ALASKA LEGISLATURE COMMITTEE FILES 1981-1982 8672

1534 SHESS SB 723

In reviewing the legislation, it is apparent to me that this is a copy of California legislation, which was introduced around the first of 1980. The introduction of this legislation in California did have some cost factor tied to it, and it did take into consideration that in the State of California, there is a system of Conciliation Courts, which provides for the process of evaluation, counselling and mediation, in order to assist the parties going through the divorce and resolving any custody matters prior to litigating. There has been an additional piece of legislation mandating mediation, which went into effect January 1, 1981. There has been recognition in California that personnel must be trained to implement the mandatory Mediation Bill and a training program has to be funded in Los Angeles, California for the purpose of training such personnel. As a member of the Board of Directors of the Association of Family Conciliation Courts, I have frequent contact with the directors of the various conciliation court programs in California, and I do not have any awareness of anyone using the figures that have been cited by one of the witnesses to the effect that 60% of the custody cases in California are now going joint custody as a result of mediation. The information that I have from the contacts that I have in California does not indicate anywhere near that statistical number and does indicate that there is great concern about giving a mandate to the effect that joint custody must be used and will work for everyone.

In summary, I would repeat my earlier position that joint custody is an effective method for planning for children, but the ingredients to make it work are not universally available in the adults that are involved in litigation. I believe it should be used selectively, just as custody to father, or custody to mother should be selectively based on a combination of factors. These factors must include the ability of the adults to understand the responsibility as parents; their willingness to share the parenting role even though they cannot share other roles and responsibilities one with the other. There must be the ability to place the child's interests before the adult's interests. There also must be an ability to function, probably more effectively than they had functioned when living together as parents. The children must be able to know that the parents are working in concert on their behalf to provide them with the optimum parenting. In the absence of these conditions, joint custody is likely to be detrimental to the children and to the adults. In the absence of a willingness to maintain a unified parenting picture for the children, the children become the negotiators between the parents, they become the communicators, and the children learn to be manipulators, telling each parent what they perceive the parent wants to hear, frequently, anything but the truth.

I would hope that this Bill would be given very, very serious consideration for a change within the Bill. I see no problem with the legislature affirming what already exists; that is, that joint custody is one of the options. I do see the creation of extreme emotional problems for people during a time that they are not functioning in a capable manner emotionally if a standard it set where the Court must show they are not capable of doing the parenting role as joint parents in order to protect the children.

Again, I wish to thank the Committee for the concern the Committee is showing over this piece of legislation, which when casually looked at appears to be a good piece of legislation, and one that would be of best interests to the parties involved. I feel very strongly that an indepth look at this legislation, based upon the experiences that I have had as a Custody Investigator, and in the experiences that many of my colleagues throughout the country have had, would indicate that there are some pitfalls in the legislation, and that it could create substantial problems, not only for the Court, but for the parties involved.

Thank you for your consideration.

Very truly yours,

Francis M. Stevens
Custody Investigator

FMS/lfs

Enclosures

cc: Justice Rabinowitz
Judge Moody
Judge Carlson

SEP 11 1981

1850 Roberts Road
Fairbanks, Alaska 99701
September 9, 1981

Senator Charlie Parr
543 3rd Avenue, Suite D
Fairbanks, Alaska 99701

Dear Senator Parr:

Thank you for the time you gave me to discuss House Bill 210, which would provide joint custody for children and would allow children the right to have a continuing loving relationship with both parents after a dissolution of a marriage.

In most states, including Alaska, a form of no-fault divorce exists that leaves no stigma on either party and neither partner need decimate the other in the public record. Though we have learned to deal with marriage dissolutions responsibly, we do not yet have a mechanism established to handle how children can obtain equal parenting from both parents as long as one parent objects to this arrangement. Because we have not yet learned how to handle this problem, the usual situation that exists in the courts today is that one parent must prove the other unfit and hence gain sole custody. This is a no-win, catch-22 situation because the very act of such allegations will destroy that parent's relationship with the children. House Bill 210 could provide a way out of this trap.

In the State of Alaska today there is an inconsistency among the courts of the various Judicial Districts with respect to the aid provided to individuals so that some children are given a greater opportunity to receive equal parenting from each of their parents after a marriage is ended, while other children are deprived of this constitutional right.

As we also discussed a related issue is the mediation services offered by Mr. Francis Stevens's program in the Third Judicial District. The success rate of this program is astounding--96% of cases are sucessfully mediated and go into court uncontested, i.e. only 4% go into court contested. (Reference: letter from Mr. Stevens dated May 1, 1981, copy enclosed). This is a dramatic statistic in favor of counseling and mediation and the positive approach toward the rights of children. Even if the success rate were only a mediocre 50% at least half the children would have the chance for equal contact and a continuing loving relationship with both parents. It is unfortunate that no such services are offered in Fairbanks where some divorce cases are still handled in an atmosphere that can only leave bitter, hostile, and acrimonious feelings with the children left in a catch-22, no-win situation.

The attached sheets summarize the attitudes and practices of the various Judicial Districts in Alaska today and are based on correspondence in the files of Representative Brain Rogers. The summary sheets show that in the First Judicial District some judges do not oppose a joint/shared custody arrangement that could allow equal parenting. In the Third Judicial District mediation services are available within the office of the Custody Investigator. Unfortunatly nothing exists in Fairbanks to help children.

During the teleconference April 22, 1981, on House Bill 210 some Fairbanks parents testified that they were frustrated by the courts in the Fourth Judicial District in their attempts to have a joint custody arrangement with their children and others stated that attorneys told them that the court would not grant joint custody or that it did not exist. A few Fairbanks parents have been able to get a joint custody arrangement through the Fairbanks courts. This information is on file in the office of Representative Don Clocksin, who was the chairman of the House HESS committee at the time.

These inconsistencies among the three Judicial Districts cited are discriminatory toward children and parents who are trying to work out a mutually agreeable arrangement.

I look forward to working with you on the concept of joint/shared custody which I think can provide a positive and responsible approach to child custody in a dissolving marriage.

Sincerely,

Larry R. Sweet

2 Blatt, M., and Kohlberg, L. "The Effects of Classroom Moral Discussion Upon Childrens' Level of Moral Judgment," in Recent Research in Moral Development, edited by L. Kohlberg and E. Turiel. New York: Holt, Rinehart & Winston, 1973.

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(Address requests for a reprint to John A. Larsen, Ph.D., Midwest Christian Counseling Center, 4620 J.C. Nichols Parkway, Suite 403, Kansas City, MO 64112.)

Joint Custody and Co-Parenting: Not By Law But By Love

THEODORE ERNST
RUTH ALTIS

In recent years, joint custody and co-parenting of children after divorce or separation has received considerable attention. The authors advocate wider recognition of this option to sole custody and visitation, review pertinent legal and other literature, identify indications and contraindications, and briefly discuss the implications for social workers.

In the late 1970s the practices of joint custody and co-parenting began to attract national attention. This was due in no small part to the nearly simultaneous appearance of two books: *Co-Parenting: Sharing Your Child Equally* by Galper [8] and *The Disposable Parent: The Case for Joint Custody* by Roman and Haddad [14]. Response to the award-winning movie *Kramer vs. Kramer* helped direct attention to the option of joint custody.

Though inextricably related, joint custody and co-parenting differ conceptually and affectively. Joint custody may be legal custody only, without the shared physical custody or commitment to shared parenting that

Theodore Ernst, M.Div., M.S.W., D.S.W., is Professor of Social Work, New Mexico Highlands University, Las Vegas, N.M. Ruth Altis, M.S.W., was most recently employed in the "Heart to Heart" program at the Kah Tai Care Center, Port Townsend, WA.

