

4281

2011-2012 Regular Sessions

I N   S E N A T E

March 28, 2011

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Introduced by Sen. JOHNSON -- read twice and ordered printed, and when printed to be committed to the Committee on Children and Families

AN ACT to amend the domestic relations law, in relation to establishing a presumption of shared parenting of minor children in matrimonial proceedings

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1     Section 1. Legislative findings. The legislature hereby finds and  
2 declares that it is the public policy of the state to assure minor chil-  
3 dren have frequent and continuing contact with both parents after the  
4 parents have separated or dissolved their marriage and that it is in the  
5 public interest to encourage parents to share the rights and responsi-  
6 bilities of child-rearing in order to effectuate this policy. At the  
7 outset and thereafter, in any proceeding where there is at issue the  
8 custody of a minor child, the court may, during the pendency of the  
9 proceeding or at any time thereafter, make such order for the custody of  
10 minor children as may seem necessary or proper. The provisions of this  
11 act establish a presumption, affecting the burden of proof, that shared  
12 parenting is in the best interests of minor children.

13     S 2. Subdivision (a) of section 70 of the domestic relations law, as  
14 amended by chapter 457 of the laws of 1988, is amended to read as  
15 follows:

16     (a) Where a minor child is residing within this state, either parent  
17 may apply to the supreme court for a writ of habeas corpus to have such  
18 minor child brought before such court; and on the return thereof, the  
19 court, on due consideration, [may] SHALL award the natural guardianship,  
20 charge and custody of such child to [either parent] BOTH PARENTS, IN THE  
21 ABSENCE OF AN ALLEGATION THAT SUCH SHARED PARENTING WOULD BE DETRIMENTAL  
22 TO SUCH CHILD, for such time, under such regulations and restrictions,  
23 and with such provisions and directions, as the case may require, and  
24 may at any time thereafter vacate or modify such order. [In all cases

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets  
[ ] is old law to be omitted.

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1 there shall be no prima facie right to the custody of the child in  
2 either parent, but the] THE BURDEN OF PROOF THAT SUCH SHARED PARENTING  
3 WOULD BE DETRIMENTAL TO SUCH CHILD SHALL BE UPON THE PARENT REQUESTING  
4 SOLE CUSTODY. THE court shall determine solely what is for the best  
5 interest of the child, and what will best promote [its] THE CHILD'S  
6 welfare and happiness, and make award accordingly.

7 S 3. Paragraph (a) of subdivision 1 of section 240 of the domestic  
8 relations law, as amended by chapter 476 of the laws of 2009, is amended  
9 to read as follows:

10 (a) (I) In any action or proceeding brought (1) to annul a marriage or  
11 to declare the nullity of a void marriage, or (2) for a separation, or  
12 (3) for a divorce, or (4) to obtain, by a writ of habeas corpus or by  
13 petition and order to show cause, the custody of or right to visitation  
14 with any child of a marriage, the court shall require verification of  
15 the status of any child of the marriage with respect to such child's  
16 custody and support, including any prior orders, and shall enter orders  
17 for custody and support as, in the court's discretion, justice requires,  
18 having regard to the circumstances of the case and of the respective  
19 parties and to the best interests of the child and subject to the  
20 provisions of subdivision one-c of this section. Where either party to  
21 an action concerning custody of or a right to visitation with a child  
22 alleges in a sworn petition or complaint or sworn answer, cross-peti-  
23 tion, counterclaim or other sworn responsive pleading that the other  
24 party has committed an act of domestic violence against the party making  
25 the allegation or a family or household member of either party, as such  
26 family or household member is defined in article eight of the family  
27 court act, and such allegations are proven by a preponderance of the  
28 evidence, the court must consider the effect of such domestic violence  
29 upon the best interests of the child, together with such other facts and  
30 circumstances as the court deems relevant in making a direction pursuant  
31 to this section and state on the record how such findings, facts and  
32 circumstances factored into the direction. If a parent makes a good  
33 faith allegation based on a reasonable belief supported by facts that  
34 the child is the victim of child abuse, child neglect, or the effects of  
35 domestic violence, and if that parent acts lawfully and in good faith in  
36 response to that reasonable belief to protect the child or seek treat-  
37 ment for the child, then that parent shall not be deprived of custody,  
38 visitation or contact with the child, or restricted in custody, visita-  
39 tion or contact, based solely on that belief or the reasonable actions  
40 taken based on that belief. If an allegation that a child is abused is  
41 supported by a preponderance of the evidence, then the court shall  
42 consider such evidence of abuse in determining the visitation arrange-  
43 ment that is in the best interest of the child, and the court shall not  
44 place a child in the custody of a parent who presents a substantial risk  
45 of harm to that child, and shall state on the record how such findings  
46 were factored into the determination. An order directing the payment of  
47 child support shall contain the social security numbers of the named  
48 parties. [In all cases there shall be no prima facie right to the custo-  
49 dy of the child in either parent. Such] (II) CUSTODY SHALL BE AWARDED  
50 IN THE FOLLOWING ORDER OF PREFERENCE, ACCORDING TO THE BEST INTERESTS OF  
51 THE CHILD:

