with any parent would not be in the best interest of the child.
Oklahoma	Non-Explicit Preference Okla. Stat. Ann. 43-109(C) provides "[i]f either or both parents have requested joint custody, said parents shall file with the court their plans for the exercise of joint care, custody, and control of their child. The parents of the child may submit a plan jointly, or either parent or both parents may submit separate plans. A plan shall be accompanied by an affidavit signed by each parent stating that said parent agrees to the plan and will abide by its terms. The plan and affidavit shall be filed with the petition for a divorce or legal separation or after said petition is filed." Domestic Violence: Okla. Stat. Ann. 43-109.3 provides that a court shall consider all proper evidence of domestic violence when determining custody.
Oregon	Non-Explicit Preference State Or. Rev. Stat. § 107.149 provides "[i]t is the policy of this state to assure minor children of frequent and continuing contact with parents who have shown the ability to act in the best interest of the child and to encourage parents to share in the rights and responsibilities of raising their children after the parents have separated or dissolved their marriage."
Pennsylvania	No preference or presumption
Rhode Island	No preference or presumption
South Carolina	No preference or presumption
South Dakota	No preference or presumption
Tennessee	No preference or presumption

STATE	DEFINITION
Texas	Presumption State It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. Tex. Fam. Code § 153.131(b). Presumption against joint custody in instances of domestic violence The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child, including a sexual assault.... It is a rebuttable presumption that the appointment of a parent as the sole managing conservator of a child or as the conservator who has the exclusive right to determine the primary residence of a child is not in the best interest of the child if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child. Tex. Fam. Code § 153.004(b).
Utah	Limited Preference State Utah Code Ann. § 30-3-10 provides "[t]he court shall, in every case, consider joint custody but may award any form of custody which is determined to be in the best interest of the child."
Vermont	No preference or presumption
Virginia	No preference or presumption
Washington	No preference or presumption
West Virginia	No preference or presumption
Wisconsin	Presumption State Wis. Stat. § 767.41(2)(am) provides "[e]xcept as provided in par. (d), the court shall presume that joint legal custody is in the best interest of the child." Domestic Violence: Wis. Stat. § 767.41(2)(d) provides "[e]xcept as provided in subd. 4., if the court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), pars. (am), (b), and (c) do not apply and there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party."

STATE	DEFINITION
Wyoming	No preference or presumption

APPENDIX B

STATE DEFINITIONS OF JOINT PHYSICAL CUSTODY

STATE	DEFINITION
Alabama	Alabama Code § 30-3-151(3) defines "joint physical custody" as "[p]hysical custody . . . shared by the parents in a way that assures the child frequent and substantial contact with each parent. Joint physical custody does not necessarily mean physical custody of equal durations of time."
Alaska	"The terms 'joint physical custody' and 'shared physical custody' are undefined by the legislature or this court." O'Dell v. O'Dell, No. S-12097, 2007 WL 1378153, *5 (Alaska 2007).
Arizona	Arizona Revised Statute § 25-402(3) defines "joint physical custody" to mean "the condition under which the physical residence of the child is shared by the parents in a manner that assures that the child has substantially equal time and contact with both parents."
Arkansas	The Arkansas Code does not define this term. But Arkansas Code § 9-13-101(b)(1)(A)(i) provides that "[w]hen in the best interests of a child, custody shall be awarded in such a way so as to assure the frequent and continuing contact of the child with both parents." "To this effect, the circuit may consider awarding joint custody of a child to the parents in making an order for custody." Id. at § 9-13-101(b)(1)(A)(ii).
California	Cal. Fam. Code. § 3004 defines joint physical custody as "mean[ing] that each of the parents shall have significant periods of physical custody. Joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents . . . ."
Colorado	Colo. Rev. Stat. § 14-10-124(1.5) provides that "[t]he court shall determine the allocation of parental responsibilities, including parenting time and decision-making responsibilities, in accordance with the best interests of the child giving paramount consideration to the physical, mental, and emotional conditions and needs of the child . . . ." "The court, upon the motion of either party or upon its own motion, may make provisions for parenting time that the court finds are in the child's best interests unless the court finds, after a hearing, that parenting time by the party would endanger the child's physical health or significantly impair the child's emotional development." Id. at § 14-10-124(1.5)(a).

