

Perils of Joint Custody

By Nancy Goldhill

[*Editor's note:* Although mandatory joint custody has been proposed three times in New Jersey since this article was originally published, proponents of such a state law change have not succeeded. Reprinted with permission from the *LSNJ Report* (July–Aug. 2000).]

Across the country, some advocates—primarily fathers—are advocating that custody laws should include a presumption that joint custody is in the children's best interests. This approach is premised, at least in part, on the mistaken notion that mothers win custody in most cases. Although proponents of mandatory joint custody claim that many, if not most, states have adopted such presumptions, in fact most states with any kind of joint custody presumption apply the presumption only where the parties agree to it.

Current New Jersey law promotes the public policy that children need “frequent and continuing” contact with both parents; the law recognizes a range of custody options, including joint custody, depending on the interests and needs of the child in a particular case. Recently a legislative proposal was introduced to mandate joint custody with only limited exceptions.

Fortunately that proposal has not moved forward thus far. In this article I look at the dangers of mandating joint custody and the status of other states' laws.

In general, custody laws are gender-neutral. Women often end up with custody of their children because men leave and do not seek custody of the children. When fathers contest custody, however, studies consistently document that they win at least half of the time. A Los Angeles study showed that when fathers contested custody, they won 63 percent of the time; a Massachusetts study found this to be so in 70 percent of cases. And a 1997 article reviewing custody laws from the 1920s to the 1990s concluded that “when fathers fight for custody they have always had about a 50 percent chance of winning, no matter what arguments or what experts they employ.”¹

Research and Literature on Joint Custody

Most experts agree that legal presumptions creating a “one size fits all” custody solution are inappropriate and are harmful to children in many cases. Research studies show that no one custody arrangement, including joint custody, is beneficial

¹ Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody Disputes—1920, 1960, 1990, and 1995*, 31 *FAM. L.Q.* 215, 217 (Summer 1997); see also Joan Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, 29 *CLEARINGHOUSE REV.* 1113, 1117 (Apr. 1996).

for children. Custodial arrangements must be tailored to the specific needs and circumstances of parents and children in individual cases. Joint custody *may* be a positive outcome where both “parents are committed to making joint custody work out of love for their children, are willing and able to negotiate differences, and are able to separate husband and wife roles from parental roles.”² On the other hand, research indicates that joint custody poses grave risks for children in high-conflict families or whose parents cannot cooperate or communicate effectively.

When courts impose joint custody on families in conflict, they are likely to exacerbate the stress that children of divorce experience. Dr. Judith Wallerstein, one of the first American researchers to study the long-term impact of divorce on children, states: “[O]ngoing conflict between divorced parents has especially detrimental effects on the children and . . . children are particularly at risk when they have frequent and continuing access to both parents who are hostile and uncooperative with each other.”³

According to Dr. Wallerstein, Dr. Janet Johnston’s research also reveals “psychological deterioration among both boys and girls when frequent contact is ordered over the objection of one or both parents in . . . intensely conflicted families. The unintended effect is that the child feels emotionally safe nowhere.”⁴

The National Council of Juvenile and

Family Court Judges, echoing these concerns, states that children in this situation are “more emotionally troubled and behaviorally disturbed than those in sole custody.”⁵ Children also suffer profoundly because they become “caught in the middle. . . .”⁶

Substantial literature clearly indicates that, while joint custody may be a viable option for some families, it may be disastrous for others. Judges and social science experts reflect that presumptions and preferences for joint custody divert courts from their fundamental obligation to assess the child’s best interests and “place much greater pressure on the judge to impose joint custody on families for which it is clearly inappropriate.”⁷

Other States’ Custody Laws

Most states, including New Jersey, recognize joint custody, along with sole custody, as one of the potential outcomes in a custody proceeding. Relatively few states, however, have adopted presumptions favoring joint custody. . . .

NEW JERSEY, WE HOPE, WILL NOT ADOPT SUCH a drastic measure as joint custody for all. To the contrary, there should be a presumption that joint or sole custody to a perpetrator of domestic violence is against the child’s best interests. In its 1994 Model Code on Domestic and Family Violence, the National Council of Juvenile and Family Court Judges recommended that

²D. Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 SOC. WORK 51, 56 (Jan. 1994).

³Judith Wallerstein & Janet Johnston, *Children of Divorce: Recent Findings Regarding Long-Term Effects and Recent Studies of Joint and Sole Custody*, 11 PEDIATRICS IN REV. 197, 203 (Jan. 1990).

⁴Judith Wallerstein & T. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 314 (Summer 1996).

⁵Family Violence Project of the Nat’l Council of Juvenile & Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 200 (Summer 1995).

⁶E. Maccoby & R.H. Mnookin, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1994). See also D. Lye, *What the Experts Say: Scholarly Research on Post-Divorce Parenting and Child Well-Being*, REPORT TO THE WASHINGTON STATE GENDER AND JUSTICE COMMISSION AND DOMESTIC RELATIONS COMMISSION (1999), available at <http://www.courts.wa.gov/parent/chap4.htm>

⁷G. Hardcastle, *Joint Custody: A Family Court Judge’s Perspective*, 32 FAM. L.Q. 201, 206 (Spring 1998).

in any custody proceeding involving family violence there should be “a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.”

