

build a body of knowledge to guide our decisions. The state of our knowledge suggests a commitment to research and the development of child-focused mediation and counseling, and education and support services for parents and children embarking on joint custody. This may better serve divorcing families than a rigid legal prescription.

Further Observations on Joint Custody

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Susan Steinman's work has provided a valuable start for what I hope will be a decade of research on the varied forms of custody which provide the context for post-divorce, parent-child relationships. This paper briefly summarizes some of the divorce research of the past decade that sheds light on joint custody and policy related developments, and then considers what further research is needed. Finally, I express several professional concerns regarding current thinking in the area of joint custody.

I. APPLICATION OF DIVORCE RESEARCH TO JOINT CUSTODY AND POLICY DEVELOPMENTS

First, we have learned that most parents who seek a divorce were not in major conflict regarding child rearing issues during marriage. The commonly heard refrain, "If parents could cooperate regarding their children, they would not be getting a divorce," is an unfortunately simplistic notion of divorce. Parents choose to divorce because of long-standing unmet needs such as incompatibility, lack of respect, lack of intimacy, failure in communication, and emotional or physical abuse. Parents rarely divorce for reasons that have anything to do with their children. From this we know that parents not in dispute regarding their children prior to divorce are, despite their divorce engendered hostilities, likely candidates for cooperation concerning child rearing after divorce.

Second, we have learned that despite the common presence of hostili-

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ties evoked by the failed marriage and the decision to divorce, for most divorcing couples this hostility diminishes during the first year following separation. Those individuals who remain enraged more than eighteen months to two years after separation are more likely to be persons with significant psychological disturbances. Children of such individuals are at significant psychiatric risk whether they are in a joint custody or a sole custody arrangement. Perhaps they are at even greater risk if they are in the sole custody of the more disturbed parent without the mitigating influence of the healthier parent on a frequent and regular basis.

Related to this is the repeated observation that it is unusual to find two equally hostile parents, particularly after the first year following separation. More often we find one very angry parent and a second parent who responds to that anger either to protect her integrity or to preserve whatever contact with the child has been allocated. The imprecision of describing such a couple as hostile and disputing parents, when in fact one parent is significantly more hostile than the other, hinders our further refinement and understanding of the issues of joint custody.

Third, we have learned that the ability to cooperate around parenting issues can be encouraged and enhanced with limited and relatively inexpensive education, counseling, or skillful mediation. Unfortunately, the traditional concept of the hostile divorce, advice from extended family and friends, and the adversary process tend to work against cooperation. Indeed, each of these sources encourages hostilities and a lack of cooperation, to the detriment of effective planning for post-divorce family relationships.

Fourth, Dr. Steinman has discovered that one-third of the children in the joint custody setting were not particularly well-adjusted and were having either learning or peer problems or both. More than one-third of the children studied in the California Children of Divorce Project were also psychologically at risk or poorly adjusted by the time of the five year follow-up. These were all youngsters in sole custody situations.¹ Thus, although the findings cannot be equated or directly compared,² it seems that either form of custody may create or consolidate

¹ J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980).

² The studies differed in a number of important regards. First, the measures used to assess parents' and children's psychological adjustments and parental hostility were not the same. Also, the intervals following separation at which the families were seen differed: the Children of Divorce sample was seen at three intervals following separation

adjustment problems after divorce. The specific nature of the problems, their origin, and their relative frequency must be investigated in future research.

Fifth, there is emerging evidence of a link between a continuing relationship with the child and the visiting parent's compliance with child support obligations. This data, of course, was obtained in our study of sole custody cases. Whether joint legal or physical custody increases the child's contact with the parent who would have received visitation under a sole custody order and whether child support payments are more frequently honored as a result, however, is not yet known.

Sixth, our research has shown that joint legal responsibility for one's children is psychologically beneficial and more acceptable to many fathers after divorce than is the absence of such legal responsibility. In our current mediation research we have also found that many mothers respond positively to sharing legal control of their children once the issue is explored and the areas of shared responsibility delineated and understood. The traditional practice of removing many fathers' legal control of their children arguably has not only been destructive to their view of themselves as fathers and to their relationships with their children, but also reflects the extent to which fathers have in the past been considered unessential in the psychological life of a child.

