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the divorce itself and those created by the post-divorce environment.

The blunt and painful truth is that the evidence available was, at best, shallow, and, at worst, misused. Theories became clichés. "Children should not be bounced back and forth like a yo-yo." "The child needs his mother." "A father is not equipped by either temperament or experience to raise a child, especially a young child." "A child needs the security of one place that he can call his own." "He can't live in two places." "If parents can't get along in a marriage, how are they going to agree in a divorce?"

These pseudo-psychological clichés, were and are, the language of the custody courtroom. It was the weight of this non-evidence which, we believe, led the courts to single out the mother for custody. Overburdened courts relied on previous settlements as their guide seldom questioning what appeared to be—but was not—an established psychological premise. The courts reacted to conventional logic.

Several recent studies are helping to reshape that conventional logic. These studies are soon to be re-enforced by the report of a divorce research panel of the National Institute of Mental Health. That report will focus on the impact of divorce on children.

The consensus of the panel of experts supports the view that custody arrangements for the children of divorce which remove the father from a child's life are, quite simply stated, the wrong way to provide for "the best interests of the child." To provide an atmosphere for normal development and provide a framework for establishing sound relationships with both parents, the courts must provide the basis for a father to stay involved with his children after divorce and not continue to pose an artificial barrier between children and father.

There is enormous initial pain for children of divorce. The child's balanced world is suddenly shattered by two people who are his role models for life. Feelings of betrayal and abandonment are evoked. Many seek confirmation that there is truth in parents' traditional reassurance that "while mommy and daddy aren't living together any more, we both love you and will always be near you." It is precisely at this moment that the court "in the best interests of the child" intervenes and effectively removes even the most interested and involved father from the daily life of the child. Listen to some of the anecdotes included in the research data we will review shortly:

> One child spent his time in his chair listening to records his father had left behind and hoping [illegible] contact him on a toy telephone."

> If mom doesn't stop smoking, I won't have any family at all."

This court enforced absence of a father from his children is based on the belief that this will be in the best interests of the child's psychological development.

The children's quotes may only be the tip of the psychological iceberg. Few researchers in the past have scientifically studied the impact of father's absence on the children of divorce: most research extended only to the family prior to divorce.

The post-divorce research that did take place excluded the father. In fact, in one study of fathers, the researchers admitted they gathered all their information from mothers.

In a paper, Fathers, Children And Joint Custody, derived from her doctoral dissertation, Judith Brown Greif, wrote:

> In contrast to a popular myth that fathers walk away from divorce and their families unscathed and carefree, the evidence here is that a majority of these men experienced stress severe enough to bring on physical problems.
>
> Denied contact with their children, being forced into the situation of getting permission from the custodial parent for extra time, often being denied access to their child's teachers who won't discuss school performance with non-custodial parents, these fathers see themselves less and less as parents and eventually act in accordance with the role society has assigned them: the absent parent. "Why don't I see more of my kids?" a father lamented. "I'm so angry because so much has been taken away ... I feel deprived. Why do I have to beg my wife to see more of my child?"
>
> ... there is a growing literature on joint parenting which documents the positive effects such arrangements have on parents and children alike. Such findings are supported by the results of this study. As seen here, fathers with joint custody of their children feel it works very well, and the fathers themselves seem most satisfied with their post-divorce relationship with their children. Children need active involvement with both parents, and the findings clearly indicate that fathers with joint custody are most likely to continue to have a high degree of influence in their child's growth and development.
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> Of added interest, some generally held concerns about the effect of joint custody do not seem borne out of this sample. For one, the issue of how disruptive it must be for children to have two homes rather than one seems to be a concern more of the observing public than of the joint custody families themselves. All of the joint custody fathers set up living space for the children in their homes, with special toys, clothes, etc. The children do not arrive with suitcase in hand; nor, after an initial period of adjustment, do they seem to feel disoriented about when they spend time with each parent. As one father explained, "There is no shuttling back and forth, my son is shuttled every day to and from school. This is called consistency, scheduling." Another father pointed out: "We're a mobile society ... some people move constantly during their lives, the rich often live in several homes ... what makes a joint living arrangement so different?"
>
> These fathers did not sense that the arrangement posed

n difficulty for their children's friends either. Many of the men explained that to come from a divorced household is not unusual among their children's friends; what makes them special is not the two homes but the fact that they get to see their fathers more than their friends who have visitation fathers.

In addition, not only do the children soon settle into the routine of the arrangement, but the issue of saying goodbye is not as painful as for children in sole custody arrangements. Fathers with limited visitation continually discussed the pain both they and their children experienced when their time together ended, due in part to the long stretch before they could see each other again, and also to the only brief amount of time (the "tease" referred to earlier) they are allowed to share. This did not hold true for the joint custody fathers who reported they and their children could more easily separate knowing they would soon have a long period of time together again.

A second belief about joint custody is that children end up being pawns in the midst of parental battles, and that this produces a situation of divided loyalties. Quite to the contrary, children seem "used" in sole custody arrangements because of the inherent unequal power distribution structured between the parents. Non-custodial parents withhold visitation if a support payment is late. In joint custody arrangements, however, the parental power and decision-making is equally divided, so there is less need to use children to barter for more. Most importantly, the fathers seem very satisfied with their degree of parental involvement, so there is less motivation to do so.

Thirdly, there are some interesting suggestions about the degree of amicability necessary between spouses in order for joint custody to work. Many professionals raise concern that parents who could not get along well enough to stay married will not be able to agree on issues once divorced. Yet, a number of these joint custody fathers reported angry, hostile relationships with their ex-wives. Some of these families chose to use the school, rather than the other parent's homes, as the drop-off point for the child. What enables the joint arrangement to work is that, despite the hostilities, the parents both care about their child. That is, these couples have been able to separate out their parental role from the marital issues.

In our attempts to understand and help families of divorce we have been remiss by focusing only on those members who remain together and failing to include those from whom they are separated. We tend to approach families of divorce as though they truly consist of only "one parent"—as though the non-custodial parent has ceased to exist.

Yet research is abundantly clear that with few exceptions the trauma of divorce can be minimized by the child's continuous open and easy access to both parents. We therefore have a responsibility to do what we can to support the involvement of the non-custodial parent, both for the sake of that parent and for the benefits that accrue to the child. In addition, we can no longer impose different standards for what is in the best interest of children from intact families as opposed to children of divorce. Children need loving relationships with two caring parents, regardless of whether those parents no longer care for one another. While divorce seems to be a viable solution for an unsalvagable marriage, parents should not be allowed to divorce their children.

Rather than support the imposition of legal visitation restrictions, we should do everything in our power to maximize contact between the child and both parents. One clear way to doing that is through joint custody arrangements. *As seen in this study, structural arrangements such as custody and visitation are crucial to the post-divorce adjustment of fathers and ultimately their children. There is a different quality of psychological involvement that evolves from the opportunity to take care of (ie, to parent) one's child, rather than "visit" with one's child.*"

A 1976 Virginia study of divorced fathers" looked at how divorce affected the entire family over a two year period, choosing homes in which the children were about four years old at the time of separation. The lives of intact families were simultaneously studied and contrasted. The study reported that fathers' absence appears to be associated with a wide range of disruptions in social and cognitive development in children. The effect seems to be most severe if the father leaves the home during the child's pre-school years. The authors add:

> Other support systems such as that of grandparents, brothers and sisters, close friends . . . also were related to a mother's effectiveness in inter-relating with the child . . . *However none of these support systems were as salient as a continued, positive, mutually supportive relationship of the divorced couple and continued involvement of the father with the child.*"

Ironically, other than money, the friction caused over custody arrangements keeps the post-divorce relationship unsettled, undermining what these researchers believe are the conditions to provide a supportive environment in which to raise the children of divorce.

(These Catch-22 situations appear throughout the legal and psychological literature).

The Divorce Project, a California study was begun in 1971 by Judith Wallerstein, a social worker and Joan Kelly, a clinical child psychologist, who said:

> Our inquiry represents a first in-depth look at children of divorce, drawn from a normal population with no history of psychiatric or psychological contact. "

Parents were interviewed, but, unlike the whole family concept of the Virginia study, the child was the focus of the research.

They learned that children whose problems increased after divorce came from homes where the conflict continued after divorce. They found that in these homes the mothers came to be seen as "powerful and terrifying". These were also the homes in which the children gravely missed their fathers.

For children under six the authors commented that

> it may be, for example, that some children can make do and grow with the relationship with two adults who, despite being in conflict, supplement each other but the diet becomes too thin in the aftermath of divorce *when the fathers' availability is reduced. . . .*"

Among children seven and eight, the authors said:

> Nearly all of the children in this sample wished for more frequent visits with the fathers. The only children reasonably satisfied were those who could bicycle over to

the father's house several times weekly, and where such frequent visits had the approval of both parents."

The Divorce Project (which is still engaged in following up the sixty families and 131 children involved) found that the pain and sense of loss experienced by the children was severe. Most felt isolated. (Not one child under 13 wanted the divorce to happen and all intensely longed for their father's return). All reflected anxieties about their own survival. Later, many came to terms with the divorce, but of the 89 children under ten, 35 (an extremely high percentage) were felt to be worse off. "These findings are not encouraging," the authors wrote, "if extrapolated to the large numbers of children experiencing divorce."

From these and other studies one point is clear: *those children who fared best after divorce were those who were free to develop loving and full relationships with both parents.*

Neither of the studies were concerned with joint custody but they noted, as did Ms Greif, that those children who saw their fathers very frequently—and for some real length of time—were all satisfied with the new family arrangements. (One of the lingering custody clichés states that "it is not the quantity of but the quality of time, that counts").

Similarly, the Virginia study reported that one-third of the men

> who had initially been highly involved, attached, affectionate parents reported that they could not endure the pain of seeing their children only intermittently and by two years after the divorce had coped with this stress by seeing their children infrequently although they continued to experience a great sense of loss and depression."

For over forty years, little if any research was conducted on either the parents or the children of divorce. Since 1971 several studies have begun to fill the void of information. They all reach similar conclusions: (1) the current custody and visitation arrangements which remove a father from the children are psychologically unsound; (2) that the best conditions for continued development, require the deep involvement of both parents; (3) that the most successful children of divorce are those where frequent father contact is coupled to a reduced sense of tension between the parents; one major source of tension has been the father's belief that he has been arbitrarily removed from his children; (4) a Catch-22 situation persists in which mutual support provides the best framework for growth at the same time every condition which might foster mutual support is undermined. The same analogy applies to the involvement of the father which the court curtails in the best interests of the child and which the psychological literature (and plain ordinary common sense) indicates should be increased. The father who is suspected by the court of moving away from his children does so because the courts put a wall between him and the child making it too painful to continue.

Other states have looked at these Catch-22 problems and evolved new solutions for handling custody.

WHAT'S HAPPENING ELSEWHERE"

Most state laws provide for the equal treatment of both parents in custody matters, but the nine-in-ten ratio of mothers being awarded custody is a national statistic. In short, the assurance of the law has very little impact on the courts themselves.

Recent concerns about custody legislation fall into three categories: (a) removing custody from the adversary setting and placing it in a conciliatory or mediation process; (b) providing for a presumption of joint custody; (c) providing separate counsel for children in contested custody cases.

Two states, Wisconsin and Oregon, have recently enacted joint custody legislation. These laws "encourage" the courts to make joint custody decisions.

The California and Pennsylvania legislatures are now considering joint custody legislation.

Several states and lesser legal jurisdictions have either formally or informally removed or are in the process of removing custody from the adversary process, substituting in its place a mediation process under court auspices.

Children's counsel is a new concept being studied in several jurisdictions.

JOINT CUSTODY

Joint custody is that post-divorce custodial arrangement in which parents agree to equally share the authority and responsibility for making all decisions that significantly affect the lives of their children. It is also the post-divorce arrangement in which children share the households of both parents either on an equal time or a split time basis. The specifics of these time arrangements vary with individual requirements. Some resolve along traditional lines; frequently a child spends half a week or a full week in one home, and an equal amount of time in another; some situations resolve along the lines of school year and non-school year. *The specifics of these decisions are left to the parents themselves, but each parent enters the negotiations as an equal partner in the eyes of the law* and it removes what one father described as the "cocked gun" of previous deci-

sions "lurking in the background as the enforcer."

The court, in joint custody, continues to remain in control of the situation, both maintaining the authority to intervene because of the physical or the psychological incapacity of one parent and the authority to ratify out-of-court decisions. In all instances, the court remains as the protector of the child. Parental access to the courts to alter custody decisions remains intact. In short, the court continues to preside, but within a more carefully and narrowly defined parameter, one which provides, we believe, an equal protection for both parents and makes possible access to both parents by the children of divorce.

CONCILIATION AND FAMILY MEDIATION

The program of the Domestic Relations Division of Hennepin County (Minneapolis) Department of Court Services provides the most vivid illustration of the conciliatory process in operation.

Here an extensive, impressive and sophisticated number of counselling and mediation programs have been devised. They include custody mediation, visitational counselling and divorce adjustment groups, combining private sessions, lectures and discussions.

One, the Divorce Experience is specifically designed for the children of divorce. The three session program focuses primarily on the emotional experience of divorce.

In addition, Minneapolis Family Court has co-sponsored a program with school personnel known as "Understanding and Coping With Family Change." The week long, voluntary, small group course is designed to deal with a child's experience of loss in the marital situation. The teacher is trained to support the other efforts of the court to reduce the stress of divorce on children.

RECOMMENDATIONS

We recommend that these three issues—joint custody, counselling and family mediation, and children's counsel—be considered during a series of public hearings bringing together in one place, at one time, the best of scientific and family data.

The information provided will be subjected to expert questioning providing the rational basis for decisions regarding legislative change in what, to date, has been extremely emotional and acrimonious debate, argued by contestants in a courtroom, with decisions often guided by myths and clichés which have had very little support in fact.

The net effect will be to provide children with equal access to both parents under rational and reasonable conditions, and to enable the father to continue as a full parent after divorce. We believe the current psychological data and the mounting number of out-of-court joint custody decisions provides the backdrop for legislative reconsideration of the domestic relations law. ■

NOTES

1. Jenkins v Jenkins, 173 Wis 502, 181 NW 826 (1921).
2. § 70, see Foster and Freed, 2 Law And The Family—New York 513 (1966, Lawyers Cooperative)
3. Tuter v Tuter, 120 SW 2d 803, 205 (CA 1938).
4. *Supra* note 2.
5. New York Domestic Relations Law, Article 240 states:

   > In all cases there shall be no prima facie right to the custody of the child in either parent.

6. From an unpublished interview with Charlotte Baum Sheedy, 1976
7. Levy v Levy, NY Supreme Court 1976, NY Law Journal 1/29/76.
8. See also Roth, *The Tender Years Presumption In Child Custody Disputes*, 15 J Fam L 423, 457 (1977).
9. Foster and Freed, *Life With Father: 1978*, 11 Fam LQ 321, 334 (1978), and Roth, *supra* note 8, at 449-57 for a recent discussion of the literature
10. Braiman v Braiman, New York State Court of Appeals, decided June 8, 1978.
11. Foster and Freed, *supra* note 9, at 325-29.
12. Lewis Hochheimer, A Treatise On The Law Relating To The Custody Of Infants 43 (Baltimore: John Murphy & Co, 1887).
13. People v Humphries, 24 Barb 521 (NY, 1857). Emphasis added.
14. Kate Chopin, The Awakening 12-13 (NY and Chicago: MS Stone & Co, 1899).
15. Begun in 1971, Divorce Project is headed by Judith Wallerstein, a social worker and Joan Kelly, a clinical child psychologist. Describing their study, the authors write in *The Effects Of Parental Divorce: Experiences Of The Preschool Child*, 14 J Child Psychiatry 601 (1975):

    > Our inquiry represents a first in-depth look at children of divorce, drawn from a normal population with no history of psychintric or psychological contact. Prior to the family disruption, all the children were considered by their parents to be within the normal and expectable range of development. They were seen in the divorce counselling service (established by this project at the Marin County Community Mental

Health Center) on referral from family lawyers, pediatricians, and schools within the framework of a preventively-oriented planning service for divorcing families with children. They were not referred as identified patients or as families in declared distress. The initial data was obtained in four to six individual clinical interviews with each family member over a six week time span. All subjects were interviewed approximately a year later, and independent information was obtained from the schools at each of these times.

16. *Id.*

17. Fathers, Children And Joint Custody, by Judith Brown Greif, presented at 1978 Meeting of the American Orthopsychintric Association in San Francisco, California. Emphasis added.

18. E Mavis Hetherington and Martha and Roger Cox, The Aftermath Of Divorce, an invited address at the meetings of the American Psychological Association (Washington, DC, September, 1976).

19. *Id.* Emphasis added.

20. *Supra* note 15, Divorce Project.

21. *Id.* Emphasis added.

22. *Id.*

23. *Supra* note 18.

24. See Foster and Freed, *supra* note 9, at 340-1.

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Judith S Wallerstein and Joan B Kelly, *The Effects Of Parental Divorce: The Adolescent Experience*, from The Child In The Family - A Psychiatric Risk (John Wiley & Sons Inc, 1974); *The Effects Of Parental Divorce - Experiences Of The Preschool Child*, Journal of the American Academy of Child Psychiatry, vol XIV, no 4, Autumn 1975; *Part-Time Parent, Part-Time Child: Visiting After Divorce* Journal of Clinical Child Psychology, summer 1977.

Task Force Report: Divorce and Divorce Reform, by the Task Force on Divorce and Divorce Reform, National Council on Family Relations, Minnesota.

The Legislative Response to Divorce: A Survey of No-Fault Divorce, from the State of Wisconsin.

There is a growing concern among knowledgable persons in the law and behavioral sciences that present practices and procedures in custody matters are in great need of review, analysis and change. The way it is now, in certain cases, the best interest of the child is not in fact being served nor is there consensus among the various professions as to what is in the best interest of the child.

In an area as complex and critical as custody, there is a pressing need for becoming more aware of what is in the best interest of the child, for developing criteria and guidelines underpinning the decision making process in custody and visitation and translating all this into practices that are more responsive to the needs of divorcing and divorced parents and their children. Neither the law alone nor the behavioral sciences alone can reach this goal. The search must be an interprofessional effort. If the law and the behavioral sciences are not responsive to each others findings and suggestions, both parents and children will suffer. The ultimate goal of divorce practices generally, and custody/visitation specifically, should be to insure the maximization of human resources by minimizing the potential damage that is present for both parents and children in all divorce cases.

There is no such thing as a simple custody/visitation determination. For in that determination we set the pattern of the future for not only the child but the parents. In the case of the child, he or she stands by helplessly as critical decisions are made about his or her life. We owe the children of all ages a custody/visitation determination based on reasonable rationale and an awareness of what is in the child's best interest. A child is not a piece of property. A child is not a prize to be awarded to a winner. A child has rights. A child should not be used by the parent(s) as a convenient club with which to clobber the other parent. A child's future should not be snuffed out by the gales of rage generated by parents trying to emotionally end a broken but once cherished relationship.

There is no one today who has the answers. Collectively we have a responsibility to search for answers so that when we say, "in the best interest of the child," we will truly know its meaning. Today, for the most part, this statement glibly rolls off the tongue into a pile of social gibberish that contains phrases that do not mean too much but sound good.

It is important that the law and the behavioral sciences work together to find answers. Those involved in court-connected counseling services as well as researchers outside the court system are beginning to shed some light on the direction to take. They are raising important questions without which the search for answers cannot begin.

The following thoughts will hopefully prod the mind into continuing the search. Each thought is like a sign post suggesting a direction to consider. Each thought is designed to stimulate a dialogue among those responsible for custody/visitation determinations.

1. Parents are forever. A divorce decree merely ends the husband/wife role but not the parent role. Often the anger generated by the husband/wife role flows over into the parent role and everything gets mixed up.
2. Families are forever. A divorce decree does not end the family, particularly for the child. It is important therefore for the family system to be protected from unnecessary stress and fragmentation as it proceeds from the filing of the divorce action to the final divorce decree.
3. Coping is learned behavior. The way children cope with the crisis of divorce will, in large part, be determined by the way their parents cope. The parents may need help to cope with the emotional components of divorce. The law has the responsibility to provide such help–and in the courthouse itself where the crisis has been filed. We cannot serve the best interest of the child without serving the best interests of the parental relationship. The two cannot be separated. The kind of relationship the parents maintain during the divorce and after the divorce will have a significant impact on the children involved–

for better or for worse. Family law practitioners should make every effort to modify inappropriate practices and procedures so that the relationship between the parents is a viable one with the anger defused and the communication enhanced.

