Library

MEMBERS PRESENT: Chairman Stewart
Vice Chairman Sader
Mr. Thompson
Ms. Foley
Mr. Beyer
Mr. Price
Mr. Chaney
Mr. Malone
Mrs. Cafferata
Ms. Ham
Mr. Banner

MEMBERS ABSENT: None

GUESTS PRESENT: Willard E. Tayler
Dale M. Newlin
Dennis E. Erickson
R. G. Whittemore
Bill Furlong, Welfare Division
Sharon McDonald, Attorney General
Bob Petroni, Clark County School District
Bill Moell, Health Division
Eleanore Muscott, Health Division
Mitchell Landsbert, A.P.
Jean Klebenow, UNR Intern (Hayes)

Chairman Stewart called the meeting to order at 8:05 a.m. and stated that he had three bills for Committee introduction.

BDR C-982: (AJR 31) Proposes to remove constitutional requirement that salaries of certain elected county officers be fixed by the Legislature.

This bill was requested by Mr. Rusk, as was the following one.

BDR 1-879: (AB 423) Changes reference to approving authority for excess fees to attorneys for indigents.

The last bill was at the request of Mr. Dini.

BDR 43-1201: (AB 422) Extends time for issuing of notice to appear on citation for unlawful parking.

Mr. Stewart REQUESTED COMMITTEE INTRODUCTION of these three bills, seconded by Mr. Malone, and passed unanimously.

Next Mr. Sader said he also had a bill for Committee introduction. He said it was an extremely complicated bill involving the procedures for adjudicating incompetency for criminal purposes. He went on to explain it is an important issue which he has been working on for some time with the district attorneys, judges and defense attorneys, all of whom agree that the current Nevada laws

on this topic are unconstitutional.

Mr. Sader REQUESTED COMMITTEE INTRODUCTION OF BDR 14-1168, (AB 425) seconded by Mr. Stewart and passed unanimously.

Chairman Stewart then noted he also had a bill having to do with landlord/tenant relationships as they relate to mobile home parks, if anyone wanted to get their signature on it.

Finally Mr. Sader said he had a bill draft request. He did not have the text of the draft as yet, but he explained that the bill had been requested by some of the law firms which handle gaming license applicants; they would like to have a bill considered which would provide looser restrictions on foreign gaming applicants, i.e., non-American gaming people who want to be licensed in the State of Nevada.

Mrs. Cafferata said she did not approve of this proposed bill.

Mr. Sader replied that the individuals requesting the bill seem to think there is a real problem with the infusion of economic resources into the state from that source.

Mr. Sader moved DRAFT THE PROPOSED BILL, seconded by Mr. Stewart, and passed, with only Mrs. Cafferata voting nay.

SB 188: Makes various changes concerning custody of children in cases of parents' separation or divorce.

Mr. Willard E. Tayler and Mr. Dale Newlin came forward to testify jointly on this bill. Mr. Newlin explained that he is a divorced father with two sons and one daughter, and the step-father of another daughter. He went on to describe the problems which he encountered during the year which passed prior to his divorce hearing. He said that these problems were the result of court orders and interventions by his spouse at that time. He explained that at the divorce hearing, split custody was granted, and that at the time he was not made aware of joint custody as a philosophy, nor was it a part of the NRS.

Mr. Tayler said he felt strongly that if, at the time of his separation, both parties had been put on notice that the State's policy is to ensure children of divorce frequent contact and involvement with both parents, where it is in their best interests, many emotional confrontations over and affecting the children would have been avoided. Additionally, both parents could have retained the right--and more importantly the needed--involvement in the childrens' lives.

Mr. Tayler cited other examples of children of divorce who have limited or no contact with one of the parents. He said this bill will greatly reduce the emotional disruption of the childrens' lives, as well as reduce the self-created hardening

of positions by the parents, of which the children are so often the pawn.

Mr. Tayler then reviewed the information contained in EXHIBIT A. (Note: A copy of this exhibit, which consists of a 9-section spiral binder, is attached to the original copy of these minutes.) He explained that the information was compiled as a summary of a vast library of information obtained from professional psychologists, psychiatrists, behavioral scientists and jurists, and their studies and papers published over the last seven years concerning the parent/child relationship during and after divorce.

Mr. Tayler replied to a question from Mr. Stewart that SB 188 is modeled after the California law, which has been in effect for approximately 18 months and which basically places emphasis on joint custody as the prime consideration.

Mr. Price said it has been his experience that the root of the problem is the people involved, and he did not feel passage of a law will prevent parents from attempting to turn the children against the other parent; you cannot legislate attitudes, as desirable as this might be in some instances.

Mr. Price also questioned how the bill would actually work; he felt that if joint custody required the children to constantly switch back and forth between homes this could also have an adverse effect on them.

Mr. Tayler agreed this bill would not solve all the problems of children of divorces, nor even most of these problems. What it will do, however, is encourage the parents to sit down and focus on the fact that the children are not property, nor pawns, but individuals, loved by both parents, and in need of separate and special consideration apart from the other aspects of the divorce.

The strength of SB 188 is that it presents the opportunity to point out the needs of the children to the parents, as well as the chance to encourage both parents to have frequent associations and a continuing relationship with the children, thus helping the parents to share the rights and responsibilities of child rearing.

Mr. Price again noted it is not possible to force parents to take an interest in their children following a divorce. Mr. Tayler agreed, but said the purpose of the bill is not to force parents into joint custody, but to "force" the courts to call this option to the attention of the parents and to encourage its implication whenever possible.

Mr. Tayler then explained, in answer to another question from Mr. Price, that there is a difference between physical custody and joint custody, and that how the physical custody is divided

up between the parents is usually decided by either the parents and/or the court. He pointed out that the child often does have input into this decision. He said it was preferable to leave as much flexibility in the agreement as possible, allowing the parents and children to work out the best arrangement for the given circumstances at a given time.

Mr. Tayler also said this bill is not expected to affect child support in any way. He noted that divided/alternating custody can also result in temporary reductions in payments while the child is living with the responsible parent; it depends upon the agreement reached by the parents and court. Mr. Newlin noted this is decided by the court, based upon ability to pay. It was stressed that this is definitely not an attempt to do away with child support.

Mr. Tayler then proceeded to outline those changes made in the bill by the Senate and explain the reasons for them.

Mr. Sader expressed concern over the effect SB 188 might have upon the Uniform Child Custody Jurisdiction Act, which has been signed by many states and which makes it very difficult to change another state's custody decree. He pointed out that passage of SB 188 would result in Nevada's having a very different philosophy from other states concerning custody and the best interests of the child. He wondered if there would be an increase in the number of requests for modification of foreign decrees, since the Uniform Act states when jurisdiction can be taken in the best interests of the child, and SB 188 sets out very definitely Nevada's policy vis-a-vis the best interests of the child.

Mr. Tayler said he did not foresee any such problems, since he felt most custody decrees are quite clear as to their circumstances and the reasons for the arrangement. He added that an additional protection is that this bill states that all orders authorized by this section must be made in accordance with the provisions of the Uniform Act. Thus, the possibility of conflict has already been addressed.

Mr. Tayler said the California Law after which this bill is modeled has the same provision, and there have not been any problems so far vis-a-vis the Uniform Act. In fact, Mr. Tayler said there has been a reduction in the contested cases over the children by 65%.

Mr. Tayler explained to Mr. Sader that joint legal custody means both parents have the legal rights and responsibilities associated with the health, education and welfare of the children, even though, for logistical or other reasons, physical custody is granted to one parent, with the other parent having specific rights of visitation. It was again stressed that joint custody cases involve agreement between the parents, therefore, there should be no major problems regarding physical custody and visitation rights.

Mr. Sader agreed with Mr. Tayler that the current system encourages alienation of the child from the non-custodial parent, and he said that if SB 188 removes some of those institutional problems and aids in the development of a different attitude, then it is a very constructive bill.

There followed a discussion of how the logistics of this type of custody do and do not differ from those of other types of custody, and the effects upon the relationships of the people involved. Mr. Tayler stressed that, while there will be cases in which some of these problems cannot be worked out, in the majority of cases the benefits far outweigh any problems which might arise.

Mr. Sader said one other problem he could foresee arising from SB 188 concerns child-snatching: if there is no court decree regarding physical custody of the child, or if both parents are granted joint physical custody, then there could be a problem vis-a-vis defining child-snatching; i.e., what it would consist of in these cases.

Mr. Tayler agreed this could be a problem, however he pointed out that studies indicate once the parents are willing to discuss joint custody, and it is agreed to, in most cases these arrangements are not breaking down. The original coordination and involvement in the childrens' lives becomes pretty much an acceptable situation and it remains that way.

Mr. Stewart suggested adding a section to the bill which would proscribe taking the child out of state, thus permitting a definition of child-snatching.

Mr. Sader suggested such a section state that, in those cases where joint custody has been ordered, but no physical custody determined, it be unlawful to take the child out of state for permanent residence without the prior permission of the other parent.

Mr. Newlin said that in California it is written right in the decree that the child is not to leave a specified area (in terms of residence).

Mr. Sader requested that Mr. Tayler and Mr. Newlin look into this matter and submit suggestions to the Committee as to how this situation could best be handled.

Mr. Tayler pointed out that such an amendment would limit the judge's authority and options, whereas the current version gives the judge all the latitude he might need to help the family work out the best situation for them. Several instances where such limitations could cause more problems than they solve were then cited.

Next Mr. Stewart noted that Mr. Tayler's statistics are misleading, because they show that a high percentage of joint

custody cases go uncontested, whereas in other types of custody the likelihood of the people returning to court is high. However, by its very nature, joint custody requires a strong commitment to agreement by the parties involved, thus the chances for future litigation are small to begin with. In other words, the statistics are biased in favor of the success of those people who have chosen the joint custody route, simply because of the type of people who would choose this option.

Mr. Tayler said the benefit is in the identification, at an early stage, of those cases where the people can be enticed into working together; thus preventing the situation from mushrooming into a major problem. He agreed, however, that those people who do opt for joint custody already have a better chance of staying out of the courts in the future.

In reply to Mr. Beyer, Mr. Tayler explained that the joint custody option is already contained in the statutes, SB 188 simply reorients its location in the statute and emphasizes its use as a tool for getting the parents to a point of mediation and for preventing major problems from developing.

Next to testify was Mr. Robert G. Whittemore, a certified psychologist, whose major emphasis is dealing with children and youth. He stressed that he is looking at this problem, not from the viewpoint of the attorneys or from the courts, but in terms of what is best for the child.

Mr. Whittemore felt there were two basic issues involved here: 1) can co-parenting exist after divorce, and 2) is the "winner take all" paradigm right for the child.

He stated that the joint custody arrangement, as proposed in SB 188, is a viable alternative. He then read from research statements concerning the need of children of divorced parents to maintain a continuing relationship with both parents.

Mr. Whittemore ended his testimony by stating that SB 188 will force people involved in divorce settings to ask themselves "what is best for the child", rather than "what is best for me", or "can I use these children as a pawn in a continuing situation where I am going to get even". This is not a bill for attorneys, judges, nor psychologists; it is a bill for children.

Chairman Stewart said he wished to note that it has been his experience that when judges have to make a custody decision, they do so with very serious and thoughtful consideration as to what will be in the best interests of the child. He added that the statutes also spell out specifically that an award of custody can only be made in the best interests of the child. Mr. Whittemore agreed with this, but noted that currently the parents are not really constrained to look at this joint custody issue, and this bill will encourage the general public

to think of joint custody as a viable option.

Next to testify was Mr. Denis Erickson, who related his personal experiences with a contested custody case during the temporary hearing followed by, a year later, an award of joint custody. He explained how both parents have had to make this agreement work, and that both are more than pleased with the results. He asked the Committee to favorably consider this bill, for the futures of both the parents and the children.

Mr. Bob Petroni, Attorney for the Clark County School District, testified he was concerned over the possible repercussions of SB 188 upon placement of the child in the school situation. He worried that, since both parents have custody, and since current regulations require the child to attend the school in the district where the custodial parent lives, there could be a problem here. He cited the example of the unruly child, who switches schools in order to follow the best athletic program for that time of year. This bill could facilitate this for the child. He felt there was definitely a need for designation in the statutes that the child will attend only one school.

Mr. Stewart asked why the school officials couldn't handle this problem through amendments to their own regulations, rather than requiring that the statutes address it. Mr. Petroni said this could be done, but it would be difficult because there is already a statute requiring the parent who has control of the child to assure the child attends school. Under current school regulations, the child attends the school in the area where the parent who has control resides. If SB 188 passes, there could be a considerable amount of confusion over all this, since both parents, by law, have control. Additionally, it is possible that litigation could be brought against the school district if they tried to enforce school regulations requiring attendance at only one school, since in effect the regulations contradict the law.

Another option suggested was to have the judge limit, in the custodial decree, where the child can go to school. Mr. Price suggested a regulation requiring a full year's attendance at one school before being eligible for the sports program, which would solve the athletics-related problem.

Mr. Petroni said there are other instances where a child might school hop: if the child is a disciplinary problem, etc.

As there was no further testimony on SB 188 Chairman Stewart closed the public hearing on this bill.

SB 246: Permits either spouse to bring an action for separate maintenance.

As there was no one present to testify on this bill, Chairman Stewart moved on to the next item on the agenda.

SB 251: Revises provisions relating to parentage.

Mr. Bill Furlong, of the Nevada Welfare Division, and Ms. Sharon McDonald, Deputy Attorney General assigned to the Child Enforcement Program, testified next.

Ms. McDonald noted that most of the changes in SB 251 are simply to clean up the language and eliminate ambiguities in the law. She then reviewed these changes, section by section.

Section 1: There had been no provision for notice in a paternity action, so this simply aligns the notice provision with others found elsewhere in NRS. Paragraph 1 is in those instances where there is a natural father, paragraph 2 involves a presumed father.

Section 2: This simply clarifies the statute of limitations; explaining who may bring actions for paternity and within what time.

Section 3: This change is simply to align this section with section 1; it is the same notice provision.

Section 4: This sentence has been added in order to clarify that the cost of the action can be passed onto the parties involved in the litigation. This is of particular importance when the litigating party is receiving welfare payments, and thus the state could be required to pay for the blood tests (Circa $400), etc. rather than the father.

Mr. Furlong added that there has been some confusion as to who pays that portion of the costs not paid for by the Federal Government in welfare-related cases: the county or the state. This amendment makes it clear the counties should pay these costs. Mr. Furlong went on to explain this would amount to approximately $7,000 - $8,000 per year, and that if the Legislature decides to delete this amendment and require the state to pay these costs, then this would have to be added to the budget of the Welfare Division.

In reply to Mr. Stewart it was noted that most cases involve the birth of a child to a young girl out of wedlock, the girl goes on welfare, and the state attempts to identify the father in order to be able to collect child support. The District Attorney handles these prosecutions.

Mr. Furlong also noted that every District Attorney objects to this amendment; they feel that since the state realizes a return from the collections made from the father, the state should be required to pay part of the costs of these paternity determinations. Additionally, these litigations are initiated at the request of the state, not the county.

Ms. McDonald explained that there are two purposes for filing

the paternity action: 1) to try to get reimbursement to the state for the welfare it has paid, and 2) to get an ongoing support order for the child for the rest of the child's minority. The latter is the more important of the two, as it could get the child completely off of public assistance.

It was explained in reply to Mr. Price that the county benefits from these actions in that they receive 75% reimbursement of all expenditures, and 15% incentives of all AFDC collections made. Mr. Price said his main concern was whether it would be more beneficial to the taxpayer--who ultimately must bear these costs--to have the money come out of the state or county funds. Mr. Price felt inclined to have the state pay these costs, since more of the state funds come from taxes paid by tourists, etc., and he felt it more appropriate the Welfare Division be given the additional funds necessary to cover these costs. Mr. Furlong said he had no problem with going to the tax committees and requesting this addition to their budget, as long as the Legislators make it clear this is what they wish. Basically it is this clarification and/or decision one way or the other by the Legislators which is required. Mr. Furlong added that historically this has been a county expense, so that is why they left it as such in this law.

Section 5: The change in the second paragraph was specifically requested by the District Attorneys, and it clarifies that the District Attorney, in filing an action for paternity, is performing a public service; i.e., he does not represent the mother nor the child.

Subsections 4, 5 and 6 of Section 5 clarify the sort of attorney-client relationship that does exist in the performance of this public service. Basically, it is the same language as contained in the original statute, it has simply been clarified.

Regarding subsection 6, section 5, this is in order to allow prosecution if evidence of child abuse, or some other criminal activity, arose in the discussion that the parent had with the District Attorney in the performance of this public service. It also covers those instances where the mother lies to the Welfare Division, but when faced with a formal court litigation, tells the District Attorney the truth; allowing the District Attorney to reveal this information to the Welfare Division who will conduct a follow-up investigation based upon the new information.

Mr. Stewart then asked if a joint custody award would affect this situation. Ms. Marion Hurst, the Administrator for Assessments and Payments, Welfare Division, came forward to testify in reply to this question.

SB 188: Makes various changes concerning custody of children in cases of parents' separation or divorce.

Ms. Hurst said she felt there would be some problems with the Aid to Dependent Children (ADC) Program if SB 188 is passed, and any of these parents decide to apply for aid from the ADC Program. This is because the regulations require that the child be living with a relative a specified degree and the relative must be maintaining care and control in the home, etc. This is a federal regulation. Thus, if there is a joint custody award, unless it is very specific, there could arise the question, under the ADC Program, of who actually has that care and control. Also, there is the potential of having two adults eligible for the same child at different times, which would involve all kinds of application, re-application, etc. Denial of eligibility based upon the state's interpretation of the federal regulation could also result in legal problems.

Mr. Sader asked how California handles this problem. Ms. Hurst said she did not know, but pointed out that California has Aid to Families to Dependent Children (AFDC), which is structured very differently from Nevada's ADC Program, and thus California might not even have the same problem.

It was learned that apparently only California has a joint custody law at the present time. Those states having ADC Programs similar to Nevada's, while possibly considering joint custody laws, do not currently have such statutes. Thus, there seems to be no model for studying this problem.

SB 251: Revises provisions relating to parentage.

Mr. Bill Curran, of the Clark County District Attorney's Office, and Ms. Sally Loerher, the attorney heading that office's Family Support Division, testified next on this bill.

Mr. Curran noted that the Family Support Division consists of approximately 4 attorneys and 30 support people, which should give an idea of the caseload of this Division. This year, to date, the Division has handled close to 180 paternity cases where paternity has actually been established.

Mr. Curran said their only concern with respect to the bill involves that section dealing with who pays for what. He said they would like to have the last sentence (lines 34-36) of section 4, page 2 of the reprint of the bill deleted. Otherwise, Mr. Curran noted they endorse the bill.

Mr. Curran pleaded his case as follows: a woman on state welfare is told by Welfare that she must identify the father. She does. The Welfare Division comes to the District Attorney, who has the blood tests, etc. conducted and prosecutes the case. If the court establishes a father, it might assess the costs of the tests, etc. against the father. However, if no father is established, then the question becomes who will pay for the costs. The mother is on welfare, so she can't pay; the presumed father has been shown not to be the father, so certainly he won't

pay; this bill, as currently written, specifically exempts the state from paying; that leaves no one but the county. Mr. Curran said they have to budget about $30,000 per year for this purpose, and they feel it is an expense more properly born by the state. He added that the county is subject to budget limitations and cannot increase their budget, the state is not capped and can therefore request a budget increase.

It was noted that an additional problem facing the District Attorneys is that the hospitals are reluctant to do the blood tests for paternity cases, because it disrupts their normal routine, they do not like to release employees for testifying as witnesses, etc. It is not the actual test which is the problem, but the resultant need to appear in court and testify. Should there be any uncertainty whatsoever as to where the payment for these tests is to come from, this could further alienate these hospitals.

As there were no further witnesses on this bill, Chairman Stewart declared the hearing on SB 251 closed.

Chairman Stewart adjourned the meeting at 10:50 a.m.

Respectfully submitted,

Pamela B. Sleeper

Pamela B. Sleeper
Assembly Attache

EXHIBIT A

ASSEMBLY JUDICIARY COMMITTEE

THURSDAY, 2 APRIL 1981

SENATE BILL NO. 188

SUMMARY OF

SUPPORTING INFORMATION

SUBMITTED BY:

DALE M. NEWLIN AND WILLARD E. TAYLER

COPIED FROM THE RENO EVENING GAZETTE--WEDNESDAY MARCH 25,1981

Opinion

Reno Evening Gazette
105th Year — No. 330
Winner of the Pulitzer Prize for Editorial Writing

Robert B. Whittington............Publisher
Robert W. Ritter............Executive Editor
Everett S. Landers............Managing Editor
Bruce L. Bledsoe............Editorial Page Editor
Robert L. Kuptz............Circulation Director
Eugene Moni............Production Director
Larry P. Nylund............Marketing Director
Vernon A. Paris............Controller
Jack Skinner............Advertising Director

4 — Wednesday, March 25, 1981

Editorial

Joint custody: The better way

The nation is hearing a good deal about joint custody lately — as it should.

Joint custody is a new method of dealing with the unfortunate hostages of divorce — our children. Under this increasingly popular concept, both husband and wife retain their full parental rights. Both have a continuing voice in the upbringing and welfare of their offspring, and both contribute to their children's emotional and physical needs.

Impossible, you say? Two warring parents who cannot get along when together will find it impossible to get along when separate — even to the limited amount needed to care for their children?

Yet studies show that intelligent cooperation is possible. Not in all cases, surely, yet in far more instances than most persons realize — enough that it is imperative that courts and juvenile officers redirect their thinking toward joint custody as a viable and — in many cases — the preferable disposition of children from divorced homes.

Under the system observed by the courts for many years, sole custody has been given to one parent or another: if the children are young, they go to the mother unless she is abysmally unfit; if the children are teen-agers, they often go with the parent of the same sex. But whatever the decision, they are sundered from one parent, with all the emotional trauma such sunderings bring. And they lose the guidance and role model of one sex or another — a guidance that is important to their view of themselves and others.

How much better the children's lives would be if they could maintain persistent and meaningful contact with both. Numerous studies show that children are better adjusted and healthier under joint custody. This does not mean children must necessarily move from home to home weekly — although many have adjusted to such moves with equanimity and pleasure. It does mean that one parent cannot prevent the child from seeing another, that both parents have the right to see medical records, to follow school grades, to offer advice — in short, to be part of the child's life.

So it is good to see a bill in the Nevada Legislature which would require judges to consider joint custody as the first preference in divorce cases. Current law permits joint custody, but does not emphasize it. The new law, which passed the Senate and now is in the Assembly, would change all that. It would state, in no uncertain terms, that no preference may be given to either parent simply because of that parent's sex. This would eliminate, or at least curb, the judicial tendency to give the mother the children on the sexist belief that women are better parents than men. Some are, some aren't. In adopting the "mothers first" policy, courts have disenfranchised fathers, giving them minimal visiting privileges and little say in their children's lives. It is little wonder that they soon drift away: many experts believe that their failure to pay child support is closely related to their feeling of rejection.

In disenfranchising the father, of course, the courts have simply followed society's general concepts, which evolved when fathers worked and mothers didn't, and one's role in life was strictly defined and limited by one's sex. But times have changed; a woman no longer need feel she is unworthy if she does not want sole custody, and a man need not feel effeminate because he wants to be near his children.

A Nevada law stressing the desirability of joint custody will help dispel these steterotypes. It will make it widely known that joint custody exists, and that it can work. It will also give support to judges who desire to break out of the old mold, and spur those who are reluctant.

But first and foremost, such a law will be in the best interests of the child. It will state clearly that children can only be injured in an antiquated system which pits parent against parent, where children become possessions to be won or lost for pride and anger and not for themselves.

Above all, this law will say that every child has a right to two loving parents, wherever possible. And that the state of Nevada will uphold that right, to the very best of its ability.