Finally, various research projects have demonstrated that the traditional visiting pattern of every other weekend is simply not sufficient contact for most children and fathers to maintain a positive relationship over time, and that the youngster's adjustment suffers. There is a significant relationship between the amount of paternal contact (excluding contact with fathers who are extremely immature or abusive) and positive post-divorce adjustment of the child. The more contact, the better adjusted is the child academically and with peers. Children confirm this

(within six months of separation, eighteen months after separation, and five years after separation) whereas Steinman's sample was seen once, with the interval varying between families. The psychological adjustment of the children, the degree of parental hostility, and the quality of parent-child relationships near the time of separation were accordingly not observed directly in the Steinman study. Next, there were no formally structured joint custody families in the Children of Divorce sample, although a number of children enjoyed a higher than usual frequency of visitation. Additionally, the Children of Divorce Project provided a six week preventive counseling service as part of the research which may have facilitated positive adjustments in children.

There were no litigated custody cases in either sample, although some parents in the Children of Divorce sample were intent on litigating before entering the research and counseling program. The extent to which divorce itself or any form of custody arrangement creates adjustment problems for children in frequency beyond that generally observed in the total child population has not yet been studied.

by their stated approval of more frequent contact with their fathers.

This divorce research confirms the need to seriously consider joint custody as an option of equal status to that of sole custody. Joint custody may indeed be superior in the long term for many post-divorce parents and children, although the percentages of families for whom this is true cannot yet be identified.

Several additional points are relevant to the consideration of joint custody. We have decades of precedence for awarding custody of children to women; indeed, it has been thought to be "in the best interests" of children to be in the sole custody of the mother. Accordingly, those fathers who have maintained a close relationship with their children have done so against both legal and psychological odds. There are clearly larger groups of men who with proper support from the legal system and mental health professionals can maintain a continuing close relationship with their children. Yet even today, women are customarily awarded custody of their children without particular consideration given to the quality of their parenting, while men must still prove their parenting capacities and interests to those who make custody decisions. As a result, many lawyers, judges, and mental health professionals who share society's bias toward women in this regard may find reasons for discouraging joint custody which have nothing to do with children's best interests.

If, in fact, links between joint custody, frequency of visitation, and child support payments exist, joint custody may have additional important policy implications. Recent estimates indicate that between forty and fifty percent of final divorce support decrees are violated within two years of their entry. A child's best interests are met not only by psychological support, but also by financial support.

For all these reasons, parents, attorneys, counselors, and judges will best serve children's interests and enhance the impartial application of the law by adopting a more open-minded attitude toward the potential benefits of joint custody.

II. WHAT QUESTIONS SHOULD BE ADDRESSED IN STUDIES OF JOINT PHYSICAL CUSTODY?

Dr. Steinman has reminded us that there is a great deal that we do not know about joint custody. Certainly, there is need to examine joint physical custody situations that are imposed by a legal system in the absence of agreement on vigorously disputing parents. For this purpose, joint physical custody is defined as the sharing of parental responsibility so that the child spends at least thirty percent of his time with one

parent or the other in any given month or year. It will be important in these studies to identify the parent who is most opposed to a joint physical custody arrangement and to trace the child's relationship with each parent in the following years. These studies should also include a parallel control sample of disputed custody cases in which sole physical custody is awarded under similar circumstances. The measures of adjustment of the children and the conflict between parents as well as the incidence of further legal action should be identical for each sample. Ideally, the sole physical custody sample in disputed cases should include equal numbers of cases in which custody was awarded to fathers and to mothers.

Additional joint physical custody arrangements which should be studied are those in which one parent was originally against the joint custody arrangement, but through educational, counseling or mediation intervention agreed to share the physical care of the children. In our current mediation study this group includes primarily mothers who were initially opposed to joint custody but whose attitudes changed following educational intervention and a mediated discussion of each parent's assessment of the current custody and visitation situation. These are parents who, had they gone first to their attorneys, might not have agreed to joint custody because the option might not have been seriously explored.

