It was Victor Hugo who said that there is nothing more powerful than an idea whose time has come. Is shared parenting one of those ideas? Listening to the current debate, it’s hard to tell. The battle lines have been drawn but is anybody right when everybody’s wrong? The Fathers’ rights groups think it’s a sliced bread idea. The Mothers’ groups claim that it is a start down the road to perdition.

So, who could object to shared parenting? Isn’t that what God intended—that all children have a father and mother to mutually guide their upbringing? And if you don’t happen to believe in God or you’re not quite sure or just haven’t given it much thought, isn’t that what Charles Darwin taught us; that two parents for every child was the ineluctable result of tens of thousands of years of evolution? Given these premises, how could anyone object to shared parenting? Well, hold your bets a minutes because our Legislature has just dealt this issue a new hand.

Declaring by statute a presumption of shared parenting could be a great idea or terrible idea. I don’t really know. However, which ever it is, Assembly Bill A-330 is a deeply flawed piece of statutory draftsmanship and it holds unintended consequences for both sides of this debate. It’s hard to know where to start, but for anyone who has attempted to read A-330 for understanding, one can only conclude that no member of the Legislature has actually read it, which will surprise absolutely none.

Throughout the Bill Memo and the Bill it switches back and forth, between the terms “joint custody,” “shared parenting” and “shared custody,” as if they meant the same thing. Now these terms could mean the same thing, but maybe not. But why use three terms when one will do? Is it too much to ask that a law be consistent and precise?

The Bill Memo makes this statement: “[The Bill requires] the court to award custody to both parents in the absence of allegations that shared parenting would be detrimental to the child. So, a judge is to award “joint custody” to the parents unless there are “allegations” of detriment to the child, if they had “shared parenting.” Huh? I thought judges’ decisions were to be based on evidence, not allegations.

In making shared parenting a presumption, the Bill requires each parent to allege and prove that an award of custody to the other parent would be
The legislative findings in the Bill state this: “The legislature hereby finds and declares that it is the public policy of the state to assure minor children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage.” With this statement, the Legislature shows just how out of touch it is with what is going on in Family Courts across our State. Fifty percent of a Family Court Judge’s custody calendar involves parents who have never married. Many of those never lived together or co-parented a child. For a significant number, the child was the product of a relationship that was punctuated by sex, drugs, alcohol and domestic violence. Some kids come from one night stands. So, what is the public policy of the state for these “families”? 3

This public policy statement exposes the primary flaw in A-330—that the presumption of shared parenting applies to every parent of every child. A presumption, in the law of evidence and when it expresses some social policy, still must be based on human experience. The effect of a presumption is to eliminate the burden of proving some fact or circumstance because our experience tells us that it is true so often that there is no need to prove it each time. To apply a presumption of shared parenting to every couple who makes a baby, stands the presumption on its head and makes a mockery of the process. For example, my cases have included custody proceedings where the child was the product of a rape—by the Mother! I also have a man who had three women pregnant at the same time. Two of the children were born within three weeks of each other. I have had a case with a man who has “fathered” nine children by eight women and I have had a case with a woman who has had eight children by eight men. Under A-330 bill, these persons would all stand before the court presumed to be entitled to shared parenting of the child. That makes no sense. Say, for example, a parent is just released from jail after serving three years for sexual abuse of the child. The other parent petitions for sole custody. What sense does it make to first presume that the sex abuser is entitled to joint custody and then require the other parent to disprove that presumption. What might make sense is to apply the presumption to children born during an intact marriage or if the parents resided together and co-parented for, say, one year. If the law is presuming that separating parents should share parenting, shouldn’t we at least expect that they have actually shared parenting before they separated?