CONCERNING SB 188 AND SUPPLIED BY DALE M. NEWLIN AND WILLARD E. TAYLER

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by Judith S. Wallerstein and
Joan B. Kelly

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by Judith S. Wallerstein and John B. Kelly

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Fall 1978 through Sept. 1980)
by John R. Alexander, Commissioner,
Los Angeles Superior Court

SECTION 1

NEVADA DIVORCE STATISTICS

YEAR	NO. DIVORCES*	NO. CHILDREN**
1980	12728***	13111
1979	11803	12158
1978	11213	11549
1977	11280	10588
1976	10298	10607
1975	10542	11385
1974	10042	11247
1973	9975	11670
1972	11650	13980
1971	9474	11558
TEN YEAR TOTAL	109005	117853

YEAR	NO. CHILDREN	NO. DECREES WITH CHILDREN**
1980	13111	7244
1979	12158	6717
TOTAL DECREES WITH CHILDREN FOR 2 YEARS		13961

SOURCES: * HUMAN RESOURCES DEPT.,HEALTH DIVISION-VITAL STATISTICS,STATE OF NEVADA

** U.S. DEPT. OF COMMERCE,BUREAU OF THE CENSUS, SPECIAL STUDIES REPORT SERIES P23-NO.84, ISSUED JUNE 1979

*** EXTENDED ELEVEN MONTHS REAL DATA TO FULL YEAR

SECTION 2

THE NEED FOR IMPROVEMENT

(These statements are extracted from the attached articles and the additional information submitted separately)

We are all aware that in the past decade, divorce has increased at an alarming rate. In 1978 one out of every two marriages ended in divorce and it is estimated 45% of the children born in that year will spend part of their childhood years in a single parent home. Regardless of whether or not you feel divorce is right or wrong, these are statistics that cannot be ignored. Nor can you ignore the effects of divorce on the parties involved especially the children.

Due to the increasing divorce rate, numerous studies have been started to determine the effects divorce has on all the parties. These studies are finding that the present system is not working. "Exclusivity of custody isn't helping anyone".

- "Children complain they miss the non-custodial parent, they experience guilt, tension, and conflict."
- "Non-custodial parents complain they miss their children; feel depressed, alienated, and powerless. They become non-parents."
- "Custodial parents complain they are overburdened, ... it is too stressful seeking work and having full-time parenting."
- "Judges complain they are overworked, the court calendar is congested, that court decisions demand wisdom beyond any judge, that no matter what the decision, the case will be back in court within a short period of time."
- "Psychiatrists, psychologists and sociologists say the current legal system is not paying attention to human development, children's needs, and the data showing what is in the best interests of the children."
- "Lawyers complain that the "winner take all" concept makes the child an object of battle in the legal arena."

Specifically children in a sole custodial arrangement have the following problems:

1. Feelings of loss and abandonment.
2. Attachment and separation anxiety.
3. Loyalty conflicts, particularly among latency-age children.
4. Strained interactions with custodial and non-custodial parent.
5. Disturbance in children's play and social relations.

6. Disturbance in cognitive performance.

7. Sex-role identification.

Parents have the following problems under a sole custodial arrangement:

1. Loss of familiar activities and habit systems.

2. Loss and separation anxiety.

3. Role loss, especially among non-custodial parents.

4. Decline in the ability to parent.

5. Physical symptoms related to both separation and loss of parental role. Including dramatic weight loss, eye and dental problems, high blood pressure, psychosomatic complaints, increased drinking, changes in sexual performance, difficulties in sleeping, eating, working and socializing.

6. Practical problems. Including basic household maintenance and economic instability.

7. Lower self-concept.

8. Declining feelings of competence.

9. Loneliness.

There is clearly a need for a new approach in providing for children's best interests in the post-divorce family.

SOME ADVANTAGES OF JOINT CUSTODY

- For the Child

1. Child is assured of frequent and continued access to both parents.

2. Child is assured of guidance, love and affection by both parents.

3. Child is relieved of split loyalty towards divorced parents.

4. Child will realize that conflict between people is natural and that solutions can be worked out and may learn to face and deal with conflict without being overwhelmed by it.

5. Child feels free to lead a more normal and secure life.

6. Child's relationship and life style with each parent remains stable and continuous.

7. Child's overall development is least effected by this arrangement.

8. Child has a greater sense of family with the continued contact of not only each parent but also with the extended family on each side.

- For the Parents

1. Each parent feels secure in their relationship with their child.

2. Neither parent is over burdened by the responsibility of holding a job and being a full time parent.

3. Allows each parent time to pursue interests and other relationships without guilt feelings of having to leave children to do so.

4. Allows each parent to lead a more normal and stable life.

5. Continues each parents feelings and sense of parenthood and responsibility towards their children.

- To Society

1. Each party develops greater stability post-divorce.

2. Improved mental health of all parties post-divorce.

3. Less family strife and reduced need for police actions; lower juvenile delinquency, and lower court costs.

4. Less likelihood of child snatching or support avoidance.

5. Development of a positive attitude towards cooperation in providing for the happiness and welfare of our children.

WHAT IS JOINT CUSTODY?

JOINT CUSTODY IS-

Awarding custody of the minor child or children to BOTH PARENTS and providing that physical custody shall be shared by the parents in such a way to ensure the child or children of frequent associations and a continuing relationship with both parents.

JOINT CUSTODY IS OFTEN THOUGHT TO BE BUT IT IS NOT-

DIVIDED/ALTERNATING CUSTODY where each parent alternates and assumes full responsibility and control accorded a sole custodial parent during the time period when the child or children are with the respective parent.

OR

SPLIT CUSTODY which awards one or more of the children to one sole custodial parent and the other child or children to the other sole custodial parent.

WHAT IS WRONG UNDER THE CURRENT STATUTE-

A contested custody case is placed into the adversary system for resolution to a family and social problem.

The attorneys must try for the total WIN for their client which exposes all available dirty laundry to show unfitness of the opposing partner which further polarizes the parents.

It encourages a winner-take-all situation based on precedence that allows the divorce to extend into the parent-child relationship.

It focuses the conflict on the child as a object of property and as an emotionally sought after trophy.

The outcomes of this contest if seen as unjust by either parent creates the conditions for relitigation, parental kidnapping, support avoidance, emotional punishment, and parental drop-outs.

In summary the needs and the best interest of the child are all to often overlooked and not addressed by the system or the parents who are locked in a contested custody dispute.

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THE INTENT OF SENATE BILL 188 AS AMENDED -

The intent of Senate Bill 188 as amended is to provide notice to both divorcing parents and attorneys that the State of Nevada feels strongly about protecting the children's best interest in divorces. The State of Nevada feels that children are not pawns or property to be won, lost or used by either parent. That children are a prime concern in the divorce and that the involvement of both parents in the children's future is preferred.

This notice to attorneys is so they will prepare their clients to attempt to mediate their custody differences or present their positions positively before the court rather than argue the negative aspects of their divorcing partner.

This early attitude alignment and guidance from their attorney will greatly reduce if not eliminate the polarization of the parents that has heretofore built-up over the custody question prior to the hearing.

This bill will create a team effort aimed at the children's survival of the parents divorce. We must remember that the children are not divorcing their parents nor are the parents divorcing their children.

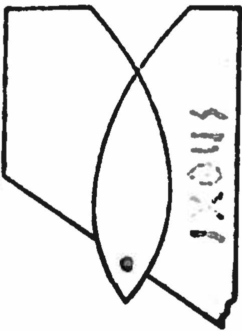
This bill puts emphasis on a custody solution that most closely resembles the family unit as it is today and a solution that can be utilized effectively in a great many more situations than it has been to date.

This bill does not mandate joint custody nor does it reduce any of the control and authority now placed in the hands of the judiciary.

This bill requires that judges, attorneys, and parents search out the solution that is in the best interest of the children.

This bill re-orients the intent and emphasizes a custody solution that has been found in studies, research, and fact to be in the best interest of children of divorces.

SECTION 3



nevada
conference
of churches

February 3, 1981

To Whom It May Concern:

The Nevada Conference of Churches supports the passage of legislation which makes possible joint custody of children in case of a divorce between the parents. The Council supports proceeding where the custody of children is at issue to make an award in the following order of preference:

1. to both parents in joint legal and physical custody

2. to either parent if clear and convincing evidence establishes that it is in the best interest of the child that custody be awarded to one parent

3. if neither parent is suitable or able to care for the child, to any other person the court finds suitable.

The Nevada Conference of Churches reviewed this matter at it's meeting on Tuesday, January 27, and at that time voted support for this legislation.

Faithfully yours,

Wesley Frensdorff

Wesley Frensdorff, President NCC
Bishop, Episcopal Church in Nevada

WF:jbv

Mel Roman, Ph.D.

Professor & Director, Group and Family Studies
Department of Psychiatry

Albert Einstein College of Medicine
1300 Morris Park Avenue
Bronx, New York 10461
(212) 430-0620

November 20, 1980

Mr. Dale M. Newlin
1068 E. Greenbrae Drive
Sparks, Nevada 89431

Dear Mr. Newlin:

I have read the newly proposed Nevada bill on joint custody with considerable interest and can offer my full and enthusiastic endorsement. I feel the bill addresses the critical issues in child custody in a most meaningful way and if passed will be a significant contribution to family well-being of divorcing parents and in the best interest of their children.

Sincerely,

Melvin Roman, Ph.D.
Professor of Psychiatry
Director, Group & Family Studies

MR:mm

Institute for Rational Living

January 30, 1981

Mr. Dale M. Newlin
1068 East Greenbrae Drive
Sparks, Nevada 89431

Dear Mr. Newlin,

Thank you for providing me with a new copy of the proposed joint custody bill in Nevada. I have studied it with great interest and believe it can be the basis for some excellent and more realistic dicisions in a troubled area of law.

My experience with California's new law has been as a psychologist working with families in marital crisis and doing custody evaluation studies at the request of clients, attorneys, conciliation court staff, and judges. Although there is--and probably always will be--great variability in decisions rendered under this type of "discretionary" bill, it gives new support for judges ready to abandon the outmoded freudian-based ideas laid down in the 19th century and, alas, of continuing influence on professional training and community "beliefs" in this last part of the 20th century.

Good behavioral studies have not been done on many of these issues. We need hard data on questions such as the stress or effect associated with the loss of a father (on a "Natural" daily, "casual" basis). What clinical data there is indicates to me that this is a much more serious problem than popular awareness would indicate.

I am happy to endorse your bill and to send you the two articles we discussed. I do not have a reprint handy on the teenage article, but will try to find one and send you a xerox.

The statute is very close to the language of the "Church-Proposal" at the end of the "A Rational Approach to Custody Determination" article. I wish the State well in passing such an emminently sensible and psychologically sane bill.

Very truly yours,

Virginia Anne Church

Virginia Anne Church

Enc.

☐ 2435 Ocean Ave., San Francisco, CA 94127 (415) 334-3450
☐ 2248 Morello Blvd., Pleasant Hill, CA 94523 (415) 680-8010

The University of Manitoba
Winnipeg, Manitoba
Canada R3T 2N2

Psychological Service Centre
Telephone 474-9222

24 December 1980

Members, State Legislature
Nevada

Dear Members of the Nevada State Legislature:

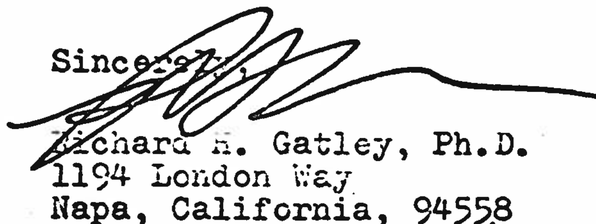
I heartily endorse the proposed act to amend Section 125.140 and the addition of Section 125.145 to the laws governing child custody in the state of Nevada.

An associate professor of psychology, on leave from the Department of Psychology and the Psychological Service Centre, University of Manitoba, I am a lecturer at the California School of Professional Psychology, Berkeley, and a national advisory director of the Family Mediation Association, Washington, D. C. I am also co-author of Single Father's Handbook, a family-oriented guide for separated and divorced fathers - encouraging men to share the responsibilities of parenting after a divorce.

I share joint legal and physical custody of my own children - having co-parented with the children's mother for almost seven years. That all of us made the move from Canada to California - with little break in continuity - testifies to the strength of our commitment and the potential flexibility of joint custody.

My children are healthy, happy kids, confident and more than prepared to cope with minor logistical inconveniences in order to have both of their parents. I know my children join me in applauding this legislation as an effective and encouraging step toward the protection and preservation of family life - in the binuclear families in which so many of us live today.

Sincerely,



Richard A. Gatley, Ph.D.
1194 London Way
Napa, California, 94558

January 21, 1981

TO WHOM IT MAY CONCERN:

As the author of *The Custody Handbook* I have spent the years from 1977 to the present researching, studying and writing about child custody following divorce. It became obvious at a very early point that traditional sole custody has bred as many problems as it solved, and frequently works against both parents and children. In general the custodial parent suffers from overwork and too much responsibility and contact with the offspring, while the non-custodial parent often experiences terrible depressions and alienation because of too little and too limited contact with the same youngsters. And the children themselves frequently feel conflicted, guilty and resentful because they love and need to have contact with both parents. Certainly the situation is one which is in need of improving for the wellbeing of *all* of the parties involved.

In the course of my research I began to interview a number of divorced couples who had agreed to share the rights and responsibilities of child raising, with or without the court's permission. These parents, on their own and usually without help, encouragement or support from anyone else, had developed their own form of joint custody. (In some cases the courts had allowed them to stipulate to joint physical and legal custody, but in others, although the parents were able to document that they had successfully used a joint custody arrangement for as much as several years prior to applying for it in court, the judge refused to sanction it on the grounds that he or she didn't think such a thing would work!) Without exception these families found that joint custody was the most satisfactory way to handle the question of child raising after divorce, and all were eager to tell me about it.

At the same time I interviewed attorneys and judges, the vast majority of whom are convinced that joint physical and legal custody was not a viable solution. In part this attitude is understandable when you realize that these professionals spend most of their time and energy dealing with those cases which are pathologically destined to a fighting format, and therefore assume that *all* divorcing couples are, as one lawyer told me, "too emotionally immature, selfish and unstable" to make any kind of cooperation possible. Unfortunately such a biased opinion and narrow viewpoint leads too many attorneys into assuming the adversary role immediately, and the parents, already under stress by the problems which are leading to the dissolution of the marriage, fall into polarized positions almost automatically. Thus you have a system which is supposed to be dedicated to looking out for the welfare of the child actually pitting the youngster's parents against each other mentally, emotionally and financially in court. Certainly it would appear that the professionals unintentionally create a self-fulfilling prophecy.

Since the publication of *The Custody Handbook* in August of 1979 I have had occassion to appear on many panels composed not only of professionals but also of joint custody parents, many of whom have only recently learned about joint custody. These parents have continually re-affirmed what my initial research indicated; it is not necessary for the adults to be friendly and amicable to make the implementation of joint custody work, nor is it a requisite ingredient for the success of such arrangements. Some of these parents are still quite angry and hostile toward each other on the personal level, but are willing to cooperate for the children's sake; others have a kind of aloof truce, and a few (usually the couples who have been sharing the children the longest) have achieved a balance of friendship, though most all agreed that they had no

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desire to return to matrimonial partnering. As one man said, "We make terrible spouses, but have learned to be good co-parents."

These parents often reiterated that there is a specific attitude necessary to make joint physical custody work; RESPECT. They express this as respect for each other's rights to parent, although the method of parenting may be different between them, and respect for the children's need to have close contact with each parent separately. Whether this respect was a natural outcome of the parent's relationship, or was insisted on by the court, its presence was seen by all the adults as being essential. In other words, you don't have to like each other to make joint custody good for the children.

As a resident of California I not only spoke out strongly in favor of joint legal and physical custody as embodied in AB 1480, (which became law in 1980), I have also had a chance to see a joint custody statute in action. Until there has been a great deal more education on the subject of divorce and child custody, people will not automatically think in terms of sharing their offspring. Usually one parent requests joint custody and the other is dubious, or even outrightly hostile, depending on the mood of the divorce. With the weight of the law on the side of the parent who is most willing to cooperate in sharing the child, the tendancy to become polarized and therefore head into a calamitous custody battle is lessened. Many women I have met since 1979 have commented to me that they had felt resistive about sharing to begin with, but have found that in actual practice joint custody works to the benefit of all concerned. (In one case, where a second marriage was being dissolved, the couple agreed to joint physical custody of their 18 month old twin daughters. This was the father's idea, and the mother felt very apprehensive about it. However, it has worked so well that she is now contacting her first husband, the father of a 7 year old boy, with the idea of working out some form of joint custody where that child is concerned also.)

Another interesting and important effect of joint physical custody is that fewer fathers are likely to consider skipping out on their financial responsibilities to the children, since they have a more normal and important position in the youngster's life than they would have as "visiting" non-custodial parents. And in recent research conducted by, among others, Commissioner John Alexander in Santa Monica, California, it has been noted that joint custody solutions are likely to have a much smaller recitavism rate than do those cases which have relied on an ajudication for sole custody.

I do not believe that joint physical custody should be mandatory, or that there should be legislation defining what forms of sharing such arrangements should take; each case is individual, and each arrangement should be tailored to the needs and desires of all the members of the family. I am strongly in favor of any legislation which will create a climate that encourages not only the parents but also the professionals to recognize that children need and have a right to the social, financial and psychological birthright of two parents, and that each parent's right to parent should be respected and upheld unless there is a strong and compelling reason to question it in relation to the child's welfare. Having read the proposed bill re joint legal and physical custody in Nevada, I am happy to endorse it. Surely our next generation is too important and fragile a resource to be neglected in the name of following tradition.

Sincerely,

Persia Woolley

Persia Woolley
16163 Camelia Terrace
Los Gatos, Ca. 95030.

UNIVERSITY of REDLANDS

Alfred North Whitehead Center

Off-Campus Office

November 13, 1980

Members, State Legislature
Nevada

Dear Members of the Nevada State Legislature:

I am writing to endorse passage of the act you are now considering which would amend Sec. 125.140, and add Sec. 125.145, to the Nevada Revised Statutes related to child custody. I am a cultural anthropologist and have conducted research and published in the fields of custody mediation and co-parenting after divorce. I worked with California's Senator Jerry Smith and Assemblyman Charles Imbrecht in the writing and passage of California's new child custody legislation.

As you may know, our new law makes joint custody a co-equal alternative in child custody determination, while it makes a strong public policy statement favoring parental cooperation in child rearing, and assuring children of "frequent and continuing contact with both parents" after divorce. I believe that your proposed legislation, which makes joint custody a clear (but not mandatory) preference, is ideally suited to fostering continuing and frequent contact of children with both their divorced parents. Once parents know that their children are not "up for grabs"--that only under unusual circumstances will the law deny a child access to a parent and deprive a parent of a custodial role--child custody will cease to be the focus of competition and hostility (and thus litigation) that it is today.

I urge you to become familiar with the recent studies which show that children who have frequent access to their mother and father after divorce, and whose parents do not "fight over" the children, show superior adjustment to divorce. I believe it is time to apply the concept of no-fault divorce to the area of child custody, providing whatever services may be necessary to help parents work out specific joint custody arrangements. Even in cases where the court must specify these arrangements, maintaining both parents' custodial status, and assuring the child of two legally-recognized parents, should be the predominant policy and practice.

Thank you for your attention and consideration.

Respectfully yours,

Dr. Diane A. Trombetta

Dr. Diane Trombetta
504 University Ave.
Los Gatos, CA 95030

225 Charcot Avenue, San Jose, California 95131 / (408) 262-8500

Betsey Warren Lebbos
A Professional Law Corporation
111 West St. John Street, Suite 330 - San Jose, California 95113
408 289-9863

January 13, 1981

MR. DALE M. NEWLIN
1068 East Greenbrae Drive
Sparks, Nevada 89431

Dear Mr. Newlin:

Thank you for your letter of December 16, 1980, and for the outstanding proposed legislation in the State of Nevada. You have my endorsement for your proposed legislation as it appears to be a substantial reform of your existing Nevada custody provisions. I enclose my resume for you to use as you deem fit pursuant to my endorsement of the proposed bill.

I wish you the very best of luck, and I admire your efforts to reform child custody legislation.

Sincerely,

Betsey Warren Lebbos

Betsey Warren Lebbos

BWL/gh
Encl.

LAW OFFICES
Doris L. Sassower

PAN AMERICAN BUILDING 200 PARK AVENUE, NEW YORK, N. Y. 10017 · 212/490-3866
REPLY TO: 75 WYKAGYL STATION, NEW ROCHELLE, N. Y. 10804 · 914/636-6060

New Address:
283 Soundview Avenue
White Plains, N.Y. 10606
(914) 997-1677

December 8, 1980

Mr. Dale M. Newlin
1068 East Greenbrae Drive
Sparks, Nevada 89431

Dear Mr. Newlin:

I was pleased to talk with you on the phone and to receive, even more recently, a copy of the proposed legislation for Nevada incorporating a presumption of joint custody. As my first-hand experience has shown that joint custody is in most instances the most desirable and beneficial custody arrangement of all, I wholeheartedly endorse a legislative approach which makes it the presumptive first choice. Hopefully, your Nevada bill will fare better than New York's did in our last legislative session!

Enclosed are some materials that may be of interest, as well as a personal bibliography. As noted thereon, if you should like to have any of the articles listed, I would be happy to forward copies to you.

Good luck--keep me posted!

All best wishes,

DORIS L. SASSOWER

DLS/vc
encls.

The Conciliation Court

MARRIAGE AND FAMILY COUNSELING SERVICES
SUPERIOR COURT, COUNTY OF LOS ANGELES
111 NORTH HILL STREET, ROOM 241, LOS ANGELES, CA 90012
(213) 974-5524

BILLY G. MILLS
SUPERVISING JUDGE

HUGH MCISAAC, M.S.W.
DIRECTOR
E. RONALD HULBERT, PH.D.
PRINCIPAL FAMILY COUNSELOR
JULIAN GARCIA, M.S.W.
PRINCIPAL FAMILY COUNSELOR

January 26, 1981

Mr. Dale M. Newlin
Child Custody Effort
P. O. Box 660
Sparks, Nevada 89431

Dear Mr. Newlin:

In response to your letter and our recent telephone conversation, I support whole-heartedly your efforts to obtain a statute which permits and gives legal definition to the concept of joint custody, in continuing the parenting relationship following dissolution. The divorce is in the spousal role, and whenever possible, parents should be encouraged to work together.

Also, because California has adopted the language used in the Nevada legislation, having similar custody statutes would be very helpful since families move back and forth with some regularity. The only question I would raise is in Section 125.140, (3); I would not list joint custody as a separate section (a) because parents would not be able to choose the custodial arrangement that is most suitable to them, and the way this section is worded, makes joint custody the preferred, rather than co-equal, custodial arrangement. This elevation is premature and will only attract resistance to the legislation from the judiciary, and mental health professionals who otherwise would support it.

Keep up the good work. If we can be of any further assistance, please let me know.

Very truly yours,

Hugh McIsaac, Director
Conciliation Court

HMcI:aa

SECTION 4

JOINT CUSTODY - MYTH and REALITY

H. Jay Folberg
and
Marva Graham

Judges, attorneys and counselors often express doubt about joint custody. This paper responds to the most frequently stated concerns about joint custody and suggests broad criteria for decreeing it in more cases. This is but a section, omitting the extensive footnotes, of a comprehensive article which also defines the terms of joint custody, traces its history, analyzes existing case law and legislation, and discusses how it is implemented. The complete article, entitled JOINT CUSTODY OF CHILDREN FOLLOWING DIVORCE, appears in 12 University of California - Davis Law Review, Special Symposium On Children And The Law (Spring, 1979).

