

# BODENHEIMER ADDRESS\*

*The effort to maintain a child's contact with both parents after divorce has prompted widespread experimentation with joint custody. Dr. Susan Steinman, a researcher trained in social work, reports that joint custody holds promise for some children, but works out poorly for others. She identifies problems that require attention from attorneys, parents, courts, and researchers and concludes that joint custody is an appropriate alternative, although not the best form of custody for all families. Following her paper are three comments by experts with differing professional backgrounds. Dr. Joan Kelly, a psychologist, mediator, and researcher, reports on existing research on custody problems and argues that more must be done to insure that divorced fathers have a significant role in their children's lives. Dr. Byron Nestor, a forensic child psychiatrist, cautions that some parents are not capable of cooperating in the way required by joint custody. For parents with the necessary potential, he recommends a gradual introduction to the sharing requisite to successful coparenting. Shirley Reece, a clinical social worker and researcher, reports on her work with hostile couples. She warns against unwarranted extrapolations from findings of modest studies with small samples, and stresses the primary importance of financial support as a protection for children and indicator of parental concern.†*

## Joint Custody: What We Know, What We Have Yet To Learn, and the Judicial and Legislative Implications

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### INTRODUCTION

During the last five years, joint custody of children has emerged as one of the most significant changes in law and social policy concerning

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the family. Lawyers and mental health professionals must now consider joint custody when advising parents outside of the courtroom about the divorce process, the resulting changes in family relationships, and how these changes will affect the happiness and development of the children of divorce. Judges are increasingly asked to make decisions about the merits of joint custody for particular families. Legislators are now asked to take a position on the social desirability of joint custody. In fact, twenty-seven states have enacted some form of joint custody legislation.

Joint custody has become an increasingly popular alternative among parents and professionals because it resonates with some basic changes in family and social life in this country: close to eighty percent of divorced mothers are now working and many fathers are now spending more time rearing their children both within the marriage and after.

The dissemination of research findings on the effects of divorce on children, particularly the work of Drs. Joan Kelly and Judith Wallerstein,<sup>1</sup> highlights the importance of the child's continuing relationship with both parents and the cessation of conflict between the parents. These factors have contributed to a movement to remove the determination of child custody and visitation disputes from the legal adversary process, which exacerbates hostility and mistrust between parents. This movement challenges the traditional court practice of awarding custody to the mother, leaving the father with rigid, restrictive visitation rights.

Joint custody remains a very controversial issue, arousing passionate feelings on both sides of the issue among professionals as well as parents. The idea of joint custody challenges traditional beliefs about male-female relationships and about what children need to grow and thrive.

Joint custody is many things; it is an ideal, a policy, and a set of expectations that influences how parents and children live and relate to one another after marital separation. The following ideas and values distinguish joint custody: first, both parents are viewed as equally important in the psychological and physical life of the child; second, both parents share authority for making decisions about the children; third, parents cooperate in sharing the authority for and the responsibilities in raising their children; and fourth, children spend a significant amount of time living with each parent.

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

An exact definition of joint custody, however, is elusive. Parents, lawyers, counselors, and judges differ widely on its meaning — practically, psychologically, and legally. Thus, because there is no consensus on what joint custody means and because personal and cultural values are often difficult to separate from the issues, there is a great need for data about joint custody. Unfortunately, presently there is little data available to guide decision making.

## I. JOINT CUSTODY LITERATURE

During the past several years, a growing body of popular literature has brought the issue of joint custody before the public and professional communities for consideration. In *The Disposable Parent*,<sup>2</sup> Roman and Haddad strongly advocate that joint custody is the best arrangement for children and parents after divorce, and that there should be a legal presumption favoring joint custody. Several books have been written for parents which describe the advantages of joint parenting and suggest guidelines for developing and managing joint custody arrangements.<sup>3</sup> This literature is valuable as an educational resource for parents embarking on a joint custody arrangement. However, it is based primarily on professional and personal opinions rather than on systematic analysis. Few empirical studies have examined joint custody and even fewer have directly assessed the children. In a study of forty divorced fathers, Grief<sup>4</sup> found that the eight fathers who had joint custody were less depressed and more satisfied with their post-divorce relationships with their children than the visiting fathers. The actual visiting patterns were unspecified in this study, and the children were not assessed.

Ahrons<sup>5</sup> conducted an investigation of forty-one parents who had been awarded joint legal custody. She found that the co-parental relationships varied with respect to the degree of conflict and cooperation and the kinds of joint custody arrangements, but concluded that parents can cooperate in child-rearing matters while discontinuing the intimate spousal relationship.

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<sup>2</sup> M. ROMAN & W. HADDAD, *THE DISPOSABLE PARENT* (1978).

<sup>3</sup> M. GALPER, *CO-PARENTING: A SOURCE BOOK FOR THE SEPARATED OR DIVORCED FAMILY* (1978); I. RICCI, *MOM'S HOUSE, DAD'S HOUSE: MAKING SHARED CUSTODY WORK* (1980); C. WARE, *SHARING PARENTHOOD AFTER DIVORCE* (1979) (reviewed by Sanger, *this issue infra*, at 793); P. WOOLLEY, *THE CUSTODY HANDBOOK* (1979).

<sup>4</sup> Grief, *Fathers, Children and Joint Custody*, 49 AM. J. ORTHOPSYCHIATRY 311, 311-19 (1979).

