# A Statutory Presumption of Joint Custody:
## Legislative Changes in New York State

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## I. Introduction

Joint custody is an arrangement in custody matters by which both parents retain equal and shared responsibilities in the raising of their child. Currently, New York State does not have a statutory presumption of joint custody. Rather the determination in custody matters is largely based upon the discretion of the court to determine whether the relationship of the parents is one that will benefit or detrimentally harm the child, upholding the best interest of the child standard. In *Braiman v. Braiman*, the Court of Appeals created a preference against awarding joint custody where the relationship of the parents is so embittered that they cannot set aside their difference for the sake of the child.[1] Although this preference has never been codified in state law, it is a guiding principle in custody determinations.

This current legislative session there are two bills proposed to the New York State legislature, in both the Assembly and Senate. If either bill passes, it will create a statutory presumption favoring joint custody. The amendments to the current domestic relations law would establish a preference for what each bill refers to as "shared parenting", along with a requirement of cooperative decision-making in the form of parenting plans to be submitted before the court. New York would join a majority of other United States jurisdictions, including the District of Colombia, to have such a statutory presumption. The aim is to reduce the number of contentious custody battles before the court, and to give children the benefits of equal and shared parenting by both parents where it would be in their best interest.[2]

[1] *Braiman v. Braiman*, 44 N.Y.2d 584 (1978).
[2] N.Y. Comm. Rep., S.B. 949, 236th Sess. (2012).

This paper will address the potential impact either of these proposed bills may have on custody determinations in New York State in three parts. Part II examines the current standard in New York for determining custody, including the numerous factors established through case law that contribute to a court's determination of the best interest of the child. Part III details the two proposed bills as they have been drafted and submitted to the legislature, and compares them to the current standard in New York to show the potential changes these bills may have on custody determinations. Finally, Part IV looks at how other states have implemented statutory presumptions of joint custody as a means to compare the New York legislation to what the American legal trend is in custody matters.

## II. Current Standard in NYS

New York has no statutory presumption that the parties share joint custody of a child. In all cases involving divorce, separation or annulment of marriage or actions involving custody or visitation "there shall be no prima facie right to the custody of the child in either parent."[3] Thus, the legislature expressly rejected the idea that gender or any other single factor carries with it a superior right to custody. Although joint custody is not presumed in New York State, New York Domestic Relations Law Section 240 provides that the court: "must give . . . direction, between the parties, for the custody . . . of any child of the parties, as . . . justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child," but subject to certain statutory limitations, such as the domestic violence factor.[4]

Section 240 of the New York Domestic Relations Law (NYDR) provides that in connection with determining the best interest of the child in custody or visitation disputes, the

[3] N.Y. DOM. REL. LAW §240 (McKinney 1990).
[4] N.Y. DOM. REL. LAW §240 (McKinney 1990).

court is mandated to consider as a factor, if raised, the issue of domestic violence.[5] Specifically, DRL § 240.1(a) provides in pertinent part:

> "Where either party to an action concerning custody or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party . . . and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interest of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section."[6]

The statutory reference to domestic violence is not restricted to physical abuse but includes psychological abuse as well.[7] When the court considers the effect of domestic violence, the court is obligated to review all warrants issued under the Family Court Act, and review the reports of the state-wide computerized registry of orders of protection and the reports of the sex-offender registry.[8]

Even though there is no statutory presumption for joint custody, parents are free to agree upon joint custody in the event of the termination of their marital relationship.[9] In *Trolf v. Trolf*, the court spelled out the circumstances in which joint custody might be appropriate: "[a]n award of joint custody is only appropriate where the parties involved are relatively stable, amicable parents who can behave in a mature, civilized fashion..."[10] They must be capable of cooperating in making decisions on matters relating to the care and welfare of the children." [11] Where

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[5] Hon. Judith J. Gische, "Domestic Violence As A Factor in Custody Determinations in New York State", 27 Fordham Urb. L.J. 937 (2000).
[6] N.Y. Dom. Rel. Law § 240.1(a) (McKinney 1999).
[7] *J.D. v. N.D.*, 652 N.Y.S.2d 468 (Fam. Ct.1996).
[8] N.Y. Dom. Rel. Law § 240 (subd.a-1)(5,6)(McKinney 1999).
[9] *Robinson v. Robinson*, 111 A.D.2d 316, 489 N.Y.S.2d 301 (2nd Dep't 1985).
[10] *Trolf v. Trolf*, 510 N.Y.S.2d 666, 667 (2nd Dep't 1987).
[11] *Id.*

separated parents are able to cooperate in making joint decisions regarding their child, and where both parents are otherwise fit and loving, it is error to deny an application for joint custody.[12]

For example, in *Monahan v. Monahan*, the court awarded joint custody, notwithstanding the marital disagreements, because the record showed that the parents were able to work together in getting the child into therapy when she appeared anxious and confused, the parents were able to work together in scheduling religious instruction for their child, and the parties were able to work together in granting the father an extra day of visitation.[13] An award of joint custody was affirmed in *Lavelle v. Freeman*, based on the fact that both parties were concerned and actively involved in the child's nurturing and care. [14] And, in *Guarnier v. Guarnier*, joint custody was awarded, notwithstanding the marital disagreements associated with the divorce, where the parties had a history of arriving at mutually acceptable agreements regarding their children and had demonstrated mature and civilized behavior.[15]