REPRINTED BY PERMISSION OF H.JAY.FOLBERG
CHILD CUSTODY EFFORT
P.O. BOX 660
SPARKS, NV. 89431

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April, 1979

CONCERNS ABOUT JOINT CUSTODY

A. CAN PARENTS COOPERATE AFTER DIVORCE?

The adversary nature of fault divorce helped insure that parents would be pitted against one another and the only surviving relationship between them would be one of animosity, if not hatred. All but a few states have now recognized the futility of requiring a finding of fault for divorce and have enacted some form of "no-fault" divorce reform to help reduce the scars left by an adversarial fight. To the extent that divorce laws and procedures still impose an adversary model on the parents in matters of custody, a self-fulfilling prophecy is created which insures that divorced parents cannot cooperate together.

One noted family law attorney summed up this frequently heard concern: "It's asking a lot to expect two people who could not get along in marriage to suddenly share decision making for a child's educational, religious and every day activities." Perhaps too often we assume that divorcing people will not be able to agree and cast divorcing parents in the role of enemies.

In arguing for joint custody as a way around this "custody trap", June and William Noble in their book by that title conclude,

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

Mel Roman and William Haddad, authors of THE DISPOSABLE PARENT, concluded that joint custody may work to minimize parental conflict. They explain that because a joint custody arrangement can meet each parent's needs more completely rancor diminishes. Another writer reaches much the same conclusion, stating that once the pressures of the day to day marriage relationship are eliminated, the possibility of being successful parents is increase.

Although there has been a frequent suggestion that joint custody can work only for couples with an amicable relationship, the pertinent inquiry should be whether the parents are able to isolate their marital conflicts from their role as parents. There is increasing evidence that a couple who makes a commitment to share custody of their children is able to cooperate even though they do not like each other. In researching for her book THE CUSTODY HANDBOOK, Persia Woolley talked with parents who are

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

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

An additional incentive for parental cooperation may be created by an award of joint custody. The Director of Conciliation Courts of Los Angeles County, Hugh McIsaac, is of the opinion that an award of joint custody makes the motivation for cooperation greater because a break-down of the arrangement will likely result in an award of sole custody to the parent who did not precipitate the failure.

Perhaps the best evidence that divorced parents can share parenting is found in statements made by parents with joint custody arrangements. Their statements demonstrate the high priority they place on their continuing involvement in their child's life has made it mandatory to find a way to work together.

Even if parents can cooperate following divorce, there is an expressed concern, particularly among mental health professionals, that joint custody is requested by parents who are not yet ready to fully dissolve their relationship and are unable "to separate in a healthy way." This concern may be lying in wait for would be joint custody parents who escape the doubts of those who believe divorced parents can't cooperate, only to be told that their desire to cooperate as parents cloaks an underlying need to perpetuate their marital relationship.

Perhaps for some, joint custody is but a way station in route to some other arrangement. However, in studying the relationship that exists between divorced parents who are participating jointly in raising their children, one reseacher concluded that the parents studied had the abiltity "to continue a co-parenting relationship while terminating, both legally and emotionally, a spousal relationship."

Patterns of parental relationships following divorce are undergoing significant change. Divorce research in the 1950's and 1960's found divorce treated as a singular event that destroyed the family and resulted in a "broken" or "single-parent home." A new concept of the post divorce family is emerging that views divorce not as a single event but as a crisis in the life cycle or process of a family that requires a rearrangement of the interdependent relationships. As one writer put it, "Divorce does not end relationships in postdivorce families, it changes them." Another author observes that "the very decision of divorce may be a family's way of trying to salvage the family by putting the pieces together in different ways." Of the many possible family patterns that can emerge after divorce, one is the establishment of a maternal and a paternal household still connected by the bonds of the parents to the children and the children to the parents.

B. SHOULD ONLY THE "BEST INTERESTS OF THE CHILD" BE CONSIDERED?

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

1. MOTHERS.

Although the impact of divorce on adults has rarely been systematically studied, what information there is tends to show that most post divorce mothers with sole custody feel "overburdened" and imprisoned by their children. Further, there is evidence that mothers with sole custody become emotionally and physically exhausted, as well as socially isolated. It is not surprising then that in a study of joint custody parents, the mothers reported that the greatest advantage they saw in joint custody was the sharing of responsibility for the children.

The mother with sole custody not only has the primary responsibility for the children, but most likely finds it necessary to supplement spousal support and child support by working outside the home. Often she must either return to school to upgrade her skills or settle for a low-paying unskilled job. Freedom from continuous parental responsibility makes it more likely that she will be able to reach a point of self-sufficiency that is not only personally satisfying, but may be mandated by public policy.

Even though a mother may feel that she doesn't want the sole responsibility for a child after divorce, she may hesitate to divulge this "selfishness" and "unnaturalness". Most strongly stated, "in our society, not to want to be a mother is to be a freak, and not to be a blissful mother is to be a witch." Although society's attitude may be changing, the potential social

and psychological consequences to a mother who is not prepared to fight for the custody of her children are ominous. The notion remains strong that if a woman is not given sole custody of the children, there must be something radically wrong with her.

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

Something other than an "all or nothing" or "win or lose" alternative may encourage the active involvement and cooperation of both parents to work together in the child's best interests, rather than fighting to protect themselves. June and William Noble, in their book THE CUSTODY TRAP, conclude that "If the mother (or father) didn't feel threatened with loss, each would be in a healthier position for give and take."

1. FATHERS

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

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

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

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

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

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

C. DOES "STABILITY" AND "CONTINUITY" REQUIRE CUSTODY TO BUT ONE PARENT?

The greatest current obstacle to an award of joint custody is the assumption that joint custody will detrimentally affect the child because the child will be "shuttled" between the parents. As previously discussed, joint custody does not necessarily require "shuttling" the child between two homes. This concern, however, is also based on the theory tht the kind of attachment to a "psychological parent" that is necessary for growth of a healthy child cannot be achieved without the certainty and stability that is thought best promoted by complete custody to one parent.

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

/ The book BEYOND THE BEST INTERESTS OF THE CHILD is often cited in support of arguments against joint custody. The eminent authors of that influential work assert that "children have difficulty in relating positively to, profiting from, and maintaining contact with two psychological parents who are not in positive contact with each other." Though the book does not directly address, or even mention, the issue of joint custody, the authors assume that divorced parents can not be in positive contact with each other and proceed to make that assumption self-fulfilling by recommending that custody be expeditiously and permanently awarded to that parent most likely to be the "psychological parent", without opportunity for modification. They further assert that the child's stability would be best served if the non-custodial parent is stripped of his or her legal rights to the child:

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

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

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

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

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

Rather than fostering cooperation between the parents, the guidelines developed in BEYOND THE BEST INTERESTS OF THE CHILD promote a situation where parents are pitted against each other in a "winner take all" battle. A high premium is placed on gaining physical custody at the first available moment so that history of "continuity" can commence. Jockeying for control over the child at the earliest stage of separation because essential

and the parent who maneuvers the child into his or her possession at the time of the custody hearing has a strong advantage.

The guidelines offered in BEYOND THE BEST INTERESTS OF THE CHILD force the parents to sever their personal and parental relationship rather than offer emotional support to one another throughout the child-rearing years. This notion may have fit within the earlier concept of divorce as the death of the family, but is irreconcilable with a concept of the postdivorce family as a reorganized, but still interdependent unit. It also contradicts the emerging model of parents divorcing one another, without being divorced from their children. Many courts now instruct divorcing families that "parents are forever."

BEYOND THE BEST INTERESTS OF THE CHILD equates stability with keeping the child in one environment. In answering the contention that joint custody would destroy stability Dan Molinoff, a joint custody father who has written about his battle for joint custody, stated:

> "What sharing parenthood offers is a new, different kind of stability...I have spent three years helping to make this type of arrangement work and can attest to the fact that two homes have been far better for our sons than one broken one. I think it is certainly more damaging for a child to have only minimal contact with an absent parent than it is to have two sets of clothes, books and toys."

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

In a Wisconsin study, Nadine Nehls reported that her research results showed there are problems regarding a child's transition between two houses. This problem did not appear, however, to be a by-product of any particular time arrangement and was present where the child lived primarily with one parent, much as in sole custody with visitation rights, as well as where time was more equally split between two homes. She concluded that this area needs further study and joined many others in

hoping that research on the effects of different custodial arrangements will be forthcoming to help determine if joint custody is more or less advantageous than sole custody for fathers, mothers and children.

Although having one environment may be an important element for the security of a very young child, other students of child behavior have emphasized that children's needs change at different ages. Joint custody provides a mechanism that allows the parents to adjust living arrangements as the child's needs change. Parents are usually in a better position to know their child's needs than are any outside "experts". If parents have a structure that allows them to admit the need for change and then make their own mutual decisions without jeopardizing their future custodial rights, they and the children can be expected to benefit.

D. DOES JOINT CUSTODY REQUIRE CLOSE GEOGRAPHICAL CONTACT?

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

It was evident in the panel discussion of parents with joint custody arrangements previously cited, that parents with joint custody arrangements must consider the distance between their residential location and the effect of moving. Favorable opportunities to move to other areas had been offered to several of the parents but the offers had been turned down in order to stay near the other parent and the children.

However, if it is accepted that the major distinguishing characteristic of joint custody is shared responsibility for major decisions effecting the child, including where the child will live, then close geographical location is not essential. Certainly in our mobile society, the question of what effect a move from the vicinity would have on a joint custody arrangement should be provided for in drafting a joint custody agreement. At a minimum, the agreement should acknowledge that any material change of circumstance may require reconsideration, negotiation, mediation or arbitration of its terms. Failing those, the courts remain available for modification if the change is considered substantial.

The experience of one family, in adjusting their joint custody arrangement to accommodate the 10,000 mile move of the father and son from California to England, is told in a recent

magazine article. It illustrates that parents can effectively resolve unanticipated major moves and separations if the best interests of their child is the central consideration within the reality and limitations of their own circumstances. The story also illustrates that the distinguishing feature of joint custody is shared decision making and not geographical proximity.

E. CAN MANY FAMILIES AFFORD JOINT CUSTODY?

1. The Chosen Few

The observation has been made that at the present time joint custody appears to be limited to a rather small group of sophisticated couples who are frequently both professionals. The Nehls study found that joint custody parents tended to be well educated and have relatively high income levels. Nehls speculates that limited access to information about joint custody might explain the correlation between education and income levels and the use of joint custody. One judge has acknowledged that joint custody parents have to have money and that where it has worked, the parties have often been professional people. A family therapist and researcher who has long specialized in the divorcing family and is an advocate of joint custody observed that no one needs to have a house, a yard and an extra bedroom to be a co-parent. "Those are just accoutrements. It is the childrens' sense of belonging and of territory that makes a home. If you have a sleeping bag rolled up in the closet, that's enough."

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

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

2. Non-Support

As was discussed earlier in this Article, non-custodial parents tend to stop seeing their children after divorce. Support payments from non-custodial parents are also often short lived. Empirical studies place the range of non-compliance with child support orders after only one year following the divorce decree from 62 percent in Wisconsin to 47 percent in Illinois. The same studies report that within one year following divorce no

support payments at all were received from ex-husbands in 21 percent of the Illinois cases and 42 percent of the Wisconsin cases. At the conclusion of 10 years following divorce 79 percent of the fathers in Wisconsin had ceased paying any support and 59 percent in the Illinois study had quit. An even higher percentage were not in full compliance but made partial payments.

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

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

3. Joint Contributions.

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

4. Family Resource Utilization

The traditional pattern of divorce is likely to disrupt the relationships that the child had with the non-custodial parent's side of the family. Although we have focused our attention on the central participants of a divorce, mothers, fathers, and their children, there is a growing recognition that grandparents also may be cut off from their grandchildren by the court order. Just at a point when a child is faced in most sole custody decisions with the loss of a parent, he also must bear the loss of grandparents and other relatives. Harry M. Fain, President of the American Academy of Matrimonial Lawyers, pointed out that a "grandparent's love can fill the deep, emotional void created in the lives of children whose parents are separated or divorced...they can connect a child with the deeper roots of his history." Margaret Mead stated it most succinctly: "[e]veryone needs to have access both to grandparents and grandchildren in order to be a full human being."

Visitation time of the non-custodial parent may not reflect the number of children involved. It may be very difficult for a non-custodial parent to find time alone with any one of his or her children. But one by-product of co-parenting is that divorced families are better able to arrange schedules so that one child has time alone with each parent.

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

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

F. WILL THE REACTIONS OF OTHERS DEFEAT JOINT CUSTODY?

Society seems to have very set notions about the roles the participants in a divorce should play. The great American "soap opera", as divorce has been called, also assigns certain role scripts to the family and friends of those who divorce. Not only does joint custody tend to destroy the soap opera aspects of the

drama and deprive some of their opportunity to mourn or console the participants, it may place friends and relatives on stage with no script.

Even if family and friends are willing to give up the old roles, they may have to overcome a feeling that there is something unsavory about divorced people being able to get along well enough to cooperate in the raising of their children. As Margaret Mead stated:

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

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

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

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

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

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

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

G. IF PARENTS CAN COOPERATE, DOES IT MATTER WHAT THE DECREE SAYS?

1. Status

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

2. Incentives

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

At times of stress or conflict, parents may also need the incentive of a realistic decree to achieve continuing compliance with the terms of their agreement. Giving one of two "equals" all the legal power contained in a court order stacks the deck against mutual cooperation in the face of what might otherwise be minor, but inevitable, parental friction. The decree then serves as a disincentive for continuing accord and mutual accommodation. Fair negotiation during the dynamics of family reorganization requires equal legal power and sanctions. Neither parent should have the right, when both are capable, to "give" or "take" custody at their whim.

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

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

3. Validity

Private agreements concerning custody and child support, particularly in contradiction of a decree, are of questionable validity and unlikely enforcement if not approved or incorporated by the court. Unilateral decisions violative of the parties private joint custody agreement cannot be prevented if the decree provides for custody to one parent. For example, a father with informal joint custody does not ordinarily have any right to make decisions regarding his child's education. The reluctance of some courts to prevent custodial parents from moving with the child out of state may leave a non-custodial parent with a non-decreed joint custody arrangement powerless to prevent the child from being permanently removed from the home jurisdiction.

Joint custody will normally require different support and financial obligations than sole custody. Both parents are entitled to know what financial arrangements they can rely on in attemptng to meet their legal oligations, rather than trying to second guess, at their peril, whether a judge might later reject or enforce their understanding.

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

. DO JOINT CUSTODY DECREES RESULT IN MORE MODIFICATION PROBLEMS?

Some opposition to joint custody is based on a fear that joint custody decrees will consume more time for modification than traditional awards of sole custody. Certainly, reported cases evidence that some joint custody decrees do come back to court, as do decrees of sole custody. In reality, there is no such thing as a "permanent" custody order. Statistics are not available to compare the proportion of modification requests stemming from joint custody awards as opposed to sole custody awards.

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

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

Other attorneys, as well as Gaddis, include provisions in their joint custody agreements for periodic review of its terms by the parties, or review and renegotiation upon the happening of listed contingencies, such as remarriage, co-habitation, or a move from the geographical area. These events when they occur,

often result in practical concerns as well as substantial emotional reactions that make fighters out of parents who previously cooperated. For this reason, the agreement may provide that the parents will seek counseling or advice on how others have handled these issues when they have arisen. Periodic review of the joint custody arrangement, counseling, mediation or arbitration should provide effective alternatives to modification motions for most parents who have demonstrated their proclivity to avoid court proceedings by stipulating to joint custody or who have been found by the court capable of cooperating together in the best interests of their children.

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

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

I. ARE DECREES OF JOINT CUSTODY ENFORCEABLE?

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

When the joint custody decree does not contain specific provisions as to how decisions regarding education, religious training or medical care are to be made and a parental deadlock

occurs, some courts may first require the joint custodial parents to confer and try to reach agreement, or participate in mediation. Then, if necessary, the court, may upon the presentation of evidence, make a decision for the parents without altering the joint custody arrangement. Other courts would allow a unilateral decision by the residential parent, or declare the joint custody a failure and decree one parent as sole custodian with the right to unilaterally make decisions.

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

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

A joint custody decree which does not provide that one parent is the residential parent or which contains no restriction against moving the child's residence is undetermined custody for purposes of interstate enforcement under the Uniform Child Custody Act. If one of the parents moves and takes the child, the other parent has no direct enforcement remedy under the Act in the second state. The only available judicial mechanism would be a motion to modify custody to provide the aggrieved parent a legal right to retain the child. If the decree does not establish with which parent the child is to reside, self-help is available to either parent, though this antithisis of cooperation would obviously mark the end of the joint custody arrangement.

CRITERIA FOR DECREEING JOINT CUSTODY

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

It has been suggested that a presumption be established in favor of joint custody. At least one appellate court has recently acknowledged a presumption against joint custody. Other courts, while not articulating such a presumption, appear to rule against joint custody on a similar premise. Presumptions of the past, first for the father, then for the mother, have not worked well. It does not seem wise to create a presumption for joint custody that might be a disincentive for careful fact finding in contested cases.

When parents do agree upon joint custody, however, it should be decreed. The courts should not stand in the way of parental efforts to share responsibility for their children following divorce. The parents, better than a judge, know what each is capable of and how they can best meet the needs of their children within the reality of divorce. Court dockets are sufficiently full of cases where parents disagree; the court should not create conflict where the parents do agree. The fact that stipulated joint custody may on occasion not work does not justify the time, expense, agony and potential error of judicial inquiry into the parents joint decision to continue their basic parental roles following divorce any more than courts should second guess parents prior to divorce. Should disagreement later occur, the courts will be available, as needed, to sort out parental rights and decide upon custody.

Concerns about agreements arrived at by "compromise" or "overreaching" are generally misfounded. All agreements represent some degree of compromise and patterns of dominance, manipulation, or overreaching during divorce are likely no different than during marriage. There is no indication that these elements occur any less frequently in reaching agreements

of sole custody, which are generally not questioned by courts. Courts may wish to satisfy concerns about these issues by requiring parents seeking joint custody to first obtain professional divorce counseling or to utilize the services of a divorce mediator. Agreements reached through attorneys representing each parent and, in those states requiring it, counsel for the child, should also answer these concerns.

This is not to suggest that it is inappropriate for courts to scrutinize stipulated joint custody agreements to assure that the financial and care arrangements are realistic. The general criteria for approval of joint custody, however, should be based on the unique features of joint custody, rather than the more restrictive criteria for divided custody. This same set of criteria can be utilized by courts in deciding when to encourage joint custody when parents don't initially agree upon a custody resolution. Indeed, with care in finding if the facts exist which satisfy the joint custody criteria set forth below, courts should consider ordering joint custody in contested custody cases.

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

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

1. A finding of parental fitness assures that the child will not be subjected to the care of a parent incapable or unwilling to provide for the child's needs and to protect the child from harm. If there is no evidence of abuse or neglect and no allegation to the contrary, a finding of fitness would normally present no difficulty. A finding of parental fitness protects both parents, in the event either later contends for

sole custody. The court's attention in considering a request for modification could then be focused only on evidence following the initial decree of joint custody.

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

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

4. The court may wish to consider the pre-divorce parenting pattern in determining which available custody alternative would be the least disruptive. A father, or a mother, who prior to divorce has not actively participated in caring for the child or in making major decisions on behalf of the child may not be in a position to actively do so following divorce without a disruptive effect. The child's needs for continued involvement with paternal and maternal relatives and friends may also be a factor. Though a child's residence need not be shifted as a result of joint custody, the practical effect of a parent's relocation or change of lifestyle should be weighed and the custody arrangement structured to minimize any disruptive effect on the child. Finally, joint custody should be viewed not in comparison to an idealized intact family, but rather relative to the less than ideal alternatives of sole custody litigation and disposable parents.

CONCLUSION

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

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

SECTION 5

JUDITH S. WALLERSTEIN, PH.D., principal investigator of the Children of Divorce Project, has been trained in child psychoanalysis and in clinical social work, and worked for many years at the Menninger Foundation as senior psychotherapist in the Children's Division. She is currently on the faculty in the School of Social Welfare at the University of California, Berkeley, and this year is a Fellow of the Center for the Advanced Study in the Behavioral Sciences at Stanford. She has served on the Advisory Commission on Family Law of the California Senate and as an advisor to the State Bar of California.

JOAN BERLIN KELLY, PH.D., was trained in child development and clinical psychology. She was on the faculty of the University of Michigan in the departments of psychology and psychiatry and subsequently served as Director of Children's Services at the Community Mental Health Center of Marin County, California. She is co-principal investigator of the Children of Divorce Project. The authors have consulted and lectured widely both here and abroad.

The judgments handed down
about marriage breakups are often filled with myths.
Here is a fresh look at

The Child In The Divorcing Family

The judge's role on the domestic relations bench is surely one of the most difficult in the judicial system. Confronted daily with complex and seemingly insoluble human problems, which evoke a combination of exasperation and moral anguish in most onlookers, the judge finds the appointed task much at odds with the ideal model of judicious calm and measured decisions.

That competent and dedicated people of conscience would be fatigued and physically depleted by this experience is entirely comprehensible. Only the judge with a strong interest and commitment to domestic relations law can deal with these issues with equanimity and a sense of accomplishment.

The judge's problems are further aggravated by a lack of information about how divorce affects children. As a society, we have been quick to believe that children are unhappy in a marriage that is unhappy for one or both of their parents. We also have been remiss in providing sorely needed court-attached services and community-based services to divorcing families with children.

In addition, mental health professionals who have been involved in courtroom procedures often offer conflicting advice. This lack of unanimity among the members of the mental health profession reflects not only different orientations and schools of thought but the paucity of research. Essentially, the mental health practitioner who stands before the court has relied on his or her own clinical experience, and that experience, no matter how extensive and illuminating, cannot match the systematic study of many children. Nor can the clinical experiences of any mental health practitioner, no matter how extensive and enlightening, be appropriately applied to children from various walks of life, particularly those who have not been identified as patients needing help.

Only in recent years have the behavioral sciences begun to accumulate systematic knowledge about the experiences of divorcing families with chil-

By Judith S. Wallerstein

Judith S. Wallerstein
is a fellow at the Center
for Advanced Study in the
Behavioral Sciences,
Stanford, California,
and teaches at the School
of Social Welfare
at the University of
California at Berkeley

dren. Findings from investigative projects, although too few in number, have been strikingly in accord with one another, despite being conducted in different regions of the country. (We refer primarily to the work of Hetherington and her co-workers in Virginia; McDermott in Michigan; Jacobsen in southern California and our own work in northern California—all of which appear as references at the end of this article.) These studies based on social and psychological research may benefit the judge by providing a context in which to understand complex issues and help facilitate decision making.

Although the courts see only a small proportion of divorcing families (estimated at approximately 10 to 12 percent of the divorcing families with children) the informal, personal attitudes of the judges, as well as the formal decisions of the courts, cast a long shadow. They influence the advice attorneys provide to both litigating and nonlitigating clients, and affect the values and expectations of the general community in regard to relationships between parents and children. Given the current divorce rate, which shows no sign of diminishing, we can estimate conservatively that one-third of the American children born within this decade will experience the disruption of their family. Therefore, it is of great importance not only for the litigating families but also for society as a whole that judges on the domestic relations bench speak with all available knowledge in addressing the issues that affect children in divorcing families.

The findings presented in this article derive primarily from a five-year longitudinal study of 131 children from 60 divorcing families in a general northern California divorcing population. Begun in 1971, the Children of Divorce Project's primary goal was the systematic exploration of the responses of children at various ages to divorce-related family change and to those changes in parent-child relationships that occur after a divorce.

Prior to family disruption, all the children in this study had reached appropriate developmental milestones in the opinion of their parents and teachers. The children and their families were seen individually in an average of 14.2 interviews per family over a six-week span in the context of a preventive planning service which was established at a community mental health center. Families were referred by attorneys, schools, physicians, and community agencies no more than a year after the parental separation and preferably much closer to it.

The initial data obtained from the four to six interviews with each family member were supplemented by independent information obtained from the children's schools. Within a year following the initial extended contact, each family member was interviewed again, on an individual basis, by the same clinical team representative. For most families, therefore, the first follow-up interview occurred about 18 months after the parental separation.

