The Judiciary, State of Hawai'i

Testimony to the House Committee on Human Services
The Hon. Mele Carroll, Chair
The Hon. Bertrand Kobayashi, Vice Chair

Thursday, February 6, 2014
9:30 a.m.
State Capitol, Conference Room 329

by
R. Mark Browning
Deputy Chief Judge, Senior Family Judge
Family Court of the First Circuit

Bill No. and Title: House Bill No. 2163, Relating to Parental Parity

Purpose: Provides that in awarding custody and visitation of a minor child in situations where the parents are unable to agree and unless it's not in the best interest of the child, the court shall ensure the inclusion of both parents and equal continuing physical, emotional, and meaningful contact with both parents.

Judiciary's Position:

The Judiciary respectfully opposes House Bill No. 2163 that requires an award of joint custody unless a party can prove, by clear and convincing evidence, that joint custody is not in the child's best interest. We have strong concerns about the possible effects of this bill.

The preamble of this bill refers to various research data. In our experience, research conclusions in child custody research are full of qualifiers, contingencies, and cautions. This reflects the complex factors that make such cases so idiosyncratic—a situation that requires judicial discretion but also may speak against an absolute presumption as well as the use of a heightened standard of proof (that is, "clear and convincing evidence" as opposed to the usual civil standard of "preponderance of the evidence"). We note that the preamble appears mistaken in its references to the meta-analysis published by Amato & Gilbreth, 1999.

To provide another perspective, we are attaching an article entitled "The Dangers of Presumptive Joint Physical Custody." The article is balanced, well reasoned, meticulously researched, and contains extensive citations. The article tempers all of its conclusions without any oversimplified summaries or biased assertions. The article includes both sociological as well as legal authority, such as (7, emphasis in original):

> The danger of the [joint physical custody] presumption is that, unless affirmatively challenged, the court is required to order joint physical custody regardless of whether that arrangement *is actually* in the best interest of the child or meets the specific needs of the dissolving family. In other words, joint physical custody will be ordered even if, *in reality,* it is bad for the child. Justice White recognized the peril of custody presumptions in *Stanley v. Illinois* where he observed:
>
> > Procedure by presumption is always cheaper and easier…than individualized determination. But when…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.21 [*Stanley v. Illinois*, 405 U.S. 645 (1972) (considering the presumption that unwed fathers are unfit parents)].

The good news is that the vast majority of child custody court orders result from agreements/stipulations made by the parents. It is a relatively small handful of cases that need contested trials. Of that group, there is a smaller number of cases involving highly litigious parents who are apparently unable to resolve "differences" without court "battles" and who return to court year after year. Enacting statutory changes that appear to affect a small group of litigating parents risks causing disruption to the much larger group of parents who are able to reach agreements under the present statutory language.

There are some common sense limitations found in this bill. As already noted, the vast majority of custody issues are resolved by agreement between the parents. All such agreements are reviewed by a judge and they become court orders only after the judge's approval. Although family court judges tend to favor joint custody arrangements, the judges are nevertheless careful to have no preconceptions about every family before them as they review each uncontested case. However, the approval of joint custody agreements is more readily given since the parents have already given evidence of their ability to jointly parent since they have reached an agreement about how they will raise their children. In contrast, the first phrase in sub-section (1) of this bill is: "[w]here the parents are unable to agree . . . (page 3, line 14)." Here, on just a common sense

basis, an indication has already been made about the parents' ability to agree about parenting. This is not to say that no case requires a trial—there are cases such as those involving a parent's plan to move out of state or a parent's use of violence in the family that are extremely difficult to settle.

The other common sense restriction concerns the phrase: "equal continuing physical, emotional, and meaningful contact with both parents (page 3, line 21 to page 4, line 3)." The current statutory language does not have a "measure" such as the word "equal." When parents disagree about parenting and custody issues, the word "equal" is simply fodder for more litigation and, short of using Solomon's sword, has little meaning with respect to the child's needs.

Increasing the standard of proof from "preponderance" to "clear and convincing" for just one sub-section of a rather long statutory section may confuse parties and may have unintended consequences. Use of a higher burden of proof than the customary civil standard of "preponderance of the evidence," essentially subverts the best interest of the child standard because a higher standard is an invitation for the parents to resort to evidence more particular to the opposing parent thereby deflecting the hearing from careful consideration and balance of the child's interests.

We respectfully oppose this bill because of the court's concerns based on long experience with the entire panoply of divorce and paternity cases (and not just the small percentage that go to trial). No set of words will ever be able to deal with all the vagaries of human behavior but the current statute contains a clear mandate that determining the "best interest of the child" means putting the child first and foremost. This clear mandate includes an extensive list of factors to guide the court and strongly recognizes the ideal of shared or joint parenting absent domestic violence. The current statute has proven adequate for these times. Changes must be made with care and certainly should not be made based on misunderstood or misreported research.

Thank you for the opportunity to testify on this bill.

Attachment to Testimony by the Judiciary, State of Hawai`i on HB2163 Relating to Parental Parity House Committee on Human Services, 2/6/14

The Dangers of Presumptive Joint Physical Custody

Gabrielle Davis, J.D., Kristine Lizdas, J.D., Sandra Tibbetts Murphy J.D., and Jenna Yauch[1]

The Battered Women's Justice Project
May 2010

Battered Women's Justice Project
1801 Nicollet Avenue South, Suite 102, Minneapolis, MN 55403
technicalassistance@bwjp.org
800-903-0111 prompt 1

[1] Gabrielle Davis, Kristine Lizdas and Sandra Tibbetts Murphy are attorneys with the Battered Women's Justice Project in Minneapolis, Minnesota. Jenna Yauch is a law student with William Mitchell College of Law.

Introduction

Popular proposals to enact statutory presumptions for joint physical custody (JPC) threaten the safety and well-being of battered women and their children. While Idaho appears to be the only state to have a universal statutory presumption for JPC,[2] several other states have presumptions that operate under specific circumstances (*e.g.,* where the parties agree to JPC or they fail to reach an agreement regarding JPC).[3] Proponents of JPC have developed an appealing theme to promote a presumption, advocating the benefits and fairness of having both parents equally engaged in their children's lives under a "shared parenting" or "co-parenting arrangement."[4] The danger of presumptive JPC is that it assumes that "shared parenting" and "co-parenting" are inherently good for all children, without regard to what is actually happening in the lives of the dissolving family. In this way, presumptive JPC blindly elevates the rights of parents – even really bad parents – over the safety and well-being of children. It also disregards a significant body of research that questions the benefits of JPC and its impact on children. Nevertheless, efforts by JPC proponents to promote legislative presumptions are gaining traction. This document explains the legal implications of JPC presumptions and the negative impact such presumptions have on battered women and their children.

---

[2] IDAHO CODE §32-717B(4).

[3] States that have presumptions of joint physical custody (or its equivalent) when parties agree to it include Maine, Michigan, Mississippi, Oregon and Vermont. 19-A ME. REV. STAT. §1651, 1653(2)(a); MICH. COMP. LAWS §722.26a(2); MISS. CODE §93-5-24(4); OR. REV. STAT. §107.169, Subd. 4; 15 VT. STAT. §666. Louisiana statutes provide that in the absence of an agreement between the parties, the court shall award custody to parents jointly. LA. REV. STAT. §9:335, Art. 132. Additionally, many states have statutory presumptions for joint legal custody, or for joint custody, generally. Those presumptions are not discussed here.

[4] This linguistic shift might seem, at first blush, to be a matter of benign political correctness. In fact, these are politically negotiated terms that predispose the family court (as well as attorneys, guardians ad litem, custody evaluators, mediators and even the litigants themselves) to devise joint custody arrangements, even where such arrangements are inconsistent with the best interests of the child.

An Overview of Joint Physical Custody

Within the context of family law, custody generally refers to the care and control of a minor child. The concept of custody is further refined by distinguishing the *authority* to make important major life decisions on behalf of the child from the *responsibility* for the everyday supervision and care of the child, including providing a primary home for the child. The former is often referred to as "legal custody," while the latter is generally referred to as "physical custody."

Although the precise legal definition of "*joint* physical custody" varies from state to state, it is generally understood to be an arrangement whereby the daily care, control and residence of the child are shared, often (but not always) equally, between the child's parents.[5] Children will often spend relatively equal time at each parent's home, and both parents may be deeply involved in their children's daily affairs (meals, transportation to and from school and activities, homework, etc.). Hence, a necessary corollary of JPC is that parents have frequent and ongoing contact with each other, ideally cooperating in parenting until the child reaches majority.

Sharing physical custody of a child is not inherently harmful and can work quite well for some families; specifically those in which there is no history of violence, little conflict, and where *both* parents share a demonstrated commitment and ability to work together.[6] In fact, many families prefer this type of arrangement and freely choose it for post-dissolution parenting.[7]

---

[5] *See*, *e.g.* MINN. STAT. §518.003 3(d) (2008).

