

POSITION PAPER

Pennsylvania Coalition
Against Domestic Violence

PRESUMPTIVE JOINT CUSTODY: NOT IN THE BEST INTERESTS OF CHILDREN

Under the best of circumstances, custody deliberations and decisions are challenging for courts, wrenching for parents, and life-altering for children. When you factor domestic violence into parental relationships, the issue of custody rises to a whole new level of complexity that requires special considerations – and protections – for parents and children who are battered.

Current Pennsylvania custody law requires that the “best interests of the child” be the guiding legal standard in custody decisions. Under this standard, judges must consider the unique facts and circumstances of each family and decide what custody and visitation arrangement will promote the children’s best interests.¹

Some individuals want to change Pennsylvania custody law to a “one size fits all” approach, where joint 50-50 custody would be presumed best in all cases. However, this “one size fits all” approach ignores critical factors that bear on the safety and well-being of children, including whether a parent is abusive to the children and/or the co-parent.

The PCADV opposes presumptive joint custody because it:

- prioritizes parents’ desires over the best interests of children;
- fails to protect children of domestic violence victims;
- increases the adversarial nature, expense, and length of litigation;
- ignores the pre-divorce family circumstances and destabilizes children’s lives; and
- ignores recommended best practices from national child custody experts.

The Pennsylvania Coalition Against Domestic Violence opposes presumptive joint custody for several reasons:

PRESUMING THAT CUSTODY SHOULD BE SPLIT 50-50 PRIORITIZES PARENTS’ DESIRES OVER WHAT IS BEST FOR CHILDREN.

- Joint custody may work well where parents can cooperate, put their children’s interests ahead of their own, and live near each other. Many divorcing families simply do not meet these criteria.
- Most parents do not choose joint custody for themselves.
 - One study found that **only 20% of divorcing couples chose joint custody**, and more than **half of these couples did not maintain joint custody over time.**²
 - The remaining 80% of divorcing couples agreed on custody at the beginning of their separation; more than 70% of those agreements were for maternal custody.

PRESUMPTIVE JOINT CUSTODY FAILS TO ACKNOWLEDGE THE OVERWHELMING NUMBER OF DOMESTIC VIOLENCE CASES IN PENNSYLVANIA’S CHILD CUSTODY SYSTEM.

- Studies show that **25 - 50% of contested custody cases involve domestic violence** as a major factor.³
- Abusive parents are twice as likely to seek sole custody of children than are non-violent parents,⁴ and they are successful about 70% of the time⁵—even though **parents who abuse a co-parent are far more likely to also abuse the children.**⁶
- Joint custody is simply not appropriate in cases where one parent is abusive.⁷ Joint custody is dangerous to abused parents and their children because it **forces continued contact and interaction even where the abusive parent poses a known risk of continued violence and abuse.**

A PRESUMPTION OF JOINT CUSTODY WOULD INCREASE THE ADVERSARIAL NATURE AND EXPENSE OF LITIGATION.

- Overcoming the presumption would require one parent to prove that joint custody is not good for the children, leading to accusations of parental unfitness and character attacks.
- Families are **more likely to relitigate** custody issues where courts mandated joint custody.⁸

PRESUMPTIVE JOINT CUSTODY IGNORES PRE-SEPARATION FAMILY CIRCUMSTANCES AND DESTABILIZES CHILDREN'S LIVES.

- Where there is ongoing conflict between parents, joint custody has been linked to higher levels of emotional, behavioral, and social problems for the children.
- Presumptive joint custody gives **no consideration to a parent's prior involvement with the child**. Rather, it requires courts to grant joint physical and legal custody to parents who were only meagerly involved with their children or unable to parent appropriately before the separation.
- Presumptive joint custody **does not allow judges to take the family circumstances into account** and craft a custody decision based on parenting skills and the changing needs of a growing child.

PRESUMPTIVE JOINT CUSTODY IGNORES RECOMMENDED BEST PRACTICES OF NATIONAL CHILD CUSTODY EXPERTS.