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is a feature of co-parenting. Many of the proponents of joint custody have been attorney fathers denied custody of their children after divorce, as many of those who promote co-parenting have been social worker parents. Attorney fathers denied sole custody, even after appeal, often seem to have espoused or advocated joint legal and/or physical custody only as a second alternative. Estranged social worker parents seem to have more frequently opted for shared parenting and then established legal bases for their commitment to co-parenting. Joint custody and co-parenting are further complicated by conflicting legal-adversary ("fathers' rights") positions as opposed to cooperative-consensus positions. The so-called fathers' rights movement often proposes that sole custody more often be awarded to fathers in contested custody situations, or that fathers be awarded more generous visitation rights, with joint custody only as a second alternative.

Definitions

Joint custody, both legal and physical (also known as split, divided, or shared custody, and even co-custody), is defined legally by Fineberg:

> In contrast to the split or alternating order, joint custody (or shared custody, as it is often called) *preserves*, at all times, both parents' joint, legal responsibility for the child's upbringing upon their separation. The crux of the order is that the separated parents continue to act as parents, sharing as equally as possible the authority and responsibility for the decisions that significantly affect the life of their child. Physical care and control is not isolated from legal custody nor do the parents divide custody in its broadest sense in such a way that it alternates between them during various times of the year. [6:433]

Many writers would disagree with the last portion of Fineberg's definition and include such alternating arrangements under a broader definition of joint custody.

Elsewhere, we have defined co-parenting as follows:

> Co-parenting is the planned, shared parenting of one or more children by divorced or separated parents. Co-parenting makes it possible for parents who are divorced or separated to continue to experience parenting as a responsibility and as an opportunity for a close, loving, caring relationship with a son or daughter. [5:678]

There are many varieties of joint custody and co-parenting ranging from custody and care splitting on school year vacation periods, to split week, alternating months, alternate six-month periods, alternate school years (depending on the age of the child), and even "bird's nest" arrangements, in which children of divorced parents remain in the same home (sometimes placed in trust for them), and former spouses alternate between the home of the children and a separate apartment or home, sometimes shared.

At the very heart of joint custody and co-parenting are specific ideas about what the notion of "family" includes. Advocates of this take as a given that the intact nuclear family is not the only viable family arrangement. Family forms they recognize are single-parent families; extended families, whether on multi-generational or other extended kinship bases; "blended" families, i.e., stepparent families. Divorced or separated families are seen as "reorganized" families. All such family arrangements (together with other social institutions) may and do successfully carry out family functions for children: physical care and protection, affective nurturance and love, status placement, role modeling, socialization, acculturation, recreation, education, religion, and so on.

Legal and Literature Review

The origins of joint custody and co-parenting in the United States as an alternative to traditional dispositions of children after divorce are somewhat uncertain. Historically, for many centuries in English and American common law, children of divorce almost always "belonged" to fathers; they were considered "property." Later, under the "tender years" doctrine, children were almost always placed in the legal and physical custody of mothers. Foster and Freed cite a 1944 "Symposium on Child Custody" as one of the earliest considerations of joint custody, as well as a 1968 student note in the Journal of Family Law [7]. However, most appellate decisions concerning joint custody are from the 1960s and 1970s; there are only a few earlier decisions. Goldstein, Freud, and Solnit, in *Beyond the Best Interests of the Child*, added complications to the issue

[9]. Stack's article in *Social Problems* in 1976 is seminal [15]. However, most of the literature concerning joint custody and co-parenting has been published since 1978. Freed and Foster in the United States [7] and Fineberg in Canada [6] have best summarized recent legal precedents and opinions in regard to joint custody and co-parenting. In recent years a number of nonlegal writers have also dealt with joint custody and co-parenting, including Abarbanel [1], Ernst [4], Galper [8], Greif [11, 12], and Roman and Haddad [14].

Nonlegal writers generally view joint custody and co-parenting favorably. Many of them view it as the most desirable custody disposition for children of divorced or separated parents. In fact, Grate and Weinstein title their article "Joint Custody: A Viable and Ideal Alternative" [10]. Some advocate that by statute it become the presumptive (but rebuttable) disposition for children of divorce, as it has in a number of states. Writing in 1980, Japenga reports that this has already occurred in four states: California, Iowa, Oregon, and Wisconsin [13]. Earlier, Buser indicates that there are already six states that have such statutes, but he does not name them [2]. In effect, many proponents of this approach take an adversary stance in regard to joint custody—that it may, even should, be imposed even when contested. As we indicate further in this article, we believe that cooperation, communication, and basic trust and agreement are necessary conditions for joint custody and co-parenting to work successfully in "the best interests of the child."

Goldstein et al. v. Roman and Haddad

An important statement about permanency planning for children, *Beyond the Best Interests of the Child* by Goldstein et al. [9], has had a major impact on judicial decisions concerning child custody, especially for dependent or neglected children. In *The Disposable Parent*, Roman and Haddad [14] correctly identify *Beyond the Best Interests of the Child* as one of the most potent arguments against joint custody and co-parenting after divorce or separation.

Goldstein et al. have made an important contribution concerning child custody and the importance of psychological parenthood. Roman and Haddad have made an important contribution concerning possibilities for joint custody and shared parenting, but they are mainly interested in the courts awarding joint custody even when contested. However, unless

Goldstein et al. and Roman and Haddad consider the possibilities of positive shared parenting by permanently separated spouses, they avoid the real issue.

Unfortunately Goldstein et al. have influenced courts not to consider joint custody for children of marital dissolution for whom neglect and/or dependency are usually not the real issues. They cogently argue that in contested custody only the "psychological parent," whether biological, foster, adoptive, or "common law," should have permanent, non-divided custody, with total, unchallengeable "parental power," e.g., total control of visitation with the other (noncustodial biological parent) [9:98]:

> If the choice, as it may often be in separation or divorce proceedings, is between two psychological parents and if each parent is equally suitable in terms of the child's most predictable developmental needs, the least detrimental standard would indicate a quick, final, and unconditional disposition to either of the competing parents. [9:67]

Despite their obvious bias, even Goldstein et al. leave an "out":

> Children have difficulty in relating positively to, profiting from, and maintaining contact with two psychological parents *who are not in positive contact with each other* (italics added). [9:38]

The point that Roman and Haddad and Goldstein et al. miss is that the core of joint custody and co-parenting are positive communication and cooperation between former spouses who are both still psychological parents. Evidence is accruing that many former spouses can cooperate about co-parenting their children even though they may disagree about nearly everything else.

Indications and Contraindications for Joint Custody and Co-parenting

Joint custody and co-parenting may be an alternative for only a relatively small but significant number of divorced or separated parents. Most writers agree that there are indications and contraindications for this arrangement [1, 6, 9, 12].

All authorities agree that there are four essential conditions that must exist if joint custody and co-parenting are to be successful.

1. Former spouses, despite their continuing differences, must agree and be able to communicate about parenting their children. They must be able to support each other and make flexible arrangements. There must be agreement about implicit rules for parenting and co-parenting schedules, details, and life styles. Joint custody and co-parenting, in fact, cannot be court ordered. To be successful it must be initiated by the parents themselves. In her definitive article, Fineberg reiterates this point [6].

But agreement does not mean "live and let live." The concern is love for the child, not parental ways or style. Co-parents may have different life styles, but the children must know that they have two strong advocates who trust each other about their children and their parenting.

2. Necessary logistical supports, including geographic proximity—especially in the ideal types of joint custody and co-parenting—must be present.

3. The children must genuinely agree to such an arrangement. The agreement may not be 100 percent, but it must be basic and with few important reservations.