A finding of high incidence of continuing or increased distress among the children led to a decision to follow the original group further, and in 1976 another round of examinations of the same youngsters, now four to five years older, was completed. Once again 58 of the original 60 families were reached. The experience of these children within the divorcing families provide a main source for the information presented here.

INITIAL RESPONSES TO MARITAL RUPTURE

Children and adolescents alike experience the parental separation and its aftermath as the most stressful period of their lives. The family rupture evoked an acute sense of shock, intense fear, worry, and grieving, which the children found overwhelming. Only a small number of the children and adolescents were relieved by the divorce decision, perhaps 10 percent, and these were, in the main, older youngsters who have seen physical fighting between their parents and were fearful about such recurrences, either on their own behalf, or on behalf of one of their parents.

The children's early responses were not governed by a balanced understanding of the issues that led to their parents' divorce decision. Most children have considerable difficulty identifying with the needs of a particular parent or in understanding the adult issues leading to divorce, even though they may well be aware of one or both parents' anger, unhappiness, or loneliness.

The children of divorcing parents were not affected by the high incidence of divorce in the community. It appears that each child considers his situation unique and is not comforted by the misery of his friends or neighbors. However, the high incidence of divorce in the community can frighten children whose parents are not divorcing. Teachers have reported children

The research reported in this paper has been supported since 1971 by the Zellerbach Family Fund, San Francisco. Dr. Wallerstein has been principal investigator, Joan B. Kelly, Ph.D., co-principal investigator. A full report of findings from the five-year California study of the effects of divorce on children and adults will appear in the book *Surviving the Breakup: How Children and Parents Cope with Divorce* by Judith S. Wallerstein and Joan B. Kelly, Basic Books, Inc., New York, in press.

A child needs a continuou: visiting relationship; one weekend per fortnigh: is insufficient

coming to school in acute anxiety because their parents fought the preceding night; worrying whether the parental quarrel meant that there would be a divorce forthcoming in their family.

At the time of the parental separation, the child's attention is riveted entirely on the disruptive process in the family and is intensely worried about what will happen to him. Whatever its shortcomings, the family is perceived by the child as having provided the support and protection which he needed and will continue to need. The divorce signifies for him the collapse of that structure and he is likely to feel alone and very frightened.

WHO HELPS THE CHILD?

For many American children, the divorce crisis is exacerbated by the relative unavailability of an extended family or community support. In the population studied, less than 25 percent of the 131 youngsters were comforted or helped by grandparents, aunts or uncles, or other members of the extended family. Overall, they were remarkably unsupported by other adults: less than 10 percent recalled the kindness and compassion of an adult who intervened at a critical time in their lives.

The limited support available to children in the divorcing family from the schools, churches, and the community, and among adults who generally have contact with the family—such as the teacher, minister, or physician—does not lessen the loneliness of children in divorcing families. Thus, the children are doubly burdened by their own fear of the collapse of the family and by the relative absence of support in larger society.

DIMINISHED CAPACITY TO PARENT

Many children and adolescents also faced the tensions and sorrow of divorce with very little help from their parents, which contributed significantly to the children's widespread distress. During the critical months following the separation, the adults, who were occupied with the crisis in their own lives and had many decisions to make, provided diminished care to their children. Parents are not necessarily less loving or less concerned about their children during divorce, but changes in their lives direct their attention elsewhere, toward their own preoccupations and problems.

Practical changes in parents' lives take their toll, reducing the time and the attention available for their children. Custodial parents are likely to seek full-time employment, leaving children with new sitters in strange homes or child care settings, or to empty houses after their day at school. The non-custodial parents' new housing is often inadequate for extended visits, and their time is such that they see their children on the run. New love relationships take on special importance. There is often a flurry of social and sexual activity immediately following the marital breakup as parents seek new companions during weekends which customarily were spent with their children.

Moreover, many adults become depressed, angry, and humiliated following the decision to dissolve the marriage, and their own unhappiness limits their capacity to provide emotional support to children. This diminished parenting sets adrift children who were accustomed to good parental care and renders them more vulnerable to their fears of being abandoned by both parents. Children who had long suffered parental neglect experienced the diminished care at the time of the divorce as a reinforcement of the parents' limited interest in their welfare.

Many of these parents experienced grave difficulty in telling their children about their decision to divorce and in explaining the divorce to the children. Parents confessed to us that they did not know how much to tell: whether to reveal details of their intimacy, or whether to elaborate on one partner's infidelity or another's frigidity. They could not decide where or when to tell the children, or how long before one parent departed the household. Many were apprehensive that their children would be unhappy, frightened, or angered by their decision. They often explained the divorce decision clumsily, and in ways which inflicted the most suffering on the children, saying "He left *us*!" or "She does *not* love *us*!" or "The divorce will not make any difference."

Thus, in many families an awkwardness in communication or a silence between parents and children existed at the height of the child's need for support. In fact, no single family in our experience provided the children with an adequate opportunity to express their concerns: to recognize with their parents what the divorce really was about, to acknowledge that it was indeed a family crisis, and to explain that things would be difficult for a while with the realistic expectation that life would gradually improve.

The parent's diminished capacity to be helpful to their children at this time undoubtedly contributed to the intensity of the children's response and particularly to their fearfulness. Furthermore, the parents' inability to provide the emotional support which the children needed continued for an extended period of time—often for several years following the marital breakup.

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From the court's perspective, the widespread diminished capacity to parent during the divorce crisis is also reflected in the impaired judgment of many parents who have difficulty separating their own needs from the needs and best interests of their children.

THE LONG DISSOLUTION PROCESS

The timetable of the divorcing process is considerably longer than most people realize. With the decision to divorce came numerous changes in the individual lives of the adults and the children and in their relationships with each other. The drama, complexity, and scope of these changes exceeded our expectations. The period of disequilibrium in the lives of the children often lasted several years. Five years after the marital separation, it was obvious that, for many children and adults, the divorce-related issues remained infused with strong feelings. Perhaps this extended timetable is both realistic and expectable, and we and others have been naive in expecting quicker resolutions.

Several stages in the trajectory of the divorcing process can be distinguished: (a) the initial acute phase, (b) the transitional phase, and (c) the restabilized family. The initial acute period following the decision to divorce is characterized by expressions of anger, frequent depression, and the previously mentioned diminished capacity to parent.

By the end of the first one and one-half years following the separation, children's acute responses *began* to subside or to disappear altogether. The transition period often lasted two to three years and were marked by many external moves as well as by changed family circumstances.

The third and final stage of the divorcing process is the early years within the restabilized post-divorce family or a new marriage. By the five-year mark, some of the families had successfully created stable homes and improved the quality of life for family members above that in the pre-divorce family. At the other end of the wide spectrum, the adults, the children, or both were unhappy or were no happier than they had been during the failing marriage.

Although the initial breakup of the family is profoundly stressful, the eventual outcome depends in large measure not only on what has been lost, but on what has been constructed to replace the failed marriage. The effect of the divorce ultimately reflects the success or failure of the parents and children to master the immediate disruption, to negotiate the transition successfully, and to create a more gratifying family to replace the family that failed.

The goal of society, therefore, is not only to facilitate or permit the dissolution of the unhappy marriage but to lay the foundation for the emerging post-divorce family, which will protect the psychological and economic needs of the children during their growing up years.

PARENTS AND CHILDREN AFTER DIVORCE

Considerable evidence indicates that the relationship between children and their divorced parents does not lessen in emotional importance in the post-divorce family. Although the mother's caretaking and psychological role became increasingly central in families where the mother had sole custody, our study showed that the father's psychological significance did not decline correspondingly. Even in remarriages (at least during their early years) in which the stepfather often became a prominent figure to the children very quickly, the biological father's emotional significance did not disappear or diminish markedly.

Throughout our research, it has been strikingly apparent that where children maintained frequent or infrequent contact with the noncustodial parent, they would have considered the term "one parent family" a misnomer. Where children have been reared in a two-parent family their self-image appears to be firmly tied to the relationship with both parents.

As a whole, our findings point to the desirability, during the years after a divorce, of children continuing relationships with both parents in an arrangement which enables each parent to be responsible for and genuinely concerned about the well-being of the children. Children who had a good outcome five years after the divorce came from families that were able to restabilize and restore the parenting after the initial dip during the breakup crisis. Children also improved when the divorce separated a child from a psychologically destructive or abusive parent. And, of course, some children benefited from the new parental relationships.

Children also did well in families where the friction between parents had dissipated. One of the best arrangements promoting good development was where the child or adolescent enjoyed parental support from both parents or had a sense of being loved and valued by one parent without being demeaned or rejected by the other. Children who enjoyed a sense of continuity with both parents felt that the divorce had contributed to the quality of their lives both by removing the stress and by continuing the important gratifications. On occasion, the children's self-esteem was enhanced by the recognition they felt was accorded them for their help in maintaining relationships in the face of divorce.

Children were generally aware of the ease with which appointments could be forgotten or plans postponed by the visiting parent. Similarly, they often recognized the burdens of the custodial parent. They could be profoundly appreciative of the effort required to maintain a household, the demands of working, and the custodial parent's reponsibility for the family. They also often were sensitive to the worries which the custodial parent carried alone.

At the other end of the spectrum, children who felt rejected or neglected by either the custodial or noncustodial parent were likely to be stressed and troubled. As a good father-child relationship over the years entails appropriate visiting and being responsive

to a child's wishes and needs and is correlated with a child's high self-esteem, a poor father-child relationship occurs within the context of inappropriate, infrequent, or unreliable visiting and is significantly linked to depression in the children. Those who experienced repeated disappointment because of a father's infrequent or unreliable visiting, or his disinterest or insensitivity to them during visits, suffered grave unhappiness which did not seem to diminish over the years. Despite repeated disappointment and the passage time, most children held tightly to the hope that the father would eventually fulfill their expectations. Only a few children developed immunity to repeated disappointments and were able to overcome the hurt of the father's rejection; those who did so had the help of unusually sensitive mothering or step-parenting as well as their own considerable inner resources.

Children who remained in the custody of a lonely, depressed, or emotionally disturbed mother were also likely to do poorly. The additional stresses of divorce on an emotionally disturbed or vulnerable parent often led to deteriorated parenting which no longer was mitigated by the buffering presence of the other spouse. In addition, children in the custody of a chronically troubled mother were more likely to go downhill after a divorce than during the failing marriage when they had two supportive parents, despite the marital unhappiness.

FAILURE OF THE DIVORCE

Failure of a divorce to provide its intended remedy was a central cause of children's poor advancement at the five-year mark. When one or both parents continued to be distressed, when one or both experienced no relief, when the quality of family life deteriorated, the children felt unable to master the stress and psychic pain of the divorce.

Similarly, when the parents continued to fight or post-divorce bitterness exceeded that of the marital conflict, children were seriously hindered in their efforts to master the situation. We were startled to discover that 30 percent of the children we studied were aware of great tension and continued bitterness between their parents at the five-year mark. Continued parental fighting was significantly related to poor psychological adjustment among the children.

Moreover, continued friction between long-divorced parents reflected psychological instability and especially loneliness and social isolation in one or both adults. Children in such troubled families were adversely affected both by continued quarreling between the parents and by the psychological problems of one or both parents. For these families, the divorce had failed as had marriage, leaving the children bewildered, angry, and unable to understand or justify the continuing stress within the family. Moreover, they had been deprived of the adult help which children need to adjust to the post-divorce family.

THE VISITING RELATIONSHIP

We had made the erroneous assumption that the visiting relationship is a continuation of a predivorce relationship between parent and child. Actually, the visiting relationship has no counterpart in the intact family. In a very real sense it is a new parent-child relationship which needs to be created and maintained following a divorce. We were surprised to discover that there was no correlation between the frequency of the fathers' post-divorce visits and pre-divorce father-child relationships. This led us to the discovery that the visiting relationship and some of the burdens which it imposes on the adults and children are very complex.

Visiting relationships are difficult to develop for many reasons. A parent-child relationship rests upon a continuity of contact within a thousand situations that mark each day and each successive year: feelings of mutuality are forged out of a thousand moments of caring, approval, disapproval, anger, and forgiveness. After a divorce, these feelings must be compressed into the funnel which represents a visit. It is not an easy task.

The logistics of caring for children, especially children of different ages, outside a home base are formidable for most adults. Visiting parents and children often find themselves with no place to go and no idea of what to do together. Furthermore, a visit itself evokes echoes of a dying marriage with its angers, jealousies, love, and longing; people, stimulated by their memories, can behave dreadfully toward each other at such time. All of these factors combine to generate severe stress during visits.

In addition, visiting fathers or mothers who feel depressed and rejected after a divorce often feel more so after visiting their children. Parting from the children is particularly painful and parents sometimes develop exacerbated depression and unhappiness after a particularly loving visit. Also, visiting parents who feel guilty about having left children in the care of a less competent parent or who left the marriage to pursue a love affair, have trouble maintaining visiting because each visit is followed by renewed guilt.

Thus, many factors affect the visiting relationship which have little to do with parents' attachments to their children. Parents who do not visit may love their children deeply, or they may not. A visiting pattern is not a good barometer of a parent's interest.

Unfortunately, children do not comprehend the complexity of the factors which affect a parent's visiting. While they understand with considerable generosity of spirit such factors as geographical distance and financial costraint, they do suffer very much when the parent who can visit fails to appear. Often they conclude that they not only are unloved but unlovable. It is this continued disappointment that erodes a youngster's self-esteem so drastically.

The visiting relationship is fragile and needs encouragement and protection, particularly following the marital breakup when it is especially vulnerable to attrition. Therefore, court orders that restrict or direct visitation should consider and evaluate the total impact on both the children and parents. Visiting disputes touch multiple aspects of the family's life that

may continue well into the future. Parents might behave differently if they understood that a child's post-divorce psychological well-being requires a continuity in the visiting relationship and that the child must not feel rejected by the visiting parent.

Furthermore, if the court's goal is to establish and maintain a parenting relationship that will help a child as he or she grows up, then the format of one weekend per fortnight, which attorneys often designate as reasonable or expectable, is probably insufficient. Most children below the age of nine prefer to see a visiting parent at least weekly and many yearn for contact several times a week if possible.

Young children may suffer if the visits are infrequent because they fear that the visiting parent will disappear. For the children, a father's appearance often acquires a jack-in-the-box quality which may contribute to negative symptomatic behaviors which custodial parents report following visits. Such behaviors may be reflected in children's fears of returning home or of not seeing the parent again, or in some other disturbance in the visiting relationship.

JOINT CUSTODY AND CHILDREN

Increasing interest in sharing legal and physical custody reflects the growing recognition that children can maintain relationships with both parents after divorce—a model which may have wider applicability than many previously assumed. In our own sample of 131 children, one-fourth of these youngsters had two committed parents during the failing and conflicted marriage.

Parents who are able to cooperate over the rearing and care of the children during the unhappy marriage provide a pool of likely candidates for joint custody following the divorce. Although we still lack much information about custodial arrangements, including joint custody, we believe that shared physical custody in the post-divorce family would be a viable option for parents. This implies that parents be able to give their continued parenting priority in their lives and in their major decisions, that they are not in conflict over the children, and that they are psychologically stable, and that both participated in the care of the children during the marriage. However, even these parents are likely to need psychological counseling in order to establish arrangements appropriate to the individual personality and age of the children.

Some children are able to deal with change better than others, but this is difficult to determine without knowing whether a child is flexible and can adapt to changing routines. Some evidence indicates that elementary school-age children are able to make better use of joint custody arrangements—even those that involve changing homes weekly—than adolescents and very young children who find such changes stressful.

Moreover, joint custody is very taxing on parents; it requires a commitment to the children and a mutual respect for one another as parents that probably is rarely obtained in many intact families and which may be impossible for divorcing or divorced parents whose differences are too great or whose anger is unabating. The children's continuing relationships with both parents can still be maintained where one parent has sole custody, but only if both parents recognize the child's need and right to continuity. The legal structure influences, but clearly does not determine, relationships within the family.

THE ANGRY PARENT AND THE CHILD

Fighting between parents for the possession and presence of their children probably has tangled roots in the parents' relationship. Such struggles often embody intense, unresolved conflicts and angers from the failed marriage. The struggle may reflect the parents' need for a supporter and ally in the marital battle.

Beyond those issues, however, fighting over custody of children may have its roots in the parents' dependence on the child. Intense dependence of parents on children, sometimes very young children, is not uncommon during a divorce crisis. Many parents in our study indicated that the physical presence of their children kept them going and effectively staved off depression and psychological disorganization. One issue involving custody and visitation disputes was the parents' dread of being alone after the divorce.

Jealous, angry or distraught parents cast their children into a great many roles in marital battles, ranging from an audience whose presence sometimes appeared as a necessary backdrop for parental fighting to that of committed battle allies. The children, in turn, ranged in their participation from astonished, frightened observers, to a denunciatory Greek chorus, and, in some instances, to a full alignment with one parent against the other. Children whose participation was aimed at humiliating one of their parents usually were between nine and 13 years old or were adolescents at the time of the separation. Approximately one-fifth of the 131 children in our study entered the fray actively within the family circle on the side of one parent, usually on the side of the parent who opposed the divorce.

FOLLOWING CHILDREN'S PREFERENCES

Although the wishes of children always merit careful consideration, our work suggests that children below adolescence are not reliable judges of their own best interests. Their attitudes at the time of a divorce may derive from the crisis itself and may be very much at odds with their usual feelings and inclinations.

Many nine-to-thirteen-year-olds were angry at the parent they believed was responsible for the divorce. Some were eager to be co-opted into the parental battling; they eagerly took sides, often against a parent to whom they were tenderly attached during the intact marriage.

Alternatively, and equally disconcerting, was the passionate commitment of some of the youngsters in that age group to rescue a depressed or suicidal parent. Their loyalty, while commendable, was sometimes to their own detriment when they took over the parenting of an unhappy parent long before possess-

ing the maturity or capacity to do so. Furthermore, their propensity to split the parents into "good parent" and "bad parent," often in contradiction with the parents' respective roles over the years, caused us to doubt the children's ability to make informed judgments about their own best interests.

In addition, several of the youngsters with the most passionate convictions at the time of breakup later came shamefacedly to regret their vehement statements. Taken together, these observations have increased our misgivings about relying entirely on the expressed preferences of children below adolescence in deciding issues which arise in divorce-related litigation.

THE COURT'S APPOINTED TASK

One task of the judge is to help the disputing family to establish the legal, psychological, and economic foundations that will provide a solid base for children as they grow up. In fulfilling this complex task, the court operates under cetain grave constraints. The first constraint is time. The pressures of the court's calendar limit the time and attention available for each family, and that time is almost always insufficient considering the complexity of human issues before the court.

An additional constraint is related to the timetable of court intervention. Crisis theory indicates that there are critical times in the life of a family when relationships are in flux and are more amenable, therefore, to outside intervention and influence. In the divorce process, the important period is likely to be immediately after the relationships of the pre-divorce family have broken loose from their customary moorings. Thus, the acute phase of the marital breakup—immediately after separation, before positions have hardened, and before decisions have been made about the many issues which confront divorcing couples—is the best time for intervention. However, the court calendar operates independently of the intervention timetable and therefore limits the court's effectiveness.

A third constraint on the judge is the unavailability of competent well-trained counselors who can work with the family. A court order is limited; it cannot address the psychological conflict underlying the legal dispute, but it can drive the psychological issues underground. A court order is inadequate to address the complex problems delineated in this article, which include the fragility of the emerging visiting relationship and friction between marital partners.

Therefore, it seems evident that the judge on the family court bench can be most effective if he or she can deploy well-trained counselors at the appropriate time in the family dispute to alleviate tension and build towards the post-divorce family. This will safeguard the best interests of the children. Unfortunately, we have not yet created a constituency that insists on these services which aid the judge to better help divorcing families.

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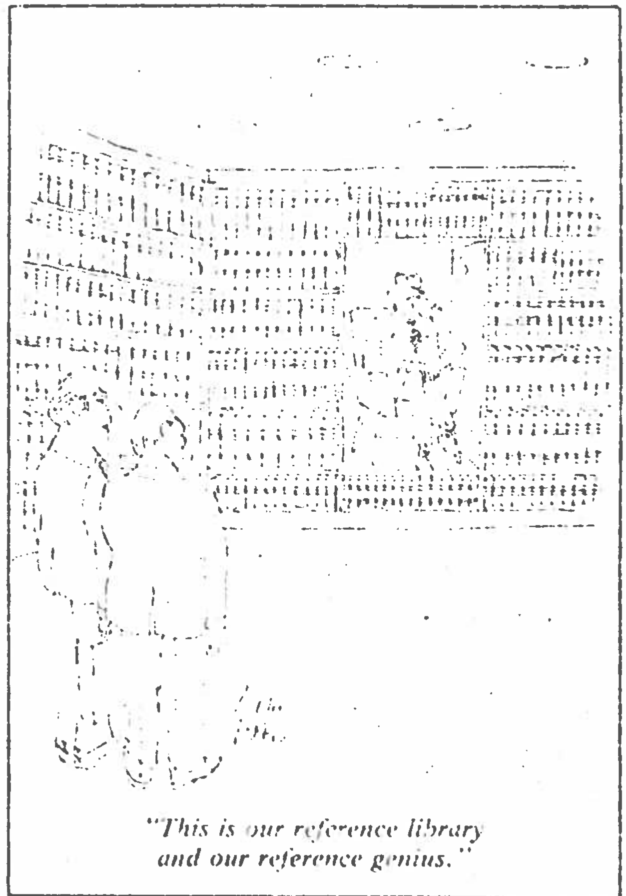

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CALIFORNIA'S CHILDREN OF DIVORCE

BY JUDITH S. WALLERSTEIN
AND JOAN B. KELLY

Five years after the breakup, 34 percent of the kids are happy and thriving, 29 percent are doing reasonably well, but 37 percent are depressed. An in-depth study of 60 families traces patterns in these different outcomes. As in married families, what counts most are the two parents' attitudes.

The conventional wisdom used to be that unhappily married people should remain married "for the good of the children." Today's conventional wisdom holds, with equal vigor, that an unhappy couple might well *divorce* for the good of the children; that an unhappy marrriage for the adults is unhappy also for the children; and that divorce that promotes the happiness of the adults will benefit the children as well.

Testing that new dogma was among our goals in 1971 when we started what became known as the Children of Divorce Project. We interviewed all the members of 60 families with children that had recently gone through divorce, and reinterviewed them 18 months later. Recently, we saw them again, after a lapse of five years (see box, page 70). Our study has no counterpart in the United States or in Europe in the span of years it covers, in the participation of so many children of different ages, and in the kinds of questions that were posed.

Our results called into sharp question much more than the idea that what is good for the parents is always good for the kids. For example, we thought that by five years after the initial separation, new family structures would be an accepted part of life, and our observations would be made within a social and psychological landscape that had come to rest. Yet we found more people than we expected to find still in various degrees of turmoil.

Our overall conclusion is that divorce produces not a single pattern in people's lives, as the conventional wisdom of any era tends to claim, but at least three patterns, with many variations. Among both adults and children five years afterward, we found about a quarter to be resilient (those for whom the divorce was successful), half to be muddling through, coping when and as they could, and a final quarter to be bruised: failing to recover from the divorce or looking back to the predivorce family with intense longing. Some in each group had been that way before and continued unchanged; for the rest, we found roughly equal numbers for whom the divorce seemed connected to improvement and decline.

What made the biggest difference for the children was not the divorce itself, but the factors that make for good adjustment and satisfaction in intact families: psychologically healthy parents and children who are involved with one another in appropriate ways. Yet providing these optimal conditions is difficult in the postdivorce family, with its characteristic climate of anger, rejection and attempts to exclude the absent parent.

Changing Family Circumstances

News of their parents' divorce clearly had been an unhappy shock to most of the children. We found that although many of them had lived for years in an unhappy home, they did not experience the divorce as a solution to their unhappiness, nor did they greet it with relief at the time, or for several years thereafter.

To be sure, as many of the children matured, they often acquired a different perspective. But at the time of the family disruption, many of the children considered their situation neither better nor worse than that of other families around them. They would, in fact, have been content to hobble along. The divorce was a bolt of lightning that struck them when they had not even been aware of a need to come in from the storm.