[6] One study found that models of shared parenting, like JPC, were "a viable arrangement for a small and distinct group of families, who self-selected into [the] arrangements." Jennifer McIntosh & Richard Chisholm, *Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation*, 14 J. FAM. STUD. 37, 38 (2008). *See, also,* Christy M. Buchanan & Parissa Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419, 424 (2008).

[7] Robert E. Emery, Randy K. Otto & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCHOL. SCI. PUB. INT. 1, 17 (2005); Mary Ann Mason, THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE BATTLE AND WHAT WE CAN DO ABOUT IT, 63-64 (2000).

The Best Interest of the Child

The paramount interest in crafting custody arrangements is to discern and protect the safety and well-being of children. Most states require that family courts apply what is known as "the best interest of the child" standard in reaching custody decisions.[8] While "best interest of the child" standards vary from state to state, they typically instruct courts to consider a list of statutorily enumerated factors to determine which parenting arrangements are appropriate for the child under the particular circumstances of the case. These factors focus squarely on the child and, depending on the jurisdiction, include such considerations as: (1) the wishes of the parents; (2) the preferences of the child; (3) the child's interaction and interrelationships within the larger family unit and extended care-giving network; (4) the child's adjustment to home, school and community; and (5) the mental and physical health of all interested parties.[9] While many states have slightly different and often expanded lists of "best interest factors," the intention is the same: to ensure that custody determinations remain child-centered.[10] That is, whatever specific form it takes, the best interest of the child standard is designed to produce custody outcomes that are good for children.

Practically speaking, the best interest of the child standard has been extremely challenging for courts to apply. Over the years, the standard has been criticized for being elusive

---

[8] *See,* ALA. CODE §30-3-152; ALASKA STAT. §25.24.150; ARIZ. REV. STAT. §25-403.03; ARK. CODE §9-13-101(C); CAL. FAM. CODE §3011; COLO. REV. STAT. §14-10-124; CONN. GEN. STAT. §46b-56a(c); DEL. CODE 13 §722; D.C. CODE §16-914 (a)(3); FLA. STAT. §16.13(3); GA. CODE §19-9-3(a); HAW. REV. STAT. §571-46; IDAHO CODE §32-717; ILL. COMP. STAT. 5/602(a); IND. CODE §31-17-2-8; IOWA CODE §598.41; KAN. STAT. §60-1610; KY. STAT. §403.270(2); LA. REV. STAT. §9:36; 19-A ME. REV. STAT. §§1653; MASS. GEN. LAWS 208 §31; MICH. COMP. LAWS §722.23; MINN. STAT. §518.17(1); MISS. CODE §93-5-24; MO. STAT. §452.375(2); MONT. CODE §40-4-212(1); NEB. REV. STAT. §42-364(2); NEV. REV. STAT. §125.480(4); N.H. REV. STAT. §461-A:6(I); N.J. STAT. §9:2-4; N.Y. DOM. REL. LAW §240; N.C. GEN. STAT. §50-13.2; N.D. CENT. CODE §14-09-06.2; OHIO REV. CODE §3109.04(F); OR. REV. STAT. §§107.137(1); 23 PA. CONS. STAT. §5303; R.I. GEN. LAWS 1956 §15-5-16; S.C. CODE 1976 §20-7-1520; TENN. CODE §36-6-106(a); UTAH CODE §30-3-10.2; 15 VT. STAT. §665(b); VA. CODE §20-124.3; WIS. STAT. §767.41(5); WYO. STAT. §20-2-201.

[9] *See*, *e.g.*,UNIF. MARRIAGE & DIVORCE ACT §402, 9A U.L.A. 288 (1979).

[10] Linda Elrod & Milfred Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of the Children in Balance*, 42 FAM. L. Q. 381, 397 (2008).

and unpredictable, inviting protracted litigation and competing expert opinions, and ultimately leaving critical parenting determinations to the discretion of the family court judge or other surrogate decision maker (*e.g.*, a custody evaluator, guardian ad litem, or other non-judicial court appointee).[11] One of the seemingly attractive features of the JPC presumption is that it bypasses the problematic application of the best interest of the child standard.[12] Rather than having to grapple with a long list of ill-defined factors and suffer the agony of protracted litigation, the JPC presumption permits the court to cut right to the chase and make a quick, easy and predictable custody award.[13] The apparent appeal of the presumption comes at a cost, however: it takes consideration of the child's best interests out of the calculus altogether.[14]

---

[11] Mary Ann Mason, THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE BATTLE AND WHAT WE CAN DO ABOUT IT, 19 (2000). Elrod & Dale, supra n. 9 at 42.

[12] Lyn R. Greenberg, Dianna J. Gould-Saltman, & Robert Schnider, *The Problem with Presumptions: A Review and Commentary*, in RELOCATION ISSUES IN CHILD CUSTODY CASES (Philip Stahl & Leslie Drozd eds., 2006).

[13] Contrary to assertions by its proponents, a JPC presumption is not likely to reduce litigation. In fact, it is more likely to have the opposite effects. In Oregon, for instance, post-decree litigation nearly doubled after enactment of its statutory JPC presumption. Margaret Brining, *Does Parental Autonomy Require Equal Custody at Divorce*? 65 LA. L. REV. 1345, 1368 (2005).

[14] Lindsay Dangl, *A Critical Evaluation of Presumptions in Favor of Joint Custody: Why Michigan Should Not Follow the Trend*, 11 MICH. CHILD WELFARE L.J. 9, 17 (2008).

How the Joint Physical Custody Presumption Works

The joint physical custody presumption is a legal short-cut. It presupposes that joint physical custody is in the best interest of the child.[15] Unlike most presumptions, which spring into effect only after a predicate fact has been established, the JPC presumption begins at the end: it starts with the legal conclusion that JPC is in the best interest of the child.[16] As discussed below, the scientific research does not support this conclusion.[17] Herein lies the legal peril: the JPC presumption universally applies a legal "conclusion" that is not universally true. It mandates a finding that JPC is in the best interest of the child, *even though the research shows that the exact opposite is often true*.[18]

The JPC presumption is generally rebuttable. That means that the legal conclusion that JPC is in the best interest of the child may be challenged through the introduction of contrary evidence. If no contrary evidence is introduced, the legal conclusion stands.[19] In other words, joint physical custody will be deemed to be in the best interest of the child unless the parent who

---

[15] *See, e.g.,* IDAHO CODE §32-717B(4) (2007) ("…there shall be a presumption that joint custody is in the best interest of the child."); D.C. CODE §16-914(a)(2) (2001) ("There shall be a rebuttable presumption that joint custody is in the best interest of the child…"); N.M. STAT. §40-4-9.1(A) (2007) ("There shall be a presumption that joint custody is in the best interests of a child…").

[16] In most cases, presumptions spring into effect only after some predicate fact has been established. Greenberg et al., supra n. 11. In the case of the presumption *against* JPC due to domestic violence, for instance, the presumption does not spring into operation unless a party first establishes the predicate fact that domestic violence has occurred. Only after the predicate fact has been established can the court infer that joint physical custody is *not* in the best interest of the child. By contrast, the JPC presumption does not require proof of a predicate fact. It simply starts with a conclusion without any foundational showing whatsoever.

[17] See discussion, *infra*.

[18] The logical fallacy is that the JPC presumption converts an untested "judgment" (that JPC is in the best interest of the child) into a conclusive "fact."

[19] Criminal law provides a familiar example of how legal presumptions work. In the United States, criminal defendants benefit from a legal presumption of innocence unless the State can produce enough evidence to prove otherwise. A defendant bears no evidentiary burden unless the State first meets its burden of proof beyond a reasonable doubt. The rebuttable JPC presumption works the same way, except that the burden to overcome the presumption requires a lesser degree of proof. The parent who desires joint physical custody bears no evidentiary burden unless the other parent puts on sufficient evidence to show that JPC is *not* in the best interest of the child.

has reason to doubt that conclusion proves otherwise. This places a substantial evidentiary burden on the party who believes that joint physical custody is *not* good for the child. [20]

Operationally, the JPC presumption means that physical custody will be shared by the parents, without regard to the safety and well-being of the child, unless the parent seeking to avoid the arrangement can produce enough evidence to rebut the presumption. The danger of the JPC presumption is that, unless affirmatively challenged, the court is required to order joint physical custody regardless of whether that arrangement *is actually* in the best interest of the child or meets the specific needs of the dissolving family. In other words, joint physical custody will be ordered even if, *in reality,* it is bad for the child. Justice White recognized the peril of custody presumptions in *Stanley v. Illinois* where he observed:

> Procedure by presumption is always cheaper and easier…than individualized determination. But when…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.[21]

As appealing as the JPC presumption may seem on the surface, it is a poor mechanism for decision-making in child custody cases.[22] Without a JPC presumption, courts must consider the *actual* best interests of the child in fashioning appropriate custody awards. With a JPC presumption, courts do not have to think about the child at all, unless one of the parents has the wherewithal to mount a formal legal challenge.[23]