<sup>5</sup> Ahrons, *The Binuclear Family: Two Households, One Family*, 2 ALTERNATIVE LIFESTYLES 499 (1979).

Ilfeld and Alexander<sup>6</sup> tracked 414 cases in Los Angeles and found that relitigation was half as frequent among joint legal custody awards as among sole custody awards. The authors concluded that joint custody must be working better for parents and children because relitigation indicates parental conflict. The researchers, however, did not contact parents or children directly to determine what kind of arrangements they had, or how these arrangements were working.

Studies of joint custody that include direct assessment of the children's experience are extremely limited. Abarbanel<sup>7</sup> studied four families in the San Francisco Bay Area, using a case study approach. She found the parents to be generally satisfied with joint parenting and most of the children adjusting well. She identified four factors which seem to make joint parenting work: (i) commitment to the arrangement, (ii) the parents' mutual support, (iii) flexible sharing of responsibility, and (iv) agreement on the implicit rules of the system. Luepnitz<sup>8</sup> studied fifty parents — sixteen custodial mothers, sixteen custodial fathers, and eighteen joint custody parents, along with their children. She found that child adjustment did not differ by custody type, and that joint custody offered a number of advantages for parents and children. She concluded that the findings did not support the presumption of maternal custody, and pointed to the need for future research on how joint custody works for children of different ages with varying degrees of parental motivation.

My own study of twenty-four families who arranged joint custody extrajudicially and who had maintained it over several years found that while offering potentially significant benefits to parents and children, joint custody required considerable effort and commitment on the part of parents and effort on the part of the children.<sup>9</sup> I concluded that joint custody arrangements should be determined with the child's individual needs and capacities foremost in mind.

The available literature suggests that joint custody is a viable option that should be explored further. There is little doubt that more systematic research is needed with larger and broader samples that will yield information about how joint custody works for children of different

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<sup>6</sup> Ilfeld, Ilfeld & Alexander, *Does Joint Custody Work? A First Look at Outcome Data of Relitigation*, 139 AM. J. PSYCHIATRY 62 (1982).

<sup>7</sup> Abarbanel, *Shared Parenting After Separation and Divorce: A Study of Joint Custody*, 49 AM. J. ORTHOPSYCHIATRY 2 (1979).

<sup>8</sup> D. LUEPNITZ, *CHILD CUSTODY: A STUDY OF FAMILIES AFTER DIVORCE* (1982).

<sup>9</sup> Steinman, *The Experience of Children in a Joint-Custody Arrangement: A Report of a Study*, 51 AM. J. ORTHOPSYCHIATRY 403 (1981).

ages and personalities, and in different family circumstances.

## II. WHAT WE KNOW ABOUT JOINT CUSTODY

Joint physical custody is a viable option. It is possible for parents to separate their intimate spousal relationship from their parenting relationship, to build on the residue of respect for one another, and to develop a cooperative, civilized relationship for childrearing. We also know that it is possible for children to live in two homes and remain positively attached to two parents who no longer love or want to be married to one another. Given this, we must ask: for *which* parents and *which* children will joint custody be beneficial, and under what circumstances? And, for whom and under what circumstances would it be contraindicated?

Our knowledge of joint custody is limited to studies of families in which parents were highly motivated to undertake joint custody and make it work, and who chose and developed the arrangement extrajudicially and without professional assistance. We have no data showing when joint custody fails. My comments about how joint custody worked will be based primarily on our earlier research at Jewish Family and Children's Services in San Francisco from 1978-1980.<sup>10</sup> We studied twenty-four families who pioneered joint custody on their own, prior to an express authorization of joint custody awards in California law. We learned a great deal about the benefits and stresses of shared parenting, the co-parental tasks involved, and the capacities and characteristics of the parents and their relationships that led to their choice of joint custody and allowed them to maintain a smooth running arrangement over several years. We also learned about the benefits and stresses for the children.

### A. Benefits

The overriding benefit for these parents was the sharing of the burdens and pleasures of childrearing. Most of the working mothers valued time off to pursue their careers and their adult social life. Their sense of identity and self-esteem gained from their paid employment allowed them more easily to relinquish the role of fulltime parent. For fathers, the preservation of a close relationship with their children and an important adult role as a parent was paramount. For these parents, shared parenting helped temper the sense of loss, personal failure, and disruption of the adult role and identity that often accompanies divorce.

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<sup>10</sup> *Id.*

It functioned as an antidote to the diminished sense of self-esteem and guilt over breaking up the family. It allowed them to preserve a sense of family and to avoid the profound sense of loss for themselves and their children. The marital relationship had failed, but joint custody represented a personal and mutual success as parents. This is best illustrated by a joint custody father trying to explain his relationship with his former wife four years after the marital break-up:

I would say we were friendly now, but we are not friends. We don't do the things that friends do. There is contact over Mary, and Mary is what we once were. She is there and the fact that she is really a neat kid is testimony to our individual worth and what we did together.

### *B. Stresses*

For a number of years, the psychological and practical benefits outweighed the disadvantages for these parents. The stresses they experienced as a result of the joint custody arrangement varied according to their personalities and the circumstances of the arrangement, and included the ongoing contact with their former spouse. Most of the time, these parents could contain the residual feelings of hurt, anger, and disappointment in order to cooperate in child-rearing matters. Periodically, they experienced conflicts and the eruption of latent stressful emotions. Shared parenting provided contact with the former spouse that made the immediate pain of separation easier to manage. But some parents reported that it fed the fantasies of reconciliation. The other disadvantages reported by the parents included a sense of discontinuity in being a part-time parent — both in their personal lives and their relationships with their children.

