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THE DISTRICT OF COLUMBIA'S JOINT CUSTODY PRESUMPTION: MISPLACED BLAME AND SIMPLISTIC SOLUTIONS

*Margaret Martin Barry**

Joint custody made its statutory debut in 1979 with the passage of California's Family Law Act.¹ Today, most states acknowledge joint custody as an option. Several jurisdictions, however, have significantly limited the applicability of joint custody, while only eight have made it presumptive.²

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1. CAL. CIV. CODE § 4600.5 (Deering 1984).

2. The eight jurisdictions that have a presumption or preference in favor of joint custody are Florida, Idaho, Kansas, Louisiana, Minnesota, Mississippi, Montana and New Mexico. See FLA. STAT. ANN. § 61.13(2)(b)(2) (West 1985 & Supp. 1997); IDAHO CODE § 32-717B(4) (1996); KAN. STAT. ANN. § 60-1610(a)(4)(A) (1994 & Supp. 1995); LA. REV. STAT. ANN. § 9:335(A)(1) (West Supp. 1997); MINN. STAT. ANN. § 518.17(2)(d) (West Supp. 1997); MISS. CODE ANN. § 93-5-24(4) (1972 & Supp. 1996); MONT. CODE ANN. § 40-4-224(1) (1995); N.M. STAT. ANN. § 40-4-9.1(A) (Michie 1994).

The courts in Florida have limited significantly the application of the statute. See *Garvie v. Garvie*, 659 So. 2d 394, 395 (Fla. Dist. Ct. App. 1995) (citing *Bienvenu and Langford*); *Langford v. Ortiz*, 654 So. 2d 1237, 1238 (Fla. Dist. Ct. App. 1995) ("Rotating custody . . . is presumptively not in the best interest of a child."); *Bienvenu v. Bienvenu*, 380 So. 2d 1164, 1165 (Fla. Dist. Ct. App. 1980) (referring to the well-settled Florida law that divided custody arrangements are not to be sustained).

In determining whether to award sole or joint custody, the Montana Supreme Court has ignored the statutory presumption and applied the best interests of the child standard to the facts of each case. See generally Dale R. Mrkich, Comment, *The Unfulfilled Promise of Joint Custody in Montana*, 48 MONT. L. REV. 135 (1987) (discussing Montana's joint custody law and the Montana Supreme Court's application of it).

California, the first jurisdiction to create a joint custody presumption, has since amended its law to apply only in cases where the parents have agreed to joint custody. See CAL. FAM. CODE § 3080 (1994). Connecticut, Maine, Michigan, Nevada and New Hampshire have similar provisions. See CONN. GEN. STAT. ANN. § 46b-56a(b) (West 1995); ME. REV. STAT. ANN. tit. 19, § 214(6) (West Supp. 1996); MICH. COMP. LAWS ANN. § 722.26a(2) (West 1993); NEV. REV. STAT. ANN. § 125.490(1) (Michie 1993); N.H. REV. STAT. ANN. § 458:17(II) (1992); see also Appendix A (providing a state-by-state analysis of joint custody statutes).

In 1996, the District of Columbia joined the small minority when it enacted a presumption in favor of joint custody. In so doing, the District entered into a realm of domestic relations law that has been described as frightfully lacking in linguistic uniformity³ and consistency in outcome.⁴

This Article discusses the District of Columbia's version of joint custody. Section I provides a brief overview of child custody trends in the United States. Section II considers the meaning of the term "joint custody" and the phrase "rebuttable presumption that joint custody is in the best interest of the child." Section III is an in-depth discussion of the District of Columbia's new joint custody law. Section IV discusses the incongruities between the concept of joint custody as advocated and the realities of a predominantly black community in which poverty defines the lives of a significant segment of the population. In particular, this section questions the benefit to the District of Columbia community of divisive gender-driven policies. Section V expands on why a joint custody presumption is in conflict with the best interest of the child standard.

This Article concludes by observing that the District's new law is of particular concern given the demographics of the jurisdiction. As with welfare reform, rhetoric supporting this law places considerable blame for societal woes on the parent who is raising children single-handedly, and in poverty. The law must not be used as a wedge to further isolate welfare mothers, causing more division where unity of spirit and purpose need to be fostered. Yet, it has the potential to do this if parents are placed in artificial and unfamiliar unions that can undermine the efforts being made by single parents.

The serendipitous approach to custody reflected in the District's presumption does not account for the real harm done to relationships when marriages or other familial unions dissolve, or when they never formed. Because courts must meet their obligation to protect children, the new law cannot be interpreted as a license to abandon analysis of the many factors—impact of anger, lack of trust, fear, and/or irrelevance due to lack of involvement—that indicate what may be in the child's best interest. The new law cannot be viewed as a shortcut to custody decision-making since it raises far more questions than it answers.

3. Taylor v. Taylor, 508 A.2d 964, 966 (Md. 1986) (citing David J. Miller, *Joint Custody*, 13 FAM. L.Q. 345, 376 (1979)).

4. See, e.g., Lee E. Teitelbaum, *Divorce, Custody, Gender, and the Limits of Law: On Dividing the Child*, 92 MICH. L. REV. 1808 (1994) (reviewing ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992)). Teitelbaum finds that much of the earlier social research on custody was "less than excellent and some [was] very poor." *Id.* at 1810.

The appendices to this Article include a state-by-state analysis of joint custody legislation and a model custody statute for the District of Columbia.

I. CUSTODY BY WHAT RULE?

From the beginning, courts have viewed their role with regard to child custody determinations as one of *parens patriae*—a duty to protect vulnerable citizens.⁵ Consistent with that role, the best interest of the child has been the driving standard, and, as such, statutory presumptions have generally been stated in those terms.⁶ This judicial function consistently has been muddled with parental interest in the companionship, care, custody, and/or management of their children. Thus, the law reflects an often unresolved conflict between the child's needs and those of the parents.⁷

The roots of the authority in Anglo-American law to act on behalf of the safety and welfare of children dates back to the seventeenth century and the equitable jurisdiction of the English courts.⁸ Determining custody was simple: the father received sole custody except in cases where the father was found to have gone beyond accepted norms.⁹ The paternal preference was based on the English common law rule recognizing the father's right to his children's services (the "fruits of their labor") in re-

5. Cf. Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195, 205 (1978).

6. See, e.g., LA. REV. STAT. ANN. § 518.17(2)(d) (stating that a presumption exists that joint custody is in the best interest of the child); MINN. STAT. ANN. § 518.17(2)(d) (same); MISS. CODE ANN. § 93-S-24(4) (same). In fact seven states and three territories refer to the child's best interest but make no reference to joint custody in their statutes: Arkansas, New York, North Dakota, Rhode Island, South Carolina, West Virginia, Guam, Puerto Rico, and the Virgin Islands. See ARK. CODE ANN. § 9-13-101 (Michie 1993); N.Y. DOM. REL. LAW § 240 (McKinney Supp. 1996); N.D. CENT. CODE §§ 14-09-06.1 to -06.2 (1991 & Supp. 1995) (including no explicit reference to sole or joint custody, but stating that evidence of domestic violence "creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded sole or joint custody of a child"); R.I. GEN. LAWS § 15-5-16 (1996); S.C. CODE ANN. § 20-3-160 (Law Co-op. 1985); W. VA. CODE § 48-2-15 (1995 & Supp. 1996); 19 GUAM CODE ANN. § 4106, 9108 (1995) (presuming that the mother receive custody of a child of "tender years"); P.R. LAWS ANN. tit. 31, § 383 (1993); V.I. CODE ANN. tit. 16, § 109 (1996).

7. This concept has acquired the status of a fundamental right of biological parents. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

8. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 477 (2d ed. 1987).

9. *Id.* (citing *Shelley v. Westbrook*, 37 Eng. Rep. 850 (Ch. 1817) (denying a poet "custody of his children on the ground of his immorality, atheism and denial of the Christian revelation"))).

turn for his obligation to provide for their welfare.¹⁰ The paternal preference was undermined by the British Act of 1839 which directed courts to grant custody of children under age seven to their mothers, and visitation rights to mothers of children seven years of age and older.¹¹ Despite American courts' adherence to paternal preference, in 1796, the earliest reported American child custody case, a Connecticut court rejected the paternal preference presumption and held that it was in the child's best interest to stay with his mother and maternal grandfather.¹²

Despite its rocky debut in this country, the paternal preference was not firmly replaced by the "tender years" doctrine until the early twentieth century. This doctrine acknowledged that both parents had equal custodial rights, but presumed that mothers were the best custodians of children of "tender years."¹³ Recognition of this presumption reflected changes in the family structure that arose out of the industrial revolution.¹⁴ The doctrine also defied the traditional notion that granting custody to a completely dependent mother was unrealistic.¹⁵ The "tender

10. See Rena K. Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 112 (1978).

11. See Joan B. Kelly, *The Determination of Child Custody*, 4 THE FUTURE OF CHILDREN 121-22 (1994). The British Act of 1839, known as the Talfourd Act, was intended to determine custody for children seven years of age and younger. It was, in fact, the first major challenge to the paternal presumption. *Id.* at 122. Kelly observes that in the seventeenth and eighteenth centuries, America applied a paternal preference in divorce custody cases, but by the nineteenth century, no longer applied the preference as strictly as English law. *Id.* In fact, many states enacted statutes modeled on the Talfourd Act; others enacted laws giving both parents equal custodial rights. See *id.*

12. See Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 695-96 & n.18 (1985) (referring to *Nickols v. Giles*, 2 Root 461 (Conn. 1796), as one of the earliest cases in which the child's interest was a factor). Professor Schepard also notes that since the 1840's, New York statutes and court decisions have instructed judges to make the welfare of the child the dominant consideration in custody decisions. *Id.* However, as late as 1839, New York espoused the father's virtually absolute right to sole custody. See *State v. Richardson*, 40 N.H. 272, 273 (1860) ("[It] is a well settled doctrine of the common law, that the father is entitled to the custody of his minor children."); cf. *People v. Mercein*, 8 Paige Ch. 45 (N.Y. Ch. 1839).

13. See Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 235 (1982). The term "tender years" has not been defined often, however, seven years of age frequently is cited as its limit. *Id.* Some courts have noted that the "tender years" doctrine may apply until the child reaches the age of 14. See *Williams v. Williams*, 296 A.2d 870, 871 (Pa. Super Ct. 1972).

14. See Kelly, *supra* note 11, at 122 (noting that during the Industrial Revolution, fathers sought employment away from the farm or village and mothers became the primary caregivers of children).

15. See Karen Czapanskiy, *Child Support and Visitation: Rethinking the Connections*, 20 RUTGERS L.J. 619 (1989). Professor Czapanskiy points out that the father's duty of support was linked to his right to receive services from the child. See *id.* at 646-47. Consistent with this reciprocal support duty theory, separated and divorced fathers were not re-

years" doctrine has been largely discredited for its inconsistency with the concepts of gender equality and the role of the father in child rearing.¹⁶

Another alternative that has been suggested is the primary caretaker presumption. This presumption is not inherently gender driven and, instead, focuses upon which parent has been most involved in the child rearing responsibilities.¹⁷ This approach is more consistent with the "best interest" paradigm since it is tied directly to parental involvement with the child, as opposed to generic assumptions about gender roles. The primary caretaker presumption has been noted, however, as effectively favoring women and not sufficiently crediting the less routine contributions of fathers.¹⁸ For this reason, the approach has not received the support that its nexus to caregiving would suggest.

Somewhat recently, yet another presumption with a shift in focus, midway between the father-mother poles, has invaded the child custody landscape.¹⁹ Over the past two decades, joint custody has been the solution *a la mode*. Joint custody ostensibly strives for gender equity in its allocation of parental rights and obligations. Unfortunately, in its preoccupa-

responsible for support of non-indigent children who were in their mother's custody. *See id.* at 647. This concept of the theory did not change until children's presence in the workforce declined for economic and moral reasons. *See id.* at 646-49; *see also* Uviller, *supra* note 10, at 112-14 (discussing the change in child custody in the nineteenth and early twentieth centuries through the imposition placed on fathers by the "tender years" doctrine to support children who were not in their custody).

16. *See* Bazemore v. Davis, 394 A.2d 1377, 1382-83 (D.C. 1978) (disapproving of the maternal preference and stating that it was "inconsistent with the basic tenet . . . that the best interest of the child should control"); *Cooke v. Cooke*, 319 A.2d 841, 844 (Md. Ct. Spec. App. 1974) (holding that the maternal preference should be used only where it is "impossible to decide upon the evidentiary facts"), *superseded by* 1974 Md. Laws 181 (July 1, 1974) (eliminating custody preference based solely on gender); (repealed) or MD. ANN. CODE art. 72A, § 1 (1974); *Watts v. Watts*, 350 N.Y.S.2d 285, 291 (N.Y. Fam. Ct. 1973) (finding the "tender years" doctrine unconstitutional deprives the father of Equal Protection under the 14th Amendment).

17. *See* Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 521-23 (1988). The primary caretaker preference eliminates much of the bickering and confusion inherent in custody determinations by awarding custody to the parent who has been most responsible for raising the child. *See id.* at 522. Furthermore, even though the primary caretaker is likely to be the mother, the choice is not inherently discriminatory and it encourages both husband and wife to assume greater co-parenting roles during marriage. *See id.*

18. *See* Kelly, *supra* note 11, at 130 (discussing the main objections to the primary caretaker presumption). According to Dr. Kelly, the major problems with such a presumption are that it ignores the quality of the child's relationship with the primary custodian and punishes men for being the primary wage earner during the marriage. *See id.*

19. Split custody, the concept of dividing the sole custody of two or more children between parents, is also part of the arsenal of custody options. Most jurisdictions, however, prefer to keep siblings together. *See, e.g.,* *Rice v. Rice*, 415 A.2d 1378, 1380 (D.C. 1980) (citing *Utley v. Utley*, 364 A.2d 1167 (D.C. 1976) for the proposition that split custody arrangements are disfavored in the District of Columbia).

tion with parents this approach tends to invert the wisdom of Solomon by instructing the courts to divide the child in the name of settling the parents' conflicting claims.²⁰

Notably, custody policy has not directly addressed the impact of various preferences on different segments of the population. Demographic considerations are significant for a jurisdiction such as the District of Columbia, a city whose population is composed predominantly of black families, many of whom live below the poverty line.²¹ Black families and, in particular, poor, black families have essentially been ignored in the development of child custody law.²² Economics have always skewed the relationship between custody analysis in the dominant culture and the

20. 1 *Kings* 3:16-28 relates the story of two prostitutes who each gave birth to a son within days of the other. One woman's son dies in the middle of the night and she claims that the other woman gave her the dead child and stole the living one from her. Each now appears before King Solomon and claims the living child as theirs.

So the king said, "Get me a sword." When they brought a sword before him, he said, "Cut the living child in two, and give half to one woman, and half to the other." The woman whose son it was, in the anguish she felt for it said to the king, "Please, my lord, give her the living child—please do not kill it!" The other, however said, "It shall be neither mine nor yours. Divide it!" The king then answered: "Give the first one the living child! By no means kill it, for she is the mother."

Id.

The King Solomon story has been used regularly as an analogy to joint custody. See, e.g., *Taylor v. Taylor*, 508 A.2d 964, 974 (Md. 1986); Singer & Reynolds, *supra* note 17, at 502.

21. The 1990 Census reports that of the 606,900 residents of the District of Columbia, 399,604 are black; 179,667 are white; and 32,710 are of Hispanic origin (including 4,391 who are also listed under the statistic for black residents). 1990 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS, District of Columbia at 3. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION-GENERAL POPULATION CHARACTERISTICS-DISTRICT OF COLUMBIA (May 1992) [hereinafter CENSUS-GENERAL CHARACTERISTICS]. There were 88,793 black families reported, and of those, 14,849 were listed as living below the poverty level. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION-SOCIAL AND ECONOMIC CHARACTERISTICS-DISTRICT OF COLUMBIA (Sep. 1993) [hereinafter CENSUS-SOCIAL AND ECONOMIC CHARACTERISTICS]. The total number of families living below the poverty level was listed as 16,453. See *id.* at 52. 46,797 D.C. residents reported that they were divorced. Of those divorced, black residents accounted for 31,784; CENSUS-GENERAL CHARACTERISTICS, *supra* at 42.

22. At the time when the paternal preference was shifting to a maternal preference in the United States and Great Britain, slave parents could not contemplate marriage. Furthermore, many children were born as the result of rape of black slave women by white owners and overseers. The children were often taken from their slave mothers and sold to other owners. "The sexual exploitation of black women was unprecedented. Black women were considered breeders, not mothers. Some slavers specialized in selling black children between the ages of 8 and 12." Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WISC. L. REV. 1003, 1033 n.124, (citing MANNING MARABLE, HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA 71-72 (1983)).

situation for impoverished black families. William Julius Wilson, in his recent publication, *When Work Disappears*, discusses the sharp increase in joblessness for black males since 1970 and its connection to the rise in the rate of single-mother families.²³ According to Wilson, the decreasing marriage rates among inner-city black parents reflects the "interaction between material and cultural constraints."²⁴ Societal norms, including those that promote taking responsibility for raising children are weakened when there is no opportunity to reinforce them due to economic failure.²⁵

While protecting the best interest of the child is the appropriate goal for any population considered, the overlay of custody analysis, based on white, middle-class precepts of gender rights and privileges regarding the raising of children, does not sufficiently account for the realities of parental roles and responsibilities in many District of Columbia households. To the extent that the District's joint custody presumption is intended to influence parental role allocation, it is overly ambitious in that it ignores the considerable pressures described by Wilson.

II. WHAT DOES A REBUTTABLE PRESUMPTION IN FAVOR OF JOINT CUSTODY MEAN?

A. *What Does Joint Custody Mean?*

Joint custody can refer to joint *legal* custody, in which both parents share in the decision-making. How that decisionmaking is shared can vary: one parent may play a consultative role only, or one parent may make all of the major decisions while the physical custodian handles the day to day supervision, and so on. Joint custody can also refer to joint *physical* custody, in which the child spends time with each parent, either on a roughly even basis or in blocks of time that are, in effect, no greater than visitation under a sole custody arrangement. The D.C. Court of Appeals recently made the distinction that joint legal custody refers to long-range decisions, and physical custody refers to control over the child and decisions related to immediate control.²⁶ Joint legal custody generally accompanies joint physical custody, but the converse is not always the case. In fact, most joint custody awards grant physical custody to one parent,

23. WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS* 95-97 (1996) (discussing the inner-city joblessness and its impact on the structure of the black community, relying on several studies dating from 1987-1993 of poor neighborhoods in Chicago).

24. *Id.* at 97 (quoting Mark Testa, *Male Joblessness, Nonmarital Parenthood and Marriage* (paper presented at the Chicago Urban Poverty and Family Life Conference (October 12, 1991))).

25. *Cf. id.*

26. *See Ysla v. Lopez*, 684 A.2d 775, 777-78 (D.C. Cir. 1996).

but limit that parent's decision-making power by requiring collaboration with the other parent.²⁷

Many state statutes suggest that joint custody is monolithic;²⁸ however, this ignores the subtle and not so subtle distinctions it encompasses. The silence in many statutes on the issues of the child's physical location and which parent has responsibility for the child reflects a desire to allow for greater flexibility in fashioning joint custody orders consistent with the best interests of the child.²⁹ Yet, this very concern inculcates a joint custody presumption: if flexibility to the point of being completely amor-

27. A Massachusetts study of 500 divorces found that 90% of all joint custody awards granted joint legal custody only. W. P. C. Phear et al., *An Empirical Study of Custody Agreements: Joint Versus Sole Legal Custody*, 11 J. PSYCHIATRY & L. 419, 425, 440 (1983), cited in Singer & Reynolds, *supra* note 17, at 503-04, n.39. One District of Columbia Superior Court Judge observed that when he asks litigants about joint custody, the fathers he encounters are clear that they want joint legal custody only. Judge Jose Lopez, *Dialogue with Bench and Bar*, September 24, 1996. See ELEANOR E. MNOOKIN & ROBERT MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 113 (1992) (reporting that in 48.6% of the 933 California families studied, joint legal custody and sole physical custody was awarded to the mother; sole legal custody and sole physical custody was granted to the mother in 18.6% of the cases; joint legal custody and sole legal custody was awarded to the father in 6.8% of the cases; and sole legal and sole physical custody was granted to the father in 1.8% of the cases).

