Joint Custody of Children Following Divorce

H. JAY FOLBERG*
and
MARVA GRAHAM**

The topic of joint custody has provoked both skepticism and praise, but little legal analysis. This article analyzes the law of joint custody as well as its history, terminology and use. The expressed concerns of attorneys, judges, and others are critically examined before suggesting broad criteria for joint custody and advocating that it be decreed more often.

INTRODUCTION

Increasing numbers of parents are attempting to continue their joint role as parents following divorce by exercising joint custody over their children.[1] The subject has received considerable attention in the press[2] in social science journals,[3] and to a lesser extent,

* Professor of law, The Lewis and Clark Law School. B.A. 1963, San Francisco State College; J.D. 1968, University of California, Berkeley.
** Third year law student, The Lewis and Clark Law School. B.A. 1956, Lewis and Clark College; M.A.T. 1963, Reed College.

[1] Divorced parents who formally obtain joint custody remain a relatively small minority, but some predict they will eventually become the majority. *See* note 248 and accompanying text, *infra*.

[2] Baum, *The Best of Both Parents*, N.Y. Times, Oct. 31, 1976 (Magazine), at 44-48; Dullea, *Joint Custody: Is Sharing the Child a Dangerous Idea?* N.Y. Times, May 24, 1976, at 24, col. 1; Fager, *Co-parenting: Sharing the Children of Divorce*, San Francisco Bay Guardian, Feb. 3, 1977, at 7, col. 1; Holly, *Joint Custody: The New Haven Plan*, Ms. MAGAZINE, Sept. 1976, at 70-71; Huerta, *Joint Custody: Co-Parenting After Divorce*, Los Angeles Times, Jan. 30, 1979, Part IV at 1, col. 2; Kellogg, *Joint Custody*, NEWSWEEK, Jan. 24, 1977, at 56; Klemesrud, *Parents Move, Children Don't Under Pact*, The Oregonian (Portland, Ore.), Feb. 20, 1978, § C, at 1, col. 3; Levine, *Parents Agree to Joint Custody*, The Christian Science Monitor, May 5, 1975, at 18; Molinoff, *For this Father, Joint Custody is Tough, Satisfying*, Capital Times (Madison, Wisc.), Oct. 30, 1975, at 33, col. 1; Molinoff, *Joint Custody: Victory for All?*, N.Y.

in legal publications.[4] There are several new popular books advocating joint custody[5] and counseling workshops and interdisciplinary conferences now frequently address the topic.[6] Three states have recently passed legislation that explicitly recognizes joint custody.[7] Additional states are considering bills supporting the concept of joint custody.[8]

Times, March 6, 1977, at § 22, at 18, col. 1; Molinoff, *After Divorce, Give Them a Father, Too*, Newsday, Oct. 5, 1975; Reiner, *Joint Custody Lets Parents be Parents*, Oregon Statesman and Capital J., (Salem, Ore.), April 23, 1978, at E-1, col. 5; *One Child, Two Homes*, TIME, Jan. 29, 1979, at 61; Ware, *Joint Custody: One Way to End the War*, NEW WEST, Feb. 26, 1979, at 42.

[3] Cox & Cease, *Joint Custody*, 1 FAM. ADVOCATE 10 (1978); Eder, *Shared Custody of Children: An Idea Whose Time Has Come*, CONCILIATION COURTS REV., June 1978, at 23; Grote & Weinstein, *Joint Custody: A Viable and Ideal Alternative*, 1 J. DIVORCE 43 (1977); Gaddis, *Joint Custody of Children: A Divorce Decision-Making Alternative*, CONCILIATION COURTS REV., June 1978, at 17; Roman, *The Disposable Parent*, CONCILIATION COURTS REV., Dec. 1977, at 1; Roman & Haddad, *The Case For Joint Custody*, PSYCH. TODAY, Sept. 1978, at 96; Stack, *Who Owns the Child?* 23 SOC. PROB. 505 (1976); Woolley, *Shared Custody*, 1 FAM. ADVOCATE 6 (1978).

[4] A comprehensive article, *Joint Custody—A Viable Alternative*, by the respected scholarly team of Henry H. Foster and Doris Jonas Freed was serialized in three parts by the New York Law Journal: Nov. 9, 1978, Nov. 24, 1978, Dec. 22, 1978, *condensed in* TRIAL, May 1979, at 26; the initial issue of the FAM. ADVOCATE, a journal by the ABA Family Law Section (Summer 1978) featured the topic "Joint Custody" and contained a number of articles on the subject, which are referred to individually herein. *See also* Ramey, Stender & Smaller, *Joint Custody: Are Two Homes Better Than One?* 8 GOLDEN GATE U.L. REV. 559 (1979); Brah, *Joint Custody*, 67 KY. L.J. 271 (1979).

[5] *See* M. ROMAN & W. HADDAD, THE DISPOSABLE PARENT (1978). The forceful advocacy of Roman and Haddad has provoked considerable discussion and comment. *See also* M. GALPER, CO-PARENTING: A SOURCE BOOK FOR THE SEPARATED OR DIVORCED FAMILY (1978); R. CASSIDY, WHAT EVERY MAN SHOULD KNOW ABOUT DIVORCE (1977). For a most helpful comprehensive treatment, *see* P. WOOLLEY, THE CUSTODY HANDBOOK (1979).

[6] 1978 Annual Conference, Association of Family Conciliation Courts, Vancouver, British Columbia, Canada, Workshop, Joint Custody (May 20, 1978); Conference of the Association of Conciliation Courts, Ft. Lauderdale, Fla., Joint Custody Workshop (Dec. 7-9, 1978); Workshop on Joint Custody sponsored by Washington Association of Family Courts and the Oregon Association of Conciliation Courts, in Kelso Washington (October 14, 1977); Panel on Joint Custody of Children, American Orthopsychiatric Association Annual Meeting, in San Franscisco, Calif. (March 27-31, 1978); Annual Meeting of National Council on Family Relations, Philadelphia, Pa. (Oct. 19-22, 1978).

[7] OR. REV. STAT. § 107.105 (amended 1977); WIS. STAT. ANN. § 247.24 (amended 1977) (West Cum. Supp. 1977-78); IOWA CODE ANN. § 598.21 (amended 1977)(West 1979).

[8] As of this writing, joint custody bills are being considered in Michigan (S.B. 1976), California (S.B. 477 and A.B. 1480) and Massachusetts (House Bills 1617, 2387, 2394 and 2411). Some of these bills simply authorize joint custody, others

Nevertheless, there is significant opposition to joint custody among members of the legal profession. Attorneys may rebuff clients who wish to try joint custody, and judges often refuse to award it.[9] This opposition ignores research findings documenting the importance of post-divorce cooperation and involvement of both parents. There is also evidence that sole custody awards often result in substantial problems for children, parents and the legal system. Joint custody, however, is an issue attorneys and judges will have to face with increasing frequency.

I. Custody Terms

Both the forms of custody following divorce and the terms which describe them are vague and overlapping. The lack of standard definitions and the courts' tendency to use certain terms interchangeably[10] have created confusion. Legal periodicals reporting custody cases at times have augmented the confusion by categorizing a case in one area of custody with headlines applicable to another category.[11] Because of this lack of definitional clarity, arguments that might validly be advanced against one form of custody are sometimes used to discourage a different custody form. This article, therefore, discusses and defines at the outset common custody arrangements and indicates judicial attitudes toward each form. The four forms of custody discussed here are sole custody, divided custody, split custody, and joint custody.

A. Sole Custody

The most commonly approved form of custody upon dissolution is an award of sole custody to one parent with visitation

---

would establish it as a preference or create a presumption of joint custody. In Oregon, where joint custody is now explicitly allowed by statute, legislation is pending that would establish a presumption for joint custody. (HB 2538) In answers received from 45 states to the author's survey of pending legislation, it was apparent that confusion exists as to what joint custody means. For that reason the survey results may be inaccurate.

[9] The appropriateness of using words such as "award" in "custody" decrees is questionable, but they are used here for introductory convenience. There is need to develop new terms. *See, e.g.*, Elkin, *The Language of Family Law is the Language of Criminal Law*, Conciliation Courts Rev., Sept. 1975, at iii.

[10] *See, e.g.*, Kilgore v. Kilgore, 54 Ala. App. 336, 308 So.2d 249 (1975) where terms "split", "divided" and "alternating" are used interchangeably to describe one custody situation,

[11] *See, e.g.*, 3 Fam. L. Rep. (BNA) 2678 (1977) where *Roth v. Roth*, an alternating custody case, is headlined as "Joint Custody."

rights to the non-custodial parent.[12] The non-custodian, by informal agreement, may have a voice in important decisions affecting the child, but ultimate control and legal responsibility rest with the custodial parent.[13]

B. Divided Custody

Divided custody allows each parent to have the child for a part of the year. This form of custody may also be referred to as alternating custody. Each parent has reciprocal visitation rights under this arrangement, and each exercises control over the child while the child resides in his or her custody.[14]

Although courts routinely divided custody upon parental request until the beginning of the twentieth century, divided custody has generally been disapproved in this century.[15] Courts have based their disapproval primarily on the theory that shifting a child from home to home results in no real home, no stable environment and no permanent associations for the child.[16] Courts also disapprove of divided custody because they believe that it creates confusion for the child as to who has authority, which leads to disciplinary problems.[17]

Despite the generally negative attitude toward divided custody, appellate courts have upheld such awards when the facts of a particular case have warranted a division of custody.[18] Courts sometimes have found the disadvantages of divided custody did not outweigh the child's right to the love and affection of both

---

[12] *See* Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Interminancy*, L. & CONTEMP. PROB., Summer 1975, at 233; Cox & Cease, *Joint Custody*, 1 FAM. ADVOCATE 10 (1978).

[13] *See also* note 12 *supra*. 1 A. LINDE, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS, § 14 (1967).

[14] *See* note 13 *supra*.

[15] Cases discussing "divided" and "alternating" custody are collected in the following annotations: Annot., 92 A.L.R.2d 695 (1963); 27B C.J.S.2d *Divorce* § 308D (1959); 24 AM. JUR.2d *Divorce and Separation* § 799 (1966).

[16] *See, e.g.*, Smith v. Smith, 257 Iowa 584, 133 N.W.2d 677 (1965). Stability and continuity of relationship as the most important elements in determining the best interests and welfare of the child were forcefully supported by the publication in 1973 of the influential work BEYOND THE BEST INTEREST OF THE CHILD, *infra* note 60. Quotations from this work appear in a number of reported cases, *see, e.g.*, Ellenwood and Ellenwood, 20 Or. App. 486, 491, 532 P.2d 259, 262 (1975).

[17] *See, e.g.*, Phillips v. Phillips, 153 Fla. 133, 13 So.2d 922 (1943).

[18] *See, e.g.*, Note, *Divided Custody of Children After Their Parents Divorce*, 8 J. FAM. L. 58 (1968).

parents.[19] Courts most often award divided custody which provides for residence with one parent during the school year and the other during vacations.[20] When parents' homes are widely separated, making frequent visits impractical, courts have sometimes approved divided custody.[21] On the other hand, some courts have justified divided custody on grounds that both parents live in the same area. In these cases, the courts view the proximity as minimizing the strains that divided custody might place on the children.[22]

The ages of the children have also influenced the courts. Courts generally maintain that young children are best left in the sole custody of one parent.[23] When parents are able to agree to divide custody, however, and the agreement is incorporated into the divorce decree, an appellate court may refuse to modify custody if there is evidence that the young child is enjoying good health, making good progress, and benefiting from a continuing relationship with both parents.[24]

There is no clear line between "sole" custody with liberal visitation rights and "divided" custody.[25] Courts unwilling to countenance divided custody may reconcile the goal of stability for the child with the goal of association with both parents by upholding a non-custodial parent's right to extensive visitation.[26] Thus, in some cases, the only significant difference between two forms of custody may be the labels placed on them.

---

[19] *See, e.g.*, Mueller v. Muller, 188 Va. 259, 49 S.E.2d 349 (1948).

[20] *See, e.g.*, Reynolds v. Reynolds, 45 Wash.2d 394, 275 P.2d 421 (1954).

[21] *See, e.g.*, Maxwell v. Maxwell, 351 S.W.2d 192 (Ky. 1961).

[22] *See, e.g.*, Grant v. Grant, 39 Tenn. App. 539, 286 S.W.2d 349 (1954).

[23] *But see* Lutker v. Lutker, 230 S.W.2d 177 (Mo. Ct. App. 1950) where the court affirmed an award of divided custody of a two-year old noting that both parents were devoted to the child, both homes were suitable for the child's growth, and the homes were not far from one another.

[24] *See* Flanagan v. Flanagan, 195 Or. 611, 247 P.2d 212 (1952). However, where it appeared that the agreement was reached during a period of great turmoil and where the wife had not been represented by counsel, the appellate court modified divided custody and gave sole custody to the mother in Whitlow v. Whitlow, 25 Or. App. 765, 550 P.2d 1404 (1976).

The *Flanagan* decision has been criticized for upholding divided custody where there was evidence that the child was upset by the alteration between homes. Note, *supra* note 18 at 64.

[25] Because parents can exercise great leeway over dividing a child's time under a traditional "sole" custody order, some have questioned the need for a "joint" custody order, *infra* Section VIII(G).

[26] The liberal visitation rights upheld in In re Marriage of Powers, 527 S.W.2d 949 (Mo. Ct. App. 1975) are discussed in 42 Mo. L. Rev. 136 (1977).

C. Split Custody

Yet another custody form is to award custody of one or more of the children to one parent and the remaining children to the other.[27] The policy of the law has generally been to keep siblings together because "A family unit is struck a vital blow when parents divorce; it is struck an additional one when children are separated from each other."[28] Courts, therefore, refuse to grant split custody absent compelling reasons.

D. Joint Custody

Finally, courts can award custody to the parents jointly.[29] The term "joint custody" as used here goes beyond the concept of "divided custody," although the terms are sometimes used interchangeably.[30] Joint custody is also referred to as joint parenting, co-custody, shared custody, or co-parenting.[31] Its distinguishing

---

[27] 1 A. LINDE, *supra* note 13.

[28] Ebert v. Ebert, 38 N.Y.2d 700, 704, 346 N.E.2d 240, 243 (1976). *But see* In re Hagge's Marriage, 234 N.W.2d 138 (Iowa 1975) which affirmed a division of the siblings with three boys to live with their father while their sister was placed in the mother's custody.

[29] Joint custody has, however, frequently been disapproved by courts. *See* discussion in Section VII *infra*.

[30] *See* Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody and Excessive Modification*, 65 CALIF. L. REV. 978, 1009 (1977).

At a conference on current developments in child custody held in New York City, Justice Felice Shea observed that often counsel do not make it clear what custody form they are asking for. She asked that the concepts of shared decisional power and equal custodial time be kept separate. 5 FAM. L. REP. (BNA) 2144 (1978).

[31] The various terms in use to describe this type of custody arrangement are listed in M. GALPER, *supra* note 5 at 16 (1978). Professor Carol Bruch uses the term "dual parenting" in a provocative article which nicely separates legal custody from a proposed obligation of each parent to share time with the child and the imposition of sanctions for failure to do so. Bruch, *Making Visitation Work: Dual Parenting Orders*, 1 FAM. ADVOCATE 22 (1978). Another term is suggested by the title of a recent report that asks for public hearings in the state of New York on joint custody and related topics, W. HADDAD & M. ROMAN, NO-FAULT CUSTODY, SPECIAL REPORT TO HONORABLE SPEAKER STANLEY STEINGUT, THE ASSEMBLY, STATE OF NEW YORK, (July 1978). Yet another term is proposed by Gaddis & Bintliff, *Concurrent Custody A Means of Continuing Parental Responsibility After Dissolution*, AFLC JOINT CUSTODY HANDBOOK at A11 (1979). They would use the term "concurrent custody" as a "general term which encompasses several varying arrangements, each of which legally affirms the continued parental role involvement in the upbringing of children by both parents after separation or divorce." Joint custody is seen as one variety of "concurrent cus-

feature is that both parents retain legal responsibility and authority for the care and control of the child, much as in an intact family.[32] While in divided custody only the parent with physical custody retains these incidents, "joint custody" upon divorce is defined as an arrangement in which both parties have equal rights and responsibilities to the minor child and neither party's rights are superior."[33] In New York, where the concept of joint custody has been more extensively developed by case law than in other states,[34] a trial court stated that "joint custody means giving to both parents an equal voice in the children's education, upbringing and general welfare."[35]

Disagreement exists among writers as to the proportionate time arrangement required for joint custody. Some writers have suggested that the term "joint custody" should be reserved for near equal time arrangements,[36] others have pointed to the flexibility that joint custody allows as one of its straongest attributes.[37] Other authors view the distinguishing trait of joint custody as allowing each parent to interact with his or her child in everyday situations rather than "visit" them.[38] In some states, notably Cal-

---

tody". Although each of the alternatives has some merit we have chosen to continue using the term joint custody in this Article rather than further proliferate the literature and confound research by adopting still another phrase. Cases and statutes most frequently use the term joint custody and though its meaning may vary, we will attempt to use it consistently and provide a definition of greater clarity.