4. The goal of a custody determination should be the establishment of two functioning homes for the child, not just the home of the custodial parent. Let me make it very clear that this does not mean that the child will be shuttled back and forth between two homes with each parent having custody. What is meant is that during visits the child will have the kind of "space" in the non-custodial parent's home that will enable the child to feel that he or she has two homes. We are traditionally oriented to thinking of one home with a father and mother as the best way to rear children, but with the reality of one million divorces a year involving one million children, we must find a way of encouraging and supporting the concept of two effectively functioning homes despite the fact that one of the homes is the primary home of residence. The two-home approach will only work in families where both parents can maintain an amicable relationship. It is possible for such relationships to exist between a divorced couple but they may need counseling help to attain this desireable relationship. This is another reason why all family courts and domestic relations courts should, whenever possible, provide court-connected marriage and family counseling services. Additionally, divorce courts should implement educational programs in the courthouse for divorcing parents so that these parents become more aware of the experience they are going through as well as prepare them for effective parenting during and after the divorce.
5. There is some research evidence which suggests it is not the divorce per se that hurts kids. The etiology of problems of children of divorce are more readily found in the kind of child/parent relationship that existed before, during and after the divorce. Much attention should be given to the pre-divorce parent/child relationship recognizing, however, that it is possible to considerably improve the relationship with one's child after the stresses of a dysfunctioning marriage are set aside.
6. A custody decision should be more than merely establishing a residential address for the child. The overall goal should be shared parenting. The way it is now, the non-custodial parent, usually the father, is defined by the law as a part-time parent ("you shall support your child and shall have reasonable visitation"). The mother feels overwhelmed with the implied message that she is responsible for the rest of the task of rearing their child. Both the law, as a representative of society, and society itself should in effect say to the parents that they are *both* expected to be deeply involved with their child in a responsible, caring, nurturing way. Effective parenting cannot be proclaimed by court edict alone nor can desireable human behavior be legislated. But, effective parenting can be encouraged and realized with expert educational-counseling help.
7. The language of family law is the language of criminal law and should be changed. Words like custody, visitation, award, unfit, non-custodial, all keep us connected to outmoded and inappropriate traditions. New words can link us to the future.
8. Family law courts should allow divorcing couples more self-determination. It is their lives that are involved. It is their future. They should therefore be encouraged and allowed to play a greater part in the decision-making process, particularly in matters like custody and visitation. Rather than fostering increased dependency on the court, these couples should be encouraged to accept more responsibility for decisions affecting their lives and their children. If the anger is too great; if the communication between the parties is broken down, the impulse of the court should be to refer the couples to a court-connected marriage and family counselor before proceeding with the adversary process. Let us not underestimate the ability of divorcing persons to help themselves in their crisis. Let us not rob them of the opportunity to grow with the crisis. More self-determination, when appropriate, increases the chances for this to happen.

9. Custody and visitation conflicts are interrelated. When couples need help with custody they usually need help with visitation matters.
10. A custody proceeding that focuses solely on what is in the best interest of the child is too restrictive an approach. More realistically we should also strive for what is in the best interest of the family.
11. The concept of a winner and loser has no place in custody matters. Our entire society should begin to think in terms of both families having ongoing responsibility and commitment to the child's physical and emotional welfare. The law can provide much needed leadership in moving society in that direction.
12. In family law we should start with a simple premise that lawyers and judges are not marriage and family counselors and conversely that marriage and family counselors are not judges. From this it easily follows that both the law and counseling professions should cooperate and communicate with each other to a greater degree if families, and therefore society, are to be served. The skills of both professions are needed to help families involved in the crisis of divorce, which includes not only the legal divorce but the emotional divorce as well.
13. We should listen to the father who wants custody. Historically the idea of the father getting custody is not new. The emphasis now should be on his ability to nurture, care for and protect the child, not because the child is his property or that he is the only one who can financially support the child as in former times. Women do not have a monopoly on the mother instinct—whatever that means. If there is mother instinct, there is also a father instinct.
14. Let us be more aware that custody and visitation conflicts are not usually the issues, but are often a smokescreen that hides other more relevant issues which show that one or both parties are still connected and are working on their emotional divorce although unsuccessfully.
15. The "problems" manifested by a child of divorce may not be problems specifically due to the divorce itself, but may be an aspect of normal developmental problems which are usually present in all children in various stages whether or not a divorce is pending. This should be carefully considered when one parent alleges that another parent is responsible for the child's problems."
16. The assumption is probably false that most divorcing parents can adequately deal with visitation problems. Many more probably need help with this than we realize.
17. The goal of a court in custody/visitation disputes should be to create a climate for negotiation rather than merely determining the "best" parent.

Whatever changes come about in family law, the changes will need support and reinforcement by society as a whole so that new social attitudes, values and rituals regarding divorce will be consonant with the new changes within the legal profession and counseling profession. It matters not where the changes will start—whether in the courthouse, in the lawyer's office or in society itself—as long as it begins.

—MEYER ELKIN

JOINT CUSTODY

By Anthony Salius, Director

Family Relations Division
West Hartford, Connecticut
From a paper presented at the
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Association of Family Conciliation Courts
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The generally accepted definition of the term "child custody" refers to the right of physical possession and disposition of a child by a parent or other competent person. The custodian normally has the exclusive right to determine and direct the upbringing of the child, including educational, health and religious considerations. It then should follow that the term "joint custody" be defined as a continued sharing of these parental rights and responsibilities by the parents following separation and divorce. However, a review of judicial determinations in this area indicates no clear definition of the term with the range of child care arrangements adopted under the cloak of joint custody varying almost in direct relationship to the number of cases considered. These arrangements may include physical alternation of child care, alternation of parents in the residence of the child, divided custody with each parent as caretaker for some of the children or situations resembling sole custody but including a sharing of decision-making responsibility for the children. Perhaps it is this absence of fixed criteria that is the strength of the joint custody concept, i.e., the needs and desires of the children and adults can be adjusted to "fit" the requirements of the particular situation and individual contracts between the parties can be molded to the specific needs of the family situation.

Although the concept of joint custody has long been recognized by the courts, acceptance of the concept as a viable custodial alternative appears to have increased during the past few years. This expanding acceptance would appear to arise from the combination of a number of factors:

1. In an increasing number of cases both parents have been more equally involved in child rearing than in the past. The traditional role models of parents are being modified and the sharing of child care responsibilities is more prevalent.

2. The increasing involvement of behavioral science and mental health professionals by contemporary family court systems in the decision-making process relative to children of divorce has had a significant impact on expansion of the criteria on which such determinations are made. Counseling, evaluation, conciliation and other dispute-resolution services provided by court-connected agencies have led to an increased understanding of the interpersonal relationships with the family system both for the court and the family members. For example, the staff of the Family Relations Division in Connecticut has observed that, in a majority of cases both parents are considered capable custodians and that the children in many such situations reveal attachment to both parents and a need for the guidance and supervision of each parent.

3. Modern trends, at least in Connecticut, indicate that an increasing number of men are requesting custody of their children in divorce and post-divorce proceedings. Although numerous explanations have been offered for this trend, the major factors appear to be an increasing sensitivity to the importance of their role in the child-rearing process by fathers and a growing awareness that fathers now have a realistic prospect for equitable consideration by the courts in custody proceedings. (Of those custody disputes referred by the Connecticut courts for Family Relations Division evaluation over the past five years, approximately 1,400 annually, fathers have been awarded custody in 38% of the cases with custody going to mothers in 45% of the situations. The remainder of cases resulted in third party custodial placement or divided custody and joint custody arrangements.)

4. Conversely, an increasing number of mothers have begun to acknowledge the competency of fathers to care for the children and are less resistent to fathers continuing to play a major role in the children's lives following the dissolution.

5. The ever-increasing number of post-dissolution proceedings related to custody modification, visitation problems and contempt matters would appear to be symptomatic of problems and inadequacies in our present system of custody dispute resolution.

Before discussion of the pros and cons of joint custody, it is important to explore some concerns and cautions for courts and counselors dealing with this concept and some of the factors or criteria which should be considered by the court or the parents themselves in the determination of whether joint custody would be an appropriate and realistic resolution for a particular family.

It would appear implicit, for a joint or shared custody arrangement to have a reasonable chance to succeed, that the parents have a good understanding of their respective roles in the arrangement, a sincere desire to "make it work", a basic sense of trust and confidence with each other and an ability to communicate at a reasonable level. It is difficult, if not impossible, to envision a court imposing such a resolution in a particular case in the absence of an agreement or understanding between the parents. Without such agreement, the court has little or no alternative but to award full custody and authority to one parent.

As agreement between the parents is a prerequisite for joint or shared custody such arrangements will, in the majority of instances, be a product of private decision-making by the parents. In situations where parents consider shared custody a possible alternative and have been unable to make a decision, the primary mechanism for the determination of appropriate cases for shared custody would be the mediation/conciliation process or other rational problem-solving methods. It is my opinion that, in such cases, it is through some form of conciliation counseling involving the total family unit that the possibility of custody dispute resolution through joint custody would best be identified and explored and that the education of family members relative to the arrangement is best accomplished.

Further, the continuing availability of mediation services or other forms of dispute-resolution to the family following the joint custody decision should be a primary consideration in the original determination. It should be anticipated that problems and conflicts will arise in the arrangement which would best be dealt with through private decision-making or formal dispute-resolution programs rather than through the litigation process which frequently tends to be destructive for all concerned. If such services are not available and easily accessible to the family, a joint custody arrangement may not be advisable.

Counseling or dispute-resolution services may also be helpful to the court and the family in evaluation of joint custody arrangements stipulated by couples involved in divorce proceedings but in which there may be some indication of remaining uncertainty or conflict. Such intervention may help to identify those matters in which joint custody was entered into merely as an expedient compromise to expedite the divorce proceedings with little attention given to the interests of the children. Experience in the Connecticut courts indicates that such compromises are often made in an attempt to avoid protracted litigation or making difficult decisions.

Mediation counseling in such cases may also help to identify, and resolve, those matters in which there is little prospect of a viable joint custody plan due to the personalities of or relationship between the parents or those situations in which the desires of the parents are fulfilled but where the arrangements may not be responsive to the needs and desires of the children. An example of the possible problems created for children in such an arrangement is evidenced by articles published several years ago in the New York Times and a national women's magazine describing the so-called "New Haven Plan", a joint custody arrangement entered into by a group of divorced or divorcing couples, living in close proximity and largely representing faculty members of a local university. The plan involved a nearly equal alternation of the physical residence of the child between the parents and day care services provided on a rotating basis by individuals in the group. The articles reported an interview with one of the couples in which both parents expressed profound personal satisfaction with the arrangement. However, in their description of the dynamics of the arrangement, both parents repeatedly stated that a major benefit was that when one parent was "up to here" with the child, physical residence would be transferred to the other parent and vice versa. It was readily apparent that, although both parents were pleased with the arrangement, neither was accepting any direct responsibility for the guidance and discipline of the child and that the arrangement failed to provide any substantial level of continuity and stability for the child. Although no formal study of the plan was conducted, the counseling staff at the New Haven court reported that the joint custody arrangements made under the plan were, for the most part, short-lived and subsequently revised to sole custody arrangements either by agreement of the parents or by order of the court.

Although it is difficult, if not impossible, to precisely define the types of cases which may be amendable to a joint custody resolution, it would appear, in addition to the level of parental relationship previously discussed, some major considerations would be:

1. Families in which both parents have been nearly equally involved in the care and upbringing of the children.

2. Situations where the parents may be considering a "split-custody" arrangement.

3. Cases where the parents may be contemplating an alternation in the care and physical residence of the children.

4. Situations where the proposed residential parent is encouraging the other parent to continue a full and active role in the lives of the children.

5. Wherever the interests of the children demonstrate a need for a formal recognition of the continuing responsibility of both parents.

6. Situations wherein the physical residence of the parents is in such close proximity as to encourage close parent-child contacts or where the situation of the parents relative to employment and life-styles encourages a continued sharing of child care responsibilities.

7. Although various articles have suggested joint custody as a possible "face-saving" device in some cases, (assisting a parent in relinquishing physical custody of a child without the appearance of being shown as an "unfit parent") it is my opinion that this tactic is misleading and confusing both to the adults and the children and that future problems are often created as such a compromise fails to deal with the realities and problems of the family situation.

   However, if such a compromise is determined to be in the best interests of all concerned, it should be cautioned that a written agreement be executed between the parties clearly establishing that one parent will be the primary residential parent and would have major discretion in the child's education, religious training, medical treatment and discipline.

CONCLUSION

In the final analysis it cannot be said that joint custody has been demonstrated to be a more effective arrangement for post-divorce child-care than other custodial alternatives or that it is appropriate in a broad range of cases. There is no objective information available either advocating or opposing the concept and experience indicates that it may be valid and workable only for a small numoer of families.

However, shared custody is a concept which appears to be responsive to many of the concerns, needs and desires of contemporary divorcing couples. It encourages persons to resolve their own problems and maintain control over their own lives and their children rather than surrendering decision-making power to a third party. Children are provided with an opportunity for continuing a full relationship with both parents following dissolution, minimizing the feelings of guilt, divided loyalty and loss so often observed in children of divorce. The concept is perhaps most effective in avoiding the sense of loss, powerlessness and alienation experienced by non-custodial parents where sole custody has been awarded to one parent.

With increased reliance by courts on the use of dispute-resolution techniques to resolve conflicts between divorcing families, the "win-lose" syndrome surrounding custody issues can be significantly reduced. In this framework the concept of joint or shared parenthood would continue to gain acceptance and, therefore, should be fully understood by all involved in the dissolution of marriage process. Although shared custody may not be a panacea for all cases in which child custody may be in question, it is an important alternative which should be explored and considered by parents as well as by legal and mental health professionals working with divorcing families.

THE PROS AND CONS OF JOINT CUSTODY

Prepared by
Donald A. Holub, Director
Milwaukee County Department of Family Conciliation

The term "joint custody" seems to lend itself to misinterpretation because it carries the connotation that all responsibilities for custody are shared equally. There may be an advantage to substituting the term "shared custody" for "joint custody" because it connotes the idea that responsibilities will be accepted by each parent and implies that an agreement as to who does what is in order. The term "shared custody" also seems to imply that each person's territory is respected and that the chances of conflict are thereby diminished. "Sharing" also tends to imply that the non-custodial parent can expect to be constructively involved in the lives of the children.

PROS

1. Joint custody provides an additional alternative for the Court to use in its efforts to safeguard the best interests of the children. With the increasing number of custody contests this additional alternative may be appropriate in some cases.

2. Joint custody arrangements permit the Court to more accurately reflect the present trend in our society in which both parents are expected to take an active role in rearing the children. A Court order of joint custody demonstrates to the parents that the Court recognizes that each parent has an important role to play in their children's lives. The increased feeling of parental responsibility may result in more faithful compliance with support orders and with other orders made for the welfare of the children. A joint custody order when appropriate provides the opportunity for the parents to develop the ability to manage custody conflicts and decisions on their own with less need for outside intervention.

3. Now that many states have diminished or eliminated the concept of fault in the divorce process, joint custody provides a step toward diminishing the concept of fault in the custody process.

4. A joint custody arrangement may provide more adequately for the children's needs when they have a strong attachment to both of their parents. Joint custody provides greater opportunity for both parents to have a means to provide guidance and direction for their children. A successful joint custody arrangement could decrease the feeling of loss that many children feel when it seems they have lost a parent in the divorce, and it could decrease the pressure for them to choose one parent over the other.

5. Joint custody provides the Court with an opportunity to allow more latitude for both parents to have a voice in custody decisions. The assumption is that two parents will make better decisions than one parent could make.

Joint Custody from the Child's Point of View

Jack C. Westman, M.D.*

At one time, fathers were favored over mothers in divorce child custody actions. In recent decades, the preference shifted toward mothers (Derdeyn, 1976). As a result, the idea of joint custody with equal rights and responsibilities of both parents for their children has emerged because of the slighting of the interests of fathers (Roman, 1978).

In thinking about joint custody, it is important to recognize that successful sole custody arrangements in the past have been de facto joint custody arrangements. The financial settlements and access to children in these post-divorce settlements have been based upon realistic sharing between the parents and free access to the children by each parent.

The fundamental appeal of joint custody lies in its philosophical approach to post-divorce relationships between parents and children. When one parent has legal custody and the other is on a visitation basis, there is a tendency to view the custodial parent as more and the visitation parent as less important in the lives of the children. The joint custody concept makes explicit the sharing of rights and responsibilities that have been implicit in successful sole custodial relationships between parents and children. Joint custody is a popular consideration in the minds of many who divorce because both parents can regard themselves as continuing their previous roles in the lives of their children. At a more practical level, joint custody may eliminate child support payments as well.

Joint custody, then, is a means of equalizing the rights of parents vis a vis their children. Joint custody has not been proposed by advocates for children, however, In fact, one group speaking for the interests of children has stressed the opposite: designating a single custodial parent who has complete control over the visitation program (Goldstein, 1973).

Under most circumstances, parents are in the best position to work out custody and visitation arrangements (Mayo, 1976; Milne, 1978). They know their children and life styles and are motivated to carry out their own agreements more than those imposed by a court. When they are responsible for arranging their own post-divorce relationships with their children, there also is a reduced tendency to shift their responsibilities to others. From the point of view of courts and their conciliation services, joint custody eliminates troublesome details from litigation. Although joint custody statutes usually stipulate that

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*Professor of Psychiatry, University of Wisconsin-Madison, Madison, Wisconsin.

it be granted only when in the interests of the children, an evaluation of those interests rarely occurs if there is parental agreement to joint custody.

In the case of adolescents who literally have two homes in the same community, joint custody can be a practical arrangement. At that age, youngsters' relationships with their parents are basically formed and they are able to make reasonable choices.

The experience of child psychiatrists with joint custody, however, calls attention to the fact that some parents do not foster the interests of their children. A joint custody arrangement can be a way of avoiding facing specific planning for the affected children. It also promotes the illusion that parental relationships with children can be preserved unaffected by the divorce. Overlooked in the process is the fact that divorce is a family affair and that when two spouses divorce each other, they are in effect divorcing one-half of each of their children (Westman, 1971). As much as many divorcing adults would prefer to ignore the fact, divorce forces children to split their lives between two separate lines of allegiance to each of their parents. Although divorce may create a less pathogenic home for children, divorce does force each child into a new kind of relationship with each parent. Even though successfully mastered by most, divorce constitutes a stress for affected children (Westman 1972). This consideration in itself leads many parents to find other ways of resolving their marital problems than through divorce.

Child advocates are less concerned about joint custody as a concept and more concerned about the ways in which it is implemented. The critical issues are the residential homes for children, the amount of time the children spend with each parent, and the presumed equality of each divorced parent in making decisions that affect the lives of the children.

From the point of view of children, splitting their lives between two homes and emphasis upon the equality of contact between parents and a sharing of responsibility for decision making between two divorced parents pose many practical problems. There is not enough experience with joint custody at this time to know if it really accomplishes its aim of preserving parent-child relationships. Growing clinical evidence suggests that it does not, and actually may be contrary to the interests of children. Joint custody allows parents who have already altered their child's life to further add the ambiguity of two homes, possibly with two neighborhoods and even, incredibly in some cases, two schools. The minds of some divorcing adults are so distant from the interests of their children that clinicians are called upon to point out to them that children have their own lives to lead and are not simply objects to be moved back and forth between their parents.

The flaw in the joint custody concept is that it assumes that each parent can play an equivalent role in a child's life after divorce. This springs from the wish of parents to preserve their pre-divorce relationships with their children after separation. Ignored, however, is the fact that separation inevitably alters the nature of parent-child relationships. As one 14 year old boy put it, "If Mom and Dad both want my custody and want the best for me, why are they getting a divorce?"

Joint custody can be sought by parents as a means of avoiding facing the fact that divorce does change relationships between parents and children. The thought of joint custody can temporarily ease the pain of separation, but inevitably the fact must be faced that the parent living with a child initially plays a more significant role than the separated parent in that child's life. We find that parents seeking joint custody sometimes really are ambivalent about their divorce and are trying to "have it both ways" through separation from their spouse with the hope of not altering their relationships with their children. Furthermore, joint custody can be a way of maintaining a remnant of the marriage through the children to the disadvantage of all parties.

To further compound the problem, joint custody is often sought when there are young children. Prior to the elementary school years, shifting from one home to the other, even when arranged at yearly intervals poses the trauma of separation from a beloved parent periodically. Attempts to resolve them by shifting living arrangements to a weekly basis accentuate the problem since the experience of separation for young children is felt nightly. To illustrate the way in which parents may be insensitive to the impact of weekly transfer on children: a three year old boy was moved from one parental home to the next every other week, and although he was experiencing nightmares and a regression in personal habits, this was disguised by the tendency on the part of each parent to blame the boy's reactions on the time spent with the other parent.

All of this highlights the fact that a joint custody arrangement requires the utmost in harmony and ccoperation between two adults who are divorcing each other because of incompatibility. To further complicate the matter, children may express their resentment over the fact that their parents have divorced by manipulating each parent against the other (Westman, 1970).

The problems with joint custody grow with the passage of time. From a child's point of view, the joint custody arrangement contains the potential for disillusionment. Since it is likely that mature people resorting to divorce will remarry others, the remarriage of one spouse or both add step-children to the picture. Consequently, the preservation of a substantial relationship with the children of a previous marriage poses

significant problems in the integration of a new family unit. When one parent or the other inevitably is unable to maintain an "equal" role in the life of a child, maintaining the facade of joint custody belies the dilution of the pre-existing child-parent relationships.

The major problems with joint custody lie in splitting residential living. For growing children, stability and continuity of home and neighborhood arrangements is a primary consideration. It is obvious that continuity of a child's school experience and peer relationships are important. The task of growing up is difficult enough if one has a single set of parents, home, neighborhood and school. Honoring these considerations for children would mandate that the establishment of two homes be such that the school and peer group experiences not be altered. It is true that many children, because of our mobile society, experience moves from one neighborhood or city to another. This is a fact of life to which many children must accommodate, but is not an expression of furthering their developmental interests.

If we look at post-divorce parent-child relationships from a child's point of view, it is clear that free access to contact with both parents is both desired by children (Rosen, 1978) and advantageous developmentally. Free access to parents, however, does not mean adjusting to two homes, two neighborhoods and possibly two communities.