A-330 is also based on some questionable premises. Here are a few. “The court may award joint custody, but in practice rarely does so.” This statement is not true. First, about 95% of all custody petitions are resolved by agreement. In my court, about 75% of those involve joint legal custody with an agreed shared parenting arrangement. Groups on the Mother’s side often say that Mothers make bad deals because they are intimidated or economically coerced. The Father’s groups say that they concede custody because biased judges favor the Mothers. My twelve years of experience tells me that neither of these positions is true. It is true that in a court system like New York’s Family Court, that hears almost 700,000 petitions each year, bad things can happen and wrong decisions can be made. But the agreements reached by parents are fair and balanced and best for the child in the huge, huge majority of cases. Finally, some studies show that in the few truly contested custody cases, joint physical custody or custody with the Father is the result in 40%+ of the cases.

“Statistics have shown that in more than 95% of divorce or separation cases, the mother was awarded sole custody of the child with the father limited to rights of visitation. This is a completely bogus statistic and you will notice that it is never sourced. “Presumptive shared parenting protects and shifts the litigation burden away from the cooperative parent and fosters a context for mediation to the child’s advantage.” (Bill Memo) This statement is not true. Since the presumption must be rebutted it requires each parent to trash the other. It does nothing to foster mediation and will probably discourage it. “Because presumptive shared parenting reduces litigation and re-litigation, it will also reduce the stress inherent in the divorce process” (Bill Memo) There is no evidence to support this conclusion and some to rebut it. Also, as mentioned earlier, 50% or more of a Family Court Judge’s custody calendar involves parents who are not married and so the “divorce process” is irrelevant to their experience and they are in need of other strategies. As with most legislative amendments, A-330 tries to shoe-horn an important legislative goal into a pair of worn out sneakers. The primary bill drafting technique is to squeeze as many new parentheticals into the old legislation without so much as changing a
comma. God forbid that they would add a period. The end result is that the law starts to look like a garage sale. Here is an example. “[The Court ... shall award the natural guardianship, charge and custody of such child to....both parents, in the absence of an allegation that such shared parenting would be detrimental to such child.” The Terms “natural guardianship” and “charge” are antiquated and no-longer in use. I don’t know what it means to award the “charge” of a child. As mentioned above, an award of custody can not be made upon an “allegation” but must be based on evidence. Finally, I receive many petitions by a parent who describes how he or she should get custody because of all the positive things that he or she has done for the child. Under A-330, each parent will be required to allege detrimental circumstances and, accordingly, be forced to trash the other parent in their pleadings. When Family Courts are trying to get parents to speak well of each other, this law requires them to speak ill of each other. The positive custody law of New York is contained in DRL § 240 in just thirty-five words. However, it is buried in a section that has **950+ words in one paragraph**! The current custody provisions contained in the Domestic Relations Law should be completely scrapped and replaced with a coherent piece of legislation like Michigan’s or Minnesota’s.

The definition of “shared parenting” contained in A-330 is virtually unintelligible and needs a complete re-write in plain English. First it starts out saying that “where the court considers awarding shared parenting....shared parenting shall mean...” One would think that shared parenting would mean what it means and not just when the court is considering awarding it. But hold on, it gets worse. “**Shared parenting shall mean an order awarding custody of the child to both parties.**” Shared parenting is a concept and not an order. This is just all legal gobbledegook. The definition of “shared parenting” in A-330 can’t be saved with an edit and needs to be re-written.

In A-330, there are two stealth sections that come out of nowhere that will stand the law of custody in New York on its head. They appear in this “shared parenting” bill but have nothing to do with sharing or parents. These sections establish an order of preference in awarding custody. The first preference is for an order of **equal** shared parenting, unless a detriment to the child is shown. The second preference, if a detriment to a child is shown, is for custody to go to one parent. In a contest between parents there would be no other choice. Then, all of a sudden the section starts talking about awarding custody to “**the person in whose home the child has been living in a nurturing and stable environment.**” Where did this come from? This section cuts off at the knees the long standing rule of **Bennett v. Jeffreys** (40 NY2d 543 [1976]) which requires a finding of “extraordinary circumstances” to justify the award of custody to a non-parent. This section has constitutional uncertainty written all over it and is surely contrary to the Supreme Court’s holding in **Troxell v. Granville** (430 US 57 [2000]). But hold on, it gets worse. The next section permits the Court to grant custody “to any other person deemed by the court to be suitable and able to provide a nurturing and stable environment.” Taken together, these two sections eviscerate the fundamental right of parents to the custody of their children and permit Family Court Judges to award custody of children to virtually anyone. I must assume that both the Mothers’ and Fathers’ groups have overlooked these sections or they would both be opposing the bill. These two provisions are contrary to twenty years of New York Case Law and contrary to the Constitution of the United States.