Five years later, there had been little shifting of the children from the custody of one parent to the other. Seventy-seven percent of the youngsters continued to live in the custody of their

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Five years afterward, 30 percent of the children still strongly disapproved of their parents' divorce.

mothers. Eight percent now lived with the fathers, a slight increase; another 3 percent shuttled back and forth from one home to the other, usually not in a planned joint-custody arrangement, but under duress when their relationship with one or the other parent became overwhelmed with ill will. An additional 11 percent of the children—adolescents—were now living on their own.

Almost two-thirds of the youngsters had changed their place of residence, and a substantial number of these had moved three or more times. The moves were generally within a radius of 30 miles, however; very few families left the region. The fathers tended to stay close by as well. One-half continued to live within the same county as their children, some still within biking distance. An additional 30 percent of the fathers were within a one-hour drive.

Twenty-four (43 percent) of the fathers had remarried in the intervening four years, of whom five were then redivorced and two subsequently remarried. Thus, 44 percent of the youngsters had a new stepmother. Nineteen of the mothers—one-third—had remarried; two of these women were then redivorced, and two widowed. Hence, nearly a quarter of the children lived with a stepparent.

The majority of the fathers (68 percent) had made their child-support payments with considerable regularity, and an additional 19 percent paid some support, but irregularly and in varying amounts. (Nationally, the estimated figures are considerably lower.) Only 13 percent were completely delinquent. Still, far more of the mothers than the fathers had traveled downward from their former economic status.

At the time of divorce, two-fifths of the families had been solidly upper class or upper middle class, whereas two-thirds of the women and their children were now either solidly middle class or lower middle class.

The Children's Differing Reactions

Hardly a child of divorce we came to know did not cling to the fantasy of a magical reconciliation between his parents. Danny, age seven, whose parents had been divorced for several years when we first saw him, softly confided his "best" fantasy. He had, he said, always wanted to fix up Hazel Street and Pine Street. "They're all filled with mud and they don't join, but a long time ago, they did, and I'd like to cut the two streets so they join. But this," he sighed, "will be a long time off."

When we saw Danny again, he was 11. "Divorce is not as bad as you think . . . not near as bad as it looks in movies or on television," he said. He had thought a lot about divorce, he told us; and had just recently figured it all out. "It's something like if you break a glass and pick the pieces up right away, they will fit back together perfectly, but if you take one piece and sand the edge, it will never fit again."

Five years after the separation, 28 percent of the children strongly approved of their parent's divorce, 42 percent were somewhere in the middle, accepting the changed family but not taking a strong position for or against the divorce, and 30 percent strongly disapproved—a major shift from the initial count. Then, three-quarters of the children strongly disapproved. Still, the faithfulness of so many youngsters to their predivorce families was unsettling, and more loyal than many parents welcomed.

Nancy, now in the second grade, said, "when they first divorced, I was kind of sad." Then, she said, she found out life was still fun because "we got to see Daddy in his house . . . . There are lots of good things to do . . . . Things are not so different . . . . You can meet a lot of new dogs and new people."

Thirty-four percent of the children and adolescents appeared to be doing especially well psychologically at the five-year mark. Their self-esteem was high and they were coping competently with the tasks of school, playground, and home. There were no significant age or sex differences among these resilient youngsters. The boys appeared to have caught up with their sisters in the years since the first follow-up, which had found the boys lagging behind. Characteristic of these children was their sense of sufficiency: the divorce had not depleted their lives by removing a loving parent, or by pairing them with an angry, disturbed one. At times, they still felt lonely, unhappy, or sorrowful about the divorce, but these misgivings did not make them aggrieved or angry at either parent.

Roughly 29 percent of the children were in the middle range of psychological health. They were learning at grade level at school and showing reasonably appropriate social behavior and judgment in their relationships with adults and children. They were considered average by their teachers. Nevertheless, islands of unhappiness and diminished self-esteem or anger continued to demand significant portions of their attention and energy, and sometimes hampered the full potential of their development.

Sonja, age 11, was typical of the middle group. "I don't think about the divorce as much as I used to," she said. "Before, I wasn't right. I was all mad and yelling at Mom . . . . Usually, I still yell at her. I tell her I don't mean it, but I can't control myself." Disquietingly, Sonja talked with considerable pleasure about hurting and slapping people. She laughed excitedly as she recounted several stories of people, adults and children, getting into

"When we see Daddy," one child said, "it's not so different, and you can meet lots of new dogs and people."

difficulties. Recently, Sonja was caught stealing some things from a shopping center and also from the school. Yet Sonja's mother indicated that the child is not as demanding as she used to be, and that, overall, her behavior is improving.

We found a final third of the children and adolescents to be consciously and intensely unhappy and dissatisfied with their life in the postdivorce family. Among this group were those with moderate to severe depression, although at least half of the depressed children had islands of relatively unburdened development within them and were able to move ahead in ways appropriate for their age in several important parts of their lives, such as school.

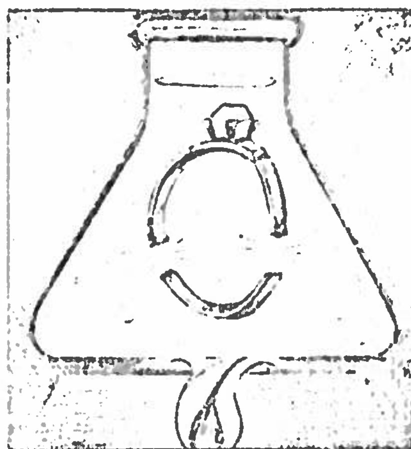
We were struck as well by the high incidence of intense loneliness that we observed in 27 percent of the children, a little higher than at the 18 month mark. These children complained of coming home to empty houses after school to await the return

CONTROLLING THE DIVORCE VARIABLE

The 60 families in our study came initially for a six-week divorce counseling service. We advertised the service as a preventive program, offered free to all families in the midst of divorce. The parents and their 131 children, aged 2 to 18, knew from the start that this brief intervention in their lives was part of a larger research project, and that our roles as clinicians and researchers were intertwined.

How typical was our group? Of the 60 families, 88 percent were white, 3 percent black, and 9 percent interracial with one Asian spouse. They were predominantly middle class and well educated, although 28 percent were in the lowest socioeconomic class, and some were on welfare.

All the families lived in Marin County, California, nationally known for its high divorce rate. Indeed, in 1970, when the study was formally established, the number of people who applied for a divorce in the county exceeded those who applied for a marriage license, a ratio higher than the national average. Now, however, we find that the divorce rate in many parts of the country has caught up. Precisely because most of the children were neither stressed by chronic poverty nor by inner-city problems, we felt our



sample gave us a good chance to study divorce as a relatively uncontaminated vector of change.

Our interdisciplinary team included six psychologists and psychiatric social workers, all trained in clinical work with children. Initially, we saw each family member alone four to six times. With family permission, we talked with the children's teachers.

All family members were interviewed again in two successive follow-ups, almost always by the same member of the team who had seen them initially. The first follow-up came approximately one year after the initial contact, the second nearly five years after separation. At the five-year mark, we were able to locate 58 of the original 60 families and 101 of the original 131 youngsters—an unusually high ratio.

Because we were interested in studying the experience and impact of divorce among psychologically normal children and adolescents, we excluded any families in which a child had a history of psychological difficulties or was currently in psychotherapy. We did not exclude parents with psychological problems, however, and on the basis of our first interviews, we diagnosed one-third of the parents as being in adequate to excellent psychological health. Half the men and slightly fewer women were in considerable psychological difficulty, with problems such as severe depression, alcoholism, or difficulty in relating to other adults and children. Some 20 percent of the parents—usually those who had been left by a healthier spouse—were seriously troubled or disturbed.

The counseling we gave helped parents refocus on the needs of their children and encouraged some parents to seek additional psychotherapy. Hence, the number of unsatisfactory outcomes revealed in our current study might be smaller than in the general population, who do not get such help. —J. S. W. and J. B. K.

Illustrations by Brock Newman

The lingering faithfulness of so many youngsters to their predivorce families was unsettling.

of the working parent. On weekends, these youngsters often felt left out of the social life of both divorced parents. Several also complained of loneliness within a remarriage, while recognizing ruefully that the newly married adults wanted privacy and time away from curious children.

Anger played a significant role in the psychological life of 23 percent of the children and adolescents, who were not coping well. Most of the anger was defensive and reflected the underlying fear, sorrow, and sense of powerlessness of these youngsters. Anger at the father was especially likely to be sustained, especially in older boys and adolescents. Three children had rejected their fathers' overtures, including Paul, who returned unopened his father's birthday present to him on his 14th birthday. Other children's anger took other forms, including explosive outbursts of temper and delinquent behavior, such as drug involvement and stealing.

The Importance of Involved Fathers

What accounted for the successful outcomes? Some children improved simply by escaping a disturbed and cruel parent to be left in the custody of a concerned and loving one. Some of these youngsters developed good relationships with a stepparent. Little boys, especially, appeared to spurt ahead with excitement and new growth with a stepfather whom they grew quickly to love.

A number of other factors seemed common to the children who dealt most resiliently with divorce. One factor, not surprisingly, was having a strong personality to start with. As we followed the course of the children whom we had placed initially within the ranks of the very well adjusted, it appeared that two-thirds of these resilient, successful copers were still functioning very well five years later. Sad to say, some boys and girls in all age groups who had been able to cope during a conflict-ridden marriage deteriorated notably in the post-separation period.

The most unpredictable change occurred among those children whose adjustment initially was a mixed bag of successes and failures. Very few of the boys and girls who were originally at the midpoint of the scale were still there after five years. Those youngsters were the most vulnerable to change, and stood in equal measure to either deteriorate or improve.

Perhaps the most crucial factor influencing a good readjustment was a stable, loving relationship with both parents, between whom friction had largely dissipated, leaving regular, dependable visiting patterns that the parent with custody encouraged. (For a description of the parents' adjustment, see box, page 72.) Forty percent of the mother-child relationships were adequate to very good, with an additional 20 percent at the adequate mark. Occasionally, when the father had been abusive or was psychologically disturbed, a strong mother bore the emotional load by herself and seemed able to give the children all the emotional support they needed. Usually, however, it took two, and a custodial parent's efforts to improve the child's life were burdened by the seeming disinterest of the other parent.

The contribution that the out-of-home parent could make emerged with clarity at five years. Frequent, flexible visiting patterns remained important to the majority of the children. Nearly one-quarter of the youngsters continued to see their fathers weekly, if not several times weekly. An additional 20 percent visited two to three times a month. Thus, 45 percent of the children and adolescents continued to enjoy what society deems "reasonable visitation," although many of the children continued to complain of not enough contact.

The 17 percent of youngsters with erratic visits (less than once a month) continued to be anguished by the father's inconstancy; the passage of five years had not lessened their wish to be loved by both parents. The same percentage as before (9 percent) had no contact.

Overall, we found that 30 percent of the children had an emotionally nurturant relationship with their father five years after the marital separation, and that this sense of a continuing, close relationship was critical to the good adjustment of both boys and girls.

These men had worked hard to earn the parenthood that fathers in intact families customarily take for granted. Some had persevered despite such irritations as one former wife who, four years after the separation, was still regularly calling her former husband during their son's visits with him to order the boy to shower. One man described the special personalities of his three children so vividly that hearing him talk, one would have been hard put to know that there had been a divorce in the family five years earlier. The children of these men, in turn, were spared the sense of loss and rejection that many less fortunate children experienced.

In contrast to the youngsters who yearned for more visits, almost one-fifth of the youngsters did not find the visits pleasurable or gratifying. A number of them resented being used to carry hostile messages between parents. Noted Larry, a 13-year-old, "My father has to understand that when he shoots arrows at my mother, they first have to go through our bodies before they reach her."

In the most unsatisfactory visiting arrangements, a range of parental behavior, from outright abandonment to general unreliability, often disap-

One woman still regularly called her former husband during their son's visits to order the boy to shower.

pointed a child repeatedly, usually leading the child to feel rejected, rebuffed, and unloved and unlovable. Anger at the rejecting father usually did not undo the child's unhappy conclusion about his or her essential unlovability to the father. Lea, for example, was an abnormally quiet girl whose teacher said she did not believe she could succeed at anything. We interviewed her at home. When asked about her father, she brought out a box containing all of the letters her father had written to her during the past three years. These letters, possibly 15 in number, were dog-eared, folded and refolded, and the interviewer couldn't help but be reminded of a precious collection of love letters that had been read and reread with tears. The father had actually visited only once in the past two years.

Peter, age nine, had not seen his father, who lives nearby, more than once every two to three months. We expected that he would be troubled, but we were entirely unprepared for the extent of this child's misery. The interviewer observed: "I asked Peter when he had last seen his dad. The child looked at me blankly and his thinking became confused, his speech halting. Just then, a police car went by with its siren screaming. The child stared into space and seemed lost in reverie. As this continued for a few minutes, I gently suggested that the police car had reminded him of his father, a police officer. Peter began to cry and sobbed without stopping for 35 minutes."

Even though the majority of fathers and children continued to see each other fairly often, by the five-year mark three-quarters of these relationships offered the children little in fully addressing the complex tasks of growing up. Yet, paradoxically, by his absence a father continued to influence the thoughts and feelings of his children; most particularly, the distinterested father left behind a legacy of depression and damaged self-esteem.

Except in extreme cases in which a father was clearly abusing children or seriously disturbed, some contact seemed better than none at all. The father's presence kept the child from a worrisome concern with abandonment and total rejection and from the nagging self-doubts that follow such worry. The father's presence, however limited, also diminished the child's vulnerability and aloneness and total dependency on the one parent.

A few other factors that we had expected to be significant in helping children adjust turned out not to be. Children were incapable of using friends to make up for troubled conditions at home; rather, those with comparatively stable homes were the ones most likely to have friends outside. Grandparents provided some solid supports for both divorced mothers and their children—when they supported the idea of the divorce—but were not a strong enough influence to make up for problems elsewhere.

THE PARENTS' ADJUSTMENT

The transition to a stabilized life after divorce can be difficult and prolonged. Most of the men said they had regained a sense of coherence and stability within the second year after divorce, but the average woman was well into her third postseparation year before reaching that point.

While two-thirds of the men and slightly more than half the women now viewed the divorce positively—a significant increase—a more sobering finding was that close to one-fifth of the men and women viewed the divorce as totally negative, which left them without resources for helping their children understand it.

In terms of the men's and women's psychological health, the people who were enjoying adequate to excellent psychological health (a third of the adults when we started the study) had expanded to include half the men and 57 percent of the women. Notable among the women in particular was a greatly enhanced self-esteem and lifting of depression. The group of men and women who previously had been troubled were essentially unchanged. For them, divorce provided no relief and made daily coping harder.

A successful resolution for one parent was not necessarily so for the other. And if the divorce worked for one or both parents, that did not necessarily portend a successful resolution for the children, though the reverse could also be true. As one woman said "The kids are great, mama's a wreck!" —J. S. W. and J. B. K.

When a parent remarried, most children enlarged their family view, making room for three major figures.

Most children did not seem to be influenced either for good or ill if their mother worked, although some of the youngest boys appeared to do significantly better in school and in their overall adjustment when the mother did not work full time.

One-third of the children once again confronted far-reaching change in their daily lives when one or both of their divorced parents remarried. (Only two of the fathers with custody remarried.) The arrival of a stepfather seemed to create particular friction for a short while. Most of the stepfathers had been married before, expected to assume the role of parent to their wives' children, and, encouraged by the women, moved quickly into the prerequisites, prerogatives, and authority that this position traditionally conveyed. Only a few men appeared sensitive to the need to cultivate a relationship with stepchildren gradually and to make due allowance for suspiciousness and resistance in the initial stages.

Still, after some early tensions, the relationships with the children from two to eight years old took root fairly

THE CHILDREN OF DIVORCE AS ADULTS

At about the same time Wallerstein and Kelly began their West Coast study of children of divorce, the psychologist E. Mavis Hetherington began a similar investigation at the University of Virginia. She focused on preschool children and their parents during the two years following divorce. Both sets of findings suggest a consistent pattern: initial pain—experienced by children of all ages, including those whose parents fought constantly before the divorce—followed by feelings of fear, anger, depression, and guilt that give way, often within 18 months, to an adjustment to the new single-parent family. (Children who must cope with many changes at once, such as moving to a new home, starting in a new school, or becoming a member of a stepfamily, take longer to make the transition.)

Sometimes, says Hetherington, an adjustment strategy that might be beneficial for a newly divorced mother can be harmful to her children. For example, in order to gain a sense of themselves as single people, some mothers in the study immediately plunged into an active social, business, or community life, leaving

the children feeling abandoned.

Since living with the same-sex parent aids a child's adjustment to divorce and because most children of divorce live with their mothers, boys initially often have greater difficulty coping with parental separation than girls do, according to Hetherington. She posits that boys suffer from the lack of a male model and from the absence of a father's discipline.

Unfortunately, these studies do not offer information about the one overriding concern of most parents: what are the lasting consequences, if any, of divorce on children? Regrettably, no one yet knows for sure.

Recently, several different research groups have begun to explore the issue for an even longer period than the five years of the Kelly-Wallerstein study. Social psychologists Richard Kulka and Helen Weingarten of the Survey Research Center at the University of Michigan examined the results of two random national surveys of 2,400 Americans, one conducted in 1957 and the other in 1976. Their study was designed to explore generational differences. Divorce has doubled since 1957; are reactions to it different now?

Although much of society has changed over the last 20 years, Kulka and Weingarten concluded that reactions to parental divorce have not. They found no differences between people from intact and nonintact families in overall adjustment or depression in adulthood. However, young adults (between 21 and 34 years old) from divorced families were less likely to be "very happy" and more likely to report symptoms of poor physical health than those from intact families. Throughout life, people of all ages from divorced families remembered their child-

Paradoxically, many fathers continued to influence their children's thoughts and feelings by their absence.

quickly and were happy and gratifying to both child and adult. Yet children with a stepfather seemed particularly sensitive to friction between parents.

Many people expect children to experience conflict as they turn from father to stepfather during their growing-up years. This was not borne out by our observations. Nor was the expectation that in the happily remarried family the biological father was likely to fade out of the children's lives. The great majority of fathers in the remarried families continued to visit, much as they had earlier. Mostly, children enlarged their view of the family and made room for three major figures. Jerry, age 10, when asked how often he saw his father, responded, "Which dad do you mean?" When a child did experience painful psychological conflict between the father and the stepfather, the adults were likely to be jealous or competitive, pulling hard in opposite directions.

The most tragic situations for the child were those in which mother and stepfather demanded that the child renounce his or her love for the father as the price for acceptance and affection

hood as the most unhappy time of life. They were also more likely to say that as adults, they had been "on the verge of a nervous breakdown." Feelings of anxiety were more prevalent among men whose parents were divorced, lending support to Hetherington's notion that the effects of divorce may be more pervasive and long-lasting for men than for women.

According to Kulka and Weingarten, the aftershock of parental divorce seemed, for both generations, to persist in subtle ways throughout adulthood. Adults from divorced families were more likely to report that "bad things" frequently happen to them. The Michigan research team reports that grown children of divorce not only are more likely to experience marital problems but also seem to have an orientation to the marital role different from other people's. Men whose parents were divorced tend to be less involved fathers, while women tend to be strongly involved mothers, perhaps unconsciously anticipating their own possible status as single parents.

In our Loneliness Research Project at New York University, Phillip Shaver and I have found that people whose parents were divorced are lonelier as adults than those from intact families. Our work was based on several thousand responses to surveys carried in several U.S. newspapers. We found that children of divorce had lower self-esteem than those whose parents had remained together. The younger the person was when the parents divorced, the lower the person's self-esteem and the more lonely he was as an adult.

We found striking differences between those whose parents were divorced during childhood, and those whose parents were not, in what people say about their mental health. As adults, those from divorced families were more likely to be bothered by crying spells, insomnia, constant worry, feelings of worthlessness, guilt, and despair. Adults who experienced parental divorce during childhood were more likely to feel afraid, anxious, and angry when they are alone. These are feelings usually associated with separation anxiety: what children feel when separated from their closest attachment figures, usually mothers or fathers.

Because of the limitations of our method, we simply don't know whether adult problems can be directly attributed to parental divorce, or to deficits resulting from parental divorce (which may, for instance, make people more vulnerable to separation anxiety), or merely to a current stressful situation (for example, a recent move, a divorce, or unemployment). Children who perceive their parents' divorce as a deliberate rejection or as a personal failure may respond differently, and perhaps develop differently, from those who see the divorce merely as an unlucky family situation. Custody arrangements and the way in which both parents adjust to divorce probably have a strong impact on these perceptions. Only recently have innovative custody arrangements become prevalent—such as joint custody, or active involvement of the noncustodial parent or stepparent. To date, none of these factors has received adequate research attention.

A 20-year longitudinal study of children of divorce would provide more robust information about long-term effects. Meanwhile, the National Institute of Mental Health is offering $1,000,000 for research to study the effects of divorce on children and useful strategies to help children adjust to parental divorce. What is clear now is that for some children, divorce can have a lasting psychological impact, while for others, it comes to exist only as a shadowy memory of an unhappy year of childhood. —Carin Rubenstein

Psychologist Carin Rubenstein is an associate editor of *Psychology Today*.

Despite popular beliefs, a divorce is neither more nor less beneficial to children than an unhappy marriage.

within the remarried family. Such children were severely troubled and depressed, too preoccupied with the chronic unresolvable conflict to learn or to develop at a normal pace.

Eventual Softening of the Strains

Most of the adults in our study, especially the women, were feeling better five years after divorce than they had when we first saw them, despite the greater economic pressure and the many stresses of the postdivorce family. But among the children, although individuals had improved or worsened, the percentages within broad categories of good and poor adjustment had remained relatively stable. Hence, it seems that a divorced family per se is neither more nor less beneficial for children than an unhappy marriage. Unfortunately, neither unhappy marriage nor divorce is especially congenial for children. Each imposes its own set of differing stresses.

Our other major finding about how important it is for a child to keep a relationship with both original parents points to the need for a concept of greater shared parental responsibility after divorce. In this condition, each parent continues to be responsible for, and genuinely concerned about, the wellbeing of his or her children, and allows the other parent this option as well.

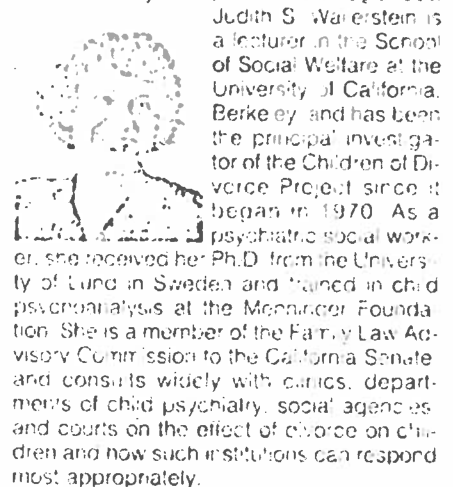
The concept of joint legal custody, in which each parent has the right to make important decisions about the life of the child, is a step in the right direction. The newer idea of shared *physical* custody, whether parents share the children 50-50, 80-20, or in other proportions, may also be a positive step, but it needs to be studied to determine its advantages and disadvantages for children at different developmental stages. Many people object that parents who cannot agree during marriage certainly cannot be expected to reach agreement on child-related matters after divorce. Indeed, some infuriated or disturbed parents will never chart a rational course with regard to their children. Yet it seems clear that our society must encourage fathers and mothers to accept the importance of continuity in parent-child relationships after divorce. Perhaps in changing legal expectations, we can take the first steps in a necessary reeducation about meeting the needs of children in the postdivorce family.

Unfortunately, it seems clear that the divorced family is, in many ways, less adaptive economically, socially, and psychologically to the raising of children than the two-parent family, or at least the two-adult family. This does not mean that it cannot be done. But the fact remains that the divorced family in which the burden falls entirely or mostly on one parent is more vulnerable to stress, has more limited economic and psychological reserves, and lacks the supporting or buffering presence of another adult for the expected and unexpected crises of life.