Joint custody also can be used when divorcing parents distrust each other. Neither parent wishes to relinquish the child to the other. Rather than resting upon mutual respect between the divorced parents, the arrangement is an expression of lack of confidence. Shifting children back and forth between such homes is an invitation to exploitation of the child by each parent and the manipulation of parents against each other by the children as well.

When parents are committed to the interests of their children, are able to work harmoniously in post-divorce arrangements, and mutually respect the relationships of the children with each other, the designation of one parent as the primary custodian with an open, amicable communication channel for promoting the children's interests with the separated parent meets the interests of the child. The stability of their home life, peer relationships and school can be preserved while their relationship with the noncustodial parent is fostered. This is de facto joint custody which also allows for the likelihood that relationships with one parent or the other inevitably will be attenuated with the passage of time. When parents divorce, they are electing to follow different life paths, and it is most unlikely that each of their children will remain central in their life priorities. From the point of view of the affected children,

it is preferable to recognize this openly than to maintain the fiction of equal commitment on the part of both parents to the children.

Although often outweighed by parental considerations, it is necessary to point out that, especially when parents can maintain harmonious post-divorce relationships, the affected children wish that the divorce had not taken place at all. It is evident that under most circumstances, post-divorce harmony is not possible between the separated parents, and that fact in itself precludes joint custody. Furthermore, there are circumstances in which the interests of children are served by the limitation or even elimination of contact with one parent against the wishes of that parent (Benedek, 1977).

Of greatest concern is the fact that children are remarkably adaptable to life circumstances. It is well known that even when physically abused by their parents, children seldom complain. The reports of successful joint custody arrangements in which children are moved back and forth between two homes are not based upon an analysis of the long term impact of these arrangements on the children. Most of the sanguine reports are from the parents' points of view. The fact that children do not vocally protest or even behaviorally reflect their discomfort does not mean that long range repercussions from these arrangements will not occur. It is this fact that makes child advocates question the enthusiastic early reports of parents regarding joint custody arrangements.

In conclusion, philosophically it is desirable to approach all divorce arrangements regarding children with the expectation of preserving both parents' rights and responsibilities. The automatic presumption in the past of the primacy of one parent over the other has contributed to many unsatisfactory post-divorce arrangements for children. In that light, the idea of joint custody is appealing. The problem, however, lies in implementation. The conceptual advantage of joint custody breaks down when the realities of divorce are examined. Because of changing life circumstances, one parent or the other usually plays a greater role in the lives of affected children. The fact is that when a family is broken up through divorce, the relationships between parents and children are inevitably altered, rarely equally.

If the spirit of statutes enabling joint custody were followed,

> "the court may give the care and custody of such children to the parties jointly if the parties so agree and if the court finds that a joint custody arrangement would be in the best interests of the child or children (State of Wisconsin, 1977)."

joint custody could be used as a means of furthering the best interests of children. In most instances when parents agree to joint custody, however, there is no judicial review of whether or not the interests of the children would be served. Under most circumstances, therefore, it is likely that sole custody is the most realistic post-divorce settlement from the point of view of affected children. The impact of joint custody on children remains to be determined. Whether or not the interests of affected children are served will depend upon the maturity of the parents, not the legal arrangements.

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For access to both parents see:
Lewis vs. Lewis 302 SW 2d 861, 863(5)
Lambert vs. Lambert 222 SW 2d 544, 548(6).

Instilling fear and mistrust into children toward the other parent see:
S___V. G___ 298 SW 2d 76, 77(13)
Leethans vs. Leethans 243 SW 2d 801, 803
Rone vs. Rone 20 SW 2d 545, 549
Kiplern vs. Kiplern 227 SW 894(2).

"Where neither parent is unfit, best interest of the child will be served by arrangement which will enable such childs association with both parents, if one parent allienates the other." 394 SW 2d 437.

The nations future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of toungs, rather than any kind of autnoritive selection." Tinker vs. Des Moines School District 393 US 503, Page 512.

There are two basic policies to be acnieved in granting visitation privileges to a parent who does not have custody; the right of the child to the emotional, social and learning benefits of a stable relationship as is possible with both of the parents and the right of the parent to know and share the love of the child.
Oregon Court of Appeals 8-17-74, RE: Marriage of Delf 582 P2d 96.

arenthood is a continuing bilateral responsibility and opportunity It cannot be avoided or successfully divided. A decree of divorce offers no excuse or alibi for the abatement of parental interest or obligation. The dissolution of the marriage contract, leaving in its wake children who are the innocent victims of the resultant broken home, should be a challenge to the fathers and mothers of such children to make an even greater effort to minimize, as far as possible, the incidental and unavoidable losses of love, council and guidance.
McBetrick vs. McBetrick 284 P2d 352, Oregon.

"Whoever may have custody, it is the duty of each parent and each family member to the children to set aside personal feelings and act in a manner which is supportive of the relationship of the children to the other parent."
Warren vs. Warren 528 P2d 1088, Oregon 1974.

Also see:
Delgado vs. Fawcett 515 P2d 210 Alaska 1973.
Ward vs. Ward 353 P2d 897 Arizona 1960.

Concerning children, custody and education see.
Conley vs. Wolen 533 P2d 955, Montana, 1975
RE: Dobbs adoption 531 P2d 303, Washington, 1975
Winters vs. Winters 223 NW 2d 166 Iowa.

Child Custody Contests in Historical Perspective

BY ANDRE P. DERDEYN, M.D.

The author reviews the historical background of interparental child custody disputes. The father's superior right to custody in the nineteenth century continued the English common law tradition, but in the twentieth century the mother's claim became superior to the father's, reflecting women's generally increasing rights and the assumption that women are better suited to caring for children. Partly as a result of recent cultural changes leading to a beginning equalization of parental rights and partly because of greater concern for children, courts are starting to focus more on children's emotional needs. It is likely that courts will increasingly call on psychiatrists and other mental health professionals for help in making their decisions.

CONCERN FOR CHILDREN involved in interparental custody contests has recently been increasing. Efforts to change court practices to conform to the needs of children and to improve both the quantity and the quality of psychiatric consultation reflect this new interest.

Knowledge of the historical background of child custody contests affords some perspective on the current trends for change. This paper will touch briefly on practices in the older Western world and will treat in detail developments in the United States up to the present time.

PRACTICES IN THE OLDER WESTERN WORLD

Roman law gave the father absolute control over his children, whom he could sell or condemn to death with impunity (1). This concept of absolute right carried over into English law, where it prevailed until the fourteenth century without appreciable change (2). In the Middle Ages childhood was not seen as the unique phase of life we now consider it to be (3). It was customary to send children as young as 7 into service or apprenticeship, where learning was secondary to the labor a child performed for his or her master (4). The child and the servant appear to have been indistinguishable in terms of how they were treated, even the language often failed to use separate terms for each (3, p. 366). It was not until the sixteenth century that children began to be looked on as being of particular interest, having important and specific developmental tasks to perform, and being worthy of affection.

In eighteenth-century England the father's right to custody was almost without limit (5). Because the father owned or managed all of the family property, there was the practical consideration that, should the child be removed from the custody of the father, the financial support of the child was in question (6). However, the idea began to evolve that custody involved not only rights but also responsibilities for the care of the child. The English courts assumed jurisdiction over the welfare of children under the developing doctrine of parens patriae, which held that the Crown should protect all those who have no other protector (7). Percy Shelley in 1817 was one of the first men to lose custody of his children (8). Custody was refused because of his "vicious and immoral" atheistic beliefs.

The doctrine of parens patriae was given substance in 1839 in Talfourd's Act, which gave the court the power to determine custody of infants under the age of 7. The right of the mother to custody in England was gradually increased in a series of acts until the Guardianship of Infants Act of 1925 proclaimed the equality of the mother and father with respect to the custody of their children (9). It was at about the same time that such equality was achieved in the United States.

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Dr. Derdeyn is Associate Professor of Psychiatry and Pediatrics and Training Director, Division of Child and Adolescent Psychiatry, University of Virginia Medical Center, Charlottesville, Va. 22901.

The reader should compare the position of the father of past time as revealed by this article to the current day. Today's father is held in slavery and degradation by today's in power authorities, the court system, the legislature, our society and cultural thinking.

SURVIVING THE BREAKUP

How Children and Parents Cope with Divorce

Judith S. Wallerstein

and

Joan Berlin Kelly

Basic Books, Inc., Publishers *New York*

to substitute for lacunae within the family structure, nevertheless, even if we regard such services as supplementary or secondary, the divorced family is at high risk when it stands alone.

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.

Building Blocks for Constructing Preventive Intervention

We began this work with the conviction that divorce is and should remain a readily available option to adults who are unhappily married. 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 and in providing a knowledge base in the real experiences of divorcing families for informed parenting as well as for improved legal, educational, and psychological interventions which can prevent, or at least mitigate, unhappy and psychopathological outcomes for the children.

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

Joint Custody

After 11 months, how is the new law working?

By Kathryn Eaker
Bee Staff Writer

"IF YOU HAD TOLD ME a year ago that I'd like joint custody, I would have told you, 'You're a fool!'" laughed Evelyn.

Elsewhere, Barbara declared: "We can deal with each other on a business-like basis, cooperating in a parental role — as long as we keep our personal relationship out of it."

Evelyn and Barbara are two Sacramento mothers who were forced by their ex-husbands, who had the law on their side, to share the physical custody of their children.

After their marriages ended in shards, both women, fearing that frequent contact with their ex-mates would only bring renewed warfare, rejected their husbands' demands to share custody of the children. Yet today both Barbara and Evelyn (not their real names) are champions of joint custody, which became California law in January. There are others who think the joint custody law has worked well in its first 11 months; a few others think it's too early to say.

Hugh McIsaac, president of the Association of Family Conciliation Courts, says "the major effect of the joint custody law is that it helps kids go through divorce. In 80 percent of the cases, kids break up over the parent who is out of the home. It is critical to maintain that contact." The thrust of joint custody, McIsaac explains, is "how can both of the parents, in a way that makes sense, bring this child to maturity as a healthy, caring human being?"

Although the following two true stories involving Sacramento families are not intended to be representative of all the ramifications of joint custody, they illustrate the power of the law to convert solid resistance to staunch support for a radical change affecting the children of divorce.

One afternoon in July, 1976, before her husband came home from work, Evelyn packed up her four-year-old son and walked out of a seven-year marriage. Angry and bitter after years of battling, she wanted nothing more to do with her husband.

She filed for divorce. Despite her husband's protests, she was awarded sole custody. Her husband, Ellis, a communications technician, was required to pay $250 a month alimony, $250 a month child support and was given visitation rights every other weekend and alternate holidays.

"I wanted custody at that time, but didn't have a chance," recalls Ellis. Last fall, anticipating passage of the joint custody law, he began proceedings for modification of his custody decree.

IN MARCH, Evelyn and Ellis met with a Family Court Services counselor to mediate the dispute.

Evelyn, who had never heard of joint custody, arrived ready to fight again for sole custody. "When Ellis walked in with a petition and plan for joint custody, I hit the roof. I had sole custody and I intended to keep it.

"I thought, 'I'm not going to put the kid through this.' Our son, Bobby, had had psychiatric therapy, and I felt that the arrangement Ellis was asking for, one week with him and one with me, wouldn't be good for him." She also objected to Ellis' demands that he meet and approve all babysitters and that she have no men in the house.

The counselor asked Evelyn, "What would be a reasonable joint custody arrangement for you?"

"I haven't given it a thought," Evelyn replied testily. "All I could think of was that joint custody would mean fighting with Ellis, and if I'd wanted that, I would have stayed married."

Furthermore, Evelyn was worried about whether Ellis "could raise a child." He was 48 when Bobby, his only child, was born. She questioned his judgment.

Ellis claims that his ex-wife would have rejected the idea on the spot, but the counselor made it clear that if she didn't cooperate she could lose custody altogether.

So despite the rough start, and with "excellent" counseling, Evelyn says she and Ellis established a goal: "Let's make things as easy as possible for Bobby."

Under the new custody arrangement, Ellis has Bobby every other weekend, plus three months in the summer. During summer vacation Ellis assumes the every other weekend privileges.

But that change is only a pale reflection of the radical difference in their lives.

"I'm a father again," Ellis says, smiling broadly. "Before, I was just someone who visited once in a while, and I could never say anything about Bobby. Now Evelyn recognizes me as an equal, she views me differently."

THROUGH THE COMMUNICATION and cooperation developed by sharing the rights and responsibilities of rearing Bobby, Evelyn says she and Ellis have become supportive friends. "We didn't communicate this well when we were married," she laughs. They freely phone to discuss Bobby's problems, "neither of us blaming the other," and, ironically, at times they find themselves a united front combating Bobby's attempts to manipulate them.

Moreover, the sharing has gone beyond the legal agreement. Evelyn recently started a new job that requires working evenings. To spare her babysitting fees, Ellis picks up Bobby after work every school day, prepares dinner and helps Bobby with his homework until his mother comes for him.

Says Evelyn, "This is the best decision for all three of us that we could have made."

Bobby, a shy, quiet third-grader, says he is happy that he sees more of his father and that the fighting has stopped. He recently expressed his feelings in an invitation he wrote at school:

Dear Mom,

Dad and you are getting good together. Mom, will you please invite my dad to my first communion. I want you to go together.

Love, Bobby

THE CONDITIONS under which the other family hammered out its joint custody arrangement were wretched, and in some respects the family is still reeling from the experience.

For nine months after Barbara filed for divorce, she and her husband, Steve, and their two young sons continued to live under the same roof in an atmosphere acrid with condemnation and guilt, tongue-lashings and icy silences, fear and pain.

But Barbara, a state accountant clerk, was afraid to leave. She doubted that she could support herself and the boys on her $1,000-a-month salary, and she was worried about being charged with desertion.

And Steve wouldn't budge unless Barbara agreed to joint custody and his support proposal.

Barbara says she fought joint custody because she is a traditionalist who believed that children belong with their mother and because she couldn't be convinced that shuttling children back and forth week after week would be good for them.

Counseling, books and hours of soul-searching allayed some of her fears, but still she was concerned about dealing with her husband after so much gall had poisoned their relationship.

That problem didn't bother Steve. "It's a myth," he insists, "that you must be friends for joint custody to work. You just have to work out the rules on how you are going to conduct the business of co-parenting."

An active member of Equal Rights for Fathers and tireless worker for passage of the joint custody law, Steve successfully delayed court action on the divorce until the law went into effect.

FACED WITH the proposition of losing custody altogether or accepting joint custody, Barbara acquiesced.

Today she has a small apartment within minutes of the family home that Steve refinanced for himself and the children. He has the boys one week, she the next, an arrangement the four of them worked out together, and one that appears to satisfy everyone.

After five months of joint custody, Barbara admits it is working well. "The children have us equally in their lives. If you don't share in this much of your children's lives, you lose too much of their growing up."

Moreover, she contends that joint custody relieves children of guilt and helps them adjust to the breakup. "Of course the boys go through an adjustment every week," she says, "but they're super."

Another reason Barbara says she likes joint custody is that sharing the burdens and responsibilities of rearing the children leaves her time and energy to rebuild her life.

But the arrangement has kinks. Verbal recriminations continue to punctuate conversations, and the boys complain that their parents at times use them as messengers to avoid communicating.

But despite that — and the fact that they get tired of packing and unpacking their clothes — Michael and Jim say they like the arrangement "because we get to see them both the same."

And both boys express relief that the fighting is over.

ACCORDING TO McIsaac, "Anything we can do to diminish the fighting is good. It is like we (professionals) just recognized that divorce is happening and are for the first time giving support to the families as they reorganize. In the parental role, no divorce takes place. That must continue."

Some psychologists, attorneys and judges question the ability of parents to cooperate after divorce when they couldn't get along while married.

But Brinkley Long, director of Sacramento County Family Court Services, notes that "parents who try joint custody find there are levels on which they can communicate."

Critics claim that children need one full-time parent, not two part-timers.

McIsaac counters that with 38 percent of all marriages ending in divorce, 60 percent with children under the age of 12, we are creating a new family system — the bi-nuclear family. "The law is just beginning to catch up with reality," he said.

Although 13 states now have joint custody laws, California alone gives it preferred status. The legislation's sponsor, Assemblyman Charles Imbrecht of Ventura, says that the response to the change has been favorable, but he believes it is still too soon to judge the impact. "We'll look at it at least another year before deciding if it needs refinement," Imbrecht says.

Initiating

JOINT CUSTODY PLANNING

Encouraging & facilitating joint physical & legal custody plans.

California's new Civil Code Sections 4600 and 4600.5 (Chapter 915 of the Statutes of 1979) propose joint legal and physical custody as an initial preference in a logical progression of choices for custody decisions concurrent with divorce of parents.

For good reason the law dictates no plan requirements.
Parents create their own joint custody plan.

The statute does not specify detailed plan preconditions on the assumption that the diversity of American culture as well as family-initiated solutions should not be limited to the perception of the legislation's authors at the time of the measure's passage. Instead, the statute is designed to encourage voluntary and cooperative plan preparation as divorcing parents assume that the initial consideration of the court will be joint custody prior to consideration of sole parent custody.

Also, a plan can be required before decreeing sole custody.

A parent who prefers not to participate in joint custody is cautioned that, unlike practice prior to Chapter 915 of the Statutes of 1979, the court is empowered to require a sole parent custody implementation plan in advance of the court's custody order as a means of discerning how cooperative a sole custodian parent is likely to be in facilitating frequent and continuing contact by the child with a non-custodial parent. Demonstration of a lack of cooperation, or submission of a sole parent custody implementation plan that foretells curtailment of "frequent and continuing contact" could jeopardize and potentially preclude a court order of sole custody to that parent.

Initiating the planning process.

How do Civil Code Sections 4600 and 4600.5 initiate the joint custody planning process?

At the time of, or prior to divorce hearing, each parent has the opportunity to submit, independently, a tentative outline of his/her personal preferences for the administration of joint custody issues. A submission of the tentative outline is similar to the present procedure of submitting a Form 1285.50, Financial Declaration, in advance of hearing. The tentative joint custody plan outline is for use by private or public-agency counselors, intermediaries, or the court. Parents need not compare their separate proposals in advance of hearing unless they desire to do so on the expectation that mutual consultation in advance will facilitate the court's process.

Source: James A. Cook, 10606 Wilkins Avenue, Los Angeles, California 90024

Advantages of submitting joint custody preferences.

Independently submitted joint custody preference outlines, from each parent, have the following advantages:

- Giving evidence to the court of how cooperative each of the parents is likely to be in administering a joint custody plan.
- Providing information, in advance and possibly not previously available, on how each parent envisions conducting co-parenting.
- Relieving the court of dictating decisions that could be unacceptable to one or both parents.
- Providing a clue to preferences of each parent and a means of discerning which preferences coincide. Consequently, preferences upon which there is agreement need not become issues of contention.
- Winnowing-out for further discussion the remaining joint custody implementation plan preferences on which there is disagreement.
- Providing a priority ranking system to assist in the negotiation of those joint custody implementation preferences upon which there is disagreement.

Accommodating changes.

Child custody encompasses years during which children are maturing, needs and interests are changing, and the economic circumstances and other responsibilities of parents may also be changing. Therefore, custody plans created by this statute are not intended to be rigid, categorical or without evolution. By avoiding itemization of specific prerequisites within the statute, California's child custody statute of 1979 avoids making adherence to, or interpretation of, a custody plan an additional or substitute focus for the parents' animosities.

The purpose of custody planning within the statute, on behalf of the child's best interests, is to encourage negotiation in a spirit of cooperation and accommodation and to minimize accusation or the imposition of unnecessary restraints upon the options parents may envision for conducting joint custody.

The statute facilitates the resolving of joint custody issues by parents without state-directed impositions in matters of personal preference.

Customarily, child custody encompasses decisions regarding, but not limited to:

Medical care | Education | Religion | Residence | Travel | Support

MEDICAL CARE

Propose names of doctors or clinics available or intended to use.

_____
_____
_____

Will you permit and encourage communication by the other parent with doctors and clinics?

Yes ___ No ___ Comment:

Would you be willing to grant either parent the ability to make medical decisions in emergencies when both parents are not available?

Yes ___ No ___ Comment:

Would you provide advance notification to the other parent about proposed and forthcoming medical care?

Yes ___ No ___ Comment:

Would you offer to participate in medical care costs?

Yes ___ No ___ Comment:

EDUCATION

In considering response to the educational questions, it is not necessarily essential that a child remain exclusively in a particular school, especially if grade curricula is uniform in an educational system.)

If education is now in progress, do you offer to assure continuity of schooling?

Yes ___ No ___ Comment:

Would you exchange information of educational deficiencies or strengths?

Yes ___ No ___ Comment:

Would you make available the opportunity for the other parent to visit teachers?

Yes ___ No ___ Comment:

Indicate schools (and locations) available for present and next grade.

Name:
Address:

Name:
Address:

RELIGION

(The following does not purport to imply that the court either favors or discredits the response to questions on religion. Instead, the questions are posed to aid parents in recognizing and accommodating each others preferences.)

Are you interested in and willing to assume a religious education responsibility?

Yes ___ No ___ Comment:

Do you have a religious preference for each child?

Yes ___ No ___ Comment:

Do you have alternate preferences? Itemize

_____
_____
_____
_____

TRAVEL COSTS

Offer a solution to the child's travel costs if one or the other parent moves from, or is no longer resident in the original home locality.

For instance, should the parent moving from the county of original residence be required to pay travel costs to and from the alternate parent's residence?

Yes ___ No ___ Comment.

Should travel costs be apportioned based on income and ability to pay?