4. All other contraindications to joint custody and co-parenting must be absent.

Galper, in *Joint Custody and Co-Parenting: Sharing Your Child Equally*, offers practical suggestions for scheduling; financial arrangements; communications between former spouses who are co-parenting; and children's adjustments to the consistency, differences, and enrichment of having two homes. The discussion of the resolution of differences and the possibilities for communication between former spouses is perhaps the most important part of her book. Successful co-parenting involves negotiations about food preferences and differences in two homes; school arrangements; agreement about sexual attitudes and behaviors, as well as religious beliefs and practices; shared clothes and laundry responsibilities; compatible bedtime hours and rituals; relatives (including former in-laws); sharing holidays equitably, and so forth [8].

Legal Bias

There is at least one other major consideration: the attitudes and biases of the courts and attorneys. Foster and Freed find that some courts and attorneys are negatively biased toward joint custody and co-parenting although even where statutory authority for joint custody does not exist as it now does in more than a dozen states, no states (with the possible exception of Louisiana) prohibit joint custody awards by statute. In a handful of states, common law precedent seems to prohibit such determinations. But Foster and Freed argue that the courts and attorneys are not really biased against such judiciously approved arrangements. Rather, they believe that the courts have wisely been reluctant to award such arrangements when the necessary conditions are not present [7:31]. Many judges and attorneys fear that joint custody awards will return to court for further litigation. The only studies that address this issue have found that the opposite is true: joint custody awards return to court less frequently than contested sole custody and visitation awards [6, 11, 12]. We agree with those who state that the attitudes and opinions of judges and attorneys are still obstacles to joint custody determinations [16].

Benefits of Joint Custody and Co-parenting

Co-parenting permits former spouses to remain equally involved in parenting even though they have different homes and separate lives. As the subtitle to Galper's book, mentioned above, indicates, divorced or separated parents and their children are still "family." Co-parenting can especially reduce sexism in the role models parents provide their children since co-parented children see both parents carrying out many similar, shared responsibilities. Co-parenting also provides respite from parenting pressures, a point widely noted as valuable for parents of retarded children and abusing parents that is no less valid for all parents. As Galper presents it, co-parenting stands in its own right as a parenting style, not as a therapeutic substitute or pick-up-the-pieces alternative to traditional intact nuclear parenting. [5].

Role of Social Workers

The role of social workers in regard to joint custody and co-parenting is three-fold: practice, research, and social action.

Practice. Social workers should consider this alternative with divorcing parents when the conditions for its success are present. They can also help parents create such conditions. In addition, social workers can be in-

volved in planning details and arrangements and, in some situations, can interpret joint custody and co-parenting to attorneys and judges.

Research. Further research concerning joint custody and co-parenting is needed. First, the actual incidence of de facto co-parenting is unknown. Many divorced parents practice some version of co-parenting without a formal joint custody award. Nearly all of the published research consists of successful case studies. Only the legal literature mentions parents who have tried joint custody and failed to carry it out successfully. Cox and Cease especially call for research concerning the impact of various custody arrangements upon children at different ages and stages of development [3].

Social Action. Social workers can more widely interpret joint custody for parents and children of divorce and can assist in developing necessary supports for co-parenting, such as job sharing, more adequate day care facilities, more favorable legislation, helping teachers understand that co-parented children really do have two actively involved parents (not just "mothers"), and abolishing restrictive rental or housing conditions.

Social workers are often in the best position to appreciate that joint custody and co-parenting cannot be forced upon unwilling parents, legally or otherwise. Co-parenting is not by law but by love. ♦

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(Address requests for a reprint to Dr. Theodore Ernst, Division of Social Work, New Mexico Highlands University, Las Vegas, NM 87701.)

SUMMER
Family Advocate
A Practical Journal by the ABA Family Law Section

JOINT CUSTODY
what does it mean?
how does it work?

Jan. 21-82

Dear Senator Parr;

Enclosed are some articles regarding Joint Custody that may further explain the issues of it.

Donna made copies of the other Documents I referred to when we Discussed the subject prior to the session.

I hope these articles help.

What little Courage Fairbanks has done on the session, it sounds as your doing an outstanding job as usual. Hope this session goes well, and thank-you for hearing my input on Joint Custody.

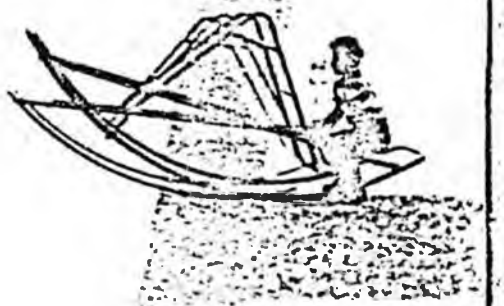
A supporter;
Shirley Dean

FL 9525462L
NIESJE J STEINKRUGER
P O BOX 2551
FAIRBANKS AK 99701

COPE
ORCE

Children Who Cope in Spite of Divorce

Marital Breakups Don't Have to Cripple a Child's Developments



David Attie

BY
JUDITH S. WALLERSTEIN, M.S.W.
Principal Investigator, Children of Divorce Project, University of California, Berkeley

Few children are unaffected by the divorce of their parents, but some are more effective than others in dealing with the changes in their homelife.

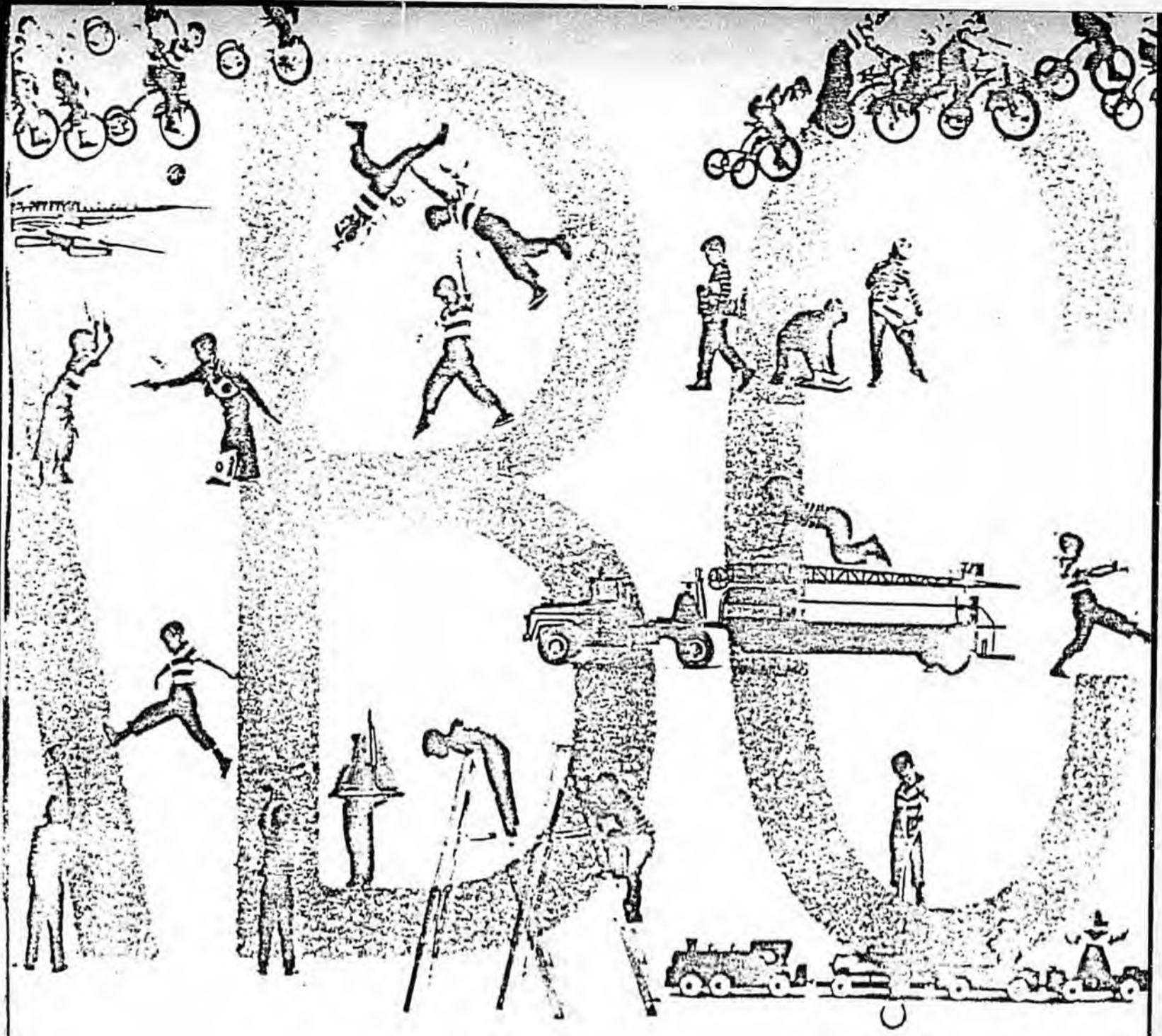
In a study of 34 preschool children who were interviewed shortly after their parents separated, 14 youngsters (42 percent) appeared able to overcome the disruption of their families and to continue their development. It is important to identify the differences existing in the family relationships of the children who were able to cope with their parents' divorce.