In order to fulfill the responsibility of child-rearing and provide even minimally for the needs of the adult, many divorced families are in urgent need of a network of services that are not now available in most communities, ranging from educational, vocational, and financial counseling to enriched child care and after-school programs. At the five-year point in our own study, two-fifths of the men and a somewhat greater number of the women characterized the brief counseling we offered as useful and supportive and were still following suggestions that we had made at the first meetings five years earlier.

Divorcing with children requires in adults the capacity to maintain entirely separate social and sexual roles while they continue to cooperate as parents. This is very difficult. We began our work with the conviction that divorce should remain a readily available option to adults who are locked into an unhappy marriage. Our findings, although somewhat graver than expected, have not changed our conviction. They have given greater impetus to our interest in easing the family rupture for children and adults alike.

Currently a fellow at the Center for the Advanced Study in the Behavioral Sciences,



Judith S. Wallerstein is a lecturer in the School of Social Welfare at the University of California, Berkeley, and has been the principal investigator of the Children of Divorce Project since it began in 1970. As a psychiatric social worker, she received her Ph.D. from the University of Lund in Sweden and trained in child psychoanalysis at the Menninger Foundation. She is a member of the Family Law Advisory Commission to the California Senate and consults widely with clinics, departments of child psychiatry, social agencies and courts on the effect of divorce on children and how such institutions can respond most appropriately.

Joan B. Kelly, coprincipal investigator of the divorce project, is a clinical psychologist with a private practice and teaches continuing-education courses for professionals, including preventive intervention with divorcing families. She received her Ph.D. in child clinical psychology from Yale University and taught in the Department of Psychology and Psychiatry at the University of Michigan. At the time the divorce project began, she was director of child services at the Marin County Community Mental Health Center.

For further information, read:

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Surviving the Breakup

How Children and Parents Cope with Divorce

JUDITH S. WALLERSTEIN
& JOAN BERLIN KELLY

1140

The Child in the Failing Marriage

A complex balance of psychological forces governed the relationship between parents and children in the failing marriages. We soon learned that the parent-child relationship did not mirror the unhappy marital ties and that the stresses of the marriage did not necessarily spill over into parents' relationships with the children. In fact, it became evident that parenting can remain relatively unencumbered by marital unhappiness or, put more technically, parenting can be maintained as a relatively conflict-free sphere of behavior within a very deprived and unhappy marriage

Adults who disagreed strongly with each other on a great many issues were able to cooperate in the care of the children. Child-rearing issues were not a source of disagreement for over one-third of the parents. One-half of the children experienced relatively consistent handling by both parents. We were sometimes surprised to find, as a repeated occurrence, that two parents who related extremely poorly to each other were still able to share the parenting and caring function, and to maintain the other partner at his or her best as a parent. For a number of the couples in our study the highest point of adulthood they were able to achieve revolved around their relationship with their children. Thus a marriage experienced as impossible by the parents was not necessarily that stressful for the children, and many of the youngsters reflected good parenting in their overall adjustment and demeanor and in their trustful attitudes with us and other adults in their lives. They expected well of the world.

Children's Feelings About Visits

We have repeatedly described the dissatisfaction of so many youngsters who felt they were not seeing their father often enough. If custody and visiting issues are to be within the realm of the "best interests of the child," then such widespread discontent must be taken very seriously.

Relationship with the Custodial Parent

Yet, even in these rich relationships which the child enjoyed with the custodial parent, the relationship with the father played a significant part. Although the children who did well did so within the context of the mother-child relationship, their good adjustment remained conditional on their not feeling rejected by the noncustodial father. The children who felt rejected by the father were burdened in their psychological functioning despite the presence of a good mother. And therefore, although the children and adolescents who did well were likely to have a good or good enough relationship with the mother, the significant link was conditional, and carried the proviso that the same child not feel rejected by the father if the adjustment was not to suffer despite the excellent mother-child relationship. Thus, the seeming dyadic within the postdivorce family appeared in this way to be deceptive, because the child continued to be aware of himself in regard to both parents and the two-parent perspective remained significant despite legal and geographical separation and the passage of years.

The Noncustodial Parent

The role of the father was two-fold in its potential effect on the child's psychological and social development. The negative effect of irregular, erratic visiting was clear. The father's abandonment, relative absence, infrequent or irregular appearance, or general unreliability, which disappointed the child repeatedly, usually led the child to feel rejected or rebuffed and lowered the child's self-esteem. We soon learned that the unvisited or poorly visited child was likely to feel unloved and unlovable, nor did anger at the rejecting father always undo the child's unhappy conclusion about his or her essential unlovability.

Issues of Custody

Taken as a whole our findings point to the desirability of the child's continuing relationship with both parents during the postdivorce years in an arrangement which enables each parent to be responsible for and genuinely concerned with the well-being of the children. For those parents who are able to reach an agreement on child related matters after divorce and are willing to give the needs of the children priority or a significant role in their decision-making regarding how and where the children reside, joint legal custody may provide the legal structure of choice. (The parents of one-quarter of the children in our study who had been able to maintain a shared commitment and devoted parenting within the conflicted marriage would provide an appropriate pool of candidates for joint custody.) Although the influence of the legal structure on the fabric of family life may be considerably less than many persons believe it to be, nevertheless, there is some evidence that legal accountability may influence and shore up psychological and financial responsibility. Furthermore, there is evidence in our findings, that lacking legal rights to share in decisions about major aspects of their children's lives, that many noncustodial parents withdrew from their children in grief and frustration. Their withdrawal was experienced by the children as a rejection and was detrimental in its impact.

In viewing joint legal custody as a reasonable step, we differentiate shared legal responsibility and shared physical custody. Both concepts require clarification in law and research. Some mistakenly view joint physical custody as requiring a strict sharing of the child's time on an equal or fifty-fifty basis. Actually, joint physical custody can take many forms, and parents can negotiate or modify a division of time in consideration of the needs of the children and of the adults. Central to the notion of shared physical custody is an understanding that it does not mean a precise apportioning of the child's life, but a concept of two committed parents, in two separate homes, caring for their youngsters in a postdivorce atmosphere of civilized, respectful exchange.

There appears to be no compelling legal reason to pattern the divorced family after the married family and to establish one presumptive pattern for all couples. Parents may have little interest in their children; they

may demean or exploit their children; they may use the children to establish a permanent foothold in the divorced partner's life. Moreover, joint custody poses many logistical problems because of the mobility of adults in American life and the high incidence of remarriage.

Our findings point, however, to the undesirability of routinely designating one parent as "the psychological parent" and of lodging sole legal and physical custody in that one parent. Such an arrangement has been interpreted by the courts to presume that the child does not have two psychological parents. This finding can be devastating to child and parent when both parents are indeed committed to a continuing relationship with their children.

In taking a position in favor of flexibility and encouragement of joint legal custody where feasible, as a symbol of society's recognition of the child's continuing need for both parents, we offer a view diametrically opposed to that of our esteemed colleagues Goldstein, Freud, and Solnit in their book *Beyond the Best Interests of the Child*.* Although we share a common psychodynamic framework with these colleagues, we have in the course our research, arrived at findings and recommendations which are greatly at variance with their views. Our findings regarding the centrality of both parents to the psychological health of children and adolescents alike leads us to hold that, where possible, divorcing parents should be encouraged and helped to shape postdivorce arrangements which permit and foster continuity in the children's relations with both parents.

* Joseph Goldstein, Anna Freud, and Albert J. Solnit, *Beyond the Best Interests of the Child* (New York: Free Press, 1973).

SECTION 6

THE CASE FOR

JOINT CUSTODY

The notion that the children of divorced parents are best consigned to the exclusive care of the mother is a relatively recent one. Given changing social patterns, the authors argue, it's time for a reappraisal.

By Mel Roman and William Haddad

On Manhattan's Lower East Side, six-year-old Morgan Gillette divides her time between two households that are within blocks of each other. Half the week is spent with her mother, Lena, and the other half with her father, Al. Weekends are alternated. In each apartment, Morgan has her own bedroom, and both rooms are filled with her presence—her clothes, drawings, and all sorts of toys. Morgan's school is situated near the two apartments so each parent can pick her up there on days when a shift takes place. On occasions when the drop-off point has been one of her parents' apartments, Morgan maneuvers Al and Lena into her room and expresses her wish that the parents, who separated when she was just over three, could live together again. But she seems increasingly aware that they won't.

Observing Morgan and talking with her parents and teachers, one concludes that she is, by and large, a happy child. She has many friends, does well at school, and seems to accept comfortably the biweekly shift in households. By a negative standard, she shows none of the disturbing symptoms (behavioral problems or poor sleeping and eating habits) that have been uncovered in so many divorced families in which one parent has sole custody of the child and the other has only visitation rights.

The Gillette joint-custody agreement was worked out in the New York State courts in 1976. It is typical of postdivorce custodial arrangements in which parents agree to share child care—to develop a pattern for dividing the child's week, routines for picking up and dropping off, and consultations on major decisions, such as schooling and summer camp.

Many forces today are at work on men, pushing them to play a greater role in family life, and, according to the magazine *Student Lawyer* (May 1978), "the women's liberation movement has made men more conscious of their equal role in family life. 'I think it's changing because fathers are realizing they have an equal right to custody,' says Judge Charles Fleck. 'Men are coming out of the woodwork.' ... Nevertheless," *Student Lawyer* concludes, "their speed is hardly mind-boggling. National Center of Health Statistics figures show that, between 1970 and 1976, the percentage of American fathers keeping custody of their children under 18 remained just over one percent of *all* family living arrangements. However, that still makes 780,000 children living with their fathers nationwide." And as best we can determine at least an equal number of children, if not more, share their fathers through joint custody.

For the last three years, one of us, Mel Roman, has been looking at such arrangements to see how they work out. Roman's studies at the Albert Einstein College of Medicine have shown that it is not profitable to seek to understand one family member in isolation, as, for example, in the case of Morgan Gillette. Family interconnections have to be closely analyzed. Roman has studied 40 families who are presently practicing joint custody, as well as 60 fathers who have various degrees of custody.

While none of the families has found joint custody to be trouble-free—and most are involved in continuously questioning its effects—there is no doubt that joint custody *is* working for them all. In most instances, the children are thriving, not merely "adjusting," and the parents themselves are working out new and, they believe, productive lifestyles.

All this contradicts the notion that once a divorce occurs, the children are best off in their mother's exclusive care. The father, by popular belief, cannot wait to enjoy his "freedom." Therefore, one objection to joint custody is the theory of the "weak father." Two other objections are often raised. First, it is argued that parents who could not reconcile conflicts while living together are even less likely to be accommodating to one another while living apart. (Unaccountably, this argument is sometimes paired with its opposite, the view that parents in a joint-custody arrangement are unable to separate in a healthy way and are using this arrangement—and by implication, their children—to stay together in some fashion.) Second, it is felt that joint custody is too disruptive: the "child as yo-yo" is put in an untenable position, in which both his loyalties and even his physical surroundings are split. As a consequence, it is felt that the child's sense of continuity and stability are undermined.

Reprinted from Psychology Today, September 1978, p. 96. Excerpt from the book The Disposable Parent, by Mel Roman and William Haddad, published by Holt Rinehart and Winston Copyright 1978. Reproduced with authors' permission.

While these objections sound plausible, they do not square with the available evidence that joint-custody couples show reduced conflict and that their children are quite well adjusted. Looking first at the issue of parental conflict, we see one pattern emerging as true of nearly all joint-custody couples. When couples want to share custody of their children, they are able to isolate their marital conflicts from their parental responsibilities. In fact, it is not uncommon for joint-custody parents to frankly admit their antipathy toward one another, but, at the same time, to maintain that they do not intend to harm their children because they might like to harm one another.

"New studies refute the theory of the 'child as yo-yo,' with loyalties split between parents."

In the case of Morgan, her parents still do not relish one another's company, yet both feel that joint custody is working out. Her father, an anthropologist, is especially positive about it. He feels that the real problem for Morgan was never the form of her postseparation living arrangement, but the fact of the separation itself. And even though Lena initially sought sole custody because she did not want to deal with what she saw as her husband's overwhelming anger, she now agrees with Al about what is truly important for Morgan. "Maybe," she says, "sole custody was an illusion. Any parent who cares at all about the other parent or that parent's relation with the child will not make decisions unilaterally."

Having been coparents for two and a half years now, Al and Lena are surprised that their anger has somewhat diminished. While they do not communicate much with each other, they feel that a "basic trust" has begun to grow and that they have evolved a good working relationship when it comes to Morgan. If she is ill and at Lena's home, for instance, she will remain there; or if Lena, who is a writer, must be elsewhere, Al will stay with Morgan at his ex-wife's apartment. Occasionally, they disagree about specific decisions that affect Morgan: for example, each chose a different summer camp for her. Generally, they do not have many big child-rearing decisions to make.

For each of them, joint custody has proven a means to be closer with, and to learn to communicate with, their daughter. For Lena, the arrangement intensifies her relationship with Morgan. "When something goes wrong, we have to work it out ourselves. . . . Neither of us can turn to Al anymore as a go-between," she says. Al also feels that the best part of the postseparation relationship is that "I can appreciate Morgan more. It's easier one-to-one. I can see her more clearly, who she is."

A Brooklyn couple whom we interviewed, Frank and Jody Vanda, also arranged a split-week custody pattern. Their two daughters, Amy, 11, and Sarah, seven, spend half the week in their mother's large, comfortable apartment and the other half in their father's smaller apartment a few blocks away. For this family, their four years of shared parenthood have been very good ones.

Asked to explain why joint custody has worked out so well for them, Frank and Jody both say it's because the commitment to shared parenthood is strong, stronger than any differences they've had. (As it happens, many of their quarrels had concerned their divergent lifestyles. Now that they lead separate lives, they no longer feel compelled to attack each other's different ways.) Jody and Frank are, in fact, unusually close. They talk with each other often, meeting for lunch to discuss the children and their lives in general. They still celebrate all four birthdays together and, on occasion, visit relatives as a family.

Jody feels that joint custody has posed no difficulties for her children. They accept the split living "totally." "There is," says their mother, "no issue of shuttling, just that there is time to be with Mother and time to be with Father. In fact, the girls were relieved to learn that they'd be with us both."

Jody also perceives that Frank, who recently joined the local school board, is now more involved with the children than prior to the separation, and that she has become—in a healthy way—less involved. "I have," she says, "let go more. I have time to myself . . . it's delicious." Both girls lead active, full lives and feel altogether free to express how they feel to both parents. Amy has said that she wishes her parents had stayed together, but as this is not possible, she likes living with them both separately.

If the Vandas have managed to maintain a close relationship, Marge and Bill Langley share custody of sons Edward, seven, and Bruce, four, while having virtually nothing to do with each other. Edward and Bruce together change homes every Monday, when one of their parents drops them off at school, and the other parent picks them up. The weekly rotation seems to be fine with the boys. The shift from the Langley house, in Brooklyn, where their father still lives and conducts his business, to their mother's apartment some 12 blocks away is no problem. The boys have friends in both neighborhoods and are doing well in school. Bill remarks that unlike other children of separated parents, "My kids don't visit, they *live* here; it's much more natural. The *other* way is unrealistic. It puts unrealistic pressure on parent and child to compress everything into five or six hours. I've seen it—the fathers walk the children in the park like dogs."

What is a problem is that Bill wants to move to the country in upstate New York and work out a new arrangement under which he would have custody of the boys one year, his wife would have them the next, and so on. Marge refuses to separate that long from the children, and they are at an impasse; other than talks with a therapist about the custody issue, months can go by when they do not speak to each other. "We don't," Marge says, "have a working relationship. Bill is unhappy about staying in the city. He wants to get out and have as little to do with me as possible. I feel at times it would be easier if he were out of my life . . . but to be completely honest, I don't want the children all the time."

Bill says he would take the children full time. This, too, is unacceptable to Marge. Given the commitment both parents show toward their sons, and their belief that joint custody is work-

g out well for the boys, it is difficult to know how they will resolve Bill's desire to move. For most couples, geographic closeness is a *sine qua non* of joint custody. As Marge expresses it, "In our situation, where both of us want custody of the children, I can't see a better setup unless one of us would bow out. Even with a power play—if one of us fought for custody and won—it would lead to so much bitterness it would be terrible."

These New York families represent but a few of the many arrangements adopted by joint-custody parents. Across the continent, in the San Francisco Bay area, four joint-custody families are the subject of a recently

"According to available evidence, children of joint-custody couples are well adjusted."

completed doctoral dissertation by Alice Abarbanel, at the California School of Professional Psychology. These four families are all quite different from one another: the amount of conflict that the parents experience varies from household to household. Each household, too, has a different division in the length of the child's stay in each household, ranging from relatively long periods (a nine-to-five-day split, for instance) to shorter periods (a four-to-three-day split). The families differed, too, in their preseparation households: in one marriage, the husband was always fully involved in child care, while in another, the husband did very little with the children before the divorce.

Clearly, joint-custody families conform to no one pattern; and just as living arrangements vary from one family to the next—splitting custody by days, weeks, months, and even years—so also do the kinds of communication that prevail between ex-spouses. Some ex-spouses are supportive of each other and maintain a close relationship, while others see as little of each other as possible; and, in between, every imaginable permutation exists—from the close to the distant. Within this wide range, however, there is at least one thing that joint-custody families all have in common: by placing the child's need for both parents first, the parents themselves work out—in different ways—a *modus vivendi*.

Only in the past few years have some courts in the country begun to recognize the importance of the two-parent principle. Before the 19th century, when custody of children arose as an issue, the response was simple: children belonged to their father. By the early years of the 20th century, customs gradually began to change, until, in the 1920s, the rights of the father were no longer recognized. From the 1920s on, mothers were virtually assured of the custody of their children, even though the women's paramount claims were not then, nor are they now, based on the law. Today, mothers receive custody in more than 90 percent of all contested cases. In at least an equivalent percentage of cases that never reach the courts (by far the greater number), the divorced woman also assumes sole custody.

In large part, the bias in favor of mothers has merely accommodated social reality. Industrialization, which separated the wage labor of men from the private labor of women, is behind the glorification of motherhood and the "maternal instinct." That is, society's stress on the maternal instinct came along precisely when it was required, making a virtue out of what seemed to be a necessity. Its enshrinement parallels the development of a new family form that we have come to call the nuclear family, the social—but not economic—center of personal life and a refuge from the world. As our culture became both urban and industrialized, the father worked away from the house and left the raising of children, for all practical purposes, in the hands of the mother.

The inevitable tendency of psychoanalysts and other researchers has been to concentrate attention upon the mother as the influential parent and to minimize, as a result, the influence of fathers, peers, and the larger social network. The legal system has pursued the same course. Although from time to time children are awarded to the father, this occurs only under the most extreme circumstances. In the absence of any real guidelines, the parents' characters are inevitably scrutinized when judging the child's best interests. It's almost inevitable that such scrutiny becomes character assassination. As the writer Joseph Epstein put it, the father "must prove his wife either an emotional cripple or a moral leper, and, should he wish to maximize his chances, preferably both."

A few isolated cases in recent years have appeared to signal a shift in the courts' attitudes. Most of these cases, however, are deceptive. In 1975, the Lee Salk case provoked wide press coverage because Salk, a renowned child psychologist, won custody of his two children, even though the court explicitly acknowledged that their mother was in no way "unfit." However, Salk's profession and the flexible hours that it allowed him made his case the exception that proves the rule. For the courts, it would appear, a child psychologist is the vocational equivalent of a biological mother.

A second case that also aroused considerable interest did, initially, appear to herald significant change. The contested suit known as the *Watts* case took place in 1973 and involved custody of three children, ages 11, nine, and five. When the ex-husband sued for custody, the children had been living with their mother, who was pregnant by the man she lived with and intended to marry. Custody was awarded to the father—but not because of the mother's way of life (unconventional lifestyles no longer have anything like the negative weight they once had in court), but because the judge, Sybil Hart Kooper, was not satisfied that the husband-to-be could assume the responsibilities of parenthood. The court's ruling against the mother, in what was in any event a melodramatic case, was bound to create attention. What was significant about the case, though, was the judge's written argument. Taking exception to the bias in favor of the mother, Judge Kooper identified some of its pertinent flaws. She pointed out, among other things, that it was "the acts and not the facts of motherhood" that determined most court practice and that the courts were guided by prejudice, not law. Kooper stressed that the law unequivocally stipulates that both parents have an equal claim when forced

to turn to the courts for a determination about the children's future. Further, a child's "tender years" should not create any legal, let alone psychological, presumption toward either parent. Citing several states that specifically disallow any prejudice on the basis of sex, Judge Kooper added, "The simple fact of being a mother does not, by itself, indicate a capacity or willingness to render a quality of care different from that which the father can provide. The traditional and romantic view, at least since the turn of the century, has been that nothing can be an adequate substitute for mother love."

Judge Kooper further remarked that

"Only recently have courts begun to accept the logic of the two-parent principle."

"studies of maternal deprivation have shown that the essential experience for the child is that of mothering—the warmth, consistency and continuity of the relationship rather than the sex of the individual who is performing the mothering function." Finally, she added, "Application of the 'tender-years presumption' would deprive respondent of his right to equal protection of the law under the 14th Amendment to the United States Constitution."

Unfortunately, despite the soundness of her arguments, Judge Kooper's decision does not appear to have had much impact. She has said that she expected it to be more influential than it has been, and that her views have been received with considerable hostility by both male and female judges.

The 14th Amendment, which guarantees that no one shall be discriminated against on the basis of sex, has recently been used to challenge the mother's overwhelming courtroom advantage. Lately, there has been talk of appointing a special lawyer, or the equivalent, for the child in a contested-custody case. Although this seems to further the recognition of the child's "best interests," there are as many reasons to be suspicious of court-appointed mediators as there are reasons to be suspicious of experts in general. It was, after all, as recently as 1955 that sociologists Talcott Parsons and Robert Bales popularized the idea that in the family, the father served an "instrumental" role and the mother an "expressive" one. What these terms connoted was an appalling reconfirmation of patriarchal assumptions in the new language of sociology; the "instrumental" father is seen as directing the child's development in serious ways, while the "expressive" mother "soothes" with all the feeling and nurturing the father is too busy and too inexpressive to give.

In any event, leaving aside the dubious value of increased court involvement in custody cases, those decisions that the most optimistic observers invoke as signs of progress are still ones that endorse an either/or view of custody. The *Levy* case, decided in 1975 in New York State, is a conspicuous exception. In that instance, the husband was awarded a divorce on the basis of his wife's adultery, but both parents were awarded custody of their 11-year-old son. Regarding his decision, Judge Guy R. Ribaudo wrote that joint custody would serve "to give that measure of psychological support and uplift to each parent which would communicate itself to the child in the measure of mutual love, mutual attention and mutual training."

The judge also ruled that "it is basic law that the father of a son is responsible for his support until he reaches a majority," and that, for the initial two years, the boy should live with his mother, after which he would choose between the two homes himself. Judge Ribaudo concluded that "although there is little New York case authority as to the concept of joint custody in matrimonial actions, there is no doubt that the courts will adopt a liberal attitude with regard to this type of custody whenever the facts of each particular case may so indicate."

So far, we have seen little evidence of this "liberal attitude." Without changing so much as a syllable, what was modestly opined in 1850 might well be repeated today: "The state of the law relating to the custody of the persons of infants is not very satisfactory. Not only are there defects which can, perhaps, be remedied only by the authority of the Legislature; but there prevails an uncertainty in the application of the law, as it exists, to the difficult cases which frequently arise in connection with the disposal of minor children."

