

TESTIMONY IN OPPOSITION TO HOUSE BILL 463

**By
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**PRESENTED TO
THE PENNSYLVANIA HOUSE FAMILY LAW SUBCOMMITTEE
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The Women's Law Project (WLP) supports joint custody when the parties enter into such an arrangement voluntarily and with the necessary commitment and resources to accomplish the goal of serving the best interests of the child. We oppose a presumption of joint custody, a concept based on an ideal that is inconsistent with the conflict that pervades the relationships of many parents who seek a judicial determination of custody.

WLP is a non-profit, public interest, legal advocacy organization dedicated to creating a more just and equitable society by advancing the rights and status of all women throughout their lives. To this end, the WLP engages in high-impact litigation, advocacy, and education. An essential component of WLP's advocacy is helping women in family law matters. The vast majority of calls to our telephone counseling service are from women who must turn to the court system for resolution of major decisions regarding the custody and support of their children and safety of their families. They are unable to afford legal representation and we provide them with individual counseling to assist them in navigating the complicated maze of Philadelphia Family Court. We also prepare and disseminate informational brochures and booklets. When necessary, we pursue litigation

and engage in policy advocacy to address systemic problems relating to child support, custody, and domestic violence. After decades of hearing callers recount difficulties navigating the family court process and negative experiences trying to present their cases in court, we embarked on a two year comprehensive study of the court. In April 2003, we published *Justice in the Domestic Relations Division of Philadelphia Family Court: A Report to the Community*, in which we presented our findings regarding the complexities, challenges, and troubling conditions in the court and made recommendations to improve the court's responsiveness to litigants. We continue to work with the Court to improve its response to families in need.

Proponents of joint custody presumptions assert that joint custody benefits both the children and the parents by increasing contact with both parents. While this argument is appealing on the surface and may prove correct in a situation where both parents voluntarily and wholeheartedly commit to a joint custody arrangement, it fails to take into account the all too common post-separation parental relationship that is characterized by acrimony and/or minimal communication. In his essay on the subject of joint custody, Judge Hardcastle, a Nevada Family Court Judge, expressed concern that the presumption of joint custody deters judges from their fundamental obligation to determine the "best interests of the child."¹ He believes that such presumptions pressure judges to order joint custody without carefully and thoroughly examining and considering the facts of the

¹ Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 Fam. L.Q. 201, 206 (1998).

cases before them, increasing the likelihood that joint custody will be ordered in inappropriate cases involving hostile and conflicted parties.²

Joint custody requires an enormous amount of effort and determination on the part of parents. When joint legal and physical custody is involved, parents must create two homes fully equipped for themselves and their children, coordinate complicated schedules, and work with each other to make both short-term and long-term decisions involving the children. Significant effort must be made so that children who shift back and forth between two parental residences are not unduly stressed by the arrangement. This is not easy for parents who are not living together and especially for parents who have never lived and parented together. Cooperation and communication are essential to the success of a joint custody arrangement; such an arrangement is incompatible with parents in conflict.

Despite extensive research by numerous academics, there is no conclusive evidence to support a presumption of joint custody. In fact, to the contrary, policy recommendations urge states not to mandate any particular presumption but to continue to refine efforts to see families as unique entities deserving fresh scrutiny in each case. The American Bar Association favors a case-by-case determination without rigid presumptions for or against joint custody.³ The National Council of Juvenile and Family Court Judges instructs judges not to presume that joint custody is in the best interest of

² *Id.*

³ Richard J. Podell, Chairman, Section of Family Law, Am. Bar Ass'n, Recommendation and Report on Model Joint Custody Statute 580 (August, 1989).

children.⁴ While researchers make clear that families wishing to embark on joint custody should not be discouraged from doing so, they urge states not to mandate joint custody, as it is not the panacea it is sometimes presented to be.⁵

Studies purporting to demonstrate the success of joint custody were erroneously relied upon to support a presumption of joint custody. These studies were highly selective, examining only the experience of parents who entered into joint custody arrangements voluntarily, or suffered from poor research methodologies - selecting samples that were too small or unrepresentative, failing to include control or comparison groups, or failing to follow up on families over time.⁶ One of the first studies that included consideration of court-imposed joint custody found that none of the arrangements were “successful” one year after the arrangement began.⁷ Other studies have shown that unresolved parental conflict correlates poorly with the level of cooperation necessary for a successful joint custody arrangement and has detrimental effects on children, including emotional and behavioral disturbances.⁸

⁴ The Family Violence Project of the National Council of Juvenile and Family Court Judges, *Family Violence: Improving Court Practice*, 41 Juv. & Fam. Ct. J. 1, 19 (1990).