---

[20] Since family court litigants often appear *pro se*, it is doubtful that many unrepresented parents will understand that they have an evidentiary burden, much less how they might meet that burden without the benefit of counsel.
[21] *Stanley v. Illinois*, 405 U.S. 645 (1972) (considering the presumption that unwed fathers are unfit parents) .
[22] Greenberg et al., supra n. 11..
[23] This is risky business in a jurisdiction that has a "friendly parent" provision. *See discussion, infra.*

The Presumption Contradicts Research on Joint Custody

Proponents of presumptive JPC claim that children are much better off when both parents are jointly engaged in their lives.[24] In fact, when parents freely elect to parent cooperatively, and they have the commitment and resources to sustain a shared parenting arrangement without significant levels of conflict, children tend to adjust well to joint custody.[25] However, even in families where joint physical custody is voluntarily chosen, research indicates that it does not always prove to be a stable or desirable model over time.[26] Moreover, given the choice, parents who are able to successfully negotiate appropriate post-dissolution parenting arrangements with little or no conflict rarely opt for joint physical custody, and even more rarely choose a purely equal physical custody arrangement.[27]

The presumption that joint physical custody is in the best interests of the child directly contradicts current research. According to a team of psychologists at Wake Forest University,

---

[24] Robert Emery, THE TRUTH ABOUT CHILDREN AND DIVORCE: DEALING WITH THE EMOTIONS SO YOU AND YOUR CHILDREN CAN THRIVE, 176 (2004). The unspoken assumption is that parents are naturally involved in their children's lives when, in actuality, they often are not. There is no research to suggest that an uninvolved parent will become involved simply by virtue of a joint parenting arrangement. Anne Opie, *Ideologies of Joint Custody*, 31 FAM. & CONCILIATION CTS. REV. 313 (1993); Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L. Q. 815 (1999).

[25] One study found that models of shared parenting, like JPC, were a "viable arrangement for a small and distinct group of families who self-selected into [the] arrangement," but noted that "most separating parents who require Court or dispute resolution services to determine their contact and care arrangements unfortunately do not share these characteristics." Jennifer McIntosh & Richard Chisholm, *Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation*, 14 J. FAM. STUD. 37 (2008). Christy Buchanan & Parissa Jahromi*, A Psychological Perspective on Shared Custody Arrangements* 43 WAKE FOREST L. REV. 419, 425. The economic realities of impoverished families, especially within poor communities of color, can make joint physical custody arrangements especially cumbersome and impractical. Margaret Martin Barry, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U. L. REV. 767 (1997).

[26] Study of joint custody families found that nearly half did not maintain that arrangement over time. Eleanor E. Maccoby & Robert H. Mnookin, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY, 103, 300 (1992). In another study, one-third of the parents who voluntarily agreed to joint custody reverted to sole custody for a variety of logistical reasons. Susan Steinman, *The Experience of Children in a Joint Custody Arrangement,*51 AM. J. ORTHOPSYCHIATRY 403 (1981). In yet another study, only one-third of the parents with an initial joint physical custody order maintained that arrangements over time. Margaret A. Little, *The Impact of the Custody Plan on the Family: A Five Year Follow-Up."* Los Angeles County Family Court Services (1991). In the UK, approximately 60% of negotiated parenting arrangements had broken down within two years. Liz Trinder & Joanne Kellett, *The Longer-Term Outcomes of In-Court Conciliation*, United Kingdom Ministry of Justice (2007).

[27] Maccoby & Mnookin, supra n. 25 at 300; *See, also,* McIntosh & Chisholm, supra n. 24 at 38 (*citing,* Smyth B (Ed) (2004) *Parent Child Contact and Postseparation Parenting Arrangements*. Research Report No. 9, Australian Institute of Family Studies, Melbourne).

"[I]mposing joint physical custody on families who are litigating, particularly if litigation is protracted, is highly unlikely to promote the best interests of the children and may in fact do them harm."[28] This conclusion is reinforced by numerous longitudinal investigations, including two recent studies in Australia following implementation of shared parenting legislation in 2006. The research suggests, among other things, that post-separation shared parenting arrangements can negatively impact children's emotional and physical development, particularly where the parents are engaged in entrenched conflict.[29]

Significantly, the current research neither absolutely supports nor absolutely rejects joint physical custody arrangements.[30] Rather, it demands "informed and careful consideration…of whether shared care...provides a desirable and viable developmental pathway for each child in the circumstances of each case."[31] In other words, the weight of the research calls for an individualized analysis of whether JPC is in the best interests of the child. Presumptive JPC calls for none. It treats every case the same, regardless of the developmental needs of the children or the level and context of parental conflict.

---

[28] Buchanan & Jahromi, supra n. 24 at 428.
[29] McIntosh & Chisholm, supra n. 24 at 50. In a California study of family court judges, two-thirds concluded that joint custody imposed by presumption led to negative or mixed results for children. Thomas J. Reddy, et al., *Child Custody Decisions: A Survey of Judges* 23 FAM. L. Q. 75, 80 (1989).
[30] There is no one-size-fits-all custody arrangement that works for all families. Even when violence is present in a family, these families should not all be treated identically either. Uniform treatment in any category ends up hurting children most. We should "not assume uniform characteristics or experiences for children who have been exposed to violence perpetrated against their mothers." Claire Crooks, et al., *Factoring in Effects of Children's Exposure to Domestic Violence in Determining Appropriate Post-Separation Parenting Plans*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES (Barry Goldstein & Mo Hannah eds., 2009).
[31] McIntosh & Chisholm, supra n. 24 at 38.

Good Faith Efforts to Rebut the Presumption Can Backfire on Children

While joint physical custody presumptions are typically rebuttable, good faith attempts to overcome them can backfire under so-called "friendly parent" provisions built into many state custody laws. "Friendly parent" provisions are commonly included among the long lists of "best interest" factors.[32] They ask the court to consider each parent's willingness to encourage and facilitate frequent and continuing contact between the child and the other parent.[33] A parent who, in good faith, seeks to challenge the JPC presumption implicitly communicates to the court a belief that frequent and continuing contact between the child and the other parent is not good for the child. Even if the parent challenging the JPC presumption does not intend to limit contact between the child and the other parent, the court might draw such an inference from the challenge itself. Consequently, the very act of challenging the presumption can create the perception, whether real or imagined, that the challenging parent would prefer to limit, rather than encourage, contact with the other parent. That perception, in turn, can be – and often is – used against the challenging parent in the court's best interest of the child analysis.[34] Since a good faith challenge to the JPC presumption represents an effort to protect the child, the very act

---

[32] ALA. CODE §30-3-152(a)(3); ALASKA STAT. §25.24.150(c)(6); ARIZ. REV. STAT. §25-403(A)(6); ARK. CODE §9-13-101(b)(2); CAL. FAM. CODE §3040; COLO. REV. STAT. §14-10-124(1.5)(a)(VI); CONN. GEN. STAT. §46b-56(c)(6); FLA. STAT. §61.13(3); 750 ILL. COMP. STAT. 5/602(a)(8); IOWA CODE §598.41(1)(c); KAN. STAT. §60-1610(a)(3)(B)(vi); LA. REV. STAT. Art.134(10); 19-A ME. REV. STAT. §1653.(3)(H); MICH. COMP. LAWS §722.23(j); MINN. STAT. §518.17(13); MO. CODE §452.375(2)(4); NEV. REV. STAT. §125.480(4)(c); N.H. REV. STAT. §461-A:6(l)(e)-(i); N.J. STAT. §9:2-4(c); N.M. STAT. §40-4-9.1(B); OHIO REV. CODE §3109.04(F)(1)(f); OR. REV. STAT. §107.137(1)(f); 23 PA. CONS. STAT. §5303(a)(2); TENN. CODE §36-6-106(a)(10); UTAH CODE 1953 §30-3-10(1)(a)(ii); VA. CODE §20-124.3(6); WIS. STAT. §767.41(5)(10); WYO. STAT. §767.41(5)(10).

[33] *See*, *e.g.*, MINN. STAT. §518.17(1)(a)(13) ("'The best interest of the child' means all relevant factors to be considered and evaluated by the court including…the disposition of each parent to encourage and permit frequent and continuing contact by the other parent of the child….").

[34] Allison C. Morrill, Jianya Dai, Samantha Dunn, Iyue Sung, & Kevin Smith, *Child Custody and Visitation Decisions When the Father has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076 (2005).

of protection can have the ironic effect of placing the child at greater risk of harm.

Consequently, the rebuttal to the JPC presumption works *worst* when a child needs it *most*. [35]

[35] As a result, a competent attorney might actually counsel his client against challenging the presumption for fear that it could be strategically disadvantageous. Likewise, an informed and genuinely protective parent might think twice before challenging the presumption for fear that the objection could actually put the child in harm's way.