52 (1) TO BOTH PARENTS JOINTLY PURSUANT TO SECTION TWO HUNDRED FORTY-D OF  
53 THIS ARTICLE. IN SUCH CASES THE COURT MUST REQUIRE THE PARENTS TO  
54 SUBMIT A PARENTING PLAN AS DEFINED IN SUBDIVISION TWO OF SECTION TWO  
55 HUNDRED FORTY-D OF THIS ARTICLE FOR IMPLEMENTATION OF THE CUSTODY ORDER  
56 OR THE PARENTS ACTING INDIVIDUALLY OR IN CONCERT MAY SUBMIT A CUSTODY

1 IMPLEMENTATION PLAN TO THE COURT PRIOR TO ISSUANCE OF A CUSTODY DECREE.  
2 THERE SHALL BE A PRESUMPTION, AFFECTING THE BURDEN OF PROOF, THAT SHARED  
3 PARENTING IS IN THE BEST INTERESTS OF A MINOR CHILD UNLESS THE PARENTS  
4 HAVE AGREED TO AN AWARD OF CUSTODY TO ONE PARENT OR SO AGREE IN OPEN  
5 COURT AT A HEARING FOR THE PURPOSE OF DETERMINING CUSTODY OF A MINOR  
6 CHILD OF THE MARRIAGE OR THE COURT FINDS THAT SHARED PARENTING WOULD BE  
7 DETRIMENTAL TO A PARTICULAR CHILD OF A SPECIFIC MARRIAGE. FOR THE  
8 PURPOSE OF ASSISTING THE COURT IN MAKING A DETERMINATION WHETHER AN  
9 AWARD OF SHARED PARENTING IS APPROPRIATE, THE COURT MAY DIRECT THAT AN  
10 INVESTIGATION BE CONDUCTED. IF THE COURT DECLINES TO ENTER AN ORDER  
11 AWARDED SHARED PARENTING PURSUANT TO THIS PARAGRAPH, THE COURT SHALL  
12 STATE IN ITS DECISION THE REASONS FOR DENIAL OF AN AWARD OF SHARED  
13 PARENTING. IN JURISDICTIONS HAVING A PRIVATE OR PUBLICLY-SUPPORTED  
14 CONCILIATION SERVICE, THE COURT OR THE PARTIES MAY, AT ANY TIME, PURSU-  
15 ANT TO LOCAL RULES OF COURT, CONSULT WITH THE CONCILIATION SERVICE FOR  
16 THE PURPOSE OF ASSISTING THE PARTIES TO FORMULATE A PLAN FOR IMPLEMENTA-  
17 TION OF THE CUSTODY ORDER OR TO RESOLVE ANY CONTROVERSY WHICH HAS ARISEN  
18 IN THE IMPLEMENTATION OF A PLAN FOR CUSTODY. ANY ORDER FOR SHARED  
19 PARENTING MAY BE MODIFIED OR TERMINATED UPON THE PETITION OF ONE OR BOTH  
20 PARENTS OR ON THE COURT'S OWN MOTION IF IT IS SHOWN THAT THE BEST INTER-  
21 ESTS OF THE CHILD REQUIRE MODIFICATION OR TERMINATION OF THE SHARED  
22 PARENTING ORDER. ANY ORDER FOR THE CUSTODY OF A MINOR CHILD OF A  
23 MARRIAGE ENTERED BY A COURT IN THIS STATE OR IN ANY OTHER STATE, SUBJECT  
24 TO JURISDICTIONAL REQUIREMENTS, MAY BE MODIFIED AT ANY TIME TO AN ORDER  
25 OF SHARED PARENTING IN ACCORDANCE WITH THE PROVISIONS OF THIS SECTION.

26 (2) TO EITHER PARENT, IN WHICH CASE, THE COURT, IN MAKING AN ORDER FOR  
27 CUSTODY TO EITHER PARENT SHALL CONSIDER, AMONG OTHER FACTORS, WHICH  
28 PARENT IS MORE LIKELY TO ALLOW THE CHILD OR CHILDREN FREQUENT AND  
29 CONTINUING CONTACT WITH THE NONCUSTODIAL PARENT, AND SHALL NOT PREFER A  
30 PARENT AS CUSTODIAN BECAUSE OF THAT PARENT'S GENDER. THE BURDEN OF PROOF  
31 THAT SHARED PARENTING WOULD NOT BE IN THE CHILD'S BEST INTEREST SHALL BE  
32 UPON THE PARENT REQUESTING SOLE CUSTODY. NOTWITHSTANDING ANY OTHER  
33 PROVISION OF LAW, ACCESS TO RECORDS AND INFORMATION PERTAINING TO A  
34 MINOR CHILD, INCLUDING BUT NOT LIMITED TO MEDICAL, DENTAL AND SCHOOL  
35 RECORDS, SHALL NOT BE DENIED TO A PARENT BECAUSE THE PARENT IS NOT THE  
36 CHILD'S CUSTODIAL PARENT.