⁵ Diane N. Lye, *Report to the Washington State Gender and Justice Commission and Domestic Relations Commission* (June 1999), y, http://www.courts.wa.gov/newsinfo/newsinfo_reports/parent/parentingplanstudy.pdf; see Ch.4, Sec 5. *What the Experts Say About Joint Physical Custody: Quotes From Leading Divorce Researchers*, attached hereto as Ex. A.

⁶ Janet R. Johnston, *Research Update: Children’s Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making*, 33 Fam. & Conc. Cts. Rev. 415 (1995). See also, Lawrence M. Berger et al., *The Stability of Child Physical Placements Following Divorce: Descriptive Evidence From Wisconsin*, 70 J. Marriage & Fam. 273 (2008) (endorsing shared physical placement following divorce, but relying on data that reflects only custody orders based on the best interests of the child rather than a presumption of shared placement).

⁷ Jana B. Singer & William B. Reynolds, *A Dissent on Joint Custody*, 47 Md. L. Rev. 497, 506-07 (1988) (citing S.B. Steinman et al., *A Study of Parents Who Sought Joint Custody Following Divorce: Who Reaches Agreement and Sustains Joint Custody and Who Returns to Court*, 24 J. Am. Acad. Child Psychiatry 554, 558 (1985)).

⁸ Johnston, *supra* note 6, at 420.

In early 1998, as part of a major study of its custody law, the state of Washington examined peer-reviewed articles and books about research on post-divorce parenting and child adjustment and produced an extensive overview of the findings of those studies that is highly relevant to the inquiry raised by this Committee.⁹ The Washington report concludes that joint physical custody in high conflict families is detrimental to children and does not accomplish the goal of fostering better communication between parents but instead may make matters worse.¹⁰ It goes on to assert that “experts in the field agree that ‘one size fits all’ approaches to developing post-divorce parenting arrangements are inappropriate and may be harmful to some families.”¹¹

Specifically, the Washington report discusses two studies showing that, while substantial contact with both parents is positive for children if there is relatively little conflict between the parents, the reverse is true when there is elevated conflict (not including domestic violence) between the parents.¹² Among families with pre-existing conflict, there does not appear to be any evidence that the conflict ends after divorce. Instead, such families often “disengage” from one another, communicating as little as possible and parenting in completely separate ways.¹³ One group of researchers also

⁹ Washington State Report, *supra* note 5 at 4-1 - 4-39.

¹⁰ *Id.* at iii. 4-17 - 4-18.

¹¹ *Id.* at 4-18, 4-20.

¹² *Id.* at 4-9 (citing P.R. Amato & S.J. Rezac, *Contact With Nonresident Parents, Interparental Conflict, and Children’s Behavior*, 15 J. of Family Issues 191 (1994); C.M. Buchanan et al., *Caught Between Parents: Adolescents’ Experience in Divorced Homes*, 62 Child Development 1008 (1991)).

¹³ *Id.* at 4-18 (citing E.E. Maccoby et al., *Coparenting in the Second Year After Divorce*, 52 J. Marriage & Family 141 (1990); E.E. Maccoby & R. H. Mnookin, *Growing Up With A Single Parent: What Hurts, What Helps* (1994)).

found that in custody cases with joint custody, there was a higher incidence of return to the courts for further action.¹⁴

A presumption of joint custody is particularly troubling in the context of domestic violence. Presumptive joint custody compromises the safety of battered women by providing a batterer with continuing opportunities for destructive and potentially lethal contact.¹⁵ Children from households where there is a history of repeated physical domestic violence are the most seriously impacted by joint custody arrangements.¹⁶ With physical violence estimated to be present in at least 50% and possibly 80% of contested custody cases,¹⁷ a presumption of joint custody increases the potential for harm to victims of domestic violence and their children.

A presumption of joint custody also inappropriately gives the batterer an advantage in the custody dispute and unfairly burdens the victim of domestic violence with rebutting the presumption. Research suggests that a presumption of joint custody may trump consideration of domestic violence, resulting in batterers retaining custody of children.¹⁸ Considering the incidence of domestic violence in custody disputes, this burden weighs heavily on domestic violence victims. In Philadelphia, where 85-90% of

¹⁴ *Id.* at 4-18 (citing A. Koel et al., *Patterns of Relitigation in the Post-Divorce Family*, 56 J. Marriage & Family 265 (1994)).