Presumptive Joint Physical Custody and Domestic Violence

The negative implications of presumptive joint physical custody are compounded for families experiencing domestic violence.[36] Research suggests that batterers are inappropriate candidates for physical custody in general,[37] let alone joint physical custody with the victim parent, and that they serve as poor roles models for their children.[38] "In cases where it is established that a parent presents an ongoing risk of violence to the child or (other) parent…no meaningful parent-child relationship is possible."[39] Additionally, the procedural and evidentiary burdens of the presumption already noted are exacerbated for victims of domestic violence, and their general vulnerability litigating against their perpetrators places them at an additional disadvantage. In families with a history of violence, JPC is simply not in the best interest of the child.[40]

In families where domestic violence is present, JPC not only requires ongoing contact between the batterer and his children, but greatly increases the amount of contact, including physical contact, with the victim.[41] Joint physical custody increases the "opportunities for abusers to maintain control and to continue or to escalate abuse toward both women and

---

[36] Mandating JPC in cases where domestic violence is present is perhaps most troubling due to studies demonstrating that in 30% to 60% of cases where a male partner is violent towards his spouse, children are also direct victims of violence. Jeffrey E. Edelson, *The Overlap Between Child Maltreatment and Woman Battering,* 5 VIOLENCE AGAINST WOMEN 134 (1999).

[37] Peter G. Jaffe, et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 FAM. CT. REV. 500, 515 (2008) (asserting that in families with domestic violence the best parenting arrangement is for sole legal custody and sole physical custody to be assigned to the parent capable of providing a non-violent home); Crooks et al., supra n. 29.

[38] Peter G. Jaffe, et al., *Parenting After Domestic Violence: Safety as a Priority in Judging Children's Best Interest*, 6 J. CTR. FAM., CHILDREN & CTS. 81, 82 (2005).

[39] Jaffe et al., supra n. 36 at 515.

[40] "The past and potential behavior of men who batter means that joint custody or sole custody to him is rarely the best option for the safety and well-being of the children." Daniel G. Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors and Safety Concerns* (2007), http://www.vawnet.org/category/Documents.php?docid=1134&category_id=617.

[41] Jaffe et al., supra n. 37 at 82.

children."[42] Even after a separation or divorce, batterers use joint physical custody arrangements to continue emotional and verbal abuse of their victims, with the children either forgotten, or worse, placed in the middle.[43] For batterers, JPC is another tool of control by which they can continue to exert power over their victims, despite physical separation or divorce.[44] The violent parent has ample opportunity to continue to coercively control the other parent, possibly diminishing that parent's capacity to parent fully. When this information is considered in light of the data on separation violence and escalation,[45] it becomes even more apparent that JPC is less a workable parenting arrangement for battered women than a court-sanctioned means for batterers to have continued contact and control over them. Statutory presumptions of JPC effectively endorse batterers' use of the legal system to maintain control over their victims.[46]

Joint physical custody arrangements in families experiencing domestic violence have negative outcomes for children because the arrangements prolong children's exposure to violence.[47] Batterers generally continue their abuse and violence and, if they lack access to the primary victim, children often become the main conduit for violence.[48] Giving a violent parent

---

[42] Saunders, supra n. 39; Jaffe et al., supra n. 37.
[43] Crooks et al., supra n. 29.
[44] That batterers use custody litigation as a tool of control is validated by evidence that men who abuse their partners contest custody over twice as often as non-abusive fathers. Am. Psychol. Ass'n, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASS'N PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY (1996), available at http://www.apa.org/pi/viol&fam.html.
[45] J.L. Hardesty & G.H. Chung, *Intimate Partner Violence, Parental Divorce, and Child Custody: Directions for Intervention and Future Research*, 55 FAM. REL. 200 (2006); Crooks et al., supra n. 29.
[46] Peter Jaffe et al., *Common Misperceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 JUV. & FAM. CT. J. 57 (2003); J. L. Hardesty & L. H. Ganong, *A Grounded Theory Model of How Women Make Custody Decisions and Manage Co-Parenting with Abusive Former Husbands*, 23 J. OF SOC. & PERS. RELATIONSHIPS 543 (2006).
[47] *See, e.g.* K.M. Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-analytic Review*, 71 J. OF CONSULTING & CLINICAL PSYCHOL. 339 (2003); D.A. Wolfe, The *Effects of Children's Exposure to Domestic Violence: A Meta-analysis and Critique*, CLINICAL CHILD & FAM. PSYCHOL. REV. 171 (2003).
[48] Janet Johnston et al., *Ongoing Postdivorce Conflict: Effects on Joint Custody and Frequent Access* 59 AM. J. OF ORTHOPSYCHIATRY 576 (finding that forced joint physical custody in families where there is domestic violence leads to children being caught in conflict between parents). Additionally, men who batter are also more likely to abuse their children. Jaffe et al., supra n. 37 at 82.

regular, ongoing contact with the other parent places children in dangerous and highly stressful situations.

Additionally, a legal presumption of JPC gives unfair advantages to the batterer-parent in custody negotiations. A batterer often will want to share physical custody of a child because such an arrangement maximizes his contact with and control over the victim-parent. By contrast, a victim-parent will want to minimize or cease contact with the batterer-parent, and have a desire to protect the child from unsupervised contact with the violent parent. A legal presumption of JPC enormously buttresses the batterer-parent's position, as it is also the starting point for the court's analysis, thus creating an enormous legal hurdle for the protective parent.

Indeed, JPC is dangerous for families where domestic violence is present even if it is "voluntarily" chosen. A battered mother's ability to voluntarily choose a custody arrangement in cooperation with her batterer is questionable at best. Due to the nature of domestic violence and the power and control that batterers exert over their victims, it is unlikely that a cooperative choice of any custody arrangement can occur. While a battered mother may not want to choose a JPC arrangement which will mandate future contact with her batterer, she may be pressured or frightened into this choice.[49] The strong likelihood that battered women are pressured into JPC arrangements is a related but separate subject that practitioners, advocates, and courts should always keep in mind. For this and similar reasons, many states have actually adopted presumptions *against* joint physical custody if domestic violence is present.[50]

---

[49] *See,* Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); *The Coercion of Women in Divorce Settlement Negotiations*, 74 DENV. U. L. REV. 931 (1997); and *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153 (1999).

[50] *See, e.g.,* MINN. STAT. 518.17(2)(d) ("…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…has occurred between the parents.").

Domestic violence is present in a significant number of custody cases,[51] but there is no reliable way to identify and track these cases for special treatment. It is clear that JPC represents a worst-case scenario for families with domestic violence, and because there is no guaranteed way to ensure that those cases are identified and treated differently, a presumption simply should not apply to any families. These presumptions both ignore the frequency with which families with custody disputes are affected by domestic violence and tacitly condone the violence by forcing all families into the very custody arrangement that is most dangerous for battered women and their children. In families where domestic violence is present, joint physical custody arrangements create tremendous safety concerns by allowing substantial opportunities for batterers to access the other parent.

[51] *See, e.g.* Janet Johnston, *High Conflict* Divorce, 4 THE FUTURE OF CHILDREN 165 (1994) (finding that among one sample population of disputed custody cases in mediation, 70-75% of parental couples had experienced physical aggression in the relationship); Janet Johnston et al., *Allegations and Substantiations of Abuse in Custody-Disputing Families* 43 FAM. CT. REV. 283, 288 (2005).

Domestic Violence Exceptions to Presumptions of JPC Do Not Work

Many states with statutory presumptions for joint legal or physical custody include language that directs courts *not* to apply the presumption for joint custody if a court finds that domestic violence has occurred between the parents.[52] In fact, some states have statutes directing courts to apply a rebuttable presumption *against* joint legal or physical custody if a court finds that domestic violence has occurred between the parents.[53] Unfortunately, the exceptions existing in statute today have proved largely futile because of the very nature of domestic violence.

An exception to a JPC presumption for domestic violence fails to provide sufficient protection to battered women and their children, because there is no reliable way for courts to consistently or accurately distinguish custody cases with domestic violence from others.[54] Given conflicting stories from two parents involved in a custody dispute, "[a] naïve professional in the family court system may dismiss or minimize the claims of both spouses or erroneously conclude that the abuse is mutual when it is not."[55] For many reasons, courts are poorly equipped to make accurate determinations about the presence of violence, thus rendering domestic violence exceptions ineffective. Many victims of domestic violence do not call their experience by labels that make it easily identifiable, especially if their experiences include more aspects of coercive control and less physical violence. A battered woman might not stand up in court and call herself such, partly because she may not recognize her own experience as abuse or battering. Additionally, victims of domestic violence may have no verifiable proof that the abuse is

---

[52] IOWA CODE §598.41(1)(a); N.H. REV. STAT. §461-A:5 (presumption is overcome by presence of domestic violence); TEX. FAM. CODE §153.131 (presumption is automatically overcome by a finding of domestic violence); W.V. CODE §48-9-207 (presumption is overcome by a showing of abuse).

[53] *See, e.g.* MINN. STAT. 518.17, subd. 2.

[54] Cases of domestic violence often get confused or lumped in with "high conflict" cases. Yet, "minimizing battering as 'couples conflict' can result in a failure to institute the proper safeguards for women and children." Crooks et al., supra n. 29.