On the other hand, joint custody is not permissible where the parties are in bitter conflict and do not agree to such an arrangement.[16] If an arrangement proves to be unworkable because of hostility or lack of communication by the parents or if the arrangement turns out to be detrimental to the children, the joint custody provisions may be terminated by agreement or, if necessary by the court. [17]

In *George W.S. v. Donna S.*, the Second Department found that the lower court erred in awarding joint custody where the record showed that the parents were not speaking to each

[12] *Darrow v. Burlingame*, 298 A.D.2d 651, 748 N.Y.S2d 798 (3d Dep't 2002).
[13] *Monahan v. Monahan*, 178 A.D.2d 829, 577 N.Y.S.2d 709 (3d Dep't 1991).
[14] *Lvelle v. Freeman*, 181 A.D.2d 976, 581 N.Y.S. 2d 875 (3d Dep't 1992).
[15] *Guarnier v. Guarnier*, 155 A.D.2d 744,547 N.Y.S.2d 455 (3d Dep't 1989).
[16] *Braiman v. Braiman*, 44 N.Y.2d 584, 378 N.E.2d 1019 (1978).
[17] *Robinson v. Robinson*, 111 A.D.2d 316, 489 N.Y.S.2d 301 (2nd Dep't 1985).

other.[18] Similarly, in *Lohmiller v. Lohmiller*, the court concluded that the parties' intense hostility precluded an award of joint custody [19] In *Seago v. Arnold*, although both parties voluntarily agreed to a joint custody arrangement, it was clear that joint custody was unworkable based on the parents' hostility for one another and demonstrated by the fact that the father regularly instituted litigation.[20] In *Lieberman v. Lieberman*, the court reversed the portion of their decision that awarded the parties joint custody on the basis that the parties had been involved in long and bitter litigation involving the children and severe hostility existed between the parties.[21]

In every case, the parties are entitled to an individualized determination of whether joint custody or sole custody serves the child's best interest. The court may consider any factor that affects the child's best interests in its resolution of a custody dispute and the determination of the child's best interests. The court must consider the totality of relevant factors and a weighing and balancing approach for custody determinations and the child's best interest.[22] In addition to the issue of domestic violence (if raised) that the court must consider in determining custody whenever it is properly raised, the court may consider factors such as the parents' abilities to care for the child; the child's preference; the financial standing of the parents, the morality of the parents; the child's prospective educational probabilities; the parents' work schedules, particularly if they limit the time available for the child; and the parent who has been the child's primary caregiver.[23] There is not one single factor that is determinative.[24]

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[18] *Gorge W.S. v. Donna S.*, 187 A.D.2d 657, 590 N.Y.S.2d 262 (2d Dep't 1992).
[19] *Lohmiller v. Lohmiller*, 140 A.D.2d 497, 528 N.Y.S.2d 586 (2d Dep't 1988).
[20] *Seago v. Arnold*, 91 A.D.2d 835, 458 N.Y.S.2d 427 (4th Dep't 1982).
[21] *Lieberman v. Lieberman*, 149 Misc.2d 983, 566 N.Y.S.2d 490 (Sup.C., Kings County, 1991).
[22] *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89 (1982).
[23] *Saunders v. Saunders*, 60 A.D.2d 701, 400 N.Y.S.2d 588 (3rd Dep't 1977).
[24] Id.

The primary caretaker doctrine defines the primary caretaker as the parent who has taken primary responsibility for: "(1) the preparation and planning of meals; (2) bathing and grooming the children; (3) purchasing, cleaning and caring for clothes; (4) medical care; (5) arranging for the child's social interaction after school and transporting the child to playmates and after school activities; (6) arranging babysitting and daycare; (7) putting the child to bed at night and attending to his or her needs during the night; (8) waking the child in the morning and helping him or her wash, dress, etc.; (9) discipline; (10) religious and secular education."[25] Moreover, the primary caretaker doctrine acknowledges that, prior to litigation, there was an agreement between the parents as to child-rearing responsibilities.[26] The court can give weight to such agreements.[27]

The expressed wishes of a child of sufficient age for or against joint custody require careful consideration by the courts.[28] However, courts must consider the age and maturity of the child together with the possibility of undue parental influence or brainwashing having been exerted on the child.[29] The wishes of a child of tender years, even one of superior intellect, should be considered but should not be given material weight.[30] On the other hand, is it is crucial to ascertain the wishes of a sixteen-year-old child, who is close to the age of majority. [31] For example, joint custody has been denied in cases where the child is an older adolescent capable of choosing which parent to spend his time with. In *Hoffman v. Hoffman,* the court

[25] *Garska v. McCoy*, 167 W.Va. 59, 278 S.E.2d 357 (W.Va. 1981). See also *Matter of Gonya v. Goya*, 298 A.D.2d 636, 749 N.Y.S.2d 287 (3rd Dep't 2002).
[26] *Id*.
[27] *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 432 N.E.2d 765 (1982).
[28] *Bullotta v. Bullotta*, 43 A.D.2d 847, 351 N.Y.S.2d 704 (2nd Dep't 1974).
[29] *Eschbach v. Eschbach,* 56 N.Y.2d 167, 436 N.E.2d 1260 (1982).
[30] *Ira K. v. Frances K.*, 115 A.D.2d 699, 497 N.Y.S.2d 685 (2nd Dep't 1985).
[31] *Feldman v. Feldman*, 58 A.D.2d 882, 396 N.Y.S.2d 879 (2nd Dep't 1977).