Further studies of joint legal custody are also needed. We need to study not only how often couples are in substantial dispute regarding legal decision-making issues (that is, issues of legal custody), but also what issues specifically cause difficulty, by whom they are raised, what kind of intervention was tried to reach agreement prior to coming to court, and whether the dispute actually affected the child. We have found in mediation that as couples address the issue of joint decision making by specifying issues they will mutually decide and agreeing to methods for resolving any disputes that might arise, the stage is set for cooperation. Research is underway that will provide us with a measure of how effective such mediations are.

Divorce research is still in its infancy. We need controlled studies of outcomes for children under father custody, mother custody, and various joint custody arrangements as part of a larger, overall sample. There are, of course, many other studies that could provide valuable information but probably will not be done because of their cost and complexity.

One critical research need is to assess the impact of legal advising on decision making in the area of parent-child relationships. The attorney's attitude regarding the shape of parent-child relationships after

divorce may have an effect on a client's behavior. Recently, for example, when a father violated a restraining order regarding the removal of his personal property from a garage, the mother's attorney retaliated by filing a motion to reduce visitation and the father's attorney retaliated in turn with a claim for sole custody. The couple had practiced *de facto* joint custody for nearly a year when these events occurred, leading directly to a full-blown custody contest which consumed the next year of the family's life and had detrimental consequences for the child.

Some professional concerns also require attention. First, research in joint custody must be objective and must be designed to permit findings that joint custody can be successful as well as detrimental. Those trained in the psychological sciences know that it is possible to devise research methodology to obtain a desired result. Thus, investigators who are ideologically opposed to joint custody may design studies which emphasize pathological symptoms and which fail to look for and report signs of coping and psychological health as well as longer-term strengths in parent-child relationships. Conversely, researchers favoring joint custody may close their eyes to evidence of difficulties. To maximize our learning we also need periodic follow-ups and standardized measures for use by research projects in locations throughout the country.

Second, we are guided in our thinking and decision making about divorce and joint custody by developmental and psychological theories propounded several decades ago that did not anticipate the special issues of divorce. In fact, most theoretical constructs focus almost entirely on the mother-child relationship because they were developed at a time when fathers were not believed to play an important role in the psychological development of a child. It was only in the late 1960s that the child development field discovered the father.

Many of these theoretical constructs were valuable to our understanding of the traditional intact family, but they sometimes lose coherence and value when applied to the more complex needs of children in a divorced family. Much has been said for example of the child's needs for stability. What is stability? Some mental health authorities define stability as the need for a single home, one toothbrush, and a primary parent. Curiously, this geographic definition of stability has taken precedence in our thinking over the internal psychological stability provided by an ongoing relationship with a loving parent who no longer lives in the same home. We know that young children successfully integrate the experiences gained in child care, preschool, and overnight visits with friends and grandparents. Why then have we assumed that the youngster could not also successfully integrate the regular and frequent

experience of being with the child's father in his own home? It is important to reexamine developmental and psychological concepts such as stability and continuity in order to expand their meaning to include the greater complexities for children in the post-divorce situation.³

The concept of separation anxiety has also been an important impediment to joint physical custody, particularly in discouraging overnights for infants in their fathers' households. Yet, developmental research would suggest that infants and toddlers with a bond to a nurturing father require more, not fewer, overnights together in order to remember who their fathers are. If we are truly interested in enhancing the child's ability to maintain and build a current relationship that will serve the child's long-term developmental needs, we must devise new techniques appropriate to post-divorce family structures.

There is also a considerable preoccupation with the child's ability to cope with differences in personalities, styles, and attitudes of parents after divorce. We do not, however, question the child's ability to cope with these same differences within an intact marriage. Further, we hear theories that parents who enter into joint custody arrangements are still "emotionally married" and that joint custody is a psychological way of avoiding the issues of separation and the death of the marital relationship. This is sometimes true, but certainly not always. However, it is not particularly relevant in any event because it does not articulate the way such a transitional state would be detrimental to the child. In the clinical field, we have focused, as always, on the more pathological reasons for entering into joint custody, while ignoring the positive reasons for seeking joint custody, such as love, attachment to a child, and the valuing of a parental role.