After follow-up interviews, the initial responses of all the children were compared. The research showed some of the psychological attributes that characterized the stress-resistant children. It also uncovered some of the support systems which the improved children had available to them or which the youngsters themselves constructed in their efforts to maintain their development.

THE YOUNGEST GROUP

The youngest children in our preschool group, who were between two years, six months and three years,

*Adapted from CHILD PSYCHIATRY: TREATMENT AND RESEARCH, edited by Mae F. McMillan and Sergio Henao, Brunner/Mazel, New York, 1977.



three m[illegible]en first seen in the study, form a small cluster [illegible], four boys and five girls. All of these children [illegible]y responded to the family disruption with a wide range of behaviors, including acute regression, heightened aggression and irritability, fearfulness, separation anxiety, bewilderment, acute sadness, and tears. Although the extent and duration of each child's distress and symptoms varied, regressive behavior occurred in all the children.

The four of these nine children who seemed in reasonably good psychological condition a year after this initial contact (three of five girls and one of four boys) did *not* appear different in their initial reactions from the children whose progress was considered poor. Indeed, for two of the children who were later considered to be doing well, the initial reaction was especially severe because separation of the parents resulted in the loss for them of their primary caretaker, the father for one little girl and the mother for one little boy in this subgroup. The initial response to separation was seen, therefore, to have little predictive or prognostic usefulness at this young age.

All four of the improved children in this youngest preschool group experienced a diminution of turmoil in the parental struggles and increased order in their homes during the invervening year. Other research has shown

Parents who did not thrust the child into their continuing struggles ha

that the household disorder usually peaks at about one year post-separation.[1] By contrast, the intensity and sense of ongoing conflict and/or depression were relatively unchanged or even heightened in the home of the three children who appeared worse at follow-up. Although still unsettled in their various new roles, three mothers of the improved children had nevertheless begun to make progress in jobs, in return to school, and in finding new and more gratifying social and sexual relationships. The one custodial father, although still in distress, had gradually during the year come to terms with the finality of the divorce he had not wanted. These four custodial parents had established adequate caretaking arrangements for the children, routines had become reestablished, and life had become a reasonably predictable experience. Visits with the noncustodial father were regular and emotionally supportive for two of the children. Although two others continued to feel disappointed in the relative disinterest of the visiting parent and the infrequency of the visits, there was no outright rejection or desertion.

All of these custodial parents had, in response to our brief six-week intervention, been able to modify their behaviors with their children in ways that would assure the child of the parent's continued caretaking and concern. Our data indicate that the parents of the children who improved were those who were able to make good use of our counseling and, by the same token were, perhaps, parents who brought psychological intactness and sensitivity to their parenting role, despite their sometimes distraught behavior at that time. On the contrary, the parents of the children who got worse had difficulty in using advice constructively. For example, one mother of a severely depressed child rejected our suggestion that the father's departure be discussed with the boy, insisting that he was too young to understand.

Perhaps the central point of difference of the children's experience in these two groups was the fact that the parents of the children who improved did not place the child centrally in the continuing parental struggles. The parents of the improved children were able to maintain a separation between their anger at each other and the child's needs. Two parents of the children who did poorly in this group brought their children into the orbit of their anger and depression and maintained the young child as their constant and often only companion. A third mother seemed, in her restless agitation, almost oblivious to the needs of her children and was angrily arranging a move to a distant city, with no plans for continued contact with the children's father who had been visiting regularly.

The stability of the environment of these four improved children can at best be considered marginal, and their improvement, therefore, may reflect as well the stress resistance and coping capacities of the children themselves. As judged at the one-year follow-up, their environment still held many risks. Thus, one child had

[1]E.M. Heatherton, M. Cox and R. Cox, "Beyond Father Absence: Conceptualization of the Effects of Divorce," presented to the Society for Research in Children Development, Denver (1975).

Who Coped & Who Didn't: How the Research Was Done

Ms. Wallerstein's findings are based on an ongoing longitudinal study of the effects of parental divorce on 131 children and adolescents drawn from a nonclinic population in a suburban community in northern California. In 1974, Ms. Wallerstein and her co-investigator, Joan B. Kelley, Ph.D., reported on the children in the group who seemed in significantly worsened psychological condition at the time of the first follow-up, one year after initial assessment. This article focuses on the preschool children who were judged a year later to be maintaining their previous good developmental pace or recovering from an acute regressive reaction to the stresses of family separation.

Of the entire sample, a total of 34 children (18 boys and 16 girls) were between the ages of two-and-a-half and six years at the time the parents separated and filed for divorce. All of these children suffered intensely from fear, bewilderment, worry, and profound sorrow

had a better adjusted child

been left by his mother and was being cared for by his devoted but hard-working father, at great psychic cost to the father; three mothers were working full-time for long hours, with limited skills and poor pay. Two of the improved children were repeatedly hurt and disappointed in their relationship with the visiting father.

The complexity of the task, the successful struggle of the child, as well as the possible psychic cost to the child, are illustrated by Karen, who was two-and-a-half years old at the initial contact. After her parents eparated, Karen regressed in her toilet training, exhibited frequent temper tantrums, refused to eat her breakfast, exhibited irritability, whining, demanding, clinging behavior, and a profound sadness accompanied by silent crying when alone in her room. To the bewilderment of her mother, she became suddenly preoccupied with staking out claims throughout her world, asserting crossly "This is mine. That is mine." Karen and her hard-pressed mother were locked into an escalating cycle of frustration and mutual irritation which peaked daily when the mother returned from work. Her father, who had been a major parenting figure, visited irregularly.

A year later, Karen at age three-and-a-half appeared bright, lively, outgoing, and fairly sunny. Still in a somewhat unstable living arrangement, she was dividing her week among the separate homes of her two parents and her baby-sitter, spending several days each week with her mother who worked full time, several with her father and his steady girlfriend, and all day long some days in the home of her baby-sitter. She seemed able to make these complex transitions without visible strain and with a clear sense of reality that astonished us in such a young child. She volunteered cheerily, referring to her father's female friend, "I have two mommies and one daddy." In an extraordinary summary of her situation and functioning, she balanced a little toy chair perilously on the gabled roof of the dollhouse, noting "It's safe. It won't fall." The child's relationship with both parents was improved at one year. The father had resumed an important role in her care, and the mother, with considerable advice from us which she had been able to use well, had deescalated her own activities and organized her life with the child. The mother also was beginning to feel both relief and some happiness in her work and her social life, although she was still under considerable pressure.