The greater weight of the research shows that kids do better in joint custodial arrangements than in sole custodial arrangements. This is sort of a duh! conclusion because we know that, on balance, children do better with two parents than with one. The problem with the research, which is a weakness with much social science research, is that there is no true control population. In other words, no researcher can measure joint custody with one group of kids and compare it with the sole custody arrangements of another group of kids **in exactly the same situation**. For example, many kids are in a sole custody arrangement because joint custody would be disastrous for them. Because of the high conflict between the parents, which prevents joint custody, sole custody doesn’t work so well either. So its like we took one bunch of sick kids to a great hospital and another bunch to a bad hospital. The kids who go to the great hospital will get better more often and more quickly. The sole versus joint custody research produces similar results.

There are about eight states that by statute (6) or case law (2) which have true joint physical and legal custody presumptions. However, I would predict that if you took any custody case in one state and decided it in any other state, the results would be the same 90%+ of the time—regardless of how their law of custody was configured. The reason for this is that every Family Court Judge in America is trying to find the arrangement that is in the best interest of the child. We do the best when we can get parents to decide the outcome. We do the worst when we have to rely on “evidence” being produced in an adversarial legal
proceeding. So, tweaking the law or completely overhauling it won’t make much difference unless we change the culture of Family Courts.

Here are eight things we should do to improve outcomes for children caught between battling parents.

1. Discourage litigation at all costs. Take away the battle field. 2. Encourage mediation at all costs—including protective mediation for victims of domestic violence. 3. Provide mandatory parent education for parents having parenting disputes. 4. Provide parent Coordinators to assist parents in the implementation of their parenting plans to reduce re-litigation. 5. Provide financial counseling for parents. Financial problems are the number one source of conflict between parents. 6. Provide full access to drug, alcohol and domestic violence treatment programs. 7. Provide government funding for these programs. Virtually no parent that needs the help of Family Court can afford these services. 8. Change the way we communicate. Banish the use of the terms custody and visitation. Speak of parental responsibilities—physical and legal.

In summary, a presumption of shared parenting makes no logical, legal or evidentiary sense if it is to be applied to every person who makes a baby, regardless of the circumstances. The Legislature should be supporting programs that encourage and enable parents to reach agreements about their children. A-330 goes in the other direction by requiring each parent to allege and prove the worst about the other parent. The adversarial litigation system is completely unsuitable to the resolution of disputes between parents and A-330 makes it even worse. Finally, the entire positive law of custody in New York should be re-written in plain English. Actually, the entire Family Court Act could use a plain English re-write. When the law was first passed in 1962, it contained about 55,000 words. It now contains over 250,000 words! If only we could make the process five times better.

The full Hugo quote is: “Greater than the tread of mighty armies is an idea whose time has come,” which appeared in Histoire d’un Crime. Written by Hugo in 1852, while in self-imposed exile on the English Isle of Jersey, this work was a day-by-day account of the 1852 coup of Charles Louis-Bonaparte, third son of Napoleon’s brother Louis. Charles would declare himself Napoleon III and institute the Second Empire.

“For What It’s Worth,” apologies to Stephen Stills.

One of the most famous one-night-stand cases involved a man and a woman cruising down the California Costal Highway in Marin County in their convertibles. They caught each other’s eye and a few miles down the road they pulled into a motel. Nine months later the product of this afternoon delight arrived and soon thereafter the custody battle ensued.