Yes ___ No ___ Comment:

Will you assume travel costs of the child to fulfill residence with the alternate parent?

Yes ___ No ___ Comment:

SUPPORT

Initial inquiry to determine the assumption of child support costs.

Alternatives:

Will you assume all child support costs?

Yes ___ No ___ Comment:

Will you assume all child support costs while the child is resident with you?

Yes ___ No ___ Comment:

Will you participate in sharing of child support costs based on need and ability of each parent to pay?

Yes ___ No ___ Comment:

If costs are shared or allocated, will you provide a monthly itemization of actual support costs?

Yes ___ No ___ Comment:

Itemize anticipated child support costs by item on monthly or yearly basis:

RESIDENCE SCHEDULE

(Indication of where the child is resident, either on an alternating basis or consistently, and the sharing of significant calendar dates.)

Under the present statute it is no longer necessary to use the term 'visitation' with its connotations of superficiality, brevity, condescension or permission. A few parents may, or may not, wish to designate a primary and a secondary residence for the child but this ranking is not necessary for those parents establishing equality in joint custody.

Indicate preference and proposals for sharing residence.

Not all schedules need to indicate an exactly equal sharing of time, and you are encouraged to propose time schedules that are practical, realistic, and suitable for your personal schedule as well as accommodating to the probable schedule of the alternate parent.

In exchanging and allocating time available, consider not only alternate days, but alternate weeks, months, seasons or years as well as the sharing or trading of holidays.

In general, how would you prefer to apportion:

The school year?

The vacation season?

Are the following days important in your scheduling?
(Note: Many of these dates have not heretofore been alternated in conventional custody/visitation decrees with omissions occurring by intent or oversight. This list is intended to rectify an observation of non-custodial parents that many of these dates were omitted entirely from former visitation schedules.

Yes	No	Date	Preferred resolution
		Child's birthday	
		Your birthday	
		Christmas	
		Hannukah	
		Special religious dates	
		Winter vacation	
		New Year's Eve & Day	
		Washington's birthday	
		Lincoln's birthday	
		Valentine's Day	
		Spring (school) vacation	
		Memorial Day	
		Independence Day	
		Labor Day	
		Halloween	

continued on page 7

Yes	No	Date	Preferred resolution

continued from page 6

Thanksgiving Day
Thanksgiving Holiday
Mother's Day
Father's Day
Other relatives' birthdays
School or teacher-convenient days off

Are there events, club meetings, obligations or opportunities you would like to accommodate on behalf of the child? Itemize.

REMAINING ISSUES

Are there issues or considerations of particular importance to you, which have not been previously itemized, that would be helpful to you and to the child if indicated in a joint custody plan?

Itemize, comment:

While not as critical to the underlying functioning of an implementation plan as the items previously indicated, the following are secondary issues that will help both parents toward implementing joint custody.

Do you agree or permit that yours is not the only acceptable and satisfactory way to raise children?

Comment:

Do you recognize that the part-time absence of your child, and joint custody, is not a denunciation or derogatory reflection of your ability to parent?

Comment:

Will you substantiate w th your child and with your other contacts that joint custody has established two equally valid homes?

Comment:

Do you agree not to estrange your child from the other parent?

Comment:

Will you respect the other parent's right to opinions and a reasonable freedom of action when with the child?

Comment:

Do you recognize that other people have differing philosophies and that it is permissible for a child to experience and evaluate these philosophies for themselves?

Comment:

If brothers and sisters are also involved, how would you prefer the relationship, residence and other activities be coordinated?

Comment:

How would you approach situations that conventional families usually attend together, such as graduation, recitals, athletic performances, etc.

Comment:

Will you facilitate the child's contact with grandparents?

Comment:

Communications

Describe the level of involvement you can tolerate with the other parent in joint custody implementation.

Comment:

Do you anticipate that your level of tolerance with the other parent will change, and under what possible circumstances?

Comment:

Is oral communication between parents satisfactory for you?

Comment:

Will you require written confirmation of verbal agreements?

Comment:

Will you facilitate telephone calls or chats by the child with the other parent during those times when the child is resident with you?

Comment:

Parenting and Services

Each parent has a different quotient of parenting skills, and varying degrees of interest and effectiveness in parenting skills. For realistic and efficient co-parenting both parents are well advised to recognize and admit these variations without rancor, ridicule or judgement. Insofar as parenting:

Which parenting task do you believe you do best?

Which tasks do you perform least well?

Which services and responsibilities would you most like to assume?

Which would you like least to do?

In making joint custody work, which service or consideration or task would you most like the other parent to do?

If baby sitting or equivalent service is needed, will you give the other parent the first opportunity to do so before selecting or engaging an individual other than the parent?

(Prior to enactment of Chapter 915 (AB 1480), Statutes of 1979, and for no discernible or equitable reason, one parent most often had to assume the expense and inconvenience of picking up and delivering the child so that the child had access to the other parent during "visitation." Since the new statute redresses the imbalance in such relationships, the following question is asked:)

Will you, or can you, pick up and deliver the child to the other parent as frequently as the same is done for you?

Financial (other than child support)

Do you believe your joint custody situation calls for a budget and a mutual understanding about that budget?

Comment:

Do you have preferences or intentions about financial savings for the child?

Comment:

Discipline

Do you have opinions about the child's safety that you would like to guarantee or convey to the other parents?

Comment:

Do you have preferences and opinions about manners, deportment, and how the child behaves that you wish to convey?

Comment:

Do you have proposals or preferences regarding punishment?

Comment:

Will you honor the joint custody implementation plan even though a child's remarks may be counter to the other parent's preferences?

Comment:

Will you concur that if the child is upset at circumstances in one home that they can't merely pick up and move to the other house without communication between the parents?

Comment:

Decisions

Will you agree that the parent having day to day jurisdiction can make decisions of the moment?

Comment:

Do you believe that substantial decisions of longer term consequence should be resolved by consensus?

Comment:

Dispute

Do you have fears or apprehensions about joint custody not working?

What are they:

Do you believe that a plan should be subject to periodic review?

Comment:

Will you permit input about the plan from the child, even if the child's observations are critical of your preferences?

Comment:

Will you participate in property and custody settlements out-of-court?

Comment:

Would you be amenable to mediation or arbitration in case of serious custody dispute?

Comment:

Information and Records

Civil Code Section 4600.5 (g). Chapter 915, Statutes of 1979, prohibits a custodial parent from prohibiting access to records and information by a non-custodial parent.

So that each parent may anticipate which records and information regarding the child are likely to be desired by the other parent, indicate which of the following are of interest to you.

Medical
Dental
School
Religious

Diet
Rest
Living & sleeping accommodations
Clothing
Pets

Other

Camps
Clubs
Cultural or extra-curricular activities
Friends & associates

Hobbies & interests

Work
Income

Not every question can or need be fully answered.

The intent of this exercise is not to imply that every consideration needs to be resolved before joint custody can be implemented.

Instead, the intent of these questions has been to focus your attention on the practical considerations of implementing joint custody and to do so without the antagonisms or apprehensions that frequently accompany divorce.

Finally, our intention has been to demonstrate that since there is such a wide range of considerations (no single item need be crucial) parents are encouraged to be flexible and accommodating in recognizing each other's preferences and needs.

APPENDIX A

CALIFORNIA

on]

date of the filing of the joint
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the marriage, and such final
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shall send a notice of entry of
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gations]

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new trial.

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ient made pursuant to Section
e marriage, upon proof that the
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d (a); (2) substituted "the" for "such" after
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ded by an earlier chapter, ch 627. See Gov

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rochure, the contents and form
Council, describing the require-
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al Council in both English and
age, all the following:
) consult an attorney regarding
he services of an attorney may
group or prepaid legal services,
on this brochure which is not
proceedings under this chapter.

[8 Civ Code]

California

(c) A concise summary of the provisions and procedures of this chapter and Sections 4514, 4530, and 4531.

(d) The nature of services of the conciliation court, where available.

(e) That neither party to the marriage can in the future obtain spousal support from the other.

(f) A statement in boldface type to the effect that upon entry of the final judgment, the rights and obligations of the parties to the marriage with respect to the marriage, including property and spousal support rights, will be permanently adjudicated without right of appeal, except that neither party shall be barred from instituting an action to set aside such final judgment for fraud, duress, accident, mistake, or other grounds at law or in equity, or to make a motion pursuant to Section 473 of the Code of Civil Procedure.

(g) That the parties to the marriage retain the status of married persons and cannot remarry until final judgment dissolving the marriage is entered.

(h) Such other matters as the Judicial Council may deem appropriate.

Added Stats 1978 ch 508 § 2.

§ 4600. [Custody order: Consideration of child's wishes: Order of preference: Pleading and finding before award of custody to person(s) other than parent, and exclusion of public from hearing]

(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 interests 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.

Amended by Stats 1972 ch 1007 § 1; Stats 1979 ch 204 § 1, ch 730 § 13, operative January 1, 1981, ch 915 § 3.

Amendments:

1972 Amendment: Deleted ", but, other things being equal, custody should be given to the mother if the child is of tender years" after "child" in subd (a).

1979 Amendment: (1) Substituted subds (a) and (b) for the former first paragraph which read:

"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 such child during his 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 his wishes in making an award of custody or modification thereof. Custody should 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."; and (2) redesignated the former second paragraph to be subd (c).

Note—Stats 1972 ch 1007 also provides: § 3. The amendments made by this act shall not be construed to affect any judgment or order made prior to the effective date of this act.

Note 2—See note following § 4600.5.

Law Revision Commission Comment:

Section 4600 is amended to add the last sentence to subdivision (a) and to make a few nonsubstantive changes. The addition of the last sentence to subdivision (a) makes clear that a nomination under the new Probate Code provisions is to be considered and given due weight, regardless of the nature of the custody proceeding.

Family Law Rules CRC Rules 1201 et seq.

Witkin Procedure 2d pp 330, 2358.

Witkin Summary (8th ed) pp 4531, 4587, 4590, 4594, 4598, 4599, 4510, 4610, 4615, 4641, 4673, 4675, 4678, 4680, 4682.

Cal Jur 3d Family Law §§ 205, 229, 232, 235, 237, 238, 243, 771.

6 Am Jur Proof of Facts 2d 499, Change in Circumstances Justifying Modification of Child Custody Order (§§ 7–23, in general) (§§ 26–46, proof of remarriage of noncustodian) (§§ 35–46, proof of remarriage of custodian).

Child custody litigation, 22 Am Jur Trials, 347.

The expanding role of the juvenile court in child custody disputes, (1975) 63 CLR 236.

Hitchens and Price, Trial strategy in lesbian mother custody cases: the use of expert testimony, (1978–1979) 9 Golden Gate U LR 451.

Custody rights of unwed fathers, 4 Pacific LJ 922.

Review of Selected 1979 California Legislation, 11 Pacific LJ 478.

Custody rights of unwed fathers; prefer
New trends and requirements in adopti
The evolution of California's child c
Southwestern U LR 1.
Role of child's wishes in California cust
Modern status of maternal preference r
Effect, in subsequent proceedings, of pa
in support or custody order made inc

1. De

De facto parents, such as foster pare
be permitted to appear as parties in juv
proceedings to assert and protect their
est in the companionship, care, custody
agement of the child involved. The juv
in a dispositional hearing must undert
cious appraisal of all available evidence
the child's best interests," including an
of the relative merits of alternati
awards, and Civ. Code, § 4600, pro
when an award of custody to the paren
detrimental, next in order of prefere
"the person or persons in whose home
has been living in a wholesome and stab
ment." B. G. In re (1974) 11 C3d 67
Rptr 444, 523 P2d 244.

Reversal of a juvenile court order
two children as dependent children of
and denying their mother legal and ph
tody was required, where the court
finding that an award of custody wa
where the court made no finding that a
custody to the mother would be detri
the children as required by Civ. Cod
before an order may be made awarding
a nonparent as against a parent, where t
of the court strongly suggested that it c
question of custody solely on the basis o
interests" of the children, without ap
principle that an award to a parent is th
disposition, and that a contrary result
showing that such custody would b
harmful to the child, and where it se
case as closely balanced, with each
custody award presenting both advar
disadvantages. B. G. In re (1974) 11 C3
Cal Rptr 444, 523 P2d 244.

Civ. Code, § 4600, relating to custo
dren and enacted as a part of the P
Act, governs custody awards in juve
proceedings. The Legislature's specifica
statute that it applies to "any proceed
there is at issue the custody of a mi
demonstrates that it was enacted to
objective of providing a uniform rule fo
proceedings in which custody questio
litigated. B. G. In re (1974) 11 C3d 67
Rptr 444, 523 P2d 244.

In enacting Civ. Code, § 4600, which
the former requirement for awarding th
of a child to a nonparent as against a p
the parent be found "unfit" and substit

such filing, the court shall, except in exceptional circumstances, enter an order awarding temporary custody in accordance with the agreement or understanding, or in accordance with any stipulation of the parties. In the absence of an agreement, understanding, or stipulation, the court may, if jurisdiction is appropriate, enter an ex parte order, set a hearing date within 20 days and issue an order to show cause on the responding party. If the responding party does not appear or respond within the time set, the temporary order may be extended as necessary, pending the termination of the proceedings.

Added Stats 1976 ch 1399 § 2.

Review of Selected 1976 California Legislation, 8 Pacific LJ 315.

§ 4600.2. [Award of custody to parent receiving assistance: Order for support]

Any order awarding custody to a parent who is receiving, or in the opinion of the court is likely to receive, assistance pursuant to the Burton-Miller Act (Chapter 2 (commencing with Section 11200) of Part 3 of Division 9 of the Welfare and Institutions Code) for the maintenance of the child shall include an order pursuant to Section 4700 or 4702 directing the noncustodial parent to pay any amount necessary for the support of the child, to the extent of the noncustodial parent's ability to pay.

Added Stats 1979 ch 1030 § 1.

Review of Selected 1979 California Legislation, 11 Pacific LJ 481.

§ 4600.5. [Presumption regarding joint custody and award thereof: Reasons for denial: Modification or termination of order: Consultation with conciliation court: Access to child's records]

(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, h
custody without awarding

(d) Any order for joint c
petition of one or both pa
that the best interests of t
order. The court shall sta
termination of the joint cu
tion or termination order.

(e) Any order for the cus
entered by a court in th
jurisdictional requirement
at any time to an order of
this section.

(f) In counties having a c
any time, pursuant to lo
court for the purpose o
implementation of the cu
has arisen in the impleme

(g) Notwithstanding any
information pertaining to
medical, dental, and scho
such parent is not the chil

Added Stats 1979 ch 915 § 2.

Note—Another version of this sect
prevails. See Gov C § 9605.

Review of Selected 1979 California

In proceedings on an order to s
by a former wife to modify a joint
ment under which the parties' m
with the father and the minor chi
mother, the trial court prejudi cu
discretion by making its ruling w
custody of both children to the fin
basis of a preexisting bias, agair at
rather than on the evidence addu
trial court harbored and exhibited
prejudice against the parties' cour

§ 4600.6. [Trial]

(a) In any case in which
sole contested issue, the c
except matters to which
assigning a trial date and

(b) In any case in which
the issues is of the custo
custody, shall order a
preference over other civi
may be given by law, for

Added Stats 1980 ch 863 § 1.

ional circumstances, enter an
lance with the agreement or
ulation of the parties. In the
stipulation, the court may, if
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dy pursuant to this subdivi-
sons for denial of an award

custody" means an order
ldren to both parents and
by the parents in such a way
nd continuing contact with

[8 Civil Code]

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 rule 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.

Added Stats 1979 ch 915 § 2.

Note—Another version of this section was added by Stats 1979 ch 206. The version enacted by ch 915 prevails. See Gov C § 9605.

Review of Selected 1979 California Legislation, 11 Pacific LJ 478.

In proceedings on an order to show cause filed by a former wife to modify a joint custody agreement under which the parties' minor boy lived with the father and the minor girl lived with the mother, the trial court prejudicially abused its discretion by making its ruling awarding physical custody of both children to the former wife on the basis of preexisting bias against split custody rather than on the evidence adduced, where the trial court harbored and exhibited an unshakable prejudice against the parties' court-approved custody agreement and the possibility that the children might properly reside in different homes. The former husband was entitled to an order based on the trial court's review of all the evidence before it, as well as on the exercise of an impartial legal discretion. Moreover, agreements by the former husband and his counsel that split custody was improper, which agreements were the result of judicial arm-twisting, did not neutralize the prejudicial effect of the trial court's bias. Schwartz, In re (1980) 104 CA3d 92, 163 Cal Rptr 498.

§ 4600.6. [Trial]

(a) In any case in which a contested issue of custody of a minor child is the sole contested issue, the case shall be given preference over other civil cases, except matters to which special precedence may be given by law, for assigning a trial date and shall be given an early hearing.

(b) In any case in which there is more than one contested issue and one of the issues is of the custody of a minor child, the court, as to the issue of custody, shall order a separate trial. The separate trial shall be given preference over other civil cases, except matters to which special precedence may be given by law, for assig... a trial date.

Added Stats 1980 ch 863 § 1.

[8 Civil Code]

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[Signature]

Award—Due to Change in Circum-
or Minor Children

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____ *[name of minor child]* by
ney for petitioner and ____

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correct, and that it would be in the
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following temporary custodial

[Signature]

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r detained by another person
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r other order of the court.

(c) In performing the functions described in subdivisions (a) and (b), the district attorney shall act on behalf of the court and shall not represent any party to the custody proceedings.

Added Stats 1976 ch 1399 § 3.

Review of Selected 1976 California Legislation, 8 Pacific LJ 315.

§ 4605. [Expenses of district attorney]

(a) When the district attorney incurs expenses pursuant to Section 4604, including expenses incurred in a sister state, payment of such expenses may be advanced by the county subject to reimbursement by the state, and shall be audited by the State Controller and paid by the State Treasury according to law.

(b) The court in which the custody proceeding is pending or which has continuing jurisdiction, shall, if appropriate, allocate liability for the reimbursement of actual expenses incurred by the district attorney to either or both parties to the proceedings and such allocation sh constitute a judgment for the state for the funds advanced pursuant to this section. The county shall take reasonable action to enforce such liability and shall transmit all recovered funds to the state.

Added Stats 1976 ch 1399 § 4.

Review of Selected 1976 California Legislation, 8 Pacific LJ 315.

62 Ops Att'y Gen 369 (CC § 4605 authorizes state reimbursement for expenses incurred by a district attorney in retaining Canadian counsel to compel an individual to comply with a California custody order where the individual has been charged in California with the offense of concealing a child in violation of a custody decree (Pen Code, § 278.5) and where criminal extradition of the individual appears futile)

§ 4606. [Appointment of counsel to represent minor child]

In any proceeding under this part where there is in issue the custody of a minor child, the court may, if it finds it would be in the best interests of the minor child, appoint private counsel to represent the interests of the minor child. When the court appoints counsel to represent the minor, counsel shall receive a reasonable sum for compensation and expenses, the amount of which shall be determined by the court. Such amount shall be paid by the parents in such proportions as the court deems just.

Added Stats 1976 ch 588 § 1.

Appointment of legal counsel for ward, proposed ward, conservatee, or proposed conservatee: Prob C §§ 1470–1472.

§ 4607. [Mediation]

(a) Where it appears on the face of the petition or other application for an order or modification of an order for the custody or visitation of a child or children that either or both such issues are contested, as provided in Section 4600, 4600.1 or 4601, the matter shall be set for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing. The purpose of such mediation proceeding shall be to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children's close and continuing contact with both parents after the

marriage is dissolved. The mediator shall use his or her best efforts to effect a settlement of the custody or visitation dispute.

(b) Each superior court shall make available a mediator. Such mediator may be a member of the professional staff of a family conciliation court, probation department, or mental health services agency, or may be any other person or agency designated by the court. In order to provide mediation services, the court shall not be required to institute a family conciliation court. The mediator shall meet the minimum qualifications required of a counselor of conciliation as provided in Section 1745 of the Code of Civil Procedure.

(c) Mediation proceedings shall be held in private and shall be confidential, and all communications, verbal or written, from the parties to the mediator made in a proceeding pursuant to this section shall be deemed to be official information within the meaning of Section 1040 of the Evidence Code.

(d) The mediator shall have the authority to exclude counsel from participation in the mediation proceedings where, in the discretion of the mediator, exclusion of counsel is deemed by the mediator to be appropriate or necessary. The mediator shall have the duty to assess the needs and interests of the child or children involved in the controversy and shall be entitled to interview the child or children when the mediator deems such interview appropriate or necessary.

(e) The mediator may, consistent with local court rules, render a recommendation to the court as to the custody or visitation of the child or children. The mediator may, in cases where the parties have not reached agreement as a result of the mediation proceeding, recommend to the court that an investigation be conducted pursuant to Section 4602, or that other action be taken to assist the parties to effect a resolution of the controversy prior to any hearing on the issues. The mediator may, in appropriate cases, recommend that mutual restraining orders be issued, pending determination of the controversy, to protect the well-being of the children involved in the controversy. Any agreement reached by the parties as a result of mediation shall be reported to the court and to counsel for the parties by the mediator on the day set for mediation or any time thereafter designated by the court.

(f) The provisions of this section shall become operative on January 1, 1981.

Added Stats 1980 ch 48 § 5, effective March 27, 1980, operative January 1, 1981.