Seen almost three years later, Karen appeared to be a bright, assertive, no-nonsense, sturdy six-year-old. She aggressively explored the consulting room in its entirety, playing every game in the office. To our surprise, she remembered the dollhouse and the toys. More to our surprise, she remembered the house where she had lived before her parents separated, when she was two years and one month old. She recalled their fights at that time. She said, matter-of-factly and without discernible sadness, that her parents still fight: "I'm used to it. They just don't like each other at all. They even fight over what's good for me. I'm used to that, too." She

(*Continued on page 35*)

at the divorce of their parents. Before the family disruption, all of these children had been considered by their parents and teachers to have reached appropriate developmental milestones. The children and their families were seen individually through interviews extending over a six-week span.

Families were referred by attorneys, schools, physicians, and other community agencies within no more than a year after the parental separation and preferably as close as possible to that separation. Initial data obtained in these four to six interviews with each family member over a six-week period were supplemented by independent information obtained from the children's schools. All family members were interviewed again individually by the same member of the interdisciplinary clinical team, within about a year following this initial extended contact. Most of the follow-ups occurred about 18 months after the parental separation.

In consideration of the extraordinarily high return of the families for follow-up (58 of the original 60 families), and the finding of such high incidence of continuing or increased distress among the children, the researchers decided to follow the original group further, and in 1976 completed another round of examination of the same youngsters, who were four to five years older at that time. Some of the data from the second follow-up is included in this article.

In identifying the children who coped successfully, the researchers used a combination of approaches. They employed the comparative judgment of the same examiner, assessing each child against the baseline of how he or she appeared to the same therapist a year later in the context of the clinical relationship. In addition, all children considered improved met accepted developmental norms which reflect educational, intellectual, and social achievements.

Shared Custody

Demanded by Parents, Discouraged by Courts

David Attie

BY PERSIA WOOLLEY

The difference between the professional reaction to shared custody and that of the people who are practicing some form of it is often amazing. During the last two years I have been researching and writing *The Child Custody Handbook* and have talked with numerous attorneys, psychologists, and judges on the subject. Not infrequently, I'd spend the day listening to learned arguments as to why such arrangements can't possibly work, and then have dinner with people who, not knowing that it was impossible, found it to be an eminently sensible way of doing things!

Although there are no actual statistics, I would say that at least 10 to 15 percent of the divorced parents in the United States have agreed to share in some fashion the problems, costs, privileges, and responsibilities of raising their children. That figure may be closer to 35 or 40 percent considering the number of teenagers who are sent off to live with their fathers after several years of living with mama.

WHAT IS SHARED CUSTODY?

For purposes of my work I have defined *shared custody* as any method that permits the children to grow up knowing and interacting with each parent in an everyday situation, whether that comes about by splitting the time on a fifty-fifty basis each week or by having the children go live with the other parent for several years or more. The overall result is the same in both

cases; that is, the youngsters have an opportunity for a more realistic, normal relationship with each parent. In addition, shared custody allows each adult to feel that he or she has had a chance to pass on to the children his or her own beliefs, standards, and social concepts.

The most common form of sharing is the block-time arrangement, often lasting a year or more in each household. Many parents arrive at this more by accident than by design. It's not uncommon for the mother who has sole custody to find that as the child gets older he or she becomes more rebellious, harder to handle, or frankly out of control. At this point the alternative of sending that child to live with the father is often accepted simply because it's preferable to turning the youngster over to the the juvenile hall or looking for a foster home.

This is rarely thought of as sharing, since it's more a question of default than of choice, but it does in fact provide for a more even input on the part of both parents where that youngster's life is concerned. The adjustments to this situation are a little more hazardous than when the parents agree to share for positive reasons, since there is frequently a large amount of guilt, rejection and resentment present between the child and the now noncustodial mother. However, with time and a little effort this arrangement can become as productive as any of the other means of sharing and just because it was arrived at via the "back door," so to speak, doesn't invalidate its usefulness.

Taking turns with the children on a large block-time basis seems to be an appropriate solution for school-aged youngsters if the parents live a great distance apart, or if there is continued conflict in the original custodial home, such as increasing sibling rivalry. Generally it is an open-ended arrangement, to be changed as the needs, circumstances and age of the child change, or to be left as is until the offspring is full grown. Sometimes, however, it is for a specified period of time, such as alternate years.

If the children are involved in many social activities in school, they may resist the idea of changing locations each year, in which case most sharing parents arrange for a 9-month/3-month division. Although this is not exactly an equal time system, it does provide for normal contact with both homes, and is certainly an improvement over the weekend visits which noncustodial parents are traditionally limited to.

SPLIT WEEKS

If the parents are willing to stay within the same school district (and for many who want to share on a much shorter term basis this is a fundamental agreement that they both adhere to), it's possible to set up the time division on anything from split weeks to alternate months. The child continues to go to the same school, maintains the same peer group, and simply goes to whichever home happens to be on the schedule that day

after school. This system seems to work admirably for both the youngster and the parents.

When it is a split-week arrangement the offspring usually make the shift on Wednesday afternoon, going home to the other household after school and then returning to the first home on Saturday night or Sunday morning. Often the parents take turns fetching or delivering their youngsters, or if the children are old enough to use public transportation, they can make the trip by themselves. This system allows each parent to have a weekend night and day to himself or herself, as well as one with the youngsters, and I know of cases where the adults occasionally trade off whole weekends to allow for trips out of town, or special excursions with the children.

When parents with very small children wish to share custody, they frequently set up an alternating day system, which takes into account the time element and need for continuity. Generally these young parents both work and can make arrangements to pick up and deliver the infant to the day care center which looks after the child during working hours. This means that they never have to have personal contact, unless they specifically wish to, and the baby has the same stable day care he or she would have if the parents were still together. A system of this type does require that each household have a supply of diapers, baby foods, safe toys, etc., but everyone agrees that's a small price to pay for the advantages of continued and consistent contact with the youngster.

For the parents with toddlers and pre-schoolers, sharing is a bit more complex. Somehow, once they reach the "terrible twos," children become over-reactive to their surroundings, and often have difficulty in changing environments on a too-frequent basis. Thus many of the parents I've talked with who had children in this age group found that sharing on a month or two at a time schedule was best for everyone. These youngsters often go through a readjustment period of several days before settling into the new routine, and if the sharing schedule is based on alterntive weeks, half of the time is spent trying to help the child adapt to the change of residence. Children of this age group are old enough to withstand longer separations from each parent, and the alternating monthly or bi-monthly method doesn't seem to be a problem for them, particularly if the nonparenting adult keeps in contact by phone and occasional visits.

BIRD'S NEST ARRANGEMENT

There are several other, unique or unusual methods of sharing which I encountered, and while they aren't suitable for everyone, they're worth mentioning. One such is the "bird's nest" arrangement, where the children and the family home stay together and the parents take turns "living in" or "living out," like birds on a nest. Usually this is accomplished by the renting of a single apartment, which is then used by the parent presently "living out." Most of these cases involve a shift once a week, at a designated time, when each parent must leave their immediate domicile clean, neat and ready for the other to move in.

There are several advantages to this system and some specific limitations. First, the children not only maintain the same school and peer group from their past, they also have the comfort and convenience of being in their usual home. Secondly, it provides each parent with a chance to get adjusted to single life without sudden displacement Third, if there is a good deal of conflict over what is to be done with the house, it provides more time in which to negotiate an amicable settlement. On the negative side, there is a distinct territorial imperative that comes to the fore eventually where the single apartment is concerned; one adult wants to hang pictures, and the other finds that to be an invasion of territory, for instance. Then too, most future spouses would take a very dim view of moving in and out of two different abodes on a regular basis, and would resent not having a place of their own to boot!

