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# The Equally Shared Parenting Time Presumption—A Cure-All or a Quagmire for Tennessee Child Custody Law?

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*“[T]he child’s best interest is the paramount consideration.  
It is the polestar, the alpha and omega.”*<sup>1</sup>

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1. Bah v. Bah, 668 S.W.2d 663, 665 (Tenn. Ct. App. 1983).

## INTRODUCTION

There may be no other area of law wrought with as much emotion as divorce and child custody. Today it seems that everyone has a story to tell about a child custody matter, either from personal experience or from the experience of a friend. These stories usually center on hostile divorces or otherwise messy custody determinations, and at least from the perspective of the storyteller, rarely do they have a happy ending.

That these stories abound in our society is not surprising considering the large number of divorces and other custody matters the courts adjudicate each year. In the 2005–2006 fiscal year alone, 14,922 divorce petitions involving minor children were filed in the Tennessee chancery and circuit courts.<sup>2</sup> From a national perspective, the numbers are even more staggering. In 1997, the total number of divorces filed nationally exceeded one million, affecting more than one million children.<sup>3</sup>

Although divorce affects children nationally, the focus of this Note is on Tennessee law and the principles that guide the courts in making child custody determinations. As stated in the quote at the beginning of this piece, Tennessee, like many other states, rests its determinations on the so-called “best interest of the child” standard.<sup>4</sup> This discretionary approach provides judges

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2. TENN. ADMIN. OFFICE OF THE COURTS, THE 2005-2006 ANNUAL REPORT OF THE TENNESSEE JUDICIARY STATISTICS 17, 19 (2007), <http://www.tsc.state.tn.us/geninfo/Publications/AnnualReport/2005-2006/2005-06annualreportstatistics.pdf>. This figure represents 7696 filings in chancery court and 7226 filings in circuit court. *Id.* The figure also does not account for divorce filings without minor children (17,285), legitimation/paternity suits (1216), suits pertaining to residential parenting or child support (18,843), or what the report refers to as “Other Domestic Relations” (5362). *Id.*

3. Divorcemagazine.com, Divorce Statistics, Marriage Statistics: Divorce Rates in America, Marriage, <http://www.divorcemag.com/statistics/statsUS.shtml> (last visited Apr. 16, 2007). This figure does not discriminate between divorces that involved minor children and those that did not.

4. See, e.g., UNIF. MARRIAGE AND DIVORCE ACT § 402 (1973) (“The court shall determine custody in accordance with the best interest of the child.”). See also ARIZ. REV. STAT. ANN. § 25-403 (2007); COLO. REV. STAT. § 14-10-124 (2006); 750 ILL. COMP. STAT. ANN. 5/602 (West 1999 & Supp. 2007); KY. REV. STAT. ANN. § 403.270 (LexisNexis 1999 & Supp. 2004); MINN. STAT. ANN. § 518.17 (West 2006 & Supp. 2007); MO. ANN. STAT. § 452.375 (West

flexibility in fashioning child custody orders by directing them to account for all relevant factors.<sup>5</sup> Intuitively, using a best-interest standard seems best for all parties involved. One author, however, citing to the language from *Bah v. Bah*<sup>6</sup>—“the child’s best interest . . . is the polestar, the alpha and omega”<sup>7</sup>—opined that “[t]hese are fancy words for a difficult situation.”<sup>8</sup>

While most states use a discretionary best-interest standard in making child custody determinations, a small number of states have also augmented their statutes to include language strengthening, or even creating, a presumption that joint custody<sup>9</sup> is in the child’s best interest.<sup>10</sup> More than once, and most recently in 2005, similar legislation was introduced in the Tennessee legislature without success.<sup>11</sup> Fathers’ rights groups, such as DAD of Tennessee, Inc.,<sup>12</sup> are fervent supporters of this type of legislation that seeks to benefit children by having both parents involved in their lives and to address what proponents see as inequities in the unfair application of the law in favor of mothers.<sup>13</sup> Although legislation trying to create a presumption of joint or shared parenting will continue to surface, in attempts to address this alleged unfairness in

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2003 & Supp. 2007); MONT. CODE ANN. § 40-4-212 (2005); WASH. REV. CODE ANN. § 26.09.002 (West 2005).

5. TENN. CODE ANN. § 36-6-106 (2005) (Westlaw 2007); *see infra* Section II.A.

6. 668 S.W.2d 663 (Tenn. Ct. App. 1983).

7. *Id.* at 665.

8. Don R. Ash, *Bridge Over Troubled Water: Changing the Custody Law in Tennessee*, 27 U. MEM. L. REV. 769, 770 (1997).

9. *See infra* Section I.B. for a discussion of different types of custody, including the concept of joint custody and the distinction between joint physical and joint legal custody.

10. Some states presumptively favor both joint legal and physical custody, while some only state a preference for joint legal custody. *See infra* notes 68–74 and accompanying text for a discussion of different states’ approaches.

11. *See infra* notes 54–58 and accompanying text.

12. *See generally* DAD of Tennessee, Inc., TNDAD – Children Need Their Dads, <http://www.tndads.org> (last visited Apr. 16, 2007).

13. For example, according to statistics found on the DAD of Tennessee, Inc. website, mothers are victorious in custody disputes 90 percent of the time, leaving fathers with only “visitation privileges.” *Id.* at <http://www.tndads.org/facts/index.html> (last visited Apr. 16, 2007).

the child custody regime, a presumption that joint custody is in the best interest of all children is clearly misguided.

This Note will examine the current state of child custody law in Tennessee and explore how to maximize both parents' involvement in their child's life while also minimizing what some view as inequities in the system. This Note argues that one-size-fits-all legislation is not the answer for Tennessee and it suggests that other measures can be taken to address this problem more effectively.

Section I gives a brief overview of child custody law in the United States, both its historical development and the different types of custody arrangements that are most common today. Section II discusses the law in Tennessee, its application, and the recent proposed legislation that would create a presumption of joint custody in Tennessee. Section III considers joint custody presumptions in general, presenting arguments of those who support a presumption and those who do not. The final section concludes by recommending alternatives to a joint custody presumption in Tennessee.

## I. AN OVERVIEW OF CHILD CUSTODY LAWS IN THE UNITED STATES

### A. *The History of Child Custody*

Like most other areas of the law, the origin of family law in the United States can be traced back to English common law.<sup>14</sup> In Colonial America, "fathers, without dispute, had almost unlimited authority of custody and control over their natural, legitimate children."<sup>15</sup> This patriarchal idea closely traced the earliest rule of child custody in England, developed around the seventeenth century, that absent extraordinary circumstances the father received sole custody of his children.<sup>16</sup>

In the nineteenth century, American courts began to abandon this so-called "paternal preference," focusing instead on the

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14. MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 3 (1994).

15. *Id.* at 6.

16. Margaret Martin Barry, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U. L. REV. 767, 769 (1997) (citing HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 477 (2d ed. 1987)).

best interests of the child.<sup>17</sup> In most cases, these early courts took the view that it was in the best interest of young children, specifically those of “tender years,” to live with their mother.<sup>18</sup> This idea gave birth to what is known today as the “tender years” doctrine, and by the early part of the twentieth century it had firmly replaced the paternal preference.<sup>19</sup>

The “tender years” doctrine was firmly engrained in the courts throughout the first part of the twentieth century.<sup>20</sup> However, during the 1960s and 1970s the doctrine began to fall out of favor, mostly due to political movements for gender equality.<sup>21</sup> The abolishment of the tender years doctrine opened the door to a fact-based “best interests of the child” standard, taking into account a number of relevant factors.<sup>22</sup> This standard is now considered to be the norm, as evidenced by many states’ statutory provisions.<sup>23</sup>

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17. See MASON, *supra* note 14, at 49–83.

18. *Id.* at 61.

19. Barry, *supra* note 16, at 770. The British courts were actually ahead of the American courts on this front. *Id.* The British Act of 1839 directed courts to award custody of children under seven years old to their mothers and children older than seven to their fathers. *Id.* Furthermore, the Act provided that even in the case of children over seven years old, visitation rights would be granted to the mother. *Id.*

20. See Julie E. Artis, *Judging the Best Interests of the Child: Judges’ Accounts of the Tender Years Doctrine*, 38 LAW & SOC’Y REV. 769 (2004).