- The **National Council of Juvenile and Family Court Judges** (NCJFCJ), the preeminent expert organization on child custody cases, created a national task force composed of judges, prosecutors, defense attorneys, legislators, and domestic violence experts, who worked for three years on a **Model Code on Domestic and Family Violence**. Section 401 of this Model Code states the following:
 - "In every proceeding where there is at issue a dispute as to the custody of a child and a determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and **not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.**" (NCJFCJ, 1994).
- The **American Bar Association** likewise recommends against presumptive joint custody. The ABA Model Joint Custody Statute states that shared custody is "inappropriate in cases in which spouse abuse, child abuse, or parental kidnapping is likely to occur." Further, the ABA's report "The Impact of Domestic Violence on Children," states "[a]nyone who has committed severe or repetitive abuse to an intimate partner is presumptively not a fit sole or joint custodian for children."⁹

RECOMMENDATION: The PCADV strongly urges that custody be adjudicated according the best interests of children, and **that the legislature continue to reject proposals that would override the existing "best interests of the child" standard with a presumption of joint custody.**

¹ 23 Pa. C.S. §§ 5301-5314; *McMillen v. McMillen*, 529 Pa. 198, 602 A.2d 845 (1992). A "best interests" determination is defined as a case-by-case decision based upon consideration of all factors that legitimately impact the child's physical, intellectual, moral, and spiritual well-being. *Wiskoski v. Wiskoski*, 629 A.2d 996 (Pa. Super. 1993). Courts are required to consider: 1) the preference of the child; 2) which parent is more likely to allow frequent and continuing contact and access to the child, a provision known as the "friendly parent" provision; 3) each parent and adult household member's present and past violent or abusive conduct; and 4) any other factor which legitimately impacts the child's physical, intellectual, and emotional well-being.

² E.E. Maccoby & R.H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody*, 103, 300 (1992).

³ State Justice Institute, *Domestic Violence and Custody Disputes* 4-8 (1997); J. Pearson, "Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs," 14 *Mediation Quarterly* 319, 320 (1997); S.L. Keilitz, Nat'l Center for State Courts, *Domestic Violence and Child Custody Disputes: A Resource Handbook for Judges and Court Managers* (1997); J.R. Johnston, "High-Conflict Divorce," 4 *Future of Children* 165 (1994).

⁴ Amer. Psychological Ass'n, *Violence and the Family: Report of the American Psychological Ass'n Presidential Task Force on Violence and the Family*, (1996), available at <http://www.apa.org/pi/viol&fam.html>. Jaffee, P.G. & Austin, G. (1995), "The Impact of Witnessing Violence on Children in Custody and Visitation Disputes," *Fourth Int'l Family Violence Research Conference* (1995).

⁵ Amer. Judges Foundation, *Domestic Violence & the Courtroom: Understanding the Problem...Knowing the Victim*, available at <http://aja.ncsc.dni.us/domviol/page5.html>.

⁶ J. Edleson, *The Overlap Between Child Maltreatment and Woman Abuse* (Apr. 1999); Appel & Holden, "The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal," 12(4) *Journal of Family Psychology* 578-99 (1998); S.M. Ross, "Risk of Physical Abuse to Children of Spouse Abusing Parents," 20(7) *Child Abuse & Neglect* 589-98 (1996).

⁷ R. Bauserman, "Child Adjustment in Joint-Custody Versus Sole Custody Arrangements: A Meta-Analytic Review," 16(1) *Journal of Family Psychology* 91-102 (2002).

⁸ M.T. Flannery, "Is 'Bird Nesting' in the Best Interest of Children?," 57 *SMU L. Rev.* 295, 343 (2004).

⁹ Amer. Bar Ass'n, Model Joint Custody Statute, 15 *Family Law Reporter* (BNA) 1494, 1494 (1989); H. Davidson, "The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association" 13 (1994).