[32] *See* Cox & Cease, *supra* note 12. *See also* Foster & Freed, *Joint Custody—A Viable Alternative*, N.Y.L.J., Nov. 9, 1978 at 4, col. 3, where the authors nicely distinguish joint authority for decisions from physical custody.

[33] WIS. STAT. ANN. § 247.24(b) (West Cum. Supp. 1978-79).

[34] *See* text accompanying notes 138-139, *infra*.

[35] Odette R. v. Douglas R., 91 Misc.2d 792, 795, 399 N.Y.S.2d 33, 36 (1977).

[36] M. ROMAN & W. HADDAD, *supra* note 5, at 175 state:

> . . . [J]oint custody is that post divorce custodial arrangement in which parents agree to equally share the authority for making all decisions that significantly affect the lives of their children. It is also that post divorce arrangement in which child care is split equally or, at the most discrepant, child care resolves itself into a two-to-one split.

[37] Grote & Weinstein, *supra* note 3, at 45 state:

> Joint custody simply does not mean that one person is to have a child for six months and the other for another six months, though it can mean a sharing of the living arrangements. Joint custody is more than an arrangement wherein one child resides with two parents—it is a flexible and open arrangement for living, sharing, and loving. No one model is adequate to describe the possibilities opened by joint custody arrangements to postdivorce families. . . ."

[38] Woolley, *supra* note 3 states:

ifornia, courts have frequently awarded joint legal custody to both parents but specifically assign physical custody to one parent.[39] The courts have been inclined in such cases to consider the parent who has physical custody as the "true" custodian of the child or children.[40]

II. Historical Perspective

A review of the history of custody decisions illustrates how the law concerning custody has changed to accommodate the needs of the day.[41] New theories of child development and changing family structures have led courts to reexamine their custody preferences.[42] This historical review is necessary to better understand why the current judicial bias against joint custody is ripe for scrutiny and change.

In England, the common law regarded children as their father's property.[43] The presumption that the father was "the person entitled by law to the custody of his child" was irrefutable.[44] The English rule of paternal preference does not appear to have been so strictly applied in nineteenth-century America.[45]

The dramatic social and economic upheavals of the nineteenth century reshaped the dynamics of the family. Industrialization changed a rural, agrarian society into an urban society. Accompanying the transition to wage labor was a separation of the home

---

> I have defined shared custody as any method that permits the children to grow up knowing and interacting with each parent in an everyday situation, whether that comes about by splitting the time on a fifty-fifty basis each week or by having the children go live with the other parent for several years or more.

[39] *See, e.g.*, Gudelj v. Gudelj, 41 Cal.2d 202, 259 P.2d 656 (1953).

[40] Commenting on such arrangements, one judge stated: "(J)oint or divided custody decrees generally give both parents legal responsibility for the child's care, but when physical or actual custody is lodged primarily in one parent, custody may be joint in name only." Dodd v. Dodd, 93 Misc.2d 641, 645, 403 N.Y.S.2d 401, 403 (1978).

[41] For a general history of custody *see* Foster & Freed, *Life with Father: 1978*, 11 Fam. L.Q. 321 (1978). *See also* Derdeyn, *Child Custody Contests in Historical Perspective*, 12 Am. J. Psych. 133 (1978).

[42] Foster and Freed trace the change in judicial attitudes which first uniformly favored fathers then shifted radically to a preference for mothers who, until quite recently, prevailed in at least 90% of the cases. Foster & Freed, *supra* note 41, at 3.

[43] Foster & Freed, *supra* note 32.

[44] King v. DeManneville, 102 Eng. Rep. 1054, 1055 (K.B. 1804). A noted exception and bellwether of later trends was the refusal of a court in 1817 to give the poet Percy Shelley custody of his children because of his "vicious and immoral atheistic beliefs." Shelley v. Westbrooke, 37 Eng. Rep. 850 (Ch. 1817).

[45] Mnookin, *supra* note 12, at 234. *But see*, Derdeyn *supra* note 41, at 1370.

and work place which placed fathers in factories and plants, while mothers generally remained at home as the primary nurturers of the children.[46] The specialization of parental function that the industrial revolution fostered helped create the concept of the nuclear family as the foundation of society.[47]

The nineteenth century also saw significant changes in the status of women and children. The early women's rights movement brought women enfranchisement, greater political power and laws granting women rights to own property rather than be property. Concurrently, the nineteenth century brought changes in the attitude of society towards children.[48] Society's acceptance of child development theories that viewed children as evolving human beings led to placing a higher value on the importance of maternal care, which undermined the paternal custody assumption.[49]

Consequently, the common law preference for fathers in custody disputes gave way to a preference for mothers as custodians, particularly of young children.[50] Most state courts, at one time or another, adopted a judicial presumption favoring mothers as custodians of their children.[51] Although early cases extolled the father-child relationship[52] the pendulum's swing in favor of moth-

---

[46] M. ROMAN & W. HADDAD, *supra* note 5, at 29-30.

[47] Stack, *supra* note 3, at 506.

[48] For a unique study that uses paintings and diaries to trace the origin of the modern family and the development of a concept of childhood *see* P. ARIES, CENTURIES OF CHILDHOOD (1962).

[49] Derdeyn, *supra* note 41, at 1371. Mnookih, *supra* note 12, at 234, reports that:

> in 1839 the English Parliament modified the absolute rule of paternal preference for legitimate children by passing the so-called Talfourd's Act, which gave a mother the right to custody of infants under the age of seven years, An Act to Amend the Law Relating to the Custody of Infants, 2 & 3 Vict. c. 54 (1839); and later for infants of any age. An Act to Amend the Law as to the Custody of Infants, 36 & 37 Vict. c. 12 (1873).

[50] The origin of the "tender years presumption" is also placed with the passage of Talfourd's Act in 1839, which permitted chancery to award custody to the mother if the children were less than seven years of age. Mnookin, *supra* note 12, at 234.

Although it has generally been agreed that preschool children are included, the age when the presumption ends is unclear. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 585 (1968).

[51] An extensive collection of cases containing a tender years presumption is cited in Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 432-33 (1975).

[52] *See, e.g.*, Magee v. Holland, 27 N.J.L. 86, 88-89 (1858):

ers elicited even more lyrical extremes of judicial bias.[53]

Judges also began to speak of the child's needs as the paramount consideration in awarding custody. The resulting best interests "test" was not so much a fixed formula as it was a general approach to custody decisions.[54] The "best interests of the child" has become the cornerstone of most state custody statutes.[55]

Later case law[56] and more recently state statutes[57] sought to

---

> Every father blessed with that natural affection which God, in His infinite wisdom and goodness, has implanted in the heart of man, that the care of his offspring may be a pleasure, rather than a burden, knows the value of those little offices which the young prattler can offer with filial affection.

[53] *See, e.g.*, Tuter v. Tuter, 120 S.W.2d 203, 205 (Mo. Ct. App. 1938): "There is but a twilight zone between a mother's love and the atmosphere of heaven, and all things being equal, no child should be deprived of that maternal influence unless it be shown there are special or extraordinary reasons for so doing." and Jenkins v. Jenkins, 173 Wis. 592, 181 N.W. 826, 827 (1921):

> For a boy of such tender years nothing can be an adequate substitute for mother love—for that constant ministration required during the period of nurture that only a mother can give because in her alone is duty swallowed up in desire; in her alone is service expressed in terms of love.

[54] The enunciation of the "best interests test" is usually credited to Justice Brewer in an 1881 Kansas decision which awarded custody of a 5-year old girl to her grandmother who had raised her rather than to her father. The judge wrote that though the father had a natural right to custody, the paramount consideration was the welfare of the child. Chapsky v. Wood, 26 Kan. 650 (1881).

[55] *See, e.g.*, MO. REV. STAT. § 452.375.

[56] *See, e.g.*, Tingen v. Tingen, 251 Or. 458, 459, 446 P.2d 185, 186 (1968) where the Oregon Supreme Court stated:

> In determining the best interests of a child in a custody dispute the court ought to consider all the relevant factors. These, as we see them would generally include: (1) the conduct of the parties; (2) the moral, emotional and physical fitness of the parties; (3) the comparative physical environments; (4) the emotional ties of the child to other family members; (5) the interest of the parties in, and attitude toward, the child; (6) the age, sex, and health of the child; (7) the desirability of continuing an existing relationship and environment; and (8) the preference of the child.

[57] *See, e.g.*, MINN. STAT. ANN. § 518.17 (West Cum. Supp. 1978):

> The best interests of the child means all relevant factors to be considered and evaluated by the court including:
>
> (a) The wishes of the child's parents or parents as to his custody;
>
> (b) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
>
> (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
>
> (d) The child's adjustment to his home, school, and community;

define the best interests approach by listing specific factors courts should consider in awarding custody. Although many statutes may direct that the factors be given equal weight,[58] courts appear to give their greatest attention to the child's need for stability and continuity of relationships and environment.[59] The interpretation of "stability and continuity" attributed to the influential book *Beyond The Best Interests Of The Child*[60] slowed acceptance of alternative forms of custody.[61]

Just as the early women's right movement influenced family structure and custody considerations, the contemporary equal rights movement has again altered the balance. The movement's emphasis on equality in the marketplace, greater independence for women to pursue professional goals and less sexual stereotyping has led to greater participation by fathers in the parenting function in intact families.[62] With fathers more likely to have been involved in the day-to-day care of their children,[63] there is less reason to assume that, upon divorce, an award of custody to the mother will give the child greater "continuity and stability" than an award to the father.

While early research on child development stressed the maternal role, recent research has emphasized the importance of the role that fathers play in their children's development.[64] In the past courts usually granted an award of custody to the father only

---

(e) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

(f) The permanence, as a family unit, of the sting or proposed custodial home; and

(g) The mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

[58] *See, e.g.*, OR. REV. STAT. § 107.137 which lists relevant factors and then directs: "The best interests and welfare of the child in a custody matter shall not be determined by isolating any one of the relevant factors. . . ."

[59] *See, e.g.*, Reflow v. Reflow, 24 Or. App. 365, 373, 545 P.2d 894, 899 (1976) "[C]ontinuity in one unchanging family environment, especially for young children, is probably the most important single element necessary to a child's wholesome development."

[60] J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973) [herenafter cited as GOLDSTEIN, FREUD & SOLNIT].

[61] *See* Section VIII(c) *infra*.

[62] Quinn, *Fathers Cry for Custody*, JURIS DOCTOR, May 1976, at 42.

[63] For one account of family switching roles in child care and household responsibilities *see* J. MCCREADY, KITCHEN SINK PAPERS (1975); *see generally* M. YOUNG & P. WILLMOT, THE SYMMETRICAL FAMILY (1973).

[64] Recent research is summarized in Roth, *supra* note 51, at 448-57.

on a showing that the mother was unfit.[65] More recently, courts have indicated a willingness to award custody to fathers when the facts of the case appear to make such an award appropriate.[66]

Fathers, perhaps encouraged by what they perceive as a more friendly judicial climate, are seeking custody in greater numbers.[67] They are also challenging the constitutionality of the tender years presumption[68] and other perceived obstacles to fair judicial treatment in custody decisions.[69] Fathers are uniting to

---

[65] Oster, *Custody Proceedings: A Study of Vague and Indefinite Standards,* 5 J. FAM. L. 21 (1965).

[66] The award of his two children to Dr. Lee Salk by a New York Court in 1975 on a finding not that his wife was unfit but that he was "better fit" was seen as a breakthrough for fathers in Solomon, *The Fathers' Revolution in Custody Cases,* TRIAL, Oct. 1977, at 33.

[67] *See,* Quinn, *supra* note 62. More than 1.5 million single parent homes are now headed by fathers, though it is not known what number of these are a result of divorce custody decrees. 5 FAM. L. REP. (BNA) 2143 (Dec. 19, 1978). Judicial attitudes may be improving, but in interviews conducted for her doctoral dissertation, Dr. Jill Sanford found judges held a continuing bias for mothers in custody disputes and a suspicion of motives of fathers who sought custody, e.g. saving child support. Fathers seeking custody were seen as "selfish" while mothers not seeking custody were seen as "abandoning their children." Dr. Sanford concluded that men wanting custody would have "to somehow prove sincerity, in addition to proving ability to parent." Kapner & Frumkes, *The Trial of a Custody Conflict,* FLA. B.J. March 1978, at 174.

[68] In State *ex rel.* Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (1973) for example, a New York court rejected the tender years doctrine as sex discrimination. Noting Supreme Court decisions that find different treatment based on sex "suspect" and subject to the strictest level of judicial scrutiny, the *Watts* court reasoned that the tender years presumption could stand only if it served a compelling state interest. The court acknowledged that the best interests of the child might well be a compelling state interest. But taking judicial notice of contemporary thought about child development that rejects the stereotyped presumption that children of tender years belong with the mother, the court concluded that the necessary nexus between a compelling state interest and the tender years presumption was not present and, therefore, different treatment based on sex was unconstitutional. *Contra,* Gordon v. Gordon, 577 P.2d 1271 (Okla. Sup. Ct. 1978), *cert. denied,* 99 S.Ct. 185 (1978).

[69] The Texas Fathers for Equal Rights recently brought an unsuccessful class action suit against all the district court judges in the state on a theory that Texas law invades their constitutionally protected parental rights by failing to allow joint custody of children post-divorce, where joint custody is in the children's best interests. The federal district court found the plaintiffs lacked standing because they failed to show that the alleged defect in the law caused them injury. In *dictum* the court stated that Texas law does not prohibit joint custodies where parents agree to joint custodies and that a compelling interest in avoiding undue interference by the state in family matters justifies prohibiting joint custody where it is opposed by one parent. *Shelton v. Chrisman,* Civil Action No. CA-3-75-1268-D, Jan. 31, 1979 (N.D. Tex. 1979).

support each other's custody battles and to press for legislative changes.[70]

Convenient presumptions, first for the father, then for the mother, are no longer available as a short cut to a court in arriving at the most appropriate custody determination. When parents disagree about custody, judges are now in the perplexing bind of trying to predict, with limited information and no existing consensus, which of two fit parents would best guide a child toward adulthood.[71]

There is scant data available documenting the effect of divorce on children,[72] and existing psychological theories are not reliable for purposes of prediction.[73] Longitudinal research on the empirical effects of different custody patterns is sadly rudimentary and provides few predictative tools,[74] with one notable exception: *researchers are finding that the key variable affecting satisfactory adjustment of children following divorce is the extent of continuing involvement by both parents in child rearing.*[75] *Similarly, divorces having the least detrimental effect on the normal development of children are those in which the parents are able to cooperate in their continuing parental roles.*[76] One researcher states the point more affirmatively: if parental cooperation can be freed from the marital tension that may have adversely effected the child, then the divorce may present a positive develop-

---

[70] Fathers groups have supported efforts to pass measures that would "*encourage*" joint custody. Although three states have recently passed bills that explicitly *recognize* joint custody, *see* notes 125-135 *infra*, no state has yet accepted the stronger language advocated by some fathers' groups.

[71] For an insightful and searching analysis of this problem, *see* Mnookin, *supra* note 12, at 226.

[72] Schlesinger, *Children and Divorce: A Selected Review*, CONCILIATION COURTS REV., Sept. 1977, at 36.

[73] *See* Mnookin, *supra* note 12, at 229, 258-60.

[74] "At this point we simply do not know what difference it makes to children of different ages to be subjected to any of the wide variety of possible arrangements." R. WEISS, MARITAL SEPARATION 171 (1975).

[75] *See* Hetherington, Cox & Cox, *Divorced Fathers*, 25 FAM. COORDINATOR 417, 425-26 (1976). *See also* Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Child in Later Latency*, 46 AMER. J. ORTHOPSYCH. 256 (1976); Wallerstein & Kelley, *The Effects of Parental Divorce: Experiences of the Preschool Child*, 14 J. AMER. ACAD. CHILD PSYCH. 600 (1975); Wallerstein & Kelly, *The Effects of Paternal Divorce: The Adolesant Experience*, in 3 THE CHILD IN HIS FAMILY (E. Anthony and C. Koupernik eds. 1974); and Wallerstein, *Children Who Cope in Spite of Divorce*, 1 FAM. ADVOCATE 2 (1978).

[76] *See* Jones, *The Impact of Divorce on Children*, CONCILIATION COURTS Rev., Dec. 1977, at 28.

mental influence.[77]

Parental cooperation can not be easily ordered or decreed, but it can be judicially encouraged and endorsed.[78] "Winner take all" custody decisions tend to exacerbate parental differences[79] and cause predictable post divorce disputes as parents try to strike back and get the last word.[80] Judges,[81] attorneys,[82] and legal scholars[83] are recognizing that parents themselves can best decide the most appropriate arrangement for the care and custody of their children upon divorce. Court connected counseling,[84] mediation,[85] and arbitration[86] are increasingly available to help families make their own decisions about child custody.

III. Joint Custody And Control During Marriage

The least disruptive custody arrangement following divorce is likely to be the one most resembling the custody and control

---

[77] Cohen, Comments on Current Divorce Research, presented at Annual Meeting, American Assoc. of Marriage and Family Counselors, San Francisco (1977). *See* Schlesinger, *supra* note 72, at 39.