28. There are twenty-four states which delineate distinctions between joint physical and joint legal custody. Generally, they describe joint physical custody as meaning that each parent shall have significant periods of physical custody and that physical custody shall be shared in such a manner to ensure that a child has frequent and continuing contact with both parents. Joint legal custody is described as meaning that the parents will share in the decision-making rights, responsibilities and authority in regard to a child's health, education, and welfare. See ALA. CODE § 30-3-151 (Michie 1975) (defining each); Ariz. Rev. Stat. Ann. § 25-402 (West Supp. 1996) (explaining that neither parents' decision-making rights are superior); CAL. FAM. CODE §§ 3083, 3084, 3085 (West 1994) (stating that a grant of joint legal custody does not necessitate an award of joint physical custody); COLO. REV. STAT. § 14-10-123.5(1) (1987); CONN. GEN. STAT. ANN. § 46b-56a(a) (West 1995); GA. CODE ANN. § 19-9-6 (1991); HAW. REV. STAT. ANN. § 571-46.1(b) (Michie 1993); IDAHO CODE § 32-717B (1996); IND. CODE ANN. § 31-1-11.5-21(f) (Michie 1987); IOWA CODE ANN. § 598.1(3), 598.41(1)(a) (West 1996 & Supp. 1996); KAN. STAT. ANN. § 60-1610(a)(4)(A) (Supp. 1995); MASS. GEN. LAWS ANN. ch. 208, § 31 (West Supp. 1996); MICH. COMP. LAWS ANN. § 722.26a(7)(b) (West 1993); MINN. STAT. ANN. § 518.17 (West Supp. 1997); MISS. CODE ANN. § 93-5-24(5)(d) (1994); MO. ANN. STAT. § 452.375 (West Supp. 1997); NEV. REV. STAT. ANN. § 125.490 (Michie 1993); N.H. REV. STAT. ANN. § 458:17 (1992) (dictating that joint custody may not include physical custody, where the court finds physical custody to be conducive to the child's best interests); N.J. STAT. ANN. § 9:2-4 (West 1993); 23 PA. CONS. STAT. ANN. § 5302 (West 1991); UTAH CODE ANN. § 30-3-10.1 (1995) (granting courts the power to make an award of exclusive authority to one parent to make certain specific decisions); VT. STAT. ANN. tit. 15, § 664 (1989); VA. CODE ANN. § 20-124.1 (Michie 1995); WIS. STAT. ANN. § 767.24 (West 1993).

29. See, e.g., *Taylor v. Taylor*, 508 A.2d 964, 970 (Md. 1986) (discussing the equitable powers of Maryland courts to enter joint custody orders, and observing that "the power of the court is very broad so that it may accomplish the paramount purpose of securing the welfare and promoting the best interest of the child").

phous is necessary to make the presumption palatable, why state the concept as firmly as the District of Columbia has done?³⁰

B. Rebuttable Presumption: What Weight Should the Term Be Given?

Throughout the debate on the District of Columbia's Joint Custody of Children Act there was much discussion as to what impact the presumption in favor of joint custody might have. Opponents of the presumption argued that it suggested a priority inconsistent with a focus on the best interests of the child.³¹ Proponents argued that since the presumption was to be rebuttable, it would be easily overcome by evidence that indicated that joint custody was not in the best interest of the child. A rebuttable presumption ultimately was accepted based on the understanding

30. One father describes the impact of joint physical custody on his son as follows: Nicolas has lived in joint custody for the past eight years, and you would think he would be used to it by now. He is not. His emotional preparation begins a week or so before he flies to visit his mother. (Nicolas lives with me when he is in school.) He becomes, to varying degrees, anxious, lethargic, somber and withdrawn from his friends
 . . . Though he would never want to have to choose between his parents, neither would he choose joint custody.

And neither would I choose it for him if I had the chance to make the decision again His mother and I should have agreed on sole custody. If we had not been able to agree, it should have been imposed. Though it would have been devastating for the one of us who lost custody of our son, I am convinced that Nicolas's childhood would have been easier.

David Sheff, *If It's Tuesday, It Must Be Dad's House*, N.Y. TIMES MAG., Mar. 26, 1995, at 65.

31. See Transcript of the Twenty-first Meeting of the Council of the District of Columbia, at 260, Dec. 5, 1995 [hereinafter Twenty-First Transcript]. Councilmember William Lightfoot stated:

Children are not chattel. They don't belong to the man. They don't belong to the woman. They should not be regarded as being some pawn that we divvy up between two warring spouses. We should arrange the best that we can, so they can grow up in a loving and nurturing community and not allow us to think that in some ideal situation we can create a legal fiction where both parents are going to be together, but, in fact, they're going to harm the child as they stay together.

Id.

He later stated:

The reason I have opposed this rebuttable presumption in favor of joint custody is because it does not put the best interest of the child first. It really does treat children as if they were property that was acquired during the marriage

. . . .

. . . Now we can talk about a Pollyanna world and the ideal word, about how we'd love for things to be, but that's not the way they are, and, once again, . . . we ought to ask ourselves what is it that's got us on the far extreme? Is it some theoretical notion we have of what's good? Is it some theoretical notion we have of our good intentions . . . ?

Transcript of the Twenty-Second Meeting of the Council of the District of Columbia, at 169-70, Jan. 4, 1996 [hereinafter Twenty-Second Transcript].

that it would stand only so long as there was no evidence that suggested an alternative custody arrangement was in the best interest of the child.³²

Consistent with the Act's legislative history is the well-established understanding that, although a rebuttable presumption imposes a burden of producing evidence on the opponent of the presumption, this party has no further burden of persuasion.³³ The presumption "disappears so soon as substantial countervailing evidence is introduced."³⁴

In *Jaramillo v. Jaramillo*,³⁵ the Supreme Court of New Mexico directly addressed the impact of a presumption on the burden of proof when it determined that placing the burden of proving that joint custody was not in the best interest of the child on a relocating parent unconstitutionally impaired the relocating parent's right to travel. The *Jaramillo* court further held that once a party seeking to relocate has demonstrated that the joint custody arrangement is no longer workable, both parties share equally the burden of demonstrating with which parent the child's best interests will be served.³⁶ The Supreme Court of Montana held in *In re Marriage of Jacobson* that a finding by the District Court of a lack of

32. "If we are serious about the best interest of the child being the principle that comes first, if that's the primary consideration in awarding custody, then we ought not to have a rebuttable presumption in favor of joint custody. It's inconsistent to have two primary principles." See Twenty-First Transcript, *supra* note 31, at 255 (statement of Councilmember Kathleen Patterson). Responding to Ms. Patterson, Councilmember John Ray, a stolid supporter of the presumption, said, "A presumption does not mean that a judge cannot do something else." *Id.* at 261. Mr. Ray elaborated further at the next reading of the bill. Speaking again in support of the presumption, he stated, "This is not a mandatory requirement. It's merely a presumption The trier of facts can look at all of the facts and make a decision that it's not in the best interests." See Twenty-Second Transcript, *supra* note 31, at 160. Councilmember Harold Brazil, the sponsor of the legislation and of amendments preserving the initial bill's presumption, added, "[I]t's clearly a bill that is talking about doing what's in the best interests of the child. That is the standard. That's the way it was and that's the way it will continue to be under [the amendment that would make joint custody presumptive]." *Id.* at 162. Mr. Brazil also stated, "[J]udges are wise, and what we are saying is, 'Here, you people with the wisdom look. We're giving you the direction we want you to go in, but if it's not in the best interests of the child, then don't award joint custody.'" Twenty-First Transcript, *supra* note 31, at 266.

33. See, e.g., FED. R. EVID. 301 ("In all civil actions and proceedings . . . a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of risk of nonpersuasion.")

34. *Stone v. Stone*, 136 F.2d 761, 763 (D.C. Cir. 1943); see also *Lincoln v. French*, 105 U.S. 614, 617 (1881) ("Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear."); *Turner v. Turner*, 455 So. 2d 1374, 1378 (La. 1984) ("A presumption does not have any probative value, but merely provides the fact-finder with a conclusion in the absence of proof to the contrary." (citing 9 J. WIGMORE ON EVIDENCE § 2491(3) (3d ed.)).

35. 823 P.2d 299 (N.M. 1991).

36. *Id.* at 308.

parental cooperation was enough to rebut the joint custody presumption.³⁷ The same court held in *In re Marriage of Dunn* that “[t]here is no mandate that joint custody must be awarded even if both parents are found to be fit and proper.”³⁸ These cases illustrate that courts grappling with the presumption in favor of joint custody recognize that, procedurally, the presumption stands only so long as there is no countervailing evidence.³⁹ Although the Court of Appeals for the District of Columbia has not considered an appeal from the application of the jurisdiction’s new joint custody presumption directly, in *Ysla v. Lopez*, the court referred to the new statute in ruling that no single factor is necessarily controlling, and thus the parents’ inability to communicate and cooperate may not preclude an award of joint custody where both parents have a strong interest in raising the child.⁴⁰

III. THE DISTRICT OF COLUMBIA’S JOINT CUSTODY OF CHILDREN ACT OF 1996

A. *The Law in the District of Columbia Prior to April 18, 1996*

Prior to the enactment of the joint custody legislation, the law in the District of Columbia unambiguously placed the best interest of the child at the center of legal analysis in custody determinations. This has been the custody standard in the District since the turn of the century, and reference to it may be found in the District’s divorce statute.⁴¹ The divorce statute prescribed a best interest of the child analysis in two separate sections—one for custody during the pendency of the action,⁴² and one for permanent custody.⁴³ These custody provisions provided the court with guidelines similar to those found in other custody statutes: the wishes of the child; the wishes of the child’s parents; interaction with parents, siblings and other individuals to whom the child is emotionally or

37. See *In re Marriage of Jacobson*, 743 P.2d 1025, 1027 (Mont. 1987).

38. See *In re Marriage of Dunn*, 735 P.2d 1117, 1119-20 (Mont. 1987).

39. See *supra* note 2 (providing a list of state statutes that include a presumption).

40. See *Ysla v. Lopez*, 684 A.2d 775, 781 (D.C. 1996).

41. See *Bazemore v. Davis*, 394 A.2d at 1377, 1379 (D.C. 1978) (noting the historical importance of the best interest standard); D.C. CODE ANN. § 16-911 (1989).

42. D.C. CODE ANN. § 16-911.

43. See *id.* § 16-914. This section is captioned “Retention of jurisdiction as to alimony and custody of children,” and begins with the phrase “After the issuance of a decree of divorce” This language seems to create a gap between this section and the *pendente lite* custody available under section 16-911, unless the custody decree was originally conceived by the D.C. Council to be a separate order that would follow the divorce award, thus making section 16-914 the permanent custody provision. This is the most logical conclusion, but the legislature and the court have not labored over the ambiguity. Permanent custody pleadings tend to cite section 16-914, and temporary custody pleadings refer to section 16-911.

psychologically connected; the child's adjustment to home, school and community; and the mental and physical health of all involved.⁴⁴ In 1994, a new consideration was added to this analysis which instructed the courts to credit the impact of abuse of one parent by the other in making custody and visitation awards.⁴⁵

The District's statutory guidelines regarding custody decisions, if read literally, could only apply in the context of divorce cases, at least prior to 1996.⁴⁶ In essence, while the Superior Court of the District of Columbia has had an equitable basis for making custody determinations, there has been no statutory standard for granting custody outside the divorce context.⁴⁷ Nonetheless, courts have consistently applied the divorce statute

44. *See id.* §§ 16-911(a)(5), 16-914(a)(3).

45. *See* Evidence of Intrafamily Offenses in Child Custody Cases Act of 1994, effective Aug. 25, 1994, 41 D.C. Reg. 4870 (1994) (amending D.C. CODE ANN. §§ 16-911, 16-914, 16-1005). This amendment specified that a court must justify, in writing, a grant of custody to a contestant who has been shown to have committed an intrafamily offense, and it further required that visitation with the abusive party be limited to those situations in which it can be demonstrated by that party that the child and custodial parent will be adequately protected from harm. *See id.* This provision references the District's domestic violence or "intrafamily offense" statute, which defines domestic violence as any criminal act against a person with whom the person has a relationship by blood, marriage, legal custody, having a child in common, having lived together at some point or having had a romantic relationship. *See* D.C. CODE ANN. § 16-1001 (5) (Supp. 1996).

In a recent article, I discussed the impact on children who witness violence in their homes:

Children who witness parental violence are always affected; they are traumatized by shock, fear, and guilt. Children suffer somatic complaints, such as insomnia, diarrhea, generally higher rates of illnesses as infants, and a higher incidence of colds, sore throats, abdominal pain, asthma, headaches, as well as bed wetting for older children. The effect of parental violence on children is also evidenced by delayed speech, delayed motor and cognitive skills, and poor school performance. In addition to the effects that result from witnessing violence in the home, children are often "accidentally harmed by blows or flying objects aimed at the mother, or are stepped on, or stumbled over, or dropped when the mother is attacked."

Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 HAST. W. L.J. 339, 341-42 (1995) (citing EFFECT OF WOMAN ABUSE ON CHILDREN, *infra* note 127).

46. *See infra* Part III(B)(11) (discussing the 1996 Act and the reference in both section 16-911 and section 16-914 to custody determinations without regard to marital status).

47. Section 11-1101(4) of the *D.C. Code* grants the Family Division of the court exclusive jurisdiction over "actions seeking custody of minor children," and section 16-4501 *et seq.* grants the court jurisdiction to make child custody determinations as part of the jurisdiction's adoption of the Uniform Child Custody Jurisdiction Act (UCCJA), 9 U. L. A. 115 (Supp. 1996). *See* D.C. CODE ANN. §§ 11-1101(4), 16-4501 (Supp. 1992). Outside of divorce, however, the standard for determining custody is based on the equitable powers of the court. *See* *Ysla v. Lopez*, 684 A.2d 775, 778 (D.C. 1996); *Taylor v. Taylor*, 508 A.2d 964, 968-70 (Md. 1986) (discussing the equitable powers of Maryland courts to enter joint custody orders and observing that "the power of the court is very broad so that it may accomplish the paramount purpose of securing the welfare and promoting the best interest of the

in all custody cases in the jurisdiction.⁴⁸ Prior to the Joint Custody of Children Act of 1996 (the Act),⁴⁹ the statute was silent as to joint custody. This did not mean that joint custody was unavailable in the jurisdiction because such custodial arrangements were accepted by courts where both parties consented.⁵⁰ Joint custody arrangements were accepted even though joint custody was considered suspect, particularly for children of tender years.⁵¹ Rather than codify the practice of awarding joint custody to parties who agree to such an arrangement, the new law creates a presumption that shifts the focus away from the child, despite the childrearing problems inherent in parental discord, and toward the parents.

child."); *Felder v. Allsopp*, 391 A.2d 243, 245 (D.C. 1978) (referring to the court's jurisdiction over visitation, custody, and divorce, based on its equitable powers rather than section 11-1101(4)).

48. The application of the divorce statute in custody disputes between unmarried parties has been so consistent that, in a case a few years ago, when a judge on his first rotation in the Family Division of the Superior Court asked opposing counsel and I to advise him of the authority upon which he could rely in deciding the case (since the statute we had cited technically did not apply), we both were caught off guard. The judge ultimately was convinced that the lack of an alternative statutory standard resulted in the practice of relying upon the divorce statute.

49. 43 D.C. Reg. 574 (1996) (amending D.C. CODE ANN. 16-911, 16-914).

50. "Due to the current practice in the D.C. Superior Court to approve voluntary joint custody arrangements, the absence of a joint custody statute in the District of Columbia tends to cause difficulty only in those situations where the parents do not agree to a joint custody arrangement." WILLIAM P. LIGHTFOOT, REVISED COMMITTEE REPORT, BILL 11-26, at 3 (Oct. 25, 1995) (D.C. Council Judiciary Comm. revised report on the Joint Custody of Children Act of 1995 (retitled)) [hereinafter REVISED REPORT]. Case law illustrates that joint custody was utilized by the court as an acceptable custody solution prior to the enactment of the joint custody statute. See *Galbis v. Nadal*, 626 A.2d 26 (D.C. 1993). The original order by the trial court was for joint custody. See *id.* at 28. It was later modified to an award of sole custody in the mother due to a change in circumstances; the court found that the parties could no longer agree on basic child rearing decisions because the father had disregarded the trial court's directive that the mother was to have the final decision-making power. See *id.*; see also *Ysla*, 684 A.2d at 779-80 (acknowledging the trial court's discretion to make a joint custody order not agreed to by both parents, while noting that the ruling was influenced by the passage of the Joint Custody of Children Act); cf. *Weiner v. Weiner*, 605 A.2d 18, 18 (D.C. 1992); *McDiarmid v. McDiarmid*, 594 A.2d 79, 80 (D.C. 1991); *Cooper v. Cooper*, 472 A.2d 878, 879 (D.C. 1984).

51. See, e.g., *Utley v. Utley*, 364 A.2d 1167, 1170 (D.C. 1976). The District of Columbia Court of Appeals expressed its concern regarding joint custody of young children as follows:

Generally, divided custody of a child of tender years is not favored . . . Perhaps the reason for this is that an orderly, meaningful, and reasonably secure family life is crucial during the formative years of a child's life. A happy and normal family life is often impossible of accomplishment when a child of tender years is subjected to the frustrating experience of divided custody especially when in the process he is shifted from home to home, from city to city, or from one family environment to another.

Id.; see also *Singer & Reynolds*, *supra* note 17, at 510 (noting the impact on children of "shuttling" them between parents).

B. The New Law

The District of Columbia's joint custody legislation was hotly debated, especially as to the role of a presumption in favor of joint custody. As initially voted on by the Judiciary Committee of the D.C. Council, the bill removed the presumption in favor of joint custody;⁵² the Committee later voted to reinsert the presumption.⁵³ The presumption favoring joint custody then was replaced at the first meeting of the Committee of the Whole by a presumption against joint custody where the parties could not agree.⁵⁴ At the final reading, however, the presumption favoring joint custody returned to replace the negative presumption. Not surprisingly, the bill, as amended, passed with limited support.⁵⁵ The result is an act that resembles the language of other presumptive joint custody statutes, yet unfortunately, reflects the fallout of its bumpy legislative process.

1. The Best Interests of the Child and the Joint Custody Presumption

The new Act amends the *pendente lite* and permanent custody provisions of the D.C. Code with variations in language that can be best explained as poor drafting (see Appendix B).⁵⁶ As the following discussion

52. See REVISED REPORT, *supra* note 50.

53. See *id.*

54. See Twenty-First Transcript, *supra* note 31, at 294.

55. The vote on the final reading of the bill was 7 in favor to 6 opposed. See Twenty-Second Transcript, *supra* note 31, at 177.

56. The *Revised Committee Report* provides no rationale for restricting the more specific language of the new law regarding the mechanics of joint custody to interim orders. See REVISED REPORT, *supra* note 50. Nor does the Judiciary Committee Report dated June 21, 1995, which reports a version of the bill including similar restrictions, provide any rationale. See *Judiciary Report*, *supra* note 50. Very few jurisdictions make a distinction between temporary and permanent custody orders. In addition, where other jurisdictions include temporary custody provisions, they are generally far less detailed than the permanent ones. See DEL. CODE ANN. tit. 13, § 727(b)(1) (1993) (providing that a court may grant a temporary custody arrangement not to exceed six months in time to enable the parents to show their ability to cooperate with the arrangement; and further stating that the Court may continue or modify the arrangement on a permanent basis); MASS. GEN. LAWS ANN. ch. 208, § 31 (West Supp. 1996) (granting the parents temporary shared legal custody of any minor child of their marriage upon the filing of a custody action, but permitting the court to award temporary sole legal custody if it determines that shared custody is not in the best interests of the child and stating that there is no presumption for temporary shared physical custody); MONT. CODE ANN. § 40-4-213 (1995) (permitting the court to award temporary custody, and if there is no objection, to act solely on the basis of the affidavit); WASH. REV. CODE ANN. § 26.09.194 (West Supp. 1997) (stating that a parent who seeks temporary custody of a child may do so by filing a motion with the court to which an opposing parent must file a responsive parenting plan); 19 GUAM CODE ANN. § 4123 (1995) (permitting the court to award custody of a minor child to either parent during the separation period); P.R. LAWS ANN. tit. 31, § 341 (1993) (awarding custody of children to the mother during a divorce proceeding, unless strong countervailing evidence to the presumption is presented).

will identify, a number of components of the new law that have the potential to clarify its application, do not specifically apply to permanent orders. Since a *pendente lite* hearing can require the same level of proof as a permanent custody hearing, this phase of the litigation is often bypassed, particularly by less affluent litigants who are either unaware of the temporary process or who cannot afford the protracted litigation.⁵⁷ In practice, many of the provisions limited by statute to the temporary order will inevitably spill over into the final decrees. The new law, however, is unclear concerning permanent custody. While the court may choose to interpret the statute narrowly by limiting its application to temporary orders, it is difficult to extract from the legislative history an intent to create such a limitation.⁵⁸ Nonetheless, statutory interpretation supports the conclusion that if language in one section of the law is not incorporated into another section, the court should not infer legislative intent.⁵⁹

Both sections of the Act establish a "rebuttable presumption that joint custody is in the best interest of the child."⁶⁰ The language further provides that the best interest of the child standard still controls, describing it as the "primary consideration."⁶¹ Consistent with this emphasis, the Act's reference to "frequent and continuing contact" between each parent and child and shared responsibility of child rearing is modified by the disjunctive "[u]nless the court determines that it is not in the best interest of the child."⁶²

57. The bypassing of the temporary custody hearing occurs even for litigants who obtain pro bono representation. If parents work, the additional court appearances can create considerable pressures on the job. If they do not work, the costs of transportation to and from court and arranging for child care can be daunting. I have had clients express considerable concern as court hearings multiplied, were continued, or became protracted, because of child care constraints and transportation costs.