21. MASON, *supra* note 14, at 125 (stating that “[a]lthough organized feminists were not often direct participants in the revolution transforming divorce and custody law, their crusade for the ERA and for other gender discrimination issues strongly contributed to the legal climate that fostered the revolution in family law”).

22. See Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1537 (1994) (stating that “[c]ourts and legislatures abolished . . . the tender years doctrine and began to articulate a broader best interests standard that was ostensibly gender neutral”); see also Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 10 (1987) (stating that the best interests standard “is [often] formulated in a way that allows some scope for other criteria”).

23. See TENN. CODE ANN. § 36-6-106(a)(1)–(10) (2005) (Westlaw 2007) (enumerating relevant factors that the court must take into account when determining custody); see also ARIZ. REV. STAT. ANN. § 25-403 (2007); COLO. REV. STAT. § 14-10-124 (2006); 750 ILL. COMP. STAT. ANN. 5/602 (West 1999 &

After the demise of the tender years doctrine, some states, while adhering to the aforementioned best interests of the child standard, also sought to create a presumption to aid the courts in making child custody determinations.<sup>24</sup> Most commonly, these presumptions took one of two forms—either a primary caretaker presumption or some sort of joint custody presumption.<sup>25</sup>

The primary caretaker preference creates a presumption that custody of the child should be vested in the parent who has been more involved in the child's upbringing.<sup>26</sup> Although arguably this approach is much more tied in with the best interest of the child standard (because presumably awarding custody to the primary caretaker would give the child a greater degree of continuity), opponents of the presumption argue that it unfairly favors women.<sup>27</sup> Joint custody, on the other hand, "presume[s] both that parenting roles are relatively interchangeable and that the best interests of the child are best advanced if the child has substantial contact with both parents."<sup>28</sup>

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Supp. 2007); KY. REV. STAT. ANN. § 403.270 (LexisNexis 1999 & Supp. 2004); MINN. STAT. ANN. § 518.17 (West 2006 & Supp. 2007); MO. ANN. STAT. § 452.375 (West 2003 & Supp. 2007); MONT. CODE ANN. § 40-4-212 (2005).

24. MASON, *supra* note 14, at 129.

25. *Id.* For cases applying the primary caretaker presumption, see *Jordan v. Jordan*, 448 A.2d 1113 (Pa. Super. Ct. 1982); *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). See also David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984) (discussing the primary caretaker presumption).

California was the first state to adopt a statutory preference for joint custody. See CAL. CIV. CODE § 4600 (West 1983) (repealed 1992). Although there was some ambiguity in the statute as to whether the presumption applied in all cases or only where the parents agreed, a California appellate court later held that joint custody was presumptively in the best interest of a child even where one parent objected to the arrangement. *In re Marriage of Wood*, 190 Cal. Rptr. 469, 477-78 (Ct. App. 1983); see also *Taylor v. Taylor*, 508 A.2d 964 (Md. 1986) (holding that joint custody could be ordered notwithstanding the objection of one of the parents).

26. MASON, *supra* note 14, at 130; Barry, *supra* note 16, at 771.

27. MASON, *supra* note 14, at 130; Barry, *supra* note 16, at 771.

28. MASON, *supra* note 14, at 130. The many forms of joint custody will be discussed more extensively in the following section.

### B. Different Types of Custody

Generally, custody may be either *sole* or *joint* and either *physical* or *legal* in nature. At the outset of this discussion, it is important to note a distinction between physical and legal custody.<sup>29</sup> Physical custody refers to the physical care and supervision of the child, while legal custody refers to the rights of a parent to make decisions about the child's well-being.<sup>30</sup> There are, therefore, a number of different ways that custody of a child can be divided between parents.<sup>31</sup> For example, the court may award sole physical and legal custody to one parent, while awarding the other parent visitation rights. In another scenario, the parents may have joint legal custody, meaning that both parents are responsible for making decisions which affect the child's well-being,<sup>32</sup> while physical custody is vested solely or primarily in one parent. Alternatively, parents may share joint custody in both the legal and physical sense.

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29. See *Thompson v. Thompson*, No. 01-A-01-9712-CV-00695, 1998 Tenn. App. LEXIS 711, at \*13 (Tenn. Ct. App. Oct. 27, 1998) ("Custody has both a legal and a physical aspect.").

30. See, e.g., TEX. FAM. CODE ANN. § 152.102 (Vernon 2002) (defining "legal custody" as "the managing conservatorship of a child" and "physical custody" as "the physical care and supervision of a child"); *Taylor*, 508 A.2d at 967 (defining "legal custody" as "the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare" and "physical custody" as "the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody"); see also 59 AM. JUR. 2D *Parent and Child* § 26 (2007).

31. For example, "split custody" refers to an arrangement where there are two or more minor children and each parent has legal and physical custody of one of the children, with the other parent receiving visitation rights. *Ash*, *supra* note 8, at 790. "Divided custody" is another related concept in which each parent has legal and physical custody of a child for part of the year or in alternate years. *Id.* Split custody and divided custody arrangements are rare, accounting for less than five percent of custody orders, and will not be focused on herein. *Id.*

32. Decisions related to the child's health and education are examples of decisions affecting the child's well-being. JANET L. RICHARDS, RICHARDS ON TENNESSEE FAMILY LAW § 8-2(a) (2d ed. 2004).



When American courts began making custody decisions based on the child's best interest,<sup>33</sup> the general arrangement was one of sole legal and physical custody vested in one parent, with the other parent receiving visitation rights.<sup>34</sup> Indeed, throughout the first part of the twentieth century, joint custody was usually considered to be an imprudent arrangement.<sup>35</sup> As presumptions like the tender years doctrine were abolished,<sup>36</sup> however, attitudes toward joint custody began to change. Social changes that swept the country during the latter part of the twentieth century caused this shift in attitudes;<sup>37</sup> in particular, one author notes:

Joint custody is a recent attempt of the law to reduce the trauma of divorce for the child and to avoid further fragmentation of an already fragmented family. *It is also the law's attempt to adapt to the reality of social change which has resulted in new and diverse lifestyles and social values rejecting the nuclear family model as the only desirable model of the "American Dream."*<sup>38</sup>

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33. See *supra* notes 17–23 and accompanying text for a history of the best interest standard for custody decisions.

34. Of course, in the nineteenth and early twentieth centuries the custodian was usually the mother, based on the tender years doctrine, while the father received visitation. See *supra* notes 17–19 and accompanying text.

35. As one court opined in a 1934 opinion, joint custody "is to be avoided, whenever possible, as an evil fruitful in the destruction of discipline, in the creation of distrust, and in the production of mental distress in the child." *McCann v. McCann*, 173 A. 7, 9 (Md. 1934). See also *Rudolph v. Rudolph*, 146 So. 2d 397, 399 (Fla. Dist. Ct. App. 1962) ("Divided custody which involves periodic removal from familiar surroundings is not desirable nor conducive to a child's welfare."); *McLemore v. McLemore*, 346 S.W.2d 722, 724 (Ky. Ct. App. 1961) (condemning joint custody arrangements, especially those involving young children); *Logan v. Logan*, 176 S.W.2d 601, 603 (Tenn. Ct. App. 1943) ("It is generally very unwise to divide the custody of a child between contending parties because it is hardly possible for a child to grow up and live a normal, happy life under such circumstances.").

36. See *supra* notes 20–23 and accompanying text.

37. See *supra* note 21.

38. Meyer Elkin, *Joint Custody: In the Best Interest of the Family*, in *JOINT CUSTODY AND SHARED PARENTING* 11, 11 (Jay Folberg ed., 1984) (emphasis added).

With the favorable shift in attitudes toward joint custody, social scientists also began to show through research that it was generally beneficial for children to have involvement from both parents.<sup>39</sup> This data led to increased judicial awareness that joint custody may not be the "evil" creature it was once thought to be.

