grudging acknowledgement that the father may not be as bad as she had thought. Next, ambivalence starts to surface and she begins to see how pleasant it is to have some time without the child while being assured that the father is taking proper care of him or her.

An emotional change can take place in both parents if the plan is structured properly. Such change must occur gradually and cannot be mandated or imposed. If all of these steps are successful, the couple is but one step away from a recommendation of joint physical custody with more extensive time sharing, presuming the child is able to use that. Compare this result with a judge's order of sole custody to the mother subject to the father's every-other-weekend visitation. Compare it also to an initial order in which the judge informs the mother that he is ordering that she have joint custody with alternating week-long periods with the child. The first order settles for less than it should from the child's perspective; the second is destined to fail. Instead, when adequate counseling services are available, we should foster a supportive continuing relationship with room for incremental adjustments that meet the child's needs and can be gradually accepted by the parents.

Joint Custody: A Cautious View

BY SHIRLEY A. REECE*

Society is protected by laws which are carefully written and which move in a judicious and deliberate fashion toward the distant goal of a more orderly life. Laws, as created by the legislature, and as defined by major court decisions, inevitably represent social and legal policies reflecting the views of individual officials empowered to exercise significant control over our lives. In our efforts to reform divorce law in California, however, there has been undue haste. We have moved quickly from no-fault divorce[1] to a policy receptive to joint custody awards,[2] and finally to mandatory mediation in all contested cases involving mi-

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[1] CAL. CIV. CODE §§ 4506, 4507, 4510 (West 1970 & Supp. 1983).

[2] CAL. CIV. CODE §§ 4600, 4600.5 (West Supp. 1983).

nor children or domestic violence.[3] This cluster of major law revisions, our first since 1872, has occurred within the last twelve years.[4]

In the last session of the California Legislature, we came dangerously close to mandating joint custody whether parents agreed or not, and to insisting and prescribing that divorcing families organize their child-caring and child-rearing functions in a particular way without unbiased data to support this proposed change. This is very much like ordering by-pass surgery for everyone with diagnosed heart disease when a more conservative approach would do just as well.

We are therefore indebted to Dr. Steinman for her meticulous efforts to study the consequences of the joint custody arrangements which California law currently allows and to identify factors which might enable decision makers to predict with greater certainty the probable outcome of individual solutions to the very serious social problems that divorce represents. I strongly agree with Professor Mnookin's view that

> [T]he primary function of contemporary divorce law is not to impose order from above, but rather to provide a framework so that divorcing couples themselves can determine their post-dissolution rights and responsibilities, or in other words, to give divorcing couples the power *to create* their own legally enforceable commitments.[5]

Court personnel are overburdened by their involvement in family affairs that under optimal circumstances should be settled by parents and their children within the family unit. One custodial father, who along with others vigorously and effectively opposed a presumption favoring joint custody, saw this legislative intervention as a gross intrusion into matters best left to private determination.[6] I agree. At best, judges are

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[3] The court may order mediation in domestic violence cases; mediation is mandatory in custody disputes. CAL. CODE CIV. PROC. §§ 1731, 1740, 1749, 1760-1772 (West 1982); CAL. CIV. CODE § 4607 (West Supp. 1983).

[4] For a historical review of custody determinations in the United States, see Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 235-43 (1982).

[5] Mnookin, *Divorce and the Law*, in MEDIATION OF CHILD CUSTODY AND VISITATION DISPUTES 16 (California Chapter, Association of Family and Conciliation Courts Institute for Training and Research) (transcripts from the Vallambrosa Retreat, Sept. 1981) (emphasis added).

[6] Letter from Michael Raugh of Palo Alto, California (Sept. 17, 1982). For contrast, see the legislature's reluctance to become overly involved in family matters, *even* in the area of child abuse reporting:

> [T]he Legislature recognizes that the reporting of child abuse and any subsequent action by a child protective agency involves a delicate balance between the right of parents to control and raise their own children by imposing reasonable discipline and the social interest in the protection and

privy to only a snapshot view of each family before them, and we must remind ourselves that they do not have to live on a day-to-day basis with their decisions as do the families on which the court's orders are imposed.

