New York's Joint Custody Presumption Assumption

By **Robert Z. Dobrish and Sophie Heinlein** | February 22, 2022

At the present time there are 14 states where there is a legal presumption that joint custody will be in the best interests of the minor child. There also appear to be about nine additional states where the presumption is applied in various shapes and forms. In those states where a legal presumption applies, the burden of proof falls on any parent who seeks sole custody to demonstrate that it would be better for the child than joint custody. Proving best interests is a daunting task because "best interests" is an amorphous concept, even the elements of which being difficult to agree upon. Thus, the burden of proof issue is of enormous significance.

While the existence of a presumption may create a shortcut in the custody determination process and help ease the court system's apparent backlog, some would argue that a presumption of joint custody is not individually tailored to serve the best interests of children and that, in particular, such a presumption may not sufficiently protect battered or abused women and children and reduce the leverage of dependent spouses.

New York is not one of the 14 states that has a statute creating that presumption or one of the nine states that otherwise officially applies the presumption, nor has its case law historically favored joint custody. Indeed, although since 1980 there have been a number of attempts to put forward and pass such legislation, none have yet been successful. The state's latest attempt at such a bill was introduced on Feb. 8, 2021 and is currently still pending. Nevertheless, over the years, a line of case law has developed signaling some judicial recognition of a presumption of joint legal custody in spite of the history of case law holding otherwise.

In *Braiman v. Braiman*, 44 N.Y.2d 584 (N.Y. 1978), the Court of Appeals made it clear that joint custody was not to be an option when the couple has not demonstrated the kind of relationship which fosters cooperative parenting. In *Braiman*, the Court of Appeals stated:

In the rare case, joint custody may approximate the former family relationships more closely than other custodial arrangements. It may not, however, be indiscriminately substituted for an award of sole custody to one parent. Divorce dissolves the family as well as the marriage, a reality that may not be ignored. In this case the gross conflict between the parents is so embittered and so involved with emotion and litigation that between them joint custody is perhaps a Solomonic approach, that is, one to be threatened but never carried out. *Id* at 591.

Trial judges, however, have fired warning shots across the bow of *Braiman* and its progeny, indicating that courts will sometimes find ways to award joint custody even in those cases where there is a history of acrimony between parents. Following *Braiman*, New York courts regularly awarded sole custody to mothers because judges were limited to two choices—sole custody or joint custody. There was no in-between. In order to side-step the *Braiman* doctrine and involve the non-custodial parent in child-rearing responsibilities, New York trial courts began to develop a "middle-ground." Courts mapped out zones of responsibility, not granting joint custody, but rather giving the

payor spouse more responsibility than that of a mere piggybank. Case law developed where different zones of responsibility (or spheres of influence) would be awarded to each parent even if an acrimonious relationship existed.

Mars v. Mars, 286 A.D.2d 201 (1st Dept. 2001), severely weakened the foundation of the *Braiman* doctrine. In *Mars*, a father with troubling qualities (put lightly) appealed a decision after trial which had granted sole custody to the mother. Although a number of judicial decisions where joint custody had been awarded despite acrimony had been affirmed by appellate courts, for the first time, an Appellate Division *reversed* a trial court's award of sole custody and granted each parent zones of responsibility, stating that "it is in the children's best interest that both parents remain involved with them, notwithstanding the parents' present intolerance for each other."

For the last 20 years, this "middle ground" has been recognized and accepted in New York and courts steadily take the general position that a child's best interests are served by the meaningful involvement of both parents.

Even without a statute creating a presumption of joint custody, a reversion to the days when there was no presumption of joint custody may be doubtful considering recent case law supporting the presumption of joint custody even in those cases where there is a history of domestic violence.

In *Frank G. v. Crystal C.*, 152 N.Y.S.3d 582 (1st Dept. 2021), the First Department recently acknowledged the rocky relationship between parents in addition to the history of domestic violence but, nonetheless, ruled that joint custody could be workable. Similar decisions have emerged from the Second and Third Departments. Allegations of major decision-making disputes, violations of separation agreements, medical and religious differences, poor communication skills, antagonism, and, in some cases, even allegations of involvement in sexual abuse of the subject children, were not enough to tip the judicial scale in favor of one parent to justify an award of sole custody.

In *Jose R. v. Diomara L.*, 153 N.Y.S.3d 854 (1st Dept. 2021), a 2021 First Department decision, the court affirmed joint legal custody which was awarded by the lower court despite one parent's limited involvement in the children's development and failure to demonstrate concern regarding the sexual abuse of one of the children by that parent's former boyfriend.

As the assumption of a joint custody presumption seems to be gaining momentum across the state of New York, it should come as no surprise that these outcomes are not outliers. In recent First and Second Department cases, a mere acrimonious relationship without a compound of any other issues has not been enough to justify an award of sole custody to a parent.

One Third Department case went so far as to state that generally, in the first instance, joint custody is the preferred arrangement, unless evidence demonstrates that the parties are unable to work together and communicate cooperatively. Even then, allegations of verbal abuse and threatening behavior resulting in an order of protection could not overcome the assumption of a joint custody presumption, or, in the case of *Elizabeth B. v. Scott D.*, 189 A.D.3d 1833 (3d Dept. 2020), less of an assumption and more of an assertion.

There is a bill in play that goes the other way and does appear to have significant support—Assembly Bill A5398 or "Kyra's Law." This bill was the result of a custody case in Nassau County

where joint custody was awarded to an abusive father who tragically shot and killed the child during his unsupervised parenting time. Where there are allegations of domestic violence based on a reasonable belief, Kyra's Law, if passed, would require the courts to hold a hearing within 60 days on the limited issue of abuse. If the hearing results in a finding, based upon a preponderance of the evidence, that one parent has been abusive, the non-abusive parent will be awarded sole custody of the child.

An additional measure would require the abusive parent to pay all legal costs to the non-abusive parent (without any balancing measure put in place against parties who make false allegations of abuse). Many believe that the bill has been proposed for good reasons but goes much too far, particularly as it pertains to the recommended procedures. If Kyra's Law passes, in addition to other ramifications, the assumption of a presumption of joint custody would take a giant step backwards.

If Kyra's Law in its present form does not pass, the Legislature may want to take a close look at setting parameters for joint custody in order to avoid a wild west mentality where anything goes. Our "battleground state" still has a long way to go.

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