[78] *See,* Folberg, *Counseling in the Courts—A Better Way to Resolve Family Disputes,* Judge's J., Fall 1975, at 74.

[79] *See generally* J. Noble & W. Noble, The Custody Trap 160 (1975).

[80] In commenting about the adverse effect of repeated post-divorce custody motions, one judge commented "the chances of a child developing emotional problems as they [sic] grow up increases in direct proportion to the thickness of the file involved in a divorce case." King v. King, 10 Or. App. 324, 328, 500 P.2d 267, 269 (1972).

[81] *See* Judge Lindslay, *Custody Procedures, Battlefield or Peace Conference,* Conciliation Courts Rev., Sept. 1975, at 1. *See also* Cantor & Ferguson, *Family Counseling in the Conciliation Court: An Alternative to Custody Litigation,* Conciliation Courts Rev., Sept. 1976, at 1.

[82] *See* Gaddis, *Divorce Decision Making: Alternatives to Litigation,* Conciliation Courts Rev., June 1978, at 43. *See also* O. Coogler, Structured Mediation in Divorce Settlement (1978), in which the author, describes in detail a divorce mediation process, including suggested *forms* for joint custody.

[83] R. Mnookin, *supra* note 71, at 287-89.

[84] *See,* Folberg, *Facilitating Agreement—The Role of Counseling in the Courts,* Conciliation Courts Rev., Dec. 1974, at 17. S.B. 477, pending in the California legislature, provides for consultation "with the conciliation court for the purpose of assisting the parties to formulate a plan for the implementation of the joint custody order . . ."

[85] *See* Milne, *Custody of Children in a Divorce Process: A Family Self-Determination Model* Conciliation Courts Rev., Dec. 1978, at 1.

[86] *See* Holman & Noland, *Agreement and Arbitration: Relief to Over-Litigation in Domestic Relations Disputes in Washington,* 12 Willamette L. J. 527 (1976). *See* American Arbitration Association, Family Dispute Services (1972). This pamphlet explains the AAA's process in marital and custody disputes and is available from the AAA, 140 W. 51 St., New York, N.Y.

exercised before divorce. Custody and control between parents during marriage has received little judicial scrutiny because courts and legislatures have been reluctant to intercede in such matters during marriage.[87] Traditionally the intact family has been viewed as a self-governing unit,[88] with parental rights and obligations vested primarily in the father.[89] The modern statutory trend has been to equalize parental rights. Today in the intact family the father and mother generally have joint and equal rights to the custody, care, and services of their children.[90]

Parental "custody" during marriage is seldom defined in statutes or cases.[91] Where it is defined, it embraces a bundle of rights and obligations.[92] The parents have an obligation to protect and care for their children,[93] to control and discipline their children[94] to provide necessary medical care,[95] and to make decisions regard-

---

[87] *See, e.g.*, People *ex rel* Sisson v. Sission, 271 N.Y. 285, 2 N.E.2d 660 (1936); Kilgore v. Kilgore, 268 Ala. 475, 107 So.2d 885 (1958).

[88] *See, e.g.*, Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925).

[89] *See, e.g.*, Pyle v. Waechter, 202 Iowa 695, 210 N.W. 926 (1926); Magee v. Holland, 27 N.J.L. 86 (1858).

[90] The following are typical of modern statutes: "The father and mother are joint natural guardians of their minor children and have equal powers and duties and neither parent has any right superior to the right of the other concerning the custody of their children." MD. CODE ANN. § 1, art. 72A; and ". . . The parents have equal powers rights and duties concerning the minor." ILL. ANN. STAT. ch. 3 § 132.

Though most states do not use the term "joint custody" in setting forth the rights of the parents to the care of their children in the intact family, the Kentucky statutes use that term: "The father and mother shall have the joint custody, nurture and education of their minor children . . ." KY. REV. STAT. § 405.021(1). *See generally* Foster & Freed, *supra* note 40 at 321 (Updated 12 FAM. L. QUART. iii (1978)).

[91] H. CLARK, *supra* note 50, § 17.2 at 573 (1968).

[92] Based on California statutes, Justice Traynor defined custody as follows: "Custody embraces the sum of parental rights with respect to the rearing of a child, including its care. It includes the right to the child's services and earnings . . . and the right to direct his activities and make decisions regarding his care and control, education, health, and religion." Burge v. City of San Francisco, 41 Cal.2d 608, 617, 262 P.2d 6, 12 (1953) (citations omitted).

[93] *See generally* Annot., 36 A.L.R. 866 (1925). An early case describes the obligations as follows: "The duty to maintain and protect [one's children], is a principle of natural law." People *ex rel.* O'Connell v. Turner, 55 Ill. 280, 284 (1870).

[94] *See* Turner v. Turner, 167 Cal. App.2d 636, 642, 334 P.2d 1011, 1015 (2d Dist. 1959), where it was stated: "The parent has authority to control the child, and to administer restraint and punishment, in order to compel obedience to reasonable and necessary directions." (citations omitted).

[95] *See generally* Annot., 100 A.L.R.2d 483 § 6 (1965). *See also* Singleton v. State, 33 Ala. App. 536, 35 So.2d 375 (1948).

ing the education and religious training of their children.[96] The authority and responsibility regarding children are generally not differentiated between the parents.[97] Although fathers were primarily responsible for supporting children at common law, modern case law and statutes have tended to make the parental support obligation joint and several.[97.1] Reciprocally, the parents jointly have a right to share the childrens' services and earning.[98] These rights are not unrestricted. The state will intervene in the affairs of an intact family unit to protect the children's welfare.[99] This state power is explained as stemming from the Crown's prerogative as *parens patriae* to protect subjects unable to protect themselves.[100]

V. JOINT CUSTODY FOLLOWING DIVORCE

When a marriage ends, the courts in all states have the task of determining the future care and custody of any minor children.[101]

---

[96] Typical judicial comments on this point include: "It is not seriously debatable that the parental right to guide one's child intellectually and religiously is a most substantial part of the liberty and freedom of the parent." Pierce v. Society of Sisters, 268 U.S. 510, 518 (1925) (citations omitted);. "As to the mother's failure to train the little girl in the faith of her fathers, that, too, is within the parents' sole control." People *ex rel.* Portnoy v. Strasser, 303 N.Y. 539, 544, 104, N.E.2d 895, 898 (1952) (citations omitted). *See also* In re Guardianship of Faust, 239 Miss. 299, 123 So.2d 218 (1960).

[97] Although it generally has been assumed that the rights of the parents are not differentiated in the intact family, both Australia and Great Britain have passed statutes which allow either parent to apply for orders regarding custodial rights during a marital relationship. Gaddis and Bintliff, *Concurrent Custody: A Means of Continuing Parental Responsibility After Dissolution,* AFLC JOINT CUSTODY HANDBOOK 15 (1979).

[97.1] *See,* Freed & Foster, 3 FAM. L. REP. (BNA) 4052 (1977), which notes that "since 1970, the majority of new state laws make support the obligation of both parents . . ." In regard to the support obligation an Illinois judge stated:

> In our opinion the support of a child is a joint and several obligation of both husband and wife . . . We recognize that this is contrary to the traditional view that support of a child is exclusively a husband's obligation . . . But with the emancipation of women and the change in times, we believe this view to be outmoded as indicated by more modern case law and statutory enactments.

Plant v. Plant, 20 Ill. App. 3d 5, 7-8, 312 N.E. 2d 847, 849-50 (1974).

[98] *See, e.g.,* "The mother of an unmarried minor child is entitled to its custody, services and earnings. The father of the child . . . is equally entitled to the custody, services and earnings of the unmarried minor." CAL. CIV. CODE § 197 (West Cum. Supp. 1979).

[99] *See, e.g.,* In re Rotkowitz, 175 Misc. 948, 25 N.Y.S.2d 624 (1941).

[100] H. CLARK, *supra* note 50, at 572.

At this point, they must sort out and assign the bundle of parental rights and obligations that have probably been undifferentiated in the intact family.[102] The belief that a court must award custody to one of two fit parents complicates the task.[103] In most states the mother and father, by statute, are equal contenders for custody of their children.[104] Even though the parent awarded "custody" usually has less than the full bundle of rights that existed in the intact family,[105] the non-custodial parent generally ceases to have authority to make significant decisions or to engage in long-range planning for the children.[106] The non-custodial parent retains authority over day-to-day decisions made during visitation periods while the children are in that parent's possession.[107]

A. De Facto Joint Custody

Following divorce, some parents informally agree to share their parental responsibility much as they did prior to divorce. Often this *de facto* joint custody comes as a gradual development.[108] The parents may then ask the court to give legal sanction to the ongoing arrangement. A circuit court judge in Oregon summed up what must be a common judicial experience:

> "We have had joint custody, I think, forever. Not because the Court thinks it is necessary to decree joint custody, but because parents went ahead despite what the decree said and did what was best . . . I've had a number of cases in court where they wanted a final stamp of approval, but for a number of years they had gone ahead and done

---

[101] One typical statutes statutes: "Whenever the court grants a decree of annulment or dissolution of marriage or of separation, it has power further to decree as follows: (a) For the future care and custody of the minor children of the marriage . . ." OR. REV. STAT. § 107.105.

[102] *See generally*, Mnookin, *supra* note 12, at 233.

[103] *See, e.g.*, Marriage of Pergament, 28 Or. App. 459, 462, 559 P.2d 942, 943 (1977) "When a family is split by dissolution of the marriage the child of necessity can be in custody of only one parent and the custodial parent is given the primary responsibility for rearing the child."

[104] *See* Foster & Freed, *supra* note 40, for discussion and chart of state statutes.

[105] H. CLARK, *supra* note 50, at 573.

[106] *See generally*, Annot. 66 A.L.R. 2d 1410 (1959) (Religion); Annot., 36 A.L.R. 3d 1093 (1969) (Education).

[107] Gaddis, *supra* note 3.

[108] Woolley, *supra* note 3, at 6 points out that in many instances teenagers are sent off to live with fathers after several years with mothers; she postulates that if these informal arrangements are included within joint custody statistics, joint custodies might comprise as much as 35 or 50 percent of custody arrangements.

what was best for the children and the best thing for themselves without paying too much attention to what the Court decree said."[109]

B. Stipulated Joint Custody

Joint custody is most often decreed when the parents present an executed separation agreement to the court for approval and include within their agreement a plan for joint parenting.[110] Just as there are no statistics on the number of families operating under some sort of *de facto* joint custody arrangement, there are no published statistics on the incidence of joint custody decrees. The number of reported appellate cases involving joint custody is not an accurate indicator of the incidence of joint custody decrees because the reported cases generally only arise from the litigation of continuing disagreements — the antithesis of cooperative parenting. One noted legal commentator indicates that joint custody currently constitutes a small minority of court approved custody arrangements but states that courts are under pressure from parents to permit "joint legal and physical custody, and they are awarding joint custody in a somewhat larger number of cases."[111] In a review of 1,922 divorce cases in San Diego, California, 72 couples (less than 4%) were listed in the court records as having been awarded joint custody[112] A recent survey in Portland, Oregon, where joint custody is recognized by statute, also found a 4% incident of joint custody.[113] Despite this evidence that joint custody decrees are rare, Harriet Whitman Lee, who worked with the Consumer' Group Legal Services in Berkeley, California, estimated that "more than half of the divorcing couples who come in . . . ask for joint custody these days."[114] Current statistical information on custody arrangements cannot document the number of joint custodial families, but the number is increasing as

---

[109] Judge Howard Blanding, Legal Aspects of Joint Custody, Panel Presentation, Conference on Joint Custody, Kelso, Washington October 14, 1977 (Transcript available from authors.)

[110] The prevalence of such agreements was seen as support for the feasibility of joint custody in Kubie, *Provisions For the Care of Children of Divorced Parents: A New Legal Instrument*, 73 YALE L. J. 1197 (1964).

[111] Bodenheimer, *supra* note 30, at 1010 (footnote omitted).

[112] Ahrons, The Coparental Divorce: Preliminary Research Findings and Policy Implications (Unpublished paper presented at the annual meeting of the National Council on Family Relations, Philadelphia, Pa., Oct. 19-22, 1978) at 6. The author found when the 144 persons were contacted that 26 did not have actual joint custody.

[113] OREGON BUREAU OF LABOR, DIVORCED WOMEN IN PORTLAND 7 (1978).

[114] *See* Dullea, *supra* note 2.

information about this custody alternative becomes more widespread,[115] and as court-connected counseling becomes more readily available.[116]

C. Court Ordered Joint Custody

In addition to *de facto* joint custody and to joint custody granted pursuant to a separation agreement, courts have occasionally awarded joint custody when neither party,[117] or only one party,[118] has requested it. Court ordered joint custody, however, is controversial. In *Braiman v. Braiman* Chief Judge Breitel of the Court of Appeals of New York made these comments about court ordered joint custody: "It is understandable . . . that joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in a mature civilized fashion . . . As a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, it can only enhance familial chaos."[119]

Yet, in at least one Michigan case, a court accepted the recommendation of the children's court appointed attorney to award joint custody, although neither parent had requested it.[120] The decision was based on the court's finding that neither parent alone was a sufficient parent. This case, thus, runs counter to the general prerequisite that before considering joint custody there must be a determination that both parents are fit.[121]

No state statutes specifically prohibit joint custody[122] but advocates perceive a need for a clear expression of public policy on joint custody. Legislative proposals have run the gamut from simply recognizing the legality of joint custody orders, to creating a strong presumption favoring joint custody.[123] To date, no state

---

[115] *See* text accompanying note 248, *infra.*

[116] In Connecticut a study of the disposition of 221 contested custody cases referred for mediation in fiscal year 1977-1978 showed that in 10% of the mediated cases the couples entered into a shared custody arrangement. Letter from Anthony Salius, Director, Superior Ct., Family Div., Conn., Feb. 15, 1979.

[117] *See* Odette R. v. Douglas R., 91 Misc.2d 792, 399 N.Y.S.2d 93 (1977).

[118] *See* Mayer v. Mayer, 150 N.J. Super. 556, 376 A.2d 214 (1977).

[119] 44 N.Y.2d 584, 586, 407 N.Y.S.2d 449, 451, 378 N.E.2d, 1019, 1021 (1978) (citation omitted).

[120] Stamper v. Stamper, 3 FAM. L. REP. (BNA) 2541 (Mich. Circuit Ct., Wayne County, June 16, 1977).

[121] *See* text accompanying notes 311, *infra.*

[122] Foster & Freed, *Joint Custody—A Viable Alternative*, N.Y.L.J., Nov. 24, 1978 at 4, col. 3.

[123] The four bills introduced in Massachusetts in 1979 illustrate the range of

has gone beyond a simple recognition of the court's authority to decree joint custody.

IV. Joint Custody Statutes*

A. Oregon

Some Oregon courts had been awarding joint custody prior to the passage in 1977 of legislation explicitly authorizing such action. These courts apparently found authority for these decrees within the wording of the then-existing post-dissolution custody statute.[124] Support to amend the statutes to explicitly recognize joint custody came from parents who had *de facto* joint custody and feared court disapproval, from fathers who felt that despite the supposed equality extended them in the custody statutes courts continued to favor mothers in custody awards, and from professionals who felt that joint custody should be clearly available in appropriate post-dissolution situations.[125]

Two bills providing for joint custody were introduced in Ore-

---

statutory possibilities. House bill 2387 requires the Court to recognize agreements reached by parents for joint legal custody and the shared or sole physical custody of the children;" House bill 2411 states "Joint custody shall be encouraged" and lists circumstances where such an award would be appropriate; House Bill 1617 states that "both parents shall share . . . custody and domicile . . . unless one or both are unfit or one or both abandon the children or voluntarily relinquish shared custody;" and House Bill 2394 directs that where parents have not made a stipulated agreement as to legal custody, "it shall be the presumption of the court . . . that legal custody . . . shall remain equally with and be equally shared by both parents."

* Following submission of this article, California Senate Bill 477 was signed by Governor Brown on July 3 and will become effective January 1, 1980. The bill, referred to in notes 175, 304, 329, 334 *infra* and elsewhere, amends § 4600 of the California Civil Code and adds a new section to create a conditional presumption in favor of joint custody. In addition, it authorizes joint custody on a discretionary basis in other circumstances and provides items to be considered in the modification of a joint custody decree. The California legislature specifically declared in the bill "that it is the public policy of this state to assure minor children of close and continuing contact with both parents after the parents have separated or dissolved their marriage."

[124] Prior to amendment Oregon law read, "Whenever the court grants a decree of annulment or dissolution of marriage or of separation, it has power further to decree as follows: (a) For the future care and custody of the minor children of the marriage as it may deem just and proper." Or. Rev. Stat. § 107.105.

[125] Minutes of the House Committee on Judiciary, March 18, 1977 and May 5, 1977; Minutes of the Senate Committee on the Judiciary, March 11, 1977 (Available from the Oregon Legislative Assembly, State Capitol, Salem, Oregon).

gon; one in the House of Representatives and one in the Senate.[126] The House bill, the stronger of the two measures, was tabled.[127] The Senate bill that became law, unlike the tabled House version, does not expressly encourage joint custody, nor does it set forth criteria for awarding it. It simply states that the court has the power to decree for the "future care and custody of the minor children of the marriage *by one party or jointly* as it may deem just and proper."[128] The statute does not specifically define joint custody.