STATE	DEFINITION
Connecticut	Conn. Gen. Stat. § 46b-56a provides that joint custody "means an order awarding legal custody of the minor child to both parents, providing for joint decision-making by the parents and providing that *physical custody shall be shared by the parents in such a way as to assure the child of continuing contact with both parents*. (emphasis added). Moreover, "[t]here shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage. Id. at 46b-56a(b). The court in Woszcyna v. Woszcyna, 2002 WL 451298, *5 (Conn. 2002) defined the term to mean "joint sharing in the physical custody of the child which is usually accompanied by a parenting plan as to the manner in which both parents will share in that custody."
Delaware	Del. Code Ann. § 13-728(a) provides that "[t]he court shall determine, whether the parents have joint legal custody of the child or one of them has sole legal custody of the child, *with which parent the child shall primarily reside* and a schedule of visitation with the other parent, consistent with the child's best interests and maturity, which is designed to permit and encourage the child to have frequent and meaningful contact with both parents . . . ." (emphasis added).
District of Columbia	D.C. Code § 16-914(a)(2) provides that "[u]nless the court determines that it is not in the best interest of the child, the court may 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 and the parents regardless of marital status."
Florida	Florida Stat. § 61.13(2)(c)1 provides that "[t]he court shall determine all matters relating to parenting and time-sharing of each minor child of the parties in accordance with the best interests of the child and in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act. It is the public policy of this state to assure that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities, and joys, of childrearing. . . ." Moreover, "[t]he 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." Id. at 61.13(2)(c)2.

STATE	DEFINITION
Georgia	Ga. Code Ann. §19-9-3(5) provides that "[j]oint custody, as defined by Code Section 19-9-6, may be considered as an alternative form of custody by the court. This provision allows a court at any temporary or permanent hearing to grant sole custody, joint custody, joint legal custody, or joint physical custody where appropriate." Joint physical custody "means 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." Id. at 19-9-6(3).
Hawaii	Joint custody "means an order awarding legal custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents, pursuant to a parenting plan developed pursuant to section 571-46.5, in such a way as to assure the child or children of frequent, continuing, and meaningful contact with both parents, provided, however, that such order may award joint legal custody without awarding joint physical custody." Haw. Rev. Stat. § 571-46.01(b).
Idaho	Idaho Code 32-717B(2) provides that joint physical custody "means an order awarding each of the parents significant periods of time in which a child resides with or is under the care and supervision of each of the parents or parties. 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."
Illinois	"The court shall determine custody in accordance with the best interest of the child." 750 ILCS 5/602(a). "Joint custody means custody determined pursuant to a Joint Parenting Agreement or a Joint Parenting Order." Id. at 5/602.1(b). "The court may enter an order of joint custody if it determines that joint custody would be in the best interests of the child." Id. at 5/602.1(c). "[T]he physical residence of the child in joint custodial situations shall be determined by: (1) express agreement of the parties; or (2) order of the court under the standards of this Section." Id. at 5/602.1(d). Finally, "[a] parent not granted custody of the child is entitled to reasonable visitation rights . . . ." Id. at 5/607(a).