found the award of joint custody of the 18-year-old child unwarranted, since at his age "he is old enough to choose which, if either parent, he wishes to spend his time with."[32]

The geographical location and proximity of parents is also an important consideration in determining joint custody. This is especially true in the case of young children. The rotation of children between parents may be harmful to the child.[33] In *Soto v. Soto*, joint custody was reversed where the custody of the parties' children was alternated upon order between the parents every two months.[34] The First Department held that the trial court erred it its determination because such an arrangement (considering the distance between the parents' residence and the frequency of rotation of the children between the parents) would disrupt the children's lives and education and was not in their best interests.[35] Similarly, in *Petras v. Cleopa*, the court awarded the sole custody to the mother and gave the husband visitation rights restricted to the custodial residence until the child reached 3 ½ years old.[36] The court reasoned that joint custody was not appropriate in this case given the very young age of the child (8 months) and the parties' inability to reach agreement upon simple decisions involving the child, such as his name.[37]

In sum, the current standard in New York appears to be that joint custody will not be awarded where the record shows that it would be unworkable because of parties hostile relationship or other circumstances of the case. However, the welfare of the child may outweigh other considerations, including the absence of mutual agreement, and joint custody will be awarded where the totality of the relevant factors favors that alternative.

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[32] *Hoffman v. Hoffman*, 66 A.D.717, 411 N.Y.S.2d 568 (1st Dep't 1978).
[33] *Petras v. Cleopa*, 109 A.D.2d 830, 486 N.Y.S.2d 352 (2nd Dep't 1985).
[34] *Soto v. Soto*, 57 A.D.2d 818, 395 N.Y.S.2d 169 (1st Dep't 1977).
[35] *Id.*
[36] *Petras v. Cleopa*, supra note 33.
[37] *Id.*

**III. Legislative Changes in New York State**

While New York State does not have a statutory presumption of joint custody, courts are given discretion in light of *Braiman* and other case law to grant joint custody in cases where it has been deemed in the best interest of the child.[38] Over the past decade, however, there has been a push within the state to amend the law to establish a statutory presumption of joint custody that may be rebutted by a parent seeking sole custody. If New York were to adopt such legislation, it would join a majority of U.S. jurisdictions that have either a presumption or preference to grant joint custody to parents.[39] During this current legislative session there are two proposed bills that would create this presumption. While it is not the first time such legislation has gone before the State legislature, case law suggests that New York is closer to establishing a presumption of joint custody. As jurisdictions throughout the state carve out more exceptions to *Braiman*, and more social scientific research is conducted regarding the effects of custody on children, the preference for joint custody in New York is more a reality than it was even a decade ago.

The pending legislation, Senate Bill 949 and Assembly Bill 6457, would amend the domestic relations law to establish a presumption of shared parenting (joint custody) of children. Introduced to the State Senate on January 9, 2013, the aim of Bill 949 is to statutorily protect the rights of both parents to continue to share in the responsibility and duties of raising their children. Supported by psychological studies and state sponsored projects, the bill aims to alleviate the burden on the courts to resolve disputes over shared parenting by acknowledging the benefits to children from being raised by both parents.[40] When custody decisions limit or exclude one parent from being involved in a child's life, it can have negative impacts on their

[38] 44 N.Y.2d 584 (1978).
[39] Daniel D. Molinoff, *Joint Custody Revisted*, 85-FEB N.Y. ST. B.J. 44, 46 (2013).
[40] N.Y. COMM. REP., S.B. 949, 236th Sess. (2012).

development. The bill consists of three major amendments to New York's Domestic Relations Law ("DRL"). The first amends DRL §70(a) to change the language, establishing a presumption of joint custody. The second amends DRL §240(1)(a) to establish an order of preference for awarding custody of minor children. The third creates DRL §240(d), which defines both "shared parenting" and "parenting plan" as they are used in the context of the joint custody statute. This legislation would effectively change the current law to a rebuttable presumption of joint custody.

Assembly Bill 6457 has a similar aim as the proposed Senate bill, but with much broader and sweeping reforms of family law in New York. It's short title is the "Family Court Reform Act of 2013" and was introduced before the State Assembly on April 1, 2013, and has subsequently been referred to the Committee on Judiciary.[41] As part of these reforms, the bill seeks to also amend the DRL to create a statutory presumption of joint custody. It creates DRL §240(d), which defines "shared parenting" as well as lays out the considerations for the court to consider when determining if shared parenting is in the best interest of the child if the parties are in agreement. This legislation, unlike its proposed Senate counterpart, specifically mentions how the court should respond in cases where domestic violence or other abuse is present in the household. It requires that a "parenting plan" be submitted before the court to help the parties come to agreement over how parenting will continue equally to the benefit of the child. The proposed assembly bill also creates DRL §240(e) that sets forth the procedure and considerations for the court when parties are not in agreement over the award of shared parenting.

[41] N.Y.A.B. 6457, 236th Sess. (2013).