[55] Jaffe et al., supra n. 36 at 507.

occurring. Women might never report the abuse to the police or take other action like seeking protection orders, leaving them without documentation to present to a court. Victims of domestic violence might also fail to self-identify due to very real fears. They may fear retaliation from their batterer for bringing up the violence and attempting to avoid application of the presumption. They might have fear or mistrust of the legal system or worry about child protective services involvement. Victims of domestic violence might also fear that they will not be believed[56] and will have revealed a very painful truth for nothing. Victims' attorneys might discourage victims from disclosing violence because they believe such allegations will make the victim appear vindictive and uncooperative or "unfriendly."[57] In those states that have domestic violence exceptions to legal presumptions for joint physical custody, allegations of domestic violence are rarely made.

Courts might also have difficulty assessing and differentiating between different forms of violence used between parties. Force used in self-defense might look like aggressive violence or battering in the context of a custody battle. An individual's single use of violence might carry the same weight as another individual's use of violent behavior over many years. Courts are ill-equipped to gauge the fear and actual impact an individual's ongoing use of violence has on a family. Courts simply have difficulty identifying domestic violence,[58] thus exceptions to a JPC presumption do not work. An exception is pointless when there is no way to determine the cases to which the exception will apply.

---

[56] "Reports of abuse first made in the context of litigation should never be dismissed solely because of the timing of disclosure." *Id.* See also Johnston et al., supra n. 50 at 288 (reporting data that allegations of abuse by mothers and fathers was substantiated at near-identical rates, disproving a parental alienation perspective that mothers are more likely to make unfounded allegations).

[57] See discussion of "friendly parent" provisions within the best interest of the child standard, *supra*.

[58] *E.g.,* M. A. Kernic et al., *Children in the Crossfire: Child Custody Determinations Among Couples with a History of Intimate Partner Violence* 11 VIOLENCE AGAINST WOMEN 991 (2005); Jaffe et al., supra n. 37 at 84 ("the intended consequences of domestic violence (i.e., intimidation, silence, and fear)…increase the odds that the court simply will not know enough about the parties to be concerned about safety issues).

Listen to Children

A presumption of JPC produces bad outcomes for battered women; it forces them to have prolonged contact with their batterers and exposes them to continued violence. A presumption of JPC also leads to continued violence in the lives of children. Recent research demonstrates that exposure to violence has incredible negative impacts on children.[59] Children exposed to domestic violence can have the same levels of emotional and behavioral problems as children who are direct victims of physical or sexual abuse.[60] Children exposed to domestic violence are more likely than other children to be aggressive and exhibit behavioral problems.[61] Additionally, these children display higher rates of Post-Traumatic Stress Disorder symptoms.[62] Specific problems vary depending on the age of the children, but exposure to violence has a developmental impact at every stage of a child's life, including: interruption of brain development (birth-3 years), inappropriate messages that violence is a tool (3-6 years), rationalizing of violence and difficulty forming peer relationships (6-12 years), use of violence in dating relationships, risk-taking behavior and drug use (12+ years).[63]

Although those promoting joint custody frequently minimize the seriousness of domestic violence and suggest that domestic violence should not interfere with a father's rights to custody of children, the research asking children about their experiences tells a different story. In one of only a handful of studies designed specifically to study children's experiences of domestic violence, McGee interviewed 54 children and 48 abused mothers,[64] finding that in 41 of the

---

[59] Peter G. Jaffe et al., *Common Misperceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 JUV. & FAM. CT. J. 57 (2003).
[60] *Id.* at 60.
[61] Crooks et al., supra n. 29.
[62] G. Margolin, *Posttraumatic Stress in Children and Adolescents Exposed to Family Violence*, 38 PROF. PSYCHOL.: RES. & PRAC. 613 (2007).
[63] Crooks et al., supra n. 29.
[64] C. McGee, CHILDHOOD EXPERIENCES OF DOMESTIC VIOLENCE, 15 (2000).

families (85%) children were eyewitnesses to violence,[65] in 25 of the families (52%) children were physically abused, in 6 families (11%) children were sexually abused, in 29 families (60%) were emotionally abused, 15 families (31%) experienced controlling behavior, and in 28 families (58%), children overheard violence.[66] The children gave many examples of emotional abuse, such as:

- Calling child a "little slut";
- Telling child they "should have been an abortion";
- Abusing the children's pets;
- Deliberately breaking the children's toys;
- Threatening to burn the house down;
- Telling the children their mother/grandmother doesn't love them;
- Telling the children the mother was having an affair, had AIDS and was dying, and was a drug user.[67]

In addition to emotional abuse, physical abuse was present in more than half of the families in the study. Hitting the children was the most common form of reported physical abuse, followed by throwing the children, throwing objects at children, and pushing children who were trying to protect their mothers out of the way. In addition, children were injured incidentally to the abuser's attack against the mother, including a child who was burned when the abuser threw a kettle of boiling water at the mother.[68] Respondents in the study reported a variety of other physically abusive behaviors such as shaking a baby, strapping a child to a bed with a belt, pushing a child's head into a dirty dishwasher, and dragging a child down stairs.[69]

A variety of cruel and controlling behaviors were also reported in McGee's study. Thirty-one percent of the families noted controlling behaviors that often mirrored abusers' efforts to control mothers. Common controlling behaviors included not allowing children to play and

---

[65] *Id.* at 49.
[66] *Id.*
[67] *Id.* at 50-51.
[68] *Id.* at 53.
[69] *Id.*

confining children to certain areas of the home, including locking children in their rooms.[70] The abusers used a variety of intimidation tactics to control the children, including holding children and their mothers hostage, constantly staring at them, depriving children of sleep, telling children's friends not to talk to them, and stalking.[71]

Although respondents were not questioned about sexual abuse, sexual abuse was reported against 11% of the children in McGee's study. The children described the emotional abuse that accompanied the sexual abuse, and their fears about what would happen to them if they disclosed (often based on the abusers' explicit threats), and their fears about not being believed.[72]

Given such graphic experiences by children, any custody process needs to incorporate the age-appropriate wishes of children.[73] More specifically, children expressing disinclination or outright rejection of a violent parent need to be respected, and their wishes honored.[74] Courts and evaluators can be too quick to second guess a child when voicing fear of and resistance to a parent, even where the parents has a documented history of violence. Courts listen to parents, but they should also endeavor to listen to children, as the determinations and custody arrangements arguably have greater effect on their lives.[75] Putting limits on parents' access to their children is always problematic; but one parent's violence toward children or the other parent needs to be taken into account. A presumption of JPC, however, does just the opposite, turning a blind eye to violence and treating all families as if they shared the same safe family relations.

---

[70] *Id.* at 54.
[71] *Id.* at 55.
[72] *Id.* at 56-57.
[73] Jaffe, et al., supra n. 36 at 510.
[74] *Id.*
[75] This is not typically the case. *See, e.g.* Judith Wallerstein & Julia M. Lewis, *Disparate Parenting and Step-Parenting with Siblings in the Post-Divorce Family: Report from a 10-Year Longitudinal Study*, 13 J. FAM. STUD. 224, 234 (2007) (explaining that "courts [are] reluctant to acknowledge the child's influential role…[and] have often thought of the child as a passive vessel for carrying one parent's agenda." The study's findings demonstrated that to the contrary, children often played a role independent from that of their parents).

Conclusion

Presumptive joint physical custody lacks the requisite foundation for sound public policy and errs on the side of risk instead of caution. Contrary to scientific evidence, the presumption is based on the faulty assumption that shared parenting is always in the best interest of the child, without regard to what is actually going on in the lives of the people directly affected. The most recent literature demonstrates that joint physical custody works best "in a small and distinct group of families, who self-select into [such] arrangements."[76] Consequently, the presumption provides no benefit for those families who are best suited for JPC because those are the families who are most likely to choose it without court intervention. The presumption would only operate in cases least suited for JPC because those are the cases in which violence and conflict are most entrenched. While the presumption may offer some short-term administrative ease, it can lead to long-term administrative problems:

> It stands to reason that custody decisions that are more formulaic and presumption-driven will leave litigants feeling that their individual circumstances have not been heard or considered. This result may have real consequences, including increased litigation, decreased post-decision involvement by the "losing parent," and decreased compliance with court orders.[77]

Most importantly, however, while presumptive JPC pays lip service to the best interest of the child, in actuality, it fails to account for the interests of the child altogether. In fact, the individual child does not factor into the equation at all. A presumption that ignores the safety and well-being of children, especially children who are at heightened risk of harm due to the presence of domestic violence, is bad public policy.

[76] McIntosh & Chisholm, supra n. 24 at 38.
[77] Greenberg et al., supra n. 11 at 163-64.

Representative Mele Carroll, Chair
Representative Bertrand Kobayashi, Vice Chair
House Committee on Human Services

In support of HB 2163

Thursday, February 06, 2014
9:30 AM
Conference Room 329
State Capitol
415 South Beretania Street

Aloha! My Name is Samuel Hodges and I am a father who has been through the Hawaii custody system. I am testifying in support of HB 2163 which allows children of divorces to have equal continuing physical, emotional, and meaningful contact with both parents. The concept of joint custody would really be in the best interest of the children in many cases since the child would benefit having equal access to both parents.

