

CHILD CUSTODY

BACKGROUND AND POLICY IMPLICATIONS OF A JOINT CUSTODY PRESUMPTION



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Child Custody

Background and Policy Implications of a Joint Custody Presumption

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DEPARTMENT OF LEGISLATIVE SERVICES
OFFICE OF POLICY ANALYSIS
MARYLAND GENERAL ASSEMBLY

Warren G. Deschenaux
Director

December 8, 2011

The Honorable Thomas V. Mike Miller, Jr., President of the Senate
The Honorable Michael E. Busch, Speaker of the House of Delegates
Members of the Maryland General Assembly

Ladies and Gentlemen:

This report, *Child Custody: Background and Policy Implications of a Joint Custody Presumption*, was prepared in response to continuing legislative interest in creating a presumption of joint custody as the standard for courts to apply when making child custody decisions. The report discusses the current law in Maryland, other states' laws, the findings of a recent study by a Minnesota commission convened to examine the issue, and arguments for and against creating a presumption of joint custody.

The report was written by Jennifer K. Botts and Lauren C. Nestor. Susan H. Russell reviewed the final report.

I trust that this information will be of assistance to you.

Sincerely,

Warren G. Deschenaux
Director

WGD/SHR/ckt

Contents

Introduction.....	1
Maryland Law	1
Legislative Initiatives.....	4
Other States.....	6
Minnesota Study Group on Joint Custody Presumption.....	7
Conclusion	11

Child Custody: Background and Policy Implications of a Joint Custody Presumption

Introduction

Under current law, Maryland courts apply the “best interest of the child” standard when making child custody decisions. In recent years, the General Assembly has been asked to consider a controversial legislative proposal to change this standard to a presumption of joint custody. This paper will discuss the state of the current law in Maryland, legislative initiatives to change the current law to a presumption of joint custody, and policy considerations gleaned from proponents and opponents of a presumption of joint custody. Additionally, the paper will provide a brief review of the status of the law on presumptive joint custody in other states and a description of the findings of a recent study completed by a commission convened in Minnesota to determine the impact of adopting a joint custody presumption in that state.

Maryland Law

Historical Perspective

Historically, when a dispute over custody of a minor child arose between the parents, the right of the father was considered superior to that of the mother. As the Maryland Court of Appeals stated in *Carter v. Carter*, “as between the mother and father, the primary right to the custody of the children is in the father, since it is his duty to provide for his children’s protection, maintenance, and education.” *Carter v. Carter*, 156 Md. 500, 505 (1929). The father’s right to custody was absolute, regardless of the welfare of the child. See *McAndrew v. McAndrew*, 39 Md. App. 1, 4 (1978).

As the notion of the child as parental property faded, approaches to child custody were modified. In 1929, the Maryland legislature passed a law providing that “[t]he parents shall have equal powers and duties, and neither parent has any right superior to the right of the other concerning the child’s custody.” (Chapter 561 of the Laws of Maryland of 1929). Despite this proscription on preferring either party in a custody dispute, Maryland courts recognized a “maternal preference,” which afforded a preference to the natural mother in cases involving a young and immature child. The Court of Appeals described the maternal preference by stating, “[s]ince the mother is the natural custodian of the young and immature, the custody of a child is ordinarily awarded to her, at least temporarily, in legal contests between parents when other things are equal, even when the father is without fault, provided the mother is a fit and proper person to have custody.” *Hild v. Hild*, 221 Md. 349, 357 (1959). In *Cooke v. Cooke*, the Court of Special Appeals clarified that the maternal preference was to be applied only for the limited

function of serving as a tie-breaker when all else was equal, and that the child's best interest was the measure by which the issue of custody was to be decided. *Cooke v. Cooke*, 21 Md. App. 376, 380 (1974).