37 (3) IF TO NEITHER PARENT, TO THE PERSON OR PERSONS IN WHOSE HOME THE  
38 CHILD HAS BEEN LIVING IN A NURTURING AND STABLE ENVIRONMENT.

39 (4) TO ANY OTHER PERSON OR PERSONS DEEMED BY THE COURT TO BE SUITABLE  
40 AND ABLE TO PROVIDE A NURTURING AND STABLE ENVIRONMENT.

41 BEFORE THE COURT MAKES ANY ORDER AWARDED CUSTODY TO A PERSON OR  
42 PERSONS OTHER THAN A PARENT WITHOUT THE CONSENT OF THE PARENTS, IT SHALL  
43 MAKE A FINDING THAT AN AWARD OF CUSTODY TO A PARENT WOULD BE DETRIMENTAL  
44 TO THE CHILD AND THE AWARD TO A NON-PARENT IS REQUIRED TO SERVE THE BEST  
45 INTERESTS OF THE CHILD. ALLEGATIONS THAT PARENTAL CUSTODY WOULD BE  
46 DETRIMENTAL TO THE CHILD, OTHER THAN A STATEMENT OF THAT ULTIMATE FACT,  
47 SHALL NOT APPEAR IN THE PLEADINGS. THE COURT MAY, IN ITS DISCRETION,  
48 EXCLUDE THE PUBLIC FROM THE HEARING ON THIS ISSUE. THE COURT SHALL STATE  
49 IN WRITING THE REASON FOR ITS DECISION AND WHY THE AWARD MADE WAS FOUND  
50 TO BE IN THE BEST INTERESTS OF THE CHILD. ANY DIRECTION MADE PURSUANT TO  
51 THIS SUBDIVISION shall make provision for child support out of the prop-  
52 erty of [either or] both parents. The court shall make its award for  
53 child support pursuant to subdivision one-b of this section. Such direc-  
54 tion may provide for reasonable visitation rights to the maternal and/or  
55 paternal grandparents of any child of the parties. Such direction as it  
56 applies to rights of visitation with a child remanded or placed in the

1 care of a person, official, agency or institution pursuant to article  
2 ten of the family court act, or pursuant to an instrument approved under  
3 section three hundred fifty-eight-a of the social services law, shall be  
4 enforceable pursuant to part eight of article ten of the family court  
5 act and sections three hundred fifty-eight-a and three hundred eighty-  
6 four-a of the social services law and other applicable provisions of law  
7 against any person having care and custody, or temporary care and custo-  
8 dy, of the child. Notwithstanding any other provision of law, any writ-  
9 ten application or motion to the court for the establishment, modifica-  
10 tion or enforcement of a child support obligation for persons not in  
11 receipt of public assistance and care must contain either a request for  
12 child support enforcement services which would authorize the collection  
13 of the support obligation by the immediate issuance of an income  
14 execution for support enforcement as provided for by this chapter,  
15 completed in the manner specified in section one hundred eleven-g of the  
16 social services law; or a statement that the applicant has applied for  
17 or is in receipt of such services; or a statement that the applicant  
18 knows of the availability of such services, has declined them at this  
19 time and where support enforcement services pursuant to section one  
20 hundred eleven-g of the social services law have been declined that the  
21 applicant understands that an income deduction order may be issued  
22 pursuant to subdivision (c) of section fifty-two hundred forty-two of  
23 the civil practice law and rules without other child support enforcement  
24 services and that payment of an administrative fee may be required. The  
25 court shall provide a copy of any such request for child support  
26 enforcement services to the support collection unit of the appropriate  
27 social services district any time it directs payments to be made to such  
28 support collection unit. Additionally, the copy of any such request  
29 shall be accompanied by the name, address and social security number of  
30 the parties; the date and place of the parties' marriage; the name and  
31 date of birth of the child or children; and the name and address of the  
32 employers and income payors of the party from whom child support is  
33 sought or from the party ordered to pay child support to the other  
34 party. Such direction may require the payment of a sum or sums of money  
35 either directly to the custodial parent or to third persons for goods or  
36 services furnished for such child, or for both payments to the custodial  
37 parent and to such third persons; provided, however, that unless the  
38 party seeking or receiving child support has applied for or is receiving  
39 such services, the court shall not direct such payments to be made to  
40 the support collection unit, as established in section one hundred  
41 eleven-h of the social services law. Every order directing the payment  
42 of support shall require that if either parent currently, or at any time  
43 in the future, has health insurance benefits available that may be  
44 extended or obtained to cover the child, such parent is required to  
45 exercise the option of additional coverage in favor of such child and  
46 execute and deliver to such person any forms, notices, documents or  
47 instruments necessary to assure timely payment of any health insurance  
48 claims for such child.