58. While there had been some discussion that the new law should be limited to custody disputes arising in the context of divorce, the District of Columbia Court of Appeals rejected that distinction in its first ruling interpreting the new law. See *Ysla v. Lopez*, 684 A.2d 775, 777-78 (D.C. 1996).

59. "[T]he expression or inclusion of one thing is the exclusion of others . . . [I]t is generally accurate to assume that when people say one thing they do not mean something else." 2A KEN SINGER, SUTHERLAND'S, STATUTES AND STATUTORY CONSTRUCTION § 47.01 (5th ed. 1992); accord *District of Columbia v. Thompson*, 593 A.2d 621, 638 (D.C. 1991) (Schwelb, J., dissenting) (disagreeing with the court's interpretation of the District's Comprehensive Merit Personnel Act); see *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

60. D.C. CODE ANN. §§ 16-911(a)(5), 16-914(a)(2) (Supp. 1996).

61. *Id.* §§ 16-911(a)(5), 16-914(a)(3).

62. *Id.* §§ 16-911(a)(5), 16-914(a)(2).

The amendment to section 16-911 describes further the various custody permutations available, listing joint legal and joint physical custody among the options.⁶³ This is the only indication in the statute that joint custody has multiple meanings. Section 16-914 does not even say this much. There is no preference for joint legal or physical custody, or a combination of both, stated in either section in connection with the presumption.

2. *Factors to Consider in Assessing What Is Best for the Child*

The new law provides, in both sections of the statute, a list of factors for the court to consider in making a joint or sole custody determination.⁶⁴ These new factors generally offer useful guidelines for judicial assessment of custody petitions; however, they neither simplify the custody process nor suggest that joint custody is ideal. A discussion of the new factors as they relate to joint custody follows.

a. *Shared Decision Making*

The capacity to communicate and reach shared decisions is central to the success of any joint custody arrangement.⁶⁵ Studies have shown that,

63. *See id.* § 16-911(a-2)(1).

64. *See* D.C. CODE ANN. §§ 16-911(a)(5), 16-914 (Supp. 1996). While the ordering is slightly different in each section, the Act amends both sections 16-911 and 16-914 by adding additional factors for the court to consider:

(F) the capacity of the parents to communicate and reach shared decisions affecting the child's welfare;

(G) the willingness of the parents to share custody;

(H) the prior involvement of each parent in the child's life;

(I) the potential disruption of the child's social and school life;

(J) the geographical proximity of the parental homes . . . ;

(K) the demands of parental employment;

(L) the age and number of children;

(M) the sincerity of each parent's request;

(N) the parent's ability to financially support a custody arrangement;

(O) the impact on Aid to Families with Dependent Children and medical assistance;

(P) the benefit to the parents; and

(Q) the evidence of an intrafamily offense as defined in § 16-1001(5).

65. *See Taylor v. Taylor*, 508 A.2d 964, 971 (Md. 1986) (stating that agreement is "clearly the most important factor"). Beth Weisberg, a practitioner with considerable experience with joint custody, describes joint custody as a "wonderful, necessary" option that can offer the best result for children *if* the parents are motivated and willing to make it work. According to Ms. Weisberg, if the parents are not committed to joint custody, it can be a source of continuing the conflict that is a major reason that parents tend to separate. Ending the conflict can provide a major benefit to children. Conversation on April 2, 1997 with Elizabeth J. Weisberg. Ms. Weisberg has practiced domestic relations law in the state of Maryland since 1979.

without cooperation between the parents, joint custody arrangements are doomed to fail.⁶⁶

Even where there is a commitment to communicate and cooperate, a joint custody order can be risky. Changing demands on one or both par-

Two jurisdictions require an agreement between the parties before a joint custody order will be granted. See OR. REV. STAT. § 107.169(3) (1995); VT. STAT. ANN. tit. 15 § 665(a) (1989). Two other jurisdictions make joint custody presumptive only if the parties agree to it. See ME. REV. STAT. ANN. tit. 19, § 214(6) (West Supp. 1995); MICH. COMP. LAWS ANN. § 722.26a(2) (West 1993). Some jurisdictions qualify this presumption and find that if the parties agree to joint custody, this creates a presumption that it is in the best interests of the minor child. See CAL. FAM. CODE § 3080 (Deering 1994); CONN. GEN. STAT. ANN. § 46b-56a(b) (West 1995); MISS. CODE ANN. § 93-5-24 (4) (1972); NEV. REV. STAT. ANN. § 125.490(1) (Michie 1993); N.H. REV. STAT. ANN. § 458:17(II)(a) (1992) (referring to joint legal custody only); VT. STAT. ANN. tit. 15 § 665(a); see also MINN. STAT. ANN. § 518.17 subd. 2 (West Supp. 1997) (stating that a court shall find a rebuttable presumption that joint legal custody is in the best interests of the child upon request of *either* or both parties).

The ability of parties to co-parent (specifically the ability to agree and communicate) is considered as a factor in making joint custody awards in several jurisdictions. See COLO. REV. STAT. § 14-10-124(1.5)(g) (1987); ILL. COMP. STAT. ANN. 5/602.1 (West Supp. 1996); IND. CODE ANN. § 31-1-11.5-21(g)(2) (Michie Supp. 1996); IOWA CODE ANN. § 598.41(3)(c) (West 1996); ME. REV. STAT. ANN. tit. 19, § 214(5) (West Supp. 1995); MICH. COMP. LAWS ANN. § 722.26a(1)(b); MINN. STAT. ANN. § 518.17 subd. 2; N.J. STAT. ANN. § 9:2-4 (West 1969); N.M. STAT. ANN. § 40-4-9.1(B)(8) (Michie 1996); OHIO REV. CODE ANN. § 3109.04 (Anderson Supp. 1994); TEX. FAM. CODE ANN. § 153.134 (West Supp. 1996); UTAH CODE ANN. § 30-3-10.2 (1995); VT. STAT. ANN. tit. 15, § 665(b)(8); VA. CODE ANN. § 20-124.3 (Michie 1995); WASH. REV. CODE ANN. § 26.09.187(2)(c)(3) (West Supp. 1997).

66. See David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 549-69 (1984) (reviewing the studies on the effects of joint custody and concluding that courts should not impose joint custody where it is apparent that the parties will be unlikely to cooperate). Professor Chambers sets out six prerequisites to imposing joint custody for judges who "sense an uncomfortable tension, indeed inconsistency, between the legislature's expression of enthusiasm for joint custody and the legislature's more overarching injunction to resolve each case to serve the best interests of the child." *Id.* at 567. They are:

- (1) the child in question is not three years of age or younger;
- (2) both parents seem reasonably capable of meeting the child's need for care and guidance;
- (3) both parents wish to continue their active involvement in raising the child;
- (4) the parents seem capable of making reasoned decisions together for the benefit of the child; . . .
- (5) joint custody would not impose substantial economic hardship on the parent who opposes it; and
- (6) joint custody would probably disrupt the parent-child relationships less than other custodial alternatives.

Id.; see also Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 471, 487 (1984) (noting that the importance of agreement and respect is emphasized in the studies and observing that even the most ardent of the early joint custody advocates assumed that it is appropriate only where the parties voluntarily agreed to it); Janet R. Johnston, *Research Update: Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making*, 33 FAM. AND CONCILIATION CRS. REV. 415 (1995) (including discussion of recent studies and concluding similarly to Scott and Derdeyn that joint custody is not advisable where the parties are in conflict).

ents due to employment, marriage or remarriage, or relocation can cause tensions that undermine and ultimately destroy the arrangement.⁶⁷ While such eventualities would not necessarily preclude a joint custody award, they do underscore the difficulty of imposing interaction implicit in the marital relationship upon parties who are not in that relationship. It is even more difficult to contemplate such interaction for parents who have no previous familial relationship. Furthermore, to make a child the focus of the imposed interaction can be harmful to a child who feels responsible for any resulting discord or who has conflicting or insufficient guidance.

b. *Willingness to Share Custody*

The "willingness to share custody" factor could be interpreted to mean that where parents are unwilling to share custody, joint custody should not be granted. The phrase has more commonly been viewed as calling upon the courts to penalize the "unfriendly" parent.⁶⁸ Parents who might otherwise raise good faith objections to the wisdom of a joint cus-

67. See Richard A. Gardner, *Joint Custody Is Not for Everyone*, FAM. ADVOC., Fall 1982 at 7, 45-46. Dr. Gardner notes that "[a] smoothly operating joint custody arrangement may run into trouble if one [or both] of the parents remarries," especially with the new obligations to the stepparent and possibly stepchildren. *Id.* at 45. Other changes such as differences in job responsibilities, relocation, or simply a deterioration in the necessary communication and cooperation can destroy the arrangement. *See id.* at 45-46.

68. Although numerous states have public policy statements in their custody statutes which encourage children having "frequent and meaningful continuing contact" with both parents, *see, e.g.*, CAL. FAM. CODE § 3040(a)(1) (Deering 1994); FLA. STAT. ANN. § 61.13(3)(a) (West Supp. 1996); MONT. CODE ANN. § 40-4-223(1)(b) (1995); NEV. REV. STAT. ANN. § 125.480(3)(a) (Michie Supp. 1995); OKLA. STAT. ANN. tit. 43, § 112(C)(3)(a) (West Supp. 1996); UTAH CODE ANN. § 30-3-10(2) (1995), some states go one step further and penalize those parents who are uncooperative or less likely to promote such contact. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-403(A)(6) (West Supp. 1995); IOWA CODE ANN. § 598.41(1) (West Supp. 1996). *But see* *Newell v. Nash*, 889 P.2d 345, 349-50 (Okla. Ct. App. 1994) (indicating that consideration of which parent is more likely to ensure frequent and continuing contact does not *mandate* that custody be awarded to the parent who would allow the most visitation).

"The parent who wishes to demonstrate that joint custody is detrimental to the child's welfare [may] be reluctant to use evidence which may [reflect an] unwillingness to cooperate." Scott & Derdeyn, *supra* note 66, at 476. *See generally* Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Custody: Analysis of Legislation and Its Implications For Women and Children*, 12 GOLDEN GATE U. L. REV. 539 (1982); Joan Zorza, "Friendly Parent" Provisions in Custody Determinations, 26 CLEARINGHOUSE REV. 921, 924-25 (1994) (stating that these provisions create many problems for women in custody disputes, particularly those in domestic violence situations); *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L. Q. 197, 202 (1995) ("[R]ecently, the ABA's Center on Children and the Law stated that friendly parent provisions are inappropriate in domestic violence cases and proposed that state legislatures amend such laws.").

tody arrangement may remain silent if raising such objections could potentially result in loss of custody entirely. A “willingness to share custody” provision can be particularly treacherous for women, since women generally are held to higher parenting standards than men and tend to be blamed for breakdowns in custody and visitation arrangements.⁶⁹ Furthermore, women usually are believed less than men and/or their concerns are more often trivialized.⁷⁰ This is particularly true for poor, black women who are often considered suspect by nature and treated with disdain.⁷¹

Generalizations that discount objections to shared custody are unwise. A custody award cannot be driven by a desire to punish the parent who believes that co-parenting is not a reasonable solution. That parent may have sound reasons for the objection, and, may prove to be the most involved, the most nurturing, and, therefore, the best candidate for custody.

c. The Wishes of the Parents and the Sincerity of Each Parent's Requests

The District of Columbia's Joint Custody of Children Act instructs the court to take into account the parents' wishes,⁷² as well as the sincerity of each parent's custody proposal.⁷³ This requires the court to review carefully objections to custody to ensure that they are concerned with the welfare of the child. Furthermore, section 16-911(a-2)(6)(B) of the Act provides that one parent's objection to any custody arrangement cannot be the sole basis for denying an order that the court deems to be in the child's best interests.⁷⁴ This section has no counterpart in the permanent custody provisions of section 16-914. Prior to the Act, joint custody orders had been entered only by agreement of the parties. This provision is intended to clarify the change in practice, at least for temporary orders. A substantive argument linked to the child's welfare is now required to sustain an objection to any custody arrangement.

Limiting this provision to temporary orders may be advantageous to a single mother who never had a familial relationship with the child's father and who intends to bypass the *pendente lite* phase of the litigation. The mother simply may argue that she does not wish to enter a foreign, com-

69. See Zorza, *supra* note 68, at 923.

70. See *id.*

71. See generally Ammons, *supra* note 22 (discussing the difficulty of applying the battered woman syndrome to black women given the negative stereotypes and imagery of black women within the culture).

72. D.C. CODE ANN. § 16-911(a)(5)(B) (Supp. 1996).

73. *Id.* § 16-911(a)(5)(M).

74. *Id.* § 16-911(a-2)(6)(B),

plex relationship with the other parent. In any event, to the extent that the father has been absent, starting a joint custodial relationship may be beyond the court's ability to establish, despite a broad interpretation of its legal authority. Furthermore, translating joint custody into only joint legal custody in such situations will not make the law more acceptable. It may, in fact, cause resentment, frustration, and rejection in a parent who is ordered to share decisions with a previously absent and uninvolved parent.⁷⁵

d. Prior Involvement in the Lives of the Children

Assessing prior involvement in the lives of the children is consistent with the concept that the primary caretaker is usually the preferred custodian. With joint custody, the court must still be concerned with the non-primary caretaker parent's involvement in the child's life. If that involvement is minimal, the interest in joint custody is suspect. When one parent's involvement in child rearing has been minimal, the court needs to assess carefully the motivation and commitment to raising the child. Furthermore, if the court orders shared physical custody or visitation for a previously uninvolved or minimally involved parent, a course of adjustment for the child and the parent may need to be specified.

A corollary of the lack of involvement in child rearing is the situation in which one parent is not really committed to the arrangement. Often, this parent pursues joint custody and gets it, but then fails to assume responsibility. The parent raising the child does not have clear authority and can be subjected to the whim of the uncooperative parent.⁷⁶ Currently, there is no precedent for sanctioning a failure to exercise visitation rights,⁷⁷ nor is there precedent for enforcing a parent's failure to meet the

75. Many of my clients have expressed outrage at the prospect of having to provide visitation to or share information with a parent who previously paid absolutely no attention to the child, a sentiment that would be compounded by a joint custody order.

76. Cf. Marygold S. Melli & Patricia R. Brown, *The Economics of Shared Custody: Developing An Equitable Formula For Dual Residence*, 31 HOUS. L. REV. 543, 555 (1994) (asserting that father visitation tends to decrease over time, while mother visitation remains stable or tends to increase).

77. In describing cultural norms that ascribe parenting responsibilities to the mother, Professor Karen Czapanskiy referenced the following quote: "[T]he mother has an 'unshakable responsibility' to her child which the father does not share." Czapanskiy, *supra* note 15, at 645 (citing *Caban v. Mohammed*, 441 U.S. 380 (1979), and *Quilloin v. Walcott*, 434 U.S. 246 (1978)). Professor Czapanskiy observes that this cultural reality has worked to the detriment of mothers where courts have given priority to the non-custodial parent's rights without according the same level of priority to the non-custodian's responsibilities. *Id.* at 645-46. The very identification of visitation as a right instead of an obligation indicates the failure to link visitation to the best interest of the child standard. It is purely a benefit granted to the non-custodial parent, often with little regard to the child's interests. One of the more troublesome expressions of that perspective was seen in the Chicago case

custodial responsibilities under a joint custody arrangement.⁷⁸ Consequently, the opportunity to abuse joint custody by using it as a means to avoid child support or to maintain control over a partner without acquiring any greater childrearing responsibilities is considerable.⁷⁹

e. Age of the Children

Many experts, as well as the D.C. Court of Appeals, have raised concern over the age of the children in the context of issuing joint custody orders.⁸⁰ The concern focuses on the particular need for stability for very young children in meeting their developmental and emotional needs and the disruption that shared physical custody can cause.⁸¹ Some have argued, however, that younger children can adjust better to such disruptions in the long term than older children.⁸² Still, others have raised sufficient concern with regard to the impact of shared custody on children of all ages to give courts pause in fashioning arrangements that will require awkward or disruptive schedules.⁸³

f. Stability

Interaction with siblings and significant others, disruption of social and school life, and the geographic proximity of parents all speak directly to a child's stability. Joint physical custody is inherently problematic in this regard, and is second only to parental collaboration in the hierarchy of concerns that must be addressed. Studies have shown that a significant

in which two girls, ages 12 and 8, refused to comply with the court order that they visit with their father for several weeks during the summer. The trial court found the two girls in contempt and had the older child sent to the detention center in shackles, while the younger one was grounded at home. The ruling was upheld by an appellate court, but was stayed pending further appeal. On April 4, 1996, the court affirmed the ruling denying modification of visitation, and the finding of contempt against the two girls, but reversed the sanctions imposed and remanded for further proceedings. See *In re Marriage of Marshall*, 663 N.E.2d 1113, 1122 (Ill. App. Ct. 1996); see also Mark Hansen, *Minor Adjustments*, A.B.A. J., July 1996, at 38.

78. If the circumstances can be proven, violation of the terms of the agreement could result in modification of the joint custody award. Interestingly, this result may not be acceptable to the parent who is not at fault and yet is unwilling to shoulder the entire obligation.

79. See *infra* note 144 (discussing "custodial blackmail").

80. See *supra* notes 73-74.

81. See *Utley v. Utley*, 364 A.2d 1167, 1170 (D.C. 1976).

82. See Paul R. Amato, *Life Span Adjustment of Children to their Parent's Divorce*, 4 THE FUTURE OF CHILDREN 141, 149 (1994).

83. See, e.g., Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects On Children of Joint Custody and Frequent Access*, 59 AM. J. ORTHOPSYCHIATRY 576, 588 (1989) (a study of parents who were entrenched in disputes over custody and visitation, concluding that children who have more frequent access are more emotionally troubled and behaviorally disturbed).

number of children suffer when they constantly are shuttled from one household to another, particularly when this involves leaving their neighborhood.⁸⁴ No studies appear to analyze the impact such movement has on children in poor, inner-city neighborhoods. There is no basis, however, for expecting that the impact of such disruption would be any less difficult for these children.

Parents committed to joint physical custody can compensate for the disruptions it causes by working to coordinate safety, as well as access to friends, family, school activities and social events. This scenario is not realistic, however, when resources are extremely limited, when the parents live more than a few miles apart, when the parents have no premise for such collaboration, or when the children find the organizational pressures of living in two households so intrusive that they outweigh the benefit of the other parent's involvement.

g. Financial Consequences

The very premise of the Child Support Guidelines⁸⁵ indicates that financial comparisons were not intended to result in custody being awarded to the more affluent parent, or to the parent whose earning potential may seem greater.⁸⁶ It is more likely, particularly given the statutory context, that the "parent's ability to financially support a custody arrangement" refers to the financial hardship, if not impossibility, for

84. See *id.*; see also Susan Steinman, *The Experience of Children in a Joint Custody Arrangement: A Report of a Study*, 51 AM. J. OF ORTHOPSYCHIATRY 403 (1981). Dr. Steinman reports, in a 1978-80 study of twenty-four families who pioneered joint custody on their own prior to express authorization of joint custody under California law, that while most children adjusted, twenty-five percent of the children were confused and unhappy because of the demands of living in two households. See *id.* at 410-12. Dr. Steinman strongly advocated the need for more studies, yet it is noteworthy that even in this highly motivated group, a significant percentage of the children were stressed by the living arrangements. See *id.* The situation is exacerbated when one parent decides to move to another locale. See Paula M. Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. FAM. L. 625, 649 (1996). Professor Raines presumes that joint custody is beneficial, but argues that the benefits break down when one parent decides to remove the children to another jurisdiction.

85. See D.C. CODE ANN. § 16-916.1(b) (Supp. 1996) ("[T]he guideline shall set forth an equitable approach to child support in which both parents share legal responsibility for the support of the child. . . . When child support is established, the child shall not live at a standard substantially below that of the noncustodial parent.").

86. The District of Columbia's human rights law is intended to end all forms of discrimination. See D.C. CODE ANN. § 1-2501 (Supp. 1996). The consideration of one parent's financial ability to support a custody arrangement should not discriminate against the parent who stayed home to raise the children or whose earning capacity is less for a number of reasons, including status in the society.

most parents to provide adequately for children in two households.⁸⁷ The number of children factor compounds this consideration since dual households reduce resources available to meet the child's needs. Diffusing the resources available for children is particularly troublesome in a jurisdiction like the District of Columbia where many households fall close to, or below, the poverty line. As discussed below, listing the impact on Aid to Families with Dependent Children and Medicaid as yet another factor for the court to consider is not helpful since it is unclear what the impact might be. It has been argued that orders making both parents equally responsible for childrearing would reduce the disparity between the mother's and the father's standard of living.⁸⁸ Such an argument does not take into account the increased costs of providing for dual residences for the children or the impact of disabling choices implicit in shared parenting. Significantly, it does not take into account another side effect of joint custody: the hardship faced by the parent who shoulders the bulk of the financial responsibility by virtue of de facto sole physical custody, with little contribution from the parent who fails to meet the obligations ordered by the court.⁸⁹ Although such a situation may be remedied by returning to court, anticipation of court costs, fees, time, child care, lost wages, the unavailability of legal help, the proof required and the hostilities such action would reignite may lead to the unintended consequence of one parent shouldering the burden with little or no contribution on any level from the other parent.⁹⁰

87. "Seriously shared physical custody requires two units large enough to house parent and child on a permanent basis—along with lots of child-rearing accoutrements . . . which must be present in both units." Singer & Reynolds, *supra* note 17, at 513.