This arrangement usually works best as a transitional mode, and in at least one California court it is frequently agreed to simply as a temporary solution to the problem of who moves out and what becomes of the home. I have heard of cases where each adult has been able to afford a completely separate home, however, and after extending the time period to monthly or bi-monthly shifts, settled into this pattern permanently. Some even put the family house in trust for the children, a situation that creates its own separate legal headaches! Yet while this solution may seem a little bizarre, it has worked well for some people.

And then there is the free-access method, which is very satisfactory if the children are mature enough to accept the responsibility involved, and the parents dedicated enough to work it out. This involves only a minimal schedule, which is completely flexible according to the needs and desires of both children and adults. In several instances the parents have bought condominiums at opposite ends of the same complex, which means the youngsters can trot back and forth with a minimum of difficulty and the adults always know the other is close by in case of an emergency. These parents find it essential to keep in close phone contact, so that the children don't get lost some time when each parent thinks they are with the other. It is crucial that the children recognize the need to keep everyone informed as to where they are going and when, however, as there are few scenes more chaotic than two parents each blaming the other for having misplaced the offspring!

to trust each other as parents

MONEY MATTERS

It became obvious in the course of my interviews that sharing is a very individual matter; what works for one family won't work for another, and there are solutions that some people have devised that others would never consider. It's not surprising, therefore, to find that each family works out its own finances in its own way. In cases where both parents work and there are an equal number of youngsters living with each adult, the parent usually assumes financial responsibility for those children living in his or her home. I've met women who voluntarily sent their ex-husbands child support money if the men took over the parenting function on a block-time arrangement. In one case the father, who has full-time custody, hired the mother to be housekeeper and after-school babysitter, pays her a regular salary, and deducts it as part of the cost of child care. This mother is a student at a nearby college, needs the part-time afternoon work, enjoys being with the children daily, and treats the money as she would any other income (it is not alimony). The IRS has assured me that as long as she is not his dependent there is nothing nefarious in this arrangement, provided that he withholds the required amount of taxes and she files her own, separate income tax return.

Interestingly, money was very low on the list of problems or considerations where sharing parents were concerned, and since my sample of interviews covered a broad range of financial situations, I feel it is an honest reflection of sharing parents' attitudes. The father who has more contact with his children is less likely to resent paying for them, and the mother who knows she can rely on her ex-husband for more than just economic help is more apt to be understanding of the financial pinches that everyone encounters. By far the most important considerations mentioned were the need for communication between the adults, the desire to stay in the same school district for the children, and an overriding belief that the youngsters' specific needs and desires should always be considered in making major decisions.

KEEPING IN TOUCH

Parental communication, usually in the form of phone calls, ranged up to three or four times a week if the parents had short-term sharing; it was much less frequent if it was a large block-time arrangement, or there was a great distance involved. Sometimes the parents would meet together for lunch on a regular basis in order to discuss the progress of their offspring, and sometimes they didn't have personal visual contact for months or years at a time, even though they talked frequently on the phone.

Not only does this kind of communication help establish the reliability of each parent in the other's eyes, it also short-circuits any potential threat of manipulation on the part of the youngsters. Manipulation only works if one is able to stir up the other person's emotions before they have a chance to understand what is happening. If the two parents are in regular contact and can check with each other before hitting the panic button, misunderstandings, misinformation or actual untruths from the children can be straightened out with one calm phone call, averting a major battle.

Most parents continued to have contact with the children when the youngsters were at the other's home, by the way, and if it was for a month or more at a time, whoever didn't have the children frequently took over the usual weekend or mid-week visiting of the traditional system.

Where short-term sharing was concerned, many of the parents had a specific agreement about staying in the same locale, and I've talked with several people who turned down job advancements because such promotions would mean leaving the area and thus losing shared contact with the children.

STILL FRIENDS?

It should be made clear that although many sharing parents became friends after they had been sharing for a while, many others did not. It is not necessary to like each other as people, even though they trust each other as parents. Nor was the sharing necessarily agreed to without stress and strain. In several cases the couple were prepared for a pitched battle in court and only agreed to sharing as a compromise on the courthouse steps.

In addition to the surprising number of people who are sharing, the most unexpected finding of my research was how incredibly individualized each case is. The people involved often came up with very ingenious solutions and even more unusual explanations for why they were doing things a certain way. The process of working out their own sharing arrangement was a positive factor in each family's achieving a constructive divorce, even if it took place years after the legal dissolution of the marriage.

In view of the number of successfully sharing parents, one wonders why shared custody is not suggested to the pre-divorce clients who come into the offices of therapists and/or attorneys. Not only are such arrangements not mentioned, they are usually specifically discouraged, even when the couple announce that they're in agreement about it.

In searching the reasons for this attitude, I found many predicated on social assumptions rather than actual fact. Invariably attorneys told me shared custody wouldn't work and in one or two cases a lawyer felt it was an ideal and therefore unrealistic solution.

(Continued on page 33)

Joint Custody

What Does It Mean? How Does It Work?