As a father that has gone through the Hawaii custody system, I have had much heartbreak. I had to overcome many obstacles and jump through many hoops just to ensure I could be a part of my son's life. Under the current gender neutral best interest of the child standard, I had to deal with supervised visits at PACT when my son was only 6 weeks old, submit myself to a battery of psychological test, attend multiple parenting courses, and meet with multiple judges, mediators, and custody evaluators. These requirements consumed a lot of resources and ultimately I was "cleared" to be a fit parent. What was peculiar about the process under this supposed gender neutral standard was the fact that these requirements were imposed only on the father and not the mother. The process took over 4 years in order for me to have joint custody of my son. The process involved such lengthy intense scrutiny that the process itself could discourage many fathers to pursue custody of their children. I was so frustrated that it motivated me to apply to law school in order to gain an understanding of how the family court and child custody system worked. I am currently a third year part-time student at the William S. Richardson School of Law.

Before I proceed, I would like to take this opportunity to offer my gratitude to the Hawaii Legislature for passing HB 1137 during the previous legislative session. By requiring that custody evaluators have certain qualifications and training was a positive first step. I personally had an assigned evaluator that would not have qualified under the new requirements and I questioned her professionalism in her assessments of my custody determination. This concern will now be mitigated with the passage of HB 1137 for any parent having to use a custody evaluator.

I do understand that there needs to be checks and balances in place to protect the welfare of the children. I also understand that no standard can be perfect; however, I would like to provide insight in favor of joint custody versus the current best interest of the child standard. Under the current gender neutral best interest standard it is interesting that Hawaii statistics show only 28.6% head of households represent custodial fathers. [1] This statistic, while not conclusive does

seem to signal some type of disparity under the current system. This disparity could stem from the fact that judges are afforded wide discretion in weighing all the factors under the best interest standard with a high standard of review. In other words, there are no set guidelines in determining what factors or what weight to give each factor in determining what is in the child's best interest and to overturn a decision would be very difficult. This type of untethered discretion with no clear guidelines is very easily subjected to personal biases. Several studies purport that sole physical custody are awarded to mothers upwards to 80% to 90% of the time. [2] Other studies have concluded "that mothers usually prevail in custody disputes between to fit parents."[3] In a specific study conducted to discern judicial bias, the results showed that "[m]others get primary residential custody 93.4% of the time in divorces, [f]athers in divorce get primary residential custody only 2.5% of the time, [f]athers in divorce get joint physical custody only 4% of the time, [and] [f]athers in divorce get primary or joint physical custody less than 7% of the time."[4] In the prominent Stanford study of 1,000 divorcing couples, it found that "mothers were awarded sole custody four times more" than fathers. [5] These statistics are alarming. Whether there was bias or not I personally felt that the cards were stacked against me form the very beginning of the process. By moving to a joint custody standard, it will give parents equal footing and may help mitigate some of the potential bias.

Next, studies have shown that having a father in children's lives have dramatic positive effect. Rates of criminal activity and suicide rates decrease with the increase of father participation. [6] Children with joint custody were more adapted and adjusted, developed better, and better in building and preserving relationships.[7] They were also more inclined to be good parents in the future.[8] In addition, joint custody families only had to go back to court one-half of the time when compared to their sole custody counterparts.[9] Research has also shown that fathers with joint custody were more than twice likely to be complaint with child support obligations compared to fathers who did not have custody or visitation. These statistics coupled with the rates of paternal custody don't appear to add up to the children's best interest. The statistics seem to show that more children of divorces are living with less contact with their fathers as compared to mothers, which may put them at higher risk for negative outcomes.

In closing, I believe that moving to a joint custody standard in Hawaii would be in the best interest of the children. It would level the playing field for parents and allow children equal access to them. Children need both parents. There are many fathers like myself that want to be a part of their child's life and love them like only a father could, but are discouraged with the current system. I urge you to consider the passage of SB 2163 or something similar. Thank you for your time and consideration.

Mahalo,
Samuel Hodges, Pharm.D.
1825 Aupuni Street
Honolulu, Hawaii 96817
Samhodges88@gmail.com
808-222-5010

---

[1] United States Census Bureau, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last visited June 17, 2013).

[2] Nicole M. Schave, *"Best Interests" of Minnesota: Adopting A Presumption of Joint Physical Custody* , 33 Hamline J. Pub. L. & Pol'y 165 (2011); Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. Pa. L. Rev. 921, 962 (2005); Julie E. Artis, *Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine*, 38 Law & Soc'y Rev. 769, 796 (2004); Matthew B. Firing, *In Whose Best Interests? Courts' Failure to Apply State Custodial Laws Equally Amongst Spouses and Its Constitutional Implications* , 20 Quinnipiac Prob. L.J. 223, 250 (2007).

[3] Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent* , 153 U. Pa. L. Rev. 921, 962 (2005).

[4] Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court* , 25 Fla. St. U. L. Rev. 891, 910-911 (1998).

[5] Matthew B. Firing, *In Whose Best Interests? Courts' Failure to Apply State Custodial Laws Equally Amongst Spouses and Its Constitutional Implications*, 20 Quinnipiac Prob. L.J. 223, 250 (2007).

[6]Nicole M. Schave, *"Best Interests" of Minnesota: Adopting A Presumption of Joint Physical Custody* , 33 Hamline J. Pub. L. & Pol'y 165 (2011)

[7] *Id.*

[8] *Id.*

[9] *Id.*

KLEINTOP, LURIA & MEDEIROS

A LIMITED LIABILITY LAW PARTNERSHIP

CHARLES T. KLEINTOP
TIMOTHY LURIA
DYAN M. MEDEIROS

NAOKO C. MIYAMOTO
CATHY Y. MIZUMOTO

DAVIES PACIFIC CENTER, SUITE 480
841 BISHOP STREET
HONOLULU, HAWAI'I 96813

TELEPHONE:
(808) 524-5183

FAX:
(808) 528-0261

EMAIL:
D.Medeiros@hifamlaw.com

TO: Representative Mele Carroll, Chair
Representative Bertrand Kobayashi, Vice-Chair
House Committee on Human Services

FROM: Dyan M. Medeiros
E-Mail: d.medeiros@hifamlaw.com
Phone: 524-5183

HEARING DATE: February 6, 2014 at 9:30 a.m.

RE: Testimony in Opposition to HB 2163 Relating to Parental Parity

Good morning Representative Carroll, Representative Kobayashi, and members of the Committee. My name is Dyan Medeiros. I am a partner at Kleintop, Luria & Medeiros, LLP and have concentrated my practice solely in the area of Family Law for more than fifteen (15) years. I am also a past Chair of the Family Law Section of the Hawaii State Bar Association. I am here today to testify against HB2163.

My sister and I were raised by a single father after our mother passed away. We remain close to my father to this day. As a result, I understand the value that comes from having a strong relationship with your father. I also have no gender bias when it comes to custody and visitation. I truly believe that custody and visitation awards should be based on what is in a child's best interest, not on a parent's gender.

That being said, both as a Family Law attorney and as an adult who has personally experienced being raised by an active and involved father, I simply cannot support HB2163 because I believe it is based on faulty assumptions about the application of custody and visitation laws and because I believe it prioritizes parents' interests over the interests of their children.

Many of the "facts" stated in the preamble to the bill are completely unsupported and in my experience, simply untrue. For example, the preamble states "the prevailing arrangement of residing solely with the mother has had a profound negative impact on most children's relationships with their fathers." The preamble cites no authority in support of this statement and in my experience it is not the "prevailing arrangement" that children reside solely with their mothers. Moreover, the non-custodial parent usually has significant time with the children.

The preamble goes on to claim that "The large majority of children of divorce are not spending extensive or consistent time with their fathers." Again, the preamble cites no authority in support of this statement and in my experience, this simply isn't true. Children of divorce are spending extensive time with both of their parents.

The preamble next claims, "Studies have shown that there are vast numbers of fathers who are willing, but are often denied the opportunity, to share the responsibility of raising their children." Not only are these alleged "studies" unidentified, there is no indication that these alleged "studies" have studied Hawai'i and/or its Courts.

The preamble next claims that "shared parenting" produces "better adult outcomes for children with divorced parents" and "also reduces the overall risk profile during childhood". Since there is no support provided for this statement, it is impossible to evaluate whether it is true. What I know is true from my years of practice, however, is that children do better when there is less conflict between parents something "shared parenting" does not determine. In fact, if parents engage in high conflict behavior, "shared parenting" won't help their children thrive and can actually lead to higher conflict. Based on my experience, high conflict cases often remain high conflict cases regardless of the custody and visitation arrangement present in the case. In high conflict cases, one or both parents will always be dissatisfied because of their animosity towards the other parent. Increasing or decreasing visitation won't solve the problem.

The preamble next claims various benefits supposedly associated with "shared parenting". Once again, since there is no support provided for this statement, it is impossible to evaluate whether it is true. It would seem to be a matter of common sense, however, that if parents are getting along, their children will thrive.