88. Dean Herma Hill Kay favors joint custody awards that make fathers equally responsible with mothers for childrearing after divorce. Such awards would allow mothers to be more competitive in the workplace. She argues that the "large disparity between men's and women's household standard of living . . . should be greatly reduced." Herma H. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CINN. L. REV. 1, 86 (1987).

89. It has been my experience that many non-custodial parents have little interest in visiting their children under sole custody orders. It is not likely that this lack of commitment will magically change under a joint physical custody order.

90. The tax consequence of a joint physical custody arrangement is yet another piece of the financial framework that should be addressed if joint custody is to be ordered. If, for example, each parent has the child for 50% of the year, neither parent will be entitled to claim the child as a dependent for federal tax purposes, not to mention related District, or state, credits and deductions. The reason for this is the Internal Revenue Code rule that the parent having custody for the greater portion of the year gets the dependency exemption. See 26 U.S.C. § 152(e)(1) (Supp. 1994). Exceptions to the rule such as ones providing for multiple support arrangements and release of claim by a custodial parent, allow parents to avoid an unfair result. See 26 U.S.C. § 152(e)(2) (Supp. 1995). Using these provisions, a parent who has the child for half of the time each year could agree to waive the exemption in alternating years, and the parent who has the child for more than half of

h. The Demands of Parental Employment

Complimentary time frames may drive how physical custody is divided and result in a schedule in which children have regular access to each parent. This might occur, for example, where one parent works days, and the other works nights. This exceptional scenario often is alluded to by proponents of joint custody who argue that the presumption of joint custody can be financially neutral or even beneficial since procuring child-care is obviated.⁹¹ In contrast, if one parent has a very demanding job which involves long hours or travel, sole physical custody should be granted to the more available parent, with flexible visitation for the more encumbered one. This arrangement may be viewed as shared physical custody, with no more than the amount of visitation provided in a sole custody order. The goal is to ensure supervision, caring, and attention to the children; one parent may, by virtue of professional demands, be less able than the other to do so.

i. Benefit to Parents

As the Maryland Court of Appeals pointed out in *Taylor v. Taylor*,⁹² the benefit to the parents is relevant not only because their feelings and interests are worth considering, but because the parents' improved self-image is likely to benefit the child.⁹³ However, the very nature of a custody battle voices parents' interests. The consideration of this factor underscores the danger that a joint custody presumption poses when the focus shifts from the child's needs to those of the parents. An earlier version of the Act read "the benefit to the parents, not to be outweighed by the best interest of the child."⁹⁴ Fortunately, since it would seem to have supported a definite conflict with the statute's emphasis on the primacy of the child's interests, the latter phrase was dropped.

Implicit in custody law is this tension between the fundamental liberty interest of natural parents in the raising of their children and the obliga-

the year could agree to waive the exemption every few years in proportion to the other parent's significant custodial responsibilities. Contemplating and providing for such arrangements as part of a parenting plan or, in the absence of such a plan, at the time that a joint custody order is entered can avoid confusion, hostilities, and reduced financial capacity to meet child rearing obligations later on.

91. See, e.g., Ronald K. Henry, *The District of Columbia's New Joint Custody of Children Act*, *The Washington Lawyer* (July/August 1996). Mr. Henry asserts that "[s]hared physical custody shares the burden of child care and allows both parents to have significant workforce participation, thereby increasing total family income." *Id.* at 54.

92. 508 A.2d 964 (Md. 1986).

93. See *id.* at 974.

94. Amendment in the nature of a substitute, reported by the Judiciary Committee on June 21, 1995. See *Judiciary Report*, *supra* note 50.

tion of courts to limit that interest when the parents are not prepared to exercise it in unison, or where they endanger the children.⁹⁵ This strong sense of right finds expression in joint custody presumptions that subject the assessment of the children's needs to a reflexive conclusion that two parents are ideal under just about any circumstance. In essence, children are reduced to chattel in that they are subordinated to the proprietary interest of their parents.⁹⁶ That is why, when the courts do intervene as the family structure is dissolving, it is primarily the parents who are heard.⁹⁷ Custody is about the raising of children. Children's voices are silenced if their interests are not made the court's central concern.

3. Parenting Plans

The *pendente lite* section of the statute provides for an eleven-part parenting plan.⁹⁸ Much has been said in the joint custody debate about

95. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . .").

96. See Twenty-First Transcript, *supra* note 31 (providing Councilmember Lightfoot's remarks). D.C. Councilmember William Lightfoot was correct in his reference to children. The reality of their status, however, equates to little more than property.

97. Even in abuse and neglect cases, the parents are present with their counsel, but the guardian appointed on behalf of the children usually appears with the social worker, not the children. The goal of these proceedings is to return the child to the neglectful or abusive parent or parents, often on the off chance that the child will not suffer more. In 1994, forty-eight states reported that 1,011,628 children were determined to have been victims of abuse and neglect, and 1,111 children died as a result of abuse and neglect. See U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 1994: REPORTS FROM THE STATES TO THE NATIONAL CENTER ON CHILD ABUSE AND NEGLECT 2-3 (1996). Nearly 80% of the perpetrators were parents. See *id.* at 2-9.

98. The components of the parenting plan provision are:

- (i) the residence of the child or children;
- (ii) the financial support based on the needs of the child or children and the actual resources of the parent;
- (iii) visitation;
- (iv) holidays, birthdays and vacation visitation;
- (v) transportation of the child or children between the residences;
- (vi) education;
- (vii) religious training, if any;
- (viii) access to the child's or children's educational, medical psychiatric, and dental care records;
- (ix) except in emergencies, the responsibility for medical psychiatric, and dental treatment decisions;
- (x) communication between the child and the parents; and
- (xi) resolving conflict such as a recognized family counseling or mediation service before applying to the court to resolve a conflict.

D.C. Code Ann. § 16-911(a-2)(2)(A) (Supp. 1996). All except the second of these are useful considerations for parties contemplating joint custody. The reference to financial

the importance of parenting plans, and several state statutes specifically refer to them.⁹⁹ Parenting plans have the benefit of compelling parties to hash out the specifics of the arrangement they are undertaking.¹⁰⁰ The

support suggests that the issue is more open than it should be, given the application of the Child Support Guidelines. The guidelines identify what "actual resources" are relevant in the support context and, to the extent that joint custody amounts to less than a 40/60 division of physical custody, there is no ambiguity as to what the amount of support is to be. The danger with this language is that it encourages the use of child support as a bargaining chip in the course of coming to a consensus on the custody arrangement. At a minimum, it has the potential to mislead litigants as to what the correct analysis should be for purposes of determining support. *See id.* §§ 16-911(a)(5); 16-914(a)(3); *see also id.* § 16-916.1(n) (providing child support guidelines regarding the impact of a 40/60 or more shared custody arrangement).

99. There are ten states which require parties to submit proposed parenting plans to the court prior to a grant of joint custody. Arizona's provisions regarding parenting plans provide a good example of what these plans should delineate:

1. Each parent's rights and responsibilities for the personal care of the child and for decisions in areas such as education, health care and religious training.
2. A schedule of the physical residence of the child, including holidays and school vacations.
3. A procedure by which proposed changes, disputes and alleged breaches may be mediated or resolved, which may include the use of conciliation services or private counseling.
4. A procedure for periodic review of the plan's terms by the parents.
5. A statement that the parties understand that joint custody does not necessarily mean equal parenting time.

ARIZ. REV. STAT. ANN. § 25-403(I) (West Supp. 1996); *see also* ALA. CODE § 30-3-153 (Michie 1975); 750 ILL. COMP. STAT. ANN. 5/602.1 (West Supp. 1996); MASS. GEN. LAWS ANN. ch. 208, § 31 (West Supp. 1996) ("At the trial on the merits, if . . . either party seeks shared legal or physical custody, the parties, jointly or individually, shall submit . . . a shared custody implementation plan."); MO. STAT. ANN. § 452.375(8) (West Supp. 1997) ("Any decree providing for joint custody shall include a specific written plan setting forth the terms of such custody. Such plan may be suggested by both parents acting in concert, or one parent acting individually, or if neither . . . the plan shall be provided by the court.); MONT. CODE ANN. § 40-4-223(b)(2) (1995); N.M. STAT. ANN. § 40-4-9.1(F) (Michie 1996); OKLA. STAT. ANN. tit. 43, § 109(C) (West 1990); WASH. REV. CODE ANN. § 26.09.181 (West Supp. 1996) ("In any proceeding . . . each party shall file and serve a proposed permanent parenting plan."). *But see* DEL. CODE ANN. tit. 13, § 727 (1993).

In addition, there are eight states which indicate that the submission of parenting plans in joint custody proceedings is discretionary. *See* CAL. FAM. CODE § 3040(a)(1) (West 1994); COLO. REV. STAT. § 14-10-123.5(3) (1987) (allowing the court to formulate its own plan if no plan is submitted or one submitted is not approved); D.C. CODE ANN. § 16-911(a-2)(2)(A) (Supp. 1996); KAN. STAT. ANN. § 60-1610(a)(4)(A) (Supp. 1994); NEB. REV. STAT. § 42-364 (Supp. 1994); OHIO REV. CODE ANN. § 3109.04 (Anderson 1996) (parenting plans may be submitted for either sole or joint custody proceedings); TEX. FAM. CODE ANN. § 153.007 (West 1996); VT. STAT. ANN. tit. 15, § 666 (1989) (finding that an agreement between the parties (or parenting plan) shall be presumed to be in the best interests of the child, but the court does not have to adopt it if it finds it was not devised voluntarily). *See also* N.J. STAT. ANN. § 9:2-4(e) (West 1969) (stating that the court may require each party to submit a custody plan in cases in which the parties cannot agree).

100. *See* Lynne M. Kenney & Diana Vigil, *A Lawyer's Guide to Therapeutic Interventions in Domestic Relations Court*, 28 ARIZ. ST. L.J. 629, 645 (1996) (stating that when

use of a standard parenting plan form provided by the court may be useful to parents and judges when joint custody is to be awarded. The danger is that the court may rely too heavily on the forms, using them as checklists, instead of making less mechanical custody determinations. Furthermore, simply providing parenting plan forms will not give *pro se* litigants insight into the level of detail needed to make the forms useful. The forms also will not alleviate the difficulty and stress involved in providing the necessary information. Trained personnel will be needed to render assistance to these parties. Given the number of *pro se* litigants in the District of Columbia, this will require resources that were not anticipated by the court or the legislature when the new Act was passed.¹⁰¹

Parenting plans are not mentioned in the permanent custody section of the statute. If parenting plans are limited to *pendente lite* orders, their benefits will be marginal, and they will be of little relevance to those litigants who choose or need to bypass this phase of the litigation. While established under only the *pendente lite* language of the statute, however, the new law allows the court to require parenting plans in *any* custody proceeding. Thus, the court could also ask for a detailed plan in permanent custody cases, including sole custody cases.¹⁰² Requiring detailed plans in sole custody cases could be viewed as unnecessarily cumbersome, except for the fact that the lines between sole and joint custody can become infinitely porous under a statute such as this in which the definition of joint custody is so malleable. Since the parenting plan language is permissive, judges¹⁰³ can pick and choose how to use it.¹⁰⁴

Judges should choose whether to use parenting plans with caution since they can open a Pandora's box of infractions for the court to address.¹⁰⁵

parents are in disagreement over matters concerning the child, parenting plans can help them reach an agreement).

101. In 53% of all cases in the Family Division of the Superior Court, one or both of the litigants are *pro se*. See DISTRICT OF COLUMBIA BAR TASK FORCE ON FAMILY LAW REPRESENTATION, D.C. BAR PUBLIC SERV. ACTIVITIES CORP., ACCESS TO FAMILY LAW REPRESENTATION IN THE DISTRICT OF COLUMBIA REP. 39 (Fall 1992).

102. See D.C. CODE ANN. § 16-911(a-2)(2)(A) (Supp. 1996) ("[I]n any custody proceeding under this chapter, the court may order each parent to submit a detailed parenting plan," thus including custody matters that do not contemplate joint custody and reaching forward to incorporate permanent orders as well.). The reference to any custody proceeding means that parenting plans could be required in sole custody cases as well.

103. The court rules allow Hearing Commissioners to replace judges in deciding custody, and other matters, with the consent of the parties. See D.C. SUPER. CT. FAM. DIV. R. 405(d) (1992). My references to judges are meant to include Hearing Commissioners.

104. In any event, judges should avoid disclosures in the cases involving domestic violence, child abuse or neglect and/or parental kidnapping that would place the vulnerable parties at greater risk.

105. See Jane W. Ellis, *Caught in the Middle: Protecting Children of High Conflict Divorce*, 22 N.Y.U. REV. L. & SOC. CHANGE 253, 261 n. 48 (explaining that the parenting

Even with the counseling or mediation suggested in statutes, once parenting plans are adopted, the court is the ultimate arbiter if these negotiations break down, and it has virtually no options for reasonably resolving much of the conflict.¹⁰⁶

4. *Providing For Which Parent Makes Decisions Requiring Immediate Attention*

Section 16-911 also has another crucial element not reflected in the permanent order provisions. It requires the court to designate a parent to make decisions that need "immediate attention" regarding the health, safety, and welfare of the child.¹⁰⁷ Giving one parent clear authority in emergency situations avoids the horror stories told of parental impasses as a child lays on the operating table.¹⁰⁸ The phrase "immediate attention," however, encompasses more than pure emergencies. The parent with such authority can make decisions regarding non-routine medical care, schooling, counseling, travel, and so on.¹⁰⁹

plan sometimes exacerbates the conflict between parents rather than lessening it); *see also* Mary Kate Kearney, *The New Paradigm In Custody Law: Looking at Parents With a Loving Eye*, 28 ARIZ. ST. L.J. 543, 585 n.228 (1996) (concluding that courts do not desire to arrange every aspect of a family's life).

106. Fines and jail sentences are both available to the court, but they cannot reasonably address the many deviations from parenting plans, particularly when application of such sanctions would only serve to exacerbate the problems raised. Change of custody is another option the court may exercise, but it is a response the court reasonably would want to reserve for serious infractions or where it is evident that the cooperation anticipated by the order is not going to occur.

107. *See* D.C. CODE ANN. § 16-911(a-2)(2)(C) (Supp. 1996).

108. *See* Singer & Reynolds, *supra* note 17, at 508-09 (discussing the situation of a hospital refusing to operate on a child because the parents, who shared joint legal custody, could not agree on whether to consent to the operation). *See id.* (citing Levy & Chambers, *The Folly of Joint Custody*, Fam. Advoc., Spring 1981 at 6, 8 (discussing a life-threatening case in Colorado in which a hospital refused to perform an appendectomy on a child with joint custodians because, while one parent consented to the procedure, the other parent refused)).

109. One Maryland attorney recounted her experience with a nine year old boy suffering from attention deficit disorder who was known to jump out of windows, cut himself, and so on. His neurologist, psychiatrist, and psychologist all agreed that he needed to be hospitalized in order to closely monitor his medication. The child's father objected to any medication and signed the boy out of the hospital. Neither parent had final say since the joint custody order did not provide for final decisionmaking in this situation. The same attorney recounted several of her cases in which the child had been enrolled in two schools right up to the beginning of the semester, with the parties relying on the court to finally determine which school the child would attend. Discussion with Cheryl Hepfer, March 27, 1997. Ms. Hepfer is a Fellow of the American Academy of Matrimonial Lawyers who has practiced domestic relations law in the state of Maryland for over 25 years. *See also*, Singer and Reynolds, *supra* note 17, at 508.

Arguably, this decision-making authority subsumes the concept of joint legal custody. However, if joint legal custody refers only to long-range decisions, as indicated by the D.C. Court of Appeals in *Ysla v. Lopez*, then the bulk of the issues requiring immediate decisions will fall to the physical custodian.¹¹⁰ In any event, children cannot be protected effectively if important decisions are hamstrung by the inaccessibility of one parent or by an impasse. Such situations will come up over the course of the child's minority, and without a mechanism to resolve them short of judicial intervention, children will suffer and the court will be overwhelmed.

As suggested by the *Ysla* court, the parent having such authority to make immediate decisions should be the parent with the most significant contact with the child.¹¹¹ It would be inappropriate to give less weight to the decision-making authority of the more involved parent. A reasonable award of joint legal custody would anticipate and foreclose manipulation of long range decisions by the authorized parent who may otherwise be tempted to delay action until situations require an immediate response. Thus, while choice of the child's school would not normally fall under this provision, a parent should not be able to put off the issue to the point at which collaboration is no longer an option. Although parenting plans set out parental responsibilities, it is difficult to expect that the court will be equipped to handle the occasions on which breach may occur.

The statute limits determinations as to who will make the decisions that require immediate attention to the parties seeking an interim order under § 16-911.¹¹² There is no legitimate reason for doing so. In balancing the children's needs and the parents' rights, the statute instructs the court to give priority to the children.¹¹³ Thus, even without this specific statutory instruction in § 16-911, the court should anticipate and provide for the authority to act when immediate action is required. Nonetheless, the mandatory language of the interim order is simply not present in the permanent one, and to the extent that this decision-making authority is not

110. Cf. 684 A.2d 775, 777-78 (D.C. Cir. 1996) (defining legal and physical custody).

111. *Id.* In *Aldridge v. Aldridge*, the Tennessee Court of Appeals concluded as follows:

An important duty of the custodian of a child is to be available to make regular and emergency decisions necessary in the life of the child, such as medical treatment for injury or illness, choice of friends or associates, or activities. Such decisions are best made by a person in close and constant touch with the child, and available in emergencies.

Aldridge v. Aldridge, No. 01A01-9308-CH-00339, 1994 WL 49890, at *3 (Tenn. App. Feb. 18, 1994) (transferring legal custody from the mother to the father since the child spent most of his time with his father).

112. D.C. CODE ANN. § 16-911(a-2)(2)(C).

113. D.C. CODE ANN. §§ 16-911(a)(5), 16-914(a)(3).

extended to permanent orders, it supports the argument that an award of joint legal custody is unwise.

5. *Parenting Classes*

Parenting classes are specified as an option under § 16-911, but not for purposes of the permanent order.¹¹⁴ As with other provisions, nothing suggests a legislative intent to limit parenting classes to those who seek interim orders, and the idea that such classes should be undertaken as soon as possible does not account for the cases in which no interim order is requested. Parenting classes may be a beneficial activity at any stage in the case. Their inclusion in the context of joint custody underscores the special challenge in such circumstances. The provision assumes, however, that parties can afford to pay for parenting classes, since they are provided by the court in limited circumstances.¹¹⁵ This simply is not the case for the majority of the litigants in the District.¹¹⁶

6. *Child Support*

The application of the Child Support Guideline does not extend to shared physical custody arrangements in which the child spends forty or more percent of the time with each parent.¹¹⁷ Unfortunately, it is not

114. See D.C. CODE ANN. § 16-911(a-2)(2)(D) (Supp. 1996).

115. District of Columbia Superior Court Social Services Division offers parenting classes through Parents Empowering Parents (PEP). Referrals to the program are through court probation officers, and generally involve cases in the Child Abuse and Neglect Branch, the Juvenile Division, and noncustodial parents in domestic violence cases. Counseling for children who have witnessed domestic violence is provided through another Court Social Services Division program called Children of Violent Environments (COVE). The program includes a parent counseling component. Referrals to this program are also through probation officers. There are other family counseling services provided by this division of the court, but the programs are designed to address problems in families where abuse, neglect, and/or delinquency have introduced the families to the court system, and where intervention is needed in order to avoid more drastic action by the court. Referrals from the Child Abuse and Neglect Branch of the Court had caused a considerable enrollment backlog for the PEP program which was recently alleviated somewhat by outsourcing referrals. This does not suggest that the Court would be in a position to handle referrals from the regular domestic relations docket.

116. Although not the benchmark for poverty status, proceeding without counsel in court is often indicative of limited resources. More than fifty percent of all cases in the Family Division have been reported as involving at least one unrepresented party. See *supra* note 101.