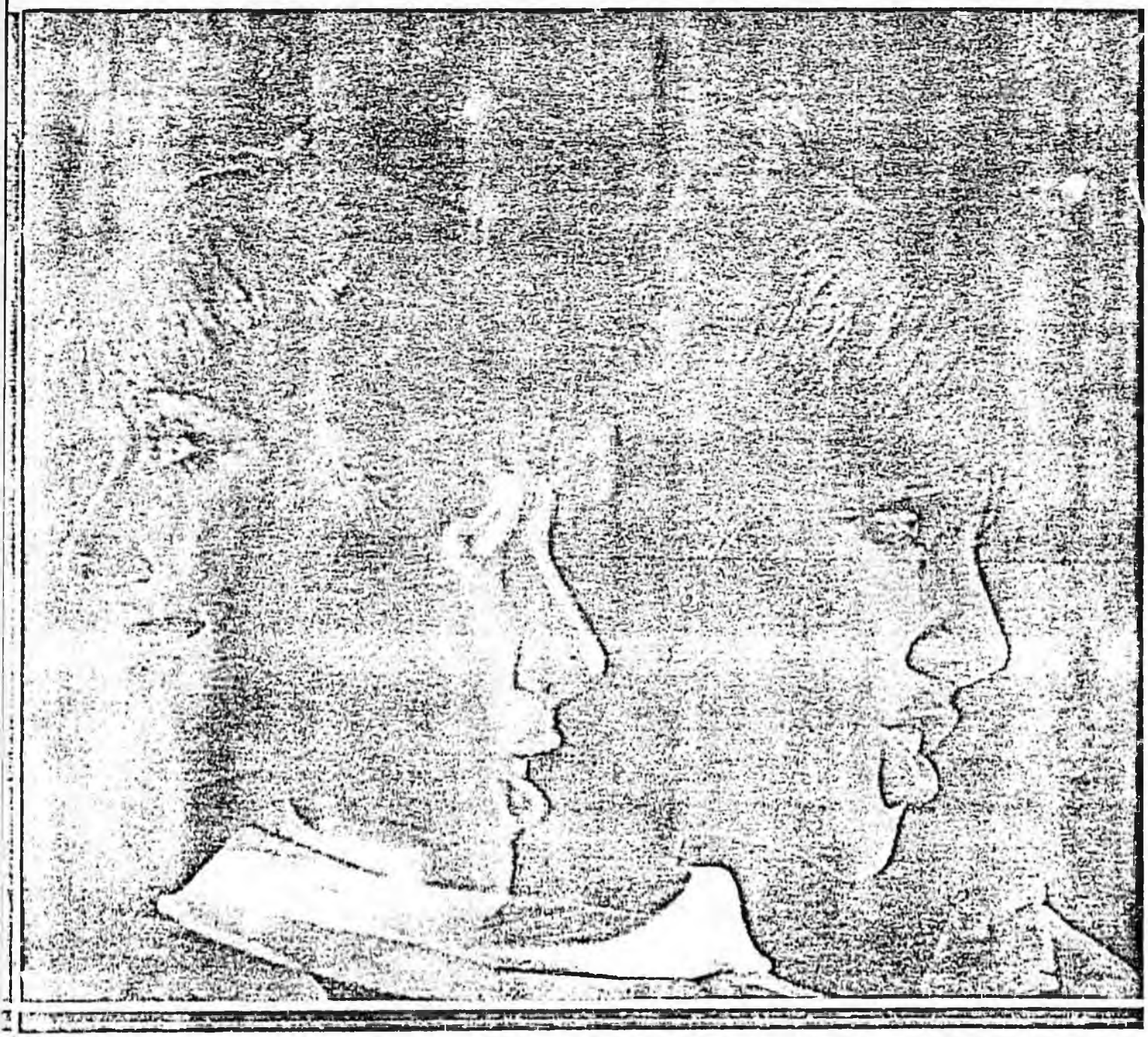
David Attie

Through the years courts have used various terms in opinions regarding custody fairly consistently so that they have become words of art. The most common custody arrangement is sole custody which means the children live with the custodial parent, who has full authority and responsibility for their care and control. The noncustodial parent has no legal right to make decisions regarding the rearing of the child.

Historically, most arrangements other than sole custody are called "divided custody" or "alternating custody" by the courts, terms which appear to be synonymous in the opinions. Divided custody in the majority of opinions describes an arrangement where each parent has physical custody, legal authority, control and responsibility for a designated period of time. The most common divided custody arrangements provide for the children to spend alternating six-month periods with each parent, if the parents live in the same school district, or nine months with one parent and three months with the other if they live in different districts.

BY MARY JANE TRUESDELL COX and LORY CEASE

Mary Jane Truesdell Cox is an attorney at law in the Denver area and
Lory Cease is a graduate student in the School of Social Work, University of Denver.



Some courts have used the term "divided custody" when one parent is given custody of some of the children and the other parent is given custody of the remaining children in that family. This arrangement is more commonly referred to by the courts as "split custody."

The term "joint custody" has been used by some courts to describe the divided custody arrangement. This is understandable since to effectuate divided custody, legal custody must be granted "jointly" to both parents. However, joint custody, as it is being used in the drafting of separation agreements by attorneys today, and as it is being practiced by joint custodians, goes beyond the concept of divided custody.

The New York Family Court has stated that joint custody means giving both parents an equal voice in the children's upbringing, education and general welfare. It may or may not mean that the parents are physically with the children for an equal amount of time, but they are required to consult with each other regarding a... im-

portant matters concerning the children, reaching decisions just as they probably would have had the marriage remained intact. Both have full custodial rights.

Susan Wendall Whicher, a family law attorney in Colorado, has suggested an additional term for the legal profession—"shared custody." The term would be used to describe a joint custody arrangement where the parents agree to share the major parenting decisions and also to designate a residential parent, who would make the day-to-day decisions. Although this arrangement would be similar to sole custody awards with liberal visitation rights for the noncustodial parent, perhaps the psychological advantage of having both parents feel that neither of them had "lost" is sufficient reason to use it in some cases.

COURTS FAVOR SOLE CUSTODY

Although joint custody is a current topic, it would be misleading to convey the impression that courts frequently award it or favor it. Prior to 1908 it was common for courts to award divided custody, but most courts today are skeptical of divided or joint custody arrangements, as well as split custody arrangements.

A quick scanning of 27B Corpus Juris Secundum, Divorce, Section 308 shows courts have ruled that divided custody should be avoided whenever it is reasonably possible to do so, that divided custody would not be approved except under very exceptional circumstances and that divided custody is not considered to be in the best interests of the child. Yet a closer reading of the many cases cited in that section leaves an impression that in many opinions the courts have ordered or approved divided custody using the same facts that it may have relied on in other cases to condemn divided custody. A reliable conclusion may be that generally courts are suspicious of awarding divided or joint custody, but in the proper case or where the parents both pray for it, they have not refused to do so.

When do courts award joint custody and under what authority? Normally the first prerequisite is the fitness of both parties seeking to be custodians. In the admittedly atypical case of *Stamper v. Stamper*, decided by the Michigan Circuit Court of Wayne County in 1977, the court held that two less than fit parents, a lesbian mother and a passive workaholic father, *should* be awarded joint custody. Secondly, some courts may look to the rights of the parents. Then usually the court considers the possible effects on the children living in two households, looking specifically at the geographical distance between the two residences as well as the social and economic differences between the homes of the parties.

Some opinions state that when the homes of the prospective custodians are similar and geographically close, the strains on the children of divided or joint custody are minimized. In addition, if problems do develop, it is easier for the children to adjust to living with a sole custodian with the noncustodial parent near. Yet these same facts have led other courts to deny joint custody because visits could be frequent or it is convenient for the children to visit the noncustodial parent. A court of the latter opinion will often award divided or alternating custody only where there is a substantial geographical distance between the homes of the parties.

AGE A FACTOR

Another fact that a court may consider is the age of the child, usually with the resulting presumption that a young child is best left in the sole custody of one parent until he or she is old enough to withstand the strains of the two environments of divided or joint custody. This age is usually fixed at six or seven, but is not conclusive.

Courts are often very reluctant to award divided or joint custody if the arrangment provides for periods of less than six months or for periods which do not correspond with school enrollment and summer vacation.

In spite of a court's lack of enthusiasm for awarding joint custody, the authority to do so exists in most states. Many courts have awarded divided custody, which vests legal custody in both parents, under the common types of statutes which authorize an award of custody "as the case may warrant" or as "is necessary" or as "the children's interests may require." The statutes of only one state, Louisiana, appear to prohibit joint custody by saying custody shall be in the party obtaining the divorce or if need dictates, in the other party. North Carolina provides for divided custody in its case law, *Griffin v. Griffin*, 75 S. E.2d 133. In the Winter 1978 *Family Law Quarterly*, Henry H. Foster and Doris Jonas Freed examined the laws of all 50 states and the District of Columbia and noted that in 21 states, both parents have equal rights to custody. In 27 states the "tender years doctrine," *i.e.* a mother should have custody of the children if she is fit, is controlling. In three states the law is in conflict. Interestingly, in 13 states where statutes say both parents are equal in reference to custody, the tender years doctrine still prevails.

Practically speaking then, most courts have the authority to award joint custody if both parents are fit and equal or it is in the best interests of the child. In those states where the tender years doctrine controls, the court could award joint custody if the mother is slightly less equal or fit.

In spite of the fact that courts do not favor joint custody, it is not uncommon to read of recent cases where joint custody was awarded or to talk to someone who is or who knows a joint custodian. In a vast majority of all divorce cases, the parties present an executed separation agreement to the court for approval which contains custody provisions. These parents can opt for a joint custody arrangement in their agreement and the

court will rarely interfere, although the United States Supreme Court has ruled in *Ford v. Ford*, 371 U.S. 187 (1962) that the court has continuing jurisdiction over the children of divorcing or divorced parents. Non-consensual joint custody awards or orders are rare, which is not surprising since the very nature of joint custody is cooperation between the parents.

However, opinions are becoming more prevalent in which the courts have awarded joint custody during modification proceedings or where upon examination of the facts, joint custody appeared to satisfy the best interests of the child more than sole custody with either parent. One such decision was made where the father traveled in his business and the mother was unable to tolerate prolonged stress.