### *C. Tasks*

While the general requirement for joint custody parents is cooperation, there are four specific tasks of co-parenting after marital separation: decision making, communication, handling differences, and building new boundaries.

The cornerstone of joint custody is making decisions together about major aspects of the children's lives. The parents in the study reported that they usually made joint decisions on issues of school, health care, religion, and major problems the children were having. They made a clear distinction between the major decisions about which they faithfully consulted one another and the daily decisions that each parent handled independently, such as discipline, peer relations, and diet. They circumscribed areas for discussion and negotiation from those

which were "off limits."

Communication is another important task of co-parenting, and one that the parents kept circumscribed. Although co-parental communication provides the opportunity to keep the arrangement organized and to increase the continuity of parenting by learning about the child's experience at the other home, it also holds the danger of arousing tension and stirring up residual anger at the ex-spouse. The parents coped with this by limiting the frequency and content of communication to what was essential for child-rearing to more practical and less personal issues that could be more easily isolated from the parents' emotional concerns.

Joint custody parents must also be able to handle the differences in their ideas about child-rearing. Whereas a framework of negotiation and joint participation was used for resolving major decisions, they coped with the conflicts that did arise in the day-to-day handling of the children with an unspoken policy of restraint. They avoided confrontation and held their own counsel with the other parent. In handling the child's complaints about the other parent or problems at the other home, these parents scrupulously avoided being critical of the other parent and referred the child back to that parent to resolve the problem. Their ability to be clear about their differences and tolerant of them was very important in sustaining joint custody.

Generally, the major task for joint custody parents is to build and maintain a new set of boundaries, that is, to maintain emotional and territorial distance while leaving open a channel of communication and a framework for negotiation of child-rearing issues. This called for an unfailing respect for the privacy and autonomy of the other parent, and a strict policy of noninterference in the other home. These parents continued to share the intimacy of involvement and concern with their children, while at the same time trying to gain the psychological autonomy needed to pursue their new lives.

### 1. Characteristics of Parents and Co-Parental Relationships

We have been able to identify characteristics that were important in sustaining the joint custody arrangement. They can serve as a profile of parents who are good candidates for joint custody.

Foremost was the sense of respect for one another as parents, despite the disappointment in each other as marriage partners. Each appreciated the value of the other to the child, and was sensitive to the possible loss of a parent-child relationship. The parents' relationships were characterized by a similarity in basic child-rearing values. There was the capacity to tolerate the minor differences that existed and to distinguish the important from the unimportant ones. These parents were

able to relinquish control and not interfere in the other parent's relationship with the child. They were personally flexible and able to accommodate to the needs of the arrangement, the child, and even to the other parent. These were not people who were rigid in their thinking or behavior. There was a capacity to contain their anger and hostility and to divert it away from the children. There was an ability to take responsibility for their part in the break-up and their current life rather than project blame onto their ex-mate. Finally, there was a sense of parity in these co-parental relationships. They accepted the premise that they were equally significant to and capable of caring for the children. This meant not only the genuine valuing of the other as a parent in raising the child but, equally as important, it enhanced the parents' own self-confidence. It was important that each parent had a sense of self-esteem as a parent in his or her own right in order to maintain the balance in the co-parental relationship.

These parents were able to separate out their roles and feelings as parents from the marital- and divorce-engendered conflicts. They had rarely argued about the children during the marriage, and were able to maintain a "conflict free" sphere around the children, which they protected through the divorcing process. This capacity was central to a smooth running co-parental arrangement. These characteristics, together with a strong personal commitment to the idea of joint custody as a fair and moral solution and commitment to their children, allowed these parents to maintain the arrangement over a number of years.

## 2. The Children's Experience

I have reported elsewhere on the psychological experience of the thirty-two children in this study, who ranged in age from four and one-half to fifteen years old.<sup>11</sup> By the time we interviewed and assessed these children, many were joint custody "veterans" — seventy-five percent had lived in a joint custody situation for over half their lives. The children's experience of the joint custody was more mixed than that of their parents. Our findings on the advantages and strains for the children and how they coped with the arrangement can be summarized as follows.

### *D. Benefits*

Joint custody was beneficial for these children in three major areas. First, they received the clear message that they were loved and wanted

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<sup>11</sup> *Id.*

by both parents. Second, they had a sense of importance in their family and the knowledge that their parents made great efforts to jointly care for them, both factors of which were important to their self-esteem. Third, they had physical access to both parents, and the psychological permission to love and be with both parents. This protected them from the crippling loyalty conflicts often seen in children who are caught in the crossfire of their parents' ongoing battles.

These children clearly had two psychological parents to whom they were positively attached and loyal, despite the marital split. This does not support the assumption in Freud, Solnit and Goldstein's *Beyond the Best Interest of the Child*<sup>12</sup> that children cannot relate well to two separated parents who are not in positive relation to one another. We have found that children can relate when parents who cannot relate positively as husband and wife can communicate constructively around the children. In our sample, in which parents generally supported each other as parents and supported the child's relationship with the other parent, the children benefited from watching their parents go to a great deal of effort to jointly care for them. It gave them a sense of importance in their family.