**A. Proposed Legislation: N.Y.S.B. 949 (2013)**

1. *Amendment to DRL §70(a)*

The first amendment the proposed legislation seeks to make is to DRL §70(a). The current language of that section states that courts *may* award custody to *either parent* when making custody determinations (emphasis added).[42] The amendment changes "may" to "shall," and requires courts to award custody not to either parent, but to "both parents, in the absence of an allegation that such shared parenting would be detrimental to such child."[43] This language effectively creates a presumption of joint custody, or shared parenting, in cases involving minor children. The amendment to this section further eliminates the prima facie right to the custody of such children in either parent. The burden is then placed on the moving parent to prove that a presumption of joint custody would be to the detriment of the child. The bill does not state any specific factors the court can look to when determining whether this burden has been met by the moving parent seeking an award of sole custody.

2. *Amendment to DRL §240(1)(a)*

The second amendment to current New York law concerns DRL §240(1)(a). This proposed change would create a statutory order of preference for granting custody that the courts should follow when making such determinations in the best interest of the child or children. Under subsection (1)(a)(II), the preference for awarding custody is as follows: First, to both parents, with the requirement of a parenting plan or custody implementation plan to be submitted to the court. This presumes that shared parenting is in the best interest of the child, and should be agreed upon by the parents. Although this is the first preference of the court, on a finding of detriment to the child, the court may on its own deny shared parenting despite this presumption.

[42] N.Y. DOM. REL. LAW §70(a)(McKinney 1999).
[43] N.Y.S.B. 949, 236th Sess., S.2 (2013).

Second, where the court or parties have determined that shared parenting is not in the best interest of the child, the court may grant custody to either parent upon consideration of factors including the likelihood of continued access to the child. Third, should the court decide that neither parent should be granted custody of the child, the court may permit that custody be granted to someone with whom the child has been residing in a stable home. Finally, the court may permit custody to be granted to another person who is deemed suitable. While not the focus of this paper, it is interesting to note that this amendment to the law acknowledges the potential rights of interested third parties when it comes to the upbringing of children in custody disputes.

3. *Creation of DRL §240(d)*

The final amendment in this proposed bill adds subsection (d) to DRL §240 to define both the terms "shared parenting" and "parenting plan" as they are used throughout the statute. In defining the term "parenting plan" the bill also sets forth the requirements of the plan that are to be submitted to the court as part of the custody determination. "Shared parenting" is an "order awarding custody of the child to both parties so that both parties share equally the legal responsibility and control of such child… as the court deems to be in the best interest of the child, taking into consideration the location and circumstances of each party."[44] This changes the language of "joint custody" to "shared parenting" to reflect the idea that both parents are continuing to share in the raising of their children.[45] Further, the definition of "parenting plan" that would be required to be submitted to the court under DRL §240(1)(a) must include, but is not limited to, the following things: 1) the legal responsibilities of each parent; 2) a weekly parenting schedule; 3) a holiday and vacation parenting schedule; 4) a schedule for special occasions, including birthdays; 5) a description of specific decision making areas for each parent,

[44] N.Y.S.B. 949, 236th Sess., S.4, sub. div. 1 (2013).
[45] *Id.*

provided that both parents shall jointly make decisions on major issues affecting the child's welfare; 6) if applicable, need for any and all parties to participate in counseling; 7) any restrictions on either parent when in physical control of the child(ren); 8) provisions for mediations of disputes.[46] The proposed legislation is clear to not limit any provisions that parents come to an agreement on with respect to their plan to continue to raise their children, it merely establishes a minimum that is required. [**Full text of the Senate bill is attached as Annex A.**]

**B. Proposed Legislation: N.Y.A.B. 6457 (2013)**

*1. Creation of DRL §240(d)*

The first amendment to the proposed Assembly bill creates a new subsection to DRL §240 regarding custody of children. This subsection defines "shared parenting" as an order of the court awarding custody to both parties so that they both share equally in the legal responsibilities of raising the child.[47] Both parties shall share equally in the living experience of time and care in raising the child when it is in the best interest of the child and shall confer with each other with regards to decisions of health, education, and general welfare of the child.[48] It recognizes that "shared parenting" should be used interchangeably with "nearly equal shared parenting." This section emphasizes that while one parent may be the primary custodial parent, both are equal when it comes to crucial decisions and the upbringing of that child. A parenting plan, agreed upon during mediation, must be submitted to the court. It encourages parties to come to an agreement on their shared and individual responsibilities of the child's upbringing without relying on judicial intervention.

[46] N.Y.S.B. 949, 236th Sess., S.4 (2013).
[47] N.Y.A.B. 6457, 236th Sess., S.3 (2013).
[48] *Id.*

This section creates a procedure for the court to follow when parties agree on the award of shared parenting. First, the court should appoint an independent evaluator to investigate the family dynamics to ascertain whether shared parenting would be in the best interest of the child. This includes a look at whether there might be domestic violence or other abuse, whether documented or not, in the household that would be detrimental to the child. Then, this report should be submitted to the court for consideration in the final determination of custody. The costs incurred by the independent evaluation are to be paid by the parties, with any costs above their means covered by the county. Should either party have a conviction for abuse (including domestic violence or physical and or sexual abuse) against either parent or the child, shared parenting shall not be an option.[49] If there are allegations of abuse, the court shall suspend the determination of custody until an investigation by the proper agency can be conducted. If the alleged abuse is confirmed, shared parenting shall not be an option. If the allegations are untrue, the court will resume its best interest analysis. If it is found that the allegations were made in bad faith by one party seeking to harm the other party, the court may impose sanctions it deems proper.[50]

