

## Developing Cooperation Between Hostile Parents at Divorce

BY BYRON NESTOR\*

[M]any parents do not come in [to divorce mediation or counseling] with those characteristics [that make them "good candidates" for joint custody] 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.<sup>1</sup>

This quote from Dr. Steinman's paper offers a realistic basis for dealing with joint custody problems. Its value lies in its suggestion that an evaluator or mediator look for ways to maximize the possibilities of *eventual* joint custody, even in dealing with hotly disputed custody situations. This does not mean a predetermined, preconceived notion of joint custody. There is no forcing of the family or the children into a joint custody mold. Instead the goal is to learn what intervention and interactions might move bitterly contesting parents toward the future possibility of cooperation.

While Dr. Steinman notes the potential of joint custody, she also counsels against false hope. Only the naive believe that every parent has the potential to cooperate with the other about custody matters. Those of us who work with custody evaluation and custody mediation recognize that some situations are devoid of any potential for joint custody arrangements. A small percentage of the divorce cases in the United States are bitterly contested over custody issues, occupying disproportionate amounts of the courts' time and causing the greatest difficulty for judges, attorneys, and mental health professionals. In the most unpalatable cases, a judge must try to bring about an end to the legal dispute, realizing that the parents simply cannot effect joint custody. We need to be able to recognize these situations sooner rather than later, and so inform the parties, their attorneys, and the judge. I have spoken to lawyers who deeply regret having caused their clients to spend \$10-15,000 based on the lawyers' sincerely held but erroneous

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\* Assistant Clinical Professor of Psychiatry at University of California, San Francisco, Medical Center. Private practice, child and adult psychiatry and psychoanalysis, Berkeley, California. B.S., 1944, University of California, Berkeley; M.D., 1948, University of Nebraska, Omaha.

<sup>1</sup> Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, *this issue supra*, 739 at 752.

belief that it might be possible to work out a joint custody arrangement. It would have been much better, obviously, if the conclusion that the task was impossible could have been reached far earlier. At the same time, such conclusions should not be drawn lightly or judges will properly lose confidence in the evaluator.

The confidence and support of the judge in working out a plan is crucial in these difficult cases. If the court backs the mediator, and if the parties' attorneys work with each other and with the mediator to develop a joint arrangement that meets the needs of the children, the parents get a sense — partly unconscious, partly conscious — of being part of a family network.

Let me share some of things I have learned from my work with children and parents in formulating custody evaluations. First and most important, children must be seen alone and with each parent separately so that one has a chance to observe the interaction with each parent, compare these interactions, then compare the interactions between the child and the observer when the parent is present and when the parent is not. Certain things become clear when this is done. A mother may state, for example, that a father terrifies and frightens the child. If the evaluator then sees the father alone with the child, and the child, while talking, moves to the father and leans against him in a relaxed way, puts an arm around his shoulder and asks him how to answer a question, it becomes immediately clear that although the fear described by the mother may be present on certain occasions, it is not a deep-seated one. Compare the implications if a child stays a distance away from one parent throughout the interview, perhaps in a corner, but remains close to the other parent during their session together. It is also revealing if a child "opens up" and bursts forth, speaking of important things when a parent is out of the room, but says very little when that parent is there. In order to draw proper conclusions from these kinds of behavior, however, it is crucial to take the parent's history and the child's developmental history into account and to invest sufficient time in the evaluation process.

Many family court services evaluations are made on the basis of too little time spent with the child — often, only one visit. A proper evaluation, however, usually requires at least ten hours with the child and parents. Responsible evaluations cannot be hurried. If all ten hours were scheduled within a one-week period, as could be done, the results might be somewhat useful for a judge, but the time spent would serve very little purpose in developing the family's potential for cooperative parenting. It takes at least five or six weeks, if not eight, for parents to react, absorb, and think about what is going on as the evaluation pro-

ceeds through various stages. It also takes time for the evaluator to ascertain not just who is the "best parent" (the relatively easy task called for if sole custody is the only available model), but rather which parent is best in what area, for which child, and at what time in the child's development. To complicate matters further, these determinations also vary from child to child within a single family.