117. In 1984, Congress mandated that all states and the District of Columbia adopt child support guidelines as a condition of receiving Aid to Families with Dependent Children. See 42 U.S.C. § 667 (1994). Awareness of a need for guidelines grew out of a nationwide movement, bolstered by government and academic studies, that challenged the significant lack of consistency and fairness in child support awards. Specifically, support awards tended to result in improved living standards for custodial parents and a corresponding decline in the standards for non-custodial parents and the children. The Superior

clear how child support will work in cases where shared physical custody is approximated, or how the resulting lack of child support will benefit the child when resources must be stretched between separate households. While there are formulas within the statute for determining support in these cases, the only requirement that stands when joint physical custody is roughly equal is that the standard of living of the child should not be less than that of the noncustodial parent. The meaning of this requirement is left to judicial discretion.¹¹⁸ The very existence of child support guidelines throughout the country demonstrates that the exercise of such discretion has not resulted in adequate support for children.¹¹⁹

Section 16-911(a-2)(3) states that “[j]oint custody shall not eliminate the responsibility for child support in accordance with the applicable child support guideline as set forth in section 16-916.1.”¹²⁰ Unless repealed or modified, the applicable child support guideline would apply regardless of the legislation enacted. This language is not repeated in the permanent order provisions. In fact, there is nothing in § 16-914 that refers to support. Instead, the Act includes an amendment to the Child Support Guidelines which provides that child support can be considered in any custody proceeding.¹²¹ The section appears after a detailed Child Support Guideline that has been interpreted as applying to *all* proceed-

Court initiated its own guidelines in response to the federal mandate, but its authority to do so was successfully challenged in court. *See* *Fitzgerald v. Fitzgerald*, 566 A.2d 719, 722, 732 (D.C. 1989). Subsequently, the Guidelines were enacted by the Council of the District of Columbia in 1990. *See* D.C. CODE ANN. § 16-916.1 (Supp. 1996).

Interestingly, the group that was most aggressive in its support of the joint custody legislation, the Children’s Rights Council, was the same group that appeared as *amicus curiae* in support of the successful parties in *Fitzgerald* and opposed enactment of the Child Support Guidelines. *See* *Fitzgerald*, 566 A.2d at 720.

118. *See* D.C. CODE ANN. § 16-916.1(n) (Supp. 1996). Under this subsection, if the child spends at least 40% of the time with each parent, the guideline is no longer presumptive, but another formula is suggested for allocating the responsibility between both parents. Another subsection is intended to protect children from slipping between the cracks of the various formulas. It states: “If the judicial officer determines that the presumption has been overcome, the amount of child support ordered shall not reduce the standard of living of the child to less than that of the noncustodial parent. The precise amount of child support is within the discretion of the judicial officer.” D.C. CODE ANN. § 16-916.1(p)(3) (Supp. 1996). Similar guidelines exist in other jurisdictions. *Cf.* CONN. GEN. STAT. ANN. § 46b-84 (West 1995).

119. *See generally* Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209 (1991) (arguing that discretionary child support standards have produced awards that are inadequate to support custodial households).

120. D.C. CODE ANN. § 16-911(a-2)(3) (Supp. 1996).

121. The amendment adds a new section entitled: “*Proceedings in which child support matters may be considered.*” D.C. CODE ANN. § 16-916.3 (Supp. 1996). This section states: “The court may consider child support matters, as it deems appropriate, in any proceeding to determine the care and custody of a minor child or children.” *Id.*

ings to determine the care and custody of minors, and seems to be a gratuitous reference intended to neutralize criticism of the joint custody presumption as an end run around child support.¹²²

7. Domestic Abuse

In the amendment to both sections of the statute, the presumption in favor of joint custody seemingly is withdrawn where there is a showing, by a preponderance of the evidence, that an intrafamily offense, an instance of child abuse or neglect, or an instance of parental kidnapping occurred.¹²³ These are important attributes of the Act and are consistent with the District's legislative strides to protect survivors of domestic violence and their children.¹²⁴ Much has been said about the need to amend

122. See *id.* § 16-916.1(a) (defining its scope as including any case brought under subsections (1), (3), (10), or (11) of § 11-1101). Subsection (1) of § 11-1101 covers custody cases in the divorce or separation context. See D.C. CODE ANN. § 11-1101(1) (1981). Subsection (3) refers to support enforcement. See *id.* § 11-1101(3). Subsection (10) refers to uniform support provisions by statutory designation, § 30-301-324, which have been repealed, and though replaced by Chapter 3A, Interstate Family Support, the new sections, 30-341.1 to 30-349.1, are not referenced in the Guideline. See *id.* § 11-1101(10). Subsection (11) refers to paternity cases. See *id.* § 11-1101(11). These subsections do not quite reach out of wedlock custody cases that are not paternity or support enforcement cases.

Thus, intentions aside, the language does clarify that certain out of wedlock custody matters not fitting exactly within the specific language of the Guideline are covered. What is troublesome is that, in addition to section 16-916.3, the firm language in section 16-911 is not simply repeated in section 16-914. While it is not crucial, given the application of the Guideline regardless of the language, the absence of the specific language may unintentionally be interpreted as having no application to permanent custody awards.

123. See D.C. CODE ANN. § 16-914(a)(2) (Supp. 1996); see also D.C. CODE ANN. §§ 16-1021 to -1026 (1989) (defining parental kidnapping); D.C. CODE ANN. § 6-2101(13) (1995) (defining child abuse); *id.* § 6-2131(3) (defining child neglect); *supra* note 45 (defining intrafamily offense). The inclusion of the child abuse and neglect and parental kidnapping provisions were added towards the end of the legislative process, as a result of the Executive Comments submitted at the May 10, 1995 public hearing. See REVISED REPORT, *supra* note 50.

124. See The Domestic Violence in Romantic Relationships Act of 1994 (codified in D.C. CODE ANN. § 16-1001(5) (Supp. 1996); D.C. CODE ANN. §§ 16-1031 to -1034 (Supp. 1996)) (requiring mandatory arrest in domestic/intrafamily violence incidents); see also Evidence of Intrafamily Offense in Child Custody Cases Act of 1994 (codified in D.C. CODE ANN. §§ 16-911(a-1) and 16-914(a-1), 16-1001(5) (Supp. 1996)); Barry, *supra* note 45 (specifying a preference for granting sole custody to the parent who is not abusive and requiring that safety concerns be specifically considered in granting visitation where there is evidence of domestic violence). These provisions are not amended by the new law.

Despite the Council of the District of Columbia's strong record in addressing domestic violence, the fact that parent and child need distance and court-enforced protection from the abusive parent seemed lost on one Council member who in his enthusiasm for passing a joint custody presumption said, "I really believe that many of the murders that you read about where you wake up and someone has walked in, shot the mother, shot the child could be avoided if there was joint custody." Twenty-First Transcript, *supra* note 31, at 249.

the reunification policy that returns children to parents who abuse or neglect them.¹²⁵ Without taking on that debate, the preference in a custody dispute should be for the parent who would not do harm. Parental kidnapping can also be very damaging to children and to the parent from whom the children are taken. In some instances, it represents a desperate attempt to achieve safety. Such kidnapping often goes hand-in-hand with partner abuse, either with the abused parent fleeing or the abusive parent taking the child as a further means of torment.¹²⁶

Abuse of one parent by another raises specific issues with regard to children that only recently have gained the recognition they warrant in custody determinations. While many children suffer physical injury as a result of being in the line of fire, children who witness violence by one parent against another often are harmed psychologically.¹²⁷ It does neither the child nor the abused parent any good to require that the harmful contact continue, especially the level of interaction expected under joint custody. However, raising abuse for the first time in the context of a custody case is often viewed as inherently suspect. The parent whose strategy for escaping abuse does not include pressing criminal charges or seeking a protective order¹²⁸ may risk losing custody to the abusive parent if the court disregards the undocumented evidence as op-

125. See, e.g., George H. Russ, *Through the Eyes of a Child, "Gregory K.": A Child's Right to be Heard*, 27 FAM. L.Q. 365, 387 (1993). Russ argues that the national policy of "family preservation" or "family reunification," which is not supported by any in-depth analysis of family constitution, has resulted in tragedy for many children in this country. *Id.* at 387. Russ contends that "[b]lind adherence to the family preservation policy using a biological definition of family often flies in the face of the "best interests of the child" and has led to the abuse, neglect, abandonment, and even death of literally thousands of children in our country." *Id.*

126. See Julie Kunce Field & Mary S. Hood, *Domestic Abuse Injunction Law and Practice: Will Michigan Ever Catch Up to the Rest of the Country?*, 73 MICH. B.J. 902, 904 (1994). Professors Kunce Field and Hood observe that batterers often abuse their partners through their children, and often abuse the children as well. *Id.* If the mother fails to protect the children by not taking them with her, she may be charged with neglect. See *id.* Further, abusive fathers frequently kidnap their children; most kidnapping parents are male and more than half of all child kidnappings are domestic violence related. See *id.*

127. See generally NATIONAL CENTER ON WOMEN AND FAMILY LAW, EFFECT OF WOMAN ABUSE ON CHILDREN (1991) (reporting on the detrimental effects of exposure to parental abuse and the recognition of this impact in child custody decisions); MARIA ROY, CHILDREN IN THE CROSSFIRE (1988) (discussing the impact of spouse-battering on children and encouraging intervention programs).

128. Because encountering the criminal system or seeking a protective order through the courts can be an alienating and embarrassing experience, [m]any women choose simply to separate. For an analysis of statistical information regarding abusive relationships, see Michael J. Strube, *The Decision to Leave an Abusive Relationship*, in COPING WITH FAMILY VIOLENCE: RESEARCH AND POLICY PERSPECTIVES 93, 94 (Gerald T. Hotaling et al., eds. 1988).

portunistic and applies an unfriendly parent penalty.¹²⁹ Professor Karen Czapanskiy made the following observation:

Studies of gender bias in the courts document how courts too often disbelieve credible evidence of domestic violence and discount its seriousness. Too often, judges ignore the substantive law along with the evidence. Too often, their orders hurt women and children who come to court in family law cases.¹³⁰

The image of black women as domineering, tough, and destructive makes it all the more difficult to assert that protection from an abusive father is either justified or desirable.¹³¹

One of my clients, a black woman with two children, refused to seek child support, including medical coverage, or any limitation of visitation from the father of her children, despite a history of abuse. The father had communicated to her that she would be "Ojayed"¹³² if she raised any of these issues in the context of their divorce. Significantly, the court never inquired about child support for the children or questioned the open visitation arrangement, despite the fact that the initial pleadings referenced the existence of a protective order and outlined a history of violence. It was as though the court accepted her situation as tenable and was not moved to inquire on behalf of the mother or the children as to the absence of protection or support.

129. See Zorza, *supra* note 68, at 923-25.

130. Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 *FAM. L. Q.* 247, 249 (1993). Professor Czapanskiy reports that in the Maryland gender bias task force survey judges and lawyers were asked whether "child custody awards disregard fathers' violence against mothers." *Id.* at 255. Approximately one third of the judges and male lawyers said "yes," and almost two thirds of the female lawyers said "yes." *Id.* at 255-56 (citing *GENDER BIAS IN THE COURTS: REPORT OF THE MARYLAND SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS* 280 (1989)). Over a fourth of the respondents to a similar District of Columbia survey agreed that "women who respond to domestic violence by leaving the home" sometimes or often are viewed as "unstable and less fit to have custody." *Id.* at 257 (quoting *DISTRICT OF COLUMBIA COURTS TASK FORCE ON RACIAL AND ETHNIC BIAS AND TASK FORCE ON GENDER BIAS IN THE COURTS, FINAL REPORT* 183 (1992)).

131. See generally Ammons, *supra* note 22 (discussing the difficulty black women face in asserting the impact of domestic violence). Professor Ammons observes that:

Among the historical stereotypes that keep black women marginalized were Mammy, Aunt Jemima, and Jezebel. Modern caricatures include Sapphire, the matriarch and the welfare queen. These representations are so powerful that the sight of a woman of African descent can trigger responses of violence, disdain, fear, or invisibility.

Id. at 1049-52 (citations omitted).

132. The reference was to the fact that ex-athlete, movie and commercial star O.J. Simpson had been acquitted in 1996 of the murder of his ex-wife and her friend, Ron Goldman, despite considerable evidence to the contrary.

The District of Columbia Code's definition of the term "intrafamily offense" does not include emotional abuse. It has long been acknowledged that emotional abuse can also be devastating as well.¹³³ A degrading statement or threatening look elicits conditioned responses associated with previous psychological abuse. That abuse can take the form of isolation, induced debility, monopolization of perception, degradation, and random reinforcers or indulgences that keep alive the hope that the abuse will cease.¹³⁴ Children who witness the anxiety, depression, and emotional withdrawal of a parent experiencing emotional abuse will present emotional or physical problems similar to those seen in children traumatized by witnessing physical abuse.¹³⁵ Clearly, forcing contact in a jurisdiction where there is a presumption of joint custody with no specific exemption in the case of emotional abuse runs contrary to the interests of the child.

Thus, despite its strong language, the Act risks giving abusive parents a greater opportunity to use custody as a means of continuing destructive contact. This is particularly true since the presumption in favor of joint custody may preclude sufficient analysis of the impact of psychological abuse, or may preclude sufficient analysis of physical abuse if the abused parent is hesitant to raise the history of abuse or is effectively silenced in the attempt to do so.¹³⁶

Even where there is a documented record, the Act does not oblige the court to conduct its own investigation with regard to previous cases of abuse, neglect, or parental kidnapping, and apparently the court does not expect to do so.¹³⁷ Furthermore, the extent to which the court has the ability to conduct such an investigation is not clear. The court's current limitations are referenced in section 3 of the Act and in the court's own assessment of the budgetary impact of the Act, both of which suggest that

133. One woman made the following observation, "He beat me, but you know it was the verbal abuse that killed me the most. I just felt like I was no good, I was trash, the things he used to say to me . . ." BARRIE LEVY, *IN LOVE AND IN DANGER* 34 (1993).

134. See MARY DUTTON, *EMPOWERING AND HEALING BATTERED WOMEN* 25-27 (1992) (discussing psychological abuse and describing it as a form of torture).

135. See *EFFECT OF WOMEN ABUSE ON CHILDREN*, *supra* note 127, at 22-45.

136. While to report an abusive parent to the child protective service agency is common, equally common is for an abusive parent or his family falsely to accuse the protective parent of child abuse as part of his control over her . . . Mothers are judged particularly harshly when allegations of child and sexual abuse are raised in custody cases. A widely believed myth exists that women frequently and falsely raise such allegations in custody cases to win tactical advantage.

Id. at 922-23.

137. See D.C. CODE ANN. §§ 16-911(a)(5), 16-914(a)(2).

the court will not be equipped to access this information readily.¹³⁸ Litigants will have to do their own checking and cross-checking which may be particularly difficult for those litigants proceeding *pro se*. The court, however, is implementing a new Domestic Violence Plan, which includes cross-referencing of criminal and domestic relations cases involving domestic violence.¹³⁹ This may result in ready access to information regarding intrafamily offenses, but it is not evident that the prevention of child abuse, neglect, or parental kidnapping will benefit in any way from this plan.

8. Consent Orders

For interim orders, the Act codifies what has been, in effect, the practice for both interim and permanent custody orders by requiring the court to enter all custody proposals that are agreed to by both parents, unless there is clear and convincing evidence that the arrangement is not in the best interest of the child.¹⁴⁰ A departure from current practice is the requirement that if the court hearing an interim support order determines that a consent agreement is not in the best interest of the child, the court must state its reasons for such a conclusion in writing.¹⁴¹ By requiring judges to specify in writing why a consent agreement is being rejected, the new law reflects the legislative intent that a judge who is not convinced that the parents' proposal is adequate must take the time to justify that conclusion.¹⁴² Although meant to induce acceptance of consent orders, the writing requirement does not absolve judges of their responsibility to protect the best interests of the child. In contemplating a proposed joint custody order, the best interests of the child standard obliges the court to ensure that the parents have assessed all components of their joint agree-

138. See D.C. CODE ANN. § 16-914(a)(3) (1981 & Supp. 1996). The Executive Officer of the D.C. Superior Court responded by letter to an inquiry from the Chair of the D.C. Council's Judiciary Committee that "the act does not specify who has the obligation of raising the issue of domestic violence, and does not obligate the court to raise the issue sua sponte." Letter from Ulysses B. Hammond, Executive Officer, District of Columbia Courts, to William P. Lightfoot, Chair of the Judiciary Committee, Council of the District of Columbia (Nov. 2, 1995) (copy on file with author). The letter went on to observe that if the court did require a screening of each custody and visitation complaint in response to this provision, the cost, short of implementing an integrated computer system, would be approximately \$30,000. See *id.* at 2. Computerizing the process would cost more, at least initially. See *id.* No authorization for funding accompanies the bill.

139. The plan is outlined in THE DISTRICT OF COLUMBIA DOMESTIC VIOLENCE PLAN (1995), which outlines the findings and recommendations of the District of Columbia Domestic Violence Coordinating Council. Implementation of the plan began on November 14, 1996.

140. See D.C. CODE ANN. § 16-911(a-2)(6)(A) (Supp. 1996).

141. See *id.* § 16-911(a-2)(6)(C) (Supp. 1996).

142. See D.C. CODE ANN. § 16-911(a-2)(6)(C).

ment, that they are committed to making it work, that their proposal fully addresses the many contingencies, and that there is no reason to believe that the child's interests will not be served by the arrangement.¹⁴³ This is particularly true given the fact that joint custody can skew any custody negotiation by giving the parent who is less interested in custody more leverage.¹⁴⁴

143. See *Bailey v. Bailey*, No. 93APF12-1694, 1994 WL 530305 (Ohio App. Sept. 29, 1994) (holding that in determining whether shared parenting is in the best interest of the child, the court shall consider the ability of the parents to cooperate and make decisions jointly). The Ohio Court of Appeals found that the "long-standing and profound communication deficiency between the parents . . . would impair implementation of a shared parenting plan. This circumstance alone would substantially contribute to a decision not to order shared parenting in this case." *Id.* at 5; see also Danece Day Koenigs & Kimberly A. Harris, *Child Custody Arrangements: Say What You Mean, Mean What You Say*, 31 *LAND & WATER L. REV.* 591, 611 (1996) (arguing that joint custody should not be ordered in situations in which the parents "have expressed a desire to avoid participation in the arrangement"). However, these authors argue that joint custody promotes cooperation between the parents and it allows the child to live in a situation which mirrors the custody and control from the marriage. They suggest that there is an added incentive for parental cooperation in joint custody scenarios because the parties know that if they do not cooperate, the court can modify the award and give sole custody to the party who will serve the best interest of the child. See Richard K. Schwartz, *A New Role For The Guardian Ad Litem*, 3 *OHIO ST. J. ON DISP. RESOL.* 117,122 (1987) (the minimum mandatory requirement for joint custody is the "parental consultation and agreement on all major decisions affecting the children"). Schwartz proposes the appointment of a guardian ad litem as a family mediator that can protect the interests of the children, promote the objectives of joint custody, and provide the courts with a means of evaluating joint custody awards. *Id.* at 118.

144. See *Zorza*, *supra* note 68, at 923. This impact is not limited to domestic violence cases. Singer and Reynolds reference an article by Chief Justice Richard Neely of the West Virginia Supreme Court of Appeals, who practiced as a domestic relations lawyer prior to taking the bench. In describing what he called "custody blackmail," Chief Justice Neely wrote:

Divorce decrees are typically drafted for the parties after compromises reached through private negotiation. These compromises are then approved by a judge, who generally gives them only the most perfunctory sort of review. The result is that parties (usually husbands) are free to use whatever leverage is available to obtain a favorable settlement. In practice, this tends to mean that husbands will threaten custody fights, with all of the accompanying traumas and uncertainties . . . as a means of intimidating wives into accepting less child support and alimony than is sufficient to allow the mother to live and raise the children appropriately as a single parent. Because women are usually unwilling to accept even a minor risk of losing custody, such techniques are generally successful.

Singer & Reynolds, *supra* note 17, at 516 (quoting Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 *YALE L. & POL'Y REV.* 168, 177 (1984)). Singer and Reynolds also quote a California study in which one-third of the divorced women reported that their husbands had threatened to ask for custody as a ploy in negotiations. See *id.* (citing LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 310 (1985)). In my experience, the numbers are closer to 50%. In one of the more extreme cases, the father, who had visitation rights, would show up for visitation one out of ten times. If his daughter was not ready for him the moment he arrived, he would call the

As with other aspects of the new law, the reason the restriction on the court's authority with regard to consent orders applies only to interim orders is not clear. It would seem that the policy considerations that endorse parental consensus with regard to child rearing would extend beyond the temporary, and often non-existent, phase of the *pendente lite* order.