¹⁵ D. Lee Kahachaturian, *Domestic Violence and Shared Parental Responsibility: Dangerous Bedfellows* 44 Wayne L. Rev. 1745, 1769-72 (1999).

¹⁶ Johnston, *supra* note 6, at 420; *See also* Alicia Summers, National Council of Juvenile and Family Court Judges, *Children's Exposure to Domestic Violence* 59 (2006).

¹⁷ STATE JUSTICE INSTITUTE, DOMESTIC VIOLENCE AND CUSTODY DISPUTES 4-8 (1997); Jessica Pearson, *Mediating When Domestic Violence is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, 14 MEDIATION Q. 319, 320 (1997).

¹⁸ Alice C. Morrill et al *Child Custody and Visitation Decisions*, 11 Violence Against Women 1076 (2005) (reviewing custody presumptions in six states and finding that a high percentage of known abusers received joint custody, even when there was a presumption against granting custody to domestic violence perpetrators, if there was also a competing presumption in favor of joint custody).

custody litigants lack counsel,¹⁹ the court provides no information or little assistance to help them present their cases, and almost 50% of the cases we observed were completed in ten minutes or less,²⁰ the likelihood of a party presenting evidence of domestic violence is extremely low. Even when they attempt to do so, our callers tell us that judges often refuse to admit such evidence, despite a statutory mandate that such evidence be considered.²¹

Exempting cases of domestic violence from the presumption will not provide adequate protection for these families because many battered women will not disclose the abuse. This reluctance to disclose abuse derives from a number of factors, including failure to recognize abuse, lack of evidence, embarrassment and shame, and, most harmful, the retaliatory physical violence that may result from disclosure.²² Moreover, many parents may be afraid to present evidence that the other parent is unfit, fearing that their reports of domestic violence, for example, will be ignored or used against them by judges who perceive allegations of domestic violence in a custody battle as false and asserted solely as a strategic maneuver to gain custody.²³

The impact of the shifting burden of proof on litigants cannot be ignored. At present, parties seeking custody of their children go to court with a general concept that they must convince the judge that it would be best for the child to be placed with them.

¹⁹ David I. Grunfeld, *10 Questions for Judge Idee C. Fox, Supervising Judge, Domestic Relations Division, Philadelphia Court of Common Pleas Family Court*, *The Philadelphia Lawyer*, Fall 2002, at 34.

²⁰ Women's Law Project, *Justice in the Justice in the Domestic Relations Division of Philadelphia Family Court: A Report to the Community*, 26-37, 60 (April, 2003).

²¹ *Id.* at 69-70; 23 Pa. Cons. Stat. Ann. §5303(a)(3);

²² Nancy K.D. Lemon, *Domestic Violence and Children, Resolving Custody and Visitation Disputes: A National Judicial Curriculum 75* (1995).

As stated above, most parties to family law proceedings, at least in Philadelphia, are pro se (that is, they are unrepresented by counsel and unable to retain counsel).²⁴ Litigants without representation may understand under the current custody statute that they should present any information they have about any negative consequences of placing the child with the other parent, if that is the case. However, it is unlikely that they will understand the meaning of a legal presumption of joint custody or the effect of such a presumption on the structure of the proceeding or nature of the evidence they must present.

In practice, joint custody can refer to several different types of arrangements. It can include both legal custody (decision-making) and physical custody (living arrangements, daily care and supervision) or it can include only joint legal custody with the child living with one parent. In reality, the latter situation is more typical.²⁵ In those cases, one parent has primary physical custody but is severely restricted in making significant decisions by the requirement of collaboration. The parent with only shared legal custody retains privileges without the responsibility of day-to-day care. The fallout from such an arrangement is complex and burdensome. Basic decisions, such as selection of the child's physician or therapist, become the subject of extensive wrangling and manipulation between the noncooperative parents. Even medical emergencies

²³ Margaret Martin Barry, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 Catholic U. L. Rev. 767, 799-801, (1997).

²⁴ Extrapolating from 2008 caseload data, it is estimated that potentially 23,000 litigants in custody cases processed in Philadelphia Family Court were without legal representation. Zygmunt A. Pines, Court Administrator of Pennsylvania, *2008 Caseload Statistics of the Unified Judicial System of Pennsylvania* 55, available at <http://www.pacourts.us/NR/rdonlyres/A5C48039-435E-4B02-8D99-1CE3A4D90F46/0/2008Report.pdf>

²⁵ Barry, *supra* note 22 at 767 n.2.

become traumatic, with horror stories of surgeons unable to operate without the consent of both parents.²⁶

Not all custody cases go to judges for resolution. Many are resolved amicably and appropriately by the parties themselves. However, those custody litigants who seek judicial resolution of their custody disputes do so because they are unable to resolve the matter themselves, and therefore are very likely to be in such conflict that they would not be capable of successful joint custody arrangements. Thus, the best interests of their children might best be served by minimizing the contact between the parties, not mandating something the parties are incapable of accomplishing.