*2. Creation of DRL §240(e)*

Further, the Assembly bill creates another subsection to DRL §240, which provides a procedure for the court to follow when the parties are in disagreement over the presumption of joint custody. When the parties are in disagreement, the court bears the responsibility to determine the best interest of the child.[51] Both parties, however, bear the burden of proof to demonstrate why their preferred determination is better for the child. As in the previous section

[49] *Id.*
[50] *Id.*
[51] N.Y.A.B. 6457, 236th Sess., S.4 (2013).

with regards to granting shared parenting, an independent evaluation is to be conducted to investigate the family dynamics, and whether there are any concerns of abuse or domestic violence in the household.[52] The court will take the report of the independent evaluator into consideration of the best interest of the child. Should the court find that an award of sole custody should be granted to a party seeking it, services may be directed to the parent to whom custody was not granted and after a period of time directed by the court, the possibility of shared parenting may be reconsidered after reevaluation of compliance with services or conditions.[53]

[**Full text of the Assembly bill is attached as Annex B.**]

**C. Justifications for the Proposed Bills**

The basic justification for these two similar bills is that there has been a trend in family law in the state of New York towards encouraging, and in many cases requiring, cooperation among parents when it comes to the custody and raising of children.[54] While the court has never been explicitly denied the ability to grant such orders of custody, there has been a long standing rule in the state that when the relationship between parents is so hostile that it will affect the upbringing of the child, the court should be free to determine which parent would be best suited to have primary custody.[55] But this standard has come under scrutiny and has changed in recent decades as research shows that maintaining a balance of parenting can be more beneficial to children who are raised in divided homes.

This proposed legislation would serve to statutorily protect the importance that shared parenting can have in a child's life. It changes the language used to define custody so that parents

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[52] *Id.*
[53] *Id.*
[54] N.Y. COMM. REP., S.B. 949, 236th Sess. (2012)
[55] *See generally* Braiman v. Braiman, 44 N.Y.2d 584 (1978).

raising a child separately can feel that their role as parent is equally valued, even if they are not the primary residential parent or caregiver of the child. By presuming that shared parenting is in the best interest of the child, there is also an interest to reduce litigation and relitigation in court of custody issues.[56] By encouraging parties to cooperate to create parenting plans and by placing a greater burden on the party seeking sole custody, it is likely that people will bring fewer custody disputes to the courtroom. Furthermore, a presumption of shared parenting limits parents using children as "bargaining chips" to get at each other in these matters.[57] However, the new laws still retain the discretion of the court to determine when shared parenting is not in the best interest of the children.

**D. Comparison to Current NYS Standard**

In many respects, the two proposed bills merely codify within the emerging law what is becoming the commonplace practice in family law in New York State. While it creates a statutory presumption that does not specifically exist now, it does not limit the discretion that courts have in determining custody decisions in the best interests of the child. It is a rebuttable presumption that can be overcome by either of the parents, or in some instances by the court itself with evidentiary support. Under the current statutory law, there is no mention of specific factors the court should consider in making such determinations; it has primarily been decided by case law. The amendments to the law do not inhibit the availability of the courts to rely on these factors established by case law in continuing to come to custody decisions. Under the proposed Assembly bill, the law would only specifically direct the court to factor domestic violence or abuse into its decision-making. The primary function of the court remains to make its

[56] Molinoff, *supra* note 39, at 47.
[57] N.Y. COMM. REP., S.B. 949, 236th Sess. (2012).

determination in the best interest of the child, taking into account many different circumstances that may be present.

1. *Consideration of Factors*

The language of the bills still allows the court's discretion when evaluating evidence presented to overcome the presumption of shared parenting, as well as to make decisions with regard to whether shared parenting is in the best interest of the child. The proposed Senate and Assembly bills merely make it preferential to grant joint custody to both parents. Thus, it is reasonable to assume that the factors relevant to the child's best interest that courts take into consideration may continue to influence custody determinations.[58] As previously explained in part I of this paper, these may include but are not limited to considerations of who will serve as the primary caretaker, the work schedules of both parents, the preference of the child (including age of child), basic logistics involved with shared parenting, the location of the parents, financial status of both parents, plus any and all other factors the court deems relevant.[59] Should the court believe that any of these factors would inhibit the parents' ability to effectively co-parent or would have such a detrimental effect on the child, it still retains full discretion to award sole custody to either parent. The only mention of specific factors that need to be considered by statute comes from the Assembly bill which prohibits shared parenting in cases where there is domestic violence or abuse; the Senate bill is silent with regards to these issues.