9. Representation for the Child

Children are generally absent and unrepresented in custody matters, with the result being that cases are presented in terms of the parents' views and desires. The language in § 16-911, for which there is no parallel in § 16-914, authorizes the court to appoint a guardian *ad litem*, an attorney, or both to represent the minor child's interests.¹⁴⁵ Although the Act's language does not expand the court's current authority, it demonstrates a heightened concern that children have a voice in the context of a statutory scheme that may be in conflict with their interests.¹⁴⁶ The Council's efforts maybe ineffective, however, because most domestic relations litigants in the District of Columbia cannot afford counsel for themselves, and the court does not have the resources to provide counsel for their children. To the extent that the legislature hoped to resolve concerns about the joint custody presumption's adverse effects on the welfare of children by authorizing representation for them, it missed its mark by not appropriating funding to pay for it. Unless provided by the court, appointment of counsel for children is simply not a realistic option, except for the minority of relatively affluent litigants.¹⁴⁷

police and come with them to get her, claiming that her mother had refused him visitation. Then he would immediately file, *pro se*, a motion for contempt, and his negotiations, each time, consisted of the offer to give up all visitation if the mother would release him from any obligation to pay child support. *But see* MACCOBY & MNOOKIN, *supra* note 27, at 11 (finding that no empirical studies exist to support the contention that divorcing husbands routinely use the threat of a custody fight to reduce or eliminate their alimony and child support obligations). *See generally* Shulman and Pitt, *supra* note 68, at 559-60 (discussing the bargaining that goes on over custody).

145. *See* D.C. CODE ANN. § 16-911(a-2)(5) (Supp. 1996).

146. This provision adds nothing to the court's current authority to appoint counsel to represent the interests of minors in custody disputes. The text of the prior law states: "In any proceeding wherein the custody of a child is in question, the court may appoint a disinterested attorney to appear on behalf of the child and represent his best interests." D.C. CODE ANN. § 16-918(b) (1989) (amended 1996); *see also* Harris v. Harris, 119 D.W.L.R. 665, 669 (D.C. Super. Ct. Apr. 1, 1991) (discussing the role of the guardian *ad litem* and attorney for a 35 year old, mentally handicapped woman in a child support case). The Harris court did not distinguish between a guardian *ad litem* and an attorney and used the terms interchangeably.

147. *See* Eisenberg v. Eisenberg, 357 A.2d 396 (D.C. 1976) (appointing guardian *ad litem* to represent the children's interests in a custody modification proceeding and requir-

10. Modification of Custody Orders

The Act as initially introduced would have allowed the court to modify existing custody orders from sole to joint custody.¹⁴⁸ Apart from further inundating the court's domestic relations docket, long-established custodial relationships would have been subject to significant change based on the passage of this new law. After a fair amount of legislative debate, the statute makes clear that mere passage of the Act does not constitute a change in circumstances sufficient to modify a custody order.¹⁴⁹

ing the father to pay for the court-appointed guardian *ad litem*); *Eaton v. Karr*, 251 A.2d 640 (D.C. 1969) (appointing guardian *ad litem* to represent the a couple's five children, and requiring the husband to pay the costs (citing *Boone v. Boone*, 150 F.2d 153 (D.C. Cir. 1945) (establishing that the court may appoint "experienced and disinterested persons" to aid in the resolution of custody disputes)); *Coles v. Coles*, 202 A.2d 394, 395 (D.C. 1964) (involving a guardian *ad litem* who was appointed to assist the court with the custody determination and "to insure a tranquil atmosphere for the child during the interim period").

Appointment of a guardian *ad litem* or an attorney for the child is rare in custody cases in the District of Columbia. The average cost of appointment of a guardian *ad litem* for a child in a custody case would range between \$2,000 to \$5,000, and "in its budget estimate the D.C. Courts admitted that these expenditures cannot be made." Letter from Deborah Luxenberg, Esq., to John W. Hill, Jr., Executive Director, District of Columbia Financial Responsibility and Management Assistance Authority, app. 8, 6 (Feb. 8, 1996).

Only a handful of jurisdictions call for a court to appoint a guardian *ad litem* for the minor child in their joint custody statutes. See ALASKA STAT. § 25.24.310(a) (Michie 1995) (indicating that the court may appoint a representative for the minor); HAW. REV. STAT. ANN. § 571-46(8) (Michie Supp. 1995) (stating that a court may appoint a guardian *ad litem* to represent the child, and that it may assess the reasonable fees of the guardian, in whole or in part, to either or both parties); N.H. REV. STAT. ANN. § 458:17(II)(b) (1992) (stating that a court may appoint a guardian *ad litem* to represent the interests of a child to assist the court in determining whether a joint legal custody award is appropriate); N.J. STAT. ANN. § 9:2-4(c) (West 1996) (allowing a court, upon its own motion or for good cause shown, to appoint a guardian *ad litem*, an attorney, or both to represent a minor child, and granting the court the authority to award counsel fees to the guardian and/or attorney and to assess the costs between the parties); OHIO REV. CODE ANN. § 3109.04(B)(2)(a) (Anderson 1996) (stating that a court, in its discretion, may appoint a guardian *ad litem* for the minor child, and shall appoint one upon the motion of either parent).

148. The joint custody legislation as introduced on January 3, 1995 included the following language: "Any order awarding custody of a minor child or children . . . may be modified from sole custody to joint custody at any time pursuant to this subsection." Joint Custody of Children Amendment Act of 1995, Bill 11-26, § 2(b)(6)(D), 11th Sess. (D.C. 1995).

149. See D.C. CODE § 16-914(a-2) (Supp. 1996). The statutory language avoids confusion as to whether modification simply to achieve joint custody meets the standard. In fact, § 16-914 makes this point while failing, inadvertently it seems, to express the modification standard itself which is set out in § 16-911(a-2)(4)(A). Section 16-911(a-2)(4)(A) states that modification or termination of a custody order can occur only upon a showing that there has been a substantial and material change in circumstances and that a modification or termination is in the best interest of the child. See D.C. CODE ANN. § 16-911(a-2)(4)(A) (Supp. 1996). Section 16-911(a-2)(4)(B) places the burden of proof for modification on the party seeking the change and sets the standard of proof as a preponderance of the evi-

11. *Not Just Divorce and Separation*

Finally, the Act obliquely addresses the possibility that application of the joint custody presumption may be limited to divorce cases.¹⁵⁰ It is significant that the legislature included in both sections of the law a phrase that is often used in connection with joint custody, "frequent and continuing contact," and connected it to language stating that the provision applies to all relationships, "regardless of marital status."¹⁵¹ This is the first time that the legislature explicitly has applied the custody stan-

dence. These provisions are no more than a codification of existing case law. *See Rice v. Rice*, 415 A.2d 1378 (D.C. Cir. 1980).

Although it does not use the language codifying the standard of review for modification or termination of a custody order, § 16-914(a-2) makes clear that the new law does not inherently amount to a substantial and material change in circumstances sufficient to warrant a modification or termination of custody. *See* D.C. CODE ANN. § 16-914(a-2). Thus, by implication only, the standard codified in § 16-911 is applied to § 16-914. It would have been better to be explicit in both sections as to the standard, with a subpart specifying that the change in law is not prima facie evidence that the standard has been met. Nonetheless, between the case law, the language in § 16-911, and the reference in § 16-914 (a-2), the codification of the standard for all custody orders is apparent, if not elegantly stated.

150. *See* D.C. CODE ANN. §§ 16-911(a)(5), 16-914(a)(2) (Supp. 1996).

151. *Id.* §§ 16-911(a)(5), 16-914(a)(2).

Both sections read as follows:

Unless the court determines that it is not in the best interest of the child, the court may issue an order that provides for frequent and continuing contact between each parent and the minor child or children and for the sharing of responsibilities of child-rearing and encouraging the love, affection, and contact between the minor child or children and the parents *regardless of marital status*.

Id. (emphasis added).

The following states have provisions which mandate that the court consider "frequent and continuing contact" as a factor in determining the best interest of the child. *See* ARIZ. REV. STAT. ANN. § 25-403(A)(6) (West Supp. 1996); COLO. REV. STAT. §14-10-124(1) (1987); 750 ILL. COMP. STAT. ANN. 5/602-(a)(8) (West Supp. 1996); ME. REV. STAT. ANN. tit. 19, § 214(5)(H) (West Supp. 1996); MINN. STAT. ANN. § 518.17(13) (West Supp. 1997); OHIO REV. CODE ANN. § 3109.04(F)(2)(b) (Anderson Supp. 1996); UTAH CODE ANN. § 30-3-10(2) (1995); VT. STAT. ANN. tit. 15 § 665(b)(5) (1989); WIS. STAT. ANN. § 767.24(5)(c) (West 1993).

Other states have provisions that reflect a legislative intent to award custody in a manner that assures that a child has frequent and continuing contact with both parents. *See* ALA. CODE § 30-3-150 (Michie 1975); ALASKA STAT. § 25.20.060(c) (Michie 1996); CAL. FAM. CODE § 3040(a)(1) (West 1994); FLA. STAT. ANN. § 61.13(3)(a) (West Supp. 1997); IOWA CODE ANN. § 598.41(1)(a) (West Supp. 1996); KAN. STAT. ANN. § 60-1610(B)(vi) (Supp. 1995); MO. ANN. STAT. § 452.375(2) (West Supp. 1997); MONT. CODE ANN. § 40-4-222 (1995); NEV. REV. STAT. ANN. § 125.480(3)(a) (Michie 1995); OKLA. STAT. ANN. tit. 43, § 112(c)(1)(a) (West Supp. 1997); 23 PA. CONS. STAT. ANN. § 5303(a) (West 1991); VA. CODE ANN. § 20-124.2(B) (Michie 1995).

The "regardless of marital status" language also could be viewed as an attempt to legitimize the practice in the District of Columbia of co-opting for all custody matters the custody standard currently limited by statute to married couples. Such an interpretation is a reach. Still, this is the first reference in the statute to custodial relationships that are not related to a marriage, giving rise to the inference in the absence of more specific language,

dard to unwed parents. While the best interest standard had been routinely applied to unwed parents, joint custody raises different issues because it is a policy that is tied conceptually to divorce and is intended to continue much of the unity attributed to marriage, vis-a-vis the children. The joint custody dialogue does not contemplate unwed parents, and as such, it does not reflect the reality that many couples live and raise children together without marrying.¹⁵² There is no legitimate basis for distinguishing between unmarried parents who are separating and parents whose marriage is dissolving, and, in this instance, the statute appropriately applies the custody options to this group of unwed parents.

There is also a large category of parents who never married, never lived together, and never coordinated their lives, however, including the responsibilities that come with having children.¹⁵³ In these situations, undistinguished by the statute, the court should be concerned about requiring the parents to enter a relationship that is completely foreign. The statute gives the court reason to be cautious in entering a joint custody order in these situations by requiring the judge to consider prior parenting history, but it is unclear whether prior history, listed as a factor to be considered in rebutting the presumption, will gain the distinction warranted in these situations.¹⁵⁴

Recently, in *Ysla v. Lopez*, the District of Columbia Court of Appeals addressed the statute's application to unwed parents in the situation of a couple who had an ongoing relationship, but often lived apart due to the

that the courts' practice of using the statute for all custody cases is consistent with the legislature's statutory intent.

152. The 1990 Census reports that of the 122,087 families residing with their own children in the District of Columbia, 48,575 are headed by female householders, with no husband present. See CENSUS—SOCIAL AND ECONOMIC CHARACTERISTICS, *supra* note 21, at 46. Married couples account for 63,110 families, and no statistic is provided for families residing with their children headed by male householders with no wife present. See *id.* The data does not specify unwed parents living with their own children. See *id.*

153. See WILSON, *supra* note 23, at 87-88.

[T]he number of children living with a single parent who *has never married* grew from 243,000 in 1960 to 3.7 million in 1983, and then to 6.3 million in 1993. As of 1993, 9 percent of all children under the age of 18 were living with a never married parent. This includes 31 percent of black children, 13 percent of Hispanic children, and 5 percent of white children.

Id.

154. D.C. CODE ANN. § 16-911 (5)(C) states that the court should consider "the interaction and interrelationship of the child with his or her parent or parents his or her siblings, and any other person who may emotionally or psychologically affect the child's best interest" and § 16-911(5)(H) permits the court to assess "the prior involvement of each parent in the child's life." See D.C. CODE ANN. §§ 16-911(5)(C), 16-911(5)(H) (Supp. 1996). Both specifically direct the court to look at the parenting history. See D.C. CODE ANN. §§ 16-911(5)(C), 16-911(5)(H) (Supp. 1996). The same factors appear in § 16-914(3)(C) and (I). See D.C. CODE ANN. §§ 16-914(3)(C), 16-914(3)(I) (Supp. 1996).

father's "itinerant nature."¹⁵⁵ The father, although not the primary caretaker, was actively involved with the child.¹⁵⁶ The case was tried prior to the Act's passage, but the Court of Appeals referred to the new law specifying its application to unmarried parents as bolstering its conclusion that even prior to the passage of the Act, joint custody could be awarded to unmarried parents, "particularly in a case such as this, where both parents [] actively participated in the upbringing of the child."¹⁵⁷ The Court of Appeals further observed, even in light of two significant factors, the parents' inability to communicate and cooperate, that "no single factor . . . [was] necessarily controlling."¹⁵⁸ The court was impressed, however, by what it described as the "strong relationship" between the father and the child. Such a relationship is often not a component of the experience shared by unwed parents who never attempted to live and raise the child together.¹⁵⁹

IV. THE IMPACT OF JOINT CUSTODY AWARDS ON FAMILIES RELYING UPON AID TO FAMILIES WITH DEPENDENT CHILDREN

That joint custody will provide a panacea for the woes of troubled neighborhoods and delinquent or troubled youth has been asserted as a positive effect of joint custody laws.¹⁶⁰ The expectation is that joint custody would woo back fathers, the same fathers who failed to assume any responsibility for their children prior to court intervention, but such sentiment has not been linked to the studies that highlight the failings of broken families.¹⁶¹ This perspective piggybacks the cynicism of racial and

155. 684 A.2d 775 (D.C. 1996).

156. *Id.* at 776.

157. *See id.* at 778.

158. *See id.* at 781.

159. *See id.* When asked if she still saw the father of her child, one woman from a poor neighborhood on the West Side of Chicago responded: "He left before the baby was born, I was about two weeks pregnant and he said that he didn't want to be bothered and I said 'Fine-you go your way and I go mine.'" Wilson, *supra* note 23, at 99.

160. *See* Brazil, *infra* note 163.

161. *See* Twenty-Second Transcript, *supra* note 31, at 106-07 (statement of Councilmember Harold Brazil). The Children's Rights Council argued in support of the District's joint custody legislation that "regardless of the social ill under consideration, whether it be psychological/emotional, crime, substance abuse . . . poor academic achievement, suicide, or sex at an early age, the data unambiguously shows that loss of one parent (usually the father) from active involvement in the life of the child poses a tremendous threat to the child's well being." Letter dated December 20, 1993 to Councilmember Harold Brazil from Barry Hill, Esq., on behalf of the Children's Rights Council. One book cited by Hill in support of the relationship between crime and single parent homes described gang members as having a "stronger need than other urban inner-city youths to distance themselves from inept or uncaring home environments." FRANCIS A.J. IANNI, *THE SEARCH FOR STRUCTURE: A REPORT ON AMERICAN YOUTH TODAY* 207 (1989).

gender-coded slurs hurled at “welfare mothers,” by blaming the parent who stuck around.¹⁶²

District of Columbia Councilmember Harold Brazil offered the following in opposition to a substitute amendment to the joint custody presumption:

Fathers have come—and especially black fathers have come, with anecdotal evidence, with moving and emotional stories about how their family was torn asunder and their efforts to try to get it back We’re trying to strengthen the family and we’re trying to strengthen especially the black family, which we all know is under siege. It’s particularly under siege in the District of Columbia, but the product of black families—of these so oftentimes single black families, broken families—are black males—black females, but particularly the black males, as we’ve now come to know them as endangered species. So we’re trying to put that back together.¹⁶³

Many of these home environments, according to Ianni, were single-parent families “where the mother has been unable or unwilling to establish adequate behavioral controls over her male children” or families in which a step-father was present against whom the male child rebelled. *Id.* Ianni studied 311 adolescents from a range of backgrounds over a period of six years, from 1979-1985, and studied several communities during the 1970s and 1980s. Ianni focused on the need for community responses to the varied demands adolescents face: their own physical and cognitive development, family and peers, and community environmental settings. *Id.* at 260. Ianni did not offer joint custody as a remedy for broken families, or even suggest it as an option in the homes of the urban gang members he assessed. William Julius Wilson observes that “children from mother-only households are more likely to be school dropouts, to receive lower earnings in young adulthood, and to be recipients of welfare. WILSON, *supra* note 23, at 92. Wilson goes on to describe the perception by inner-city black women that men are not inclined to meet their responsibilities as fathers or husbands. *Id.* at 98-99.

162. Cf. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* 77 (1991) (noting that the welfare mother is accused of being lazy, avoiding work, and instilling bad values in her children). Mr. Wilson makes the following observation:

Neighborhoods plagued by high levels of joblessness are more likely to experience low levels of social organization: the two go hand in hand. High rates of joblessness trigger other neighborhood problems that undermine social organization, ranging from crime, gang violence, and drug trafficking to family breakups and problems in the organization of family life.

WILSON, *supra* note 23, at 21. The high level of poverty in the black community “is one of the legacies of historical racial segregation.” *Id.* at 16. Wilson’s discussion of the deterioration of social organization within the black community has been criticized for providing ammunition to those opposed to the current welfare policy because his analysis lends legitimacy to those who regard public assistance as a symptom of black pathology. See Adolph Reed Jr., *Dissing the Underclass*, *THE PROGRESSIVE*, Dec. 1, 1996, at 20, 21. The truth is that any analysis can be contorted, and while Wilson is not as political in his analysis as some may wish, particularly in the current anti-welfare climate, he is not an apologist for those who lay the blame for the status of blacks living in poverty at the feet of what they label as indolent welfare mothers.

163. Twenty-Second Transcript, *supra* note 31, at 106-07.

Such assertions mischaracterize black women as holding their men at bay with the complicity of the civil justice system. Black women are not the cause of the difficulties faced by black families, and joint custody should not be viewed by legislators as an antidote to evils unjustly attributed to black women.¹⁶⁴ Such views blame victims of exclusion and poverty, and are both misplaced and insidious.¹⁶⁵ They divide and further defeat communities that need strength, persistence, and considerable creativity to overcome their legacy. The healing will not be advanced by scapegoating those who have shared the burden of economic and psychological abuse that, despite considerable gains, continues to play a role in our history. Nor will policies that cling to the ideal of the nuclear family help black communities beset by poverty, or any other group within our society for whom such associations have failed or never formed.¹⁶⁶

164. Cf. WILSON, *supra* note 23, at 87-110 (discussing the *many* factors which have harmed the structure and cohesiveness of black families).

165. According to Professor Ammons, the black, single female who is the head of the household has been blamed for the lack of black economic progress. See Ammons, *supra* note 22, at 1050 n. 174. Ammons cites the Moynihan Report of the 1960s (newly dusted off and offered to support current welfare policy despite protest from its author) for its assertion that the black woman prefers a matriarchal system with the result that the black community "has been forced into a matriarchal structure which, because it is so out of line with the rest of American society, seriously retards the progress of the group as a whole." *Id.* (citing OFFICE OF POLICY PLANNING AND RESEARCH, U.S. DEP'T OF LABOR, *THE CASE FOR NATIONAL ACTION—THE NEGRO FAMILY* 30 (1965)).

166. Suzanne LaFont, reporting on her 1987-1991 study of families in Kingston, Jamaica, observed:

Where is their history of paternal responsibility of the father for their offspring? Was it supposed to have survived 300 years of slavery? Should it have been internalized during the slave period because it is how the slave owners lived? Or was it to have evolved in the post-emancipation era of poverty, migration and discrimination The concept of 'father' in the Caribbean needs to be recognized by the state for what it is and not for what it should be. . . .

. . . .

. . . . Promoting the nuclear family may be detrimental in terms of the way a child can be made to feel about themselves [sic] growing up in society which tells them children need mothers and fathers If a child internalizes the dominant ideology . . . that child . . . will mature feeling shortchanged.

. . . . Social engineering is a complex process. The Jamaican example has proved that policies and laws do not necessarily have the intended effects.

SUZANNE LAFONT, *THE EMERGENCE OF AN AFRO-CARIBBEAN LEGAL TRADITION: GENDER RELATIONS AND FAMILY COURTS IN KINGSTON, JAMAICA* 207-09 (1995); see also Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19 (1995) (discussing the need for a more positive view of the single parent family, and the economic inequities suffered by women resulting from the elevation of the traditional nuclear family). Professor Dowd observes that:

[I]t is ironic that the law permits many fathers to be parents in little more than name (or genes) only, while condemning single parent families for, among other things, the absence of a father Critical . . . is an understanding of the actual

There were almost seventy thousand Aid to Families with Dependent Children (AFDC) recipients in the District of Columbia in 1996.¹⁶⁷ AFDC is a federally-funded support program, administered by states and the District, which grants small monthly cash benefits and medical coverage to children who are deprived of support or child care due to a parent's death, disability, or regular absence from the home. While "continued absence" has been interpreted in recent years to allow the absent parent to maintain greater contact with the child, no federal statute or regulation specifically addresses what impact joint custody has on the analysis.¹⁶⁸ Nor are there federal court decisions on point. As it stands, if there has been court-ordered joint custody, the AFDC parent has the burden of proving that the contact is nonetheless insignificant.¹⁶⁹

Comprehensive changes in the welfare system resulting from the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which replaces AFDC as it has been known, make unclear the extent to which this type of public assistance will con-

division of caregiving during marriage and after divorce[S]ingle parenting is the most common pattern [with both].