49 S 4. The domestic relations law is amended by adding a new section  
50 240-d to read as follows:

51 S 240-D. CUSTODY OF CHILDREN. 1. WHERE THE COURT CONSIDERS AWARDING  
52 SHARED PARENTING PURSUANT TO THE PROVISIONS OF PARAGRAPH (A) OF SUBDIVI-  
53 SION ONE OF SECTION TWO HUNDRED FORTY OF THIS ARTICLE, "SHARED PARENT-  
54 ING", SHALL MEAN AN ORDER AWARDING CUSTODY OF THE CHILD TO BOTH PARTIES  
55 SO THAT BOTH PARTIES SHARE EQUALLY THE LEGAL RESPONSIBILITY AND CONTROL  
56 OF SUCH CHILD AND SHARE EQUALLY THE LIVING EXPERIENCE IN TIME AND PHYS-

ICAL CARE TO ASSURE FREQUENT AND CONTINUING CONTACT WITH BOTH PARTIES, AS THE COURT DEEMS TO BE IN THE BEST INTERESTS OF THE CHILD, TAKING INTO CONSIDERATION THE LOCATION AND CIRCUMSTANCES OF EACH PARTY. THE TERM "SHARED PARENTING", SHALL BE CONSIDERED INTERCHANGEABLE WITH "NEARLY EQUAL SHARED PARENTING". AN AWARD OF JOINT PHYSICAL AND LEGAL CUSTODY OBLIGATES THE PARTIES TO EXCHANGE INFORMATION CONCERNING THE HEALTH, EDUCATION AND WELFARE OF THE MINOR CHILD, AND UNLESS ALLOCATED, APPORTIONED OR DECREED, THE PARENTS OR PARTIES SHALL CONFER WITH ONE ANOTHER IN THE EXERCISE OF DECISION-MAKING RIGHTS, RESPONSIBILITIES AND AUTHORITY.

2. FOR THE PURPOSES OF THIS ARTICLE A "PARENTING PLAN", REQUIRED TO BE SUBMITTED TO THE COURT PURSUANT TO CLAUSE ONE OF SUBPARAGRAPH (II) OF PARAGRAPH (A) OF SUBDIVISION ONE OF SECTION TWO HUNDRED FORTY OF THIS ARTICLE, SHALL INCLUDE BUT NOT BE LIMITED TO:

(A) THE LEGAL RESPONSIBILITIES OF EACH PARENT;

(B) A WEEKLY PARENTING SCHEDULE;

(C) A HOLIDAY AND VACATION PARENTING SCHEDULE;

(D) A SCHEDULE FOR SPECIAL OCCASIONS, INCLUDING BIRTHDAYS;

(E) A DESCRIPTION OF ANY SPECIFIC DECISION MAKING AREAS FOR EACH PARENT PROVIDED, HOWEVER, THAT BOTH PARENTS SHALL CONFER AND JOINTLY DETERMINE MAJOR ISSUES AFFECTING THE WELFARE OF THE CHILD INCLUDING HEALTH, EDUCATION, DISCIPLINE AND RELIGION;

(F) IF APPLICABLE, THE NEED FOR ANY AND ALL OF THE PARTIES TO PARTICIPATE IN COUNSELING;

(G) ANY RESTRICTIONS ON EITHER PARENT WHEN IN PHYSICAL CONTROL OF THE CHILD OR CHILDREN; AND

(H) PROVISIONS FOR MEDIATION OF DISPUTES.

3. ONE PARENT MAY BE DESIGNATED AS A PUBLIC WELFARE RECIPIENT IN SITUATIONS WHERE PUBLIC WELFARE AID IS DEEMED NECESSARY AND APPROPRIATE. IN MAKING AN ORDER OF SHARED PARENTING, THE COURT SHALL SPECIFY THE RIGHT OF EACH PARENT TO THE PHYSICAL CONTROL OF THE CHILD IN SUFFICIENT DETAIL TO ENABLE A PARENT DEPRIVED OF THAT CONTROL TO ENFORCE THE COURT ORDER AND TO ENABLE LAW ENFORCEMENT AUTHORITIES TO IMPLEMENT LAWS FOR RELIEF OF PARENTAL KIDNAPPING AND CUSTODIAL INTERFERENCE.

S 5. This act shall take effect on the first of November next succeeding the date on which it shall have become a law and shall apply to actions and proceedings commenced on and after such date.