§ 4700. [Order for child support]

(a) In any proceeding where there is at issue the support of a minor child, the court may order either or both parents to pay any amount necessary for the support, maintenance, and education of the child. At the request of either party, the court shall make appropriate findings with respect to the circumstances on which the order for the support of a minor child is based. Upon a showing of good cause, the court may order the parent or parents required to make the payment of support to give reasonable security therefor. All payments of support shall be made by the person owing the support payment prior to the payment of any debts owing to creditors. Any order for child support may be modified or revoked as the court may deem necessary, except as to any amount that may have accrued prior to the date of the filing of the notice of motion or order to show cause to modify or revoke. The order of modification or revocation may be made retroactive to

the date of the filing of the r
modify or revoke, or to any da
tion or revocation may include
the prevailing party.

(b) When a court orders a pers
a child during the child's mino
emancipated, the liability of t
upon the happening of the c
person having physical custod
made, fails to notify the pers
attorney of record of the perso
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the contingency, except that t
and all support payments whic
original order for support, or
whom payments are to be ma
payments, or his or her att
contingency.

(c) In the event obligations
bankruptcy, the court may m
nance and education of the chi

Amended by Stats 1972 ch 1118 § 2. Stats
Amendments:

1972 Amendment: Added the third and s
1980 Amendment: (1) Substituted "the" f
gnding the second sentence; and (b) su
persons owing such amounts", in the f
person ordered to pay support" for
sentence; (b) substituting "the person
substituting "the overpayments shall"
sentence; and (d) adding "or her" after

Note—Stats 1972 ch 1118 also provid
Responsibility Act of 1972.

Family Law Rules: CRC Rules 1201 et se
Within Summary (8th ed) pp. 4531, 4631
5188.

Cal Jur 3d Family Law §§ 305, 310, 318,
Cal Forms 37:66.

1 Am Jur Proof of Facts 2d 1, Change in
§§ 6 et seq. (Proofs that circumstances
to justify modification of order).

Rights and obligations of child support. 1
Annulment of later marriage as reviving
agreement. 45 ALR3d 1033.

Right to credit on accrued support payn
expenditures. 47 ALR3d 1031.

Retrospective increase in allowance for a
Provision in decree that one party obtain
ALR3d 9.

Right to credit on child support payme
made for benefit of child. 27 ALR3d 1

Father's liability for support of child fo
but made no provision for support. 91

[8 Civil Code]

Birth Control § 5, Criminal Law §§ 60, 216, 1700, 2352, 2353, 2357, 2358, 2360, 2365, 2366, 2368, 2377, 2379, 3169; Witkin Crimes pp 519, 520, 522, 523, 525, 991; Criminal Procedure p 46; Summary (8th ed) p 3557.

§ 275. [Soliciting and taking drug or submitting to an attempt to procure miscarriage: Exceptions: Punishment.] Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, except as provided in the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code, is punishable by imprisonment in the state prison. [1872; 1967 ch 327 § 4; 1976 ch 1139 § 168, operative July 1, 1977.] *Cal Jur 3d Criminal Law §§ 60, 216, 2352, 2353, 2357, 2365, 3169.*

§ 276. [Soliciting woman to submit to operation, etc., to procure miscarriage: Exceptions: Punishment: Proof necessary.] Every person who solicits any woman to submit to any operation, or to the use of any means whatever, to procure a miscarriage, except as provided in the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code, is punishable by imprisonment in the county jail not longer than one year or in the state prison, or by fine of not more than five thousand dollars ($5,000). Such offense must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances. [1957 ch 270 § 1; 1967 ch 327 § 5; 1976 ch 1139 § 169, operative July 1, 1977.] *21 Cal Jur 3d Criminal Law §§ 2352, 2353, 2365, 2387; Witkin Crimes pp 78, 79, 520, 525, 526.*

CHAPTER 4

Child Abduction

[The heading of Chapter 4, consisting of §§ 278–280, was amended to read as above by Stats 1976 ch 1399 § 8.]

§ 278. [Definition and penalty; Return of child.] (a) Every person, not having a right of custody, who maliciously takes, entices away, detains or conceals any minor child with intent to detain or conceal such child from a parent, or guardian, or other person having the lawful charge of such child shall be punished by imprisonment in the state prison for two, three or four years, a fine of not more than ten thousand dollars ($10,000), or both, or imprisonment in a county jail for a period of not more than one year, a fine of not more than one thousand dollars ($1,000), or both.

(b) A child who has been detained or concealed in violation of subdivision(a) shall be returned to the person having lawful charge of the child. Any expenses incurred in returning the child shall be reimbursed as provided in Section 4605 of the Civil Code. Such costs shall be assessed against any defendant convicted of a violation of this section. [1976 ch 1399 §§ 10, 10.5, operative July 1, 1977.]

§ 278.5. [Detention or concealment of child in violation of custody decree.] (a) Every person who in violation of a custody decree takes, retains after the expiration of a visitation period, or conceals the child from his legal custodian, and every person who has custody of a child pursuant to an order, judgment or decree of any court which grants another person rights to custody or visitation of such child, and who detains or conceals such child with the intent to deprive the other person of such right to custody or visitation shall be punished by imprisonment in the state prison for a period of not more than one year and one day or by imprisonment in a county jail for a period of not more than one year, a fine of not more than one thousand dollars ($1,000), or both.

(b) A child who has been detained or concealed in violation of subdivision (a) shall be returned to the person having lawful charge of the child. Any expenses incurred in returning the child shall be reimbursed as provided in Section 4605 of the Civil Code. Such costs shall be assessed against any defendant convicted of a violation of this section. [1976 ch 1399 § 11.]

APPENDIX B

OREGON

House Bill 2538

Sponsored by Representative RICHARDS

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Creates a disputable presumption that joint custody is in the best interests and welfare of the child.

NOTE: Matter in bold face in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted; complete new sections begin with SECTION

A BILL FOR AN ACT

Relating to domestic relations; amending ORS 107.137.

Be It Enacted by the People of the State of Oregon:

Section 1. ORS 107.137 is amended to read:

107.137. (1) In determining custody of a minor child pursuant to ORS 107.105 or 107.135, the court shall give primary consideration to the best interests and welfare of the child. In determining the best interests and welfare of the child, the court may consider the following relevant factors:

(a) The emotional ties between the child and other family members;

(b) The interest of the parties in and attitude toward the child; and

(c) The desirability of continuing an existing relationship.

(2) The best interests and welfare of the child in a custody matter shall not be determined by isolating any one of the relevant factors referred to in subsection (1) of this section, or any other relevant factor, and relying on it to the exclusion of other factors.

(3) No preference in custody shall be given to the mother over the father for the sole reason that she is the mother.

(4) It is a disputable presumption that joint custody is in the best interests and welfare of the child.

[*(4)*] (5) In determining custody of a minor child pursuant to ORS 107.105 or 107.135, the court shall consider the conduct, marital status, income, social environment or life style of either party only if it is shown that any of these factors are causing or may cause emotional or physical damage to the child.

visitation rights of the parent or parents not having custody of such children.

(c) For the restraint of a party from in any manner molesting or interfering with the other or the minor children.

(d) That if minor children reside in the family home and the court considers it necessary for their best interest to do so, the court may require either party to move out of the home for such period of time and under such conditions as the court may determine, whether the home is rented, owned or being purchased by one party or both parties.

(e) Restraining and enjoining either party or both from encumbering or disposing of any of their property, real or personal, except as ordered by the court.

(f) For the temporary use, possession and control of the real or personal property of the parties or either of them and the payment of instalment liens and encumbrances thereon.

(g) That even if no minor children reside in the family home, the court may require one party to move out of the home for such period of time and under such conditions as the court determines, whether the home is rented, owned or being purchased by one party or both parties if that party assaults or threatens to assault the other.

(2) In case default is made in the payment of any moneys coming due under the terms of an order pending suit, any such delinquent amount shall be entered and docketed as a judgment, and execution may issue thereon to enforce payment thereof in the same manner and with like effect as upon a final decree. The remedy provided in this subsection shall be deemed cumulative and not exclusive.

(3) The court shall not require an undertaking in case of the issuance of an order under paragraph (c), (d), (e), (f) or (g) of subsection (1) of this section.

(4) In a suit for annulment or dissolution of marriage or for separation, wherein the parties are copetitioners or the respondent is found by the court to be in default, the court may, when the cause is otherwise ready for hearing on the merits, if support or custody of minor children is not involved, in lieu of such hearing, enter a decree of annulment or dissolution or for separation based upon an affidavit of the petitioner, setting forth a prima facie case, and covering such additional matters as the court may require.

[1971 c.280 §12; 1973 c.808 §7; 1977 c.205 §1; 1977 c.847 §1; 1977 c.878 §1a]

107.100 [Amended by 1953 c.553 §2; 1953 c.635 §2; 1961 c.540 §1; 1963 c.476 §1; 1965 c.603 §6; 1969 c.198 §53; 1969 c.591 §283; repealed by 1971 c.280 §28]

107.105 Provisions of decree. (1) Whenever the court grants a decree of annulment or dissolution of marriage or of separation, it has power further to decree as follows:

(a) For the future care and custody of the minor children of the marriage by one party or jointly and for the visitation rights of the parent or parents not having custody of such children as it may deem just and proper.

(b) For the recovery from the party not allowed the care and custody of such children, or from either party or both parties if joint custody is decreed, such amount of money, in gross or in instalments, or both, as may be just and proper for such party, either party or both parties to contribute toward the support and welfare of such children. The court may at any time require an accounting from the custodian of the children with reference to the use of the money awarded.

(c) For the support of a party, in gross or in instalments, or both, such amount of money for such period of time as it may be just and equitable for the other party to contribute. The court may approve, ratify, and decree voluntary property settlement agreements providing contribution to the support of a party. If requested by either party, the court shall make and set forth in its decree the findings of fact upon which its award or denial of support was based. In making such support order, the court shall consider the following matters:

(A) The duration of the marriage;

(B) The ages of the parties;

(C) Their health and conditions;

(D) Their work experience and earning capacities;

(E) Their financial conditions, resources and property rights;

(F) The provisions of the decree relating to custody of the minor children of the parties;

(G) The ages, health and dependency conditions of the children of the parties, or either of them;

(H) The need for maintenance, retraining or education to enable the spouse to become employable at suitable work or to enable the spouse to pursue career objectives; and

(I) Such other matters as the court shall deem relevant.

(d) For the delivery to one party of such party's personal property in the possession or

control of the other at the time of the giving of the decree.

(e) For the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances. The court shall view the contribution of a spouse as a homemaker in the contribution of marital assets. There is a rebuttable presumption that both spouses have contributed equally to the acquisition of property during the marriage. The court shall require full disclosure of all assets by the parties in arriving at a just property division.

(f) If there is a minor child of the marriage:

(A) For the appointment of one or more trustees to hold, control and manage for the benefit of the children of the parties, of the marriage or otherwise, such of the real or personal property of either or both of the parties, as the court may order to be allocated or appropriated to their support and welfare, and to collect, receive, expend, manage or invest any sum of money decreed for the support and welfare of minor children of the parties.

(B) For the appointment of one or more trustees to hold, manage, and control such amount of money or such real or personal property of either or both of the parties, as may be set aside, allocated or appropriated for the support of a party.

(C) The court shall direct the terms of the trust and make provision for the disposition or distribution of such money or property to or between the parties, their successors, heirs and assigns after the purpose of the trust has been accomplished. Upon petition of a party or a person having an interest in the trust showing a change of circumstances warranting a change in the terms of the trust, the court shall have the power to make and direct reasonable modifications in its terms.

(g) To change the name of either spouse to a name the spouse held before the marriage. The court must decree a change if it is requested by the affected party.

(h) A judgment against one party in favor of the other for any sums of money found to be then remaining unpaid upon any enforceable order or orders theretofore duly made and entered in the proceedings pursuant to any of the provisions of ORS 107.095, and for any such further sums as additional attorney fees or additional costs and expenses of suit or defense as the court finds reasonably and necessarily incurred by such party; or, in the absence of any such order or orders pendente lite, a like judgment for such amount of money as the court finds was reasonably necessary to enable such party to prosecute or defend the suit.

(2) In determining the proper amount of support and the proper division of property pursuant to paragraphs (b), (c) and (e) of subsection (1) of this section, the court may consider evidence of the tax consequences on the parties of its proposed decree.

(3) If an appeal is taken from a decree of annulment or dissolution of marriage or of separation or from any part of a decree rendered in pursuance of the provisions of ORS 107.005 to 107.105, 107.115 to 107.142, 107.405, 107.425, 107.445 to 107.520, 107.540 and 107.610, the court making such decree shall provide for the temporary support of the minor children of the parties thereto, and may provide for the temporary support of a party. The order may be modified at any time by the court making the decree appealed from, shall provide that the support money be paid in monthly instalments, and shall further provide that it is to be in effect only during the pendency of the appeal. No appeal lies from any such temporary order.

(4) If an appeal is taken from the decree or other appealable order in a suit for annulment or dissolution of a marriage or for separation, and the appellate court awards costs and disbursements to the prevailing party, it may also award to that party, as part of the costs, such additional sum of money as it may adjudge reasonable as an attorney fee on the appeal.

(5) If, as a result of a suit for the annulment or dissolution of a marriage or for separation, the parties to such suit become owners of an undivided interest in any real or personal property, or both, either party may maintain supplemental proceedings by filing a petition in such suit for the partition of such real or personal property, or both, within two years from the entry of said decree, showing among other things that the original parties to such decree and their joint or several creditors having a lien upon any such real or personal property, if any there be, constitute the sole and only necessary parties to such supplemental proceedings. The procedure in the supplemental proceedings, so far as applicable, shall be the procedure provided in ORS 105.405, for the partition of real property, and the court granting such decree shall have in

the first instance and retain jurisdiction in equity therefor.
[1971 c.280 §13; 1973 c.502 §8; 1975 c.722 §1; 1975 c.733 §2; 1977 c.205 §2; 1977 c.847 §2; 1977 c.878 §2a]

107.108 Support or maintenance for child attending school. (1) In addition to any other authority of the court, the court may provide for the support or maintenance of a child attending school:

(a) After the commencement of a suit for annulment or dissolution of a marriage or for separation from bed and board and before the decree therein;

(b) In a decree of annulment or dissolution of a marriage or of separation from bed and board; and

(c) During the pendency of an appeal taken from all or part of a decree rendered in pursuance of ORS 107.005 to 107.142, 107.260, 107.405, 107.425, 107.445 to 107.520, 107.540, 107.610 or this section.

(2) An order providing for temporary support pursuant to paragraph (c) of subsection (1) of this section may be modified at any time by the court making the decree appealed from, shall provide that the support money be paid in monthly instalments, and shall further provide that it is to be in effect only during the pendency of the appeal. No appeal lies from any such temporary order.

(3) If the court provides for the support and maintenance of a child attending school pursuant to this section, the child is a party for purposes of matters related to that provision.

(4) As used in this section, "child attending school" means a child of the parties who is unmarried, is 18 years of age or older and under 21 years of age and is a student regularly attending school, community college, college or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment.
[1973 c.827 §12a]

107.110 [Amended by 1965 c.600 §4; 1969 c.179 §1; 1969 c.198 §54; 1969 c.591 §284; repealed by 1971 c.280 §28]

107.115 Effect of decree; effective date; appeal. (1) A decree of annulment or dissolution of a marriage restores the parties thereto to the status of unmarried persons, unless a party is married to another person. Such decree shall give the court jurisdiction to award, to be effective immediately, the relief provided by ORS 107.105. The decree shall revoke a will pursuant to the provisions of ORS 112.315, but the decree shall not be effective in so far as it affects the marital status of the parties until the expiration of 60 days from the date of the decree, or, if an appeal is taken, until the suit is determined on appeal, whichever is later.

(2) In case either party dies within the 60-day period specified in subsection (1) of this section, the decree shall be considered to have entirely terminated the marriage relationship immediately before such death, unless an appeal is pending.

(3) (a) The Court of Appeals or Supreme Court shall continue to have jurisdiction of such an appeal pending at the time of the death of either party. The appeal may be continued by the personal representative of the deceased party. The attorney of record on the appeal, for the deceased party, may be allowed a reasonable attorney fee, to be paid from the decedent's estate. However, costs on appeal may not be awarded to either party.

(b) The Court of Appeals or Supreme Court shall have the power to determine finally all matters presented on such appeal. Before making final disposition, the Court of Appeals or Supreme Court may refer the proceeding back to the trial court for such additional findings of fact as are required.

(4) The marriage relationship is terminated in all respects on the expiration of the 60-day period specified in subsection (1) of this section, or, if an appeal is taken, when the suit is determined on appeal, whichever is later, without any further action by either party. However, at any time within the 60-day period or while an appeal is pending, the court may set aside the decree upon motion of both parties.

(5) A decree declaring a marriage void or dissolved shall specify the date on which the decree becomes finally effective to terminate the marriage relationship of the parties.

(6) The 60-day period specified in subsection (1) of this section does not apply when a decree declares a marriage void under ORS 107.005.
[1971 c.280 §14]

107.120 [Repealed by 1971 c.280 §28]

107.125 [1965 c.336 §3; repealed by 1971 c.280 §28]

107.126 Decrees and orders as liens; duration. No order or decree for the future payment of money in gross or in instalments, entered under ORS 107.095 or 107.105, shall continue to be a lien on real property for a period of more than 10 years from the date of

(5) In a proceeding held under subsection (1) of this section, the court may assess against either party a reasonable attorney fee for the benefit of the other party.
[1975 c.500 §3]

107.415 Notice of change of status of minor child required; effect of failure to give notice. (1) If a party is required by a decree of a court in a domestic relations suit, as defined in ORS 107.510, to contribute to the support, nurture or education of a minor child while the other party has custody thereof, the custodial parent shall notify the party contributing such money when the minor child receives income from his own gainful employment, or is married or enters the military service.

(2) Any custodial parent who does not provide notice, as required by subsection (1) of this section may be required by the court to make restitution to the contributing party of any money paid, as required by the decree. The court may enter a judgment or satisfy all or part of any accrued judgment to accomplish the restitution.
[1971 c.314 §1]

107.420 [1961 c.340 §1; repealed by 1971 c.280 §28]

107.425 Investigation of parties in domestic relations suit involving welfare of children; counsel for children; staff. (1) Whenever a domestic relations suit, as defined in ORS 107.510, is filed, or whenever a habeas corpus proceeding or motion to modify an existing decree in a domestic relations suit is before the court, the court having jurisdiction may, in cases in which there are minor children involved, cause an investigation to be made as to the character, family relations, past conduct, earning ability and financial worth of the parties to the suit for the purpose of protecting the children's future interest. The court may defer the entry of a final decree until the court is satisfied that its decree in such suit will properly protect the welfare of such children. The investigative findings shall be offered as and subject to all rules of evidence.

(2) The court, on its own motion, may:

(a) Cite either party to the suit to appear and testify as a witness during this investigation; and

(b) Appoint counsel for the children. A reasonable fee for an attorney so appointed may be charged against either or both of the parties or as a cost in the proceedings.

(3) The court having jurisdiction of cases described in subsection (1) of this section may hire and fix the salaries of such professional and clerical personnel as are necessary to carry out the purposes of this section. The salaries of the professional and clerical assistants shall be paid in the same manner as the salaries of county officers are paid.
[1971 c.280 §3; 1973 c.502 §11]

107.430 [Formerly 107.180; 1963 c.223 §1; repealed by 1971 c.280 §28]

107.431 Modification of portion of decree regarding visitation of minor child; procedure. At any time after a decree of annulment or dissolution of a marriage or a separation is granted, the court may set aside, alter or modify so much of the decree relating to visitation of a minor child as it deems just and proper or may terminate or modify that part of the order or decree requiring payment of money for the support of the minor child with whom visitation is being denied after:

(1) Motion to set aside, alter or modify is made by the parent having visitation rights;

(2) Service of notice on the parent or other person having custody of the minor child is made in the manner provided by law for service of a summons; and

(3) A showing that the parent or other person having custody of the child or a person acting in that parent or other person's behalf has interfered with or denied without good cause the exercise of the parent's visitation rights.
[1977 c.578 §4]

107.435 [1971 c.280 §19; repealed by 1973 c.502 §18]

107.440 [1953 c.434 §14; 1965 c.388 §1; repealed by 1971 c.280 §28]

107.445 Attorney fees in certain domestic relations proceedings. In any proceeding brought under ORS 108.110 and 108.120, and in any contempt proceeding brought to compel compliance with any orders authorized by ORS 107.095, or with the decree in any suit to annul or dissolve a marriage or for separation the court may make an order awarding to a party a sum of money determined to be reasonable as an attorney fee therein. The order shall be entered and docketed as a judgment, and execution may issue thereon in the same manner and with like effect as upon a final decree.
[1971 c.280 §18]

107.450 [1963 c.434 §13; 1965 c.388 §2; repealed by 1971 c.280 §28]

APPENDIX C

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upon the payment of a license fee as fixed in RCW 36-.18.010 shall require each applicant therefor to make and file in his office upon blanks to be provided by the county for that purpose, an affidavit showing that they are not afflicted with any contagious venereal disease. He shall also require an affidavit of some disinterested credible person showing that neither of said persons is an habitual criminal, and that the applicants are the age of eighteen years or over: *Provided, further,* That if the consent in writing is obtained of the father, mother, or legal guardian of the person for whom the license is required, the license may be granted in cases where the female has attained the age of seventeen years or the male has attained the age of seventee.. years. Such affidavit may be subscribed and sworn to before any person authorized to administer oaths. Anyone knowingly swearing falsely to any of the statements contained in the affidavits mentioned in this section shall be deemed guilty of perjury and punished as provided by the laws of the state of Washington. [1979 ex.s. c 128 § 2; 1973 1st ex.s. c 154 § 29; 1970 ex.s. c 17 § 5; 1963 c 230 § 4; 1959 c 149 § 3; 1909 ex.s. c 16 § 3; 1909 c 174 § 3; Code 1881 §§ 2391, 2392; 1867 p 104 § 1; 1866 p 83 §§ 13, 14; RRS § 8451.]

