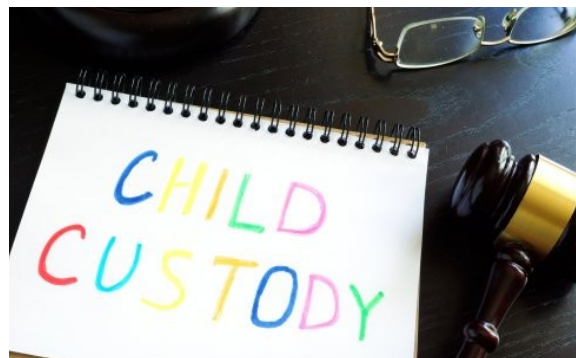


A New Era in Child Custody Law: Why New York's Proposed Shared Parenting Presumption Will Harm the Best Interests Standard

August 25, 2026

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For more than 50 years, New York has adhered to one fundamental principle in child custody cases: there is no one-size-fits-all answer. Every child is different. Every family is different. Every custody dispute presents its own unique facts, challenges, strengths, and concerns.

That principle is embodied in a deceptively simple phrase that has become the cornerstone of New York custody law: the child's best interests.

It is not merely a slogan. It is the product of decades of thoughtful decisions by the New York Court of Appeals and the Appellate Divisions, recognizing that judges — not legislators — must evaluate each family individually and fashion custody arrangements based on the evidence in each case.

Despite the "best-interests" standard being gender-neutral, some New York legislators find the individualized best-interests standard insufficient or believe it has run its course. They want 100% unmitigated equality from the starting gate — before the evidence is heard, before the family is understood, and before anyone has determined whether equal parenting time is actually best for the child. Equality first; facts later. Enter Senate Bill S4128.

Bill S4128 is not New York law. Not yet, anyway. As of the 2025–2026 legislative session, it remains in Committee. But the thinking behind it is dangerous and deserves attention, because when it becomes law it will upend traditional custody analysis: instead of starting with the child and asking what arrangement best serves that child, it starts with an answer — parental equality — and works backward from there.

At first glance, the legislation appears benign. After all, who could oppose children having meaningful relationships with both parents? But this bill does not. Instead, it fundamentally changes New York custody law by creating a legal presumption that shared parenting is in a child's best interests and shifting the burden of proof to the parent seeking sole custody.

The bill sets forth: "The provisions of this act establish a presumption, affecting the burden of proof, that shared parenting is in the best interests of minor children." It further states: "The burden of proof that shared parenting would be detrimental to such child shall be upon the parent requesting sole custody."

Finally, the legislation establishes an order of preference that places an award of shared parenting to both parents first, requiring the court to explain why it declined to order shared parenting whenever a different custodial arrangement is selected.

Those provisions mark a dramatic departure from decades of New York law.

The Presumption Is the Problem

Supporters of the legislation argue that the bill merely encourages judges to consider shared parenting. Critics argue that is incorrect. New York judges already consider shared parenting every day. Current law does not prevent a court from awarding joint legal custody. It does not prevent equal parenting time. It does not prevent creative parenting schedules tailored to a particular child's needs. Indeed, judges frequently fashion parenting plans that maximize each parent's involvement when doing so serve the child's best interests.

The existing law is not hostile to shared parenting if the parties agree. But it does not impose it on hostile parents who cannot even agree whether the sun or the moon is in the sky. The proposed legislation does just that. It forces combative litigants to suddenly become pillars of friendship and equanimity. Instead of asking, "*What custodial arrangement is in this child's best interests?*" the court is first instructed to begin with a predetermined answer and then determine whether someone has produced sufficient evidence to overcome it.

That subtle shift has enormous consequences. The presumption becomes the starting point rather than the conclusion. The burden shifts. Litigation changes. Most importantly, the focus shifts away from the child as an individual and toward satisfying or rebutting a legislative assumption. That is precisely what New York's appellate courts have spent decades avoiding.

The Legislature Cannot Know Every Family

Family Court judges decide custody cases involving real children, not abstract notions. These children include those with autism, anxiety disorders, intensive medical needs, parents working overnight shifts, long-distance parents, communication issues requiring police, exposure to domestic violence, manipulation by one parent, or a need for both parents, and protection from one.

No statute can anticipate those facts. No legislative committee can predict them. No presumption can account for them. The legislature has never met these children. The trial judge has. That distinction matters.

Experience Cannot Be Legislated

Custody trials are unlike virtually every other civil proceeding. Judges observe parents' testimony. They evaluate credibility. They hear from forensic evaluators. They review school records, medical records, therapy records, Child Protective Services investigations, and police reports. They assess demeanor, consistency, judgment, insight, and empathy. These are countless intangibles that never appear in a transcript.