Furthermore, the language of the bills, which defines and enumerates the requirements of a parenting plan, codifies the court's preference for agreement among the parties, with or without

[58] *See generally* Freiderwitzer v. Freiderwitzer, 55 N.Y.2d 89 (1982), *supra* note 22.
[59] *See generally* Saunders v. Saunders, 60 A.D.2d 701, 400 N.Y.S.2d 588 (3rd Dep't 1977), *supra* note 23.

their attorneys, as to how their child will be parented.[60] In practice, most of the specific requirements of the parenting plan are established through parent cooperation, often by way of their attorneys as well as the attorney for the child, before it is presented to the court. This provision ensures that in general the most commonly disputed details of custody arrangements are thoroughly thought out before the court becomes involved in issuing an order of custody. This statutory amendment permits and encourages parents to use conciliation services and or mediation to come to the terms of the plan.[61] While attorneys are not expressly denied the ability to continue in the practice of facilitating such agreements, the parties involved are given the responsibility of coming to an arrangement that reinforces the parenting rights of both in a way that will serve the best interest of their child and contribute to positive child development.

2. *Impact on Case Law*

One of the biggest impacts that either of these bills would have on the way custody determinations are made in New York will be with regards to the application of the *Braiman* standard to joint custody cases. When *Braiman* was decided in 1978, it seemed to create a rule that disfavors joint custody when there were severe tensions between parents.[62] It created a standard that when parents are so antagonistic towards each other and cannot put those differences aside for the sake of the child, the court should not presume joint custody is in the best interest of that child.[63] To overcome the *Braiman* standard, a parent seeking joint custody who does not have a good working relationship with the other parent would have to prove why their rights as a parent should not be so readily dismissed because of that relationship with the child's other parent. Both bills have the potential to make the *Braiman* standard the exception

[60] N.Y. Comm. Rep., S.B. 949, 236th Sess. (2012).
[61] N.Y.S.B. 949, 236th Sess., S.2 (2013).
[62] 44 N.Y.2d 584 (1978).
[63] *Id*.

rather than the norm. In many respects, this reflects a trend in cases following *Braiman* in recent years that have continued to carve out exceptions to this standard.

## III. Joint Custody in Other States

In the United States, there are at least three-dozen states that have statutes authorizing courts to award joint or shared custody to parents.[64] There are states that have a general presumption of joint custody. Some states authorize joint custody to parents when the parents agree. Other states have statutes that provide for the option of an award of joint custody if it is in the best interests of the child.[65] Many of these jurisdictions also rely on codified factors for courts to consider when awarding joint custody and have created ways for parties to rebut the presumption of joint custody. This section provides an overview of various state statutes that authorize joint custody and offers some comparisons with the current standard and the proposed custody legislation in New York.

### A. General Presumption of Joint Custody

States that have a general presumption of joint custody assume that joint custody is in the best interests of the child and courts are required to give this form of custody first consideration. Statutory law in the District of Columbia relies heavily on the best interests of the child as a primary consideration in determining custody. However, the District of Columbia also has a "rebuttable presumption that joint custody is in the best interests of the child."[66] This suggests

[64] Custody Criteria Chart, 45 FAM. L. Q. (4)(Winter 2012), available at http://www.americanbar.org/content/dam/aba/publications/family_law_quarterly/vol45/4win12_chart2_custody.authcheckdam.pdf (accessed March 16, 2013).
[65] *See generally*, Smith v. Smith 887 So.2d 257 (Ct. Civ. App. Ala. 2003) (holding that joint custody is considered on custody option and is found only if in the best interests of the child).
[66] DC CODE ANN. § 16-914.

that although there are other forms of custody for the DC courts to consider, the preferred form of custody is joint custody unless the presumption can be rebutted. Methods of rebutting the presumption in the District of Columbia include intra-familial violence, child abuse, child neglect, or parental kidnapping. If any of these circumstances are met by a preponderance of the evidence than there is a rebuttable presumption that joint custody is not in the best interests of the child.[67]. Additionally, under statutory law, the DC courts have the authority to order the parties to develop a workable parenting plan that determines scheduling and allocation of rights and responsibilities that are in the best interests of the child.

Another state with a presumption of joint custody is Florida. Statutory law in Florida requires a court to order "parental responsibility…to be shared by both parents."[68] Florida law presumes that parents will share in decision-making about their children and that the child has frequent and continuing contact with both parents, which encourages parents to share the rights and responsibilities of childrearing.[69] Parents cannot obtain sole custody unless there is a showing that the sharing of parental responsibilities is not in the best interests of the child.[70] Moreover, in some of these decisions the Florida courts have approved rotating custody agreements.[71] Florida courts have also approved joint custody in cases where the parties were not married or where the parties divorced but both parents were deemed equally competent to care for the minor child.[72] The only exception to this presumption is if the court finds that joint

[67] DC CODE ANN. § 16-914 (3).
[68] FLA. STAT. § 61.13; 61.401.
[69] *Id.*
[70] *See e.g.*, Branch v. Branch, 631 So.2d 386, 387 (1994) (holding that sole custody would not be awarded to a parent absent a finding that shared custody would be detrimental to the child).
[71] *Id.*
[72] FLA. STAT. § 61.13; 61.401.

custody would be detrimental to the child, such as a case with a conviction for domestic violence.