In 1972, the Maryland General Assembly passed a proposed constitutional amendment to add a new Article 46 to the Declaration of Rights of the Maryland Constitution, known as the Equal Rights Amendment, which provides that "[e]quality of rights under the law shall not be abridged or denied because of sex." The amendment was ratified by the voters at the 1972 general election. Against this backdrop, in 1974, the legislature abolished the maternal preference by passing a law explicitly stating that "in any custody proceeding, neither parent shall be given preference solely because of his or her sex." (Chapter 181 of the Laws of Maryland of 1974).¹

Modern Principles

Best Interest of the Child

Currently, Maryland courts resolve custody disputes based on a determination of "what is in the child's best interests." In a custody dispute between the child's parents, the court examines numerous factors and weighs the advantages and disadvantages of the alternative environments. The criteria for judicial determination includes, but is not limited to (1) the fitness of the parents; (2) the character and reputation of the parties; (3) the desire of the natural parents and any agreements between them; (4) the potential for maintaining natural family relations; (5) the preference of the child, when the child is of sufficient age and capacity to form a rational judgment; (6) material opportunities affecting the future life of the child; (7) the age, health, and sex of the child; (8) the residences of the parents and the opportunity for visitation; (9) the length of the separation of the parents; and (10) whether there was a prior voluntary abandonment or surrender of custody of the child. See *Montgomery County v. Sanders*, 38 Md. App. 406 (1977).

Statutorily, the court's discretion to determine custody or visitation is limited if there is evidence of abuse or neglect. If the court has reasonable grounds to believe that a child has been abused or neglected by a party in a custody or visitation proceeding, the court must determine whether the abuse or neglect is likely to occur if custody or visitation rights are granted to the party. Unless the court specifically finds that there is no further likelihood of child abuse or neglect by the party, the court must deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well being of the child. (Annotated Code of Maryland, Family Law Article, § 9-101). Similarly, in a custody or visitation proceeding, the court must consider evidence of abuse by a party against the other parent of the party's child, the party's spouse, or any child residing within the party's household, including a child other than

¹ This provision was later repealed by the revision of the Family Law Article in Chapter 296 of 1984. According to the Revisor's Note, the provision was "deleted as unnecessary in light of the Maryland Equal Rights Amendment."

the child who is the subject of the custody or visitation proceeding. If the court finds that a party has committed abuse against any of these individuals, the court must make arrangements for custody or visitation that best protect the child who is the subject of the proceeding and the victim of abuse. (Annotated Code of Maryland, Family Law Article, § 9-101.1).

Joint Custody

Traditionally, when one parent was granted custody of a minor child, the other parent would generally be awarded visitation rights. Prior to 1984, joint control of a child was denounced as an arrangement “to be avoided whenever possible, as an evil fruitful in the destruction of discipline, in the creation of distrust, and in the production of mental distress in the child.” *McCann v. McCann*, 167 Md. 167 (1934). However, significant societal changes caused Maryland courts to reexamine those views. In 1984, the Court of Appeals first recognized and applied the concept of “joint custody.” See *Taylor v. Taylor*, 306 Md. 290 (1986). The court held that a circuit court may, in the exercise of its general equity powers, order joint custody of minor children. *Taylor* at 301. This authority is codified in statute, which provides, “[i]f the parents live apart, a court may award custody of a minor child to either parent or joint custody to both parents.” (Annotated Code of Maryland, Family Law Article, § 5-203(d)(1))

The *Taylor* court explained that, within the meaning of “custody” are the concepts of “legal” and “physical” custody. Legal custody means the right and obligation to make long range decisions involving the education, religious training, discipline, medical care, and other matters of major significance concerning the child’s life and welfare. Joint legal custody means that both parents have an equal voice in making those decisions, and that neither parent’s rights are superior to the other. Physical custody means the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody. Joint physical custody is, in reality, “shared” or “divided” custody, with the child in the physical custody of each parent for periods of time that may or may not be on a 50/50 basis. *Taylor* at 296-297. The court noted that with respect to physical custody, for practical purposes, there is no difference between the rights and obligations of a parent having temporary custody of a child pursuant to an order of shared physical custody and one having temporary custody pursuant to an award of visitation. *Taylor* at 297.

The court emphasized that in any child custody case, the paramount concern is the best interest of the child. In a case in which the court is considering an award of joint custody, the court must consider the factors set forth in the *Sanders* decision, and in addition, a range of factors particularly relevant to a determination of joint custody, including (1) the capacity of the parents to communicate and reach shared decisions affecting the child’s welfare; (2) the willingness of the parents to share custody; (3) the fitness of the parents; (4) the relationship established between the child and each parent; (5) the preference of the child; (6) the potential disruption of the child’s social and school life; (7) the geographic proximity of parental homes; (8) the demands of parental employment; (9) the age and number of children; (10) the sincerity of the parents’ request; (11) the financial status of the parents; (12) any impact on state or federal

assistance; (13) the benefit to the parents; and (14) any other factors the court considers appropriate. *Taylor* at 304-311.