Those observations cannot be reduced to a statutory formula. Nor should they be. The genius of New York's custody law has always been its flexibility. The law recognizes that children are individuals, not categories. The proposed legislation would replace that flexibility with a presumption crafted in Albany by legislators who will never meet the family appearing before the court.

The Bill Solves a Problem That Does Not Exist

There is nothing inherently wrong with encouraging parents to cooperate. Recognizing the importance of both parents in a child's life is not controversial. Those principles are already reflected in New York law.

What is controversial is converting those aspirations into a legal presumption that shifts the burden of proof. Presumptions are appropriate when experience shows that one factual conclusion almost always follows from another.

Custody cases are the opposite. Every experienced matrimonial attorney knows that no two custody cases are alike. The facts that matter in one family may be completely irrelevant in another. That is why New York has wisely resisted bright-line rules for decades.

The legislature now proposes to create one. And that is where the proposal goes fundamentally wrong.

Fifty Years of New York Law Reject Bright-Line Rules

The most fundamental flaw in Senate Bill S4128 is not its endorsement of shared parenting. Rather, it is its departure from a principle that has guided New York custody law for generations. There are no categorical presumptions in custody cases because every child deserves an individualized determination based on his or her own circumstances.

For more than 50 years, New York has adhered to a fundamental principle in child custody cases: there is no one-size-fits-all answer. Domestic Relations Law § 240(1)(a) directs courts to determine custody "in accordance with the best interests of the child," a standard the Court of Appeals has consistently interpreted as requiring an individualized determination based on the totality of the circumstances. N.Y. Dom. Rel. Law § 240(1)(a); *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 94–95 (1982); *Eschbach v. Eschbach*, 56 N.Y.2d 167, 171–74 (1982).

Long before phrases such as "shared parenting" and "equal parenting time" entered the public conversation, the New York Court of Appeals recognized that custody disputes cannot be resolved by formulas. They require careful judicial evaluation of the child's particular needs before the court.

This individualized approach was articulated decades ago in *Lincoln v. Lincoln*, where the Court of Appeals recognized that custody litigation differs fundamentally from ordinary civil litigation because the court's paramount obligation is to protect the child's welfare. To fulfill that obligation, the Court authorized trial judges to conduct in camera interviews of children, when appropriate, underscoring that custody determinations require a careful examination of each child's unique circumstances. *Lincoln v. Lincoln*, 24 N.Y.2d 270, 272–73 (1969).

That philosophy permeates nearly every significant custody decision issued by New York's highest court.

In *Braiman v. Braiman*, the Court of Appeals rejected the notion that joint custody should be the norm, noting that it is generally inappropriate when parents are embattled and unable to cooperate. The Court explained that joint custody is reserved for the relatively rare situations in which parents have demonstrated an ability to set aside their personal differences and work together to raise their children. *Braiman v. Braiman*, 44 N.Y.2d 584, 589–90 (1978).

The lesson from *Braiman* remains as relevant today as it was nearly 50 years ago: joint custody is appropriate only when it serves a particular child's needs, not because the law presumes it should.

The Court later reaffirmed that joint custody is appropriate only when the parents possess sufficient cooperation and mutual respect to make shared decision-making workable. *Louise E.S. v. W. Stephen S.*, 64 N.Y.2d 946, 947 (1985).

Four years later, in *Friederwitzer v. Friederwitzer*, the Court reaffirmed that custody determinations must rest on "the best interests of the child" after considering all relevant facts and circumstances. Rejecting mechanical approaches, the Court emphasized that custody decisions require careful weighing of the evidence in each case. *Friederwitzer*, 55 N.Y.2d at 94–95. The Court explained that no single factor governs the custody determination and that trial courts must evaluate all relevant circumstances bearing on the child's welfare. *Id.*

That same year, the Court decided *Eschbach v. Eschbach*, perhaps the most frequently cited custody decision in New York. There, the Court articulated what has become the cornerstone of New York custody jurisprudence: courts must consider the totality of the circumstances, including the quality of each parent's home environment, parental guidance, relative fitness, the child's emotional and intellectual development, the stability of existing arrangements, and any other factor bearing on the child's welfare. Significantly, the Court declined to elevate any single factor above the others, instead entrusting trial judges with broad discretion to determine which arrangement serves the child's best interests. *Eschbach*, 56 N.Y.2d at 171–74.

Among the factors identified by the Court are the quality of each home environment, each parent's past performance and relative fitness, the child's emotional and intellectual development, the stability of the existing custodial arrangements, and

each parent's willingness to foster the child's relationship with the other parent. *Id.*

The significance of *Eschbach* cannot be overstated. It rejected formulaic decision-making and rigid hierarchies. Most importantly, it reaffirmed that custody determinations cannot be reduced to a single presumed outcome.