Third, in our eagerness to protect the child of divorce we are requiring more of joint custody parents than we do of any other parents in the life history of the child. We do not insist that parents be educated about or agree upon child-rearing issues within the intact family; instead the state only becomes interested in extreme cases. Joint custody orders which require the development of a detailed plan and continued supervision and evaluation over time represent a stance and policy of intervention unparalleled in child welfare history. Although a plan is useful for parents to develop in mediation, one could question a judge's ability to consider its merits, given the current lack of judicial training in this area. In fact, we require that joint custody parents be super-parents, rather than the average, good-enough parents that create the

³ See text at 769-70 *infra*.

average child in our society.

Fourth, I am concerned about the position that argues joint custody should not be awarded when parents do not agree. In these cases, it is almost always the woman who is opposed to joint custody. Women do not need to ask for, nor agree to, joint custody. They are presumed by society, lawyers, the courts, and themselves to have a right to keep the children in their care and protection. It is the father who must ask for joint custody and it is often in the mother's power to agree or disagree. The mother's position is particularly enhanced if she knows that a refusal to share parenting with her spouse will preclude a joint custody order regardless of her reasons for denying joint custody. In this context, it would be important to study women who refuse a request for joint custody. Some women legitimately refuse joint physical custody because they have lived with men who have emotionally or physically abused their children. And some seek relief from physical spousal abuse or harassment. Others who refuse, however, are angry and rejected women who seek revenge and a reinstatement of self-esteem by using their children to punish a spouse who has terminated the marriage. There are also women whose identities are so bound up in their role as full time mother that they can not envision sharing the parenting role with the father without undue anxiety and fear for their own well-being. Further, there are emotionally disturbed women who, due to their own pathology, vigorously fight a father's desire to be involved in the children's lives. Some additional women have been advised by friends or parents not to allow the father anything more than traditional every-other-weekend visitation. In these various instances, there may be no legitimate reasons based on the father's capacity to parent for refusing to consider joint custody. Yet the children of such women would be denied more generous access to their father despite the real possibility that increased contact could be more psychologically beneficial. We need to know what percentage of refusals are based on which of these or other reasons.

Finally, I am concerned that we should devote greater effort to meeting the competing needs of children after separation and divorce. Psychological and developmental needs of divorced children are no different from those of children in intact families, but it may be harder to meet youngsters' developmental needs after divorce because divorce, unlike marriage, does not exist for the purpose of nurturing children. After divorce, children's developmental needs may be in competition with each other. The preschool child, for example, needs a degree of structure and stability to maintain and enhance his psychological functioning and continuing development. As mentioned earlier, this is often in-

terpreted as a need for one home, not two. But the youngster also has a competing need to maintain nourishing relationships with both loved parents. To meet this need, the preschooler would, because of his immature sense of time and lack of memory for relationships, need contact with each parent several times a week. Thus the need for stability and for parental relationship compete with each other, and our dilemma is to arrange things to satisfy both important needs.

Complicating our task is the knowledge that some post-divorce arrangements fulfill short-term needs, while compromising longer-term psychological needs and vice versa. For the preschool child, moving back and forth between homes may indeed create some anxieties and confusion, but this must be balanced against the emptiness and longing of the child who goes through his later school years without a close relationship with both parents.

It is important for us to adopt a frame of reference that addresses all the possible consequences of sanctioning a particular post-divorce arrangement. We must look at short- and long-term problems and short- and long-term needs. Increasingly we are seeing before the courts two parents with reasonable relationships to the child, each of whom wants to parent full time. Such cases have the potential to push counselors, mediators, and judges beyond the limits of current psychological knowledge and predictive capacity. In these instances we are more likely than usual to make judgments based primarily upon unconscious, irrational or irrelevant factors. The turmoil and anger of divorce often make it difficult for us to remain honest, objective, and nonaligned. In fact, when both parents are deemed "good-enough" parents and each supports and encourages the child's relationship with the other, there is no basis in either psychology or law for making a rational choice between parents. In these families, lawyers, judges, and mental health professionals can truly serve the child's developmental interests by encouraging each parent to take an active post-divorce role in the child's life.