Severability——1973 1st ex.s. c 154: See note following RCW 2.12.030.

Penalty for violation of marriage requirements: RCW 26.04.230.

26.04.220 Retention of license by person solemnizing——Auditor's record. The person solemnizing the marriage is authorized to retain in his possession the license, but the county auditor who issues the same, before delivering it, shall enter in his marriage record a memorandum of the names of the parties, the consent of the parents or guardian, if any, and the name of the affiant and the substance of the affidavit upon which said license issued, and the date of such license. [Code 1881 § 2393; 1866 p 84 § 15; RRS § 8453.]

26.04.230 Penalty for violation of marriage requirements. Any person knowingly violating any of the provisions of *this act shall, upon conviction thereof, be punished by a fine of not more than one thousand dollars, or by imprisonment in the state penitentiary for a period of not more than three years, or by both such fine and imprisonment. [1909 ex.s. c 16 § 4; 1909 c 174 § 4; Code 1881 § 2394; 1866 p 84 § 16; RRS § 8452.]

*Reviser's note: "this act" is codified as RCW 26.04.030, 26.04.040, 26.04.210, and 26.04.230.

26.04.240 Penalty for unlawful solemnization——Code 1881. Any person who shall undertake to join others in marriage knowing that he is not lawfully authorized so to do, or any person authorized to solemnize marriage, who shall join persons in marriage contrary to the provisions of *this chapter, shall, upon conviction thereof, be punished by a fine of not more than five hundred, nor less than one hundred dollars. [Code 1881 § 2395; 1866 p 84 § 17; RRS § 8454. FORMER PART OF SECTION: 1909 c 249 § 419; RRS § 2671 now codified as RCW 26.04.250.]

*Reviser's note: "this chapter" (chapter 182, Code 1881) is codified as RCW 26.04.010, 26.04.050 through 26.04.140 and 26.04.220 through 26.04.240. Code 1881 §§ 2391 and 2392, being part of chapter 182, Code 1881, appear to be superseded by 1909 ex.s. c 16 § 3 (RCW 26.04.210) which is subject to the penalties of RCW 26.04.230.

26.04.250 Penalty for unlawful solemnization——1909 c 249. Every person who shall solemnize a marriage when either party thereto is known to him to be under the age of legal consent or a marriage to which, within his knowledge, any legal impediment exists, shall be guilty of a gross misdemeanor. [1979 ex.s. c 128 § 3; 1909 c 249 § 419; RRS § 2671. Formerly RCW 26.04-.240, part.]

Punishment of gross misdemeanor when not fixed by statute: RCW 9.92.020.

Chapter 26.09
DISSOLUTION OF MARRIAGE——LEGAL SEPARATION——DECLARATIONS CONCERNING VALIDITY OF MARRIAGE

Sections

Living in marital relationship within state submits person to state jurisdiction as to proceedings under this chapter: RCW 4.28.185.

Process——Domestic relations actions: Rules of court: CR 4.1.

26.09.010 Civil practice to govern——Designation of proceedings——Decrees. (1) Except as otherwise specifically provided herein, the practice in civil action shall govern all proceedings under this chapter, except that trial by jury is dispensed with.

(2) A proceeding for dissolution of marriage, legal separation or a declaration concerning the validity of a marriage shall be entitled "In re the marriage of ..... and ....." Such proceeding may be filed in the superior court of the county where the petitioner resides.

(3) In cases where there has been no prior proceeding in this state involving the marital status of the parties or custody or support obligations, a separate custody or support proceeding shall be entitled "In re the (custody) (support) of ....."

(4) The initial pleading in all proceedings for dissolution of marriage under this chapter shall be denominated a petition. A responsive pleading shall be denominated a response. Other pleadings, and all pleadings in other matters under this chapter shall be denominated as provided in the civil rules for superior court.

(5) In this chapter, "decree" includes "judgment".

(6) A decree of dissolution, of legal separation, or a declaration concerning the validity of a marriage shall not be awarded to one of the parties, but shall provide that it affects the status previously existing between the parties in the manner decreed. [1975 c 32 § 1; 1973 1st ex.s. c 157 § 1.]

26.09.020 Petition in proceeding for dissolution of marriage, legal separation, or for a declaration concerning validity of marriage——Contents——Parties. (1) A petition in a proceeding for dissolution of marriage, legal separation, or for a declaration concerning the validity of a marriage, shall allege the following:

(a) The last known residence of each party;

(b) The date and place of the marriage;

(c) If the parties are separated the date on which the separation occurred;

(d) The names, ages, and addresses of any child dependent upon either or both spouses and whether the wife is pregnant;

(e) Any arrangements as to the custody, visitation and support of the children and the maintenance of a spouse;

(f) A statement specifying whether there is community or separate property owned by the parties to be disposed of;

(g) The relief sought.

(2) Either or both parties to the marriage may initiate the proceeding. [1973 2nd ex.s. c 23 § 1; 1973 1st ex.s. c 157 § 2.]

26.09.030 Petition for dissolution of marriage——Court proceedings, findings——Transfer to family court——Legal separation in lieu of dissolution. When a party who is a resident of this state or who is a member of the armed forces and is stationed in this state, petitions for a dissolution of marriage, and alleges that the marriage is irretrievably broken and when ninety days have elapsed since the petition was filed and from the date when service of summons was made upon the respondent or the first publication of summons was made, the court shall proceed as follows:

(1) If the other party joins in the petition or does not deny that the marriage is irretrievably broken, the court shall enter a decree of dissolution.

(2) If the other party alleges that the petitioner was induced to file the petition by fraud, or coercion, the court shall make a finding as to that allegation and, if it so finds shall dismiss the petition.

(3) If the other party denies that the marriage is irretrievably broken the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospects for reconciliation and shall:

(a) Make a finding that the marriage is irretrievably broken and enter a decree of dissolution of the marriage; or

(b) At the request of either party or on its own motion, transfer the cause to the family court, refer them to another counseling service of their choice, and request a report back from the counseling service within sixty days, or continue the matter for not more than sixty days for hearing. If the cause is returned from the family court or at the adjourned hearing, the court shall:

(i) Find that the parties have agreed to reconciliation and dismiss the petition; or

(ii) Find that the parties have not been reconciled, and that either party continues to allege that the marriage is irretrievably broken. When such facts are found, the court shall enter a decree of dissolution of the marriage.

(4) If the petitioner requests the court to decree legal separation in lieu of dissolution, the court shall enter the decree in that form unless the other party objects and petitions for a decree of dissolution or declaration of invalidity. [1973 1st ex.s. c 157 § 3.]

26.09.040 Petition to have marriage declared invalid or judicial determination of validity——Procedure——

Findings——Grounds——Legitimacy of children. (1) While both parties to an alleged marriage are living, and at least one party is resident in this state or a member of the armed service and stationed in the state, a petition to have the marriage declared invalid may be sought by:

(a) Either or both parties, or the guardian of an incompetent spouse, for any cause specified in subsection (4) of this section; or

(b) Either or both parties, the legal spouse, or a child of either party when it is alleged that the marriage is bigamous.

(2) If the validity of a marriage is denied or questioned at any time, either or both parties to the marriage may petition the court for a judicial determination of the validity of such marriage.

(3) In a proceeding to declare the invalidity of a marriage, the court shall proceed in the manner and shall have the jurisdiction, including the authority to provide for maintenance, custody, visitation, support, and division of the property of the parties, provided by this chapter.

(4) After hearing the evidence concerning the validity of a marriage, if both parties to the alleged marriage are still living, the court:

(a) If it finds the marriage to be valid, shall enter a decree of validity;

(b) If it finds that:

(i) The marriage should not have been contracted because of age of one or both of the parties, lack of required parental or court approval, a prior undissolved marriage of one or both of the parties, reasons of consanguinity, or because a party lacked capacity to consent to the marriage, either because of mental incapacity or because of the influence of alcohol or other incapacitating substances, or because a party was induced to enter into the marriage by force or duress, or by fraud involving the essentials of marriage, and that the parties have not ratified their marriage by voluntarily cohabiting after attaining the age of consent, or after attaining capacity to consent, or after cessation of the force or duress or discovery of the fraud, shall declare the marriage invalid as of the date it was purportedly contracted;

(ii) The marriage should not have been contracted because of any reason other than those above, shall upon motion of a party, order any action which may be appropriate to complete or to correct the record and enter a decree declaring such marriage to be valid for all purposes from the date upon which it was purportedly contracted;

(c) If it finds that a marriage contracted in a jurisdiction other than this state, was void or voidable under the law of the place where the marriage was contracted, and in the absence of proof that such marriage was subsequently validated by the laws of the place of contract or of a subsequent domicile of the parties, shall declare the marriage invalid as of the date of the marriage.

(5) Any child of the parties born or conceived during the existence of a marriage of record is legitimate and remains legitimate notwithstanding the entry of a declaration of invalidity of the marriage. [1975 c 32 § 2; 1973 1st ex.s. c 157 § 4.]

26.09.050 Provisions for child support, custody and visitation——Maintenance——Disposition of property and liabilities. In entering a decree of dissolution of marriage, legal separation, or declaration of invalidity, the court shall consider, approve, or make provision for child custody and visitation, the support of any child of the marriage entitled to support, the maintenance of either spouse, and the disposition of property and liabilities of the parties. [1973 1st ex.s. c 157 § 5.]

26.09.060 Temporary maintenance or child support——Temporary restraining order——Preliminary injunction. (1) In a proceeding for:

(a) Dissolution of marriage, legal separation, or a declaration of invalidity; or

(b) Disposition of property or liabilities, maintenance, or support following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse; either party may move for temporary maintenance or for temporary support of children entitled to support. The motion shall be accompanied by an affidavit setting forth the factual basis for the motion and the amounts requested.

(2) As a part of a motion for temporary maintenance or support or by independent motion accompanied by affidavit, either party may request the court to issue a temporary restraining order or preliminary injunction, providing relief proper in the circumstances, and restraining or enjoining any person from:

(a) Transferring, removing, encumbering, concealing, or in any way disposing of any property except in the usual course of business or for the necessities of life, and, if so restrained or enjoined, requiring him to notify the moving party of any proposed extraordinary expenditures made after the order is issued;

(b) Molesting or disturbing the peace of the other party or of any child;

(c) Entering the family home or the home of the other party upon a showing of the necessity therefor;

(d) Removing a child from the jurisdiction of the court.

(3) The court may issue a temporary restraining order without requiring notice to the other party only if it finds on the basis of the moving affidavit or other evidence that irreparable injury could result if an order is not issued until the time for responding has elapsed.

(4) The court may issue a temporary restraining order or preliminary injunction and an order for temporary maintenance or support in such amounts and on such terms as are just and proper in the circumstances.

(5) A temporary order, temporary restraining order, or preliminary injunction:

(a) Does not prejudice the rights of a party or any child which are to be adjudicated at subsequent hearings in the proceeding;

(b) May be revoked or modified;

(c) Terminates when the final decree is entered or when the petition for dissolution, legal separation, or declaration of invalidity is dismissed. [1975 c 32 § 3; 1973 1st ex.s. c 157 § 6.]

26.09.070 Separation contracts. (1) The parties to a marriage, in order to promote the amicable settlement of disputes attendant upon their separation or upon the filing of a petition for dissolution of their marriage, a decree of legal separation, or declaration of invalidity of their marriage, may enter into a written separation contract providing for the maintenance of either of them, the disposition of any property owned by both or either of them, the custody, support, and visitation of their children and for the release of each other from all obligation except that expressed in the contract.

(2) If the parties to such contract elect to live separate and apart without any court decree, they may record such contract and cause notice thereof to be published in a legal newspaper of the county wherein the parties resided prior to their separation. Recording such contract and publishing notice of the making thereof shall constitute notice to all persons of such separation and of the facts contained in the recorded document.

(3) If either or both of the parties to a separation contract shall at the time of the execution thereof, or at a subsequent time, petition the court for dissolution of their marriage, for a decree of legal separation, or for a declaration of invalidity of their marriage, the contract, except for those terms providing for the custody, support, and visitation of children, shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties on their own motion or on request of the court, that the separation contract was unfair at the time of its execution.

(4) If the court in an action for dissolution of marriage, legal separation, or declaration of invalidity finds that the separation contract was unfair at the time of its execution, it may make orders for the maintenance of either party, the disposition of their property and the discharge of their obligations.

(5) Unless the separation contract provides to the contrary, the agreement shall be set forth in the decree of dissolution, legal separation, or declaration of invalidity, or filed in the action or made an exhibit and incorporated by reference, except that in all cases the terms for custody, support, and visitation shall be set out in the decree, and the parties shall be ordered to comply with its terms.

(6) Terms of the contract set forth or incorporated by reference in the decree may be enforced by all remedies available for the enforcement of a judgment, including contempt, and are enforceable as contract terms.

(7) When the separation contract so [illegible], the decree may expressly preclude or limit m[illegible] of any provision for maintenance set forth in th[illegible]. Terms of a separation contract pertaining to custody, support, and visitation of children and, in the absence of express provision to the contrary, terms providing for maintenance set forth or incorporated by reference in the decree are automatically modified by modification of the decree.

(8) If at any time the parties to the separation contract by mutual agreement elect to terminate the separation contract they may do so without formality unless the contract was recorded as in subsection (2) of this section, in which case a statement should be filed terminating the contract. [1973 1st ex.s. c 157 § 7.]

26.09.080 Disposition of property and liabilities—Factors. In a proceeding for dissolution of the marriage, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

(1) The nature and extent of the community property;

(2) The nature and extent of the separate property;

(3) The duration of the marriage; and

(4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse having custody of any children. [1973 1st ex.s. c 157 § 8.]

26.09.090 Maintenance orders for either spouse—Factors. (1) In a proceeding for dissolution of marriage, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to marital misconduct, after considering all relevant factors including but not limited to:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage;

(d) The duration of the marriage;

(e) The age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance. [1973 1st ex.s. c 157 § 9.]

26.09.100 Child support——Apportionment of expense. In a proceeding for dissolution of marriage, legal separation, declaration of invalidity, maintenance, or child support, after considering all relevant factors but without regard to marital misconduct, the court may order either or both parents owing a duty of support to any child of the marriage dependent upon either or both spouses to pay an amount reasonable or necessary for his support. [1973 1st ex.s. c 157 § 10.]

26.09.110 Minor or dependent child——Court appointed attorney to represent——Payment of costs, fees, and disbursements. The court may appoint an attorney to represent the interests of a minor or dependent child with respect to his custody, support, and visitation. The court shall enter an order for costs, fees, and disbursements in favor of the child's attorney. The order shall be made against either or both parents, except that, if both parties are indigent, the costs, fees, and disbursements shall be borne by the county. [1973 1st ex.s. c 157 § 11.]

Process——Domestic relations actions: Rules of court: CR 4.1.

26.09.120 Support or maintenance payments——To whom paid——Arrearages. (1) The court may, upon its own motion or upon motion of either party, order support or maintenance payments to be made to:

(a) The person entitled to receive the payments; or

(b) The department of social and health services pursuant to chapters 74.20 and 74.20A RCW; or

(c) The clerk of court as trustee for remittance to the person entitled to receive the payments.

(2) If payments are made to the clerk of court:

(a) The clerk shall maintain records listing the amount of payments, the date when payments are required to be made, and the names and addresses of the parties affected by the order; and

(b) The parties affected by the order shall inform the clerk of the court of any change of address or of other conditions that may affect the administration of the order; and

(c) The clerk of the court shall, if the party fails to make required payment, send by first class mail notice of the arrearage to the obligor. If payment of the sum due is not made to the clerk of the court within ten days after sending notice, the clerk of the court shall certify the amount due to the prosecuting attorney. [1973 1st ex.s. c 157 § 12.]

26.09.130 Support or maintenance payments——Order to make assignment of periodic earnings or trust income——Duty of payor to withhold and transmit. The court may order the person obligated to pay support or maintenance to make an assignment of a part of his periodic earnings or trust income to the person or agency entitled to receive the payments: *Provided*, That the provisions of RCW 7.33.280 in regard to exemptions in garnishment proceedings shall apply to such assignments. The assignment is binding on the employer, trustee or other payor of the funds two weeks after service upon him of notice that it has been made. The payor shall withhold from the earnings or trust income payable to the person obligated to support the amount specified in the assignment and shall transmit the payments to the person specified in the order. The payor may deduct from each payment a sum not exceeding one dollar as reimbursement for costs. An employer shall not discharge or otherwise discipline an employee as a result of a wage or salary assignment authorized by this section. [1973 1st ex.s. c 157 § 13.]

26.09.140 Payment of costs, attorney's fees, etc. The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.

The court may order that the attorney's fees be paid directly to the attorney who may enforce the order in his name. [1973 1st ex.s. c 157 § 14.]

26.09.150 Decree of dissolution of marriage, legal separation, or declaration of invalidity——Finality——Appeal——Conversion of decree of legal separation to decree of dissolution——Name of wife. A decree of dissolution of marriage, legal separation, or declaration of invalidity is final when entered, subject to the right of appeal. An appeal which does not challenge the finding that the marriage is irretrievably broken or was invalid, does not delay the finality of the dissolution or declaration of invalidity and either party may remarry pending such an appeal.

No earlier than six months after entry of a decree of legal separation, on motion of either party, the court shall convert the decree of legal separation to a decree of dissolution of marriage. The clerk of court shall complete the certificate as provided for in RCW 70.58.200 on the form provided by the department of social and health services. On or before the tenth day of each month, the clerk of the court shall forward to the state registrar of vital statistics the certificate of each decree of divorce, dissolution of marriage, annulment, or separate maintenance granted during the preceding month.

Upon request by a wife whose marriage is dissolved or declared invalid, the court shall order a former name restored and may, on motion of either party, for just and reasonable cause, order the wife to assume a name other than that of the husband. [1973 1st ex.s. c 157 § 15.]

26.09.160 Failure to comply with decree or temporary injunction——Obligation to make support or maintenance payments or permit visitation not suspended——Motion. If a party fails to comply with a provision of a decree or temporary order of injunction, the obligation of the other party to make payments for support or maintenance or to permit visitation is not suspended, but he may move the court to grant an appropriate order. [1973 1st ex.s. c 157 § 16.]

26.09.170 Modification of decree for maintenance or support, property disposition——Termination of maintenance obligation and child support——Grounds. Except as otherwise provided in subsection (7) of RCW 26.09.070, the provisions of any decree respecting maintenance or support may be modified only as to installments accruing subsequent to the motion for modification and only upon a showing of a substantial change of circumstances. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

Unless otherwise agreed in writing or expressly provided in the decree the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child or by the death of the parent obligated to support the child. [1973 1st ex.s. c 157 § 17.]

26.09.180 Child custody proceeding——Commencement——Notice——Intervention. (1) A child custody proceeding is commenced in the superior court:

(a) By a parent:

(i) By filing a petition for dissolution of marriage, legal separation or declaration of invalidity; or

(ii) By filing a petition seeking custody of the child in the county where the child is permanently resident or where he is found; or

(b) By a person other than a parent, by filing a petition seeking custody of the child in the county where the child is permanently resident or where he is found, but only if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian.

(2) Notice of a child custody proceeding shall be given to the child's parent, guardian and custodian, who may appear and be heard and may file a responsive pleading. The court may, upon a showing of good cause, permit the intervention of other interested parties. [1973 1st ex.s. c 157 § 18.]

26.09.190 Child custody——Relevant factors in awarding custody. The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including:

(1) The wishes of the child's parent or parents as to his custody and as to visitation privileges;

(2) The wishes of the child as to his custodian and as to visitation privileges;

(3) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

(4) The child's adjustment to his home, school, and community; and

(5) The mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed guardian that does not affect the welfare of the child. [1973 1st ex.s. c 157 § 19.]

26.09.200 Child custody——Temporary custody order——Vacation of order. A party to a custody proceeding may move for a temporary custody order. The motion must be supported by an affidavit as provided in RCW 26.09.270. The court may award temporary custody after a hearing, or, if there is no objection, solely on the basis of the affidavits.

If a proceeding for dissolution of marriage, legal separation, or declaration of invalidity is dismissed, any temporary custody order is vacated unless a parent or the child's custodian moves that the proceeding continue as a custody proceeding and the court finds, after a hearing, that the circumstances of the parents and the best interests of the child require that a custody decree be issued.

If a custody proceeding commenced in the absence of a petition for dissolution of marriage, legal separation, or declaration of invalidity, (subsection (1) of RCW 26.09.180) is dismissed, any temporary order is vacated. [1973 1st ex.s. c 157 § 20.]

26.09.210 Child custody——Interview with child by court——Advice of professional personnel. The court may interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation privileges. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be made part of the record in the case.

The court may seek the advice of professional personnel whether or not they are employed on a regular basis by the court. The advice given shall be in writing and shall be made available by the court to counsel upon request. Counsel may call for cross-examination any professional personnel consulted by the court. [1973 1st ex.s. c 157 § 21.]

26.09.220 Child custody——Investigation and report. (1) In contested custody proceedings, and in other custody proceedings if a parent or the child's custodian so requests, the court may order an investigation and report concerning custodian arrangements for the child. The investigation and report may be made by the staff of the juvenile court or other professional social service organization experienced in counseling children and families.