That philosophy perhaps reached its clearest expression in *Tropea v. Tropea*, the Court's landmark relocation decision. Prior to *Tropea*, New York courts frequently applied rigid rules governing relocation requests. The Court of Appeals expressly abandoned those rules, holding that no single factor should be treated as dispositive and that courts must instead evaluate all relevant facts to determine the child's best interests. *Tropea v. Tropea*, 87 N.Y.2d 727, 739–41 (1996).

Likewise, in *Nehra v. Uhlar*, the Court recognized that although prior custody agreements and existing custodial arrangements are important considerations, they cannot override the court's independent obligation to determine the child's best interests. *Nehra v. Uhlar*, 43 N.Y.2d 242, 251 (1977).

Although *Tropea* involved relocation rather than shared parenting, its reasoning is directly applicable here. The Court rejected bright-line rules because they inevitably fail to account for the extraordinary variety of family circumstances in custody litigation.

The irony is striking.

While the legislature proposes creating a statutory presumption favoring one custodial arrangement, the Court of Appeals has spent decades rejecting rigid rules that interfere with individualized decision-making.

A Presumption Is Not Merely a Preference

Supporters of Senate Bill S4128 often argue that the legislation encourages meaningful involvement from both parents. If that were all the bill accomplished, there would be little controversy.

New York law has long recognized the importance of preserving children's relationships with both parents whenever consistent with their welfare. See *Eschbach*, 56 N.Y.2d at 171–74. The bill, however, does considerably more. It expressly provides: "The provisions of this act establish a presumption, affecting the burden of proof, that shared parenting is in the best interests of minor children."

It further provides: "The burden of proof that shared parenting would be detrimental to the child shall be on the parent requesting sole custody." S. 4128, 2025–2026 Leg., Reg. Sess. (N.Y. 2025).

That language is critical. A judicial preference guides discretion. A statutory presumption that shifts the burden of proof, changes the legal framework itself.

Instead of beginning with two parents standing on equal legal footing while the court determines what arrangement serves the child's best interests, the legislation instructs courts to begin with a preferred outcome that must be overcome through litigation.

That marks a fundamental change in New York custody law.

The Reality of Custody Litigation

The legislature's proposal also reflects a misunderstanding of how custody cases usually unfold. Few custody disputes involve two equally capable parents who disagree only about the allocation of parenting time.

Family Court judges routinely handle cases involving domestic violence, coercive control, untreated mental illness, substance abuse, parental alienation, developmental disabilities, educational disputes, and children with extraordinary medical or

psychological needs.

Some parents communicate effectively despite the end of their marriage. Others cannot exchange a child without police intervention. Still others demonstrate extraordinary cooperation under extraordinarily difficult circumstances. The point is not that shared parenting is inappropriate. Often, it is precisely the right solution.

The point is that no legislature can know which family falls into which category before the evidence is presented. That is why judges conduct hearings. That is why forensic evaluations are ordered. That is why attorneys for the child participate.

Furthermore, that is why appellate courts repeatedly emphasize that custody determinations depend on the totality of the circumstances, that no single factor is dispositive, and that considerable deference is afforded to the Family Court's credibility determinations because it has the unique opportunity to observe the witnesses firsthand. *Eschbach*, 56 N.Y.2d at 171–74; *Friederwitzer*, 55 N.Y.2d at 94–95; *Louise E.S.*, 64 N.Y.2d at 947.

Judicial Discretion Protects Children

The genius of New York custody jurisprudence has never been that it favors mothers over fathers — or fathers over mothers. It favors neither. It favors children.

By refusing to adopt categorical rules, New York has preserved what matters most: the ability of trial judges to listen to witnesses, evaluate credibility, assess expert testimony, and fashion parenting arrangements tailored to the unique needs of each child.

That discretion is not a weakness in our law. It is its greatest strength. The legislature undoubtedly seeks to encourage meaningful parental involvement, an objective few would dispute. But good intentions cannot justify replacing individualized justice with statutory presumptions.

The best interests of children are too important to be decided by legislative formula. The question should never be whether the legislature prefers shared parenting. The question should remain the one New York courts have asked for generations:

What arrangement is in the best interests of this child?

Until someone can demonstrate that New York's courts have failed to answer that question faithfully, and there is no empirical evidence establishing such systemic failure, the legislature should resist replacing decades of thoughtful jurisprudence with a presumption that assumes the answer before the first witness is sworn.

The legislature cannot legislate wisdom into custody cases. It cannot legislate parental cooperation. And it cannot legislate what is best for children it has never met.

That responsibility properly belongs where New York law has always placed it: with the judges who hear the evidence, evaluate the facts, and decide each case, child by child.