California, for example, became the first state to adopt a preference for joint physical and legal custody in 1980.<sup>40</sup> Today, joint custody is allowed in all fifty states, although approaches vary as to whether joint custody—either in its physical or legal form or both—is presumptively preferred.<sup>41</sup>

## II. TENNESSEE'S APPROACH TO CHILD CUSTODY DETERMINATIONS

### A. The Statutory Scheme

In Tennessee, the courts are primarily concerned with the welfare of the child when making child custody determinations.<sup>42</sup> Therefore, when a custody dispute arises among parents, the courts must engage in a comparative fitness analysis of the parents to determine what sort of living arrangement is in the child's best inter-

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39. See Susan Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, in JOINT CUSTODY AND SHARED PARENTING 111 (Jay Folberg ed., 1984) (finding that children in joint custody arrangements benefited by feeling loved by both parents, experiencing a greater sense of importance within the family, and being able to avoid a "tug of war" between parents); see also W.N. Bender, *Joint Custody: The Option of Choice*, 21 J. DIVORCE & REMARRIAGE 115 (1994) (finding that the benefits to children included better adjustment after the divorce); J. Pearson & N. Thoennes, *Custody After Divorce: Demographic and Attitudinal Patterns*, 60 AM. J. OF ORTHOPSYCHIATRY 233 (1990) (finding that "joint legal and residential noncustodians were decidedly more involved with their children following divorce than were noncustodians in sole custody arrangements").

40. MASON, *supra* note 14, at 130. Although the statute was clear on the fact that joint custody was presumptively in the best interest of the child when the parties agreed on joint custody, the statute was somewhat ambiguous on whether joint custody should be imposed when the parties could not agree. *Id.* at 130 & n.36. However, an appellate court interpreting the statute held that the legislative intent of the California statute made it possible to award joint custody over the objection of a parent. *Id.* (citing *In re Marriage of Wood*, 190 Cal. Rptr. 469 (Ct. App. 1983)).

41. See *infra* notes 68–74 and accompanying text.

42. See RICHARDS, *supra* note 32, § 8-3(a).

est.<sup>43</sup> The trial judge has discretion in making the custody determination and is guided by Tennessee Code Annotated section 36-6-106, which directs that custody determinations must be founded in the best interest of the child and that all relevant factors should be considered.<sup>44</sup> The statute also gives a non-inclusive list of relevant factors that must be taken into account:

- (1) The love, affection and emotional ties existing between the parents or caregivers and child;
- (2) The disposition of the parents or caregivers to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent or caregiver has been the primary caregiver;
- (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; . . .
- (4) The stability of the family unit of the parents or caregivers;
- (5) The mental and physical health of the parents or caregivers;
- (6) The home, school and community record of the child;
- (7)(A) The reasonable preference of the child if twelve (12) years of age or older;
- (B) The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;

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43. *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996) ("In custody and visitation cases such as this one, the evidence should have been reviewed to determine both parties' fitness as a comparative matter.").

44. TENN. CODE ANN. § 36-6-106 (2005) (Westlaw 2007).

(8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; . . .

(9) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child; and

(10) Each parent or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child.<sup>45</sup>

Another statutory provision, Tennessee Code Annotated section 36-6-101(a)(2)(A)(i), directly addresses joint custody. The section provides that "neither a preference nor a presumption for or against joint legal custody, joint physical custody or sole custody is established."<sup>46</sup> However, the section also provides that if the parents agree to a joint custody arrangement, then there is a presumption that joint custody is in the child's best interest.<sup>47</sup>

### B. Application of Tennessee Law

Although Tennessee's statutory scheme includes a provision that "the gender of the party seeking custody shall not give rise to a presumption of parental fitness or cause a presumption or constitute a factor in favor or against the award of custody to such party,"<sup>48</sup> many critics, most notably groups concerned with fathers' rights, continue to assert that the application of the law in Tennessee unfairly favors women.<sup>49</sup>

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45. § 36-6-106(a)(1) to (10).

46. TENN. CODE ANN. § 36-6-101(a)(2)(A) (2005 & Supp. 2006).

47. *Id.*

48. § 36-6-101(d).

49. DAD of Tennessee, Inc. is one such group. See DAD of Tennessee, Inc., *supra* note 12. The group states their mission as follows:

*Our goal* is to bring about changes in the domestic laws of our state to empower divorced fathers as equal partners in parenting. *Our purpose* is to allow fathers to father, mothers to mother, and for children to receive the love and support of

The numbers do show that mothers act as primary custodian more often than fathers. The author of this Note conducted a case law survey in 2006 that clearly shows that mothers generally receive more custodial time with their children as compared with fathers.<sup>50</sup> Of the eighty-five reported and unreported Tennessee appellate decisions that addressed disputed child custody<sup>51</sup> between January 2004 and April 2006, fifty-four (63.53%) were decided in favor of the mother, while only twenty-eight (32.94%) were decided in favor of the father. In three of the cases, equal parenting time was granted (3.53%). This data, while certainly not constituting a scientific study, does show that mothers tend to receive custody of the children more often than fathers.<sup>52</sup> One study

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both parents. *Our belief* is that everyone will benefit: fathers, mothers, grandparents — but especially children.

DAD of Tennessee, Inc., *supra* note 12, at <http://www.tndads.org/mission/index.html> (last visited Apr. 16, 2007).

50. Specific research data is on file with the author.

51. The data collected only refers to initial custody decisions and modifications of custody. Relocation cases were excluded.

52. The rationales used by the courts in awarding mothers primary physical custody included the following: that the mother had been the child's primary caretaker (*Gratton v. Gratton*, No. M2004-01964-COA-R3-CV, 2006 Tenn. App. LEXIS 209 (Tenn. Ct. App. Mar. 28, 2006); *Ort v. Ort*, No. W2005-00833-COA-R3-CV, 2006 Tenn. App. LEXIS 6 (Tenn. Ct. App. Jan. 5, 2006); *Townsend v. Townsend*, No. W2004-02034-COA-R3-CV, 2005 Tenn. App. LEXIS 784 (Tenn. Ct. App. Dec. 14, 2005)); that the mother was more willing to maintain a relationship between the child and the father than vice versa (*Chaffin v. Ellis*, 211 S.W.3d 264 (Tenn. Ct. App. 2006)); that the father was abusive and paid no support until ordered to do so by the court (*Keith v. Surratt*, No. M2004-01835-COA-R3-CV, 2006 Tenn. App. LEXIS 68 (Tenn. Ct. App. Jan. 31, 2006)); that the mother offered more stability than the father (*Caldwell v. Caldwell*, No. E2005-00139-COA-R3-CV, 2006 Tenn. App. LEXIS 64 (Tenn. Ct. App. Jan. 31, 2006)); and that the father had behaved in a threatening manner toward the mother (*Morgan v. Morgan*, No. E2005-00305-COA-R3-CV, 2005 Tenn. App. LEXIS 817 (Tenn. Ct. App. Dec. 27, 2005)).

Rationales used in awarding fathers primary physical custody included: that the father was more stable (*Cantrell v. Cantrell*, No. M2003-01075-COA-R3-CV, 2006 Tenn. App. LEXIS 59 (Tenn. Ct. App. Jan. 27, 2006); *Campbell v. Campbell*, No. W2004-01608-COA-R3-CV, 2005 Tenn. App. LEXIS 438 (Tenn. Ct. App. July 5, 2005)); that it was the child's preference to reside with the father (*Smith v. Smith*, No. M2003-02259-COA-R3-CV, 2006 Tenn. App. LEXIS 42 (Tenn. Ct. App. Jan. 23, 2006); *Williams v. Williams*, No. E2004-02439-COA-R3-CV, 2005 Tenn. App. LEXIS 567 (Tenn. Ct. App. Sept. 12,

asserts that mothers are awarded primary physical custody as much as ninety percent of the time.<sup>53</sup>

The concerns surrounding the propensity of courts to award custody only to mothers have not gone unnoticed in the Tennessee legislature. For example, legislation was introduced in 1996 to strengthen the preference for physical and legal joint custody in Tennessee.<sup>54</sup> After much debate in the legislature and various

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2005)); and that the mother was abusing alcohol (*Benson v. Watkinson*, No. E2004-01989-COA-R3-CV, 2005 Tenn. App. LEXIS 566 (Tenn. Ct. App. Sept. 9, 2005)).

53. IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 571 (4th ed. 2004) (citing E. MACCOBY & R. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992)).