STATE	DEFINITION
Indiana	"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." Ill. Code § 31-17-2-13. "An award of joint legal custody under section 13 of this chapter does not require an equal division of physical custody of the child." Id. at 31-17-2-14.
Iowa	"The court may provide for joint custody of the child by the parties. The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents after the parents have separated or dissolved the marriage, and which will encourage parents to share the rights and responsibilities of raising the child . . . ." Iowa Code § 598.41(1)(a).
Kansas	"The court shall determine custody or residency of a child in accordance with the best interests of the child." Kan. Stat. Ann. § 60-1610(3). "After making a determination of the legal custodial arrangements, the court shall determine the residency of the child from the following options, which arrangements the court must find to be in the best interest of the child . . . (A) *Residency*. The court may order a residential arrangement in which the child resides with one or both parents on a basis consistent with the best interests of the child; (B) *Divided Residency*. In an exceptional case, the court may order a residential arrangement in which one or more children reside with one or both parents on a basis consistent with the best interests of the child." Id. at 60-1610(5).
Kentucky	"The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent . . . ." Ky. Rev. Stat. Ann. § 403.270(2). "The court may grant joint custody to the child's parents . . . if it is in the best interest of the child." Id. at 403.270(5). "A parent not granted custody of the child is entitled to reasonable visitation rights . . . ." Id. at 403.320(1).
Louisiana	"In a proceeding in which joint custody is decreed, the court shall render a joint custody implementation order except for good cause shown." La. Rev. Stat. Ann. § 9:335(A)(1). "The implementation order shall allocate the time periods during which each parent shall have physical custody of the child so that the child is assured of frequent and continuing contact with both parents." Id. at 9:335(A)(2)(a). "To the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally." Id. at 9:335(A)(2)(b).

STATE	DEFINITION
Maine	"An award of shared parental rights and responsibilities may include either an allocation of the child's primary residential care to one parent and rights of parent-child contact to the other parent, or a sharing of the child's primary residential care by both parents." Me. Rev. Stat. Ann. § 19A-1653(2)(D)(1). "The court, in making an award of parental rights and responsibilities with respect to a child, shall apply the standard of the best interest of the child. In making decisions regarding the child's residence and parent-child contact, the court shall consider as primary the safety and well-being of the child." Id. at § 19A-1653(3).
Maryland	"If the parents live apart, a court may award custody of a minor child to either parent or joint custody to both parents." Md. Code Ann. § 5-203(d)(1). "Neither parent is presumed to have any right to custody that is superior to the right of the other parent." Id. at 5-203(d)(2).
Massachusetts	"Shared physical custody" means that "a child shall have periods of residing with and being under the supervision of each parent; provided, however, 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." Mass. Gen. Laws ch. 208, § 31.
Michigan	Joint custody "means an order of the court in which 1 or both of the following is specified: (a) that the child reside alternately for specific periods with each of the parents; (b) that the parents shall share decision-making authority as to the important decisions affecting the welfare of the child." Mich. Comp. Laws § 722.26a(7). "If the parents agree on joint custody, the court shall award custody unless the court determines on the record, based upon clear and convincing evidence, that joint custody is not in the best interests of the child." Id. at 722.26a(2). "If the court awards joint custody, the court may include in its award a statement regarding when the child shall reside with each parent, or may provide that physical custody be shared by the parents in a manner to assure the child continuing contact with both parents." Id. at 722.26a(3).
Mississippi	Mississippi Code Ann. § 93-5-24(5)(c) provides that joint physical custody "means that each of the parents shall have significant periods of physical custody."

STATE	DEFINITION
Missouri	Missouri Ann. Stat. § 452.375(1)(3) provides that joint physical custody "means 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. 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."
Montana	"The court shall determine the parenting plan in accordance with the best interest of the child." Mont. Code Ann. § 40-4-212(1). "Based on the best interest of the child, a final parenting plan may include . . . provisions for . . . a residential schedule specifying the periods of time during which the child will reside with each parent, including provisions for holidays, birthdays of family members, vacations, and other special occasions." Id. at 40-4-234(2)(c). "[F]requent and continuing contact with both parents . . . is considered to be in the child's best interests." Id. at 40-4-224(1)(l).
Nebraska	Joint physical custody means the "joint responsib[ility] for 'minor' day-to-day decisions and the exertion of continuous physical custody by both parents over a child for significant periods of time." Elsome v. Elsome, 601 N.W.2d 537, 544 (Neb. 1999) (internal quotation marks omitted).
Nevada	"Because the Missouri definition provides flexibility and requires courts to clarify parents' joint physical custody arrangements, we conclude that district courts should apply the Missouri definition in determining whether a joint physical custody arrangement exists." Rivero v. Rivero, 195 P.3d 328, 335 (Nev. 2008)
New Hampshire	"In determining parental rights and responsibilities, the court shall be guided by the best interests of the child . . . ." N.H. Rev. Stat. Ann. § 461-A:6. A parenting plan may include provisions relative to . . . residential responsibility. Id. at 461-A:4. "Any provision of law which refers to a "custodial parent" shall mean a parent with 50 percent or more of the residential responsibility and any reference to a non-custodial parent shall mean a parent with less than 50 percent of the residential responsibility." Id. at 461-A:1-20.
New Jersey	Joint physical custody "constitut[es] joint responsibility for minor day-to-day decisions and 'the exertion of continuous physical custody by both parents over a child for significant periods of time.'" Mamolen v. Mamolen, 788 A.2d 795, 799 (N.J. Ct. App. 2002).