Finally and most importantly, the preamble claims that the purpose of HB2163 is to "help eliminate any preference in child custody decisions that unfairly favors one parent more than the other". This stated purpose, however, appears to be untrue as HRS 571-46(a)(1) currently reads,

> Custody should be awarded to either parent or to both parents according to the best interests of the child, and the court may also consider frequent, continuing, and meaningful contact of each parent with the child unless the court finds that a parent is unable to act in the best interest of the child.

There is no preference stated in the current law. If HB2163 is being proposed because of an allegation about how the law is being applied, there should be clear and specific proof provided of that allegation, not the vague and unsupported claims made in the preamble.

A close examination of HB2163 shows that it basically requires that equal physical, emotional, and meaningful contact (hereafter "equal contact") be ordered unless the Court finds that equal contact is not in the best interests of a child based upon clear and convincing evidence. Although HB2163 refers to the "best interests of a child", it is in fact virtually eliminating the best interests of a child from the Court's consideration.

Under HB2163 any deviation from equal contact can only occur if there is "clear and convincing evidence" that a deviation should occur. "Clear and convincing evidence" is an extremely high burden of proof, second only to the "beyond a reasonable doubt" burden of proof. The effect of imposing this burden of proof would be to virtually eliminate the Court's discretion to determine the best interests of a child in favor of a "one size fits all" approach that imposes "equal contact" in each and every case regardless of whether equal contact is truly in a child's best interest. It prioritizes a parent's desire for equal contact over what is in a child's best interest.

Interestingly, although the preamble talks about the benefits of "shared parenting", HB2163 actually requires equal contact, not shared parenting. Shared parenting is not the same as equal contact. Shared parenting can be achieved without a rigid requirement of equal contact. A parent who has 6 days out of 14 with his or her children does not have "equal" contact. However, he or she clearly has extensive involvement and shared parenting.

HB2163 is completely unnecessary since HRS 571-46(a)(1) does not contain a preference of any kind. If the legislature believes that HRS 571-46(a)(1) should be modified to require the Court to consider maintaining contact between both parents and children (something the Court already does), I would support the following modification of HRS 571-46(a)(1)

> Custody should be awarded to either parent or to both parents according to the best interests of the child, and the court ~~may~~ shall consider maintaining frequent, continuing and meaningful contact between the child and both parents ~~of each parent with the child~~ unless the court finds that a parent is unable to act in the best interest of the child.

Otherwise, I strongly oppose HB2163.

Thank you.

TO: Representative Mele Carroll, Chair
Representative Bertrand Kobayashi, Vice-Chair
House Committee on Human Services

FROM: Jessi L.K. Hall
E-Mail: jhall@coatesandfrey.com
Phone: 524-4854

HEARING DATE: February 6, 2014 at 9:30 p.m.

RE: Testimony in Opposition to HB2163

Good day Representative Carroll, Representative Kobayashi, and members of the Committee. My name is Jessi Hall. I am an attorney who practices Family Law. I am also a past Chair of the Family Law Section of the Hawaii State Bar Association. I am here today to testify against HB2163.

First of all, I have extreme doubts as to the validity of the information provided for in the preamble to the Bill. The preamble makes a broad assumption that a "large majority" of children reside with their mothers and have limited or inconsistent contact with their Fathers. The parties submitting the same should be required to provide details as to where they obtained these statements. I am personally aware of a large number of custody cases in the First Circuit in which both parents have significant contact with their children. Based on the cases that I am privy too, I would say that significant contact with both parents is the norm and situations as set out in the preamble are the minority.

Second, there are many factors in which the Court needs to consider in making a custody orders. Currently Hawaii Revised Statutes § 571-46(a)(1) as written encourages the Court to include in their consideration that there should be frequent and consistent contact between the child and both parents. This provision could strengthened by just modifying some of the current language. I would support HRS 571-46(a)(1) being modified as follows:

> Custody should be awarded to both or either parent according to the best interests of the child, and the Court ~~may~~ shall consider maintaining frequent, continuing and meaningful contact between the child and both parents ~~of each child with the parent~~ unless the Court finds that a parent is unable to act in the best interest of the child.

Finally, the biggest issue with the proposed language of HB2163 is the use of the term "equal". If parties removed labels and focused on the schedule that works best for the child and both parents based on their

schedules, location of residence, and location of school then the best possible outcome would be reached for the child. Use of the word "equal" creates certain expectations. Parties will think that they won/loss (depending on the side that they are on) if the schedule is not equal down to the day (in some cases down to the hour). Most of the time a truly "equal" schedule is difficult for all involved, even intact families are incapable of doing everything on an "equal" basis. When parties get fixated on the term they are unable to see that something different may work better for all.

It is for the above reasons that I must write in opposition of HB2163 as it is currently written. Thank you for this opportunity to testify.

mitsuyama + rebman
DIVORCE AND FAMILY LAW

737 Bishop Street, Ste 1450
Honolulu, Hawaii 96813
tel 808 545 7035
mitsuyamaandrebman.com

To: Committee on Human Services
Rep. Mele Carroll, Chair

From: Alethea K. Rebman & Dyan K. Mitsuyama
Email: info@mitsuyamaandrebman.com
Phone: 545-7035

Re: Testimony in Opposition to H.B. 2163, Relating to Parental Parity
Hearing: Thursday, February 6, 2014 at 9:20 a.m.
Place: Conference Room 329

Good afternoon, Chair and members of the Committee. We are partners at Mitsuyama & Rebman LLLC, a law firm concentrating in family law matters.

We present this testimony in opposition to H.B. No. 2163, which is a major proposed overhaul to our current custody law.

1. Section 1 presents a narrow and one-sided view of the research in the field. The research does not support the strong statements contained in this preamble.
    a. For example, "Unfortunately, the prevailing arrangement of residing solely with the mother has had a profound negative impact on most children's relationships with their fathers" is mistaken on almost every level. The prevailing arrangement post-contested custody case is not children residing solely with their mother. And there is no evidence provided (or, to the best of our knowledge, existing) that our current custody awards have had a negative effect on "most" children's relationships with their fathers.
    b. In contrast to the language given in the proposed bill, for instance, the opinion of a recent Washington case is that joint custody arrangements should "encouraged primarily as a voluntary alternative for relatively stable, amicable parents…As a court-ordered arrangement imposed upon already embattled and embittered parents…it can only enhance familial chaos." It is important to note that "relatively stable, amicable parents" are not generally in family court, calling into question whether mandated "equal" time and/or access is appropriate.
    c. The language in the bill also fails to account for the reality of same-sex parenting couples, whose numbers can only grow.

2. The amendment to HRS § 571-46 proposed in Section 2 removes judicial discretion, which is critical in family cases. It may also have the unintended consequence of forcing the judge to order that a parent have equal contact even if that parent does not wish it, or it has never existed before.

3. No law should remove the need for a party to prove the best interests of a child when the party petitions the court for a certain custody arrangement. There can be no good presumption of the best interests of the child, as the range of possible facts for each individual family and each child is so wide-ranging.

It appears that the presumption is that every family coming to Family Court consists of (1) two parents in the same home; and (2) that each parent participated equally in the duties of raising the child. This is surely not the case.

Thank you for the opportunity to submit testimony in opposition to H.B. No. 2163.

Dara Carlin, M.A.
Domestic Violence Survivor Advocate
881 Akiu Place
Kailua, Hawaii 96734
(808) 218-3457

February 6, 2014

Good Morning Representatives and thank you for this opportunity to provide testimony IN STRONG OPPOSITION of HB 2163.

While the intent and language of HB 2163 sounds good in the spirit of increasing post-divorce harmony and the best interests of the children, **this is an extremely dangerous piece of legislation that is sure to increase the mortality rate of domestic violence survivors and their children** .

In 2011, the **Department of Justice** released a comprehensive 175 page report authored by Dr. Daniel Saunders entitled ***"Child Custody Evaluators' Beliefs About Domestic Abuse Allegations"*** that explains in detail why legislation such as HB 2163 is so harmful. The entire report can be found here:

http://www.collaborativelawyersflorida.com/Library/111031-Custody-Evaluators-Beliefs-About-Domestic-Abuse-Allegations.pdf

but for this hearing's purposes, I will highlight some of the conclusions and determinations made from the DOJ report:

- **Several studies reveal that, in many custody-visitation proceedings, domestic violence remains either undetected or is not documented when it is detected** (e.g., Araji & Bosek, 2010; Davis, O'Sullivan, Fields, Susser, 2011; Johnson, Saccuzzo, & Koen, 2005; Kernic, Monary-Ernsdorff, Koepsell, & Holt, 2005; Voices of Women, 2008).

- **Although the majority of professionals reported knowing about post-separation violence, screening, and assessing dangerousness, judges, evaluators, and private attorneys reported the lowest rates of such knowledge.**

- **Of particular concern was the relatively high percentage of evaluators who recommended that the victim receive physical custody, but that legal custody be shared by the parents.** Evaluators must understand **the potential negative implications of this arrangement, given the likelihood that many abusers will use the arrangement to continue their harassment and manipulation through legal channels** (Bancroft & Silverman, 2002; Jaffe, Lemon, & Poisson, 2003; Zorza, 2010).