B. Wisconsin

Wisconsin's new joint custody statute became effective on February 1, 1978. Unlike the Oregon statute, it offers a definition of joint custody. The definition adopts a joint custodial rights and responsibilities concept, stating: ". . . Joint custody under this paragraph means that both parties have equal rights and responsibilities to the minor child and neither party's rights are superior."[129]

---

[126] 1977 Or. Laws, Chapter 205 (Senate Bill 446, Or. Senate, Reg. Sess. (1977); House Bill 2532, Oregon Legislative Assembly, Reg. Sess. (1977).

[127] House Bill 2532, *supra* note 126, which failed to pass, stated "joint custody shall be encouraged" and included the following list of circumstances under one or more of which joint custody might be appropriate:

> (a) Where there exists an amicable relationship between the parties and they are able to communicate and generally agree with each other concerning joint decisions affecting the welfare of the child.
> (b) Where both parties are employed and the child would benefit by the assumption by both parties of joint responsibility for care and maintenance of the child.
> (c) Where the child is of such age or emotional development that the child would benefit from experiencing the advantages of joint custody.
> (d) The health or the conditions of one party are such that custody of the child by that party alone may be undesirable.
> (e) Where legal conditions exist such that the interests of the child would be best served by joint custody.
> (f) Where the parties live in sufficiently close proximity to each other that the child's life is not disrupted to any significant degree by joint custody.
> (g) Any other circumstances as the court may deem appropriate.

Bills similar to Oregon's HB 2532 have been defeated in California, Massachusetts, and Pennsylvania. *See* Foster & Freed, *Joint Custody—A Viable Alternative*, N.Y.L.J., Dec. 22, 1978 at 2, col. 5.

[128] OR. REV. STAT. § 107.105. (New language is italicized.) Other Oregon statutory provisions were amended to recognize the option of joint custody; e.g. ORE. REV. STAT. 107.095 now provides for support "by one party or jointly."

[129] WIS. STAT. ANN. § 247.24. (West Cum. Supp. 1978-79). This definition of

Prior to the passage of this bill, some Wisconsin judges and family court commissioners had read Wisconsin's custody statute as permitting joint custody, while others had found joint custody precluded.[130] The resulting inconsistencies in decisions among and within the counties led drafters to introduce a clarifying amendment.[131] As in the Oregon experience, part of the push for the legislation in Wisconsin came from the "grass roots."[132] A Family Court Counselor was quoted as saying that divorcing couples had become more assertive in seeking control over the custody determination and that "more parents were seeking joint custody in various forms, and they were facing discouragement from their lawyers, judges, family court commissioners and marriage counselors."[133]

C. *Iowa and Other States*

Iowa also amended its post-divorce custody statute to authorize an award of joint custody where justified in 1977. The statute now reads:

> "When a dissolution of marriage is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be justified. The order may include provision for joint custody of the children by the parties."[134]

Other states with post-divorce custody statutes that expressly accomodate joint custody include North Carolina and Maine.[135]

VI. Joint Custody Case Law

The question of whether a particular state statute provides authority for an award of custody jointly or whether the court must select from between two fit competing parents usually de-

---

joint custody is advocated by the authors of this article.

[130] Bondenhagen, Joint Custody of Children and the Wisconsin Divorce Reform Act of 1977 (Unpublished Paper, University of Wisconsin Law School, Dec. 13, 1977) at 22.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 23.

[134] Iowa Code Ann. § 598.21 (Supp. 1978-79).

[135] N.C. Gen. Stat. § 50-13.2(b) states: "An order for custody of a minor child may grant exclusive custody of such child to one person, agency, organization or institution, or, if clearly in the best interest of the child, provide for custody in two or more of the same. . . ." Me. Rev. Stat. title 18, § 217 states: "[The judge] may decree which parent shall have the exclusive care and custody of the person of such minor or he may apportion the care and custody of the said minor between the parents, as the good of the child may require."

pends on the court's interpretation of general statutory custody language. Few reported cases contain discussions of the propriety of joint custody awards under typical custody statutes. But in a recent New Jersey case, the court specifically addressed the question of whether the New Jersey post-divorce custody statute gave the court authority to order joint custody. The New Jersey statute provides that:

> "[T]he court may make such order as to the alimony or maintenance of the wife, and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just . . . ."[136]

In finding that this statute contained authority for joint custody, the court stated:

> "Clearly, this legislative grant of authority would include the authority to order "joint", "divided" or "split" custody. Assuming, therefore, that the circumstances of the parties and the nature of the case render an award of joint custody, "fit, reasonable and just," there is no reason why such an order should not be entered."[137]

In New York the statute does not expressly provide for joint custody. It merely provides that the divorce court "must give . . . direction, between the parties, for the custody . . . of any child of the parties, as . . . justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child."[138] New York courts have not hesitated to infer from this language the power to give custody jointly to both parents where appropriate. As one judge reasoned, "[t]his court has the power to award custody to either parent, and so can give such custody jointly to both parents."[139]

Missouri appellate courts, on the other hand, have held that Missouri's seemingly broader statute precludes joint custody. There the statutes direct that upon dissolution of a marriage:

---

[136] N.J. STAT. ANN. § 2A.

[137] Mayer v. Mayer, 150 N.J. Super. 556, 561, 376 A.2d 214, 217 (1977). Having found statutory authority to award joint custody, the court then considered whether it was appropriate under the facts of the case. Reasons given to support the joint custody award were (1) the children, ages 13 and 11, were not of such a young age that an award of joint custody would be detrimental to them; (2) the parents would be living one in New Jersey and one in Pittsburgh, Pennsylvania, and if sole custody were given the mother, visitation by the father would be difficult and expensive, and (3) the children were entitled to know, love and respect their father just as much as they know, love and respect their mother. *Id.* at 220.

[138] N.Y. DOM. REL. LAW § 240.

[139] Odette R. v. Douglas R., 91 Misc. 2d 792, 795, 399 N.Y.S.2d 93, 95 (1977).

> The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including: (1) The wishes of the child's parents as to his custody; (2) The wishes of a child as to his custodian; (3) The interaction and interrelationship of the child with his parents, his siblings, and any other person who may significantly affect the child's best interests; (4) The child's adjustment to his home, school, and community; and (5) The mental and physical health of all individuals involved.[140]

The court said that a 1949 Missouri case's statement that "In the very nature of things general custody must be awarded to one parent as against the other . . ."[141] correctly interpreted Missouri's custody laws.[142]

The research of Foster and Freed, indicates that "it is only in a minority of states that one finds decisions or rules which are prejudicial to the viable alternative of joint custody . . ."[143] One of the minority states is Vermont. In a recent Vermont Supreme Court decision, the court established a presumption that joint custody is against the best interests of the child. A finding of special circumstances indicating that such an award would be in the child's best interest is necessary to overcome this presumption.[144]

VII. Attitude of Attorneys, Judges and Behavioral Experts

Increased use of joint custody is inhibited not only by a lack of clear statutory authority and by some negative precedent in case law, but by a prevailing attitude of pessimism about its use by the professionals divorcing parents encounter. Parents who have sought joint custody have encountered attorneys with a negative attitude about joint custody, even when the couple has agreed on the custody issue.[145] One parent reported:

---

[140] Mo. Rev. Stat. § 452.375. This list of factors to be included in determining the best interests of the child was added by amendments in 1973. There has been a trend in the 1970's to articulate such factors in order to bring meaning to the nebulous "best interests of the child" standard for custody awards.

[141] Schumm v. Schumm, 223 S.W.2d 122, 125 (Mo. Ct. App. 1949).

[142] Cradic v. Cradic, 544 S.W.2d 605, 607 (Mo. Ct. App. 1976).

[143] Foster & Freed, *supra* note 127.

[144] Lumbra v. Lumbra, 394 A.2d 1139 (Sup. Ct. Vt. 1978). The negative attitude of some courts toward joint custody is not confined to the United States. The Ontario Court of Appeals denounced joint custody except in special cases in reversing an order of a trial court that had granted joint custody where each parent had sought sole custody. Lipovenko, *Court Overturns Order for Joint Custody of Child,* The Globe & Mail (Toronto, Canada) March 30, 1979.

[145] Woolley, *supra* note 3 at 9 states: "Not only are such arrangements not mentioned, they are usually specifically discouraged . . ."

> "My former husband and I waged a more difficult battle with the lawyers than we did with one another; they wanted one or the other parent named as custodian.[146]

In one popular handbook directed to parents contemplating or experiencing divorce, the attorney authors make the following statements against joint or divided custody:

> "Particularly for younger children, the instability of this sort of arrangement is bound to be upsetting. In early development, psychologists are agreed, routine has an important emotional function in a child's growth. The repeated uprooting from friends and schools is another source of disturbance. For a child faced with a situation that is already bewildering, this pillar-to-post life can be nothing more than an additional and possibly overwhelming burden."[147]

A "Shared - Custody Primer" recently printed in New West magazine warns fathers to "Interview prospective attorneys as to their views on shared custody before offering a retainer. Be prepared for opposition and even scorn."[148]

Perhaps one reason for the negative attitude of attorneys is their recognition that many judges frown on joint custody awards. Materials distributed at an orientation workshop for new judges sponsored by the Oregon Judicial College included the following admonition — even though the Oregon Legislature had recently passed legislation making the alternative of joint custody an express part of the law:[149]

> "Joint custody is an abomination to the Court, a nightmare to the children and a fruitful source of subsequent controversy."[150]

In a case before the Oregon Court of Appeals that did not directly concern joint custody, a comment in the dissent shows that the same arguments advanced against divided custody tend to be used against joint custody:

> "Joint custody is the least attractive alternative facing a court. It succeeds in dividing not only the legal responsibilities but also the practical aspects of child rearing and shifts the parental role in the eyes of the children on a constant basis."[151]

---

[146] Holly, *supra* note 2.

[147] R. MOFFETT & J. SCHERER, DEALING WITH DIVORCE 108-09 (1976).

[148] Ware, *Joint Custody: One Way to End the War*, NEW WEST, Feb. 26, 1979, at 44.

[149] *See* note 127 and accompanying text, *supra*.

[150] Oregon Judicial College, Judicial Orientation Workshop, Domestic Relations Outline, III 3(d), (October, 1977) (Unpublished).

[151] Roberts v. Roberts, 30 Or. App. 1149, 1154, 569 P.2d 668, 670 (1977) (Dissenting opinion) (Richardson, J.); *See* text accompanying notes 14-26 *infra*, for a summary of arguments against divided custody.

A dissenting judge in an earlier Washington case expressed a similar attitude toward joint custody:

> "I cannot agree with the majority that the custody should be awarded jointly to the parents. It has been my experience as a trial judge that joint custody does not bring satisfactory results. Divided responsibility ends too often in constant bickering between the parents, each trying to exert authority — all to the detriment of the children."[152]

One explanation offered to explain the hostility of some judges toward joint custody is that successful joint parenting is not visible to those involved in litigating contested cases.[153] Judges encounter only the failures of joint custody and perhaps extrapolate from that experience a pessimistic view of its possibilities.[154]

Considerable disparity exists in behavioral experts' attitudes toward joint custody. Professor Foster and Dr. Freed caution that joint custody has received its most serious setback, not from attorneys or courts, but from behavioral experts.[155] The initial task for proponents of joint custody, state Foster and Freed, is to overcome the professional bias of child behavior experts.[156] Perhaps typically, the "experts" are not in agreement. The most ardent supporters of joint custody are, themselves, behavioral scientists.[157] Other behavioralists and mental health professionals are skeptical and believe joint custody will create unresolved adjustment difficulties for children and may represent an unhealthy continuing relation between the parents.[158]

These behavorial experts, however, have been quick to label as "unhealthy" any deviation from that which has been regarded as normal or that which is considered novel.[159] Thomas Szasz, the

---

[152] Wheeler v. Wheeler, 37 Wash.2d 159, 170, 222 P.2d 400, 406 (1950).

[153] Gaddis, *supra* note 3 at 19.

[154] Although later labeling it "a myth that most American courts are dead set against joint custody", Foster and Freed explained the skepticisim of lawyers and courts as follows: ". . . [l]awyers and courts encounter custodial failures more often than successful arrangements as to child custody, hence, their pessimism, if not their hostility, towards a division of control and physical custody, is understandable." Foster & Freed, *supra* note 122, at 4, col. 1, and *supra* note 127 at 2, col. 1.

[155] Foster & Freed, N.Y.L.J. Nov. 24, 1978, at 4, col. 2.

[156] *Id.*

[157] *See, e.g.*, M. ROMAN & W. HADDAD, *supra* note 5.

[158] *See* text accompanying notes 211-222, *infra.*

[159] *See generally* S. GETTLEMAN & J. MARKOWITZ, THE COURAGE TO DIVORCE, Ch. 4 (1974), which does not specifically address the issue of joint custody, but is an excellent resource to help dispell many myths of divorce and its effect on children.

noted iconoclastic psychiatrist, has stated that "the characteristic tendency of modern society is to brand as sick that which is merely unconventional."[160] There may be a tendency to shame people into abiding by conventional norms in divorce by suggesting anything to the contrary is a barometer of emotional disturbance.[161] However, some authors in the mental health profession have noted this suggestion is a fallacy and counter that parents can better fulfill their roles toward children if "freed from conjugal misery."[162] Moreover, "a child's relationship with his or her parents . . . does not depend on the parents' marital status."[163]

VIII. Analyses of Joint Custody Concerns

Those opposed to joint custody raise many questions concerning the viability of such arrangements. Many of these apprehensions, however, merely reflect distrust of the unfamiliar. Examination of these concerns reveals that the feared disadvantages of joint custody are generally unfounded or no worse than the disadvantages of other forms of custody.

A. Can Parents Cooperate After Divorce?

The adversary nature of fault divorce helped ensure that parents would be pitted against one another and that the only surviving relationship between them would be one of animosity, if not hatred. All but a few states have now recognized the futility of requiring a finding of fault for divorce and have enacted some form of "no-fault" divorce reform to help reduce the scars left by an adversary contest.[164] To the extent that divorce laws and procedures still impose an adversary model on the parents in matters of custody, they create a self-fulfilling prophecy which ensures that divorced parents cannot cooperate together. One noted family law attorney summed up this frequently heard concern: "It's asking a lot to expect two people who could not get along in marriage to suddenly share decision making for a child's education, religion and every day activities."[165] Perhaps too often we

---

[160] *Id.* at 42.

[161] *Id.* at 48.

[162] *Id.* at 47.

[163] *Id.* at 73.

[164] Only Illinois, Pennsylvania and South Dakota now have fault grounds exclusively. Freed & Foster, *Divorce in the Fifty States,* 11 Fam. L. Q. 297 (1977) updated in 11 Fam. L. Q. at v. (1978).

[165] Harry Fain of Los Angeles, past chairman of the ABA Family Law Section,

assume that divorcing people will not be able to agree and cast divorcing parents in the role of enemies.[166]

In arguing for joint custody as a way around this "custody trap," June and William Noble conclude,

> "[I]f custodial care were to be considered a joint responsibility in divorce, as it is in marriage, there would be less opportunity for enmity to replace cooperation. . . . Arguments about child upbringing, financial needs, and the like go on in virtually every marriage, normal or otherwise. These arguments do not have to become more shrill upon separation. In fact, removing the irritating factor of two unloving people living together can probably make them both more responsive to the needs of the children."[167]

Mel Roman and William Haddad, authors of *The Disposable Parent*, concluded that joint custody may work to minimize parental conflict. They explain that because a joint custody arrangement can meet each parent's needs more completely, rancor diminishes.[168] Another writer reaches much the same conclusion, stating that once the pressures of the day to day marriage relationship are eliminated, the possibility of being a successful parent increases.[169]

Although there has been a frequent suggestion that joint custody can work only for couples with an amicable relationship, the pertinent inquiry should be whether the parents are able to isolate their marital conflicts from their role as parents.[170] There is increasing evidence that a couple which makes a commitment to share custody of their children is able to cooperate even though they do not like each other. In researching for her book, *The Custody Handbook*, Persia Woolley talked with parents who are co-parenting. She found that "although many sharing parents became friends after they had been sharing for a while,

---

as quoted in Dullea, *supra* note 2.

[166] Woolley, *supra* note 3, at 33.

[167] J. NOBLE & W. NOBLE, THE CUSTODY TRAP 160 (1975).

[168] They report that their own research and two other joint custody studies agree that "joint-custody couples show reduced conflict and their children are quite well adjusted." M. ROMAN & W. HADDAD, *supra* note 5, at 116.

[169] Woolley, *supra* note 3, at 33.