STATE	DEFINITION
New Mexico	Custody "means the authority and responsibility to make major decisions in a child's best interests in the areas of residence, medical and dental treatment, education or child care, religion and recreation." N.M. Stat. Ann. § 40-4-9.1(L)(2). Joint custody "means an order of the court awarding custody of a child to two parents. Joint custody does not imply an equal division of the child's time between the parents or an equal division of financial responsibility for the child." Id. at § 40-4-9.1(L)(4). "An award of custody means that . . . each parent shall have significant, well-defined periods of responsibility for the child . . . ." Id. at 40-4-9.1(J). Period of responsibility "means a specified period of time during which a parent is responsible for providing for a child's physical, developmental and emotional needs, including the decision making required in daily living. Id. at 40-4-9.1(L)(7).
New York	The court "shall enter orders for custody and support 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." N.Y. Dom. Rel. Law § 240.
North Carolina	Joint physical custody requires that each parent have custody for at least one-third of the year or for more than 122 overnights per year. See Miler v. Miller, 568 S.E.2d 914, 918 (N.C. Ct. App. 2002); N.C. Gen. Stat. § 50-13.2.
North Dakota	"The husband and father and wife and mother have equal rights with regard to the care, custody, education, and control of the children of the marriage . . . ." N.D. Cent. Code § 14-09-06. "An order for custody of an unmarried minor child entered pursuant to this chapter must award the custody of the child to a person . . . as will, in the opinion of the judge, promote the best interests and welfare of the child." Id. at 14-09-06.1.

STATE	DEFINITION
Ohio	"When husband and wife are living separate and apart from each other . . . and the question as to the parental rights and responsibilities for the care of their children and the place of residence and legal custodian is brought before a court of competent jurisdiction, they shall stand upon an equality as to the parental rights and responsibilities for the care of their children and the place of residence and legal custodian of their children . . . ." Ohio Rev. Code Ann. § 3109.03. "When making the allocation of the parental rights and responsibilities for the care of the children . . . the court shall take into account that which would be in the best interest of the children." Id. at 3109.04(B)(1). "Whenever possible, the court shall require that a shared parenting plan . . . ensure the opportunity for both parents to have frequent and continuing contact with the child, unless frequent and continuing contact with any parent would not be in the best interest of the child. Id. at 3109.04(D)(1)(c).
Oklahoma	"In awarding the custody of a minor unmarried child . . . the court shall consider what appears to be in the best interests of the physical and mental and moral welfare of the child." Okla. Stat. Ann. 43-109(A). "The court . . . may grant the care, custody, and control of a child to either parent or to the parents jointly. For purposes of this section, the terms joint custody and joint care, custody, and control mean the sharing by parents in all or some of the aspects of physical and legal care, custody, and control of their children." Id. at 43-109(B). Shared physical custody requires each parent to have physical custody for more than 120 nights each year. Id. at § 43-118(10).
Oregon	Joint custody "means an arrangement by which parents share rights and responsibilities for major decisions concerning the child, including, but not limited to, the child's residence, education, health care and religious training. An order providing for joint custody may specify one home as the primary residence of the child and designate one parent to have sole power to make decisions about specific matters while both parents retain equal rights and responsibilities for other decisions." Or. Rev. Stat. § 107.169.
Pennsylvania	Shared custody means "an order awarding shared legal or shared physical custody, or both, of a child in such a way as to assure the child of frequent and continuing contact with and physical access to both parents." 23 Pa. Cons. Stat. Ann. § 5302.