Id. at 67.

167. See MAYOR'S INTERAGENCY POLICY COUNCIL AND CITIZENS WELFARE TRANSFORMATION COMMITTEE, REPORT AND RECOMMENDATIONS FOR WELFARE REFORM IN THE DISTRICT OF COLUMBIA App. F (Jan. 1997) [hereinafter MAYOR'S REPORT]. Of the 69,298 total D.C. recipients, 21,021 were adults and 20,206 were female single heads of households. See *id.*

168. See 2 JOHN P. McCAHEY ET AL., CHILD CUSTODY AND VISITATION LAW AND PRACTICE § 13.07[3] (1996) (discussing the impact of joint physical custody awards on receipt of AFDC benefits, and addressing the impact of 42 U.S.C. § 601 *et seq.*). Persons eligible to receive AFDC benefits are also eligible to receive free medical care through the Medicaid program. Cf. Randall W. Robinson & Alan M. Wasserman, *AFDC, Medicaid & Food Stamps: Assisting Assistance Units*, 35 ADVOCATE 20 (1992) (citing 42 U.S.C. Sec. 1396a(a)(10)(A)(I)(1) (1991), the Medicaid statute).

169. See Diann Dawson, Comment, *The Evolution of a Federal Family Law Policy Under Title IV-A of the Social Security Act—The Aid to Families with Dependent Children Program*, 36 CATH. U. L. REV. 197, 209 (1986). The author points out that House Bill, H.R. 4266, 98th Cong. (1983), was introduced to require a joint custody preference as a condition of federal funding of state AFDC programs. See *id.* at 212. That bill went nowhere. According to Dawson, "There is no evidence . . . that adequate consideration has been given to the potential impact joint custody laws may have on AFDC families, particularly when faced with court custody proceedings initiated in the context of the federal child support enforcement program." *Id.* That observation is as true today as when Dawson made it. See generally Roger J.R. Leresqye, *Targeting "Deadbeat" Dads: The Problem with the Direction of Welfare Reform*, 15 HAMLIN J. PUB. L. & POL'Y 1 (1994). Mr. Leresqye observes that Congress failed to understand that too much visitation by a noncustodial parent of an AFDC child could result in ineligibility because the child may no longer qualify as deprived of parental support or care. See *id.* at 37. Citing California law, he points out that some state laws preclude credit in AFDC cases for expenses incurred and savings resulting from shared physical custody arrangements. See *id.* at 38.

tinue.¹⁷⁰ Instead of the federal welfare entitlements in the form of AFDC, states and the District will receive block grants under which they have wide discretion to fashion their own welfare programs, subject to certain federal requirements.¹⁷¹ One of the benefits of the new law, and one that must be reached to feel any sense that we as a society are meeting our obligation to the poor under this welfare reform, is that states now have the flexibility to eliminate the rule that disqualifies a family from receiving cash assistance when there is a second parent in the house. This has been one of the most insidious aspects of AFDC, in that fathers who were unable to support their families were driven away so that their families could qualify for benefits.¹⁷² The result has been to encourage a lack of responsibility and a sense of irrelevancy for fathers. The District of Columbia makes clear in its proposed plan that such disincentives will no longer apply, and that two-parent households will be encouraged.¹⁷³

170. See WILSON, *supra* note 23, at 169-70 (describing PRWORA); see also Alexia Pappas, Note, *Welfare Reform: Child Welfare or the Rhetoric of Responsibility?*, 45 DUKE L.J. 1301, 1326 (1996) (concluding that the new welfare law eliminates the commitment to children that has evolved during this century and replaces it with "a policy of national child abandonment.").

171. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. The welfare reform law embodied in a new Title IV-A of the Social Security Act, recently enacted by Congress and signed by the President, replaces AFDC with a new block grant program called the Temporary Assistance to Needy Families (TANF) program. See Pub. L. No. 104-193, § 401, 110 Stat. 2105, 2113. Under the new law, states must comply with certain requirements in order to receive block funding, including the requirements that TANF parents find work within two years of being on the rolls and that parents not exceed a maximum of five years total time in the program. See Pub. L. No. 104-193, §§ 402, 408, 110 Stat. 2105, 2113, 2134. The constraints are exacerbated by the fact that states and the District are no longer required to provide any level of cash benefits to their citizens living in poverty; the concept of welfare entitlement has ended. See WILSON, *supra* note 23, at 170. Furthermore, states are now encouraged to include behavioral provisions, such as ending benefits for any child born after AFDC has been afforded to the family and requiring teens who wish to receive AFDC benefits to stay in, or return to, their parents' home. See Pub. L. No. 104-193, § 408, 110 Stat. 2105, 2136. States and the District must restructure their programs by July 1, 1997, in order to qualify for the federal block grants. See *id.* § 403(a)(3)(C)(ii); MAYOR'S REPORT, *supra* note 167 at 38. The District is currently in the process of completing its plan for providing assistance consistent with the new federal law. The Mayor's proposal for the District's program is currently in the review process. See *id.* at 4-6.

172. See Robinson & Wasserman, *supra* note 168, at 22 n.18 (discussing the fact that under the continued absence requirement, daily visitation almost always negates the requisite finding, and arguing that frequent visitation should not preclude eligibility for AFDC benefits because the continued absence requirement shouldn't "serve to interfere with an absent parent's relationship with his or her child"). The national Governors Association listed supporting intact families by eliminating welfare rules that penalize two parent families as one of its six goals for welfare reform. Kim Cobb, *How Fares Welfare?: States Reform as Congress Debates and Every Step Breeds Controversy*, THE HOUSTON CHRONICLE, Dec. 18, 1994, at A1.

173. See MAYOR'S REPORT, *supra* note 167, at 74-75.

The District's proposed plan does not refer to households in which custody, including joint custody, is an issue.¹⁷⁴ Presumably, under the block grant, the District will have greater flexibility in establishing how joint custody will be accommodated. It may resort to the significant contact analysis employed under AFDC,¹⁷⁵ at least for purposes of determining which household should receive assistance.¹⁷⁶ In that event, the District can get some guidance in approaching this issue by looking to what other jurisdictions have done to maintain AFDC benefits in joint custody situations. Ohio, for example, provides by statute that the court awarding joint custody may decide the child's primary residence if necessary to qualify for AFDC purposes.¹⁷⁷ While some state agencies have enacted policies, many state agencies address the matter on a case-by-case basis.¹⁷⁸ Where both parents have equal physical custody, for example, agencies have been known to distribute benefits to the first parent who applies. It appears, however, that the benefits have never been split between joint physical custody households.¹⁷⁹ Thus, it is not clear what course the District will take, particularly where joint physical custody

174. *See id.*

175. 42 U.S.C.A. § 606(a) (AFDC definition of "dependent child" for purposes of qualifying for benefits under the program which definition includes deprivation of parental care by reason of "continued absence").

176. A joint custody arrangement should identify a child's primary home and designate one parent as the primary custodian in order to meet the absent parent requirement. *See Robinson & Wasserman, supra* note 168, at 20.

177. *See* OHIO REV. CODE ANN. § 3109.04(A)(2) (Anderson 1996). There are five other jurisdictions which make reference to AFDC in their joint custody statutes as well. *See* ARIZ. REV. STAT. ANN. § 25-403(L) (West Supp. 1996) (stating that the court may specify one party as the minor child's primary caretaker and one home as the minor child's primary home for purposes of defining eligibility for public assistance, but that this finding does not diminish the rights of either party, nor create a presumption for or against either party in a custody modification proceeding); CAL. FAM. CODE § 3086 (Deering 1994) (delineating that a court may specify one parent as the child's primary caretaker and that one home will be the child's primary home to aid in determining eligibility for public assistance); OKLA. STAT. ANN. tit. 43, § 112(E) (West Supp. 1997) (stating that in custody, support, or enforcement cases, the court shall inquire whether public assistance money was provided by the Department of Health Services for the minor child's benefit and, if it has, the DHS shall be a necessary party for the adjudication and establishment of the debt owed); R.I. GEN. LAWS § 15-5-16 (D)(1) (Supp. 1995) (requiring that a parties' receipt of public assistance not be a factor in awarding custody); UTAH CODE ANN. § 30-3-10.2(4) (1995). The Utah statute requires the court to inform parties that

[a]n order for joint custody may preclude eligibility for public assistance in the form of aid to families with dependent children, and that if public assistance is required for the support of children of the parties at any time subsequent to an order of joint legal custody, the order may be terminated.

Id.

178. *See* Conversation with Steve Cesar, Acting Chief, Federal Office of Child Support Enforcement, Policy Branch Department of Health and Human Services, February 7, 1996.

179. *See id.*

awards provide a roughly even split. Benefits may be granted to the first custodian who seeks them, with support contributions required of the other parent. As a result, this other parent may not be able to provide for the child while in his or her custody. In addition, attempting to split the benefits for the children will not provide a solution since AFDC is meager at best and cannot begin to accommodate the redundancies needed for dual homes. Furthermore, the benefits available under PRWORA will not be any greater.

Joint *legal* custody should not raise the same problems with regard to distribution of benefits. Although it may raise a significant contact issue, once that hurdle is overcome, the benefits would be collected by the parent having physical custody. This may lead, however, to a preference for granting only joint legal custody in the case of indigent parents, particularly given the statutory admonition to consider the impact upon AFDC benefits.¹⁸⁰ Such a practice in turn, may raise due process questions since the custodial arrangements available to families living in poverty would be limited by virtue of their status.¹⁸¹ Nevertheless, the alternative of no access to this type of public benefit in one of their dwellings under a joint physical custody arrangement makes the lives of children living in poverty even more tenuous.

V. JOINT CUSTODY SHOULD NOT BE PRESUMED OR IMPOSED

A joint custody presumption is attractive because it seeks to reconstruct, or construct, the Ozzie and Harriet ideal of the nuclear family out of a relationship that has failed, or in many cases never existed.¹⁸² Neither reason nor social science support such high regard.¹⁸³

All too often in this area of law, legislatures swing from one preference to another without requiring solid evidence in support of the approach considered. The maternal preference, for example, reinforces the notion

180. See D.C. CODE ANN. §§16-911(a)(5)(O), 16-914(a)(3)(P) (1981 & Supp. 1996) (listing impact on Aid to Families with Dependent Children and medical assistance as factors to consider in determining the best interest of the child and in rebutting the presumption in favor of joint custody).

181. See *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972) (finding that Fourteenth Amendment due process protections are implicated if consideration of the rights of a parent to the companionship, care, custody, and management of his or her child is denied based upon a determination of indigent status, and holding that an illegitimate child could not become a ward of the state without a hearing on the parental fitness of the biological father).

182. See Stephen B. Reed, *The Demise of Ozzie and Harriet: Effective Punishment of Domestic Abusers*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 337 (1991) (illustrating the dangers inherent in creating policy based on idyllic perceptions of the nuclear family).

183. See *supra* notes 66 and 84.

that mothers are responsible for children while fathers are not.¹⁸⁴ Joint legal or physical custody, on the other hand, forces mothers who in fact have been responsible for the children to make concessions in order to continue to raise them.¹⁸⁵ Joint legal custody reinforces the notion that fathers have a decision-making, as opposed to a caretaking, role in the family. Although most statutes do not indicate a preference for the form of joint custody awarded, currently most orders award joint legal custody.¹⁸⁶ Seven jurisdictions have statutes that specifically favor joint legal custody.¹⁸⁷ In these jurisdictions one parent has the bulk of the responsibility for providing the day to day nurturing of the children and must negotiate with the absent parent with regard to decision-making. In essence, the absent parent has the benefit of wielding authority without undertaking the responsibility for its execution. This imbalance not only is unfair to the physical custodian, but can undermine that parent's role in child rearing since decisions are subject to negotiation with a parent who is not otherwise functioning in the daily life of the family.¹⁸⁸

184. Sylvia Law and Patricia Hennessey make this very point and go on to observe that when fathers sought to overcome the maternal preference, it was defeated on "[t]he flimsiest and most sex-biased showing of maternal 'unfitness.'" Sylvia A. Law & Patricia Hennessey, *Is the Law Male?: The Case of Family Law*, 69 CHICAGO-KENT L. REV. 345, 348 (1993). The authors make the following observation about joint custody:

When courts or legislatures do address the principles for adjudicating child custody disputes, they often act without close attention to factual complexity, empirical evidence, or respect for generally prevailing principles of lawmaking [An] example of thoughtless action in the custody area occurred in the 1980s when several jurisdictions adopted a strong preference for joint custody [T]he presumption for joint custody was adopted without careful attention to empirical evidence or diversity of factual situations Joint custody adversely impacts on women because it diminishes their bargaining power and forces them to make financial concessions in order to avoid it.

Id. at 352-53 (footnotes omitted).

185. See *id.*; see also Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 177-78 (demonstrating how men can use joint custody as a bargaining chip against their wives in divorce proceedings).

186. See *supra* note 27 (discussing joint legal custody).

187. See COLO. REV. STAT. § 14-10-123.5 (1987); DEL. CODE ANN. tit. 13, § 727 (1993); IND. CODE ANN. § 31-1-11.5-21(f) (Michie Supp. 1996); IOWA CODE ANN. § 598.1(3) (West 1996); MINN. STAT. ANN. § 518.17 subd. 2 (West Supp. 1996); N.H. REV. STAT. ANN. § 458:17(II) (1992); UTAH CODE ANN. §§ 30-3-10.1, 30-3-10.2 (1995).

188. Singer and Reynolds describe the parenting problems and inequity that joint physical custody creates:

[T]he vast majority of court-ordered joint custody decrees provide for equal parental *rights*, but impose vastly unequal parental *responsibilities*.

. . . .

Joint legal custody thus severely restricts the ability of the parent with whom the child lives to make significant decisions affecting both her life and the lives of her children. In essence, it gives the nonresidential father veto power over most major decisions regarding the health, education, and upbringing of children who

A jurisdiction like the District of Columbia, where single parenthood and poverty are prevalent,¹⁸⁹ should be concerned about whether structural changes in its custody laws will undermine the ability of the single parent to persevere. Joint custody does not guarantee that the absent parent will miraculously arrive on the scene and share in responsibilities previously shunned. What it does do is give the absent parent an opening to undermine the status of the parent who is functioning in that role. In one of my cases, the mother kept trying to establish some time, any time, that the father would spend with their son. The father, who was extremely critical of the care provided by the mother and insisted on his right to set down certain rules, consistently refused to make any arrangement to even visit the child. His availability, he maintained, would depend on what kind of work he could get. The mother observed that he had consistently been unemployed for years, and thus this contingency consumed any possibility of contact with the child.

Judge Mack, writing for the District of Columbia Court of Appeals in *Bazemore v. Davis*, had this to say about imposing a maternal presumption in child custody cases:

McCormick, in his treatise on evidence, suggests that there are four principle reasons for the creation of presumptions. First, some presumptions are created to correct an imbalance resulting from a party's superior access to the proof. Second, notions, usually implicit rather than expressed, of social and economic policy, incline the courts to favor one contention by giving it the benefit of a presumption, and correspondingly to handicap the disfavored adversary. Third, a presumption may be created to avoid an impasse, to reach some result, even though it is an arbitrary one. Lastly, a presumption may be based on a judicial belief that proof of some fact renders the inference of the existence of another fact so probable that it is

are not in his physical care. . . . To subject a nonconsenting physical custodian to such an arrangement . . . invites chaos and offends well-established principles of parental autonomy. . . .

[J]oint legal custody affords a nonresidential parent many privileges and a significant measure of control over his former spouse, but few parental obligations or responsibilities.

Singer & Reynolds, *supra* note 17, at 503-05 (footnote omitted).

189. Single-parent households are now the majority in the District. See GEORGE GRIER, GREATER WASHINGTON RESEARCH CENTER, SINGLE-PARENT FAMILIES: A FIRST LOOK BASED ON 1990 CENSUS DATA 7-8 (Aug. 1992). Ninety percent of the single-parent families are African American and 89% of the single-parents are female. See *id.* The poverty rate for families with a single head of household with related children is 31%. See *id.*

sensible and time-saving to assume the truth of the other fact until the adversary disproves it.

The first rationale . . . would not justify a presumption here, as both parents have access to proof concerning their child's best interests.

Nor do the second, third or fourth reasons survive close scrutiny . . . for they would be either arbitrary, or based on unwarranted assumptions. . . .

. . . .

. . . . [T]he presumption facilitates error in an arena in which there is little room for error A norm is ill-suited for determining the future of a unique being whose adjustment is vital to the welfare of future generations. Surely, it is not asking too much to demand that a court, in making a determination as to the best interest of a child, make a determination upon specific evidence related to that child alone.¹⁹⁰

The analysis is just as persuasive when applied to joint custody.

The best interest of the child standard as applied, however, is not beyond reproach, particularly in the context of unwed, single parents living in poverty. This category of litigant violates just about every aspect of the traditional, middle-class family ideal, and that ideal is the premise from which most judges begin their analysis of what is best for the child. Judges and others who apply the best interest standard inevitably incorporate personal prejudices that reflect those held by society at large.¹⁹¹ For example, effort is made to encourage co-parenting even when parents are demonstrably antagonistic;¹⁹² women are resented and mistrusted, even as they are expected to epitomize the good parent;¹⁹³ black women are particularly vilified;¹⁹⁴ men are viewed as discriminated against in the

190. *Bazemore v. Davis*, 394 A.2d 1377, 1381-83 (D.C. Cir. 1978) (citations omitted).

191. David Chambers observes that "[w]henver the word 'best' is used, one must always ask 'according to whom?'" Chambers, *supra* note 66, at 488.

192. Joint custody "assumes that [the parents] will make decisions as though the marriage were not dissolved. . . . It seems to make little sense to adopt a relationship that can be so easily disrupted." Gary N. Skoloff, *Joint Custody: A Jaundiced View—Calling Solomon's Bluff*, TRIAL, Mar. 1984, at 52, 54.

193. See *Zorza*, *supra* note 68, at 923 (regarding discrimination against women).

194. Black women who are professionals are not immune to the stereotyping that makes the lives of blacks living in poverty seem so hopeless. Professor Patricia Williams speaks of taxi cab drivers refusing to stop for her and her physician husband, stores that assume she is there to shoplift, and cashiers flinging change on the counters. See Jennifer M. Russell, *Nothing to Be Ashamed Of*, ESSENCE, Aug. 1991, at 140; see also Ammons, *supra* note 22, at 1053 n.179 (citing the Russell article and discussing further policies that discouraged blacks from obtaining memberships at a health spa chain). It is difficult to find "security" in distinctions based on class in a society that has such a solid foundation in racial prejudice.

custody process or as needed to offset the negative impact of being raised by a single mother, thus resulting in an effort to encourage the father's participation in child rearing.¹⁹⁵ Judges reflect these perceptions and their constant modulation as attitudes change. In short, the best interest of the child standard is inherently broad and adaptable, and, as such, is ripe for abuse.¹⁹⁶

Presumptions and preferences can give guidance to judges who are understandably under siege due to the volume of custody cases and the detail needed to evaluate each under the best interest of the child standard.¹⁹⁷ They can also ameliorate the concerns about abuse of judicial discretion. Although any presumption cries out for the exception in an area as idiosyncratic, and, as Judge Mack points out,¹⁹⁸ as important custody law, the benefits of limiting judicial discretion can outweigh the disadvantages, provided the standard adopted relates directly to the child's welfare and is not applied by rote.¹⁹⁹ The primary caretaker presumption most accurately meets the objective of giving courts some guidance in applying the best interest of the child standard with a minimum

195. "In the vast majority of cases, the fathers do not want custody and the children remain with the mother by parental choice. When fathers do want custody, their chances of winning are substantial." Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 2, 3 (1982).

196. See Janet L. Dolgin, *Why Has the Best Interest Standard Survived?: The Historic and Social Context*, 16 CHILDREN'S LEGAL RTS. J. 2 (1996). Professor Dolgin argues that the best interest of the child standard is flawed, but has survived because of its ability to "sustain the illusion that the moral essence of old-fashioned, traditional families can be preserved even as those families are changing under the pressures of modernity." *Id.* at 8; see also Chambers, *supra* note 66, at 487-99; Janet L. Dolgin, *Suffer the Children: Nostalgia, Contradiction and the New Reproductive Technologies*, 28 ARIZ. ST. L.J. 473, 484-86 (1996).

197. See Scott & Derdeyn, *supra* note 66, at 484-96 (evaluating joint custody's accuracy as a legal decision principal, measured by the extent to which it efficiently reflects the law's policy objective, and concluding that while its decision costs are lower it does not accurately reflect the best interest of the child standard).

198. See *supra* note 160 and accompanying text.

199. Professor Jane Murphy states:

[I]n the area of custody, replacing multifactor, highly discretionary standards with rules such as the primary caretaker presumption would foster more decisions that ultimately serve the best interests of the children of divorce. Advocates of the primary caretaker rule argue that it advances the virtues of certainty and predictability while furthering the goal of producing decisions in the best interests of the child. In applying the primary caretaker rule, decisionmakers must look to past behavior rather than attempt to predict future behavior.