Discussions of these issues are necessarily often general and theoretical. Let me break from this tradition and provide a specific example of how the custody evaluation can develop families' potential to move toward joint custody. Assume a father with every-other-weekend visitation has been fighting for two years to change the order and allow for increased visitation. Although there has been fault and error on both sides, the father has done some irresponsible things in the management of the child which the mother holds against him and presents to the court. Because of various delays nothing has happened for six months, and, as a result, the father tenaciously and angrily continues to press for increased visitation. The mother just as tenaciously and toughly maintains that any increased visitation will be bad for the child.

How does one develop cooperative parenting potential in such a case? First, we need to assume the evaluator is neutral, and paid by both sides. The father, after realizing that he need not be defensive with the evaluator, grudgingly acknowledges some of his mistakes and gives evidence of regret and a changed point of view. The evaluation also reveals that the child likes being in the father's company, and the evaluator is convinced that more visitation is psychologically appropriate for this child (not just that it is a good thing in general, but that this particular child needs it).<sup>2</sup>

Obviously, the father is going to agree with this, but how can one best suggest the increased visits to the mother? The mediator could recommend that the every-other-weekend schedule, which represents four days a month, be revised to call for one day every weekend — for example, Friday night and Saturday one weekend, then Saturday and half a day on Sunday the next. To forestall complaints that this schedule precludes full weekend trips or plans with the children, the mediator can draft a plan that includes occasional variations to meet this need. But the idea is presented as predominantly "one day every week-

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<sup>2</sup> This schedule would be inappropriate for a nursing infant or for a child of any age who handles repeated transfers poorly. In such cases, more daytime contact and fewer overnight visits are needed. Sometimes, as with the nursing infant, the child's welfare requires far greater time with one parent until a new developmental stage is reached. It is essential that children's needs be individually assessed and reassessed as they mature.

end," which means the child's visits with the father will be separated by a gap of only one week rather than two, allowing the child more continuity in the relationship.

Now add one more variable: a recommendation that the child be picked up by the father from school on Wednesday afternoon and taken to the father's home for dinner and to spend the night. Although there need not be an express requirement that dinner be at home, that intent is conveyed to the father. Under this arrangement, the child will live at the father's home that night, sleep there, and be returned to school by the father on Thursday morning. This expanded schedule provides a total of eight visitation days out of thirty and the gap between child-father contact is three or four days, not fifteen. Moreover, the plan sounds reasonable.

What, however, is the mother's reaction likely to be? She may respond that the midweek visit will not work, that the child will be fed "junk food," stay up too late, not do his or her homework, and arrive at school on Thursday exhausted and inadequately prepared.

How might one interact with the mother rather than recommend that the court impose on her this seemingly reasonable arrangement? An imposed plan will not work. First, present the plan's advantages to the mother and indicate that her concerns are understood. Next, build in ways to meet those concerns. Provide for reevaluation of the plan after a two or three month interval, the exact period depending on the mediator's judgment; the main goal is to relieve the mother's anxiety. Assure her that the plan is worth trying. Tell her she has a right to call the mediator (not the court) if she sees any evidence the child is suffering in school or if the child's health becomes impaired because of the arrangement or if she feels the plan has caused any other serious difficulty. If the situation warrants, the mediator will see the child and the father to review the situation and investigate whether changes can be made to improve the situation and if not will recommend to the court that it be terminated.

Note that all these steps are taken in the context of sole custody with visitation. The family is now "right next door" to joint custody, but that final move should occur only if it appears appropriate after this plan has been evaluated for how well it is working in reality. There are a number of unpredictable variables: the father's ambivalence, the existence of other relationships (such as the presence of a new spouse or lover), the emotional reaction of the mother. If the father deals satisfactorily with the situation, the child's general behavior will almost always improve, including his or her behavior with the mother and at school. If that happens, a change starts to take place in the mother. First comes

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<sup>1</sup> to a policy receptive to joint custody awards,<sup>2</sup> and finally to mandatory mediation in all contested cases involving mi-

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\* Clinical Professor, Department of Psychiatry, School of Medicine, University of California, San Francisco; Chief Social Worker, Child & Adolescent Service, Langley Porter Psychiatric Institute; B.A., 1952, U.C.L.A.; M.S.W., 1954, School of Social Welfare, University of California, Berkeley.

<sup>1</sup> CAL. CIV. CODE §§ 4506, 4507, 4510 (West 1970 & Supp. 1983).

<sup>2</sup> CAL. CIV. CODE §§ 4600, 4600.5 (West Supp. 1983).