The task for professionals, of course, is to help decide whether a particular couple is a good risk to participate in what has been called a "social and legal experiment,"[7] joint custody. We have come to expect that the behavior of judges in our society will be guided by standards and well-accepted evidentiary rules in reaching decisions. In family affairs, however, none of us has control over many of the events and forces which may shape lives, often in extraordinary ways. We learn how to parent from the models presented to us, repeated trial and error, the experiences of others, the advice of experts and neighbors, and society's more universally accepted expectations for us. Very often decisions flow not from a firm knowledge base nor from a solid body of evidence, but rather from a position of personal bias or conviction related to some popular ideology. Under such circumstances, what happens to families may and does vary enormously from one jurisdiction to another. That is not only bad law, but exceedingly defective public social policy.[8]

It would be especially instructive if legislators, judges, lawyers, domestic relations counselors, and mental health personnel were periodically required to review their decisions and recommendations related to indivdual family matters and thereby expand their understanding of the unintended and totally unexpected consequences of their decisions. It would provide a more disciplined and sober approach to a most vexing

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> safety of the child. Therefore, it is the intent of the Legislature to require the reporting of child abuse which is of a serious nature and is not conduct which constitutes reasonable parental discipline.

1980 Cal. Stat. ch. 1071§ 5. *See* CAL. PENAL CODE §§ 11165-11174 (West 1982).

[7] Comment by Dorothy S. Huntington, Ph.D., Director of Research and Evaluation, Center for the Family in Transition, Corte Madera, California, at Mediation Models Seminar, Feb. 6, 1982.

[8] W. GRUBB & M. LAZERSON, BROKEN PROMISES: HOW AMERICANS FAIL THEIR CHILDREN 237 (1982), quoting Daniel Moynihan:

> No government, however firm might be its wish, can avoid having policies that profoundly influence family relationships. This is not to be avoided. The only option is whether these will be purposeful, intended policies or whether they will be residual, derivative, in a sense concealed ones . . . . *A nation without conscious family policy leaves to chance and mischance an area of social reality of the utmost importance, which in consequence will be exposed to the untrammeled and frequently thoroughly undesirable impact of policies arising in other areas.*

problem, that of substantial judicial and professional intervention without a concomitant and reciprocal responsibility to monitor those actions. The right to judge and to decide must be matched by commensurate responsibility to evaluate the judgments reached, not only for their effect on parents, but also for compliance and disobedience as well.[9] The central question, of course, is what difference a court order has *really* made in the lives of parents and children.[10]

Once our state budget crisis clears, I would advocate that every major piece of legislation affecting the family and its functioning should include an appropriation of at least $50,000 to study the effects of that legislation over a five-year period. This might prove to be a very humbling experience and offer some valuable lessons. Serious students of the family should not be alone in their appreciation of the family's complexity, variability, and the degree to which its strengths and weaknesses are contingent on outside sources of support. Without doubt, the fabric and texture of family life has woven into it more idiosyncrasies, serendipity, vagaries, and personal trauma than any one of us can possibly imagine. These individual differences in families do, indeed, make a very real difference. We need desperately to know what makes things go or work, and what portends possible failure and more trouble ahead.

To add another perspective to our discussion of custody of law, I will focus on a small number of families that have come to psychiatric attention because of failure in mediation efforts and protracted difficulties related to custodial arrangements and visitation. Clinical services and the law often intersect when court counselors become exhausted and refer cases to outside agencies for continuing help. Let me review very quickly our work with ten families so referred and describe our "near failure" with nine of them. Our experience as skilled clinicians who know how to work with difficult cases is instructive. The sample consisted of ten mothers and nine fathers in the San Francisco Bay Area; one father was in another part of California and not available to us.

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[9] Compare the supervisory and mandatory review provisions of the California statutes regulating the juvenile courts' jurisdiction in dependency and neglect cases. CAL. WELF. & INST. CODE §§ 300, 364, 366, 366.2 (West Supp. 1982).

[10] Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978 (1977). It is of more than passing interest that Professor Bodenheimer observed that joint custody awards may only postpone the day when a sole physical custody decision might need to be made, given the mobility in our society. In Dr. Steinman's earlier study, one-third of the families at follow-up had made such sole physical custody arrangements, precipitated by a geographical move, remarriage, a new baby, or entry of the child into adolescence.

Sixteen children were involved, ranging in age from twelve months to fourteen years. One father had physical custody and was supporting his children with Aid to Families with Dependent Children (AFDC). In the nine cases in which mothers had physical custody, only one father was supporting his children. The parents ranged in age from twenty-five to forty-six years, their education from the tenth grade through college, and most were college educated. They were teachers, clerical workers, accountants, janitors, craftsmen, and health professionals. There were five interracial marriages; two couples had never married.

The medical records and psychological data have important predictive value. First, and most striking, all of the couples had a history of recurrent problems with contractual relationships. They had experienced problems with their marriages, employers, attorneys, and therapeutic relationships. In addition, they had significant problems with the management of money and frequent difficulties related to the scheduling and keeping of clinic appointments. For these parents, problems relating to child support payments and visitation were clearly predictable.