54. H.R. 2501, 99th Gen. Assem., Reg. Sess. (Tenn. 1996); S. 2580, 99th Gen. Assem., Reg. Sess. (Tenn. 1996). See also RICHARDS, *supra* note 32, § 8-2(b). The bill summary for House Bill 2501/Senate Bill 2580 states:

This bill would . . . shift to a presumption that shared parental responsibility is in the best interests of the child. This bill would make it the public policy of this state to assure minor children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and encourage parents to share the rights and responsibilities of child rearing. This bill would allow the courts, in any proceeding where the custody of minor is at issue, to allow custody to be awarded in the following order of preference, according to the best interests of the child: (1) To both parents jointly: -- The court, in its discretion, would require the parents to submit a plan for implementation of the custody order upon finding that both parents are suitable parents, or the parents acting individually or in concert may submit a custody implementation plan to the court prior to issuance of a custody decree; (2) To either parent: -- The court is to consider which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of that parent's sex. The burden of proof that shared parental responsibility would not be in a child's best interest shall be upon the parent requesting sole custody; (3) To neither parent: -- The court would award custody to the person or persons in whose home the child has been living in a wholesome and stable environment; (4) To any other person or persons: -- The court would award custody to whomever was deemed by the court to be suitable and able to provide an adequate and stable environment.

committees, the legislation was passed in an amended form with the limitation that joint custody is presumptively in the best interest of the child *only* if the parents agree to joint custody.<sup>55</sup>

In 2005, legislation was again introduced that would create “a rebuttable presumption that equally shared parenting time is in the best interest of the child.”<sup>56</sup> The proposed bill created quite a

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Bill Summary for H.R. 2501, 99th Gen. Assem., Reg. Sess. (Tenn. 1996), S. 2580, 99th Gen. Assem., Reg. Sess. (Tenn. 1996), *available at* [http://www.legislature.state.tn.us/info/Leg\\_Archives/99GA/Bills/BillSummary/SB2580.htm](http://www.legislature.state.tn.us/info/Leg_Archives/99GA/Bills/BillSummary/SB2580.htm).

55. RICHARDS, *supra* note 32, § 8-2(b). The statute as enacted reads as follows:

[N]either a preference nor a presumption for or against joint legal custody, joint physical custody or sole custody is established, but the court shall have the widest discretion to order a custody arrangement that is in the best interest of the child. Unless the court finds by clear and convincing evidence to the contrary, *there is a presumption that joint custody is in the best interest of a minor child where the parents have agreed to joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child.* For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate, the court may direct that an investigation be conducted. The burden of proof necessary to modify an order of joint custody at a subsequent proceeding shall be by a preponderance of the evidence.

TENN. CODE ANN. § 36-6-101(a)(2)(A)(i) (2005 & Supp. 2006) (emphasis added).

56. H.R. 1729, 104th Gen. Assem., Reg. Sess. (Tenn. 2005); S. 1782, 104th Gen. Assem., Reg. Sess. (Tenn. 2005). House Bill 1729 reads, in pertinent part, as follows:

Tennessee Code Annotated, Section 36-6-101(a)(2)(A), is amended by deleting the current language in its entirety and by substituting instead the following language:

(A) Except as provided in the following sentence, the court shall have the widest discretion to order a custody arrangement that is in the best interest of the child. Unless the court finds by a preponderance of the evidence to the contrary, or where the parents have agreed to a different custody arrangement, at a hearing for the purpose of determining the custody of the minor child, *there shall be a rebuttable presumption that equally shared parenting is in the best interest of the child.* For the purpose of assisting the court in making a determination whether an award of equitably shared parenting is inappropriate, the

stir among family law attorneys and other interested parties.<sup>57</sup> Although the legislation was passed by the Tennessee State Senate, it was withdrawn in the House.<sup>58</sup>

Because legislation concerning joint custody presumptions has been introduced at least twice in the Tennessee legislature, it seems unlikely that this issue will disappear. The next section of this Note considers the various approaches that other states have taken in the joint custody arena and will examine arguments both for and against statutory provisions creating a presumption in favor of joint custody.<sup>59</sup>

### III. JOINT CUSTODY AND SHARED PARENTING APPROACHES

As previously noted, the social sciences played a large part in creating a more favorable attitude toward joint custody in the United States.<sup>60</sup> The early studies found that children living in joint custody arrangements benefited in ways that other children of divorce did not. For example, research conducted in 1979–1980 examined twenty-four California families who chose joint physical custody prior to the enactment of any statutory preference.<sup>61</sup> This research showed that the children in joint custody arrangements

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court may direct that an investigation be conducted. The burden of proof necessary to modify and order of shared parenting at a subsequent proceeding shall be by a preponderance of the evidence.

H.R. 1729, 104th Gen. Assem., Reg. Sess. (Tenn. 2005) (emphasis added).

57. See Jay Hamburg, *Equally Shared Parenting Bill Raising Concerns*, TENNESSEAN, May 3, 2005, available at [http://tennessean.com/government/archives/05/03/69044202.shtml?Element\\_ID=69044202](http://tennessean.com/government/archives/05/03/69044202.shtml?Element_ID=69044202); Tennessee Guerilla Women: Mandatory Joint Custody Bill Alert, <http://guerillawomentn.blogspot.com/2006/02/mandatory-joint-custody-bill-alert.html> (Feb. 8, 2006, 10:15).

58. The Senate passed the bill on April 18, 2005, and it was withdrawn in the House on April 24, 2006. Tennessee Bar Association, TBA Bill Tracking Service, <http://www.tba2.org/tbatoday/legislation/2006/action.html> (last visited Apr. 16, 2007).

59. The following discussion of the arguments both for and against presumptive joint custody primarily refers to joint custody arrangements where the parents share both physical and legal custody. Where only joint physical or joint legal custody is referred to, it will be duly noted.

60. See *supra* notes 33–39 and accompanying text.

61. See *supra* note 39 and accompanying text.



felt loved by both parents, felt a greater sense of importance within their family, and were able to avoid a loyalty "tug of war" between parents.<sup>62</sup>

Although this research seems to paint a pretty picture of joint custody, even the social scientists themselves warned that joint custody was probably not the best solution in all cases.<sup>63</sup> Moreover, most of the early research focused on families who had voluntarily agreed to a joint custody arrangement.<sup>64</sup> Common

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62. Steinman, *supra* note 39, at 115. As stated by author Susan Steinman:

Joint custody was beneficial for these children in three major areas. First, they received the clear message that they were loved and wanted by both parents. Second, they had a sense of importance in their family and the knowledge that their parents made great efforts to jointly care for them, both factors being important to their self-esteem. Third, they had physical access to both parents, and the psychological permission to love and be with both parents. This protected them from the crippling loyalty conflicts often seen in children who are caught in the crossfire of their parents' ongoing battles.

*Id.* at 115.

63. See Richard A. Gardner, *Joint Custody is Not for Everyone*, in JOINT CUSTODY AND SHARED PARENTING 63 (Jay Folberg ed., 1984). Gardner asserts that three criteria must be met in order for joint physical custody to be workable: (1) both parents should be "reasonably capable of assuming the responsibilities of child rearing;" (2) "[t]he parents must have demonstrated their capacity to cooperate reasonably and meaningfully in matters pertaining to raising their children;" and (3) "[t]he children's moving from home to home should not disrupt their school situation." *Id.* at 66. Conversely he asserts that there are three categories of parents who are "poor candidates" for a workable joint custody situation: (1) parents "who cannot communicate with one another;" (2) "[p]arents who cannot cooperate;" and (3) "[p]arents who are actively litigating for sole custody of their children." *Id.* at 66-67.

64. See, e.g., Steinman, *supra* note 39; see also Beverly Webster Ferreiro, *Presumption of Joint Custody: A Family Policy Dilemma*, 39 FAM. REL. 420 (1990). Ferreiro gives the following note of caution:

First, most of the early studies involved only parents who voluntarily chose joint custody. Second, it is difficult to disentangle the effects of pre-existing parental characteristics from the effects of custody type—it may be that parents who choose joint custody are simply different from parents who choose sole custody. It cannot be inferred from correlational data alone that differences between the behavior of joint and sole custody parents are causally related to type of custody.

sense would suggest that different results might be reached when examining joint custody arrangements that were not entered into voluntarily, but were instead judicially imposed over a parent's objection.

Recent research also hails joint custody as producing more "well-adjusted" children.<sup>65</sup> Although the principle benefit to children in joint custody arrangements is the involvement of both parents,<sup>66</sup> joint custody is not the only way to encourage such involvement.<sup>67</sup> In fact, forcing parents into an unwelcome or contentious joint custody situation might actually mean that the children experience less fruitful and meaningful interactions with one or both parent(s).

Recognizing the benefits to children of having two involved parents, it is no surprise that many states have laws that support both parents' involvement in raising their child.<sup>68</sup> The states' approaches generally fall into one of the following categories: (1) states with statutory language creating a preference for

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*Id.* at 423.