[170] In summarizing circumstances favorable to joint custody, Foster and Freed described the necessary parental relationship as follows: "2. The parties have demonstrated that they are capable of reaching shared decisions in the child's best interests and are able to communicate and to give priority to the child's welfare." Foster & Freed, *supra* note 127 at 3, col. 1. New York City Supreme Court Justice Bentley Kassel described the necessary parental attitude as "the parents must give priority to the child's interest when they communicate." 5 FAM. L. REP. (BNA) 2143, 2144 (1978).

many others did not . . . It is not necessary to like each other as people even though they trust each other as parents."[171] In studying fathers who have joint custody, another researcher found that many of the fathers had hostile relationships with their ex-wives and avoided seeing them for long periods of time, using the child's school as the drop-off point for scheduled exchanges. But despite the hostilities, the fathers reported that they had been able to separate out their marital problems from their role as parents.[172]

Some have suggested that joint custody makes cooperation between parents possible because it eliminates the need for and the likelihood of power plays between them. Rather than a one-sided decision that places power in the sole custodian and creates in the imbalance a need to strike back, recognition of the equal rights of the parents "discourages power plays, use of strategy, and neutralizes the power of the custodial parent."[173] With the power more equally divided, the possibility of using the children as pawns decreases.[174]

An award of joint custody may create an additional incentive for parental cooperation. The Director of the Conciliation Court of Los Angeles County, Hugh McIsaac, is of the opinion that an award of joint custody makes the motivation for cooperation greater because a break-down of the arrangement will likely result in an award of sole custody to the parent who did not precipitate the failure.[175] Perhaps the best evidence that divorced parents can share parenting is found in statements made by parents with joint custody arrangements. Their statements demonstrate that the high priority they place on their continuing involvement in their child's life has made it mandatory to find a way to work together.[176]

---

[171] Woolley, *supra* note 3, at 9.

[172] Grief, Fathers, Children, and Joint Custody 11-12 (Unpublished paper presented at the 1978 Annual Meeting of the American Orthopsychiatric Association, San Francisco, Cal.). *See also* Grief, *Joint Custody; A Viable Alternative?* TRIAL, May 1979, at 32.

[173] Gaddis, *supra* note 3, at 18.

[174] Grief, *supra* note 172, at 11.

[175] Interview with Hugh McIsaac, Director of the Conciliation Court, Los Angeles County, California, Feb. 4, 1979. Legislation now pending California to create a presumption for joint custody would allow modification to sole custody upon ". . . evidence of any substantial or repeated failure of a parent to adhere to the plan for implementing the joint custody decree . . ." Calif. S.B. 477.

[176] Both M. GALPER, *supra* note 5, and M. ROMAN & W. HADDAD, *supra* note 5, contain numerous "testimonials" of joint custody parents that support this conclusion. *See also* Ware, *supra* note 2. Remarks by parents who participated in a panel presentation, Practical Aspects of Joint Custody at a workshop sponsored by the Washington Association of Family Courts and the Oregon Associa-

Even if parents can cooperate following divorce, there is an expressed concern, particularly among mental health professionals, that joint custody is requested by parents who are not yet ready to fully dissolve their relationship and are unable "to separate in a healthy way."[177] This concern may be lying in wait for would be joint custody parents who escape the doubts of those who believe divorced parents can not cooperate, only to be told that their desire to cooperate as parents cloaks an underlying need to perpetuate their marital relationship. Perhaps for some, joint custody is but a way station enroute to some other arrangement.[178] However, in studying the relationship that exists between divorced parents who are participating jointly in raising their children, one researcher concluded that the parents studied had the ability "to continue a co-parenting relationship while terminating, both legally and emotionally, a spousal relationship."[179]

Patterns of parental relationships following divorce are undergoing significant change.[180] Divorce research in the 1950's and 1960's treated divorce as a singular event that destroyed the family and resulted in a "broken" or "single-parent home."[181] A new concept of the post-divorce family is emerging that views divorce not as a single event but as a crisis in the life cycle or process of a family that requires a rearrangement of the interdependent relationships.[182] As one writer put it, "Divorce does not end relationships in post-divorce families, it changes them."[183] Another

---

tion of Conciliation Courts, Kelso, Washington, Oct. 14, 1977 (transcript available from authors) showed this same dedication to cooperation. [hereinafter cited as Parents Panel].

[177] M. ROMAN & W. HADDAD, *supra* note 5.

[178] One might question if parental efforts to "shut the book softly" and utilize joint custody as a transition for children and parents is, in itself, something to be discouraged.

[179] Ahrons, The Coparental Divorce: Preliminary Research Findings and Policy Implications 13 (Unpublished paper presented at the annual meeting of National Council on Family Relations, Philadelphia, Pa., Oct. 19-22, 1978).

[180] Meyer Elkin, the founding director of the Los Angeles Conciliation Court, in writing about joint custody, believes that family patterns have changed so rapidly as to make traditional family law "a reflection of another time, another age that no longer exists." Elkin, *Editorial-Reflections on Joint Custody and Family Law,* CONCILIATION COURTS REV., Dec. 1978, at iii.

[181] Abarbanel, Joint Custody: What are We Afraid Of? 3 (Unpublished paper presented at the 1978 annual meeting of the American Orthopsychiatric Association in San Francisco, Cal.).

[182] *See* Ahrons, *supra* note 179, at 14.

[183] Grote & Weinstein, *supra* note 3, at 46.

author observes that "the very decision of divorce may be a family's way of trying to salvage the family by putting the pieces together in different ways."[184] Of the many possible family patterns that can emerge after divorce, one is the establishment of a maternal and a paternal household still connected by the bonds of the parents to the children and the children to the parents.[185]

B. Should Only The "Best Interests of The Child" Be Considered?

The dominant legal doctrine that custody will be awarded in the best interest of the child[186] has tended to focus attention on the child without acknowledging the implicit fact that the child's best interest is interdependent with and to a large measure a by-product of the best interest of all family members.

1. Mothers.

Although researches have rarely systematically studied the impact of divorce on adults,[187] what information there is tends to show that most post-divorce mothers with sole custody feel their children overburden and imprison them.[188] Further, there is evidence that mothers with sole custody become emotionally and physically exhausted,[189] as well as socially isolated.[190] It is not surprising then that in a study of joint custody parents, the mothers reported that the greatest advantage they saw in joint custody was the sharing of responsibility for the children.[191]

The mother with sole custody not only has the primary responsibility for the children, but most likely finds it necessary to supplement spousal support and child support by working out-

---

[184] Elkin, *supra* note 180.

[185] *See* Ricci, *Disspelling the Stereotype of the Broken Home,* CONCILIATION COURTS REV., Jan. 1976, at 7.

[186] Almost every reported child custody decision uses this doctrine as a starting point. Most state statutes listing criteria for custody decisions also concentrate on the "best interest of the child." *See e.g.,* UNIFORM MARRIAGE AND DIVORCE ACT § 402.

[187] M. ROMAN & W. HADDAD, *supra* note 5, at 50-51.

[188] *Id.* at 73-79.

[189] *Id.* at 79.

[190] Remarks of Helen Mendes, Ph.D, at conference on "The Divorcing Family" at University of Southern California, Jan. 26-27 as reported in Los Angeles Times, Jan. 30, 1979.

[191] Nehls, Joint Custody of Children: A Descriptive Study 7 (Unpublished, 1978).

side the home.[192] Often she must either return to school to upgrade her skills or settle for a low-paying unskilled job. Freedom from continuous parental responsibility makes it more likely that she will be able to reach a point of self-sufficiency that is personally satisfying. Further, public policy may mandate such self-sufficiency.[193]

Even though a mother may feel that she does not want the sole responsibility for a child after divorce, she may hesitate to divulge this "selfishness" and "unnaturalness."[194] Most strongly stated, "in our society, not to want to be a mother is to be a freak, and not to be a blissful mother is to be a witch."[195] Although society's attitude may be changing, the potential social and psychological consequences to a mother who is not prepared to fight for the custody of her children are ominous.[196] The notion remains strong that if a woman is not given sole custody of the children, there must be something radically wrong with her.[197]

Yet not all mothers really want custody of their children upon divorce, and more have mixed feelings about custody. An award of joint custody may help assauge the guilt the mother may experience if the children are awarded to the father's sole custody and forestall the negative speculation about the mother that the children would likely learn from those around them. More importantly, it may allow the mother to retain more than "visitor" status and serve to actively involve her in the parenting role.

Something other than an "all or nothing" or "win or lose" alternative may encourage both parents to actively work together in the child's best interests, rather than to fight to protect themselves. It has been observed that "If the mother (or father) didn't

---

[192] It is reported that, "About 60% of divorced women work outside the home", *One Child, Two Homes,* TIME, Jan. 29, 1979, at 61. A recently completed survey in Portland, Oregon found 84% of divorced women worked for pay. OREGON BUREAU OF LABOR, DIVORCED WOMEN IN PORTLAND 35 (1978).

[193] In Oregon, ex-wives are encouraged to become independent of spousal support within a ten-year period; failure to make "a reasonable effort" to become independent gives grounds to terminate spousal support. OR. REV. STAT. § 107.407.

[194] *See* S. GETTLEMAN & J. MARKOWITZ, *supra* note 159, at 194.

[195] *Id.*

[196] *See,* J. NOBLE & W. NOBLE, *supra* note 167, at 120-22, in which the authors recount a dramatic case where a mother who decides initially not to seek custody is rebuffed by parents, neighbors and lawyers until she does fight for custody and loses. She then suffers the double whammy of public censure for relinquishing custody and of judicial insult by being found the "less fit" parent.

[197] R. EISLER, DISSOLUTION, NO FAULT DIVORCE, MARRIAGE AND THE FUTURE OF WOMEN 57 (1977).

feel threatened with loss, each would be in a healthier position for give and take."[198]

2. Fathers

If mothers feel "overburdened" following divorce, fathers usually are not sufficiently "burdened". Attention in recent years to the effects of divorce on fathers[199] has exploded the myth that fathers walk away from divorce and from their families unscathed and carefree. In her unpublished doctoral dissertation on Fathers, Children, and Joint Custody, Judith Greif reported that her research showed that after divorce men experienced stress that sometimes caused physical problems, depression, and a severe sense of loss.[200] In the usual pattern, fathers lose wife, home and children, and end up with only visitation rights and support obligations. Some men become so overwhelmed by these difficulties that sooner or later they just give up and stop seeing their children.[201]

Another study of fathers revealed that fathers often continued to have almost as much face-to-face interaction with their children immediately after divorce as fathers in intact homes, but that non-custodial fathers became increasingly less available to their children over a period of time.[202] In explaining why the non-custodial fathers tended to fade out of their children's lives, this study stated that

> ". . . (Fathers) could not endure the pain of seeing their children only intermittently and by two years after divorce had coped with this stress by seeing their children infrequently although they continued to experience a great sense of loss and depression."[203]

In a panel presentation by joint custody parents one father explained why it had been important to him to have joint custody.

> "I think built into the legal system that favors giving custody to the woman, there's a tendency to cause the father to feel that he's not really a father. He's a "good fellow" or a "good friend". There's a tendency to make you walk away. I know I felt this so I'm sure that other men who do not have this right [joint custody] must."[204]

---

[198] J. NOBLE & W. NOBLE, *supra* note 167, at 160.

[199] For instance the October, 1976, issue of FAM. COORDINATOR was devoted to materials on fathers and fathering.

[200] Greif, *supra* note 172, at 8.

[201] E. ATKIN & E. RUBIN, PART-TIME FATHER 29 (1976).

[202] Hetherington, Cox & Cox, *supra* note 75, at 421.

[203] *Id.* at 427.

[204] Parents Panel, *supra* note 176.

In the same study that reported that women see joint custody's greatest advantage as a sharing of responsibility, the men studied saw the greatest advantage as an "opportunity for the child to maintain contact with both parents."[205] Whereas the artificial structure of "visiting" the children does not foster a normal parental relationship between father and children,[206] to the extent that joint custody allows interaction in normal day-to-day living situations, even fathers who were somewhat uninvolved with their children prior to divorce are able to become "nurturing" parents.[207] Experts in child development often stress the importance of a male as well as a female role model for children in daily activities.[208] Although we have in the past glorified the role of the mother in raising children, there is no psychiatric evidence or longitudinal behavioral studies that establish the superior parenting ability of one sex or the other.[209] As stereotyped sex roles have broken down, fathers have become more involved in rearing their children in intact families, and it is no longer a natural assumption that upon divorce the mother is the only "nurturing" patent, even of very young children.[210]

C. Do "Stability" and "Continuity" Require Custody To Only One Parent?

The greatest current obstacle to an award of joint custody is the assumption that joint custody will detrimentally affect the child because the child will be "shuttled" between the parents. As

---

[205] Nehls, *supra* note 191, at 7.

[206] Greif, *supra* note 172, at 7. Fathers with visitation rights have used a variety of terms to describe this limited relationship with their children including "Disneyland Dads," "Sugar Daddy," "Week-end father," "Good-time Charlie," and "I feel like a grandfather."

[207] *Id.*

[208] *See, e.g.*, H. BILLER, FATHER, CHILD & SEX ROLE (1971).

[209] A study by the Child Study Institute at the University of Maryland looked at children in the sole custody of mothers and children in the sole custody of father and concluded:

> Given comparable income, parental adjustment, and parental interests in the child, fathers were seen as equally capable as mothers in providing a home environment conducive to the healthy growth and adjustment of the child."

3 FAM. L. REP. (BNA) 2745 (1977).

[210] *See* Parke & Swaine, *The Father's Role in Infancy: A Re-evaluation*, 25 FAM. COORDINATOR 365 (1976) and Lamb & Lamb, *The Nature and Importance of the Father-Infant Relationship*, 25 FAM. COORDINATOR 379 (1976). It is estimated that 1,500,000 men now head single parent homes. 5 FAM. L. REP. (BNA) 2143 (1978).

previously discussed, joint custody does not necessarily require "shuttling" the child between two homes.[211] This concern, however, is also based on the theory that the kind of attachment to a "psychological parent" that is necessary for the growth of a healthy child cannot be achieved without the certainty and stability that is thought best promoted by complete custody to one parent.[212]

One might ask at the outset why a guideline seeking stability and continuity does not logically imply continuing, as nearly as possible, the same relationship between child and parents that existed before the divorce.[213] Evidence supports the fact that children, who often exhibit an extraordinary measure of common sense, show a great tenacity and desire to continue existing relationships with both parents.[214] Some experts believe that joint custody, by reducing the child's feelings of rejection and abandonment, as well as supplying continued positive role models, is conducive to the child's emotional stability.[215]

The book *Beyond The Best Interests Of The Child* is often cited in support of arguments against joint custody. The eminent authors of that influential work assert that "children have difficulty in relating positively to, profiting from, and maintaining contact with two psychological parents who are not in positive contact with each other."[216] Though the book does not directly address, or even mention, the issue of joint custody, the authors appear to assume that divorced parents can not be in positive

---

[211] This argument has been used most frequently against divided custody, *see* Section I(B). Although joint custody does not require any particular type of physical arrangement or division of a child's time between the parents, because many joint custody families do divide the child's time, arguments against divided custody are frequently advanced against joint custody.

Woolley, *supra* note 3, found that joint custody families were using a great variety of physical arrangements including alternating weeks, split weeks, alternating days, and "bird's nest"—where the children stayed in the family home and the parents took turns "living in" and "living out." Some families with older children left arrangements completely flexible and worked out schedules as needs of children and parents dictated.

[212] *See* GOLDSTEIN, FREUD & SOLNIT, *supra* note 60.

[213] *See* discussion, Section III, *supra*.

[214] M. ROMAN & W. HADDAD *supra* note 5, at 111. In a recent University of Michigan study on children of divorced parents, the custody arrangement most frequently chosen by 165 children questioned was half the week with one parent and half with the other. 5 FAM. L. REP. (BNA) 2395 (1979).

[215] Elkin, *supra* note 180, at iv.