Historically the trend in custody law has been away from judicial presumptions and toward individual assessment. Custody law goes back to the 17th century Anglo-American paternal preference based on property law. In the 18th century, American courts shifted to the tender years doctrine, which presumed mothers to be the best caretakers of young children. With the emphasis on gender equity and increased parenting role of fathers in the 20th century, this doctrine has largely given way to an individual assessment based on the “best interests of the child.”²⁷ The reemergence of a presumption in favor of any custodial arrangement such as joint custody inappropriately substitutes an easy fix for the right solution and muddies the best interests of the child standard with considerations of parental interests. One commentator has described this

²⁶ Singer & Reynolds, *supra* note 7, at 508-09.

²⁷ Barry, *supra* note 22, at 769-71.

approach as one that “tends to invert the wisdom of Solomon by instructing the courts to divide the child in the name of settling the parents’ conflicting claims.”²⁸

A presumption of joint custody is simply inappropriate in a custody case. A presumption is not probative; rather, it merely supplies the fact-finder with a conclusion when there is no proof to the contrary.²⁹ Thus, a presumption of joint custody automatically establishes a conclusion that joint custody is appropriate without any information that supports that conclusion and shifts the burden of proof to the party seeking to prove that joint custody is inappropriate.

Presumptions and the resulting shift in burdens are generally created for four principal reasons. First, some presumptions are created because of a natural tendency to burden the party desiring change and/or to correct any imbalance created by one party having better access to the proof. Second, special economic or social policies, more often implicit than outspoken, incline courts to favor one premise by assigning it the advantage of a presumption. Third, out of convenience, a presumption may be created to avoid an impasse or standstill and reach a result regardless of whether or not the result is arbitrary or capricious. Fourth, a presumption may be based on a judicial estimate of the probabilities – that proof of one fact makes the inference of the existence of another fact so probable that it saves time and makes more sense to assume the truth of the second fact until the adversary disproves it.³⁰

²⁸ *Id.* at 771-72.

²⁹ See 9 J. Wigmore, *Evidence* § 2491 (Chadbourn rev. 1981); see also *Turner v. Turner*, 455 So. 2d 1374, 1379 (La. 1984).

³⁰ John W. Strong et al., *McCormick on Evidence* § 337 at 415, § 343 at 437-38 (5th ed. 1999); C. McCormick, *Handbook of the Law of Evidence* 806-07 (2d ed. 1972); see also *Bazemore v. Davis*, 394 A. 2d 1377, 1381 (D.C. 1978) (citing McCormick).

None of these rationales justify a presumption of joint custody. The first rationale does not justify a presumption because parents seeking custody are presumably on equal footing in front of the court and have equal access to proof of what is in the best interest of their child/ren. Likewise, the second, third, and fourth rationales do not work because they would “either be arbitrary, or based on unwarranted assumptions,”³¹ as they fail to take into account the realities of the parties’ unique true-life situations and the results of research on joint custody. Thus,

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.³²

The custody statute as currently written declares it the “public policy of this Commonwealth, when in the best interest of the child, to assure a reasonable and continuing contact of the child with both parents after a separation or dissolution of the marriage and the sharing of the rights and responsibilities of childrearing by both parents”³³ It also provides for an award of shared custody based on finding that parties are able to cooperate.³⁴ This finding of capability of cooperation is intended to shield

³¹ *Bazemore*, 394 A. 2d at 1381.

³² *Id.* at 1381-83 (citations omitted).

³³ 23 Pa. Cons. Stat. Ann. § 5301.

³⁴ 23 Pa. Cons. Stat. Ann. § 5302; *Hill v. Hill*, 619 A.2d 1086 (Pa. Super. 1993).

children from the contentious relationships that make joint custody arrangements harmful to them.

The Women's Law Project believes that families would be better served if joint custody were entered into only with the voluntary agreement of the parties. Based on the demonstrated risk of harm caused by court-imposed joint custody in cases in which the parents are in conflict, the Women's Law Project opposes a statutory presumption of joint custody.

The Women's Law Project is grateful for the opportunity to share this information with the Committee and remains available to assist the Committee in any way it can to further the best interests of Pennsylvania's children.