65. See Robert Bauserman, *Child Adjustment in Joint Custody versus Sole-Custody Arrangements: A Meta-Analytic Review*, 16 J. FAM. PSYCHOL. 91 (2002). Bauserman found that:

Children in *joint physical or legal custody* were better adjusted than children in sole-custody settings, but no different from those in intact families. More positive adjustment of joint-custody children held for separate comparisons of general adjustment, family relationships, self-esteem, emotional and behavioral adjustment, and divorce-specific adjustment. Joint-custody parents reported less current and past conflict than did sole-custody parents, but this did not explain the better adjustment of joint-custody children. The results are consistent with the hypothesis that joint custody can be advantageous for children in some cases, possibly by facilitating ongoing positive involvement with both parents.

*Id.* (emphasis added). Notably, this study conducted a meta-analytic review of existing studies, many of which focused on children living in both joint physical or legal custody arrangements. This differs from other studies that focused only on joint custody arrangements which incorporated both the physical and legal aspects. See Steinman, *supra* note 39.

66. See Bauserman, *supra* note 65, at 91.

67. Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 502 (1988); see *infra* Section IV.

68. See *infra* notes 69–73.

equally shared parenting time or a maximization of time with both parents;<sup>69</sup> (2) states with statutory language supporting frequent and continuing contact with both parents;<sup>70</sup> (3) states with no statu-

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69. Alaska, Iowa, Oklahoma, Texas, Vermont, and Wisconsin all have statutory language which creates a preference for substantially equal shared parenting time or a scheme which maximizes time with both parents. ALASKA STAT. § 25.20.070 (2004) (“Unless it is shown to be detrimental to the welfare of the child . . . the child shall have, to the greatest degree practical, equal access to both parents during the time that the court considers an award of custody . . . .”); IOWA CODE ANN. § 598.41(1)(a) (West 2001 & Supp. 2007) (“The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents . . . .”); 43 OKLA. STAT. ANN. tit. 43, § 110.1 (West 2001) (“It is the policy of this state to assure that minor children have frequent and continuing contact with parents . . . and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage.”); TEX. FAM. CODE ANN. § 153.131(b) (Vernon 2002) (“It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child.”); VT. STAT. ANN. tit. 15, § 650 (2002 & Supp. 2006) (“[A]fter parents have separated or dissolved their marriage it is in the best interests of their minor child to have the opportunity for maximum continuing physical and emotional contact with both parents . . . .”); WIS. STAT. ANN. § 767.41(4)(a)(2) (West Supp. 2006) (“The court shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households.”).

70. The following states have statutory provisions that support “frequent and continuing contact” with both parents: Alabama, Arizona, Arkansas, California, Colorado, Delaware, the District of Columbia, Florida, Idaho, Illinois, Louisiana, Maine, Missouri, Montana, New Hampshire, New Mexico, Ohio, Oregon, Pennsylvania, Virginia and West Virginia. ALA. CODE § 30-3-150 (LexisNexis 1998) (“It is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children . . . .”); ARIZ. REV. STAT. ANN. § 25-403(A)(6) (2007) (The determination is based in part on “[w]hich parent is more likely to allow the child frequent and meaningful continuing contact with the other parent.”); ARK. CODE ANN. § 9-13-101(b)(1)(A)(i) (2002 & Supp. 2005) (“When in the best interests of a child, custody shall be awarded in such a way so as to assure the frequent and continuing contact of the child with both parents.”); CAL. FAM. CODE § 3020(b) (West 2004) (“[I]t is the public policy of this state to assure that children have frequent and continuing contact with both par-

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ents . . . ."); COLO. REV. STAT. § 14-10-124(1) (2006) ("[I]t is in the best interest of all parties to encourage frequent and continuing contact between each parent and the minor children of the marriage . . . ."); DEL. CODE ANN. tit. 13, § 728(a) (1999) (The custody schedule should be "designed to permit and encourage the child to have frequent and meaningful contact with both parents."); D.C. CODE § 16-914(a)(2) (2001 & Supp. 2006) ("There shall be a rebuttable presumption that joint custody is in the best interest of the child or children . . . ."); FLA. STAT. ANN. § 61.13(2)(b)(1) (West 2006 & Supp. 2007) ("It is the public policy of this state to assure that each minor child has frequent and continuing contact with both parents . . . ."); IDAHO CODE ANN. § 32-717B(4) (2006) ("[A]bsent a preponderance of the evidence to the contrary, there shall be a presumption that joint custody is in the best interests of a minor child or children."); 750 ILL. COMP. STAT. ANN. 5/602(c) (West 1999 & Supp. 2007) ("[T]he court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child."); LA. CIV. CODE ANN. art. 132 (1999) ("In the absence of agreement, or if the agreement is not in the best interest of the child, the court shall award custody to the parents jointly . . . ."); ME. REV. STAT. ANN. tit. 19-A, § 1653(1)(C) (Supp. 2006) ("[I]t is the public policy of this State to assure minor children of frequent and continuing contact with both parents . . . ."); MO. ANN. STAT. § 452.375(4) (West 2003 & Supp. 2007) ("[I]t is the public policy of this state that frequent, continuing and meaningful contact with both parents after the parents have separated or dissolved their marriage is in the best interest of the child . . . ."); MONT. CODE ANN. § 40-4-212(1)(l) (2005) (One relevant factor is "whether the child has frequent and continuing contact with both parents."); N.H. REV. STAT. ANN. § 461-A:2(I)(a) (LexisNexis 2007) (The statute supports "frequent and continuing contact between each child and both parents."); N.M. Stat. Ann. § 40-4-9.1(A) (LexisNexis 2006) ("There shall be a presumption that joint custody is in the best interests of a child in an initial custody determination."); OHIO REV. CODE ANN. § 3109.04(D)(1)(c) (LexisNexis 2003 & Supp. 2007) (The parenting plan should "ensure the opportunity for both parents to have frequent and continuing contact with the child."); OR. REV. STAT. § 107.137(1)(f) (2005) (One factor in determining custody is "[t]he willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child."); 23 PA. CONS. STAT. ANN. § 5301 (West 2001) (It is the public policy of the state "to assure a reasonable and continuing contact of the child with both parents."); VA. CODE ANN. § 20-124.2(B) (2004 & Supp. 2006) ("The court shall assure minor children of frequent and continuing contact with both parents . . . ."); W. VA. CODE ANN. § 48-9-101(b) (LexisNexis 2004) ("[A] child's best interest will be served by assuring that minor children have frequent and continuing contact with parents . . . .").

tory provisions, but nevertheless, case law support for both parents' involvement;<sup>71</sup> (4) states with statutory preferences for joint legal custody only;<sup>72</sup> and (5) states with statutory schemes creating a presumption for joint physical or legal custody where the parties agree to such.<sup>73</sup> Additionally, there are a handful of states that do not have statutory language or case law supporting involvement by both parents.<sup>74</sup>

Considering the recently proposed legislation in Tennessee that would have created a joint physical and legal custody presumption,<sup>75</sup> the remainder of this section will examine the arguments for and against such a presumption.

### A. *The Argument for Joint Custody Preferences*

Supporters of statutory preferences and/or presumptions for joint custody usually advance one of two different arguments: (1)

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71. Two states, Georgia and Kentucky, do not have support in their statutes, but have case law which supports involvement by both parents. *See In the Interest of A.R.B.*, 433 S.E.2d 411, 413 (Ga. Ct. App. 1993); *Chalupa v. Chalupa*, 830 S.W.2d 391, 393 (Ky. Ct. App. 1992).

72. Kansas, Massachusetts and Minnesota, have statutory preferences for joint legal custody only. KAN. CIV. PROC. CODE ANN. § 60-1610(a)(4)(A) (West Supp. 2007) (joint legal custody preferred); MASS. GEN. LAWS ANN. ch. 208, § 31 (West 2007) (presumptive joint legal custody at temporary hearing); MINN. STAT. ANN. § 518.17(2) (West 2006 & Supp. 2007) ("The court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child.").

73. States that take the same approach as Tennessee—a joint custody preference where both parents agree—are Connecticut, Michigan, Mississippi, Nevada, and Washington. CONN. GEN. STAT. ANN. § 46b-56a(b) (West 2004 & Supp. 2007) (presumption for legal joint custody where the parties agree); MICH. COMP. LAWS ANN. § 722.26a(2) (West 2002); MISS. CODE ANN. § 93-5-24(4) (2004); NEV. REV. STAT. ANN. § 125.490(1) (LexisNexis 2004); WASH. REV. CODE ANN. § 26.09.187 (West 2005).