[216] GOLDSTEIN, FREUD & SOLNIT, *supra* note 60, at 38.

contact with each other. The proceed to make that assumption self-fulfilling by recommending that custody be expeditiously and permanently awarded to the parent most likely to be the "psychological parent," without opportunity for modification.[217] They further assert that the child's stability would be best served if the non-custodial parent is stripped of his or her legal rights to the child:

> "Thus, the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits."[218]

The elimination of the ongoing relationship between the child and one parent is designed, paradoxically, to protect the no more important psychological relationship "between the child and the custodial parent."[219] The authors appear to disclaim responsibility for this radical proposal by, in effect, placing the blame at the feet of the parents for legal consequences far more severe than their actual parenting relationship may justify:

> "[T]he state neither makes nor breaks the psychological relationship between the child and the noncustodial parent, which the adults involved may have jeopardized. It leaves to them what only they can ultimately resolve."[220]

This stark treatment afforded the non-custodial parent by Goldstein, Freud and Solnit has been criticized by many, including Professor Henry H. Foster, Jr. who stated:

> "In short, at the whim of the custodial parent, all contact with the other parent would be foreclosed. Such a position ignores the child's needs and desires, as well as those of the other parent, and in the name of continuity and autonomy encourages spiteful behavior. Given such power, one can visualize the blackmailing, extortion, and imposition which might be visited upon the non-custodial parent who wants to maintain contact with his or her child."[221]

Rather than fostering cooperation between the parents, the guidelines developed in *Beyond The Best Interests Of The Child* promote a situation where parents are pitted against each other in a "winner take all" battle. A high premium is placed on gaining physical custody at the first available moment so that a his-

---

[217] *Id.* at 37.
[218] *Id.* at 38.
[219] *Id.*
[220] *Id.*
[221] Foster, *A Review of Beyond the Best Interest of the Child,* 12 WILLAMETTE L. J. 545, 551 (1976).

tory of "continuity" can commence. Vying for control over the child at the earliest stage of separation becomes essential and the parent who maneuvers the child into his or her possession at the time of the custody hearing will have a strong advantage.[222]

The guidelines offered in *Beyond The Best Interests Of The Child* encourage the parents to sever their personal and parental relationship rather than offer emotional support to one another throughout the child-rearing years.[223] This notion may have fit within the earlier concept of divorce as the death of the family, but is irreconcilable with a concept of the post-divorce family as a reorganized, but still interdependent unit. It also contradicts the emerging model of parents divorcing one another without becoming divorced from their children.[224] Many courts now instruct divorcing families that "parents are forever."[225]

Beyond The Best Interests Of The Child equates stability with keeping the child in one environment. In answering the contention that joint custody will destroy stability Dan Molinoff, a joint custody father who has written about his battle for joint custody, stated:

> "What sharing parenthood offers is a new, different kind of stability . . . I have spent three years helping to make this type of arrangement work and can attest to the fact that two homes have been far better for our sons than one broken one. I think it is certainly more

---

[222] Many courts have wholly embraced the "Beyond the Best Interests of the Child" thesis in divorce custody cases. *See, e.g.*, In re McClure, 21 Or. App. 441, 535 P.2d 112 (1975) in which the Oregon Court of Appeals affirmed the award of custody to the mother who regained physical custody of their two children following recovery from her mental breakdown and then moved the children out of state. Though the children were most recently in the care of the mother, the father had previously cared for them and was found by the court relatively equal in "those factors considered when custody is determined." *Id.* at 444-45. The appellate court, after extensively quoting Goldstein, Freud and Solnit, held "the best interests of the children will be served by the least detrimental alternative of continuing their custody in the mother." *Id.* at 446. The court's acknowledgement of the importance of "leaving the children where they are" regardless of why they have been shifted between mother and father *Id.* at 445, was notice to other divorce litigants that the parent with physical custody at the time of the hearing is likely to "win" permanent custody.

[223] Stack, *supra* note 3 at 507.

[224] *See* Folberg, *Facilitating Agreement*, CONCILIATION COURTS REV., Dec. 1978, at 17.

[225] The Association of Family Conciliation Courts has distributed more than 130,000 copies of a pamphlet entitled "Parents Are Forever." ASS'N OF FAM. CONCILLIATION COURTS, PUBLICATION REPORT (1978).

> damaging for a child to have only minimal contact with an absent parent than it is to have two sets of clothes, books and toys."[226]

Those who have studied joint custody families have sought to weigh the advantages for children of two psychological parents against the problems created by two homes in order to answer the persistent question of whether two homes undermine stability. Judith Greif concluded that the concern over the disruption of having two homes was more a concern of others than of joint custody families themselves.[227] Alice Abarbanel observed four shared custody families in California and found that the children felt "at home" in both environments and that the children saw themselves as living in two homes.[228] Her research showed that it had taken the families a period of time to evolve the time schedule that worked best for them and, while each maintained enough flexibility in the schedule to allow the parents to cooperate in covering vacations and sickness, all found a certain predictability and stability in the schedule as a benefit.[229] Abarabanel found that the children of the families studied did in fact have "two psychological parents, not one."[230]

In a Wisconsin study, Nadine Nehls reported that her research results showed there are problems regarding a child's transition between two houses.[231] This problem did not appear, however, to be a by-product of any particular time arrangement and was present where the child lived primarily with one parent, much as in sole custody with visitation rights, as well as where time was more equally split between two homes. She concluded that this area needs further study and joined many others in hoping that research on the effects of different custodial arrangements will be forthcoming to help determine if joint custody is more or less advantageous than sole custody for fathers, mothers and children.[232]

Although having one environment may be an important element for the security of a very young child, other students of child behavior have emphasized that children's needs change at different ages.[233] Joint custody provides a mechanism that allows the

---

[226] Molinoff, *Joint Custody: Victory for All?* N.Y. Times, March 6, 1977, § 22, at 18, col. 1.

[227] Greif, *supra* note 172, at 10.

[228] Abarbanel, *supra* note 181, at 15.

[229] *Id.* at 17.

[230] *Id.* at 20.

[231] Nehls, *supra* note 191, at 31.

[232] *Id.*

[233] Batt, *Child Custody Disputes: A Developmental-Psychological Approach*

parents to adjust living arrangements as the child's needs change. Parents are usually in a better position to know their child's needs than are any outside "experts."[234] If parents have a structure that allows them to admit the need for change and then make their own mutual decisions without jeopardizing their future custodial rights, they and the children can be expected to benefit.[235]

D. Does Joint Custody Require Close Geographical Contact?

The location of the parents' homes is a frequently mentioned factor to be considered in determining whether an award of joint custody is appropriate.[236] However, it is apparent that the "geographical closeness" required for joint custody is a by-product of a number of factors: age of the children, school arrangements, location of other members of the child's network of supporters (grandparents, cousins, friends), ease and availability of transportation, and the family's financial resources. It may be more accurate to speak in terms of the logistics of joint custody rather than geographical limits.[237]

It was evident in the panel discussion of parents with joint custody arrangements previously cited that parents with joint custody arrangements must be aware of the distance between their residential locations and the effect of moving. Several parents had turned down favorable opportunities to move to other areas in order to stay near the other parent and the children.[238] However, if it is accepted that the major distinguishing charac-

---

to Proof and Decisionmaking, 12 WILLAMETTE L. J. 491 (1976).

[234] M. GALPER, *supra* note 5, at 124.

[235] Professor Robert H. Mnookin observes that of possible decision makers, "parents are more appropriate decision makers than some disinterested third part (like a judge) or a professional (like a doctor)" in remarks not directly concerning custody decisions in *Children's Rights: Legal and Ethical Dilemma,* 2 THE TRANSCRIPT, No. 3, at 8 (1978) (published by Boalt Alumni Association, Berkeley, California).

[236] Although proximity is often mentioned as a prerequisite for joint custody, *see, e.g.,* Lumbra v. Lumbra, 394 A.2d 1139 (Sup. Ct. Vt. 1978), the great distance between the parents homes was seen as a reason to award joint custody in Mayer v. Mayer, 150 N.J. Super. 556, 376 A.2d 214 (1977).

[237] Foster and Freed speak of the necessary closeness of the parental homes in these terms: "The logistics are such that there is no substantial disruption of the child's routine, schooling, association with friends, religious training, etc. Ordinarily this means close geographical proximity of both parents or a 'bird nest' arrangement." Foster & Freed, supra note 127.

[238] Parents Panel, *supra* note 176. Alice Abarbanel observed that "all the parents in this study expressed a commitment to staying in close geographical proximity," Abarbanel, *supra* note 181, at 25.

teristic of joint custody is shared responsibility for major decisions effecting the child, including where the child will live, then close geographical location is not essential.[239] Certainly in our mobile society, joint custody agreements might anticipate a move from the vicinity and provide a process for dealing with it.[240] At a minimum, the agreement should acknowledge that any material change of circumstance may require reconsideration, negotiation, mediation, or arbitration of its terms. Failing those, the courts remain available for modification if the change is considered substantial.[241]

The experience of one family, in adjusting their joint custody arrangement to accommodate the 10,000 mile move of the father and son from California to England, is told in a recent magazine article.[242] It illustrates that parents can effectively resolve unanticipated major moves and separations if the best interests of their child is the central consideration within the reality and limitations of their own circumstances. The story also illustrates that the distinguishing feature of joint custody is shared decision making and not geographical proximity.

E. Can Many Families Afford Joint Custody?

At the present time joint custody appears to be limited primarily to sophisticated couples who are frequently both professionals.[243] The Nehls study found that joint custody parents tended to be well educated and have relatively high income levels.[244] Nehls speculates that limited access to information about joint custody might explain the correlation between education and income levels and the use of joint custody.[245] One judge has acknowledged that joint custody parents have to have money and that where it has worked, the parties have often been professional

---

[239] One of the authors has drafted an apparently successful joint custody agreement, accepted by the court, in which one parent resides in Oregon and one in Colorado, and in another case where the residential parent was in Oregon and the other parent, an airline pilot, was anticipating a move to Hawaii.

[240] *See* discussion accompanying notes 318-320, *infra*.

[241] *See* discussion of modification issue, Section VIII (H), *infra*. S.B. 477, now pending in the California Legislature, would specifically allow consideration of evidence ". . . that one parent has established, or is likely to establish, his or her principal residence in another state . . ." in motions to modify decrees of joint custody.

[242] Ware, *supra* note 2, at 52-53.

[243] Bodenheimer, *supra* note 30, at 1011.

[244] Nehls, *supra* note 191, at 20-21.

[245] *Id.*

people.[246] A family therapist and researcher who has long specialized in the problems of divorcing families and is an advocate of joint custody has observed, however, that no one needs to have a house, a yard and an extra bedroom to be a co-parent. "Those are just accoutrements. It is the childrens' sense of belonging and of territory that makes a home. If you have a sleeping bag rolled up in the closet, that's enough."[247]

It was clear from testimony given at the Oregon Legislative Hearings on joint custody that knowledge of the possibility of using joint custody is not widespread.[248] In fact, one of the express reasons offered for passing new legislation when the legal possibility for joint custody already existed was to increase the group of people who know of and recognize the possibility of using joint custody.[249] As information about joint custody becomes more widely disseminated, one would expect its use to increase throughout all parts of society. Susan Whicher, a Colorado attorney who heads a special American Bar Association committee on joint custody has stated:

> "[L]egally it's terrifying for a lot of lawyers and judges, but by the end of the 1980's it will be the rule rather than the exception."[250]

As was discussed earlier in this article, non-custodial parents tend to stop seeing their children after divorce.[251] Support payments from non-custodial parents also are often short lived.[252] Empirical studies place the range of non-compliance with child support orders after only one year following the divorce decree from 62 percent in Wisconsin to 47 percent in Illinois.[253] The same

---

[246] Remarks of New York Supreme Court Justice Bentley Kassal, Conference on Current Developments in Child Custody, New York, Dec. 2, 1978, *reprinted in* 5 FAM. L. REP. (BNA) 2141 (1978).

[247] Isolina Ricci, in a presentation entitled *Cooperative Parenting After Divorce: Myth or Reality* given at a conference on the Divorcing Family, University of Southern California, Jan. 27, 1979, as reported in the Los Angeles Times, Jan. 3, 1979, Part IV, at 4, col. 2. Persia Woolley found child sharing arrangements at all economic levels. Letter to authors dated March 9, 1979.

[248] *See* note 125 *supra.*

[249] *Id.*

[250] *One Child, Two Homes, supra* note 2.

[251] *See* notes 202-203 and accompanying text, *supra.*

[252] *See* Annot., 92 A.L.R.2d 705 (1963).

[253] Johnson, *Child Support: Preventing Default,* CONCILIATION COURTS REV., Sept. 1978, at 27, at 31. Johnson compares the higher non-compliance figures from a metropolitan county in Wisconsin, where support payments, apparently, need not be paid through the court, with non-compliance in seven diverse Illinois counties, where support payments were ordered to be paid through the courts. The same figures as those cited above in Wisconsin are cited by R.

studies report that within one year following divorce no support payments at all were received from ex-husbands in 21 percent of the Illinois cases and 42 percent of the Wisconsin cases. At the conclusion of 10 years following divorce 79 percent of the fathers in Wisconsin had ceased paying any support and 59 percent in the Illinois study had quit.[254] An even higher percentage were not in full compliance but made partial payments.[255]

Children are inevitably the losers when child support is in arrears.[256] A chicken and egg dilemma is often posed as to whether visitation restrictions and a lack of parental cooperation concerning visitation invites non-support,[257] or whether non-support causes opposition to regular visitation. The two areas, each of obvious importance to the children, are inexorably connected.[258]

One of the most positive attributes of joint custody is its potential for avoiding the problem of nonsupport arising out of bitterness over the custodial decision.[259] Not only does regular contact with the children create an incentive to provide for their needs, but participating in routine activities of feeding, clothing, housing and caring for children realistically brings home to both parents the escalating expenses of rearing them and promotes more flexible attitudes. Additionally, the likely increased contact between co-parents makes each more aware of the financial capabilities of the other and breeds sensitivity to what each can monetarily contribute.[260] Parents who can rely on each other for more than just economic help are more apt to be understanding of the

---

MOFFATT & J. SCHERER, *supra* note 147, at 116, though the authors there seem to attribute the figures to New York.

[254] *Id.* at 31.

[255] It is not entirely clear from the comparative tables used by Johnson, *Id.*, if the percent figures listed under "no compliance" included cases in which less than the full amount was contributed.

[256] E. ATKIN & E. RUBIN, PART-TIME FATHERS 90 (1976).

[257] *See* E. ATKIN & E. RUBIN, *supra* note 256 for a typical scenario of the chain reaction.

[258] Though support obligations and visitation previleges are generally independent, there is a trend to legally recognize their interrelationship. *See, e.g.*, OR. REV. STAT. § 107.135 which authorizes a petition to cease support if visitation rights are purposely frustrated. New York family courts have regularly held that child support and visitation rights are interdependent. 3 FAM. L. REP. (BNA) 1109 (1977). The Utah Supreme Court has also held that visitation is a condition precedent to receiving support. 1 FAM. L. REP. (BNA) 2208 (1977). *Contra,* Comiskey v. Comiskey, 48 Ill. App. 3d 17, 366 N.E.2d 87 (1977).

[259] Johnson, *supra* note 251.

[260] For examples of co-parents' attitudes on flexibility of financial arrangements, *see* M. GALPER, *supra* note 5, at 48-50.

financial pinches that most sometime encounter.[261]

Joint custody thus helps free both parents to pursue educational and financial improvement. If the joint custody arrangement is able to allow the mother (or in some cases the father) to improve earning capacity and is flexible enough to allow them both to work more than do most sole custody arrangements, then both parents may better be able to contribute to the childrens' financial needs.[262] Such mutuality of contribution enhances cooperation, fosters independence and provides the children with greater security as well as a more positive view toward each parent.[263] Joint custody appears to open up the total human and financial resources of both parents for the benefit of their children as well as themselves.

Monetary resources alone, however, do not determine the affordability of joint custody. The traditional pattern of divorce is likely to disrupt the relationships that the child had with the noncustodial parent's side of the family.[264] Although we have focused our attention on the central participants of a divorce, mothers, fathers, and their children, there is a growing recognition that court orders may also cut off grandparents from their grandchildren.[265] Just at a point when a child is faced in most sole custody decisions with the loss of a parent, he also must bear the loss of grandparents and other relatives. Harry M. Fain, President of the American Academy of Matrimonial Lawyers, pointed out that a "grandparent's love can fill the deep, emotional void created in the lives of children whose parents are separated or divorced . . . they can connect a child with the deeper roots of his history."[266] Margaret Mead stated it most succinctly: "[e]veryone needs to have access both to grandparents and grandchildren in order to be a full human being."[267]

Visitation time of the non-custodial parent may not reflect the

---

[261] Woolley, *supra* note 3, at 9.

[262] M. GALPER, *supra* note 5, at 17-19.

[263] For a handbook that both traces patterns of cooperation and sets out practical guidelines on how to provide greater security for children through shared custody, *see* P. WOOLLEY, THE CUSTODY HANDBOOK (1979).

[264] S. GETTLEMEN & J. MARKOWITZ, *supra* note 159, at 93.

[265] Some few states now give grandparents standing in their childrens' divorce proceedings. In Wisconsin the 1977 Divorce Reform Act retained the statute allowing the court to award visitation rights to a grandparent where that is in the child's best interests, and expanded it to include great-grandparents as well. WISC. STAT. ANN. § 247.245. *See generally* Annot., 90 A.L.R.3d 222 (1979).

[266] As quoted in The Oregonian (Portland, Oregon) Dec. 26, 1977, at 1, col. 1.

[267] M. MEAD, BLACKBERRY WINTER — MY EARLIER YEARS 282 (1972).

number of children involved. It may be very difficult for a non-custodial parent to find time alone with any one of the children. But one by-product of co-parenting is that divorced families are better able to arrange schedules so that one child has time alone with each parent.

Some joint custody families find that the children "have more of their parents' individual time and attention than most kids do."[268] When the child is with them they clear the decks for parenting. Joint custodial parents may have fewer actual hours with their children then when the family was intact, but they have noted that the time they have is of a higher quality.[269]

Although the development of the nuclear family has tended to seclude the family from the wider family,[270] in many subcultures "parenting" is not reserved for only mothers and fathers, but an entire network of relatives and friends are called upon to raise the children.[271] Particularly when parents divorce, there is reason not only to preserve the network of friends and relatives that the child has had, but also since the chances are very high that both parents will be working, we should encourage an opening up of the family system to welcome other's help. Joint custody provides a better opportunity for preservation of contact with a greater number of supporters than does sole custody. For this reason, joint custody may in fact be the optimum option upon divorce for the poor as well as the rich.[272]

F. Will The Reactions of Others Defeat Joint Custody?

Society seems to have very set notions about the roles that the participants in a divorce should play. The great American "soap opera," as divorce has been called,[273] also assigns certain role scripts to the family and friends of those who divorce. Not only does joint custody tend to destroy the soap opera aspects of the drama and deprive participants of their opportunity to mourn or console the parties, it may place friends and relatives on stage with no script.