In these families, in which parents had basically similar child-rearing values and, perhaps more important, were clear about their differences and tolerant of them, the children adapted to the differences with a minimum of conflict and confusion. In the few families in which parental hostility and conflict continued to involve the children, however, the children were troubled by it.

### *E. Switching Homes*

A major concern about joint custody is whether switching homes generates confusion and anxiety in the child about where he belongs. Most of the children were impressively able to keep their complex schedules in mind and demonstrated a sense of mastery over switching between homes. Twenty-five percent of the children, however, were anxious and insecure about switching homes. They worried about themselves, their parents, possessions, and exhibited an overall sense of instability. These children fell into two groups: four- to five-year-old girls (the two girls in this age group who were not having trouble were those who traveled with older sisters), and a group of seven- to nine-year-old boys who were worried and felt insecure about their ability to keep track of

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<sup>12</sup> J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTEREST OF THE CHILD* (1973).

things and were having learning problems at school.

### *F. Continuity*

The continuity of school life and friendships was found to be very important to all the children in the study, but particularly to the latency age and adolescent children. They valued the stability of remaining in one school and used school as an anchoring place. The adolescents' age-appropriate involvement in school-based social activities, as well as the loosening of psychological ties to the parents, made the long established dual-home arrangement antithetical to their needs when they became teenagers. Thus, the continuity of school and peer relationships needs to be seriously considered in developing joint custody arrangements.

### *G. Changes Over Time*

We conducted follow-up interviews twelve to eighteen months after the initial series of interviews, in order to identify significant junctures in joint custody and to see how changes in the lives of parents and children affected the arrangements. While hoping to learn about what precipitates change and how parents and children adapt, we did not expect to find much change because these arrangements had been maintained over a number of years (two-thirds had shared custody for four years or more) and because the parents had felt committed to joint custody and were generally satisfied.

We were surprised to find that one-third of the families had shifted to an arrangement in which their children lived primarily in one home. These children continued to see the other parent on a regular basis, and the parents maintained their joint decision making. The major events that precipitated the shift from a dual-home to a primary-home arrangement were: a geographical move; remarriage and a new baby (we were surprised to find that remarriage alone did not seem to have an effect); and entry of the child into adolescence.

### *H. Summary*

Joint physical custody is a viable option that offers important benefits to parents and children. But it is not an easy arrangement. It is an intricate, complex structure requiring considerable commitment on the part of parents and considerable effort on the part of parents and children.

Joint custody is not for everyone. The parents in our sample were

committed and generally satisfied, but the children's experience was more mixed. While it was not possible to know whether the dual home arrangement had caused or was the primary factor in the unhappiness and adjustment problems experienced by one-third of the sample, these children were clearly overburdened by the demands of the arrangement and were unable to achieve a feeling of mastery and security within their post-divorce living situation even after a number of years. We concluded that the capacities and vulnerabilities of the individual child must be at the top of the list of considerations in decisions about joint physical custody. It may be that a cooperative, smooth running co-parenting relationship is a *necessary* but not *sufficient* condition for children to do well. In other words, we need to consider not only which *parents*, but also which *children* make good candidates for joint custody.

### III. WHAT WE HAVE YET TO LEARN

We have no data on the outcome of joint custody for families in which parents come to joint custody (at least initially) involuntarily or as a result of pressure from the legal system. We also have no information on what factors are most important in differentiating joint custody that succeeds from joint custody that fails.

Decisions about joint custody are being made daily in the courtroom, in the offices of family court services, and by parents with the assistance of mediators and counselors. Although the bias, values, and concerns about joint custody vary among judges, mediators, counselors, and certainly the parents, there is a consistent wish for long range data that can guide decision making.

The following five broad areas of information are important to informed decision making and to the development of supportive, educational, and counseling services to help parents and children implement the decisions that have been made: (i) the nature of the agreement; (ii) determining who can successfully overcome initial resistance to joint custody; (iii) the nature of the parents' characteristics, relationships, and social and ethnic factors; (iv) the impact on children of joint custody arrangements; and (v) junctures in joint custody.

These are the basic questions we are studying in our current research and service project at Jewish Family and Children's Services in collaboration with the Center for the Family in Transition. The study involves two sub-groups of families:

1. "Non-disputing" parents: parents who have mutually agreed to joint custody without court involvement; and

2. "Legally disputing" parents: parents who are in legal dispute and who have brought the dispute to their attorneys or to court. In this group, either one parent wants joint custody and the other is opposed, or both parents are seeking sole custody and a third party has recommended they explore joint custody.

We are studying parents and children who are in the process of decision making and implementation of joint custody within the first year of filing for dissolution, and we are following-up parents and children at six-month intervals over a three-year period.

### *A. The Nature of the Joint Custody Agreement*

First we need to look at the nature of the joint custody agreement entered between parents and how that is related to the success of the arrangement. Does the route from which parents come to joint custody make a significant difference in the outcome? In our study sample, we have been very impressed by the differences in what a legal joint custody agreement means. The parents in our current study population come to joint custody from the following routes:

(i) Parents mutually agree to a joint legal and physical custody arrangement on their own and arrive at a plan either independently or after consulting with a third party.

(ii) Parents agree in theory to joint legal and physical custody but cannot agree on a plan and thus consult an attorney or mediator.

(iii) Parents agree in principle, but their relationship is so conflictual that the implementation of joint custody is continually in dispute.