74. The remaining thirteen states—Hawaii, Indiana, Maryland, Nebraska, New Jersey, New York, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Utah and Wyoming have no statutory language or case law promoting shared parenting. *See SHARED PARENTING COUNCIL OF AUSTRALIA, SUBMISSION ON THE FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL 2005 25* (2006), [http://www.aph.gov.au/senate/committee/legcon\\_ctte/family\\_law/submissions/sub100.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/family_law/submissions/sub100.pdf). This is, of course, not to say that the courts of these states do not inherently support involvement by both parents in a child's upbringing.

75. *See supra* notes 54–58 and accompanying text.

that legal and social science propositions support a joint custody preference; or (2) that the United States Constitution requires joint custody as a matter of right. Both of these arguments will be discussed below.

### 1. Legal and Social Science Propositions

Proponents of presumptive joint custody often cite a number of factors in support of their arguments. These factors include the following: (1) psychological benefits to the children by having meaningful relationships with both parents;<sup>76</sup> (2) psychological benefits to the parents;<sup>77</sup> (3) encouragement of child support payments;<sup>78</sup> (4) reflection of modern social norms;<sup>79</sup> and (5) judicial economy.<sup>80</sup>

Not surprisingly, the benefits enjoyed by children in joint custody arrangements are almost always touted as the primary reason for enacting statutory joint custody preferences or presumptions. There are numerous psychological studies confirming that children benefit from continued meaningful contact with both parents following divorce.<sup>81</sup> In contrast, data shows that children with only one involved parent are at a greater risk than other children for a multitude of problems, including adolescent suicide, teenage pregnancy, behavioral disorders, drug abuse, and failure to complete high school.<sup>82</sup> Supporters of presumptive joint custody assert that promoting two-parent involvement through joint custody will lessen these problems and create more well-adjusted children.

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76. See *infra* notes 81–82 and accompanying text.

77. See *infra* notes 83–86 and accompanying text.

78. See *infra* notes 87–91 and accompanying text.

79. See *infra* notes 92–94 and accompanying text.

80. See *infra* notes 95–97 and accompanying text.

81. See *supra* notes 39, 62, 65.

82. Center for Children's Justice, Inc., Child Custody Statistics, <http://www.childrensjustice.org/stats.htm> (last visited Apr. 16, 2007). The Center for Children's Justice has compiled many statistics concerning children that live in "fatherless" homes or otherwise have the involvement of only one parent. For example, children from fatherless homes account for 63% of youth suicides, 71% of teenage pregnancies, 85% of children who exhibit a behavioral disorder, 75% of children in chemical abuse centers, and 71% of all high school dropouts. *Id.* (citing U.S. Dept. of Health & Human Services, Bureau of the Census; U.S. Dept. of Health & Human Services; Center for Disease Control; and others).

The argument is also advanced that presumptive joint custody benefits the parents themselves.<sup>83</sup> For example, in *Taylor v. Taylor*,<sup>84</sup> a Maryland case in which the court held that joint custody could be judicially imposed over the objection of one of the parents,<sup>85</sup> the court cited to research tending to show that in successful joint custody arrangements both parents enjoyed a healthy level of self-confidence and self-esteem in their parenting skills, which in turn benefited the children.<sup>86</sup>

Another factor cited by supporters is that more child support will be paid if both parents' involvement in the child's life is furthered.<sup>87</sup> The failure of fathers (and mothers) to pay child support is an enormous problem in this country.<sup>88</sup> Some commentators assert that the failure of parents to pay child support is related to the defaulting-parent's lack of meaningful contact with the child.<sup>89</sup> It has been suggested that stronger joint custody preferences would remedy the nonpayment of child support by giving the payor-parent a more meaningful parenting role, thus increasing his desire to pay child support.<sup>90</sup> However, it is important to note that this argument may apply more to presumptive joint *legal* custody than to joint physical custody.<sup>91</sup>

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83. Singer & Reynolds, *supra* note 67, at 500–01.

84. 508 A.2d 964 (Md. 1986).

85. *Id.*

86. *Id.* at 972 (citing Susan Steinman, *Joint Custody: What We Know, What We Have Yet To Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739, 745–46 (1983)).

87. Ferreiro, *supra* note 64, at 421–22; Singer & Reynolds, *supra* note 67, at 501 (citing Dale R. Mrkich, Comment, *The Unfulfilled Promise of Joint Custody in Montana*, 48 MONT. L. REV. 135, 138 (1987)).

88. For example, the United States Census Bureau reported that in 2003 7.3 million custodial parents were due child support totaling \$37 billion dollars, of which only \$25.4 billion, or 68.6%, were reported as being received. TIMOTHY S. GRALL, U.S. CENSUS BUREAU CURRENT POPULATION REPORTS, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2003 8 (2006), <http://www.census.gov/006pubs/p60-230.pdf>.

89. Singer & Reynolds, *supra* note 67, at 501 (citing Dale R. Mrkich, Comment, *The Unfulfilled Promise of Joint Custody in Montana*, 48 MONT. L. REV. 135, 138 (1987)).

90. As Ferreiro states, "Proponents of joint custody argue that if a father's role is legitimized and legally reinforced, fathers will be more likely to fulfill their financial obligations." Ferreiro, *supra* note 64, at 421.

91. See *infra* notes 139–40 and accompanying text.

The evolution of traditional family and gender roles is also suggested as a factor supporting joint custody. Commentators suggest that joint custody arrangements more accurately reflect the modern family norm.<sup>92</sup> For instance, mothers are likely to spend more time in the workplace and fathers more time with their children than was the case only thirty years ago.<sup>93</sup> Joint custody, therefore, would purportedly mirror the family scheme pre-divorce more so than a traditional sole-custody arrangement. Groups advocating fathers' rights also contend that a presumption for joint custody would equalize fathers' parenting time with mothers' parenting time.<sup>94</sup>

Judicial economy is a final argument frequently advanced in support of presumptive joint custody.<sup>95</sup> Proponents of this argument assert that a joint custody presumption enables a judge to order joint custody when both parents are reasonably fit, thereby avoiding lengthy and resource-intensive, best-interest inquiries. It is also argued that "some judges simply are not well-suited, either by training or by temperament, to make this kind of decision. Joint custody makes easier the life of such a judge."<sup>96</sup> The idea is that joint custody presumptions would tend to reduce litigation and re-litigation of custody matters.<sup>97</sup>

## 2. A Constitutional Approach

Some advocates in this area argue that only joint custody—an equal division of both legal and physical custody—satisfies par-

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92. Singer & Reynolds, *supra* note 67, at 501.

93. The U.S. Department of Labor reports that the percentage of working mothers whose youngest child was under the age of three increased from 34.3% in 1975 to 61% in 2000. U.S. Department of Labor, Bureau of Labor Statistics, *Most Mothers Work*, <http://www.bls.gov/opub/working/data/chart16.txt> (last visited Apr. 17, 2007).

94. See DAD of Tennessee, Inc., *supra* note 12, at <http://www.tndads.org/index.html> (last visited Apr. 17, 2007).

95. Singer & Reynolds, *supra* note 67, at 501 (citing Barton S. Blond, *In the Child's Best Interest—A Better Way: The Case for Presumptive Joint Custody in Missouri*, 52 UMKC L. REV. 567, 586 (1984)).

96. *Id.*

97. See *id.*



ents' Constitutional due process rights.<sup>98</sup> The basis of this argument lies in the Supreme Court's holding that the right to direct the upbringing of one's children is a fundamental right.<sup>99</sup> The argument, thus, is that because a fundamental right cannot be impeded without a compelling state interest,<sup>100</sup> in the absence of such an interest, equal parenting time is required to avoid a due process violation.<sup>101</sup>

In examining this contention, it is first important to note that the *federal* case law relied on in this argument primarily discusses scenarios in which the state impeded the province of the parents.<sup>102</sup> The case law declaring parenting rights as fundamental did not touch upon the more relevant discussion of custody determinations.<sup>103</sup> Indeed, the Supreme Court has held many times that states, rather than the federal government, should handle the law of domestic relations; the Court emphasized the value of federalism even when recognizing an exception to federal diversity jurisdiction.<sup>104</sup>

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98. Margaret F. Brinig, *Does Parental Autonomy Require Equal Custody at Divorce?*, 65 LA. L. REV. 1345, 1349 (2005).