The *Taylor* court emphasized that the single most important factor in the determination of whether an award of joint legal custody is appropriate is the capacity of the parents to communicate and to reach shared decisions affecting the child's welfare. The court further stated that rarely, if ever, should joint legal custody be awarded without a record of mature conduct on the part of the parents that demonstrates an ability to effectively communicate with each other concerning the best interest of the child. In the absence of such a record, joint legal custody should only be awarded if it is possible to make a finding that there is a strong potential for such conduct in the future. The court noted that there is nothing to be gained and much to be lost by conditioning the making of decisions affecting a child's welfare upon the mutual agreement of parties when there is evidence of an acrimonious relationship between the parties and a failure of rational communication. The court further stated that even in the absence of bitterness or inability to communicate, if the evidence demonstrates that the parents do not share parenting values and each insists on adhering to irreconcilable theories of child rearing, joint legal custody is not appropriate. *Taylor* at 305.

Legislative Initiatives

Presumption of Joint Custody

In recent years, a number of unsuccessful measures have been introduced to create a statutory preference for or a rebuttable presumption of joint legal and physical custody. (*See, e.g.,* HB 1158 of 2003, HB 1217 of 2004, HB 1327 of 2007, SB 1047/HB 925 of 2010, and HB 950 of 2010). Most recently, during the 2011 legislative session, Senate Bill 909/House Bill 1132 (both failed) would have provided:

In an initial child custody proceeding, whether pendente lite or permanent, involving the parents of a child, there is a rebuttable presumption that:

- (1) joint legal custody is in the best interest of the child; and
- (2) physical custody to each parent for approximately equal periods of time is in the best interest of the child.

Policy Considerations

Arguments in Favor of Presumptive Joint Custody

Those in favor of presumptive joint custody argue that it preserves connections and allows a child to enjoy a meaningful relationship with both parents, which can reduce the

traumatic effects on the child that can result from the dissolution of the parents' marriage. They argue that joint custody is the most natural arrangement for a post-divorce family because it resembles the intact family as closely as possible, allowing both parents to participate equally in the lives of their children.

Additionally, proponents assert that joint custody is an important symbolic statement that serves to encourage continued involvement of the nonresidential parent, rather than relegating that parent to the second class status of a "visitor" in the life of the child. The *Taylor* court observed that joint custody may have a salutary effect on the parents because their improved self-image as parents is likely to redound to the ultimate benefit of the child. *Taylor* at 311.

Joint custody is also perceived as a solution to the problem of child support. Proponents state that many noncustodial parents under sole custody arrangements tend to withdraw following divorce, which results in a corresponding failure to pay child support. It is believed that sharing custody may prompt increased financial support of children.

Finally, proponents argue that in cases in which both parents are fit to provide for the children, the judicial process of determining which parent should receive sole custody is time-consuming, difficult, and uncertain. Additionally, many proponents, particularly fathers, perceive an inherent bias by judges in favor of the mother in custody determinations. They assert that joint custody would level the playing field and provide more certainty to litigants.

Arguments Against Presumptive Joint Custody

On the other hand, those opposed to amending the law to add a presumption of joint custody advance several arguments. First, opponents state that joint custody is already a frequent outcome in child custody cases and that therefore a presumption is unnecessary. The Women's Law Center completed a comprehensive study of divorce and custody cases filed in Maryland in fiscal 2003. See *Families in Transition: A Follow-Up Study Exploring Family Law Issues in Maryland*. The research sample included 1,268 cases that involved custody issues. Of the total number of cases in the sample, more than half (55%) resulted in some form of joint legal custody (joint legal with physical custody to mother, joint legal with physical custody to father, and joint legal and physical custody).