(iv) Parents are in dispute because one parent wants joint custody, but the other parent is opposed. A joint custody agreement is arrived at through mediation or stipulation by the parties' attorneys, with varying degrees of confidence in and commitment to the agreement.

(v) Parents are in dispute, each wanting sole custody, when joint custody is raised as an alternative by a third party (mediator or attorney). We need to differentiate:

(a) cases in which parents have not been aware of this option and begin to consider it with a third party's help;

(b) cases in which parents continue to oppose the sharing of raising the children and come to joint custody as a compromise solution that neither party really wanted.

(vi) Parents remain in dispute, are unable to come to agreement, and joint custody is arrived at by court order.

Some parents who entered our study with an agreement to undertake joint custody were not legally disputing, but fell across a wide spectrum with respect to: (i) whether the decision was voluntary, pressured, or

coerced; (ii) their confidence in the principle of joint custody or in their specific plan; (iii) the degree, intensity, and manifestation of conflict and hostility between parents; (iv) the presence of respect and trust in the other as a parent; (v) the ability to separate feelings about the other parent in the marriage and divorce experience from communicating and decision making about the children; (vi) the degree of resolution or acceptance of divorce, and (vii) the parents' psychological equilibrium.

A preliminary look at the first thirty-two families shows the following initial positions:

*Legally disputing.* Eight families entered in a legal dispute in which the fathers wanted joint custody and the mothers did not.

*Legally nondisputing.* Seventeen families had made an agreement to undertake joint custody in some form, but there was a great variation in such factors as the level of conflict, hostility, and voluntariness of the agreement. Many of these legally nondisputing parents had significant disputes.

*Truly nondisputing.* In four families, both parents legally agreed to joint custody, had confidence that it was the best alternative, and had minor child-related disputes.

*Court-ordered.* In four families, the court ordered joint custody over the continued objections of the mother, either with or without the court mediator's recommendation.

### *B. Who Can Successfully Overcome Resistance to Joint Custody?*

We need to observe over time the factors that differentiate the parents who overcome their initial resistance to shared custody and develop the capacities and resources to manage the arrangement, from those parents who cannot. However, assessing this potential during the early stages of divorce, when parents are in great distress and conflict, is quite difficult. We should not assume that parents are prepared to undertake joint custody simply because they have technically agreed or compromised through mandatory mediation. A legal agreement does not necessarily mean parents have settled their disputes, or have the resources to implement joint custody. Joint custody is at greatest risk of failure when it is court-ordered although parents remain in dispute, when they are unable to come to any level of agreement and do not demonstrate any motivation to come to a joint solution, and when joint custody is ordered in the hope that it will end a battle and parents will learn to cooperate.

The four families with whom we are working in the Joint Custody Project who have been ordered to undertake joint custody and who have been referred to our Project for help have several things in common. In three of the cases:

(i) Parents continue to be intensely hostile; the hostility during marriage and after separation manifests itself in physical violence or verbal abuse. (In the fourth case, the differences in personality, lifestyle, and parenting are experienced by one parent as neglect, and as damaging to the child.)

(ii) The parents cannot talk to one another about the children and negotiate business between themselves without the eruption of intense anger, although they do follow the order and prescribed time schedule.

(iii) The children are having significant emotional and behavioral problems. Although there are clearly other significant factors (degree of parental conflict, psychological stability of the individual parents, or the vulnerabilities of these children) that may be as significant or more so than the joint custody arrangement per se, it is clear that living in joint custody is extremely stressful for these children.

(iv) The parents, while concerned about the problems their children are having, cannot work together to make a joint decision about how to help them, and cannot jointly decide about therapy or make a coordinated effort to support the children at home.

We hope to learn about the course and outcome of joint custody in these court-ordered cases over time as they move further away from the acute phase of the separation crisis. But we need to differentiate between joint custody that is a division of time prescribed by a court order and joint custody that is the product of parents trying to work together.

### *C. Parents: Their Characteristics, Relationship, and Ethnic and Social Factors*

We need to develop an understanding of the characteristics and capacities of parents themselves, the relationship between former spouses, and any social, economic, or cultural variables that would help differentiate joint custody situations likely to be satisfying to parents and children from those which would not.

We do know something about the characteristics of parents and their co-parental relationships that make them "good candidates" for joint custody. We have developed this profile from studying families who have chosen joint custody. In working with divorcing parents in mediation and counseling I have found that many parents do not come in with those characteristics in evidence. Yet, one can often assess the potential of parents to identify, take responsibility for, and separate their feelings about their spouse and the divorce from an evaluation of their children's needs and feelings. This potential was recently demonstrated during one of our education and support group meetings for joint custody parents. The group, whose membership is comprised of mothers and fathers not of the same family, was sharing the feelings of rage and helplessness that surfaced in interacting with their spouses and the impulse, or at least fantasy, to take the child and go off to a foreign coun-

try. The mother of a five-year-old daughter talked about her fantasy of taking off for Europe with her daughter and, when asked what kept her from doing that (she actually did have a job offer in Germany), said, "I just couldn't do that to my daughter. I know she loves her father and besides, I've read all that divorce research."

### 1. Special Problems

What are some of the constraints or special problems that would make joint custody less likely to work? Some of the problems that we have noted so far in our study sample include: (i) emotional disturbance of a parent; (ii) alcoholism; (iii) history of physical violence or other spousal abuse; (iv) very intense hostility and conflict between parents, such that they cannot control or divert it away from the children; (v) extreme lack of respect for the other parent, or lack of self-esteem as a parent; (vi) differences in child-rearing approaches that are viewed as a violation of important values; and (vii) denial by one parent of the reality of the divorce (although this often changes with time and is more specific to the early separation period).