Even if family and friends are willing to give up the old roles, they may have to overcome a feeling that there is something

---

[268] M. GALPER, *supra* note 5, at 133.

[269] Parents Panel, *supra* note 176.

[270] Stack, *supra* note 3, at 508.

[271] *Id.* at 513.

[272] *See* the argument advanced on this point by M. ROMAN & W. HADDAD, *supra* note 5, at 113-115.

unsavory about divorced people being able to get along well enough to cooperate in the raising of their children. As Margaret Mead stated:

> Among the older generation, there is some feeling that any contact between divorced people somehow smacks of incest; once divorced, they have been declared by law to be sexually inaccessible to each other, and the aura of past sexual relations makes any further relationship incriminating.[274]

Fathers participating in joint custody arrangements may find that their involvement in the daily tasks of child rearing raises questions about their manhood in the minds of some. Daniel Molinoff, who was one of the trail blazers for joint custody fathers, described his experience as follows:

> Most of my relatives and friends also thought I had made the wrong decision. Most of the uncles and aunts, none of whom had been divorced or separated from their children during their marriages, thought Michael and Joel were "better off with their mother." "Mothers take care of children," they said, "not fathers."
>
> My friends didn't like the idea of my having custody either, but for different reasons. Most of the men I knew were angered by what I was doing. The married men, who were not taking as active a part in the upbringing of their children as I was, saw my arrangement as a threat to their marital tranquility, to the system, to Manhood . . . As for the women I knew . . . they couldn't understand why I'd want to cook and clean for my children . . . other women, including neighborhood mothers and my sons' teachers, considered me the village villain.[275]

Women who are co-parenting, on the other hand, often feel that they are being criticized for not being proper mothers if they are willing to "let" the children's father "have" the children rather than keep the children in their exclusive domain.[276]

Joint custody families may encounter difficulties with schools and teachers. One joint custody parent reported that no matter how carefully she described their shared arrangement, the school continued to cast her alone in the role of the care-taking parent.[277] School notices and communications to parents are often addressed "Dear Mother."[278] School personnel may have difficulty accepting the fact that on certain days they should call the father

---

[273] Isolina Ricci, marriage and family counselor, as quoted in Huerta, *supra* note 2.

[274] M. Mead, *Anomalies in American Postdivorce Relationships,* DIVORCE AND AFTER 121 (P. Bohannan ed. 1971).

[275] Molinoff, *After Divorce, Give Them a Father, Too,* Newsday, Oct. 5, 1975.

[276] M. GALPER, *supra* note 5, at 112.

[277] Baum, *supra* note 2.

[278] Another joint custody father reports that after informing his childrens'

if the child becomes ill at school.

The mechanics of communicating with the school may be an irritation, but a more substantive problem is that the child may find the subtle influences of the classroom geared to an intact nuclear family model. Not only does the picture of mom, dad, sister, brother, dog and cat prevail in many school books, it may still be the picture in the minds of many teachers. Some children may have difficulty in not fitting this model.[279]

Because joint parenting may be a more complicated and currently unconventional way to raise children after divorce than having the children remain with the mother or father,[280] parents who choose to be co-parents must be prepared to explain their arrangement and enlist the cooperation of their families and the schools, as well as friends, in order to help the arrangement work.[281] Of course, it is often no less easy for children and custodial parents in more traditional divorce arrangements to explain the continual absence of one parent.

G. If Parents Can Cooperate, Does It Matter What The Decree Says?

The fact that parents have been informally working out what

---

teachers that he was sharing joint custody and the children were residing with him, the next notice from the classroom was politely addressed "Dear Parent". The message read, "Please send a pair of your old pantyhose to school with your child . . ."

[279] When a child from a joint custody family was asked by her second-grade teacher to draw a picture of her family, the little girl began drawing two houses. Upon correction by the teacher, the child changed her picture to show what the teacher wanted, although the resulting picture did not reflect the reality of her life. M. GALPER, *supra* note 5, at 111.

[280] Joint custody can encompass arrangements in which the children reside with one parent, except for periods that in sole custody situations would be referred to as visitation. Again, the distinction is the shared authority for major child related decisions and a requirement for open communication and cooperation, *See* text accompanying notes 29-40 *supra*. In joint custody arrangements where the children regularly reside with one parent, others may or may not know of the shared decision making.

[281] A 12-year old boy who spends two days with one parent, then two days with the other and rotates three day weekends in each home did not perceive his unconventional living arrangement as a problem to his friends: "My friends know where to reach me. I just give them the phone numbers and the schedule. It works out okay." Parents of an 8-year old girl, however, who spends summers with her father and the rest of the year with her mother reported that their daughter "has two sets of friends, neither of which has fully accepted her because of her part-time living." *One Child, Two Homes, supra* note 2.

amount to "joint custody" arrangements, probably for as long as the concept of post divorce custody awards has existed, prompts some to ask, "So what's in a term?" Certainly some of the agitation for joint custody involves a search for status as a legal custodian, as much as a search for a new or different living pattern. Parents, and, in particular, fathers, want legal recognition of their right to participate in their child's life and assurance that the other parent does not have unequal power. Rather than arrive at joint custody by circumventing the court order and accepting a judicially imposed fiction, there is a desire to have the court order match reality. Moreover, a divorce decree is a public document to which children who increasingly want to learn the circumstances of their parents' divorce and their legal relationship to each parent may later refer.[282]

It is indeed curious that judges and attorneys would argue for disregard of a court order[283] or tell people who desire to conform their conduct to the language of the law that what the court pronounces in its decree is without factual consequence. Even the most cooperative of parents sometimes need legal definition of their rights, responsibilities, and the parameters of their parenting relationship. It belies the integrity of our judicial system and the credibility of its pronouncements to expect parents to pretend that a custody decree means something different than what it says. This is particularly true when the court maintains the power of contempt when its decrees are not followed as written.

At times of stress or conflict, parents may also need the incentive of a realistic decree to achieve continuing compliance with the terms of their agreement. Giving one of two "equals," all the legal power contained in a court order stacks the deck against mutual cooperation in the face of what might otherwise be minor, but inevitable, parental friction. The decree then serves as a disincentive for continuing accord and mutual accommodation. Fair

---

[282] A teenager, Gabrielle Ream, who works with her school's Divorced Kids Group says "I think it's very important to read the (divorce) agreement . . ." Cooke, *Children of Divorced Help Peers With Woes,* The Oregonian, (Portland, Oregon) March 21, 1979, at D4, col. 3.

In a somewhat parallel vein, there is a growing trend to recognize the right and interest of adopties to obtain information from sealed adoption records. *See,* R. Klibanoff, *Genealogical Information in Adoption: The Adoptee's Quest and the Law,* 11 FAM. L. Q. 185 (1977).

[283] In Shelton v. Chrisman, Civil Action No. CA-3-75-1268-D, Jan. 31, 1979 (N.D. Tex. 1979), the court points out that the state itself does not enforce decrees relating to custody. "Notwithstanding the terms of the decree, the parents are generally free to do with their children what they will, if they agree."

negotiation during the dynamics of family reorganization requires equal legal power and sanctions. Neither parent should have the right, when both are capable, to "give" or "take" custody at their whim.

Including a provision for joint custody in the decree not only gives legal recognition to the equal-status of the parents, but also provides a standard of expected behavior to guide the parents following divorce. Carol Bruch, writing about her intriguing proposal for "dual parenting orders", first develops the importance to the child and to the parents of continuing involvement and then emphasizes the role that court orders can effectively play in shaping patterns of behavior.[284]

Perhaps it is a question of whether our legal system should encourage parents to attempt to work within the system with its civil safeguards and dignity, or outside of it by their own devices. Requiring parents who are given no choice but to utilize the courts to dissolve their marriage and fix their custody rights and obligations to arrange their relationship contrary to the courts. written pronouncements because its forms and conventions do not meet the reality of their situation and needs is a classic case of the tail wagging the dog.[285]

Finally, formal custody decrees are necessary because private agreements concerning custody and child support which contradict a decree are of questionable validity and are not likely to be enforced if not approved or incorporated by the court.[286] Unilateral decisions which violate the parties' private joint custody agreement cannot be prevented if the decree provides for custody to one parent. A father with informal joint custody, for example, does not ordinarily have any right to make decisions regarding his child's education.[287] The reluctance of some courts to prevent custodial parents from moving out of state with the child may leave a non-custodial parent with a non-decreed joint custody arrangement powerless to prevent the child from being permanently removed from the home jurisdiction.[288]

Joint custody will normally require different support and finan-

---

[284] Bruch, *Making Visitation Work: Dual Parenting Orders*, 1 FAM. ADVOCATE 22 (1978).

[285] This makes "the law appear an ass", as Mr. Bumbles phrased it in C. DICKENS, OLIVER TWIST, Ch. 10.

[286] *See* Daniel v. Daniel, 239 Ga. 466, 469, 238 S.E.2d 108, 110 (1977).

[287] For a discussion of the non-custodial parents rights in matters of the child's education, *see* Annot., 36 A.L.R.3d 1093 (1970).

[288] Bodenheimer, *Equal Rights, Visitation, and the Right to Move*, 1 FAM. ADVOCATE 18 (1978).

cial obligations than sole custody.[289] Both parents are entitled to know what financial arrangements they can rely on in attempting to meet their legal obligations, rather than trying to second guess, at their peril, whether a judge might later reject or enforce their understanding.[290]

There is always the possibility that joint custody and its accompanying finances will require court modification if a change in circumstances occurs.[291] Modification can not be intelligently considered if the original decree does not accurately reflect the situation and legal relationships at the time of the divorce. Decrees incorporating the joint custody agreement provide some standard for a court to later determine, if necessary, whether both parents have lived up to their bargain for the benefit of the child.[292]

H. Do Joint Custody Decrees Result In More Modification Problems?

Some opposition to joint custody is based on a fear that joint custody decrees will consume more time for modification than traditional awards of sole custody.[293] Certainly, reported cases evidence that some joint custody decrees do come back to court[294] as do decrees of sole custody.[295] In reality, there is no such thing

---

[289] GALPHER, *supra* note 5, at 48-52.

[290] For example, where a father stopped making support payments for a six month period during which he assumed custody of the children so his ex-wife could return to school, a Georgia trial court nonetheless held him in arrears for payments not made during the period the child was with him. The Appellate court refused to uphold the execution but cautioned "we are by no means authorizing blanket modification of divorce decrees by private agreement." Daniel v. Daniel, 239 Ga. 466, 469, 238 S.E.2d 108, 110 (1977).

[291] *Id.*

[292] *See, e.g.*, Leskovich v. Leskovich, 385 A. 2d 373, (Pa. Super. Ct. 1978).

[293] *See* instructions to judges *supra* note 150 and accompanying text.

[294] *See, e.g.*, Huffman v. Huffman, 50 Ill. App.3d 217, 365 N.E. 2d 270 (1977); Gall v. Gall, 336 So.2d 10 (Fla. Dist. Ct. App. 1976); In re Leskovich, 385 A.2d 373, (Pa. Super. Ct. 1978); Brand v. Brand, 441 S.W.2d 750 (Mo. Ct. App., 1969); Loebenburg v. Loebenburg, 85 R.I. 115, 127 A.2d 500 (1956); Gallagher v. Gallagher, 60 Ill. App.3d 26, 376 N.E.2d 279 (1978); Hare v. Porter, 233 So.2d 653 (Fla. Dist. Ct. App. 1970). Asch v. Asch, 164 N.J. Super. 499, 397 A.2d 352 (1978); Daniel v. Daniel, 239 Ga. 466, 238 S.E.2d 108 (1977).

[295] Surprisingly few statistics are available on post-divorce litigation. It is reported that in Dane County, Wisconsin, 34.3% of cases in which there was an initial custody study return to court for further custody litigation within two years. Milne, *supra* note 85, at 5.

as a "permanent" custody order.[296] Statistics are not available to compare the proportion of modification requests stemming from joint custody awards as opposed to sole custody awards.

There is, however, some evidence based on judicial experience that less, not more, modification battles result from decrees of joint custody. Commissioner John R. Alexander of Santa Monica, California, estimates that in the past two and a half years he has had at least a dozen cases before him in court where the couples have stipulated to joint custody. None of these couples, so far as he knows, have reached an impasse over their children's upbringing that have brought them back to court. He suggests that this lack of "legal pathology" indicates that the principal of joint custody is working better in practice than many domestic relations lawyers and judicial officers might expect.[297]

One attorney who has negotiated and secured for his clients many joint custody decrees has written that these decrees, when based on a mediated or negotiated settlement have a low "recidivism rate" and rarely come back for redetermination.[298] This attorney, Stephen Gaddis, urges inclusion of a mediation or arbitration provision in the initial joint custody agreement as an alternative to resolve a parental deadlock.[299] Such a provision, stresses Gaddis, is appropriate "because an important part of the joint custodial process is to encourage private decision making rather than litigation."[300] If mediation fails, arbitration is another available mechanism that couples can include in the joint cus-

---

[296] Hearings before the California Senate Committee on Judiciary, Conciliation Courts (Testimony of Christian E. Markey, Presiding Judge, Super. Ct. of Los Angeles Cty., Family Law Division) Dec. 6, 1978: "I believe quite frankly that there is no such thing as a "permanent" custody order. I think the law's fairly clear that when you're talking about the best interests of the minor, there really isn't a permanent custody order, thus, at any time. One must be prepared, it seems to me, to adjudicate the best interests of the child with respect to what's put properly before the court."

[297] *Joint Custody*, L.A. County Bar Family Law Section Newsletter, No. V, Winter, 1978, at 3.

[298] Gaddis, *supra* note 3, at 19.

[299] *Id.* at 20. Gaddis urges the following wording:

> In the event that the parents alone cannot resolve a conflict, they agree to seek appropriate, competent assistance. The matter shall be referred for mediation (if that is not successful, for arbitration) to Family Court, a counselor, or to a lawyer or professional person skilled in the area of resolution of the problems of children and their families. This procedure shall be followed to its conclusion prior to either party seeking relief from the court.

[300] *Id.*

tody agreement.[301]

Other attorneys, as well as Gaddis, include provisions in their joint custody agreements for periodic review of its terms by the parties,[302] or review and renegotiation upon the happening of listed contingencies, such as remarriage, co-habitation, or a move from the geographical area.[303] When these events occur, they often result in practical concerns as well as substantial emotional reactions that make fighters out of parents who previously cooperated. For this reason, the agreement may provide that the parents will seek counseling[304] or advice on how others have handled these issues. Periodic review of the joint custody arrangement, counseling, mediation or arbitration should provide effective alternatives to modification motions for most parents who have demonstrated their proclivity to avoid court proceedings by stipulating to joint custody or who the court has found are capable of cooperating together in the best interests of their children.[305]

If joint custody should fail or require modification, the proceeding should be no more burdensome or harmful than modification of sole custody decrees. The same mechanisms available to one are available to the other. Each requires a material change of circumstances before modification can be ordered.[306] The remarks of a California judge considering a request for modification of spousal support are even more apt in regard to modification of child custody:

---

[301] The American Arbitration Association, in its pamphlet FAMILY DISPUTE SERVICES (1978) suggests the following arbitration provision in separation agreements: "Any controversy arising out of or relating to this agreement or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association. Both parties agree to abide by the terms of the award rendered by the Arbitrator(s) and judgment upon the award may be entered in any Court having jurisdiction thereof." On the use and enforceability of arbitration clauses in separation agreements, *see* Holman & Noland, *Agreement and Arbitration: Relief to Over-Litigation in Domestic Relating Disputes in Washington*, 12 WILLAMETTE L. J. 527 (1976).

[302] Correspondence from Shirley J. Burgoyne, Esq., Ann Arbor, Mich. Oct. 20, 1976 (Shared Custody Agreement Form).

[303] Gaddis, *supra* note 3, at 20.

[304] *See* Elkin, *Postdivorce Counseling in a Conciliation Court*, 1 J. OF DIVORCE 55 (1977). S.B. 477, pending in California, would specifically encourage the use of conciliation courts "to resolve any controversy which has arisen in the implementation of a plan for joint custody previously approved by the court."

[305] *See infra*, Section IX, Criteria for Decree of Joint Custody.

[306] *See* Caroll v. Caroll, 4 FAM. L. REP. (BNA) 2768 (Ill. Ct. App. 1978).