This code was developed and reviewed by experienced and well-respected judges, public policy experts, advocates, attorneys, and others. The American Bar Association has adopted the identical position.⁸

⁸ AM. BAR ASS'N, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION (1994).

Other Legal Arrangements for Minors

In addition to custody determinations in divorces, the care, custody, and control of minors may be determined by other legal processes or arrangements. They include legal guardianship and emancipation, described below.

Legal Guardianship

A guardianship is a formal legal arrangement that transfers legal custody of a child under 18 to someone, usually to a person other than the child's parent.¹ A judge must appoint a guardian. The court to which a potential guardian must apply varies from state to state. The options include, but are not limited to, the county juvenile, family, probate, or children's court.²

A guardianship does not terminate parental rights. Guardianship merely suspends a parent's custodial rights. Moreover, legal guardianships do not last forever. Most guardianships end at age 18, or when the guardian or child dies, or when the court grants a request to terminate the guardianship. Although caring for a child without court-ordered custody is not illegal, a guardianship gives the guardian legal rights and responsibilities that an informal caregiver would not have. A legal guardianship makes the guardian responsible for the care, custody, and control of the child. A guardianship also allows a caregiver more easily to enroll a child in school and make educational decisions, obtain medical coverage, and make medical decisions for the child.

Parents have the right to object to a guardianship or custody order. The court must generally determine that the child will suffer some harm or detriment if the child remains in parental custody and that a guardianship is in the child's best interest. In some states a parent may still visit a child after a guardianship is appointed. The judge may order a specific amount or type of visitation and a particular schedule. Other times, the court may provide visitation solely at the guardian's discretion.

A guardian may be either a relative or a nonrelative. If the child is related to the guardian, financial support is available to guardians through a Temporary Assistance for Needy Families (TANF) grant.³ If the custodian is not related, a child may not receive a TANF grant. However, there may be other avenues for support. For example, in some states a nonrelated guardian may receive state-funded financial assistance and medical coverage for a child. Because in most cases a transfer of custody does not extinguish a parent's financial support obligation, child support and private medical coverage from the parents may also be a source of support for the child.

¹ Some states do not provide for a “guardianship” or “custodianship.” In those cases nonparents may have to file a custody action, just as a biological parent would.

² Advocates should call local children's organizations or the county court clerk to determine how to petition for a guardianship in their state.

³ Some states offer special financial assistance to children who are living with a relative. Advocates should contact the local social services agency to determine if their state has such a program.

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Emancipation

Emancipation is a legal process that releases a minor from the care and control of any parent, guardian, or institution (such as the foster care system). The age of emancipation or majority (when a person becomes a legal adult) varies from 18 to 21 with state law. However, a minor may request to be emancipated at an earlier age. Thereafter the minor is responsible for one's own care and (in most cases) financial support.

The effect of emancipation differs by state. Generally, however, emancipated minors may work, make all medical decisions, choose a residence, enroll in school or college, enter into basic contracts, and sue and be sued without the consent of a parent or guardian. But, in gaining these adult responsibilities, emancipated minors lose many important childhood privileges, including the right to financial support from both parents, protection from financial liability for accidental or intentional harm that the minor may cause, and out-of-home care options such as foster care.⁴

Emancipation does give minors rights similar to adults. However, in most states, some rules do not change. Emancipated minors may not get married or enroll in the military without the consent of a court or a parent. Emancipated minors may not drive, smoke, purchase or consume alcohol, or vote before the applicable ages. Statutory rape laws still apply, and a minor must still attend school.

In some states, emancipation is final. Once emancipated, the minor may not "unemancipate." In other states, however, a minor remains emancipated only as long as the conditions allowing emancipation continue. For example, if before reaching the age of majority a minor loses a stable source of financial support, the minor would no longer be considered emancipated.

A decision maker (typically a judge) takes many factors into account when determining whether emancipation is appropriate for a minor: age, ability to be financially self-supportive, parent's consent for the minor to leave out of home, the minor's wish to live apart from parents, maturity, and whether emancipation is in the minor's best interest. Some states have specific laws on how to emancipate, while in other states the application process varies by county. Advocates working with minors who wish to emancipate can contact a local children's rights organization, the county court clerk, or the local child welfare agency to find out about how to proceed in their counties. However, especially in those states in which emancipation is irreversible, advocates should be sure to explore fully with the minor other placement options (such as guardianship or living informally with a relative or family friend).⁵

⁴ Some states offer the option of emancipation for certain purposes, such as making educational decisions. Furthermore, marriage and joining the armed services (e.g., air force, army, navy, marines, coast guard) may result in emancipation. However, before doing either, the minor needs the permission of a parent or guardian.

⁵ For specific information on the laws regarding emancipation and the age of majority in a state, see www.law.cornell.edu/topics/Table_Emanicipation.htm.

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