No completed study of joint custody has included Black, Asian, or Hispanic families. As a result, the effects of joint custody in various ethnic families or cultural traditions is unknown. Twenty-five percent of the parents in our current research population are Black, Asian, or Pacific Islander. We are speculating that the involvement of grandparents as major caretakers of the children in the Black families being studied and the close involvement and valuing of extended family are particularly supportive to a joint custody arrangement for parents and children and lend additional continuity for the children. However, this remains to be documented.

### *D. Impact of Joint Custody on Children*

We also need data on the characteristics of the children themselves — as to which ones make "good candidates" for joint physical custody and for which children the stresses of living in two homes outweigh the benefits. From our first study we learned that although all of the children benefited from the knowledge that they were valued and loved by both parents and from the psychological permission to love and be with both parents, they varied in their capacity to master the demands of living in two homes, to enjoy their living arrangements, and in their overall adjustment. Even in joint custody arrangements when parents

managed well and were satisfied, the responses of the children varied.

### 1. Age-Related Differences

Information on the experience of a two-home arrangement for children of different ages is certainly needed. There is increasing concern about the impact of a two-home arrangement for infants and toddlers, as we are seeing larger numbers of very young children in the divorcing population. In our current sample of thirty-two families, forty-five percent of the children were under five years old when their parents entered the program. Joint physical custody might ease the fears of abandonment and the worry about the safety of the absent parent to which preschool children are particularly vulnerable after separation. Would this outweigh the strain of the transitions from one home to the other? Would the anxiety and distress frequently observed at separations and transitions in children between eight months and three years (when children have developed a strong attachment to a primary caregiver but cannot yet sustain the relationship internally during the person's absence), be a temporary reaction or have more lasting effects? Would this be mediated by shared parenting during the marriage and the strength of attachment to both mother and father before separation, or by the young child's experience with multiple caregivers (grandmothers, important babysitters, or childcare givers)? Would the distress reactions to transitions from one home to the other be reduced as parental tension is reduced? Observing dual-home joint custody for these very young children over time will be particularly instructive in addressing these concerns.

School-age children face the developmental tasks of learning and building relationships with their peers as well as the need to consolidate their sexual identification with the same-sex parent. We found in our first study that, in general, a dual-home arrangement can work well for school-age children when the continuity of school and friendships are maintained. The joint custody arrangement was particularly valued by the seven- to ten-year-old boys, perhaps because of the security of significant time with their fathers. The greater cognitive development, including a better sense of time and geography, made shifting homes easier for some school-age children. The exceptions were a group of school-age boys ages seven to nine who had weaker cognitive and social competencies. These boys were having learning problems at school and were confused and insecure about moving from one home to another.

The school-age children who made full use of the joint custody arrangement and were proud of their ability to negotiate the arrangement are best represented by nine-year-old Henry, who lives one week with

his mother and one week with his father. Henry often travels by bicycle the two miles from school to each parent's home. When asked about the location of his homes, he volunteered that his mother's house "was just a few blocks away" and confidently instructed the interviewer about the address and precise directions to his other home. He showed a sense of freedom and access in the arrangement. In contrast to the children like Henry, whose clarity and mastery over time and geography were impressive, is eight-year-old Peter who, when asked what it was like to live in two houses, replied, "Sometimes difficult — a little. My mother says it's three blocks away from here to my mother's house, and my dad says it's only two blocks away. I don't know who to believe." This was a child who had moderate learning problems, whose parents were more hostile and conflictual than the norm, and who was frustrated and confused by his parents' differing expectations.

For adolescents, their age-appropriate involvement with friends and school-based social activities and their desire for increased control over their lives may make regular shifting between homes run counter to their needs. The small number of adolescents in our first study decided to live in one primary home when they became teenagers, and many of the pre-adolescents indicated their interest in doing so when they became teenagers. They had lived in a dual-home arrangement for a number of years, but when they became teenagers felt that it interfered with relationships with friends. In discussing her decision to live with her mother, a fourteen-year-old girl stated, "I want to make sure that my friends know where to reach me. I have my own telephone at my mom's." The increased independence of adolescents and their greater ability to travel between homes on their own might make living in one primary home with more flexibility in being with the other parent a desirable alternative at this age.

## 2. Individual Differences

We need to know more about the individual differences in children's temperaments, coping patterns, and cognitive and social competencies. Children differ in how they characteristically respond to change and to new situations and how flexible and how resilient they are. Information on individual differences and on how particular strengths and vulnerabilities might affect a child's experience of joint custody would be useful in developing appropriate arrangements.

The kinds of arrangements, such as the time schedule and geographical proximity transportation arrangements, may certainly be significant in how children manage the two-home arrangement. Further information on whether one type of arrangement is better than another, and for

which children, would be useful. In our first study, one could not tell how a child was doing by looking at the particular time schedule. In one-half of the families, the children split the week between their two homes (usually three days in one home and four days in the other). Another twenty-five percent had a week to week schedule, while the remaining families had arrangements that ranged from alternating homes each day, every two weeks, or every three months, to alternate weekends with the other parent, and even alternate years. The one schedule that was clearly problematic was the year-to-year arrangement in which the children, ages nine and ten, changed schools, neighborhoods, and lifestyles to live one year with the mother in a rural area and one year with the father in a cosmopolitan town several hundred miles away.