Second, opponents assert that a presumption of joint custody would negate the inquiry trial courts are required under the *Taylor* decision to make regarding the capacity of the parents to communicate and reach shared decisions regarding the child's welfare. Because joint legal custody requires frequent contact between divorcing parties, the parents must demonstrate a high level of cooperation and commitment to make a joint custody arrangement successful. Opponents argue that if parents are forced to negotiate decisions when they are unable to cooperate, the tensions between them are likely to be exacerbated and the opportunity to develop a long-term constructive relationship may be compromised. Additionally, and most significantly, according to opponents, the *Taylor* standard recognizes that foisting joint custody on warring parents can create unnecessary suffering for children who are the subject of endless

fighting between the parents. Thus, opponents believe that presumptive joint custody would make it more likely that joint custody would be imposed in inappropriate situations.

Additionally, while opponents acknowledge that joint custody can be an ideal arrangement in cases in which the parties agree to it, they contend that when joint custody is imposed by the court, parties return to court more frequently to litigate such matters as school selection, medical and mental health treatment, and extracurricular activities. According to the 2003 data by the Women's Law Center noted above, cases in which joint legal and/or physical custody were imposed by judicial intervention resulted in more subsequent litigation than when the parties agreed to it. Specifically, when the court ordered joint legal and physical custody, or when it ordered joint legal custody and primary physical custody to the fathers, subsequent litigation rates were the highest at 19% and 27%, respectively. According to opponents, constant litigation subjects the child to trauma and uncertainty as the child does not know what is going to happen with respect to a given issue.

Opponents also argue that, while equal sharing of parental decision making and equal sharing of a child's time with both parents is an appealing concept, placing a presumption of joint custody in the law would take the focus off of the current "best interest of the child" standard and instead inappropriately refocus child custody decisions on the rights of the parents. They assert that in hotly contested custody disputes, often the notion of "equality" for parents is in direct opposition to the best interest of the child. Opponents stress that the current "best interest of the child" standard appropriately recognizes that each custody case is unique and that no single custody arrangement should be granted superior status under the law.

Advocates for victims of domestic violence argue vehemently against placing a presumption of joint custody in the law. According to advocates, joint custody orders allow physical abuse and emotional intimidation of domestic violence victims to continue by forcing victims to negotiate and compromise with their batterers. They assert that abusers will use joint custody, not as a way to co-parent, but as a way to gain ongoing access to the victim as a means of continued control and domination of the victim. Joint custody orders thus place victims in danger of further violence. The Maryland Network Against Domestic Violence, in written testimony before the House Judiciary Committee regarding House Bill 950 of 2010 stated, "HB 950 is rooted in the disappointment and frustration that anyone who has ever dealt with the heartbreak of a child custody dispute has experienced. By substituting what amounts to a presumption of joint legal and physical custody as the solution to the problems of custody, we read HB 950 as an ultimately futile attempt to push parents into a joint custodial situation when joint custody may be harmful to a child. Often, joint legal custody is the worst solution in custody disputes, particularly in cases related to abuse."

Other States

A review of statutes found seven states (Florida, Idaho, Minnesota, New Mexico, Texas, West Virginia, and Wisconsin) and the District of Columbia with a presumption that joint

custody is in the best interest of the child. An additional eight states (Alabama, California, Connecticut, Mississippi, Nevada, New Hampshire, Tennessee, and Vermont) have a presumption that joint custody is in the best interest of the child only if the parents agree. Two states (Maine and Michigan) require courts to award joint custody if the parents agree to it. Sixteen states (Alabama, Alaska, Arizona, Arkansas, California, Florida, Hawaii, Idaho, Iowa, Louisiana, Minnesota, Mississippi, Nevada, Oklahoma, Oregon, and Wisconsin) and the District of Columbia have rebuttable presumptions that joint custody is not in the best interest of the child if there have been allegations of domestic violence. Finally, two states (Texas and Washington) prohibit courts from awarding joint custody if there is a history of domestic violence.

Minnesota Study Group on Joint Custody Presumption

Background

A 2008 law in Minnesota required the state court administrator to convene a study group to consider the potential impact of adopting a presumption of joint physical custody. The group was directed to examine the potential positive and negative impact on parents and children, the fiscal impact, and the experiences of other states. The group was also required to consider data and information from academic and research professionals. Minnesota currently has a “best interests of the child” standard and courts consider specified factors set forth in statute to make a custody determination. If joint physical or joint legal custody is sought, Minnesota also considers the ability of the parents to cooperate, plans for dispute resolution, whether sole custody would be detrimental to the child, and whether there has been domestic violence in the relationship. The state has rebuttable presumptions that each parent is entitled to receive at least 25% of the parenting time for the child and that upon the request of either or both parties, joint legal custody is in the best interest of the child. However, there is also a rebuttable presumption that joint legal or joint physical custody is not in the best interest of a child if there has been domestic abuse. Although the report states that there is no statutory preference for or presumption for or against joint physical custody, it notes that Minnesota has historically preferred not to award joint physical custody due to concerns about the inability of parents to cooperate and resolve disputes as well as the lack of routine and stability for children.

