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JOINT CUSTODY IN NEW YORK: A STATUTE WHOSE TIME HAS COME?

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Joint or shared custody has been defined as both parents' ongoing shared legal responsibility and joint control over their children's upbringing, following the separation or dissolution of the marriage. Joint custody according to most statutes and New York caselaw, has two parts: joint legal custody and joint physical custody. Joint legal custody refers to the rights of parents to make major decisions concerning their child, including: education, health care and religious upbringing. Joint physical custody refers to an alternating custody arrangement for a child so that the child spends approximately equal time with both parents and may or may not be included in a court's joint custody award.

In Braiman v. Braiman, the New York Court of Appeals held that, in the absence of a joint custody statute, judicial authority to make an award of joint custody could be implied from the language of the Domestic Relations Law § 240. However, in the same decision, the court held that joint custody is appropriate only in the rare cases involving, "relatively stable, amicable parents behaving in a mature, civilized fashion." Applying this holding, the courts have consistently denied joint custody, solely because they determined the parents to be antagonistic toward each other, even where both parents 8888have demonstrated a loving relationship with the child.

Currently, New York remains one of a rapidly diminishing number of states without a statute for joint custody. It can only be assumed the Legislature has resisted the national trend toward joint custody because it believes the court's reasoning in Braiman is still valid. The Braiman court made the critical assumption that divorced couples, in general, and particularly those who have been through acrimonious divorces, will by definition be unable to cooperate on and manage the sharing of responsibility and control of their children, pursuant to a joint custody agreement. Based upon this assumption the court concluded that any joint custody award imposed on embattled parents, "can only enhance family chaos."

This line of reasoning, though seductive, is at best overly simplistic and dangerously naive. Contrary to the court's unsubstantiated 'common sense' assumption, numerous recent studies reveal failure to pay child support, obstruction of visitation by the custodial parent, failure to visit by the non-custodial parent along with other punitive behavior and displays of purely self-interested concern,are more likely to occur in cases where sole custody is awarded. Other researchers have found the quality of the relationship between the mother and father, especially at the time of the separation, does not predict whether a joint custody agreement can work. And yet another has shown that relatively inexpensive counseling can alleviate embattled parents initial, punitive attitudes toward each other and their custodial arrangement.

The other traditional argument against permitting joint custody--and one briefly eluded to in the Braiman holding--is that joint custody awards will lead to increased spousal abuse. Opponents of joint custody argue it will guarantee an abusive ex-spouse(usually the father), continuing access and control over the previously abused spouse. However, the mere potential for spousal abuse, unless narrowly defined and carefully proven, should not

automatically preclude a joint custody award. And although divorce related spouse abuse is contemptible, it does not relate directly to parental fitness. More importantly, joint custodians need not maintain direct contact with each other for joint custody to succeed, communication can be through indirect means such as by letter or phone and the child may be transferred between the homes by a third party. Thus joint custody need present no special danger to an abused spouse.

This is not to suggest that joint custody is appropriate in all cases. If the spousal abuse is either frequent or if any one incident were severe, then joint custody may not be appropriate. Joint custody may be wrong when one parent exerted extreme control and and domination over the other parent. In this type of situation, there may be concern that joint custody will be used as a weapon to threaten the continuation of this type of behavior. However, this situation has a slippery slope and great care must be given to ensure that it is not a fabrication created to avoid joint custody.

Given Braiman's largely unfounded and erroneous fears about the dangers of

granting joint custody, the issue remains, what , if any legal presumptions should the judiciary be able to make in a custody situation? The first step for the New York courts and Legislature must be long overdue official recognition that it is sound " public policy of the state to assure minor children have frequent contact with both parents." There is virtual unanimity among social scientists and even opponents of joint custody will concede as much. This consensus among experts, is most likely behind the mini-revolution

toward joint custody that has swept the country in the decade and a half since Braiman.

The existing joint custody statues establish various preferences for joint custody, ranging from joint custody as one option a judge can choose to joint custody as a presumption in the best interests of the child. Most of these states permit a court to impose joint custody over the objection of one of the parents. In the past twelve years,joint custody bills introduced in the New York Senate and Assembly have presented joint custody as merely an option. The intrinsic problem with these bills, and the statutes they were modeled upon, is that they put joint custody on equal footing with sole custody. Without a rebuttable presumption in favor of joint custody, these laws effectively put the burden of achieving joint custody upon the parent seeking it. Failure to carry this burden will result in an award of sole custody to one parent or the other. Knowledge by parents heading into trial that the court is equally or more likely to decree sole custody requires that both parents prepare to fight each other. It makes joint custody relatively difficult and expensive to achieve while making the optimum outcome less probable. Not only is this model inefficient in terms of judicial economy but it also runs contrary to the thrust of the argument for joint custody which encourages the social policy goals of acceptance, forgiveness and cooperation (by favoring such a parent).

In 1994, for the first time, a bill has been introduced to both the New York Senate and the Assembly that seeks to rectify the shortcomings of previous joint custody proposals. After reviewing psychological studies--including: state sponsored projects spanning 38 states which "revealed convergent findings that children of all ages have better adjustment after divorce when they have full parenting from both parents"; the reports of the National Institute of Mental Health which concluded custody arrangement which effectively remove one parent from a child's life interferes with the child's normal development; and statistics showing that although Braiman gave courts the option to award joint custody, mothers still receive sole custody in 95% of divorce cases--the bill's sponsor's introduced it for the purpose of creating a statutory presumption of joint custody for all minor children whose parents are no longer married.

The bill can be summarized as follows:

a) Section 1 sets forth the legislative intent of creating a joint custody presumption.

b) Section 2 amends the Domestic Relations Law to require the court to award joint custody in the absence of allegations that shared parenting would be detrimental to the child.

c) Section 3 amends the Domestic relations Law to re-establish a priority of preferences for the awarding of custody. Under the proposal, the first preference would be joint custody and then custody to either parent. If the court opts not to award joint custody it must state its reasons for denial.

d) Section 4 creates a definition of shared parenting under the Domestic Relations Law. Under this definition both parents would remain legally responsible and in control of their children so that both parents share in the care and upbringing of their children.

CONCLUSION

In theory, Braiman stands for the proposition that judges have the authority, pursuant the Domestic Relations Law § 240, to make a joint custody award when they believe it to be in the best interests of the child. But, by restricting such an award to only those cases where both parents agree to joint custody and are not antagonistic toward each other, the Braiman court made what even admitted to be the ideal option, the courts' last resort. In the succeeding years as national awareness of the benefits which flow from a child maintaining contact with both parents has increased, more states have come to the inevitable conclusion that stems from this knowledge. Until now, New York's legislature has lagged woefully behind in addressing this area of jurisprudence. However, with the passage of the current joint custody bill in the Senate and Assembly, New York courts may finally be able to fulfill the promise of Braiman v. Braiman.