Geographical proximity between parental homes was perhaps the most consistent dimension that both parents and children believed was important if joint custody was not to be overly burdensome. The parents in our first study lived in close proximity — two-thirds lived within five miles of one another. In the other cases, parents and/or children put considerable effort into traveling. The parents felt, at least for several years, that the arrangement was worth the trouble, and so did many of the children. From the children's point of view, the proximity of their parents' homes was very valuable, as was the proximity to their school. It was not just a logistical issue, but had different psychological meaning for the children. What an adult might consider geographical closeness may be experienced very differently by a particular child. Many of the children who knew the geography well had confidence in their ability to negotiate the distance between homes and had a sense that their parents were accessible. They considered traveling the few miles between homes a routine part of their lives. To the children who did not have a clear cognitive map and who did not feel a sense of mastery over the arrangement, the distance between homes was a source of insecurity.

While we need to learn more about how the specific types of arrangements support or burden children, at this point geographical proximity, particularly in relation to maintaining the continuity of school, friendships, and neighborhoods, should be given high priority in planning for joint custody. It seemed that the children who could walk or bike to each home felt a greater sense of control and access in the arrangement. For one eight-year-old boy whose parents felt that he was not yet ready to take the two buses between his San Francisco homes, going independently between homes was a great wish. In talking about what happens when he forgets things at the other house, he said:

I'd like to go get it but I can't because I don't know which way to go. When I grow up I'm going to walk . . . it's not very far. Then I can go when I want to.

### *E. Junctures to Joint Custody*

The last major area we need to learn about is how joint custody works over time and how changes in the lives of children and parents affect the arrangement. Some of the junctures that we have identified as triggers for change in joint custody are: (i) the developmental needs and capacities of children, such as entrance into school, increased need to be with the same-sex parent, and entry into adolescence; (ii) remarriage; (iii) birth of a new baby; (iv) career-related change; and (v) a geographical move. These junctures may create crises in the joint custody family that either cause a breakdown in the arrangement or demand new adaptations by parents and children. We need to learn about what these patterns of change are and how parents and children adapt.

It would be very useful in the initial decision making process about child custody for parents, lawyers, counselors, and judges to have information about how the psychological state of parents, children, and their interrelationships may change from what they were during the acute phase of the divorcing process. The emotional states of the individuals and the nature of their interaction during the first two years after marital separation may be a specific response to the divorce crisis rather than an indication of the future functioning of the individuals or the joint custody arrangement. Parents are asked to make decisions about the children and future family relationships at a time when they are in the greatest disequilibrium. Judges, attorneys, and counselors see families at their worst. This suggests that in decisions about the workability of joint custody in families in which parents do not exhibit all the characteristics and capacities we have discussed, we should keep in mind the potential for change so that decisions do not preclude cooperative parenting. Yet, we must also be realistic and not make decisions based purely on the hope that conflicts and hostility will die down, or that psychological and co-parental functioning will improve sufficiently to create a satisfying joint custody arrangement. It will be very useful to gain information about the potential for change and development by following families through the initial crisis and decision making process, into the implementation of the arrangement, and finally, settling into separate homes over time.

#### IV. IMPLICATIONS FOR JUDGES AND LAWMAKERS

Because of limited data, we have no definitive knowledge on joint custody. What we do have points to the conclusion, in my view, that we are going in the right direction with a public policy that encourages cooperative parenting after divorce and that protects the child's relationship with both parents, a policy established in the current California law. Joint physical and legal custody is a *vehicle* — but only a vehicle — to do this.

##### A. *Presumption or Option*

Currently, California establishes joint custody as a legal option that is preferred when parents are in agreement. The major policy issue being presented to state legislators, including California's, is whether there should be a legal presumption in favor of joint custody. Should judges award joint custody when parents are in dispute? This issue was hotly debated in the California Assembly and Senate Committees on the Judiciary from 1980 to 1981, with the introduction of A.B. 1706<sup>13</sup> and A.B. 2202.<sup>14</sup> This legislation, although amended numerous times, intended to make joint physical custody the preferred mode, even when parents do not agree to it. The legislation was based on the assumption that a joint physical and legal custody arrangement is in the best interest of most children, as long as both parents are considered fit.

The evidence we currently have does not support a legal presumption in favor of joint custody, particularly when parents are in dispute. Rather, a legal presumption would be based on hope: the hope that the hostility and conflict between the disputing parents will die down, the hope that parents can be forced by a court order to cooperate in the best interest of their child, and the hope that a joint physical custody arrangement will still be beneficial to children under these circumstances. The broader concept on which our current state policy is based, that the child be guaranteed access to both parents, should be viewed not solely as physical access, but also as psychological access — the permission to love and be with both parents.

The law affects decision making directly through the decision of the judge and indirectly by influencing parental bargaining in mediation or legal negotiation. The group of parents who would be most directly affected by the law are those who have failed to resolve their child-related disputes through mediation and must bring their dispute before

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<sup>13</sup> Cal. A.B. 1706 (1981-82 Regular Session) (Kapiloff).

<sup>14</sup> Cal. A.B. 2202 (1981-82 Regular Session) (Imbrecht).

a judge. We can assume that it is these parents who are most hostile, least motivated, or least able to cooperate with one another and who would have the greatest difficulty implementing joint custody in a manner constructive to themselves and their children. In these cases, there is a significant risk that the children will remain caught in the crossfire of their parents' battles — exposed to continuing hostility as well as being held in a state of limbo when decisions about their well-being cannot be resolved between the parents.