Murphy, *supra* note 119, at 226 (footnote omitted). Professor Karen Czapanskiy argues that "predictable rule-based regimes" can ameliorate the impact of gender-based discrimination, but she cautions if we go too far toward standardization we may be unable to give sufficient weight to the "context in which particular parties operate." Karen I. Czapanskiy, *Domestic Violence, The Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 273 (1993).

of error. Such a presumption has the benefit of rewarding the parent who has been most consistently and directly involved in child rearing, while assuming that the child will continue to reap the benefits of such effort.²⁰⁰ Joan Kelly, writing for the Center for the Future of Children, argues that the most serious problem with the primary caretaker standard is that it ignores the quality of the relationship between the child and caretaker in favor of “counting hours and rewarding many repetitive behaviors.”²⁰¹

Why psychological adjustment and other factors mentioned by Kelly²⁰² would not be considered under the primary caretaker standard is not clear. The focus should be on the quality of care that is provided, but the logical place to look for that quality is in the relationship between the child and the parent who most consistently has been the caregiver. Evidence that this relationship is not the most beneficial one should rebut the presumption.

Unlike the joint custody presumption, the primary caretaker presumption does not rely on aspirations regarding the behavior of parents that courts are not equipped to make operational. It should not be so difficult for the law to acknowledge that children need clarity, consistency, and nurturing, and this comes most reliably from the parents who have a record of providing it.²⁰³ Joint custody often leaves the issue of structure continually on the table, with location or decision-making constantly in flux. By giving priority to the child care relationships that existed prior to separation, a primary caregiver presumption avoids forcing new, tenuous arrangements upon all involved.

200. I use “parent” advisedly in the context of a primary caretaker standard. While babysitters, other relatives, or family friends may establish greater caretaking relationships than either parent in some circumstances, we are not at a point in our sense of communal responsibility for child rearing where stigma will not attach to being removed from the care of either parent. For all the failings that I have identified with regard to imposing joint custody, the ideal underlying the standard is that children expect to be in the custody of either or both parents. The primary caretaker standard should be approached consistent with the family law precept that parents are the contenders for custody unless they are shown to be unfit.

201. Kelly, *supra* note 11, at 130. The author adds:

Indeed, the most important emotional and interactive behaviors promoting children’s development and psychological, social, and academic adjustment, such as love, acceptance, respect, encouragement of autonomy, learning, and self-esteem, moral guidance, and absence of abusive interactions, are not considered.

Id.

202. *See id.*

203. Clearly, in those circumstances where both parents meet the standard, the presumption would not apply. *See* Polikoff, *supra* note 13, at 243 (describing the primary caretaker presumption as a sex-neutral standard that values nurturing and care). Polikoff concludes that men who are angered at the possibility of losing custody under such a standard should change their approach to parenting, and not seek to change the law. *See id.*

While a primary caretaker presumption is more rationally related to the best interest standard, it is no more than a substitute for the careful analysis a judge is expected to provide in the difficult context of the custody case. When parents' lives are disconnected or never were connected, the court determining custody must make a choice as to whom it has the greatest responsibility to protect in the process of allocating rights and responsibilities. A presumption cast in terms of which parent gets to do what further distracts the court from the person who it has traditionally been obligated to protect—the child. Acknowledging that a joint custody presumption is unwise does not mean that children do not need nurturing from both parents. It simply reflects the deduction that if a co-parenting relationship did not exist prior to separation, or has been severed as a result of parental conflict, the court is not likely to create or re-establish it by edict.

The hope alluded to by D.C. Councilmember Brazil, that joint custody will reconnect fathers to their families, can be achieved more accurately by addressing poverty and the resulting pressures on family unity. In the area of custody law, designating visitation as an obligation, as well as a right, speaks more directly to the issue of involving fathers in the lives of their children. This would give more incentive to parents to be consistent in asserting and developing their child rearing role, rather than conferring a demanding relationship intended to foster such interaction even where it never existed. While it is difficult to envision forcing parents to spend time with their children, courts could go further than they do to enforce the best interest of the child standard by imposing consequences for failure to visit. At present, a non-custodial parent who fails to show up nine out of ten times is apt to bring a contempt motion for the few occasions in which the child was not waiting at home when the visiting parent finally appeared. In one of my cases, the mother was constantly waiting and trying to explain to her daughter why the father, who rarely appeared for visitation, had not come. She developed avoidance strategies, such as not getting her daughter dressed for the scheduled outing, to avoid the child's sense of disappointment. The mother also shortened the time that they would wait at home for his arrival. The father nonetheless filed a motion to enlarge visitation, citing foiled efforts to visit his daughter. He lost his motion and as a result of his record, the father must call the day prior if he intends to exercise his visitation rights. While much has been made of the potential for joint custody to give parents more of a stake in child rearing, parents who so resent or covet the custodial authority of their counterparts that they subject their children to disappointment and rejection are not good candidates for increased responsibility.

Joint custody should certainly be available to parents who freely commit to co-parenting. Such commitment has the potential to overcome economic and social barriers that may otherwise defeat it. Too much is at stake, however, to embark on this particular variety of social engineering without both parents being vested in its success.

VI. CONCLUSION

The District of Columbia is a city in which the largest segment of its population does not fit neatly within the dialogue on joint custody, which has been driven primarily by white, upper- and middle-class parents. The aspirations and hostilities expressed in the context of this dialogue are ones that the black community buys into at a far greater cost. Allusions to the failings of welfare mothers by city legislators create despair where exceptional fortitude is needed, particularly in increasingly difficult times. While family models in which both parents play a significant role can be desirable, they will not be achieved by blaming the parent who shoulders the family burden in the face of economic and social pressures that make that role particularly hard to execute.

Most families in the District of Columbia, from all economic and social classes, resolve custody issues by agreement. That agreement generally represents the best hope for addressing the needs of children since the court is not likely to force two unwilling parents into an alternative arrangement. Furthermore, such agreements reflect an exercise of parental responsibility that courts are, and should be, loath to second guess. The role of the court in consent situations should be to determine that the agreement was entered freely and that the children involved enjoy a level of shelter and financial support consistent with their parents' financial status. These, however, are not the situations addressed by a presumption in favor of joint custody. The presumption comes into play in the face of conflict between the parents as to what custody arrangement is best. Parental rights aside, this suggests dysfunction, and society has an interest, represented by the concept of *parens patriae*, in ensuring that the children do not suffer in the exchange. A joint custody presumption is a seemingly tidy response to the discomfort of choosing between the perceived wishes and needs of two parents battling for the right to raise their child. It says, "Both of you should do this together, and since we know that this solution is far from tidy in the details, you propose a plan indicating what it should mean."

Financial, organizational, and emotional stresses directly related to orchestrating joint custody anticipate commitment and resources. It is shortsighted to presume that poor families have the resources and that

broken families possess the commitment. In fact, requiring collaboration can perpetuate abusive relationships, even under a statute such as the District's that specifically exempts cases in which there is a history of domestic violence, child abuse and neglect, or parental kidnapping. The language does not reach emotionally abusive relationships, and may not reach poorly documented abusive situations that do not fit within the statute. In such situations, joint custody can defeat the salvation sought by parent and child through a separation.

That is why, despite the joint custody presumption, the requirement in the District's new statute that the best interest of the child standard has priority must not be lost in the excitement over this brand new spin. The change should not be viewed as radical: the court is still called upon to evaluate custody arrangements in relation to the best interest of the child. Embarking on that assessment should rarely, at least in contested cases, escape the difficult analysis of what will indeed be the best custodial arrangement. Even without statutory imprimaturs, courts have this responsibility in their role as protectors of the children. The beauty of the best interest of the child standard is that it allows courts the flexibility to assess an infinite variety of parental relationships and seek the best result under each set of circumstances presented. That courts have not always used this discretion wisely has been its failing.

Thus, the search for an alternative to the best interest of the child standard is understandable. The premise of the standard is irrefutable, but its application is vague and inherently biased. It has been criticized as being

unfair to fathers²⁰⁴ and to mothers alike.²⁰⁵ An emphasis on the primary caretaker can mitigate these failings in that it focuses on care of the child. It forces an analysis of child care, and, as such, may force the court and the litigants to bring children out of the shadows. If it is not interpreted as a mechanical checklist of daily child maintenance,²⁰⁶ it has the benefit of rewarding nurture in its most affirmative sense. This does not mean that the court should be relieved of analysis of what is in fact best for the child, or that the goal of encouraging the involvement of both parents should be abandoned. Participation in the raising of children can be a matter of ego, tied directly to the need to love, to be loved, to role identification, and to deeply held beliefs regarding fundamental rights. These are highly emotional and deeply essential feelings that are implicated when parents struggle to capture their relationship with their children. However, these feelings can be accommodated without creating contorted and tenuous arrangements that may simultaneously reward the uncommitted parent and undermine the one who is committed. As

204. Fathers' rights organizations take the position that custody awards under a best interest of the child standard are inherently inequitable because the application of this standard tends to favor the mother. Courts, it is argued, are unable or unwilling, without more, to recognize the importance of fathers in the child rearing equation. Some of the rhetoric has been quite speculative. For example, David Popenoe observes:

We know that fathers have a surprising impact on children. Fathers' involvement seems to be linked to improved quantitative and verbal skills, improved problem-solving ability and higher academic achievement How fathers produce these intellectual benefits is not yet clear. No doubt it is partly a matter of the time and money a man brings to his family.

David Popenoe, *Where's Papa?*, UTNE READER, Sept.-Oct. 1996, at 71. Mr. Popenoe refers to an array of studies that support this and similar assertions that extol the superiority of the male caregiver. *See id.* at 68-106. Rationality lies somewhere between his findings and the Utah Supreme Court's ruling that a father's attack on the statutory maternal presumption "might have some merit . . . if the father was equally gifted in lactation as is the mother." *Arends v. Arends*, 517 P.2d 1019, 1020 (Utah 1974). The political middle ground for some, and the beacon of fairness for others, has been joint custody. It is a seductive concept: both parents have a right, indeed an obligation to continue to rear their children. What is disturbing is the desire to impose such an assumption instead of regarding what the history of care has been in each case. *See generally* R.F. DOYLE, *THE RAPE OF THE MALE* (1976); MAURICE R. FRANKS, *WINNING CUSTODY* (1983); Uviller, *supra* note 10.

205. *See* Robert F. Cochran, Jr., *The Search for Guidance in Determining the Best Interests of the Child at Divorce: Reconciling the Primary Caretaker and Joint Custody Preferences*, 20 U. RICH. L. REV. 1, 15-17 (1985); Uviller, *supra* note 10 at 129-30 (asserting that the maternal preference should apply since any other approach, including the best interest of the child, fails to take into account that men do not assume equal responsibility during marriage, and that very fact disadvantages women). This is true, Ms. Uviller argues, even in families where women work since men are treated better than women in the workplace and women are discriminated against due largely to assumptions about their child rearing responsibilities. *See id.*

206. *See* Kelly, *supra* note 11 (noting the lack of attention paid to the quality of the parent-child relationship in the primary caretaker standard).

important as parents' interests and feelings may be, it is a mistake to allow them to trump the best solution for the child. The court must balance the competing interests of the parents with those of their children, and given the relative vulnerability of the latter class, the court must protect them. The court's role is to think carefully, guided primarily by the protection of the child's, not the parents' interests or ill-conceived notions of social engineering about the implications of decisions as to where, with whom, and under whose tutorship children in each case before the court will spend their lives. Joint custody may be an appropriate result, but there are far too many negative implications attached to the District of Columbia's current presumption that it is *the* appropriate result.

APPENDIX A
 JOINT CUSTODY STATUTES
 STATE-BY-STATE ANALYSIS—1996

State	No Joint Custody Statute	Presumption for Joint Custody	May Order Upon Request of One Parent	Distinguish B/W JT Legal & Physical Custody	At Court's Option "May"	Joint Legal Custody Only	Parenting Plan Required by Court	Statute Defines Joint Custody	"Frequent & Continuing Contact" a Factor	Language Re Ability to Agree (Under BIC)	Appointment of "Guardian at Litem"	Considers Evidence of Domestic Violence	Refers to AFDC
Alabama				X	X	X	X	X	X	X		X	
Alaska					X				X		X	X	
Arizona				X	X		X	X	X			X	X
Arkansas	X												
California		X if parties agree		X			X discretionary		X			X	X
Colorado				X	X	X	X discretionary	X	X	X		X	contrary to BIC
Connecticut		X if parties agree		X				X					
Delaware					X	X	X					X	creates a rebuttable presumption
D.C.		X					X		X	X	X	X	X

State	No Joint Custody Statute	Presumption for Joint Custody if parties agree	May Order Upon Request of One Parent	Distinguish B/W JT Legal & Physical Custody	At Court's Option "May"	Joint Legal Custody Only	Parenting Plan Required by Court	Statute Defines Joint Custody	"Frequent & Continuing Contact" a Factor	Language Re Ability to Agree (Under BIC)	Appointment of "Guardian at Litem"	Considers Evidence of Domestic Violence	Refers to AFDC
Maine		X if parties agree						X "shared parental rights & respons."	X	X		X	
Maryland				X	X								
Massachusetts				X	X		X	X				X	w/temp. custody
Michigan		X if parties agree		X				X		X			
Minnesota		X		X		X				X		X	rebuttable presumption
Mississippi		X preference		X				X					
Missouri				X	X		X	X	X			X	
Montana		X					X	X	X			X	
Nebraska					X								
Nevada		X if parties agree		X					X			X	rebuttable presumption not in BIC

State	No Joint Custody Statute	Presumption for Joint Custody	May Order Upon Request of One Parent	Distinguish B/W JT Legal & Physical Custody	At Court's Option "May"	Joint Legal Custody Only	Parenting Plan Required by Court	Statute Defines Joint Custody	"Frequent & Continuing Contact" a Factor	Language Re Ability to Agree (Under BIC)	Appointment of "Guardian at Litem"	Considers Evidence of Domestic Violence	Refers to AFDC
New Hampshire		X if parties agree		X		X		X			X	X	
New Jersey				X	X		X discretionary	X		X	X	X	
New Mexico		X					X	X		X			
New York	X												
North Carolina			X										
North Dakota	X											X creates a rebuttable presumption	
Ohio					X		X discretionary	X "shared parenting"	X	X	X	X	X
Oklahoma					X		X discretionary	X	X penalizes uncoop party		X		X
Oregon				X if parties agree				X					X
Pennsylvania				X	X			X "shared custody"	X				X

State	No Joint Custody Statute	Presumption for Joint Custody	May Order Upon Request of One Parent	Distinguish B/W JT Legal & Physical Custody	At Court's Option "May"	Joint Legal Custody Only	Parenting Plan Required by Court	Statute Defines Joint Custody	"Frequent & Continuing Contact" a Factor	Language Re Ability to Agree (Under BIC)	Appointment of "Guardian at Litem"	Considers Evidence of Domestic Violence to AFDC
Rhode Island	X											X not in BIC
South Carolina					X							
South Dakota					X							
Tennessee					X							X
Texas					X		X	discretionary		X		X
Utah				X	X	X		legal only	X	X		X
Vermont				X	X		X	discretionary	X	X		X
Virginia				X	X				X	X		X
Washington					X		X			X		X
West Virginia	X											X
Wisconsin				X	X			legal only	X			X
Wyoming					X							X not in BIC
Guam	X								X			X

APPENDIX B
MODEL CUSTODY LANGUAGE FOR THE
DISTRICT OF COLUMBIA.

The District of Columbia needs a custody law that does not set an obtuse standard in a legislative construct reminiscent of London Bridge. What follows is a legislative proposal that creates a simpler statute, and, while it includes joint custody, it emphasizes maintaining the status quo with regard to caretaking while encouraging an assessment of what best addresses the need of the child.

Section 2, Title 16 of the District of Columbia Code is amended as follows:

(a) § 16-911(a)(1) is amended by inserting in the second line after the “and” and prior to “their minor children” the following:

“child support as set forth in § 16-916.1 for”

(b) § 16-911(a)(5) is amended to read as follows:

“(5) determine who shall have the care and custody of a minor child or children pending the proceedings consistent with the standard set forth in § 16-4503A.”

(c) § 16-912 is amended to read as follows:

“§ 16-912. Permanent custody, alimony; enforcement.

When a divorce is granted to either spouse, the court may decree him or her permanent alimony sufficient for his or her support and, where appropriate, shall award permanent custody of the parties’ minor children to either or both spouses as set forth in § 16-4503A and shall provide for support of the minor children as set forth in § 16-916.1, and shall secure and enforce the payment of such alimony and child support as set forth in § 16-911, § 16-916, and § 30-301 et seq.”

(d) § 16-914 is amended to read as follows:

“§ 16-914. Retention of jurisdiction as to alimony and custody of children.

After issuance of a decree of divorce granting alimony and providing for the care and custody of children, the case shall still be considered open for any future orders relating to those matters.”

(e) The first paragraph § 16-916.1(n) is amended to read as follows:

“In a case in which shared custody is ordered or agreed to and the child spends 40% or more of the child’s time with each parent, the following procedure shall be followed:”

(f) A new section, § 16-4503A is added to read as follows:

“(a) The court shall determine who shall have the care and custody of a minor child or children without conclusive regard to the race, color,

national origin, political affiliation, financial status, sex, or sexual orientation of a party according to procedures set forth in this section.

(b) The best interest of the child shall be the basis for determining the care and custody of minor children.

(c) In determining the best interest of the child, the court shall consider all relevant factors, including, but not limited to:

(1) which parent has attended most consistently to the emotional and developmental needs of the child;

(2) the wishes of the child or to his or her custodian, where practicable;

(3) the wishes of the child's parent or parents;

(4) the interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may emotionally or psychologically affect the child's best interest;

(5) the mental and physical health of all individuals involved;

(6) the child's adjustment to his or her home, school, and community;

(7) the potential disruption of the child's social and school life;

(8) the geographical proximity of the parental homes as this relates to the practical consideration of the child's or children's residential schedule;

(9) the demands of parental employment;

(10) the sincerity of each parent's request;

(11) the impact on public benefits and medical assistance.

(d) For the purposes of this section,

(1) If the judicial officer finds by a preponderance of evidence that a contestant for custody has committed an intrafamily offense, any determination that custody or visitation is to be granted to the abusive parent shall be supported by a written statement by the judicial officer specifying factors and findings which support that determination; and

(2) In determining visitation arrangements, if the judicial officer finds by a preponderance of the evidence that an intra family offense has occurred, the judicial officer shall only award visitation if the judicial officer finds that the child and custodial parent can be adequately protected from harm inflicted by the other party. The party found to have committed an intra-family offense has the burden of proving that visitation will not endanger the child or significantly impair the child's emotional development.

(e) Joint sole and/or joint legal custody may only be granted upon the express agreement of both parties. The court shall make findings that indicate that both parties agree to the terms of such an order.

(1) If the court contemplates entering a joint legal and/or joint physical custody order, it may order each parent to submit a detailed parenting plan delineating each parent's position with respect to the scheduling and allocation of rights and responsibilities that will best serve the interest of the minor child or children. The parenting plan may include, but shall not be limited to, provisions for:

- (i) the residence of the child or children;
- (ii) visitation when the child is not residing with the other custodian;
- (iii) holidays, birthdays, and vacation visitation;
- (iv) transportation of the child or children between the residences;
- (v) education
- (vi) religious training, if any;
- (vii) access to the child's or children's educational, medical, psychiatric, and dental care records;
- (viii) the parent who will make the decisions that need immediate attention concerning the health, safety, and welfare of the child;
- (ix) structuring decisionmaking in situations not covered in the preceding subparagraph;
- (x) communication between the child and the parents; and
- (xi) resolving conflict through a recognized family counseling or mediation service before application to the court to resolve such conflict.

(2) No joint custody order will be entered unless the court designates the parent who will make the decisions that require immediate attention concerning the health, safety, and welfare of the child.

(f) Visitation or co-parenting obligations shall be terminated if a pattern of failing to meet such obligations is proven by a preponderance of the evidence, unless the absent parent can offer good cause to believe that such omissions were the result of circumstances beyond the parent's control.

(g)(1) An award of custody may be modified or terminated upon the motion of one or both parents, or on the court's own motion, upon a determination that there has been a substantial and material change in circumstances and that such modification or termination is in the best interest of the child.

(2) When a motion to modify custody is filed, the burden of proof as to substantial and material change in circumstances is on the party seeking a change, and the standard of proof shall be by a preponderance of the evidence.

(h) The court, for good cause or upon its own motion, may appoint a guardian ad litem or an attorney or both to represent the minor child's or

children's interests. Once this burden is met, both parents share equally the burden of demonstrating what result is in the best interest of the child.

(i) The court shall enter an order for any custody arrangement that is agreed to by both parents unless there is reason to believe that such arrangement is contrary to the best interest of the child or children.

(j) The provisions of this act shall apply to pleadings filed after the date of enactment."