> One of the paradoxes of our present legal system is that it is accepted practice to tie up a court for days while a gaggle of professional medical witnesses expounds to a jury on just how devastating or just how trivial a personal injury may be . . . Yet at the same time we begrudge the judicial resources necessary for careful and reasoned judgments in this most delicate field — the break up of a marriage with its resulting trauma and troublesome fiscal aftermath. The courts should not begrudge the time necessary to carefully go over the wreckage of a marriage in order to effect substantial justice to all parties involved.[307]

I. Are Decrees of Joint Custody Enforceable?

Decrees of joint custody are enforceable, though they may present some unique issues and consequent uncertainty. The more delineated the parental rights and responsibilities in a joint custody decree, the more subject it is to traditional enforcement procedures. If the decree establishes "residential care," with one parent for certain periods of time, for example, that parent has a right to require return of the child from the other parent as agreed and resist a modification of joint residential custody in the absence of a material change in circumstances.[308] Similarly, typical provisions for child support, college expenses, insurance coverage and tax exemptions can be enforced as in any other decree.[309]

When the joint custody decree does not contain specific provisions as to how decisions regarding education, religious training or medical care are to be made and a parental deadlock occurs, some courts may first require the joint custodial parents to confer and try to reach agreement, or participate in mediation.[310] If necessary, the court may, upon the presentation of evidence, make a decision for the parents without altering the joint custody arrangement.[311] Other courts may allow a unilateral decision by the residential parent[312] or declare the joint custody a failure and decree one parent as sole custodian with the right to unilaterally make decisions.[313]

---

[307] In re Brantner, 67 Cal. App.3d, 416, 422, 136 Cal. Rptr. 635, 638 (4th Dist. 1977).

[308] *See, e.g.*, Caroll v. Caroll, 4 FAM. L. REP. (BNA) 2768 (Ill. Ct. App. 1978).

[309] *See* Gaddis, *Joint Custody of Children: A Divorce Decision—Making Alternative*, WASH. ST. BAR NEWS, March 1978, at 17.

[310] Private mediation as well as court connected services may be utilized for this purpose. *See* COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT 161 (1978). *See also* note 304, *supra* for proposed California legislation on point.

[311] *See, e.g.*, Asch v. Asch, 164 N.J. Super. 499, 397 A.2d 352 (1978).

[312] *See e.g.*, Burge v. City of San Francisco, 41 Cal.2d 608, 262 P.2d 6 (1953).

[313] *See, e.g.*, Huffman v. Huffman, 50 Ill. App. 3d 217, 365 N.E. 2d 270 (1977).

In considering a modification of joint custody to sole custody, the conduct of one parent in unilaterally frustrating or violating the joint custody arrangement may influence the court in choosing which parent shall have sole custody.[314] This potential consequence may increase even more the motivation for parental cooperation and serve a preventive function.[315] It may also, however, lead to punitive modifications to sole custody and give rebirth to a consideration of "fault" which is, arguably, not relevant to a custody modification.[316] Punitive decrees are of questionable validity, at least for purposes of out of state enforcement.[317]

Living in the same geographical area is not essential to a workable joint custody arrangement,[318] but restrictions against geographical moves with the child, particularly out of state, are common in joint custody agreements and decrees.[319] The very nature of joint custody requires parents to confer and, if necessary, negotiate over where the child shall live when one parent moves and what other adjustment to the joint custody pattern will be necessary.[320] Such provisions restricting moves, whether by prohibition or by requiring a joint decision, have come under attack on practical and constitutional grounds.[321] They, too, may lead to punitive changes of custody for their violation, but they serve an important preventive function in at least requiring negotiation.[322]

A joint custody decree which does not provide that one parent is the residential parent or which contains no restriction against moving the child's residence is undetermined custody for pur-

---

[314] Where a father violated a joint custody order by asserting, without benefit of a "neutral determination by a court," that he would henceforth be sole custodian of the children, the appellate court directed the lower court to ". . . consider appellee's disrespect for the legal process and evaluate how it bears on his fitness to be awarded custody of the children." In re Leskowich, 385 A.2d 373, 378 (Pa. Super. Ct. 1979).

[315] Calif. SB 477, now pending, expressly allows a court to consider a parent's "failure to adhere to the plan for implementing the joint custody. . ." *See* note 175 *supra*.

[316] *See* Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody and Excessive Modifications* 65 CALIF. L. REV. 978, 1013 (1977).

[317] *Id.* at 1004, 1006.

[318] *See* discussion Section VIII(D), *supra*.

[319] Gaddis, *supra* note 3, where a form provision is suggested restricting removal from the jurisdiction without prior consent or court approval.

[320] *See* Woolley, *supra* note 3.

[321] *See e.g.* Bodenheimer, *Equal Rights, Visitation, and the Right to Move*, 1 FAM. ADVOCATE 19 (1978).

[322] *But see*, Bodenheimer, *supra* note 316, at 1004.

poses of interstate enforcement under the Uniform Child Custody Act. If one of the parents moves and takes the child, the other parent has no direct enforcement remedy under the Act in the second state.[323] The only available judicial mechanism would be a motion to modify custody to provide the aggrieved parent a legal right to retain the child. If the decree does not establish with which parent the child is to reside, self-help is available to either parent, though this antithesis of cooperation would obviously mark the end of the joint custody arrangement.

IX. Criteria for Decreeing Joint Custody

Joint custody is not for everyone.[324] The indiscriminate use of joint custody as a "cop out"[325] or to avoid hurting one parent[326] would be to substitute one evil for another. For some the anger and frustration surrounding divorce is too great an immediate obstacle to the cooperation required to make joint custody work.[327] For those whose divorce was precipitated by severe differences over how the children should be raised or who have, in fact, harmed their children by consciously using them as weapons in their private war, joint custody may be only a perpetuation of unacceptable and damaging parental conduct. There are, sadly, some parents who do not care for their children and others who are incapable because of pathological disturbances or marginal capacities of participating in reasoned decision making for their children. In many cases the divorce may have been marked by one parent's lack of involvement in caring for and making decisions about the children. However, it defies reason and what we know of human potential to think that those capable of joint custody constitute less than 4 per cent of the divorcing population.[328]

It has been suggested that a presumption be established in

---

[323] Bodenheimer, *supra* note 316, at 1011.

[324] Woolley, *supra* note 3, at 34.

[325] Braiman v. Braiman, 44 N.Y.2d 584, 586, 407 N.Y.S.2d 449, 452, 378 N.E.2d 1019, 1022 (1978). *See also* Foster & Freed, *supra* note 127.

[326] 5 Fam. L. Rep. (BNA) 2144 (1978).

[327] As the anger diminishes over time and parental roles are isolated from marital conflicts, joint custody might then be considered. Stating "it's rarely too late to work out a joint custody program, no matter how much time has elapsed since the divorce . . .", Ware tells of a couple who battled destructively over their children for four years before deciding to try co-parenting. Both parents now strongly advocate joint custody. Ware, *supra* note 2, at 54-55.

[328] *See* notes 112-13 and accompanying text, *supra*.

favor of joint custody.[329] At least one appellate court has recently acknowledged a presumption against joint custody.[330] Other courts, while not articulating such a presumption, appear to rule against joint custody for a similar reason.[331] Presumptions of the past, first for the father, then for the mother, have not worked well.[332] It does not seem wise to create a presumption for joint custody in all cases; it might serve as a disincentive for careful fact finding if custody is contested.[333] Perhaps a legislatively declared "preference" for joint custody is a workable middle ground, however, these terms are but labels, the effect of which may be dependent on statutory wording and court interpretation.[334]

When parents do agree upon joint custody, however, it should be decreed.[335] The courts should not stand in the way of parental efforts to share responsibility for their children following divorce. The parents know, better than a judge, what each is capable of and how they can best meet the needs of their children within the

---

[329] Roman & Haddad, *supra* note 3, at 173. In a strong dissent in a recent New Hampshire Supreme Court decision that awarded sole custody to the mother, Judge Douglas urged trial judges and attorneys to consider a presumption of joint custody. Starkeson v. Starkeson, 397 A.2d 1043 (Sup. Ct. N.H. 1979). Massachusetts (HB 2394), and Oregon (HB 2538) have bills pending which would establish a statutory presumption for joint custody of children upon divorce. California Senate Bill 447 would create a presumption that joint custody is in the best interests of a minor child, but only if 3 factors are present: (1) parental agreement, (2) consideration of the child's wishes where appropriate, (3) submission of an acceptable joint custody plan. Absent these three factors the court could award joint custody as a matter of judicial discretion.

[330] Lumbra v. Lumbra, 394 A.2d 1139 (Sup. Ct. Vt. 1978).

[331] *See, e.g.*, Gall v. Gall, 336 So.2d 10 (Fla. Dist. Ct. App. 1976); Ralston v. Ralston, 396 S.W.2d 775 (Ky. Ct. App. 1965).

[332] *See* comments of Justice Felice Shea who feels presumptions in custody cases are *per se* inappropriate. 5 FAM. L. REP. (BNA) 2144 (1978).

[333] Foster and Freed oppose use of presumptions in custody disputes and call for "meticulous fact finding", Foster & Freed, *supra* note 127.

[334] The "preference" for joint custody which would be established in California with the enactment of AB 1480 now pending in the California legislature has been referred to as a "mandatory joint custody bill." *See* Bach, *Mandatory Joint Custody Bill—A Help or A Hindrance to Lawyers?*, The Los Angeles Daily Journal, June 11, 1979, at 3, col. 1.

[335] Language that would require acceptance of a stipulated parental agreement is contained in House Bill 2387 introduced in the 1979 Massachusetts Legislative Session: "Where the parents have reached an appropriate agreement providing for the joint legal custody and the shared or sole physical custody of the children, the Court shall enter an order accordingly unless specific findings are made by the Justice indicating that such an order would not be in the best interests of the children." California S.B. 477 is similar. *See* note 329 *supra*.

reality of divorce. Court dockets are sufficiently full of cases where parents disagree; the court should not create conflict where the parents do agree. The fact that stipulated joint custody may on occasion not work does not justify the time, expense, agony and potential error of judicial inquiry into the parents joint decision to continue their basic parental roles following divorce any more than courts should second guess parents prior to divorce. Should disagreement later occur, the courts will be available, as needed, to sort out parental rights and decide upon custody.

Concerns about agreements arrived at by "compromise" or "overreaching" are generally misfounded. All agreements represent some degree of compromise and patterns of dominance, manipulation, or overreaching during divorce are likely no different than during marriage. There is no indication that these elements occur any less frequently in agreements of sole custody, which are generally not questioned by courts. Courts may wish to satisfy concerns about these issues by requiring parents seeking joint custody to first obtain professional divorce counseling or to utilize the services of a divorce mediator.[336] Agreements reached through attorneys representing each parent and, in those states requiring it, counsel for the child, should also answer these concerns.

This is not to suggest that it is inappropriate for courts to scrutinize stipulated joint custody agreements to assure that the financial and care arrangements have been adequately considered and are realistic. The general criteria for approval of joint custody, however, should be based on the unique features of joint custody, rather than the more restrictive criteria for divided custody.[337] Courts can utilize this same set of criteria in deciding when to encourage joint custody when parents do not initially agree upon a custody resolution. Indeed, if a court is careful in finding that the facts exist which satisfy the joint custody criteria set forth below, courts should consider ordering joint custody in contested custody cases.

An award of sole custody to one of two parents competitively

---

[336] In Alameda County, California, joint custody proposals are referred to conciliation court counselors for an evaluation. Bodenheimer, *supra* note 288, at 1011.

[337] In *Lumbra v. Lumbra*, 394 A.2d 1139, 1142 (Sup. Ct. Vt. 1979), the court listed factors trial courts should consider in joint custody cases. Included, among other things, were "age of the child," "distance between houses of the parents," and "frequency of transfer and proportion of each parent's custodial time;" factors taken from divided custody cases. *See also* Mayer v. Mayer, 150 N.J. Super. 556, 376 A.2d 214 (1977).

seeking custody runs a high risk of coming back to haunt the court in motions for modification, contempt, non-support, and a myriad of other manuevers that parents embittered over a custody fight may devise.[338] Though court ordered joint custody may be more likely to fail than when parents agree, ordered joint custody is not necessarily more prone to failure than an order of sole custody following a divisive court contest. The potential benefit to the child is greater because a court ordered joint custody decree may help parents discover their potential for shared parenting and require them to do more for their children rather than less.[339] It is too often forgotten that one of the most noble functions of laws and courts is to establish models for conduct expected of people.[340]

Joint custody benefits children and parents by continuing the active involvement of both parents in the child's life through shared authority similar to that during the marriage. Courts should decree joint custody when (1) both parents are fit; (2) both parents wish to continue their active involvement in raising the child; (3) both parents are capable of making reasoned decisions together in the best interests of the child; and (4) joint custody would disrupt the parent-child relationship less than other custody alternatives.

A finding of parental fitness assures that the child will not be subjected to the care of a parent incapable or unwilling to provide for the child's needs and to protect the child from harm. If there is no evidence of abuse or neglect and no allegation to the contrary, a finding of fitness would normally present no difficulty.[341] A finding of parental fitness protects both parents, in the event either later contends for sole custody. The court's attention in considering a request for modification could then be focused only on evidence following the initial decree of joint custody.

---

[338] *See* note 296 and text accompanying, *supra*.

[339] As Elkins, *supra* note 180, at vi stated: "It is well known that when we expect more of people and ask them to stretch for their potential, people rise to the occasion and meet expectations. When we encourage divorced parents to be involved in shared parenting, as in joint custody, we are addressing ourselves to the strengths in them rather than their weaknesses."

[340] In commenting on the role of law, Professor Carol Bruch observed: "In general, law works in at least two ways. It sets standards for acceptable behavior and it resolves disputes . . . [r]easonable societal expectations that are included in a court's judgment will be obeyed by the majority of people." Bruch, *supra* note 31, at 22, 26.

[341] An unofficial estimate indicates that between 80 and 90 percent of contested custody cases involve two perfectly fit parents, P. WOOLLEY, THE CUSTODY HANDBOOK (1979).

If one parent, though fit, does not wish to be actively involved in raising the child following divorce, there is little reason to go further.[342] Stipulated agreements of joint custody should meet the requirements of this criteria without further evidence, as would separate petitions or motions by both parents for sole custody. Inclusion of this criteria, which will in most cases be a "given," creates a risk that it will be used as a battleground for testing sincerity or comparing degrees of love for the child. However, it does provide the court with the opportunity to focus the parents' attention on the need of both parents to actively involve themselves on a continuing basis with the child. It also provides some standard for modification should one parent later "drop out" or otherwise fail to meet his or her joint parental responsibility.

Even if the parents in the emotional heat of their divorce have not made reasoned decisions together in the best interests of their child, the judge may find that they are capable of doing so. If the parents, outside of the divorce setting, have each demonstrated that they are reasonable and are willing to give priority to the best interest of their child, then the judge need only determine if the parents can separate and put aside any conflicts between them to cooperate for the benefit of their child. The judge must look for the parents ability to cooperate and if the potential exists, encourage its activation by instructing the parents on what is expected of them.[343] In the increasing number of jurisdictions offering court connected counseling, professional guidance is readily available and can be a condition of joint custody.[344]

The court may wish to consider the pre-divorce parenting pattern in determining which available custody alternative would be the least disruptive. A father, or a mother, who prior to divorce has not actively participated in caring for the child or in making major decisions on behalf of the child, may not be in a position to actively do so following divorce without a disruptive effect. The child's needs for continued involvement with paternal and mater-

---

[342] Professor Carol Bruch argues that both parents can be compelled to assume part of the burden of caring for their children by use of "dual parenting orders," short of joint custody. Bruch, *supra* note 31.

[343] Stephen Gaddis in a letter to the authors dated March 28, 1979, points out that "A responsibility rests on the practicing bar members of the bench, and others involved in the legal process to assert ourselves in teaching our clients what all the alternatives are, and what is appropriate behavior."

[344] Court-connected conciliation and counseling services are now available in at least 15 states. They all offer custody counseling and some offer custody mediation without charge. Report of Exec. Dir., Association of Family Conciliation Courts, Annual Meeting, Hartford, Conn., 1979.

nal relatives and friends may also be a factor. Though a child's residence need not be shifted as a result of joint custody, the court should weigh the practical effect of a parent's relocation or change of lifestyle and should structure the custody arrangement to minimize any disruptive effect on the child. Finally, the court should view joint custody not in comparison to an idealized intact family, but rather relative to the less than ideal alternatives of sole custody litigation and disposable parents.

CONCLUSION

Joint custody has been brought to the attention of attorneys and judges by parents who seek to divorce their spouse, but not their children. Limited social science data indicate that joint custody may often best serve the needs of children to remain actively involved with both parents following divorce. The law has reluctantly responded by allowing joint custody in limited circumstances and expecting the worst. The cases frequently refer to joint custody as a modern Solomon, dividing the child in two,[345] rather than recognizing it as an opportunity to avoid cutting off half the child's family and to allow the child the continuing benefit of both parents.

Joint custody is no cure-all for the agony of divorce and the often difficult adjustment it requires of children and parents. It is, however, preferable to the divisiveness inherent in decreeing custody to one parent or the other. Joint custody will work in more cases than now thought possible. Responsibility rests with attorneys, judges and others involved in the process of divorce to inform clients of this positive alternative to the isolation of sole custody and the bitterness of custody litigation.

---

[345] When two women claimed to be the mother of the same child, King Solomon called for his sword and threatened to divide the child. He observed the women's reactions and reasoned that she who was willing to give up the child rather than see it split in two was the true mother. 1 *Kings* 3:16-27.