A liberal attitude is certainly not evident in the influential book *Beyond the Best Interests of the Child*, written in 1973 by Joseph Goldstein (Yale law professor), Anna Freud (child psychoanalyst), and Albert Solnit (child psychiatrist and director of Yale University Child Study Center). Their book advances the position that divorced couples cannot get along and invariably use the child as a battleground. The authors strongly recommend not only that there be one custodial parent, but also that that parent have complete and exclusive control over all aspects of custody: "Once it is determined who will be the custodial parent, it is that parent, not the court, who must decide under what conditions he or she wishes to raise the child. Thus, the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits."

Moreover, the authors are quite clear that such visits, even if allowed, are not worth much. In their view, "a 'visiting' or 'visited' parent has little chance to serve as a true object of love, trust and identification, since this role is based on his being available on an uninterrupted day-to-day basis."

The stature of its authors has assured the book considerable attention and may well have influenced those lawyers and judges whose knowledge of child development is limited. If so, we believe this to be extremely unfortunate. Not only do we radically disagree with almost all that the book argues with regard to child custody, but we also believe that the authors have failed to support their views or to take into account the evidence available on the development of children in various home settings. They do not cite, nor do there exist, any social science data to support the proposition that a single official parent is preferable to two. They seem unaware that the family is undergoing profound changes, and that these changes cannot help but affect our attitude toward custodial care.

The new forms of family life that are coming into being are increasingly evident in intact, as well as divorced, households. As men and women move beyond sex-defined roles, parenthood and the family are being subject to reevaluation. More women are seeking careers outside the home and more men are finding that they want to, or must, share responsibility for the children. Nor do we anticipate that this trend will be reversed. If anything, our present cultural climate virtually ensures that once a marriage is severed, shared parenthood is more necessary than ever.

We do not mean to imply that there are no problems associated with joint custody. The mere logistics of the arrangement take time and energy. Nevertheless, it is fairly obvious that those who choose joint custody are willing to work out whatever difficulties arise; indeed, concerned parenthood seems to be at the root of the success that joint-custody parents report. And when parents display such concern, then surely the trade-off that joint custody often exacts—two homes in exchange for two parents together—is well worth it.

What problems do arise are endemic to marital dissolution: the child may at times prefer one household to the other. Or one parent may want to relocate and discovers that the need for geographic proximity to the ex-spouse and children makes any major move impossible, as in the case of the physicist who shared with his wife the joint custody of their young daughter. Because the parents lived at a great distance from each other, their daughter spent alternating years with each of them. The system worked well for four years, at which point the physicist decided to move to England and tried to persuade his wife to continue the same arrangement. She refused, however, and the case went to court; she won sole custody of their child. But when single-parent households experience similar conflicts, there is neither the opportunity nor, more important, the commitment, to arrive at a satisfactory solution.

Although we cannot be certain that joint custody is the answer for all those who raise children after a divorce, it appears to be the most logical and emotionally sound choice. Unlike sole (generally maternal) custody, it does not banish the father or overburden the mother, and, just as important, it does not sever ties between one parent and the children. Quite the reverse: by maintaining the family structure in reorganized form, joint custody, we believe, resolves most of the problems raised by sole custody. Nor is joint custody a negative solution; we think it offers positive advantages and opportunities for growth for each of the family members.

We also recognize that our convictions reflect only what is, so far, possible to know. Until more studies are conducted, and there are more households that adopt a joint-custody arrangement within a sympathetic society, it is well to remain somewhat cautious. With an issue as intricate and emotionally charged as the fate of children after a divorce, caution—by which we mean a respect for the complexity of human affairs—will always be desirable.

There is no reason to suppose that joint custody will soon become commonplace for postdivorce families in America. Almost everything in our society militates against its widespread adoption, which is highly ironic. Although our evidence suggests that joint custody should increasingly be the pragmatic (and hence characteristically American) choice, current attitudes and institutions indicate that its widespread adoption is no less than a revolution away.

Mel Roman is a professor in the department of psychiatry at the Albert Einstein College of Medicine, and director of family studies at the Bronx Municipal Hospital Center.

William Haddad is a journalist and former associate director of the Peace Corps. He is currently director of New York State Office of Legislative Oversight.

SECTION 7

CO-PARENTING: EVERYONE'S BEST INTEREST

Diane Trombetta and Betsey Warren Lebbos*

The nuclear family in America is experiencing rapid change. In 1974 over one million marriages per year were ending in divorce or annulment in the United States.[1] If the divorce rate stabilizes at its 1974 level, approximately 40% of new marriages will ultimately end in divorce.[2] The rate of remarriage has not kept pace with the divorce rate, especially in families where children are involved. Bane[3] predicts that 20 to 30% of children born around 1970 will be involved in divorce. Another 3 to 5% will be affected by annulment or long-term separation. In other words, at least one million minor children are involved yearly in marital dissolutions. Paul Glick and Arthur Norton, two Census Bureau analysts writing in a recent issue of *American Demographic*, predict that 45% of American infants born last year are destined to live part of their lives before age eighteen with only one parent. Approximately 45% of all Black children in this country already live under such a handicap.

The legal system is responsible for attempting to make fair, just, and equitable solutions for the care of the minor children affected by divorce. In California, child custody is governed by Civil Code S4600 which provides that custody will be awarded in the following order of preference:

(a) To either parent according to the best interests of the child;

(b) To the person or persons in whose home the child has been living in a wholesome and stable environment;

(c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

Section 4600 further provides that if the child is of "sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody and modification thereof." In interpreting this section, most courts will ask the child of fourteen years or older which parent the child would prefer to live with. The California Code specifies exclusivity of possession of children, and this is historically based. In the nineteenth century the father was preferred as the exclusive custodial parent over minor children. In the 1824 case, *United States v. Green,* 26 F.Cas. 30, 31–31, it was stated as follows:

> As to the question of the right of a father to have custody of his infant child this is not on account of any absolute right but for the benefit of the infant, the law presuming it to be for his interest to be under the nurturance and care of his natural protector. . .[4]

In 1887 Louis Hocheimer, in *A Treatise On The Law Relating To The Custody of Infants,* stated, "By the laws of the land, the claims of the father are superior to those of the mother. . ."[5]

However, commencing with the twentieth century, with the romanticization of motherhood becoming paramount, children became the mother's exclusive domain. Judges became literary and alliterative in extolling the virtues of mother's care over the infant child. Thus, it was stated in *Tuter v. Tuter,* 120 S.W. 2d 203, 205, C.T. App. (1938), as follows: "There is but a twilight zone between a mother's love and the atmosphere of heaven, and all things being equal, no child should be deprived of that maternal influence. . ."[6] In another leading case during that period, *Jenkins v. Jenkings,* 173 Wis. 592, 181 N.W. 826 (1921), the court reemphasized its adamant stand on behalf of mother's exclusivity: "For a boy of such tender years, nothing can be an adequate substitute for mother love . . . required during the period of nurture that only a mother can give. . ."[7]

In California, however, dissatisfaction with

*Dr. Diane A. Trombetta has taught courses in Anthropology and Education at various universities in the San Francisco Bay area since 1970. She now teaches in the External Degree Program for Redlands University, California.

Betsey W. Lebbos is a practicing family law attorney in the State of California and is in private practice in San Jose, California.

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the preference for mother's exclusive custody mounted until in 1972 an amendment to Civil Code S4600 deleted the preference for mothers of young children over fathers in custody litigation.

Most professionals acknowledge that California custody law is inadequate. Other states have provided more guidance to the judiciary in determining what is in the best interests of children than the existing California statute. For example, the 1970 Michigan Child Custody Act establishes ten different criteria in determining what is in the best interests of the children. Those considerations, some of which are set forth in the statute itself, include:

(a) The love, affection, and other emotional ties existing between the competing parties and the child.

(b) The capacity and disposition of competing parties to give the child love, affection, and guidance and continuation of educating and raising of the child in its religion or creed, if any.

(c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care . . . recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

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

(e) The permanence as a family unit, of the existing or proposed custodial home.

In addition to more specificity and guidance for the judges making the custody decisions, a movement is underway nationwide to remove custody from the adversary setting and to place it in a conciliatory or mediation process; to provide for the presumption of joint custody, with both parents having an equal access to their own children; and to provide separate counsel for children in contested custody cases. This article discusses the major problems identified with the present California statutes favoring sole custody after divorce and summarizes recent research which indicates that a change in the statutes is needed to protect the best interests of children and parents.

Recently two bills have been proposed in the California legislature relative to Civil Code S4600 and concerning joint custody specifically. Assembly Bill Number 1480, March 29, 1979, introduced by Assemblymen Imbrecht and Torres, provides a preference for joint physical and legal custody to both parents with sole custody to either parent as a second choice if a preponderance of the evidence establishes sole custody to be in the best interests of the child or the parents agree that one parent shall assume custody. The Bill proposed by Senator Jerry Smith would presume joint custody only if both parents agree to this arrangement and if they have a written custody plan approved by the Court.

Why are there such proposals for change? Because no one likes the present system. The children of divorce, parents, and judges increasingly complain that exclusivity of custody is not benefiting anyone. In a nutshell:

> Children complain they miss the non-custodial parent; they experience guilt, tension, and loyalty conflicts as a result.
>
> Non-custodial parents complain they miss their children; they feel depressed, alienated, and powerless. They become "non-parents."
>
> Custodial parents complain they are over-burdened, have too many responsibilities, and that seeking work and having the responsibility of full-time parenting is too stressful.
>
> Judges complain that they are overworked, that the Court calendar is congested, that custody decisions demand Solomic wisdom beyond the capacity of any judge, and that no matter what their decision, the case will be back in Court within a short period of time.

To these complaints can be added those of psychiatrists, psychologists, and sociologists who say that the current legal system does not pay attention to human development, children's needs, and the data which is available showing what is psychologically in the best interests of children. Others complain that "winner take all," the concept implied by sole custody, treats the child as an object to be fought over within the legal custody arena.

The legal system must become aware of the sociological and psychological research concerning the needs of children before it presumes to make decisions affecting their health, welfare, and development. Most existing studies on the

impact of divorce indicate it is a highly complex process which represents a major source of stress and readjustment for children and parents.[8,9,10,11,12,13,14] One author has stated, "Divorce is one of the most severe crises in contemporary American life."[15] In California and elsewhere, most courts "award" the children to one parent after divorce, usually the mother. Let us look at what happens to children during divorce, and under exclusive custody arrangements in particular. These children have the following problems:

1. *Feelings of loss and abandonment.*
One well-known study of 60 California families and 131 minor children aged 2 through 18 found that

—preschoolers were filled with fears of being abandoned after their parents' divorce;

—children of all ages expressed verbally and behaviorally a great sense of loss if one parent was absent; and

—among all of the 44 children under 6 years of age, the effects observed of being left almost exclusively in the care of only one parent were found to be negative.[16]

Another author states, "Children are not only deeply pained by one parent's absence, but they interpret it as abandonment; as a consequence they feel devalued and guilty. . ."[17]

Some researchers believe that the psychological process underlying post-divorce symptoms in children resembles mourning or bereavement.[18,19,20,21] Even those authors who do not ascribe to the mourning theory note that loss or severe attenuation of the parent-child bond is a real possibility among children and non-custodial parents. Limited visitation severely restricts the opportunity to provide daily nurturance and comfort needed to strengthen the relationship.[22] Some non-custodial parents, reacting to the pain of being able to see their children only intermittently, cope by seeing their children infrequently.[23] One study found that the behavior of the divorced father (non-custodial parent) became less important than that of the mother (custodial parent) in the social personality and cognitive development of the child.[24] Highly involved non-custodial parents, on the other hand, play an extremely important role as a support system for both the child and the custodial parent.

2. *Attachment and separation anxiety.*[25]

3. *Loyalty conflicts,* particularly among latency-age children.[26]

4. *Strained interactions with custodial and non-custodial parent.*
Children of divorced parents exhibit more negative behavior than do children of intact families; these behaviors are most marked in boys and have largely disappeared in girls by two years after divorce.[27] The misbehavior is directed primarily toward the custodial parent (usually the mother). Children are likely to develop a fantasized image of the absent or non-custodial parent, which may lead to false impressions about others of the same sex as the absent parent.[28] Children have also demonstrated difficulty in expressing conflictual feelings with the non-custodial parent.[29] Similarly, non-custodial parents have reported their reluctance to discuss painful issues with their children for fear of "spoiling" the short time they have to spend together.[30] Another study points out that single parents offer their children a more restricted array of positive characteristics to model than do two parents.[31]

5. *Disturbance in children's play and social relations.*
The pattern of findings reported for play and social relations parallels those for personal interactions: there seems to be an increase in problem behavior during the first year following divorce, and a marked improvement by the end of the second year. Play is more fragmented and less cognitively and socially mature in children from divorced families in the first year following divorce. More hostile, anxious, and less happy affect mark the play of boys even at two years following divorce. Restriction in the themes and affect expressed, restrictive fantasy, difficulty in assuming the role of others, and a high use of aggressive themes in fantasy have been observed in play among boys. Both boys and girls from divorced families have exhibited immature, ineffective, and negative social behaviors in social interactions—these characteristics disappearing more quickly among girls than boys.[32]

6. *Disturbance in cognitive performance.*
Changes in IQ or cognitive performance seem to be especially sensitive to the quality of care

in the single-parent home, and the extent to which both mother and father are involved in childrearing after divorce. Poor control of the custodial parent, inconsistency, and family disorganization, often reported to be present in single-parent families, seem to lead to inattention which ultimately results in poor performance on tasks requiring sustained attention.[33] Paternal availability seems especially important in IQ performance of boys of all ages.

7. *Sex-role identification.*
Potential problems in this area are also associated with the structure of the custodial arrangement after divorce. Many researchers agree that where a meaningful relationship is maintained with two parents, their role in the identification process is more nearly performed.[34] The preponderance of the evidence to date indicates that boys in single-parent (mother-headed) families are especially vulnerable to problems with sex-role identity. Preschool boys and boys in their early school years from mother-headed families have been described as more dependent, less masculine,[35] more feminine in self-concept and sex-role preference, and less aggressive than boys in intact families. They have been shown to have play patterns and game preferences more characteristic of girls than boys and show the feminine pattern of greater verbal than physical agression.[36,37]

Since children are not doing well under the present system, how are the parents fairing? Studies indicate the following problems associated with divorce generally and exclusive-custody arrangements in particular:

1. *Loss of familiar activities and habit systems.*[38,39,40,41]
The stress imposed by the necessity to revise long-standing habits and life styles is probably more intense for those who were married longer.[42] The continued presence of child and a familiar home setting, however, gives custodial parents a greater sense of continuity.[43]

2. *Loss and separation anxiety.*[44,45,46,47,48,49]
Several researchers report symptoms in divorced parents similar to bereavement. Both parents experience feelings of loss, previously unrecognized dependency needs, guilt, anxiety, and depression.[50] The pervasive concern of the non-custodial parent (usually the father) is a sense of loss of his child.[51]

3. *Role loss,* especially among non-custodial parents.[52]
The sense of role loss is reinforced by social institutions such as the schools, which either refuse or fail to discuss a child's performance and adjustment with a non-custodial parent. Non-custodial parents who have more contact with their children generally do not report this sense of role loss. This finding, that it is not just the fact of having children, but the experience of an active ongoing relationship with them that is ego-producing, supports the work of Erikson, Biller, and others who have noted the importance of such involvement-parenting for healthy adult development.[53]

4. *Decline in the ability to parent.*[54,55]
One study reports that divorced parents made fewer maturity demands on their children, were less consistent, had less control over their children, and communicated less well. The mother-son relationship seems particularly problematic in divorced families. "The single mother may confront specific problems of authority in discipline. . . . The single mother may have to be super-mother to counter the image of greater authority and power vested in males."[56] Another study states, "The combined needs of the children may be intolerable to the emotionally unsupported solitary parent. Since the emotional requirements of children are very likely to take the form of demands for physical attention or personal service, the remaining parent may be subject to physical as well as emotional exhaustion."[57]

5. *Physical symptoms related to both separation, and loss of parental role.*[58,59]
Some of the physical symptoms reported include dramatic weight loss, eye and dental problems thought to be nerve-related, high blood pressure, psychosomatic complaints, increased drinking, as well as changes in sexual performance. Divorced parents have also reported difficulties in sleeping, eating, working, and socializing.

6. *Practical problems.*[60]
These problems range from basic household maintenance to the effects of economic instabil-

ity often experienced by one or both parents after divorce.

7. *Lowered self-concept.*
"Perhaps because he leaves the home and suffers the trauma of separation from his children, the divorced father seems to undergo greater initial changes in self-concept than the mother, although the effects are longer lasting in the mother."[61] Mothers have reported feeling physically unattractive and helpless; fathers of not knowing who they were and feeling rootless.

8. *Declining feelings of competence.*[62]
Divorced parents have expressed the sense that they have failed as parents and as spouses, and that they function less well in social situations after divorce. In fact, "the amount of time a parent spends with a child directly affects his/her competence in dealing with that child."[63]

9. *Loneliness.*[64,65]

Researchers caution us not to assume that all of these problems are experienced by all divorcing parents. Also, some stresses will tend to be common ones, where others are associated with the different roles of custodial versus non-custodial parent. Professionals also offer different theories of the divorce process to explain the symptoms they encounter. Despite these qualifications and despite the fact that most people eventually cope successfully with many of their divorce-related problems, "the course of adjustment (is) often unexpectedly painful."[66]

What do existing studies indicate is necessary for adequate post-divorce adjustment? The following factors seem to be particularly important in adult adjustment to divorce:

1. The development of a satisfactory heterosexual relationship after divorce.[67]
2. The amount of cooperation and support received from the ex-spouse (the more cooperation and support, the easier the adjustment).[68,69]
3. The length of the marriage before divorce (the longer the marriage, the more difficult the adjustment to single life).[70]
4. The amount of discontinuity experienced in role behavior, life-style, and habit patterns after divorce (the less discontinuity, the better the adjustment).[71,72]
5. The amount of contact and interaction sustained with the children (the smaller the loss of parent-child bonding and interaction, the better the adjustment).[73,74,75] In addition, continuation of the parental role implies greater psychological and social continuity after divorce.
6. Age at divorce (the older the parents, the more difficult the adjustment tends to be).[76]
7. Response of the child.[77] (Children with behavior problems represent additional stress for parents.)

Many of the factors affecting children's adjustment are similar to those affecting the parents such as age of the child,[78] amount of sustained contact with non-custodial parent,[79,80] amount of stress experienced by the parents,[81] and parents' attitudes toward themselves.[82] In addition, researchers are increasingly calling attention to the quality of the relationship between divorced parents, as well as the degree of mutual support and agreement, as playing major roles in the healthy functioning of all members of the divorced family.[83] Less disruption in family functioning has been found when there was support and agreement between divorced couples and when parents refrained from using their children to express anger toward each other. Several support systems have been associated with more effective functioning of the custodial parent and his/her child—support systems such as friends, grandparents, and siblings. However, none of these support systems seem to be as salient as a continued, positive, mutually-supportive relationship of the divorced couple and the continued involvement of the non-custodial parent with the child.[84]

In spite of all of this available data, the legal profession has been slow to recognize that the present bias toward exclusive-custody rulings should be changed for everyone's sake. This resistance to change is based in large part on the belief that children cannot be shared by competing adult parents. This belief is based on an underlying assumption that conflicting parents cannot cooperate sufficiently to share responsibility for their children, and therefore the legal system must intrude and award the children to one parent or the other. But human nature is flexible, and the legal system must recognize that warring husbands and wives can

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become cooperative parents, that children need the guidance and care of two parents, and that the responsibility for encouraging cooperative parenting is on the legal system now.

Joint custody is receiving increasingly widespread attention and recognition as a possible solution to the many problems posed by sole custody or sole/joint combinations.[85,86,87,88,89] Joint custody is an arrangement whereby parents continue to share, in whatever specific ways, responsibility for their children and to maintain their full status as parents. Responsibility in all areas can be shared, or responsibilities can be divided and delegated, just as time with the child must be divided and delegated. This sharing or delegation of responsibility can be by mutual agreement or court order, can involve communication between the parents, or may simply require adherence to a written agreement which necessitates no contact between parents except in emergencies. Joint custody gives to children and parents most of the benefits which would ensue in most everyone's picture of the "ideal" compromise, but which people are only beginning to visualize as actually feasible. Common sense tells us that children and parents profit to the extent that parents refrain from "fighting over the kids" and that children can continue to receive the care, guidance, and love of a mother and father. Goldstein, Freud, and Solnit[90] rejected even considering this possibility, asserting without any documentation whatsoever that children cannot love two people who do not love each other. Their solution is "the least detrimental alternative," which is to give total power and control to one parent, without even the guarantee of visitation rights to the non-custodial parent. According to this line of thinking, at least one thing will supposedly be assured: there will be no loyalty conflict for the child and no conflict between the parents if there is only one parent. (The authors do not deal with the psychological effects of parental loss and thus implicitly assume that parental conflict is more damaging to a child than parent loss.) If the non-custodial parent dies and the child knows that parent is dead, then perhaps Goldstein et al. are correct. In all other cases —even when adopted children have never seen their "real" parents—the parent-child bond is a psychological and emotional reality which does not disappear by decree. Children and parents continue to feel the curiosity, loyalty, the sense of loss, the fears of abandonment, and the emotional attachment and ambivalence that comes simply from knowing "you are my daughter;" "I am your child."

As long as parents assumed that exclusive custody was inevitable (somebody had to "lose"), as long as everyone believed exclusive custody, no matter how painful, was really best for children, and as long as no one was examining the psychological effects of sole-custody/single-parent families, then exclusive custody rulings went unchallenged. The worst that people *saw* was a messy courtroom battle and hard feelings between parents, which everyone expected anyway. Suddenly, however, we are seeing a very different situation as a result of the combination of factors already discussed. We are also admitting more openly the destructiveness and barbarity of the courtroom adversary process when it is applied to child-custody disputes.

Child-custody is an emotionally charged ared in the law and in society. Therefore we cannot simply trust that parents will remember that it would be best if they stopped fighting and allowed their children continued and equal access to a mother and a father. Our legal structure and our laws must support what is in fact in the best interests of children and adults, even if individual parents must overcome some psychological resistance to doing so. How could the law protect children's relationships to both parents after divorce and encourage parents to come to mutual custody agreements rather than to fight each other for a most dubious "victory."?

The first, most basic step to take is to change the starting point or premise for determination of child custody, thus changing the nature and course of the process itself. REVISION # 1: Remove child custody from a win/lose —all/nothing presumption to a presumption of concensus, equality, and the protection of parent-child bonds. The courts in effect should say to parents, "We don't care how you feel about each other. As long as there is no clear, convincing evidence that either of you is abusive and unfit as parents, our assumption is that you are both qualified to continue as parents, albeit under different circumstances." This simple change immediately destroys the necessity of

proving which parent should "have" the children; there is no battle because there is no contest and no prize to win. There is no loyalty conflict because children do not have to choose between parents and one parent does not need to convince the child that the other parent is less fit. Thus the kinds of problems which exist under the present system—courtroom litigation; friends and relatives taking sides; thousands of dollars spent on attorney and expert-witness fees; difficulties in enforcing the "treaty"—all would be substantially reduced or avoided by this simple, clear legal presumption of equal protection of the parental status of both parties. (This parallels our presumption in criminal cases that one is innocent until proven guilty. In family law, on the other hand, by stating that children will be awarded to *either* parent, the law is saying in effect "we must choose between you; one of you must be judged less fit than the other; somebody has to be guilty.") Ironically, while we criticize married parents for not sharing the care and responsibility for their children equitably, we actually prevent divorced parents from doing so. (A presumption of joint custody does not mandate joint custody, however, in cases where one parent relinquishes custody voluntarily or both parents agree sole custody is preferable.)

The next step is to develop a mechanism whereby the delegation of responsibility may be arranged and consensus reached on the present and future care of the children. Again, the full authority of the law should stand behind what we know or believe is best: the development of a custody arrangement by consent of the parties, not by mandate of the State. Parents need not like each other or interact in order to share the rights and responsibilities of parenthood. What parents do need during and after divorce is a neutral setting in which to work out existing hostilities and then develop the terms of their arrangement—or at least verbalize their differences to a neutral party who can then report to the court if need be.