The Idaho Annotated Code also has a presumption of joint custody "absent a preponderance of evidence to the contrary."[73] Orders of joint custody are designed to "assure the child or children of frequent and continuing contact with both parents."[74] The court is given the option of awarding joint physical custody or joint legal custody or both to both parents, depending on what is in the best interests of the child. But, the court does have discretion in determining the amount of time the child spends with each parent.[75] Additionally, the Idaho Annotated Code does provide for a presumption against joint custody in cases where one of the parents is found by the court to be a habitual perpetrator of domestic violence. Thus, in repeat domestic violence situations, joint custody would not be presumed to be in the best interests of the child.[76]

The state of Iowa also has a general presumption of joint custody. The court is required to order an award of joint custody to assure the child has the opportunity for maximum physical and emotional contact with both parents…and encourages the parents to share the rights and responsibilities of raising the child."[77] Iowa courts order joint custody if it is reasonable and in the best interests of the child. Joint custody is not ordered if such contact with both parents would result in direct physical or emotional harm against the child or a parent.[78] Similar to other states, Iowa statutory law provides for a rebuttable presumption against the awarding of joint

[73] IDAHO CODE ANN. § 32-717B.
[74] *See* King v. King, 50 P.3d 453 (Idaho Sup. Ct. 2002) (providing that the statute has a presumption that joint custody is in the best interests of a minor child).
[75] *Id.* at 460.
[76] *See supra*, note 9, at (5).
[77] Iowa Code § 598.41.
[78] *Id.* at 1.a.

custody if there is a history of domestic abuse between the parents.[79] In the absence of just cause, one parent cannot prevent the other parent from having contact with the child. Just cause is limited to the safety of one parent from domestic abuse.[80]

Moreover, the court can grant joint custody "on the application of either parent" and "where the parents do not agree to joint custody."[81] Iowa statutory law is more focused on joint custody arrangements than whether or not the parents agree. The relationship between the parents is but one factor to be considered when a court makes a custody determination.[82] In New York, the current standard requires the opposite. As discussed earlier, New York currently does not permit awards of joint custody in cases where the parents do not agree to it.

Finally, another state, New Mexico, presumes joint custody to be in the best interests of the child at an initial custody determination.[83] In determining whether joint custody is in the best interests of the child, New Mexico statutory law provides for several factors that include: parental ability to care for the child; parental willingness to accept responsibilities of parenting; whether the child can maintain and strengthen a relationship with both parents through regular contact; and workability of the parenting plan.[84] When the court grants or denies a request for joint custody, the court is required to state in its decision its basis for granting or denying the request.[85] Further, the court must go beyond stating that joint custody is not in the best interests of the child since this is not sufficient under statutory law.[86]

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[79] *Id.* at 1.b.
[80] *Id.* at 1.c-d.
[81] *Id.* at 2.a.
[82] *See* In re Marriage of Bulanda, 451 N.W.2d 15 (Ct. of App. Iowa 1989) (finding that joint custody was in the best interests of the child, even though both parents did not agree).
[83] N.M. STAT. ANN. § 40-4-9.1.
[84] *Id.*
[85] *Id.* at H.
[86] *Id.*

**B. Joint Custody When Parents Agree**

Some states authorize joint custody when the parties agree.[87] Often these agreements are favored if a court finds that joint custody is in the best interests of the child or when parents develop a parenting plan agreement together.[88] In California, there is a joint custody presumption where the parents have agreed to joint custody.[89] Connecticut provides for a similar presumption. Connecticut General Statutes Annotated states that, "there shall be a presumption…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."[90] A Connecticut court held in Tabackman v. Tabackman,[91] that joint custody was improperly granted since neither parent requested or agreed to joint custody. Both Connecticut and California encourage agreement as the basis for awarding joint custody. The presumption does not exist without an initial agreement between the parties and this agreement is in the best interests of the child. When the court declines to order joint custody, the court must specify its reasons for denying an award of joint custody.

Another example is Alabama. Under Alabama Code § 30-3-153, if joint custody is ordered, then the parents are required to submit, "as part of their agreement, provisions covering matters relevant to the care and custody of the child." However, if the parties cannot reach an agreement on education, holidays, medical and dental care, and other issues, then the court will determine the plan for the parents and the child.[92] Moreover, Alabama courts are required to

[87] *See generally*, Blonigen v. Blonigen, 621 N.W.2d 276 (Ct. App. Minn. 2001) (finding that when the parties agree to joint custody and the court approves it, the parties are bound).
[88] *Id.*
[89] Cal. Fam. Code § 3080.
[90] CONN. GEN. STAT. § 46b-56a.
[91] 26 Conn. App. 366 (1991).
[92] ALA. CODE § 30-3-153(b)

consider joint custody in every case but may, "award any form of custody" which serves the best interest of the child.[93]

To determine whether joint custody is in the best interests of the child, the court considers the same factors considered in awarding sole legal and physical custody of a child.[94] One of the factors considered by the court is "the agreement or lack of agreement of the parents on joint custody."[95] Alabama statutory law encourages parents to devise an agreement that is workable and in the best interests of the child. Additionally, if both parents request joint custody then it is presumed that joint custody is in the best interests of the child.[96] But, if there is no request for joint custody by the parents, then there is not a presumption that joint custody is in the best interests of the child.[97] In any subsequent order for custody, the court must grant the joint custody request unless there are specific findings for why joint custody was not granted.[98] Thus, without a request for joint custody, the Alabama courts are unlikely to grant such an agreement unless it is in the best interests of the child.[99]

**C. Joint Custody As An Option**

Some states, such as Minnesota, have a more generalized analysis and fall somewhere between states that award joint custody only when the parents agree, and considering joint custody as an option whether the parents agree or not. In Minnesota there is a presumption that if either or both parents request joint custody that joint legal custody is in the best interests of the