(2) In preparing his report concerning a child, the investigator may consult any person who may have information about the child and his potential custodian arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian; but the child's consent must be obtained if he has reached the age of twelve, unless the court finds that he lacks mental capacity to consent. If the requirements of subsection (3) of this section are fulfilled, the investigator's report may be received in evidence at the hearing.

(3) The court shall mail the investigator's report to counsel and to any party not represented by counsel at least ten days prior to the hearing unless a shorter time is ordered by the court for good cause shown. The investigator shall make available to counsel and to any party not represented by counsel the investigator's file of underlying data and reports, complete texts of diagnostic reports made to the investigator pursuant to the provisions of subsection (2) of this section, and the names and addresses of all persons whom the investigator has consulted. Any party to the proceeding may call the investigator and any person whom he has consulted for cross-examination. A party may not waive his right of cross-examination prior to the hearing. [1973 1st ex.s. c 157 § 22.]

Authority to make reports to assist courts of other states: RCW 26.27.200

26.09.230 Child custody——Priority status of proceedings——Hearing——Record——Expenses of witnesses. Custody proceedings shall receive priority in being set for hearing.

Either party may petition the court to authorize the payment of necessary travel and other expenses incurred by any witness whose presence at the hearing the court deems necessary to determine the best interests of the child.

The court without a jury shall determine questions of law and fact. If it finds that a public hearing may be detrimental to the child's best interests, the court may exclude the public from a custody hearing, but may admit any person who has a direct and legitimate interest in the work of the court.

If the court finds it necessary to protect the child's welfare that the record of any interview, report, investigation, or testimony in a custody proceeding be kept secret, the court may make an appropriate order sealing the record. [1973 1st ex.s. c 157 § 23.]

26.09.240 Child custody——Visitation rights. A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger the child's physical, mental, or emotional health. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings.

The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger the child's physical, mental, or emotional health. [1977 ex.s. c 271 § 1; 1973 1st ex.s. c 157 § 24.]

26.09.250 Child custody——Powers and duties of custodian——Supervision by appropriate agency when necessary. Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, health care, and religious training, unless the court after hearing, finds, upon motion by the noncustodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical, mental, or emotional health would be endangered.

If both parents or all contestants agree to the order, or if the court finds that in the absence of the order the child's physical, mental, or emotional health would be endangered, the court may order an appropriate agency which regularly deals with children to exercise continuing supervision over the case to assure that the custodial or visitation terms of the decree are carried out. Such order may be modified by the court at any time upon petition by either party. [1973 1st ex.s. c 157 § 25.]

26.09.260 Child custody decree——Modification. (1) The court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child. In applying these standards the court shall retain the custodian established by the prior decree unless:

(a) The custodian agrees to the modification;

(b) The child has been integrated into the family of the petitioner with the consent of the custodian; or

(c) The child's present environment is detrimental to his physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

(2) If the court finds that a motion to modify a prior custody order has been brought in bad faith, the court shall assess the attorney's fees and court costs of the custodian against the petitioner. [1973 1st ex.s. c 157 § 26.]

26.09.270 Child custody——Temporary custody order or modification of custody decree——Affidavits required. A party seeking a temporary custody order or modification of a custody decree shall submit together with his motion, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other

parties to the proceedings, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted. [1973 1st ex.s. c 157 § 27.]

26.09.280 Child custody or support actions or proceedings——Venue. Hereafter every action or proceeding to change, modify, or enforce any final order, judgment, or decree heretofore or hereafter entered in any dissolution or legal separation or declaration concerning the validity of a marriage, whether under this chapter or prior law, in relation to the care, custody, control, or support of the minor children of the marriage may be brought in the county where said minor children are then residing, or in the court in which said final order, judgment, or decree was entered, or in the county where the parent or other person who has the care, custody, or control of the said children is then residing. [1975 c 32 § 4; 1973 1st ex.s. c 157 § 28.]

26.09.290 Final decree of divorce nunc pro tunc. Whenever either of the parties in a divorce action is, under the law, entitled to a final judgment, but by mistake, negligence, or inadvertence the same has not been signed, filed, or entered, if no appeal has been taken from the interlocutory order or motion for a new trial made, the court, on the motion of either party thereto or upon its own motion, may cause a final judgment to be signed, dated, filed, and entered therein granting the divorce as of the date when the same could have been given or made by the court if applied for. The court may cause such final judgment to be signed, dated, filed, and entered nunc pro tunc as aforesaid, even though a final judgment may have been previously entered where by mistake, negligence or inadvertence the same has not been signed, filed, or entered as soon as such final judgment, the parties to such action shall be deemed to have been restored to the status of single persons as of the date affixed to such judgment, and any marriage of either of such parties subsequent to six months after the granting of the interlocutory order as shown by the minutes of the court, and after the final judgment could have been entered under the law if applied for, shall be valid for all purposes as of the date affixed to such final judgment upon the filing thereof. [1973 1st ex.s. c 157 § 29.]

26.09.300 Restraining orders——Notice——Refusal to comply——Penalty——Defense. (1) Any person having had actual notice of the existence of a restraining order issued by a court of competent jurisdiction in an action for the dissolution of a marriage under this chapter who refuses to comply with the provisions of such order when requested by any peace officer of the state shall be guilty of a misdemeanor.

(2) The notice requirements of subsection (1) may be satisfied by the peace officer giving oral or written evidence to the person subject to the order by reading from or handing to that person a copy certified to be an accurate copy of the original on file by a notary public or the clerk of the court of the court order which copy may be supplied by the court, the complainant or the complainant's attorney.

(3) The remedies provided by this section shall not apply unless restraining orders subject to this section shall bear the legend: VIOLATION OF THIS ORDER WITH ACTUAL NOTICE OF ITS TERMS IS A CRIMINAL OFFENSE UNDER CHAPTER 26.09 RCW AND IS ALSO SUBJECT TO CIVIL CONTEMPT PROCEEDINGS.

(4) It is a defense to prosecution under subsection (1) of this section that the court order was issued contrary to law or court rule: *Provided*, That no right of action shall accrue against any peace officer acting upon a properly certified copy of a court order lawful on its face if such officer employs otherwise lawful means to effect the arrest. [1974 ex.s. c 99 § 1.]

26.09.900 Construction——Pending divorce actions. Notwithstanding the repeals of prior laws enumerated in section 30, chapter 157, Laws of 1973 1st ex. sess., actions for divorce which were properly and validly pending in the superior courts of this state as of the effective date of such repealer (July 15, 1973) shall be governed and may be pursued to conclusion under the provisions of law applicable thereto at the time of commencement of such action and all decrees and orders heretofore or hereafter in all other respects regularly entered in such proceedings are declared valid: *Provided*, That upon proper cause being shown at any time before final decree, the court may convert such action to an action for dissolution of marriage as provided for in RCW 26.09.901. [1974 ex.s. c 15 § 1.]

26.09.901 Conversion of pending action to dissolution proceeding. Any divorce action which was filed prior to July 15, 1973 and for which a final decree has not been entered on February 11, 1974, may, upon order of the superior court having jurisdiction over such proceeding for good cause shown, be converted to a dissolution proceeding and thereafter be continued under the provisions of this chapter. [1974 ex.s. c 15 § 2.]

26.09.902 RCW 26.09.900 and 26.09.901 deemed in effect on July 16, 1973. The provisions of RCW 26.09.900 and 26.09.901 are remedial and procedural and shall be construed to have been in effect as of July 16, 1973. [1974 ex.s. c 15 § 3.]

26.09.905 Construction of chapter with uniform child custody jurisdiction act (chapter 26.27 RCW). See RCW 26.27.900.

Chapter 26.12
FAMILY COURT

Sections

California Keeps a Formula for Injustice in Child Custody Fights

By JAMES A. COOK

Curbside clutter last week marked the end of the holiday season. Forlornly awaiting garbage trucks, trees with dragging tinsel and heaps of crinkled gift wrap signaled the passing of anticipation and the beginning of memories.

But inside many homes, warm recollections had been purchased at a price of bitter conflict. While others were rushing about from store to store, planning close family gatherings around the tree or menorah, divorced parents in these homes too often were making frantic calls to their lawyers, petitioning courts and waging fierce battles over which one of them would spend the holidays with the children.

No other single time span incites such heated controversy between divorced parents as do the holidays. Wrapped as they are in the mood and myth of family unity, the holidays are meant to be shared with children. Children give purpose to tradition. Thus, this time of the year highlights more poignantly than any other example how badly our courts have failed to protect a child's right to know the love of both parents.

Up until now, the courts have meticulously divided between divorcing parents all the material wealth of the marriage. The car, the couch, the house, were split 50-50. But the most precious part of that marriage, the children, went to one parent, the one designated as custodian, almost exclusively. The other parent was regularly left with only a very small portion of the child's time and frequently had to fight repeatedly, assuming devastating legal expenses, to even maintain that shred of contact with the child.

This formula for injustice is about to become a thing of the past. On Jan. 1, California's new joint custody law AB1480 went into effect. Hereafter, at the request of either parent, judges must consider joint custody awards. Such requests can be made not only for pending divorces, but also in the case of divorces already granted.

From now on divorcing parents will be encouraged either to sit down together and work out joint-custody arrangements or to work them out through their attorneys or counselors. In order to allow the utmost flexibility and, thereby, to insure that various ways of life can be accommodated under the new law, no rigid guidelines have been imposed on litigating couples. Thus, each joint-custody agreement can be tailor-made. Each set of parents can draw up a plan most practical and suitable to their situation. Legislators believe that this "self-ordering" (designing the court order under which they will be bound) will lead to more compliance with court orders on the part of parents, since most people are inclined to honor an agreement they negotiate themselves.

Further, since the court still has the authority to order sole custody to the parent most tolerant of the child's continuing relationship with the other parent, it is believed that this action will prove to be an incentive to greater cooperation between negotiating parents.

The new custody law was inspired in part by the growing number of custody-change suits brought by fathers who had no recourse under the prevailing law to overcome custodial mothers who obstructed the father's attempts to maintain close contact with the child. Non-custodial mothers were also interested in the joint custody concept, though they are fewer in number and thus have not received as much publicity as have the fathers.

Divorced fathers have become more willing in recent years to express their anguish over the loss of their homes, their wives and their children. More people realize the important role a father plays in the child's life. And more fathers develop and value their parenting skills. In fact, the new movie "Kramer vs. Kramer" gains its power from the nurturant father role played by Dustin Hoffman. Still, the courts were caught in a cultural lag. Laws did not change fast enough or sensitively enough to respond to social changes.

The initial push for new legislation came from professionals in psychiatric, sociological and counseling fields. A gratifyingly large number of lawyers also endorsed the necessity of joint custody.

Actually, the outrage over custody awards began to build soon after the "no-fault" divorce Family Act of 1970 was enacted. Subsequent studies regarded the lack of a joint-custody option as the single greatest inequity left unrectified when the no-fault divorce was imposed. Since the statute still provided that custody could only be awarded to either parent (or an outsider under certain circumstances), the parent who demanded it of the court would receive a divorce without showing of cause. The other parent—who may not have been consulted, may not have been desirous of divorce and may not have wittingly given cause for divorce—could be promptly excluded from the child's life except for visitation based on a schedule decreed by the court without consulting the excluded parent.

In fact, the non-custodial parents often are treated as nonpersons. They have been barred from access to their children's medical records, although they often are financially responsible for the medical bills. School administrators and teachers have often colluded with the obstructionist parent by refusing to provide the non-custodial parent with any information whatsoever about the child—even though such refusals violate federal law.

The net effect was that law-abiding fathers whose conduct as fathers and husbands was theoretically not in question, were, nevertheless, severed from a normal relationship with their children in decrees as severe as if the men had committed a crime.

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And, despite the myth of the irresponsible, footloose and fancy-free former husband, many divorced fathers are determined to remain committed parents to their children. Many yearn to rejoice with their child over a school award or to commiserate over a failure. They seek to share influencing and guiding their child through the formative years.

The new law should help avoid two problems that frequently endanger the well-being of children. In the past, excluded parents have sometimes resorted to "child stealing" or to abandoning child support for lack of frequent and extensive contact with their children. Certainly, a pattern of mounting frustration over not being able to see and share the child often precedes abandonment or child stealing by the non-custodial parent.

Studies show that about two-thirds of divorced fathers fall behind in child support after the first year of divorce, and if, as seems to be the case, a significant number of these fathers have had visitation obstructed before finally withdrawing support, joint custody should end this vicious cycle.

Moreover, the new law will shift the focus to a decision based on protecting the child's equal access to both parents regardless of custodial arrangements and on encouraging parental sharing of responsibility for the child. Thus, the new law stipulates that custody should be awarded in the following order of preference according to the best interests of the child: To both parents jointly or to either parent. When awarding sole custody, the court is encouraged to choose the parent who will most tolerate the child's frequent and continuing contact with the other parent. Preference of custodian will not be made on the basis of the parent's sex.

No longer can the reluctant or vindictive parent easily use custody, visitation obstruction or denial as a weapon against the other parents or use the court as party to such action.

Certainly, all children are entitled to the love and influence of both parents, but when they are pulled between two sparring parents they suffer acutely. Psychologists and psychiatrists have often warned of the long-lasting ill effects of such trauma.

After years of study, in fact, professionals have compiled a list of adverse reactions a child suffers as a result of sole-custody awards. Children immediately feel lost and abandoned regardless of the presence or excellence of the custodial parent. Feelings of anxiety and loyalty conflicts lead to strained relations with the custodial parent, disturbances in the child's social relations and learning problems. There is often confusion in sex-role identification.

But children are not the only ones to undergo trauma. Non-custodial parents feel anxious over the separation and at the loss of their close family members, and familiar roles and habits. Practical problems such as economic instability create added stress. The ability to parent declines as does self-concept. (Mothers feel less physically attractive and fathers suffer greater initial changes.) Feelings of rootlessness and extreme loneliness also pain these parents.

Joint custody, which preserves as much as possible of the existing relationship between parents and child, will soften many of these symptoms.

Every year about this time, much is written of the large number of Americans who suffer severe depression throughout the holiday season. Suicides increase. Some of these incidents are directly related to the shattered home. Many of my colleagues bewail the high stacks of litigation papers filed by clients who, in the face of the custodial parent's resistance, cling to the hope, however slight, of sharing the holidays with their child.

For these people and for the many, many children lost and confused by embattled parents, the new joint-custody law is a marvelous present for the new year. □

James A. Cook, an administrator of a nonprofit association that researches legislative, regulatory and judicial matters, initiated and authored the original version of AB 1480 which, in modified form, took effect Jan. 1.

DEFINITIONS OF CHILD CUSTODY

Sole Custody
Split Custody
Joint Legal Custody
Divided or Alternating Custody
Joint Custody
Joint Physical Custody
Joint Physical & Legal Custody

As an aid to parents and clients, as well as professional practitioners, the following is intended as a layman's guide to child custody terminology. Counselors may find this compilation useful for distribution to clients so that all parties have a similar comprehension of terms. The ease with which many of these terms have been incorporated into casual conversation, but without definition, has led to misinterpretation. Furthermore, the lay public has been exposed to a wide range of interpretations of custody. Some of the definitions have been erroneous or contradictory, often because the omission or addition of descriptive adjectives alters or restricts the scope of custody.

Confusion also arises because courts, as well as the media, frequently use certain terms interchangeably.

Definition of terms is, primarily, the product of statute and case law precedent. The following definitions have been derived from such sources, but this compilation is intended as a convenience rather than a legal reference. However, a mutual understanding by parents of these terms is less likely to stimulate a legal quest on an erroneous assumption about a form of custody or to necessitate subsequent litigation because of a reinterpretation.

Since our primary intent is to aid the divorced family toward an operable plan of custody rather than a diversion into debating the intent of terms, we hope this information will be useful in establishing a terminology with which the parties agree.

The parent or parents particularly interested in joint custody are advised to consider the term in its larger content, that of joint physical and legal custody. This is the final form of custody described at the conclusion of this compilation. The scope and intent of each previously described custody form aids in clarifying the intent and significance of joint physical and legal custody.

Acknowledgment is extended to the following authorities, from whom definition information has been derived, although we are refraining from indicating specific reference to each authority because of our edited abbreviations or elaborations of their original comments. Therefore, readers will also benefit from the more extensive descriptions of:

H. Jay Folberg & Marva Graham, 'Joint Custody of Children Following Divorce,' Univ of Calif, Davis, Law Review, Summer 1979.

Robert Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Interminancy,' Law & Contemporary Problems, Summer 1975.

A Lindey, ' Separation Agreements and Ante-Nuptial Contracts,' 1977

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Source: James A. Cook, 10606 Wilkins Avenue, Los Angeles, Calif 90024.

Sole custody describes an award of custody to one parent with visitation rights to the non-custodial parent.

An early impetus for this form of custody was, and still is, an intention by the court to know whom to hold legally responsible as being in control of the activities and conduct of a child. However, much of the dissension of recent years about sole custody has arisen because participants have frequently assumed that sole custody is less of a responsibility for the conduct of a child in society as a whole and more of a responsibility in control of a child's access to the alternate parent.

Divided or Alternating Custody

Divided or alternating custody permits each parent to have a child for a part of a year or alternating portions of a year, or upon subsequent or alternating years. Reciprocal visitation rights are afforded to the non-custodial parent. Each parent alternates and assumes the responsibility and control accorded a sole custodian during the time period when child is awarded to the respective parent.

Divided or alternating custody is not joint custody.

Split Custody

Split custody awards one or more children to one parent and the other child or remaining children to the alternate parent. Parents and courts considering the split custody alternative will wish to weigh carefully the wisdom and necessity of assuring that the children do or do not have significant time together with their siblings.

Joint Custody

California's Civil Code Section 4600, Section I, taking effect January 1, 1980 opens with a public policy statement of intent "...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 addition, Section 2, Section 4600.5 (c) defines joint custody: "...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. Consequently, joint custody, as intended by the California statute is initially and primarily concerned with the joint physical aspect of custody described below under joint physical and legal custody.

In joint custody, both parents retain and share the responsibility and authority for the care and control of the child or children.

Joint legal custody is available, as an alternative, for a parent or parents desirous of solely the legal relationship. California's Civil Code Section 2, Section 4600.5 (c) offers: "...such order may award joint legal custody without awarding joint physical custody."

A primary intent is to offer an opportunity of joint legal sharing to those parents who by reason of distance or isolation (such as military or overseas service) of certain limitations of remarriage are unable to participate in joint physical custody.

The scope and authority and participation by a joint legal custodian has been increasingly limited by decisions and opinions. In its most restrictive interpretation it has been characterized as the 'right of survivorship' with an opportunity to be a successor custodian. In its broadest interpretation, joint legal custody has encompassed nearly all the major responsibilities and opportunities that California relegated to custodians except physical, day to day residence. Those responsibilities and opportunities included decision participation in matters of education, medical care, religion, discipline and financial support.

Apprehension about decreeing merely joint legal custody without concurrent joint physical custody arises because it imposes upon a joint legal custodian all the legal responsibilities and obligations of a child's conduct, delinquency, encounters with the law, vandalism, and creditors with none of the physical relationship that would help a joint custodian to ameliorate or forestall the causes and consequences of a minor's legal problems.

Emphasis upon the necessity of joint physical custody rather than solely joint legal custody was most recently generated by a decision of California's First Appellate District on May 9, 1979, prior to the legislative debate and enactment of California's new joint custody statute in In Re Marriage of Neal. That decree, among other pronouncements indicated that joint legal custody was, in effect meaningless in comparison with sole parent physical custody. Consequently, the subsequent emphasis in California's new custody statute for a reiteration in several locations of 'frequent and continuing contact' was also bolstered with a definition of joint custody as meaning "...that physical custody shall be shared by the parents..." (Section 2. Section 4600.5 (c).) At three different paragraphs within the statute a requirement was imposed that the court specify its reasons if joint custody is not awarded.

Other limitations on joint legal custody, as compared with physical custody, are contained in 'Burge v. San Francisco,' 41 Cal. 2d 608 (1953) and 'Adoption of Van Anda,' 62 Cal. App. 3d 189 (1976). In California, these cases are regarded as obstacles to smooth functioning of joint custody.

Consequently, parents establishing joint custody will wish to assure themselves of the full scope of joint physical and legal custody lest subsequent litigation occur that is more the consequence of interpretation than any inherent flaw in the concept of joint parenting.

The sharing of that responsibility can traverse an entire spectrum from casual cooperation to specifically delineated times and functions. The sharing can be of all parenting functions or the parties can adopt or allocate functions to each other depending on capabilities, interests, and practical solutions for assuming responsibility.

The sharing of the child or children's time between joint custodia can also extend across a spectrum, whether the decision is for a scrupulously equitable division of time or a rational and reasonable allocation of time predicated on the time each parent has available to assume custodianship or to grant time to the alternate parent.

Joint custody can also accommodate a wide range of alternatives fo the allocation and assumption of the financial obligations of child support. Thus far, no known statute permitting an award of joint custody has specified a concurrent formula concerning child support. The resoluti of child support within joint custody remains a matter for the parents to resolve among the alternatives available to them or for the court to determine after an assessment of resources, assets, income and ability of each parent to pay.