99. *Id.* at 1350; see *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

100. See *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring); see also 16b AM. JUR. 2D *Constitutional Law* § 815 (2007) (“Under the strict standard applied in [reviewing laws that burden fundamental rights], the state bears the additional burden of establishing that it has a compelling interest that justifies the law, and that the law or ordinance is narrowly tailored such that there are no less restrictive means available to effectuate the desired end.”).

101. Brinig, *supra* note 98, at 1350.

102. *Id.* at 1350–51. For example, in *Pierce v. Soc'y of Sisters* the Court held that a state law requiring parents to send their children to public school was unconstitutional, recognizing the right of parents to make choices concerning the upbringing and education of their children. *Pierce*, 268 U.S. at 534–36.

103. See *supra* note 102; *Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923) (establishing parents' right to direct their children's education).

104. See *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (“One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed that ‘[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.’” (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890))); *Ankenbradt v. Richards*, 504 U.S. 689, 703 (1992).

In the few cases where the federal courts have heard cases involving domestic relations, they have done so in order to “answer a substantial federal question that transcends or exists apart from the family law issue in general.”<sup>105</sup> For example, in *Palmore v. Sidoti*,<sup>106</sup> the parents divorced and the mother was awarded custody.<sup>107</sup> Thereafter, the mother, a white woman, remarried a black man and the father petitioned for a change in custody.<sup>108</sup> The lower court, basing its decision on entirely racial concerns, awarded the father custody.<sup>109</sup> The Supreme Court reversed, noting that “[t]he [lower] court correctly stated that the child’s welfare was the controlling factor. But that court was entirely candid and made no effort to place its holding on any ground other than race.”<sup>110</sup> The Court in *Palmore* also stated:

The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. In common with most states, Florida law mandates that custody determinations be made in the best interests of the children involved. The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause.<sup>111</sup>

The federal court’s reluctance to hear cases involving domestic relations, as well as the Supreme Court’s own statement that a best-interests standard is “indisputably a substantial governmental interest,” serve to weaken the rationale of parents that argue for constitutionally required equal parenting time.<sup>112</sup> It follows that “the best interests of the child, protected by the state, should

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105. Brinig, *supra* note 98, at 1355.

106. 466 U.S. 429 (1984).

107. *Id.* at 430.

108. *Id.*

109. *Id.* at 431.

110. *Id.* at 432.

111. *Id.* at 433 (citation omitted).

112. *Id.*

prevail over the constitutional interest of either of the competing parents.”<sup>113</sup>

### B. *The Argument Against Joint Custody Presumptions*

Like any hotly disputed area of law, the arguments against joint custody presumptions or preferences are as numerous as those on the opposite side.<sup>114</sup> The arguments against statutorily presumptive joint custody include: (1) problems with ambiguous terminology;<sup>115</sup> (2) the alternatives to presumptive joint custody as the exclusive way to encourage continuing contact;<sup>116</sup> (3) the inadequacy of the social science data;<sup>117</sup> (4) the view that a presumption is an “easy out” for the judge;<sup>118</sup> (5) the detrimental effects on divorce bargaining;<sup>119</sup> (6) the dangerous effect of a presumption on situations where domestic violence is present;<sup>120</sup> and (7) the imposition of financial burdens.<sup>121</sup>

The problem with ambiguous terminology in these types of statutes has to do with the different connotations associated with the term “joint custody.”<sup>122</sup> As discussed previously, joint custody may refer to either joint *legal* custody or joint *physical* custody.<sup>123</sup> Many times it is unclear just what type of “joint custody” a statute, or for that matter, a judicial opinion, is referring to.<sup>124</sup>

113. Brinig, *supra* note 98, at 1358. For more on the interplay between Constitutional law and child custody, including a somewhat differing opinion, see David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461 (2006).

114. See The Liz Library, Joint Custody Research, <http://www.thelizlibrary.org/liz/those-jointcustody-studies.html> (last visited Apr. 17, 2007) (including rebuttals to many of the studies on which supporters of presumptive joint custody rely).

115. See *infra* notes 122–24 and accompanying text.

116. See *infra* notes 125–27 and accompanying text.

117. See *infra* notes 128–29 and accompanying text.

118. See *infra* notes 130–31 and accompanying text.

119. See *infra* notes 132–34 and accompanying text.

120. See *infra* notes 136–38 and accompanying text.

121. See *infra* notes 139–40 and accompanying text.

122. See *supra* notes 29–32 and accompanying text.

123. See *supra* notes 29–32 and accompanying text.

124. See RICHARDS, *supra* note 32, § 8-2(a) (“Judicial opinions frequently refer only to ‘custody’ without specifying whether physical or legal custody is intended.”).

Next, many opponents contend that it is illogical to use presumptive joint custody as the panacea for problems that children from single-parent homes face.<sup>125</sup> They contend that although children with two involved parents may benefit enormously from both parents' involvement, it does not follow that a presumption for joint custody ensures such a benefit.<sup>126</sup> Furthermore, neither does it follow that presumptive joint physical custody is the only, or even the best way to ensure lasting and meaningful relationships with both parents.<sup>127</sup> For instance, the custody arrangement may actually harm more than help a child whose parents find themselves in a joint custody parenting arrangement against one or both parents' wills where the child becomes a pawn in his parents' custody disputes. The detrimental effects of such a contentious joint custody arrangement would far outweigh any benefit of receiving equal or nearly equal time with each parent.

Opponents of the presumption advance a third rationale that even though the social science data supporting joint custody is strong, it may nevertheless be flawed when applied to a presumptive scheme of joint custody.<sup>128</sup> Most joint custody studies examine families and children in joint custody schemes that were voluntarily entered into by agreement, rather than imposed by such a statutory presumption.<sup>129</sup> Therefore, there is little data showing how the custody arrangements worked when one parent opposed the joint custody arrangement.

Opponents also reject supporters' contention that the presumption aids in judicial economy. Instead, the opponents believe that the presumption distorts, rather than eases the burden on the

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125. See *supra* note 82 for examples of some of these problems.

126. Singer & Reynolds, *supra* note 67, at 502.

127. *Id.* Possible alternatives will also be discussed *infra* Section IV.

128. See *supra* note 64.

129. See *supra* note 64. In addition to studies that only examine families who voluntarily enter into a joint custody arrangement, another problem with the existing data is that many joint custody studies consider only legal joint custody arrangements, or combine both legal and physical joint custody arrangements together. Because of all these variables in the existing research, one author who asserts that joint custody children are better-adjusted even admits that "[i]mportantly, a causal role for joint custody cannot be demonstrated because of the correlational nature of all research in this area." Bauserman, *supra* note 65, at 98.

judicial system.<sup>130</sup> As one commentator stated, a presumption “creates the illusion of equality and Solomonic wisdom and improperly allows a judge to avoid making a difficult—but often necessary—choice between two seemingly fit parents.”<sup>131</sup>

The joint custody presumption also detrimentally affects divorce bargaining.<sup>132</sup> Scholars assert that divorce bargaining is already somewhat lopsided.<sup>133</sup> Studies show that “divorcing husbands routinely and successfully use the threat of a custody fight to reduce or eliminate alimony and child support obligations.”<sup>134</sup> As a result of these threats, opponents of the presumption worry that a joint custody presumption would only make divorce bargaining more unequal.<sup>135</sup>

The problems associated with domestic violence and divorce is another oft cited, and perhaps the most serious issue raised in opposition to joint custody presumptions.<sup>136</sup> As one author points out:

The risks entailed in creating a presumption in favor of joint custody are great. Since the presumption has its most powerful effect when the parties cannot reach an agreement and must litigate, and since the class of people who litigate custody is disproportionately likely to include intimate abusers, a presumption in favor of joint custody is particularly likely to be dangerous. Unfortunately, the two devices that are often intended to be protective of victims of violence—exceptions for domestic violence cases and requirements for agreement—often turn out to be inadequate to protect them. . . . [D]omestic

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130. Singer & Reynolds, *supra* note 67, at 515.

131. *Id.* at 502–03.

132. *Id.* at 515–17.

133. *Id.* at 515.

134. *Id.* at 503.

135. *Id.* at 517.