- The majority of states include a "friendly parent" factor that must be considered in

custody determinations (Zorza, in press; 2007). Parents are expected to facilitate a good relationship between the children and the other parent. Despite a reasonable reluctance to co-parent out of fear of harm to themselves or their children (Hardesty & Ganong, 2006), survivors may end up being labeled "unfriendly" or "uncooperative," thereby increasing the risk of losing their children (American Psychological Association, 1996). **The friendly-parent standard works against survivors because any concerns they voice about father-child contact or safety for themselves are usually interpreted as a lack of cooperation** (Zorza, 1996).

- **Survivors are therefore placed in a no-win situation**: If they do not report abuse, then protections for them and solid grounds for custody are not available; yet reporting the abuse may be viewed as raising false allegations in order to gain advantage in divorce proceedings (Dore, 2004).

- **In practice, friendly-parent provisions, together with statutes presuming joint custody, tend to override presumptions against awarding joint legal custody with the abuser** (Morrill, Dai, Dunn, Sung, & Smith, 2005).

- Further compounding victims' experiences are contradictory messages from criminal courts, family courts, child protection investigations, and visitation services (Hester, 2009). For example, criminal courts support victims' testimony about the abuse, but in family court the same testimony might be interpreted as non-cooperation. **To overcome these inconsistencies some states have introduced integrated DV courts** (Aldrich & Kluger, 2010).

- **Research has documented the ongoing and sometimes escalating dangers faced by victims and their children after they leave violent relationships.** Homicidal threats, stalking, and harassment affect as many as 25 to 35 percent of survivors who have left a violent relationship (e.g., Bachman & Saltzman, 1995; Hardesty & Chung, 2006; Tjaden & Thoennes, 2000a).

- Domestic abuse survivors and their children may experience serious harm as a result of family court decisions.

- Offenders may be able to continue their abuse of their ex-partners and children due to unsupervised or poorly supervised visitation arrangements (Neustein & Lesher, 2005; Radford & Hester, 2006); sole or joint custody of children may be awarded to a violent or potentially violent parent rather than a non-violent one; and mediation may be recommended or mandated in a way that compromises victims' rights or places them in more danger. **Tragically, in some cases post-separation contacts end in the homicide of a mother and/or her children** (Saunders, 2009; Sheeran & Hampton, 1999).

Representatives, I respectfully urge you to base your vote on the facts and research rather then the sentiment and appeal of HB 2163. Thank you again for the opportunity to provide testimony in this matter.

House Committee on Human Services (HUS)

Thursday, February 6, 2014 9:30 AM, State Capitol CR 329

Testimony of Marilyn M Moore in Strong Support of **HB 2163**

Relating to Parental Parity.

Dear Chair Mele Carroll and Members of HUS,

Thank you for the opportunity to testify in support of HB 2163. I strongly support retaining shared custody by both parents in the lives of children who are the product of divorce. Studies have shown most children with the continued influence of both parents not only become better adults, but also benefit by overall risk-reduction profile during childhood.

Often children feel they are responsible for the break-up of their home. When lost or diminished contact with one parent is added to this, the child's future relationships almost invariably suffer. Studies show that single parent homes produce more drug-related problems, more school drop-outs, more pregnant teens, creating more dependence on social programs. This pattern has, unfortunately, been identified in the last decades as dependence on social programs has grown to approximately 48 percent of the United States population.

Shared custody has been known to frequently reduce or eliminate the adversarial relationship between divorced parents, thus enhancing each parent's relationship with the child as well as breaking the cycle of anger and retribution. Even if this does not happen, studies show that retention of a child's relationship with both parents clearly leads to a more well-balanced adult.

Thank you for taking the time to read my testimony.

LATE

Committee on Human Services
February 06, 2014 – 9:30 AM
State Capitol, Room 329
Su Kim
Testimony in support of H.B. No. 2163

Chair Carroll and members of the committee,

I am in strong support of H.B. No. 2163 relating to parental equality in the case of separated parents. I believe that a system built to favor mothers over fathers is a blatant violation of parental rights.

Studies have shown that the absence of or limited contact with either mothers or fathers presents higher risk of future delinquent behavior, and can have adverse effects on the emotional and mental growth of the child.

In some cases, this inequity creates a bias towards one parent purely based on time spent with said parent. While this amendment may not completely resolve these issues, it will be a step in the right direction towards fixing the unfortunate side effects of an unfair system.

As a child of separated parents, I can tell you that any time that I could have spent with my father would have, more than likely, helped with some of the personal, mental, and emotional problems that I faced growing up. This bill will help prevent stories like mine in which the lack of my father's presence affected me and my sibling's perception of self-worth.

I imagine many children being raised by a single mother may feel they have no one else to turn to. Having a father figure as a stable part of the child's life will provide the support and guidance they need in these times.

Some fathers may choose not to pursue as much parental custody, but I believe that many are faced with an uphill battle to receive the rights that mothers are handed without a question.

Please vote in favor of this bill and support parental equity. Thank you.

Su Kim

LATE

Committee on Human Services
February 06, 2014 – 9:30 AM
Testimony in favor of H.B. No. 2163

Honorable Chair and board members,

My name is Steven Nordell and I strongly advise the passing of H.B. 2163. The passing of this bill is a much needed change, and progress towards an unbiased system.

The current law is only one of the many cogs of a machine that has unfortunately been geared towards favoring mothers in the case of custody and parental time spent with children of divorce.

While the purpose of the laws of family court are supposed to be fair and balanced, and for the best interest of the child, many times judges default to sole custody being awarded to mothers unless presented with empirical evidence of risk to the child. Even then, that evidence may be nothing in the face of cognitive dissonance and media indoctrination that the system itself has embedded into the general population.

Furthermore, the existence of cases in which custody was awarded to the father and resulted in harm of the child/children is far too rare to justify this gender bias and renders all attempts by loving, caring, and nurturing fathers to gain equal rights impotent. Additionally, this awards leverage to be used against fathers, in the event of a parental dispute and unfairly cripples what little parental rights fathers have.

All in all, there should be equality in all aspects of parenting. Parental desertion, abuse, and unfairness are a reality, but that does not justify nor excuse the lack of attempts to make every improvement possible towards a fair and optimal system.

Steven Nordell

LATE

To: Chair Mele Carroll &
Members of Human Services Committee
In Support of HB2163

Hello Chair Mele Carroll and member of the Human Services committee,

As a father who has been a victim of the State of Hawaii's legal system that automatically gives fathers less custodial & visitation rights to their child, I support HB2163. I wish to tell you the reasons why I support HB2163. A father who wants/willing to care for his child should be given the equal opportunity to do so.

In most situations, fathers get shorthanded from the very beginning. Being in a marriage has the advantage of shared income, two people sharing the financial living costs and one. Going into a divorce, fathers are expected to find a new living space while paying child support, his own bills and personal needs. Furthermore, on top of having lost my home and simple pleasures, I got one third of my income deducted while still spending my personal money to buy food & gifts for my daughter.

Most of the laws written regarding custody requirements are based on the needs of the mothers and child in absence of a father. If the fathers are willing to share as many responsibility as needed, most of the needs of the child are made with less stress on the mothers. Speaking from experience, most of the problems between mother and father, after separation or divorce, is based on following court guidelines and financial responsibility made on the fathers by the courts.

Hardships that fathers must withstand are not taken into enough consideration while negotiations, in regards to custody & child support, are being made. I was ridiculed by my past in-laws and common friends for supposedly not caring for my child when I was prevented by the courts from seeing my child. I was only given two "supervised" one hour visitation and four hours every other weekend. Despite my pleas to the mother of my daughter for more visitation, she hid behind the guise of following the courts guidelines. I am an educated young man with a steady job who wants nothing more than to be with my daughter for as much time as I can possibly get. I make every sacrifice, financial & personal, that will benefit my daughter's future, yet I'm expected to walk the same path as an irresponsible father who didn't want a child when nothing could be further from the truth. I was held to the same requirements and given the same treatment as others who want and do less for their children as I. I do not believe this is right, to hold every father to the same guidelines made for a lesser individual. I do not expect to be given less responsibility for my willingness but I do think fathers who request more custody, if proven to be able fathers, should be given opportunity to do so.

I feel that my daughter is not being given the same amount of care as if there was two parents willing to make the time. As for the mother of my daughter, I do not doubt her love, but I do see that since she has to care for our daughter much more, on her own, her level of tolerance and understanding is lower due to emotional exhaustion. With two parents, taking turns giving each other a break from the constant supervision needed to care for our toddler will lead to the best outcome for all three of us. Emotional, physical and financially better for all. I am sure that there are some fathers who are irresponsible but I believe that more often than most, willing fathers will do what's best for their child. Forward motion in society is not possible without faith in humanity.

Sincerely
Christopher Manabat