We cannot expect a court order of joint custody to create cooperative parenting. We are finding that even an agreement to undertake joint custody through mandatory mediation among parents who initially brought their disputes to court, but were able to make a legal agreement, does not necessarily create cooperative parenting. Joint custody from a legal point of view does not automatically become joint custody from the psychological point of view. A legal presumption does not seem to be the solution.

### Joint Custody Plan

If parents who bring their dispute to court are nevertheless assessed as having the *potential* for cooperation — suppression of hostility, the ability to support the child's relationship with the other parent, and to separate out their own needs from the child's needs — then a referral for extended mediation or counseling to help disputing parents develop these capacities and evaluate the needs of the children may be an important requirement for joint custody. The aspect of the current law that is frequently neglected in the debate about joint custody is the clause that states a judge may require a "plan" from parents.<sup>15</sup> This, in my view, is a most useful and important resource for judges in deciding about joint custody. Extended mediation or counseling can produce more than a legal agreement. As a child-focused planning process, it can help parents develop the tools and rehearse what they will need to do on their own in cooperating and making decisions concerning the children. Requiring a specific joint custody plan developed by the parents over a period of time can be a useful way for the judge to assess whether parents have a good chance of building a cooperative joint custody arrangement. We have found that a *very specific* joint custody plan is useful psychologically as well as legally. The process of addressing very specific details of a particular couple's co-parental relationship can help them clarify and anticipate their concerns and potential conflicts and take responsibility for devising agreed upon solutions. Impor-

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<sup>15</sup> CAL. CIV. CODE § 4600(b)(1) (West Supp. 1983).

tant issues to be addressed include not only the child's basic schedule, but also when and how parents communicate, information to be shared, decisions to be made jointly versus independently, guidelines for schedule changes, responsibility for child rearing tasks, relationships with relatives and the anticipation of future changes.

### *B. Follow-up*

The importance of developing and using mediation, counseling and support services to assist disputing parents with strengthening the capacities needed for joint custody over a period of time must be emphasized. We have found in our current Joint Custody Project that the format of extended mediation to develop a parenting agreement, with follow-up interviews every four to six months, has been useful not only for the research, but has also provided a safety valve for parents. They should be encouraged to make an agreement and live with it, with the knowledge that they will have the opportunity to review the efficacy with one another and a third party without having to wait until things break down or until they feel they are facing a legal dispute.

Although the additional time needed for follow-up visits to assess how the arrangement is working is a practical concern for court mediators, follow-up can be a valuable support for the parents and children as well as a tool for assessing the viability of an arrangement having less than ideal circumstances. From the court's point of view, there may be some hesitation to encourage parents to return with their problems. Concern with avoiding litigation and relitigation may lead to an assumption that if parents do not come back to court, the arrangement must be working well. This may be an unfounded assumption, particularly with regard to the children. A referral to a mediation or counseling service outside of the court process may be valuable to monitor how a particular arrangement is working and to support parents and children in joint custody.

### *C. Input From Children*

The importance of assessing the individual child's strengths, vulnerabilities, concerns, and wishes must be emphasized, particularly when parents are in dispute over the children. Parents at the time of divorce often have competing perceptions of the children's needs and problems and as to how they are adjusting to the divorce and their particular living arrangements. A parent's perceptions of the child's adjustment may be distorted by the parent's own satisfaction or dissatisfaction. Frequently, the parent who sought the divorce views the child as coping

better than the person who opposed it. Similarly, a parent who sought a particular custody arrangement and who is satisfied with it may see the child as adjusting well, while the other parent sees the child as troubled.

Therefore, a neutral person, trained in general and divorce-specific assessments of children, would play an important role in representing the child's separate concerns and point of view and in providing input into the decision making process.

### CONCLUSION

The development of public policy in the area of joint custody has given legal recognition to two basic values: the child's right to continue a loving relationship with both parents, and the encouragement of cooperation and shared responsibility between parents after the marriage has ended. Joint custody has opened up the possibility for more creative and individually tailored arrangements for children and parents after divorce.

Joint custody is a philosophy, not a legal formula. At its best, joint custody: (i) is flexible; (ii) recognizes the individuality of children and families; (iii) recognizes that the enduring and tenacious nature of parent-child attachment does not go away with divorce; (iv) calls forth a strength and maturity on the part of parents in order to put their children first at a time of personal debilitation; (v) acknowledges the original family as a valuable structure for child-rearing, even though the marriage has been dissolved; and (vi) addresses the reality of changes in society and the family.

Joint custody at its worst is a simple legal formula that technically divides the child's life between the two parents without consideration of the child's specific needs and capacities and that tries to end a war between parents who do not want or are not able to end it between themselves.

Joint custody is a process, not a panacea. The goal of the process is the development by divorcing parents of a reorganized family structure to best support the children's growth while allowing the adults to move on to a more satisfying life for themselves. Joint custody decisions still require evaluation — not evaluation of who is the better parent, but evaluation of the kind of arrangement that is best for a particular child and family, at a particular time in that child's life.

Research is underway at our project and elsewhere to follow the course and outcome of joint custody for families over time. With this work, and with the gathering of clinical and court experience, we can

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

BY JOAN B. KELLY\*

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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