Work histories were exceptionally unstable. Although most of the parents were employed, there were frequent job changes, often for trivial reasons. There were impulsive terminations; one family, for example, had no plan but to apply for some kind of public assistance. One father misappropriated funds while on the job, resulting in his termination. Some of the parents were supporting themselves through illegal activities such as gambling, pimping, and drug dealing. Because of irregular income, there were frequent residential moves, sometimes following eviction.

The parents' marital careers were conflicted from the very beginning and were sometimes chaotic, often characterized by repeated threats and actual violence, broken promises, infidelity, and deception. There were also numerous violations of the law, including theft to support drug habits, shoplifting, breaking and entering, misappropriation of funds, impersonation of a court officer, mail tampering, wife battering, and child abuse.

Our efforts to help these families resolve their custody disputes failed in all but one case, a case in which no one would have predicted a favorable outcome. This couple, too, had been involved in several violations of the law and previous attempts elsewhere in psychotherapy. The mother had once worked as a prostitute; the father was a pimp. As expected, the father refused to come to the clinic, but he did not interfere with his child's or his former wife's participation in our treatment efforts. The case has had its ups and downs, and the therapist has

weathered many storms. However, the child is doing appreciably better in school, and the mother is now employed as a secretary. Thus, after two and one-half years and almost ninety psychotherapeutic sessions, that family is finally settling down. An enormous amount of professional time must be invested if our efforts are to make a difference in these difficult cases.

Several principles suggested by our experience should guide the law's response to custody disputes. Children should have a right to a relatively stable, nurturant environment and, optimally, to be provided with those necessities, both material and psychological, which foster and enhance growth. They should have a right not to be divided, almost as if they were property, in order to satisfy parental demands for joint physical custody. They should have a right to expect that judges will serve as their advocates in keeping with the best interests principle.

Joint custody is currently in vogue and is being fought for as a right even by parents who give no evidence of deep or abiding interest in their children. Six-year-old Tina, one of the children we treated, demonstrates the point. Tina was a first grade student and the daughter of two troubled professional people who had decided on joint custody. Her parents gave this child the responsibility of monitoring the custody schedule so she could tell them where she belonged on a given day. They had a three/four arrangement: three days with one parent and four days with the other. When she came to our attention, her major symptom was that she was literally pulling her hair out, and her plaintive comment was, "My daddy can't even remember that I'm supposed to have my piano lessons on Thursday."

The trend toward the equalization of parental rights has clearly taken precedence over the rights of children despite the popular rhetoric, almost a cliché, of the best interests principle. When parents are fighting for equality, children are likely to be caught in the crossfire and become the true innocent victims. As one twelve-year-old boy put it, "My parents are having a tug-of-war, and I'm the rope." This form of warfare is unhealthy for children, parents, judges, and court and mental health personnel. In the best of all possible worlds, joint custody — freely chosen — should be a *mutual* right of parents and children. Although children do better if they have access to both parents to serve as models for identification, embattled custody or visitation is absolutely not good for children. In most cases, it is demonstrably harmful; children must not be abandoned to the psychopathology of their parents.[11]

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[11] S. Reece, The Use and Misuse of Psychiatric Clinic Resources, The Early Identification of Trouble Spots in Mediation: Red Flags, (paper read at Twentieth Annual

Although custody, support, and visitation are inevitably intertwined, Dr. Steinman's study pays very little attention to child support. Yet, money still talks and often speaks more eloquently than a thousand promises or good intentions. Study after study under public and private auspices documents that only about forty-nine percent of the mothers in the United States ever collect the full amount of child support awarded by the courts; according to the Bureau of Census, the percentage of dishonored awards varies greatly along racial and ethnic lines.[12] Bills can never be paid with broken promises. Child support at a decent level should be the first order of business. It can provide immediate and concrete evidence of a parent's intention of honoring a duty to his or her child and of obeying the law as set forth in a specific court order. Paying one's way is intimately connected in our society with autonomy, self-responsibility, self-respect and self-esteem. A failure to provide, when there is clear capacity to do so, denigrates and devalues purported concern for one's children and their caretaker. The Arizona model, which requires that support be decided first at a separate trial when custody or visitation is contested, provides an opportunity to observe payment behavior before addressing custody questions:

> In all cases when custody or visitation is a contested issue, the court shall first hear all other issues including maintenance and child support. The contested issue of custody or visitation shall not be heard at any hearing involving other issues even upon agreement of attorneys . . . .
>
> After all other issues have been decided and the amount of maintenance and child support established by the court, then the issues of custody or visitation may be heard.[13]

When a court orders support but then fails to monitor or enforce payment, it effectively condones and reinforces irresponsible parental behavior. It also thereby abandons its duty to protect children in troubled families who are subject to repeated psychological trauma and are already at great risk. The payor may also benefit when support obligations are enforced through a reduction in the guilt many parents experience from failing to meet their obligations at the time of divorce; the issue deserves study. We also need to study the relationship of nonpayment of child support to custody and visitation disputes to learn whether such disputes are mitigated when the custodial parent has had

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Conference of the Association of Family and Conciliation Courts, San Francisco, May 21, 1982).