In most of California at the present time there is almost no official, legal pressure brought to bear on parents to clarify and/or compromise their differences. Even conciliation courts hesitate to recommend counseling if one parent does not agree to such an effort. All a parent need do to prevent compromise is to refuse it, and then proceed directly to the courtroom where present law and custom hold out the possibility of a total "victory." Needless to say, the elements which determine who wins in the courtroom are hardly the same criteria a counselor would use to determine the best interests of a family experiencing divorce. REVISION # 2, then, would be creation of a neutral but mandatory mediation process responsible to the court rather than to either party as individuals; a minimum mediation period in which issues can be resolved or compromised; and a recommendation to the court which reflects the parental agreement and/or suggestions of the counselor. One basic consideration should guide both the counselor and the court in their final recommendations: what arrangement will maximize the chances of the child(ren) receiving the maximum nurturance and involvement possible from both parents? If responsibility cannot be delegated equally, control should be delegated in favor of the parent who is most likely to encourage and respect the child's relationship with the other parent. Under today's custom of choosing between parents, control tends to go to the parent who is most adamant about excluding the other, who mounts the strongest courtroom battle, and who is least open to co-parenting.

Whatever the parents' responses to mediation—whether they reach a mutual agreement or not—neither parent should be threatened with the loss of his or her child, just as children should not have to face the loss of a parent. As a last resort, the precise division of time and delegation of responsibilities may need to come under the court's jurisdiction. Even when parties are highly antagonistic, the court can still protect each parent's right to be a parent, and each parent's obligation not to interfere in the areas delegated to the other party. In fact, there will be far less reason and motivation to interfere if each parent's status and role is clearly protected and equitably delegated.

REVISION # 3: In cases where a parent believes joint custody is indeed detrimental to a child or believes the other parent is unfit, parties should have the option of bringing these issues before the law, but again only after proceeding through a process of neutral investigation and/or mediation.

There is no doubt that children, parents,

and the legal system fare best after divorce when children and parents are permitted to continue and develop loving and full relationships. This means that we must replace our presumption of exclusive custody with a joint-custody presumption. The legal system will have to accept that the end result—the best interests of children—justifies support of creative, imaginative, and flexible co-parenting arrangements.

FOOTNOTES

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ADDENDUM

On September 21, 1979 California's Governor Jerry Brown signed a new child custody law, Assembly Bill 1480. AB 1480 is a significant step forward in the reform of custody dispute processing, although the extent to which the intent of this legislation will be realized in actual cases remains to be seen. The following is a summary of the major similarities and differences between the wording of the new statute and the recommendations made in the preceding article.

1. Although AB 1480 strongly encourages shared parenting, sole custody remains a "first preference" co-equal with joint custody. In addition, the parent seeking to exclude the other parent from custody is not given the burden of proof. In other words, the maintenance of both parental roles, and the preservation of shared parenting for children, are not given a legal advantage.

2. As recommended in the preceding article AB 1480 requires the court, in making an order for custody to either parent, to "consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent" (SEC. 1, subdivision b paragraph 1). Unfortunately the "other factors" are not specified, thus permitting the presiding judge wide (if not absolute) discretion in making custody rulings. To its credit, however, AB 1480 will require judges to give their reasons for denying joint custody.

3. The definition of joint custody offered in AB 1480 differentiates between legal and physical custody but does not define either concept. One of the reasons these concepts have not been defined is that no single definition manages to cover all families or all situations. Thus the terms are left undefined in an effort to give the court flexibility, but such vagueness also creates a source of friction between parents and confusion in the courts (see *In Re: The Marriage of Neal*, First Appellate Court, Division Four, State of California, May 1979). The preceding article suggests a less problematic approach: to use a term such as joint "parenting" instead of joint "custody," which connotes possession of the child; to define joint or co-parenting as a sharing of the physical care, socialization, and nurturance of a child, with the specifics of such a parenting arrangement to be defined by the parents themselves or, if necessary, by a court order.

4. AB 1480 does not specify, as the article suggested, mandatory mediation for divorcing parents who cannot or do not develop mutually agreeable plans for their children's care. The view expressed in the preceding article is that a legal preference for shared parenting would maximize the potential effectiveness of any mediation and counseling efforts. Such a legal preference in favor of shared parenting implies a preference for compromise between parents competing for custody; yet such a preference does not prohibit sole-custody rulings from being issued by the court or from being pursued by one or both parents. Similarly, negotiation and compromise would be facilitated by placing the burden of proof on the parent who seeks to exclude his or her ex-spouse from sharing the parenting role. A clear legal mandate, in this author's opinion, would encourage many more divorced parents to come to mutual agreements concerning the care of their children. Our laws and our society should expect no less of parents, even though all parents will not be capable of achieving this goal.

Despite some limitations, AB 1480 represents a successful dialogue between different points of view and a creative compromise between Senate Bill 477 and Assembly Bill 1480, which entered the legislative process almost simultaneously. It is a credit to all who participated in this process that as of January 1980, California will boast one of the most progressive custody statutes in the United States. National attention is now focused on California, to see whether this new statute will facilitate successful shared parenting arrangements and rulings.

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Assembly Bill No. 1480

CHAPTER 915

An act to amend Section 4600 of, and to add Section 4600.5 to, the Civil Code, relating to child custody.

[Approved by Governor, September 21, 1979. Filed with Secretary of State September 22, 1979.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1480. Imbrecht. Child custody.

Existing law specifies certain preferences in making an award of child custody. In making such an award the overriding concern, however, is the best interests of the child. There is no specific authorization for an award of joint custody and there is no presumption that joint custody is in the best interests of the child.

This bill would specify the circumstances in which a presumption favoring an award of joint custody shall operate, as well as specifically authorizing such an award in other cases, as designated. It would also specify that access to records and information pertaining to a minor child shall not be denied to a parent because such person is not a child's custodial parent.

The people of the State of California do enact as follows:

SECTION 1. Section 4600 of the Civil Code is amended to read:

4600. (a) The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of the child during minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an award of custody or modification thereof. In determining the person or persons to whom custody should be awarded under paragraph (2) or (3) of subdivision (b), the court shall consider and give due weight to the nomination of a guardian of the person of the child by a parent under Article 1 (commencing with Section 1500) of Chapter 1 of Part 2 of Division 4 of the Probate Code.

(b) Custody should be awarded in the following order of preference according to the best intersts of the child:

(1) To both parents jointly pursuant to Section 4600.5 or to either parent. In making an order for custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of that parent's sex.

The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

(2) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.

(3) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

(c) Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests

of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

Sec. 2. Section 4600.5 is added to the Civil Code, to read:

4600.5. (a) There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage.

If the court declines to enter an order awarding joint custody pursuant to this subdivision, the court shall state in its decision the reasons for denial of an award of joint custody.

(b) Upon the application of either parent, joint custody may be awarded in the discretion of the court in other cases. For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate under this subdivision, the court may direct that an investigation be conducted pursuant to the provisions of Section 4602. If the court declines to enter an order awarding joint custody pursuant to this subdivision, the court shall state in its decision the reasons for denial of an award of joint custody.

(c) For the purposes of this section, "joint custody" means an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with both parents; provided, however, that such order may award joint legal custody without awarding joint physical custody.

(d) Any order for joint custody may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interests of the child require modification or termination of the order. The court shall state in its decision the reasons for modification or termination of the joint custody order if either parent opposes the modification or termination order.

(e) Any order for the custody of the minor child or children of a marriage entered by a court in this state or any other state may, subject to the jurisdictional requirements set forth in Sections 5152 and 5163, be modified at any time to an order of joint custody in accordance with the provisions of this section.

(f) In counties having a conciliation court, the court or the parties may, at any time, pursuant to local rules of court, consult with the conciliation court for the purpose of assisting the parties to formulate a plan for implementation of the custody order or to resolve any controversy which has arisen in the implementation of a plan for custody.

(g) Notwithstanding any other provision of law, access to records and information pertaining to a minor child, including but not limited to medical, dental, and school records, shall not be denied to a parent because such parent is not the child's custodial parent.

SECTION 8

Child custody— A legal problem?

Donald B. King

RECENTLY I was asked to participate in a program presented to a group of divorced fathers. Most of these men believed they had been victims of discrimination in a court conflict over custody of their children. This experience prompted me to reconsider a question which I have repeatedly debated with myself since I became San Francisco's Domestic Relations Judge in February 1977: What is the best way to handle disputes over the custody of children—best for the mother, best for the father and, most importantly of all, best for the child?

At my panel presentation there were suggestions, if not demands, by the fathers that the system be changed. Their ideas ranged from removing child custody from the court system, to having the issue decided by a jury rather than a judge. This same issue has been endlessly debated by almost everyone involved with divorce or child custody.

Before evaluating our present system and considering possible alternatives, it is important to remember where we have been and how we arrived at our present system. Over the past 2,000 years, most societies have automatically given custody of the children to the father when a marriage ended; this has changed in the United States only within the last 100 years. This may come as a surprise to you, since it differs so widely from the way our law has handled this issue during our lifetimes.

Roman law gave the father total control over his children. This carried over into English common law and, to a great extent, to America. In historical terms, society has only recently stopped using child labor to support the family by working children more hours than even adults are expected to work today.

It may also surprise you to learn that until rather recently the father's custody rights were superior to those of the mother even as to a young baby. Just over 100 years ago, in a decision which acknowledged that the husband had mistreated his wife, a New York judge stated:

> The only difficulty, if any, in the present case, in regard to the right of the father to retain the child, arises from the child being of tender age, and deriving its sustenance, in part, from the breast of the mother. But upon the evidence, I think these circumstances form no obstacle to the father's right. (*People v. Humphries*, 24 Barb 521, 523 N.Y. 1857)

As America became more industrialized, the role of women and children changed significantly in our society. Laws were enacted severely limiting child labor and requiring mandatory attendance in school. The law also changed with regard to the mother's rights to child custody. After centuries of legal bias in favor of the father, a number of states enacted statutes creating a legal presumption that the mother should be given the custody of a child of tender years.

Equal rights

California adopted such a statute by enacting Civil Code Section 138 in 1931. In 1970, as part of the Family Law Act, California amended this section -- now 4600 -- so that the mother no longer automatically receives legal preference over the father as to the custody of a child of tender years. Finally we have reached a point where each parent has an equal legal right to custody of their child.

As part of this changing process, the law also came to recognize that the child had rights which must be considered in any custody dispute. This resulted in the enactment of a statutory standard: Custody should be awarded to the parent able to serve the best interests of the child.

The test lacks the element of certainty because of the wide range of facts and circumstances underlying custody disputes.

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Since the enactment of the Family Law Act in California, child custody hearings are the only ones in which evidence of misconduct of the husband or wife is admissible. Such evidence is ostensibly necessary to determine the best interests of the child, however it often merely renews and expands the war between already embittered spouses.

I seriously dispute the wisdom of having child custody and visitation disputes decided by the adversary system. Frequently, the judge hearing such disputes is a short-timer as a family law judge, with little or no training in psychology and child development. Indeed, the judge may never even have handled such cases as a lawyer. These hearings inevitably occur on crowded calendars and are governed by formal rules of evidence which overwhelm and frustrate the parties in their efforts to tell their side of the case. As a practical matter, such handling makes a bad situation worse. In addition, it is senseless in these days of taxpayer revolt to confine such matters to the overcrowded court system. It seems incredible to tie up a courtroom, a court clerk, a court reporter, a bailiff and a judge, not to mention supporting court personnel, to resolve a human problem--which of two parents is best suited to have custody of their child.

These proceedings are expensive both financially and emotionally to the parties and the children. As a practical matter, the judge's discretion in custody and visitation disputes is almost total. The judge's decision will seldom be reversed by an appellate court unless there has been an unbelievable abuse of discretion. Child custody is a legal problem only because the Legislature, by statute, requires the judge to decide it. In reality, it is not a legal problem. It is a human problem, an interpersonal problem, a psychological problem, and a child developmental problem. The only real legal issue ever involved in such cases is whether or not the court has jurisdiction over the parties and the child.

Successful alternatives

Are there alternatives to our present system which could operate more successfully? I believe there are, although I do not believe child custody disputes should be removed from the court system, nor do I believe such disputes should be decided by a jury. In the former case, any alternative to the court system could probably function just as well as part of the court system, since related legal problems such as support, termination of marital status, division of assets, etc. must be resolved in court. Moreover, to the extent there is a need for enforcement of the custody decision, the court processes provide the only effective means of enforcement. In the latter case, using a jury to decide child custody would clog our courts, cause incredible delays and be inordinately costly to the parties and taxpayer. A totally untrained lay jury could not decide mixed questions of law and fact which require substantial background, experience and training.

Let us look at our present system of handling child custody disputes in most California courts. The custody dispute is usually brought into court with a request for a temporary order pending trial. The hearing on temporary custody is often nearly as prolonged and usually more bitter than that which will occur when "permanent" custody is determined. This system may well result in two separate hearings, each involving much the same testimony. The first of these hearings, most often occurring at the time of separation when one party has filed a petition for dissolution, results in making a bad situation worse because of testimony and counter-testimony to show misconduct by the parties. A court investigator will then conduct an investigation and make a report taking up to 12 weeks to complete. If that does not assist the parties and their counsel in resolving the dispute, a trial then takes place. If the differences between the parties were not irreconcilable before this trial occurs, they certainly will be afterwards, probably forever.

In some California courts, variations of this procedure are utilized in an effort to handle custody disputes in a better way. However, these variations depend upon the particular domestic relations judge, the judge's philosophy, experience and approach, and, perhaps more fundamentally, upon the extent to which the County Board of Supervisors appropriates the funds necessary to allow the court to employ qualified family counselors to assist in the process. Nevertheless, these variations have taught us that there are more effective ways to handle child custody and visitation disputes with far less emotional and financial cost to the parties.

A case study

I would like to briefly analyze San Francisco's method of handling custody disputes. San Francisco is fortunate in having an Office of Family Court Services staffed by five well-trained family counselors. As Domestic Relations Judge for our Court, I have established a procedure requiring the

Donald B. King *received his J.D. from the University of San Francisco Law School. He has been a Domestic Relations Judge for the San Francisco Superior Court since 1977 and is author of "Guidelines for Domestic Relations Cases."*

parents involved in child custody or visitation disputes to meet informally with our family counselors before I hear any issues in the courtroom. When I initially call my domestic relations calendar, I send every case involving disputed custody or visitation issues to the Office of Family Court Services, just a few doors from my courtroom. There, a trained family counselor meets first with counsel, then with each party, and seeks to mediate the dispute. Our mediation process resolves almost every temporary custody or visitation dispute coming before my court without any court hearing on the issue. If the mediation effort is unsuccessful, the counselor then tells the parties the recommendation he or she intends to make to the court. This resolves almost all remaining cases by agreement. If agreement is reached either by mediation or as a result of this counselor recommendation, the parties and counsel return immediately to my courtroom for a hearing on remaining disputed issues, such as child support, spousal support, etc. I have referred approximately 1,300 cases in this manner, and fewer than one dozen have returned without an agreed resolution, requesting a hearing. In other words, only 1 percent of these cases return to my courtroom unresolved. When such a case does come back, counsel for the party who disagrees with the recommendation is asked to state the reasons. A hearing is then conducted only in those cases where it really appears appropriate. In two years this has numbered only five cases.

The use of mediation to resolve temporary custody disputes has proved highly satisfactory to the parties, their counsel, the staff of the Office of Family Court Services, and the court. I recently conducted an anonymous survey among 67 lawyers who practice regularly in our Domestic Relations Department. There was unanimous and enthusiastic approval of this method of handling temporary custody and visitation disputes. As a matter of fact, this process achieves a far better solution than could have been achieved as a result of an adversary hearing in open court.

Through this meeting between parents and a trained family counselor, we are also able to motivate many parents to seek counseling for problems associated with the end of their marriage and to put them in contact with an appropriate community counseling resource. It is not at all unusual to see people who have gone through this process walk out of court with smiles on their faces!

An unforeseen benefit of this process has been that very few of these cases later come on for a contested hearing regarding "permanent" custody, since even if an investigation and report are required, our initial mediation procedure seems to help these parties accept the ultimate recommendation of the Office of Family Court Services without further hearing.

In those few cases where there is a request for a hearing on "permanent" custody (and this is usually where there are two excellent parents), it is conducted at a separate hearing far in advance of the trial. Once custody is thus resolved, fewer contested trials occur.

Cases which return for repeated hearings burden every court. The use of the above process has almost totally eliminated such cases from our calendar. Over a year and a half ago, I heard one case which had been in court on contested custody or visitation hearings 35 times since a contested trial resulted in an interlocutory judgment of divorce. It has not been back since, and I do not think it will be. Counseling by our Office of Family Court Services and referral to appropriate community counseling resources, if necessary, are the primary reasons such cases no longer return for contested hearings.

In summary, the results of this process in the San Francisco Superior Court have been truly amazing. Not only are better results achieved, but this is accomplished in a manner which diffuses the emotional conflict attendant upon the filing of a petition to dissolve a marriage. Perhaps even more significantly, the San Francisco Superior Court, with over 4,500 petitions for dissolution filed each year, now has a hearing involving a contested issue of "permanent" custody no more than once or twice a month. In the last six months, there has been only one hearing in our court involving a contested issue of temporary custody, whereas other similarly-sized courts have 10 to 20 each week.

Some suggestions

These results represent an outstanding success; however, a change in statutory provisions could bring about even better results. What would I propose? The statutes governing child custody and visitation should be amended to make a meeting mandatory between parents, counsel and a trained family counselor prior to any court hearing where custody or visitation is in dispute. The counselor would act as a mediator between the parents, and all discussions with the counselor would be confidential. In the event mediation did not produce an agreement between the parents, the counselor would make a recommendation to the parties. If this recommendation were not acceptable to both parties, they would immediately go before a custody conference officer for a hearing where the counselor would state his or her recommendation and the reasons for it.

This conference, more like a meeting than a hearing, would be held by the custody conference officer, who probably would not be a lawyer. In fact, the preferred background for this officer would be training and experience in family counseling. In almost all courts this assignment could be carried out as a part-time officer of the court.

All conferences before the custody conference officer would be informal. The rules of evidence would not apply except to a limited extent. Conferences, under the

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direction of the custody conference officer, would not be conducted in the traditional adversary fashion of direct examination and cross-examination, although each party would be entitled to be represented by counsel.

Such conferences would take place without a reporter or clerk, although a bailiff might be present in the discretion of the custody conference officer. This officer would tell the parties his decision and reasons therefore at the conclusion of the conference.

Each party would have the right to an immediate appeal to a Superior Court Judge (usually the Domestic Relations Judge). This would be a reported hearing with counsel and parties present. It would be conducted in an informal manner in chambers, although the rules of evidence would be applicable. At the start of the hearing, the custody conference officer would present his decision and the reasons for it. The judge would then make such inquiries of the parties (and their witnesses) as necessary. Counsel for each party would then have the opportunity to present additional information as they desired. A decision, and the reasons for it, would be orally stated to the parties by the judge at the conclusion of the hearing. If the issue at the hearing is temporary custody or temporary visitation, the regular courtroom hearing would follow immediately on all remaining issues, such as child support, spousal support, etc.

If the issue in dispute is "permanent" custody, the same general procedure would be followed, except that it would begin with the conference before the custody conference officer. This proposal contemplates that the issue of "permanent" custody would be handled separately from the rest of the contested issues and would be decided as soon as it was ripe for decision. This would normally follow the investigation and report in cases where the parties and their counsel still could not agree. Thus, custody would never be an issue in dispute at a contested dissolution trial.

Both the custody conference officer and the appeals judge should be permitted to meet with the child to determine his or her preference. However, this meeting would be private, confidential and off the record.

We all bear a responsibility to improve the administration of justice. To properly carry out this responsibility, we must seek new and better ways to handle the public's business. I am certain that my proposal for handling custody and visitation cases is a better way. I would propose that that California Legislature begin pilot programs in two urban superior courts to try out this proposal and measure its results. Each such program should operate under specially created Judicial Council and local rules deemed appropriate considering local resources, problems and practices.

Child custody and visitation disputes can be handled more expeditiously and with less expense to the taxpayer by using this procedure. This proposal would free precious judicial time, while affording the parties and child a more satisfactory opportunity to be heard in a meaningful manner, with results more truly in the best interests of the child, the parents and society.

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APPENDICES 1

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Evaluating the 'success' of joint custody decrees

Repeat court appearances as an indicator of custody stability

One measure of relative success is the frequency of return to court for relitigation of joint custody as compared with sole parent custody.

Two years of custody decrees evaluated in California analysis

On November 7, 1980, Commissioner John R. Alexander of the West Distric (Santa Monica) of the Los Angeles County Superior Court summarized the rates of controversy in joint and sole parent custody cases from the Fall of 1978 through September 30, 1980. In the next few months Commissioner Alexander will have completed a more extensive commentary on his statistical review. Meanwhile, this advance 'look' at his preliminary findings will be of special interest to the critics and supporters of joint custody.

Statistics were gleaned from case files and index cards compiled by Commissioner Alexander and fellow jurists in the Santa Monica family law court.

Joint custody awards compared with sole custody decrees

From Fall 1978 to September 30, 1980, 414 custody cases occurred in this court, of which 67% (277 cases) were sole custody awards and 33% (137 cases) were joint custody awards.

Joint custody relitigation one-half as frequent as sole custody

Of those cases, only 16% of the joint custody awards resulted in repeat courtroom appearances (22 of the 137 cases.) However, 31% of the sole custody awards resulted in courtroom reappearances (86 of the 277 cases.)

Results when one parent doesn't agree to joint custody

The gratifyingly high rate of 'stability' within cases where joint cust was decreed regardless of opposition to joint custody by one of the parents i illuminating

17 decrees of joint custody were awarded although parents objected (in 14 of which there was opposition to joint custody by one parent and in 3 of which there were 'defaults' by one parent.)

71% of those cases (12) resulted in no later flareups or courtroom controversy despite the initial objection by one parent to joint custody. 5 (of the 17) resulted in later controversy, 2 of which were settled by agreement, 2 were settled after contested hearing, and 1 is still pending, a notice of appeal having been filed August 26, 1980.

Joint custody decrees, even when there is no initial agreement, are more stable than arbitrary solo parent custody decrees

Obviously, a preference is for both parents to agree to joint custody,

But, even when both parents don't agree to joint custody there are fewer flareups in unconsented joint custody than in exclusive sole custody decrees. (29% are compared with 31%).

In short, a decree of joint custody even when one parent disagrees appears to be more stabilizing than the arbitrary and decisive decree of sole parent exclusive custody.

Statistics as offered by Commissioner Alexander:
RATES OF CONTROVERSY IN JOINT AND EXCLUSIVE CUSTODY CASES.

Results of study conducted by John R. Alexander, Commissioner, Los Angeles County Superior Court, West (Santa Monica) District, Fall '78-Sept 30 '8

Table 1 : Summary of Results

1.	Total nr of cases studied	414
2.	Exclusive custody awards, Total nr:	277
3.	Controversies over custody or visitation arising from the 277 exclusive custody awards:	86
4.	Coefficient of controversy (86/277)	0.3105
5.	Joint custody awards, Total Nr:	137
6.	Controversies arising from 137 joint custody awards:	22
7.	Coefficient of controversy (22/137)	0.1606

Table 2 : Unconsented joint custody awards follow-up

1.	Joint custody awards made after,	
	a) Default by one parent	3
	b) Opposition by one parent	14
	c) Total:	17
2.	Cases with no later flareups of controversy	12
3.	Ratio of stability (12/17)	0.7059
4.	Flareups of later controversy	
	a) Settled by agreement	2
	b) Settled only after contested hearing	2
	c) Still pending (notice of appeal filed, Aug. 26, 1980)	1
	d) Total	5
5.	Coefficient of controversy (5/17)	0.2941

(Compare with Table 1, line 4: Coefficient in all exclusive custody cases: 0.3105)

Considering number of cases studied, results are believed accurate within 1% plus or minus.

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