[93] ALA. CODE § 30-3-152(a).
[94] *Id.*
[95] *Id.* at (1).
[96] ALA. CODE § 30-3-152(b).
[97] *See* Bryant v. Bryant, 739 So.2d 53 (Ala. Civ. App. 1999).
[98] *Id.*
[99] ALA. CODE § 30-3-152(c).

child.[100] Minnesota does allow courts to award joint legal or physical custody over the objection of a party, but that in those instances the court must make detailed findings on each of the factors and explain how the factors led to its determination that joint custody would be in the best interests of the child.[101] When joint custody is sought in Minnesota, the court considers: (1) whether the parents are able to cooperate in rearing the children, (2) what methods have been used by the parents to resolve disputes related to the child, (3) whether it would be harmful to the child to have one parent have sole control over raising the child, and (4) whether domestic abuse has occurred between the parents.[102] Minnesota courts, along with a majority of courts in other states, will not find that joint custody is in the best interests of the child if there is a history of domestic abuse between the parents.[103] These states promote joint custody when there is a workable agreement in place that will benefit the emotional, mental, and physical needs of the child. However, similar to the current standard in New York, these states do not encourage joint custody agreements when the parents are not in agreement and there is no automatic presumption of joint custody. But, the new proposed standard in New York would presume that joint custody is workable in all cases unless proven otherwise.

In comparison, some states, currently including New York, joint custody is just one option that a court may award even when the parents do not agree, as long as certain criteria are met. These states provide courts with factors to consider that affect the child's physical, emotional, and mental well-being. Indiana law allows joint custody to be granted even if the

[100] MINN. STAT. § 518.17.
[101] *Id.*
[102] *Id.* at Subd. 2. (a)-(d).
[103] *Id.* at Subd. 2.

parties do not agree to it or request it.[104] This suggests that Indiana courts have the authority to grant an award of joint custody if it is in the best interests of the child, even if the parties disagree or are hostile with one another. Another example is Wisconsin. Wisconsin law allows for an award of joint custody if both parents agree or, if the parents do not agree, but one parent requests joint custody.[105] But, even when only one of the parents requests joint custody the court can still find that both parents are capable parental responsibility for the child's care and make a joint custody award.[106] Thus, a Wisconsin court can impose joint custody on parents if the court thinks the parents can work together in raising the child.[107]

Other states such as Kentucky and Nebraska provide for the option to consider a joint custody award if it is beneficial to the child or if there are specific findings. In Kentucky, the "cooperative spirit of parties is not condition precedent to a joint custody order."[108] Custody is determined according to the best interests of the child and the court gives each parent equal consideration.[109] Thus, Kentucky courts are free to consider all types of custody awards, including joint custody despite disagreement between the parents.[110] Similarly, in Nebraska a court has the authority to grant custody of a child to both parents if they agree or if there are specific findings present in the case that indicate joint custody is in the best interests of the

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[104] *See* Clark v. Madden, 725 N.E.2d 100 (Ind. Ct. App. 2000) (finding that joint custody was in the best interests of the child even though the parents did not request it).
[105] Wisc. Stat. § 764.41.
[106] *See* Fedun v. Fedun, 227 A.D.2d 688 (3d Dept. 1996) (upholding a family court's award of joint custody over the objection of the mother where court believed that there was sufficient evidence that each parent wanted what was best for the child and could work together with the other parent cooperatively).
[107] *Id.*
[108] *See* Squires v. Squires, 854 S.W.2d 765 (Ky. 1993).
[109] KY. REV. STAT. ANN. § 403.270(2) (West 2012).
[110] *See* Scheer v. Zeigler, 21 S.W.3d 807 (Ct. App. Ky. 2000) (finding that as long as joint custody remains the law of Kentucky, joint custody must be accorded the same dignity as sole custody).

child.[111] In Maryland, courts are given the option to award custody of a minor child to either parent or joint custody to both parents because "neither parent is presumed to have any right to custody that is superior to the right of the other parent."[112] In Taylor v. Taylor, the Maryland Court of Appeals found that when joint custody is appropriate in a given case, "it can result in substantial advantages to children and parents alike, and [the] feasibility of such [an] arrangement is certainly worthy of careful consideration."[113] Thus, when courts are given the option to award joint custody the emphasis is on the best interests of the child and the long-term benefits of having both parents share parenting responsibility for the minor child.

Many states statutorily provide for joint custody awards to parents. In the sections above, some states have a statutory presumption of joint custody. In those states, joint custody is recognized as being in the best interests of the child unless there is a mitigating factor such as domestic violence or child abuse. Other states, courts can grant awards of joint custody if the parties agree to joint custody and develop a parenting plan that addresses each parent's responsibilities towards the child. Finally, there are states that consider joint custody to be one of many options available to the court in determining a custody agreement. With the proposed changes in the legislation in New York, if the new laws pass it is likely that New York courts will begin to issue more orders of joint custody to parents unless there is an existing reason why joint custody is not in the child's best interests.

[111] NEB. REV. STAT. § 42-364(5).
[112] MD. CODE ANN., FAM. LAW § 5-203.
[113] 508 A.2d 964, 970 (Md. 1986).