[12] U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS: DIVORCE, CHILD CUSTODY, AND CHILD SUPPORT (Series P-23, Nos. 106-107) (U.S. Government Printing Office, 1979).

[13] ARIZ. REV. STAT. ANN. § 25-238 (1976).

regular and dependable financial support.[14]

A child can live without visitation and contact with the noncustodial parent, but *no* child can survive without dependable support;[15] failure to provide is both child abuse and neglect,[16] and at times can become a life-threatening matter. Judges, attorneys, and court counselors need to give this most important issue priority attention.

Let me conclude by underscoring several of Dr. Steinman's important points and by entering a caveat. Certainly we need to identify those characteristics in parents seeking joint custody which would appear to make them good candidates for participation in this social and legal experiment.[17] Conversely, the need is equally important to weigh and understand the significance of parental characteristics and behavior which spell trouble for most children, whether living in intact families or in joint custody arrangements. These include behavior which indicates severe mental illness, chronic alcoholism, drug abuse, impulsivity, potential child and sexual abuse, repeated violations of the law (and convictions), prolonged property contests, and unequivocal evidence of pathological negative attachment between the parents. There is a large and growing body of respectable research to document the profoundly negative effects on children of such behavior; accordingly, parents who over time display serious impairment in their adult functioning are not good candidates for joint custody arrangements. Further, we need to identify those qualities in children which define a healthy capacity for adaptive coping, predicting resiliency during the stress of the post-divorce period, and we must know which children will suffer greatly if caretaking plans are not stable and consistent.

It is also essential that we begin to understand the impact of the various routes by which couples arrive at a joint custody decision and to differentiate the resulting outcomes. Dr. Steinman's work clearly points us in the right direction and will contribute to our evaluative efforts. Because divorce is both a stressful event and a process extending over a considerable period of time,[18] researchers would be wise in pursuing a life-cycle approach to studying joint custody, with special attention to supporting social systems (such as schools, churches and the workplaces

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[14] A possible correlation was suggested in a telephone interview with Judge Irwin Cantor, Superior Court, Maricopa County, Ariz. (June 21, 1982).

[15] *See* S. Reece, note 11 *supra.*

[16] CAL. PENAL CODE § 270 (West 1970 & Supp. 1982).

[17] *Cf.* Benedek & Benedek, *Joint Custody: Solution or Illusion?,* 136 AM. J. PSYCHIATRY 1540, 1543 (1979).

[18] Hetherington, *Divorce: A Child's Perspective,* 34 AM. PSYCHOLOGIST 851 (1979).

of parents) that affect outcomes in small but crucial ways.[19] Longitudinal data are sorely needed. We also need to extend the current literature on the economics of divorce[20] by focusing on property, alimony, and child support awards in joint custody cases, thereby illuminating a probable relationship between economic matters and other contested issues.

I laud Dr. Steinman's efforts and appreciate the difficulty of her task. She travels on largely uncharted seas and no doubt will be buffeted by unpredictable and swiftly changing winds. Her work is important but modest, and her data necessarily cover only a very small sample of the joint custody cases being decided in California. My caveat to attorneys and researchers is: resist every future temptation to stretch Dr. Steinman's data or to distort the meaning of her findings (when they are known), for we can ill afford any more public policy in the name of family protection which is not founded on a solidly established base of knowledge.[21] If we maintain a relatively unbiased perspective on the proper role of parents in shaping their family's destiny within the law, and if we take the long view — avoiding popular slogans, fashionable bandwagons, and quick solutions — there is every reason to expect that our families and children ultimately will be better served by the law and by the professionals designated to help them.

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[19] For a comprehensive statement, see Clingempeel & Reppucci, *Joint Custody After Divorce: Major Issues and Goals for Research*, 91 PSYCHOLOGICAL BULL. 102 (1982).

[20] L. Weitzman, C. Bruch & N. Wikler, *Support Awards and Enforcement,* in NATIONAL JUDICIAL EDUCATION PROGRAM, JUDICIAL DISCRETION: DOES SEX MAKE A DIFFERENCE? 53-56, 90-95 (NOW Legal Defense and Education Fund 1981), expanded and published as Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A. L. REV. 1181 (1981).

[21] For an analysis of the insufficiency of Wallerstein and Kelly's work as a basis for establishing a preference for joint custody, see Bruch, *Parenting At and After Divorce: A Search for New Models* (Book Review), 79 MICH. L. REV. 708 (1981); Cingempeel & Reppucci, note 19 *supra*, at 106.