Joint custody has also been referred to as joint parenting, co-parenting, shared custody or co-custody. Forms of joint custody have also been characterized as dual parenting, no-fault custody, and concurrent custody. The variations incorporating 'parenting' are applicable definitions sociologically, but they have not yet been given l recognition that converts parenting from a description into a keyword. While the various alternative words may stimulate a way of comprehending custody participation for both parents, it appears likely that 'joint custody' will prevail as the terminology in most jurisdictions for the forseeable future.

While some observors object to use of the term 'custody' because of the connotations of criminal law, the similarity may merely be coincident and is a probable outgrowth of the intent to establish adult responsibility for control of the actions of minors.

A significant alteration occurs when joint custody is amplified or constrained by the addition of specific adjectives as in joint legal custody, joint physical custody, or joint physical and legal custody.

During legislative debate, various qualifications upon the scope o joint custody were proposed, debated, and thereupon eliminated. The limiting qualifications were removed so as not to restrict the scope of options and arrangements available to parents through joint custody. Geographic proximity, for instance, was removed as a qualification that might limit availability of joint custody for a parent or parents desirous of sharing custody.

The sharing of residence, participation in care, and establishmen and recognition of the validity of a dual home are integral to the conce of joint physical custody.

The allocation of significant periods of time for the child or children to be resident exclusively with each parent is usually a major consideration of a parent or parents enjoying joint physical custody.

Precise equality of time allocation may become an initial preoccupation of those parents desiring joint physical custody. However, once the principal of sharing jointly has been established and the fear of irreparable loss of the child or children by one of the parents has been dispelled, the practical availability of time by each parent of child-rearing time can become the guideline for allocating residence time.

Hesitancy to accept participation in joint custody by one parent may have assumed the likelihood of acquiring sole parent custody is frequently traceable to (a) an expectation of child support financial income by reason of retaining sole possession of a child, (b) fear and guilt that by more frequent and extensive contact with the alternate parent a child may develop a distaste for the sole custodian, particular if the parent prone to sole custodianship was clearly the initiator of the divorce, and (c) opportunities for extortion or psychological harass that are inherent in retaining sole custody if the excluded parent is known to place a high value on a parental relationship with an isolated child or children and longs for their companionship. Hence, counselors and parents will need to encourage a realistic exorcism of financial greed, fear and guilt, and extortion and harassment in order to achieve a more relaxed allocation of time.

Ten basic variations for allocation of time exist from which joint custodians can integrate or elaborate on their preferences and their availability.

Variations for sharing joint physical custody include:

(1) Freedom of movement between two homes.
(2) School year versus summer vacation, with exchange weekends & night
(3) Divide Fall & Spring semesters and divide summer vacation.
(4) 2-3 months versus 2-3 months, with exchange nights and weekends.
(5) 1 month versus 1 month, with exchange weekends & nights.
(6) 2 weeks versus 2 weeks, with nights & special vacation periods.
(7) 1 week versus 1 week, with special vacation period.
(8) 3½ days versus 3½ days, with special weekend & vacation periods.
(9) Workday week versus weekends, with special vacation periods.
(10) Child remains in original home, parents alternate.

The meaningful sharing of significant periods of time for a relaxed relationship by child and parent, free from superficiality and impermanence of "visitation" is paramount to the intent of joint physica custody.

Financial child support for joint physical custody situations is also subject to a range of choices.

Among the choices from which parents can select for resolution of child support:

(1) One parent assumes all child support costs.
(2) Each parent alternates and assumes child support costs in response to fluctuations and seasonal variations in each parent's income.
(3) Each parent assumes child support costs while child is resident with the respective parent.
(4) Equal split between parents of child support costs
    (a) based on predetermined dollar figure, or
    (b) based on actual and verifiable expenditures.
(5) Percentage sharing of costs predicated on respective but different incomes of each parent.
(6) Sharing of costs based on need and ability of each parent to pay.

Joint Physical & Legal Custody

The intent of California's custody statute of 1980 is to establis a condition and expectation that joint physical and legal custody will prevail unless a parent can establish with sufficient reason that a less equitable custody award should be decreed. The court is required to itemize the reasons for a less than equitable decree of joint custody.

Joint physical and legal custody can encompass the provisions itemized above for joint legal and for joint physical custody, respectiv However, by agreement, parents can also alter, trade or allocate from am the provisions with those custody forms to suit their needs and preferen and those of their children.

A statute, such as California's, that signifies a preferred solut of joint custody and more stringent requirements for the justification o less than joint custody, provides an important incentive for parents to anticipate constructively the merits of joint custody, both legal and physical.

HOUSE RESEARCH AGENCY
Pouch Y
Juneau, Alaska 99811
465-3991

KEY WORD: Child Custody

Research Request No: 82-98

RESEARCH EVALUATION

TO: Representative Mike Burns

FROM: Duncan L. Read, Director

RE: Evaluation of Research Products

To assist us in improving the quality of our research services, we would appreciate your response to the following questions:

- Was the information unbiased?

- Did it provide answers to (or, at least, useful information on) all the questions you posed?

- Was the research completed and delivered to you in a timely manner?

- Was it clearly written?

- May we release this information to the public?

  [ ] Now

  [ ] Three months from the date of transmittal

  [ ] At the end of the current legislative session

Please be assured that we will take your comments seriously in performing future research for you.

Please return to House Research Agency, Mail Stop 3100.

Thank you.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

January 29, 1981

MEMORANDUM

TO: Representative Mike Beirne
Attention: Jody Sutherland

FROM: Christine Johnson and Carol Riggs, Research Staff

SUBJECT: Research Request 82-18
Child Custody and Visitation Enforcement

This memorandum is in response to your request for information regarding joint custody and enforcement of parental visitation rights in California, Oregon, and Washington. The relevent statutes from each state are attached, and the major provisions summarized below.

Joint Custody

In California, Oregon, and Washington, as in many other states, the courts have the authority to award custody of children to both parents jointly. In California and Oregon, state statutes expressly give the court this power. In Washirgton, the court is empowered to award custody as it sees fit, based on a determination of the best interests of the child.

At present, California is the only one of these three states which has enacted legislation pertaining to presumptive joint custody. Legislation regarding presumptive joint custody was introduced in the Oregon Legislature in 1979, and a bill is currently under consideration in the Washington House of Representatives.

California. California is unique among states with joint custody laws in that its statutes establish specific procedural guidelines for the court; in other states, the tendency has been to simply grant the courts the power to award joint custody or to imply the availability of joint custody by defining it.

California law states that custody shall be awarded in the following order of preference, depending on the best interest of the child: first, to both parents jointly; and second, to one of the parents. It is important to note that this provision does not create a presumption of joint custody; rather, it states the public's preference for joint custody awards.

California law presumes that joint custody is in the best interest of the child only when both parents have agreed to this award. The court has the right to deny joint custody even under these circumstances; however, it is required by law to state the reasons for the denial.

Where only one parent desires joint custody, California law requires that the court consider it equally with sole custody. If joint custody is not awarded, the court must again explain its rationale.

Legislation is currently pending in the California State Legislature which would make joint custody the presumption in all cases unless:

(a) the parents have agreed that custody should be awarded to only one of them; or

(b) the court finds one parent unfit.

Oregon. Currently, under Oregon law, the courts may award custody of children to "one party or jointly."

Oregon House Bill 2538, which was not enacted, would have created a disputable presumption that joint custody is in the best interests and welfare of the child. In contrast to the current California law, this proposal would have made joint custody the presumption in all custody cases, not just cases where the parents had agreed upon a joint custody arrangement. A copy of the legislation is attached for your reference.

Washington. As noted above, legislation regarding joint custody is currently under consideration in Washington. The proposed legislation is similar to California's in that joint custody would be a disputable presumption when both parents were in agreement, and would be considered equally with sole custody at the request of either parent. Unlike California's current law, however, the legislation would establish a streamlined procedure for modifying existing orders to stipulate joint instead of sole custody. The bill is expected to be revised in committee within the next two days, and we will forward a revised version to you as soon as it arrives.

Enforcement of Parental Visitation Rights

Neither the National Council of State Legislatures nor the National Association of Commissioners for Uniform State Laws were familiar

with any model legislation on visitation enforcement. A staff person for the latter felt that there was a general trend among the states towards provisions for mediation or arbitration of visitation disputes.

The procedures for enforcement of visitation in California, Oregon, and Washington are briefly outlined below.

California. An individual who willfully denies visitation can be prosecuted under California Penal Code section 278.5. An individual convicted under this code may be punished by imprisonment for not more than one year and one day, a fine of not more than $1,000, or both.

According to Jack Trier, who is in charge of visitation enforcement for the Sacramento area, very few people are criminally prosecuted in California for failure to grant visitation. Typically, non-custodial parents who have been denied visitation file a complaint with Trier's office. The custodial parent is then notified by letter that a complaint has been filed; he or she is warned of the possible consequences, and advised to contact the other parent, a private attorney, or Trier's office. Trier estimates that 75% of the cases are resolved by him or his staff, acting, in his words, as "social workers", and persuading the parties to compromise. The remaining cases are referred to the Family Court system for resolution.

Since January of 1981, California law has required that visitation disputes be subject to mediation before being referred to court. The law states that:

> The purpose of such mediation proceeding shall be to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children's close and continuing contact with both parents after the marriage is dissolved. The mediator shall use his or her best efforts to effect a settlement of the custody or visitation dispute.

Cases which are mediated result in a legal court order; however, attorneys are not necessary, and the procedures are less formal than in an actual courtroom.

Trier noted that in the majority of the cases handled by his office, there are conflicts regarding visitation because the original custody order did not specify precisely when and under what circumstances the non-custodial parent may see the child. Trier said that orders typically state that the non-custodial parent has the right to "rea-

sonable visitation". Problems arise because the two parents cannot agree about what this constitutes. According to Trier, generally what is necessary in these cases is negotiation of a formal visitation schedule.

Oregon. In Oregon, a non-custodial parent must return to court in order to enforce his or her visitation rights. According to Judge Nachtigal, of the Circuit Court for the Portland area, an individual who is willfully denying visitation may be held in civil contempt of court, and sentenced to up to six months in jail. Often, however, the court will refer the parents to the Family Concilation Service which attempts to resolve their disputes out of court.

Under Oregon law, there are no criminal penalties for withholding visitation. Oregon law does permit the court to eliminate or reduce child support payments if visitation is being denied; however, according to Judge Nachtigal, very few judges, if any, exercise this power. The court also has statuatory authority to award attorneys fees to parents who are in violation of a visitation order.

Washington. The procedure for enforcement of visitation in Washington is very similar to Oregon's. An individual who is being denied visitation must file a motion with the court in order to have his or her visitation order enforced. The court may charge the custodial parent with contempt. Parents are frequently referred to Family Court for mediation.

By law, the court may order a party to pay a reasonable amount for the cost to the other party of maintaining and defending a visitation enforcement proceeding.

We hope this information is of use to you. Please don't hesitate to call us if you require anything further.

CJ/cj

Attachments:

California Statutes
Oregon Statutes
Washington

FAMILY LAW REFORM AND JUSTICE COUNCIL OF ALASKA, INC.

P.O. BOX 4-1646
ANCHORAGE, ALASKA 99509

RUDY JOHNSON, PRESIDENT
(907) 333-6693
"ALASKANS FOR CHILDRENS RIGHTS"

FAIRBANKS - BOX 73256
KETCHIKAN - BOX 7176
SITKA - BOX 913

April 26, 1981

WRITTEN TESTIMONY
by
RUDY JOHNSON

IN SUPPORT
of
H. B. 210
JOINT CUSTODY

presented
April 22, 1981

via Teleconference Network
Anchorage

FAMILY LAW REFORM AND JUSTICE COUNCIL OF ALASKA, INC.

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Present and past methods of dealing with disputed child custody issues have been a disasterous failure. Historically we have allowed biases and not the best interest of the children to be the determining factors in the millions of cases that have filtered through our court systems. The results of over a century of abusive dispositions of these cases are measurable as will be mentioned later. To thoroughly appreciate the need for H.B. 210 we must understand the failures of the present system and be realistic enough to accept the fact it is failing!

In a 1860 opinion the New Hamshire Supreme Court ruled in upholding an award of custody to a father;

> "It is a well settled doctine of the common law, that the father is entitled to the custody of his minor children, as against the mother and everybody else: that he is bound for their maintenance and nurture and has the corresponding right to their obedience and their services."
>
> "It is one of the cardinal principles of nature and of law that, as against strangers, the father, however poor and humble, if able to support the child in his own lifestyle and of good moral character, cannot without the most shocking injustice, be deprived of the privilege by anyone whatever, however brilliant the advantage he may offer. It is not enough to consider the interests of the child alone." (American Journal of Psychistry 133:12107, 1976, page 1370)

From this 18th century mentality we went to the other extreme as espoused in the Minnesota Family Law Practice Manual.

"Except in very rare cases the father should not have custody of the minor children of the parties. He is usually unqualified psychologically and emotionally; nor does he have the time and care to supervise the children. A lawyer not only does an injustice to himself, but he is unfair to his client, to the state, and to society if he gives any encouragement to the father that he should have custody of his children. A lawyer who encourages his client to file for custody, unless it is one of the classic exceptions, has difficulty collecting his fees, has a most unreasonable client, has taken the time of the court and the welfare agencies involved, and has put a burden on his legal brethren." (Volume 50, pg 75)

Has the tender years doctine been eliminated in our system today? In theory yes, we have very good case law and Alaska has some of the most progressive statatory law in the nation. But the facts are the biases still exist and preconcluded decisions are being made before the facts are ever established in awarding custody of children, to the detriment of the children.

Since 1977, we have been associated with over 185 divorce reform organizations around the nation that have collectively gathered the results of over 350,000 disputed child custody cases. The results shockingly demonstrate the above statements. Out of these cases only 4.5% of them were decided in favor of fathers. It is not remotely the intent of this writer to suggest fathers should receive custody most of the time but common sense tells us that it is not in the best interest of children to be placed in a single parent home headed by a mother 95.5% of the time, the long term negative effects on the children would no doubt be just as disturbing with the figures reversed. This organization is currently doing a study of the Anchorage Court System where we are examining the records of each divorce case for the past two years and the initial results show that in this city the statistical conclusions will not even be as impartial as the national study, as appauling as those figures are.

What are the results of the abuses spoken of so far?

1. 90% of all homocides are a direct result of domestic relation problems.

2. 90% of the american prision population is from a broken home.

3. 90% of all women murdered between the ages of 20 and 30 are killed by their husbands or ex-husbands.

4. 9 out of 10 women on welfare are products of divorce.

5. 70% of the civil case load in the Alaska Court system is domestic relations.

The criminal activities related to these problems are the results of people, normal everyday Americans, being pushed too far by an apathetic system. By being denied the access to their children, by being forced to be financially obligated to their ex-spouse to the point of ridiculousness, by having gasoline poured onto the smoldering pile of emotions by attorneys and others involved with the case as these people are going through the most difficult emotional experience they will ever encounter next to losing a loved one in death. <H.B. 210>will elliviate a lot of the grief for these people and give them alternatives that are encouraged by the courts and the related legal establishment that are more comfortable and that they can live with.

As the law has developed some courts have recognized the failures of the present system and have provided direction to the lower courts in their written opinions.

> "Parenthood is a continuing bilateral responsibility and opportunity. It cannot be avoided or successfully divided. A decree of divorce offers no excuse or alibi for the abatement of parental interest or obligation. The dissolution of the marriage contract, leaving in its wake children who are the innocent victims of the resultant broken home, should be a challenge to the fathers and mothers of such children to make an even greater effort to minimize, as far as possible, the incidental and unavoidable losses of love, council and guidance."
> (McBetrick vs. McBetrick 284 P2d 352, Oregon)

> "Whoever may have custody, it is the duty of each parent and each family member to the children to set aside personal feelings and act in a manner which is supportive of the relationship of the children to the other parent."
> (Warren vs. Warren 528 P2d 1088, Oregon, 1974)

Attitudes are slowly being changed and direction is being provided by the Alaskan courts on an individual basis. In a 1975 opinion from the Ketchikan Superior Court, Judge Thomas Schulrz emphasized the positions taken here in his remarks as he awarded custody of a 4 year old boy and a 7 year old girl to the father.

> "Certainly a factor in determing the fitness of the parent is the kind of learning which might be called fitness that either or both parents are able and willing to provide. In terms of fitness, to provide the care that these children requires and in terms of the relationship that the parties bear to the children I find both are fit and both are in fact good parents, have taken good care of the children, love the children and both have a good relationship with them. I am left with the very narrow basis on which to resolve the question and that is the view that I can take from the testimony that I've heard up till now, of which parent is better able to maintain the status quo to facilitate the children and their desire at this point as its reflected in the testimony the relationship they have with the parents, and maintaining a meaningful relation-

ship with both. I am satisfied from what I've heard that the father is better able to do that at this point. And ultimately in this case, it's my considered opinion that the parent most fit will be that parent that demonstrates the best ability to maintain open communications between both. These children were, as all others are, brought into the world without being asked about it and they're being left now in a situation that they didn't particularly ask for and probably don't want but they are entitled to the guidance and assistance from both their parents." (Johnson vs. Johnson, Transcript 186 to 189, Ketchikan Superior Court, April 7, 1975)

In considering child custody matters we must recognize the fact that most parents that come before the court are not only fit, they are very fit parents and the state would never consider interfering in their lives so long as there was not a divorce petition filed. H.B. 210 is a necessary vehicle to help change attitudes. It also recognizes the right of the parents to control their own families and it encourages them to do this. It paves the road to making decisions in disputed custody cases based upon what is right with this family and these parents rather than what is wrong with the parents and the children. It provides a means for settlement that feels better for the parents which in turn helps the children feel better. Recent studies such as the one from California reporting the results of families in transition after divorce over a period of 5 years (Psychology Today, January 1980, Enclosed) show that when the parents deal with their divorce constructively and creatively then the children are not adversely affected on the long run whereas if the parents have a lot of turmoil and grief for extended periods of time these children will be affected adversely for years to come and even into their adulthood.

Mediation and joint custody works! The Association of Family Conciliation Courts is an organization made up of judges, social scientists, attorneys and a few lay people like myself and they have concluded with their studies that 60 to 80% of all disputed child custody cases are settled out of court with the existing mediation programs by the parents themselves. The Association has officially endorsed joint custody as the best first choice in resolution of disputed cases and has published hundreds of studies showing joint custody, joint parenting, does and is working. The concept has been being used for up to 3 years in various jurisdictions and is working even when mediation is required rather than voluntary. Of course, the success rate is lower under those circumstances but if we can settle on the average, 70% of all cases out of court the dollar value alone is astronomical in terms of judicial costs not to mention the emotional benefits to the parties themselves and the resultant decrease in the criminal activities that are related and the welfare costs. But the most important consideration is how all this benefits the children of divorce. The results of the study from California can not be given too much emphasis.

What I have stated here is based upon fact not my opinion. Some people have opposed H.B. 210 but I say anyone who opposes it simply does not know enough about it and the facts surrounding the concept. One attorney for instance testified that by encouraging mediation a man could and will intimidate a women into agreeing to something she really does not want. I am positive that is not the rule as my experience has shown me and when such a rare thing happens the checks and balances written into the existing law are designed to catch it. For instance in the do it yourself kits available from the efforts of Representative Bradner and Gardiner in 1977 it is a requirement that one of the spouses appear before the court before the divorce is granted. The legislative intent was to allow the judge to ascertain from that party that the agreement was indeed mutual and not coerced.

Other checks and balances exist in H.B. 210. If the court finds that joint custody is not in the best interest of the family he only needs to state his reasons for that conclusion and dismiss the concept. The bill specifically states the presumption for joint cusotdy is rebutable. It is a long way past due that we require the courts to justify their disposition of child custody decisions, that is all this bill requires and it still leaves them a lot of discreation, too much discreation in my opinion but I am willing to compromise on that to get the bill.

Joint custody is not for everyone but it works for most, with direction, and I think it would be inhuman to deny this wonderful alternative to the present system to parents and children because of those few that are too immature to make it work. The courts and the present system will always be available for those people who decide they want to go that way.

It was reported that under present law we do not need H.B. 210. This is theoretically correct but what is so important about the bill is it will help change attitudes and attitudes are the key to helping divorcing people experience a creative divorce that will strengthen the family instead of destroying it.

If I have appeared anxious in my oral testimony as well as this written testimony, it is because I know that in the time it takes you to read this:

> there will be over 1,000 divorces in the United states affecting over 3,000 children;
>
> there will be at least two homocides as a result of the activities surrounding these people;
>
> there will be four more prison inmates;
>
> and we have just gotten 150 more people on our welfare rolls;
>
> 40 Alaskans were divorced today!

JOINT CUSTODY IS THE ONLY LOGICAL AND MORALLY ACCEPTABLE ALTERNATIVE TO A HAPPY INTACT HOME FOR CHILDREN OF DIVORCE. PARENTS DIVORCE EACH OTHER, CHILDREN NEVER DIVORCE THEIR PARENTS.

Enclosure: California Report

Carbon Copies sent to the following:

Governor Jay Hammond
Representative Rogers
Representative Gardiner
Representative Meekins
Senator Parr
Mr. Mark Lewis, Chicago, Illinois
Mr. Vern Lee, Fairbanks, Alaska
Mr. Wayne Ross, Esquire, Anchorage, Alaska
Mr. Bill Riech, Sitka, Alaska
Mr. John Reese, Esquire, Anchorage, Alaska
United Fathers Organization, Santa Ana, California
M.E.N. International, Wilmington, Delaware
Mr. Max Gruenberg, Esquire, Anchorage, Alaska

Respectfully Submitted:

RUDY JOHNSON