STATE	DEFINITION
South Carolina	"The Family Court has exclusive jurisdiction . . . to order joint or divided custody where the court finds it is in the best interests of the child." S.C. Code Ann. § 20-7-420(A)(42). Legal custody "means the right to the physical custody, care, and control of a child; the right to determine where the child shall live; the right and duty to provide protection, food, clothing, shelter, ordinary medical care, education, supervision, and discipline for a child and in an emergency to authorize surgery or other extraordinary care." Id. at 20-7- 490(21). Physical custody "means the lawful, actual possession and control of a child." Id. at 20-7-490(23).
Tennessee	Tenn. Code Ann. § 36-6-101(2)(A)(i) provides that "neither a preference nor a presumption for or against joint legal custody, joint physical custody or sole custody is established, but the court shall have the widest discretion to order a custody arrangement that is in the best interest of the child." Section 36-6-205 defines "physical custody" as "the physical care and supervision of a child." Section 36-6-402(4) defines "primary residential parent" as "the parent with whom the child resides more than 50 percent (50%) of the time." Finally, section 36-6-402(5) defines "residential schedule" as "the schedule of when the child is in each parent's physical care, and it shall designate the primary residential parent; in addition, the residential schedule shall designate in which parent's home each minor child shall reside on given days of the year, including provisions for holidays, birthdays of family members, vacations, and other special occasions, consistent with the criteria of this part . . . ."
Texas	"Joint managing conservatorship" means the sharing of the rights and duties of a parent by two parties, ordinarily the parents, even if the exclusive right to make certain decisions may be awarded to one party. Texas Fam. Code § 101.016. The parents may agree to a joint managing conservatorship or the court may render an order appointing the parents joint managing conservators, id. at 153.133, only if the appointment is in the best interest of the child and considering certain factors. Id. at 153.134. But "[j]oint managing conservatorship does not require the award of equal or nearly equal periods of physical possession of and access to the child to each of the joint conservators." Id. at153.135.
Utah	Joint physical custody "means the child stays with each parent overnight for more than 25% of the year, and both parents contribute to the expenses of the child in addition to paying child support." Utah Code Ann. § 78-45-2(13).

STATE	DEFINITION
Vermont	Vermont Stat. Ann. § 664 defines physical responsibility as "the rights and responsibilities to provide routine daily care and control of the child subject to the right of the other parent to have contact with the child. Physical responsibility may be held solely or may be divided or shared." Section 665 adds that "[t]he court may order parental rights and responsibilities to be divided or shared between the parents on such terms and conditions as serve the best interests of the child. 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."
Virginia	Virginia Code Ann. § 20-124.1 – "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.
Washington	"A 'residential schedule' shall be put in place which designates in which parent's home each minor child shall reside on given days of the year . . . ." Wash. Rev. Code § 26.09.184. "The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances." Id. at § 26.09.187(3)(a). "[T]he court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time if such provision is in the best interest of the child." Id. at § 26.09.187(3)(b).
West Virginia	W. Va. Code § 48-1-239 defines shared parenting in terms of "basic shared parenting" or "extended shared parenting." "'Basic shared parenting' means an arrangement under which one parent keeps a child or children overnight for less than thirty-five percent of the year and under which both parents contribute to the expenses of the child or children in addition to the payment of child support." Id. at § 48-1-239(b) "'Extended shared parenting' means an arrangement under which each parent keeps a child or children overnight for more than thirty-five percent of the year and under which both parents contribute to the expenses of the child or children in addition to the payment of child support." Id. at § 48-1-239(c).

STATE	DEFINITION
Wisconsin	"[T]he court shall make such provisions as it deems just and reasonable concerning the legal custody and physical placement of any minor child of the parties . . . Wis. Stat. § 767.41(1)(b). "[I]n determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child." Id. at 767.41(5). One such relevant fact is "[w]hether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party." Id. at 767.41(5)(am)11.
Wyoming	"[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." Wyo. Stat. Ann. § 20-2-201(a). "The court shall order custody in well defined terms to promote understanding and compliance by the parties. Custody shall be crafted to promote the best interests of the children, and may include any combination of joint, shared or sole custody." Id. at 20-2-201(d).