The report noted that the lack of information concerning child custody outcomes was a major obstacle to the group’s ability to make a definitive recommendation. As is the case in Maryland, data is not currently collected on information such as the rate at which joint physical custody is ordered or the frequency of modification and enforcement proceedings associated with sole versus joint physical custody outcomes. Although this lack of information limited the group’s abilities, the group attempted to fulfill its responsibilities by first drawing on its personal and professional experience to identify strengths and weaknesses of the current custody system. Perceived strengths of the current custody system identified by the group included the individualized consideration of each child’s situation and needs that the “best interest” standard

promotes and the fact that parents can choose joint custody. However, group members acknowledged that because of the individualized application, custodial outcomes are difficult to predict and the process is viewed by some parents as involving too much judicial discretion. The group also noted that some parents in the court system encounter financial, cultural, and linguistic barriers that may limit participation.

Testimony

The group also solicited input from professional groups and the public on the potential ramifications of adopting a joint physical custody presumption, which were similar to the traditional policy arguments advanced in Maryland.

The group heard testimony from a psychologist who advised that parents who are best suited for a joint physical custody arrangement (*e.g.*, parents with good communication skills and the ability to put the needs of their children first) will do so without the need of a legal presumption. It was also reported that a presumption of joint physical custody could increase the number of children exposed to parental conflict because parents would likely be required to communicate and negotiate more frequently in a shared parenting arrangement. Finally, the psychologist advised that parents who had a child together but were never married may lack a history of trust, communication, and joint decision making that are critical in joint custody arrangements.

Other testimony focused on the impact of joint physical custody in cases involving domestic violence. Presenters from the Battered Women's Justice Project advised that contested custody cases often involve allegations of domestic violence. The study group was advised that abusive behavior sometimes includes threats to harm the children in order to control or punish the victim, and that this behavior may continue after separation or divorce. The group heard testimony that statutory exceptions to joint custody presumptions for cases involving domestic violence were not effective for many reasons, including the fear of retaliatory violence, victims' unawareness of the dynamics of domestic violence and its impact on children, and the lack of evidence in many domestic violence cases.

Testimony also indicated that California adopted a joint physical custody presumption in 1979, but in 1994 amended that statute to make the presumption applicable only in cases in which the parties agree to joint physical custody. A survey of California family court judges concluded that two-thirds of the judges determined that joint custody imposed under a presumption led to mixed or worse results for children due to lack of parental cooperation, instability, ongoing parental conflict, and logistical difficulties. Finally, a study of 1,000 joint custody families found that nearly half of the families did not maintain the arrangement over time, with children experiencing "informal custodial drift" and transitioning to living predominately with one parent.

Presenters also attempted to analyze the implications of adopting a joint physical custody presumption for fathers. One presenter testified that under a joint physical custody arrangement,

fathers might have more opportunity for a meaningful and consistent role, and could therefore be encouraged to stay more involved in their children's lives.

Additional testimony focused on the logistics of an award of joint physical custody. While some parents may choose to remain in the same general area, other parents might wish to relocate. Even parents who remain in close proximity to one another might be in different school districts. There were also concerns raised that the dynamics of joint physical custody may require more flexibility with schedule changes, which may not always be possible for both parents due to employment or other responsibilities. More frequent travel between parents may not be possible for some parents who lack reliable transportation. The group also considered testimony regarding the fiscal impact of an award of joint physical custody. Under a joint physical custody award, both households would likely have increased costs for transportation. Joint physical custody may also affect eligibility for public benefits that are conditioned on having a qualifying child for minimal time periods and may complicate the determination of eligibility for the Earned Income Tax Credit.²

Academic Findings

The group also examined academic literature relating to joint custody. However, the group was cautioned that no one study has been definitive. Two articles of particular interest were reports published in 1999 and 2006 summarizing research findings from various studies.