136. See Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403 (2005); Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL’Y & L. 657 (2003).

violence exceptions from the presumption can only be effective if the court is informed of the violence and is able to recognize it and its importance.<sup>137</sup>

The argument that a joint custody presumption would endanger those children whose lives are already affected by domestic violence closely relates to the argument that joint custody only works well for those children whose parents are able to interact well.<sup>138</sup>

Finally, the possibility of a reduction in the amount of child support received to benefit the child is a factor which weighs against a joint custody presumption. Although supporters assert that under the presumptive scheme, payment of child support would increase because the payor parent is more satisfied with his or her parenting role, the opposite might well be true.<sup>139</sup> Certainly, joint *legal* custody may encourage payment of child support because the payor-parent feels more involved in the child's life. However, due to child support guidelines that take into account how much time the payor parent is spending with the child, a presumption for joint physical custody might actually reduce the amount of support a child receives.<sup>140</sup> The situation may well arise where an obligor parent is paying less support because he or she is supposed to be spending increased time with the child, yet fails to exercise such visitation. The child is then harmed because he is not receiving the appropriate amount of financial support.

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137. Greenberg, *supra* note 136, at 430–31.

138. *Id.* at 431; *see also* Gardner, *supra* note 63, at 66–67 (asserting that joint custody arrangements are only workable where the parents can cooperate and communicate well).

139. Ferreiro, *supra* note 64, at 421.

140. A reduction in support might occur due to state-specific child support guidelines which grant adjustments for more than standard amounts of parenting time. For example, in Tennessee the alternate residential parent may receive a downward adjustment in support if the parent is spending at least 121 days with the child. *See* TENNESSEE DEPARTMENT OF HUMAN SERVICES CHILD SUPPORT DIVISION, A GUIDE TO TENNESSEE INCOME SHARES 14 (2004), <http://www.state.tn.us/humanserv/is/Documents/InterpretiveGuide.pdf>.

#### IV. CONCLUSION—IS A JOINT CUSTODY PRESUMPTION RIGHT FOR TENNESSEE?

The question still remains—is a joint custody presumption for equal parenting time, like the one envisioned by House Bill 1729,<sup>141</sup> right for Tennessee? So far, the Tennessee legislature has answered that question in the negative.<sup>142</sup> Undoubtedly, the motives of those who support the presumption are not misplaced. There is no dispute that children who have continuing and meaningful relationships with both parents benefit enormously.<sup>143</sup> However, enacting a law for a presumption of joint physical custody in Tennessee is not the best solution at this time.

The unfavorable effects of the presumption, particularly its impact on victims of domestic violence and its detrimental financial effect on children, pose a serious threat to the children and families of Tennessee. Tennessee domestic violence statistics are already alarming. In 2001 alone, the Tennessee Bureau of Investigation reported that 63,802 incidents of domestic violence occurred.<sup>144</sup> Considering thirty to sixty percent of batterers also abuse their children,<sup>145</sup> and that nationally over half of custody mediators fail to include alleged abuse in their reports to the court,<sup>146</sup> a joint custody presumption could put Tennessee children in a vulnerable and frightening situation. Furthermore, children in Tennessee, many of whom already do not receive enough financial support,<sup>147</sup> should not be placed in an even more precarious posi-

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141. See *supra* notes 54–58 and accompanying text.

142. See *supra* notes 54–58 and accompanying text.

143. See *supra* notes 39, 62, 65, 81 and accompanying text.

144. Tennessee Coalition Against Domestic & Sexual Violence, <http://www.tcadsv.org/DV%20stats.htm> (last visited Sept. 19, 2007) (citation omitted). The term “domestic violence incidents” includes murder, assaults and sexual offenses. *Id.*

145. NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, CHILDREN AND DOMESTIC VIOLENCE 1 (2007), <http://www.ncadv.org/files/childrenandchildcustody.pdf>.

146. Nancy E. Johnson, Dennis P. Saccuzzo & Wendy J. Koen, *Child Custody Mediation in Cases of Domestic Violence: Empirical Evidence of a Failure to Protect*, 11 VIOLENCE AGAINST WOMEN 1022, 1032–33 (2005).

147. For example, Tennessee has collected child support for only between forty-one and sixty percent of the caseload handled through state child support enforcement procedures. National Center for Children in Poverty, State Child

tion by a joint custody presumption that might reduce the amount of financial support further.

Even though presumptive physical joint custody is not appropriate for Tennessee, still there are ways the state could encourage both parents' continuing involvement. Education may be key—for parents, attorneys, and the judiciary.

Under Tennessee law, parents in a custody dispute may be ordered “to attend an educational seminar concerning the effects of the dissolution of marriage on the children.”<sup>148</sup> This statute covers divorcing parents as well as post-judgment proceedings.<sup>149</sup> However, even though some judges require all parties to attend a seminar,<sup>150</sup> the statute itself is permissive in nature, stating that the court may order attendance on a “case by case basis.”<sup>151</sup>

Additional limitations of the statutes are that the educational seminar may not exceed four hours total and that a party's failure to attend the course is not grounds for denying the divorce.<sup>152</sup> Strengthening this statute to make attendance mandatory<sup>153</sup> and extending the sessions past the four-hour mark would educate the parents on how to handle conflict more appropriately, both with regard to themselves and their children, and hopefully lead to a stronger relationship between the child and each parent.<sup>154</sup>

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Support Collection, [http://www.nccp.org/publications/pub\\_539.html](http://www.nccp.org/publications/pub_539.html) (last visited Oct. 22, 2007).

148. TENN. CODE ANN. § 36-6-101(e)(1) (2005 & Supp. 2006).

149. *Id.* (stating that the provision applies “[i]n an action for dissolution of marriage involving minor children, or in a post-judgment proceeding involving minor children”).

150. RICHARDS, *supra* note 32, § 8-9 n.287 (“Some judges have a standing order which requires all parties to attend the seminar, but permits the parties to petition the court if they object to attending.”).

151. § 36-6-101(e)(1).

152. § 36-6-101(e)(1), (3). While refusal to attend is not grounds for denying divorce, it is punishable by contempt. § 36-6-101(e)(3).

153. The mandatory attendance requirement could have narrow exceptions, such as not requiring attendance when there is domestic violence involved.

154. More education for parents could also lead to less custody litigation. The hope is that by giving parents more education and support that they may be more willing to come to solutions regarding custody arrangements, thereby reducing the number of disputes that would otherwise be litigated.



In addition to more parental education, it would also be wise to encourage more education for attorneys and judges in this area. Family law attorneys should be mindful not only of their role as zealous legal advocates but also as counselors for their clients, especially when the matter at hand involves minor children. Attorneys can urge their clients to take the educational seminar discussed above or even to consider therapy to help with the animosity between the parties.<sup>155</sup> Judicial education may also be appropriate to inform judges more thoroughly of the emotional and psychological effects custody proceedings have on children and to educate the judiciary in the most optimal methods of conducting a best-interest inquiry.

Continued application of a traditional best-interest inquiry in Tennessee child custody disputes is in the best interest of Tennessee children—a presumption for joint physical and legal custody is not.<sup>156</sup> Education of all parties involved, including parents, attorneys, and the judiciary would better serve the ultimate goal

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155. In her treatise on Tennessee family law, Professor Richards lists a number of practice tips for attorneys in handling child custody determinations, including urging the “client to take the divorce education classes or to read a good book on the subject of the effect of divorce on children,” that the lawyer should also attend the classes and familiarize themselves with the issues so as to advise his client appropriately, urging the “client to consider therapy if there is animosity between the parties,” and to consider the use of mediation “to limit or reduce disagreement over child-related issues.” RICHARDS, *supra* note 32, § 8-11.

156. Although not directly addressed herein, another possibility for future Tennessee legislation would be the enactment of a presumption for joint *legal* custody only. However, some of the problems that uncooperative parents face in a presumptive joint physical custody arrangement would also occur in a presumptive joint legal custody scheme. Parents who cannot communicate and cooperate enough to agree on a visitation schedule can probably not be expected to make major life decisions for the child without hostility and conflict.

Joint legal custody arrangements do allow each parent to have a voice in making parenting decisions that affect a child’s well-being. However, these arrangements raise new problems, most notably that if parents who share legal custody are unable to come to an agreement as to an important decision, someone must have the power to make the final choice. This means that either one parent must have tie-breaking authority, or, in the alternative, a judge would have to decide, putting an even further strain on an already overburdened judiciary.

here, which is to foster meaningful and continued relationships between children and both their parents.