The most recent article examined by the group, Joan B. Kelly, *Children's Living Arrangements Following Separation and Divorce; Insights from Empirical and Clinical Research*, 46 FAM. PROCESS 25 (2006), summarized findings from research on various aspects of children of divorce. The following are some of the findings reported in the article:

- Parenting agreements that were reached through mediation instead of the adversarial process resulted in more frequent joint legal custody agreements with clearer details of joint decision making.
- Frequent and regular contact with fathers in low-conflict situations was associated with more positive adjustment for boys and younger children. However, when intense conflict persisted between parents, poorer adjustment was measured.
- When parents shielded their children from conflict, children with high conflict parents did not differ from low-conflict parents. Although the results have not been empirically studied, Kelly noted a trend for parents to use neutral transition sites such as schools or day cares in order to shield children from potential conflict during the exchange process.

² Under federal law, a qualifying child must live with the parent for more than six months of the year in order to claim the credit. Even if a child is living in an equally shared physical custody arrangement, both parents cannot claim the credit.

- Reduced father involvement after divorce was linked to conduct problems, particularly for boys, but when both parents remained actively involved and provided authoritative parenting, the boys had no more delinquent behaviors than those in married families.
- Increased parental involvement was associated with better adaptive behavior, communication, and socialization skills in young children.
- Joint physical custody was found to be more beneficial to children when there was little conflict, but high levels of conflict suppressed the benefits.
- Fathers who were never married to their child's mother reported more maternal interference, less time, and fewer overnights with their children.
- Conflict between most parents is reduced two to three years after the divorce, but 8-20% of parents remain in chronic high conflict. However, parents with serious personality disorders, substance abuse problems, and mental illness are disproportionately represented among these parents.
- A high level of parental conflict over time results in less parental involvement and more difficulties in the father-child relationship.
- When adolescents with a good father-teen relationship at separation continued to have frequent contact with their fathers, the young adults did not differ from those whose parents had not divorced.
- In a study of college students with divorced parents, more than half of them indicated they wanted more time with their fathers.
- Closeness to fathers increased incrementally with increases in father-child time, as did college financial support.

The next article, Diane N. Lye, *What the Experts Say: Scholarly Research on Post-Divorce Parenting and Child Well-being*, Report to the Washington State Gender and Justice Commission and Domestic Relations Commission (June 1999), also provided a general summary of scholarly research. Among the author's findings was a lack of evidence that any particular post-divorce residential schedule was most beneficial for children. The author emphasized that while there appeared to be a clear consensus among researchers that divorce could have serious consequences, not all children experience problems. Several factors were shown to influence how well or poorly children fared after a divorce, including adequate income, the functioning of the primary residential parent, and the quality of the neighborhood.

This report also noted that parental conflict affected findings on child well-being following a divorce. One study found that among boys, high levels of contact with a nonresidential father was beneficial in low-conflict families, but harmful when accompanied with high levels of conflict. Another study found that adolescents with dual residency arrangements had enhanced well-being in low conflict families, but reduced well-being when there were high levels of conflict.

The report also noted that there was generally agreement among researchers supporting the notion that more frequent child-nonresidential parent contact is associated with improved child support compliance (*i.e.*, fathers who see their children more often are more likely to pay the full amount of child support). The prevailing theories to explain this are (1) parents are more willing to pay child support when they are involved with their children; (2) parents want to see that their child support is being spent appropriately, therefore they increase contact; and (3) characteristics that predispose payment also predispose involvement.

Recommendations of Study Group

The group ultimately made no conclusive recommendation either for or against a presumption of joint physical custody but did recommend that the legislature fund an enhanced data collection project in order to gather more information on child custody patterns.

Conclusion

Custody laws have evolved dramatically since the days in which a father's right to his children was absolute and without regard to the welfare of the children. Although a determination of "what is in the child's best interests" has been the standard in Maryland for some time, there remains an interest in continuing to evaluate whether a legal presumption of joint custody should be adopted. While a joint custody presumption is seen by proponents as a way to better guarantee that both parents have the opportunity to remain involved in their child's life, opponents maintain that the current standard properly focuses on the child's welfare while still maintaining the ability for courts to award joint custody to parents who are best suited for such an arrangement.