WORKING IT OUT

For those parents who decide to exercise joint custody there seems to be an endless number of ways to make it work. Joint custodians often attempt to live in the same neighborhood, the same school district and provide homes of equal size, furnishings, etc., so that the children's environments remain similar. Disciplinary procedures are often worked out in advance to ensure stability. One extremely flexible and innovative couple maintains a home and an apartment in the same neighborhood. The children always remain in the house while the parents alternate living in the house and apartment, thus providing maximum stability for the children. The amount of time each joint custodian spends with the children differs with each family. Some parents split up the week, others split the week and weekends, and others follow the time schedules used in alternating custody arrangements which were discussed earlier. Cooperative parents who are sensitive to their children's needs can work out any number of details to everyone's advantage and convenience.

The most common arguments in support of joint custody are that the close relationship between the child and the noncustodial parent is not severed and the child has the benefit of growing up under the love and influence of both parents. There is evidence that a child has a need for both parents and some courts go so far as to articulate a child's legal right to an ongoing relationship with both his parents and also his paternal and maternal relatives.

Other arguments center on the advantages of sharing the responsibility of child-rearing. Some parents with joint custody feel it is the only way they can successfully earn the extra income needed after a divorce and still adequately parent. It gives each parent both the opportunity to experience the full responsibility of caring for the children and the opportunity to experience a life without children, which allows for a fuller social life. One judge ordered joint custody for similar reasons. In that case the mother had experienced a mental breakdown and needed to avoid stress but had shown herself capable of caring for her children.

Animosity toward parents by children who feel deserted might be reduced by joint custody. Likewise, animosity toward a child by a sole custodian who views the child as a burden might be lessened if joint custody were awarded. Some also feel that sole custody increases the tension and conflict between parents because one has all the authority and the other parent feels stripped of all parental rights.

Presently, when sole custody is awarded, if the custodial parent needs temporary or indefinite relief from the responsibilities of child care due to a stressful time in his or her life, the custodial parent too frequently is afraid to ask the other party for assistance for fear of losing custody. Even if the noncustodial parent agrees to a temporary arrangement, the children's interests will not be best served during the temporary custody period unless the children have already established a good relationship with the noncustodial parent.

MORE FLEXIBILITY

Courts and behavioral scientists have long recognized that as children grow older, it is often advantageous for them to have an adult of the same sex after whom to model their behavior. Joint custody can allow the flexibility to arrange custody as needed as the child grows and several professionals feel that close contact with both parents is especially valuable if one parent dies and the other has sole custody.

Sole custody is often interpreted by the noncustodial parent as a form of punishment, especially when a court declares each parent to be fit. Joint custody avoids that aspect of divorce. Addressing this punishment concept, Justice Barker of Australia wrote in 1966:

> Practical experience in the matrimonial jurisdiction leads to the conclusion that any separation of the responsibility for the child's upbringing and the authority to control it would in most cases end unsatisfactorily and in some cases disastrously. . . . [T]he custody of a child is not to be committed or refused to one party or the other merely as a reward for virtue or penalty for matrimonial guilt.

Finally, any advocate of joint custody cannot avoid answering the recommendations made by Solnit, Freud and Goldstein in *Beyond the Best Interests of the Child*, i.e., that the child should be in the sole custody of the psychological parent and that the noncustodial parent's visits with a child should be subject to the wishes of the custodial parent. One objection to the book is that it does not allow for flexibility or for analyzing individual situations. The book's position totally ignores the child's desires as well as those of the other parent in the name of continuity and autonomy. Neither do the authors acknowledge any rights of biological parents. The further recommendation that there be no modifica-

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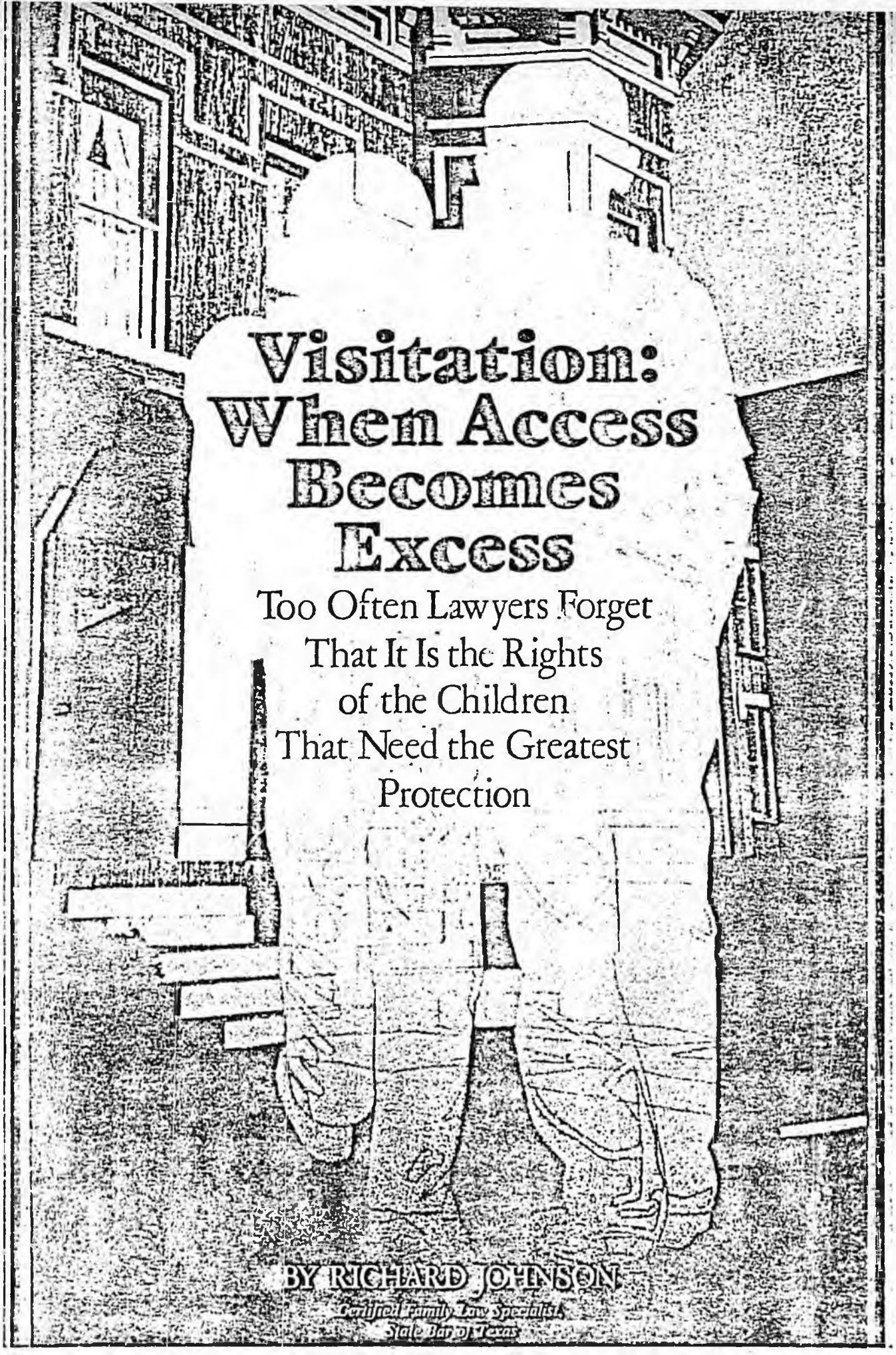


Visitation: When Access Becomes Excess

Too Often Lawyers Forget That It Is the Rights of the Children That Need the Greatest Protection

BY RICHARD JOHNSON
Certified Family Law Specialist
State Bar of Texas

Parental visitation, or access as it is frequently called, is one of the most overlooked and underthought portions of a divorce decree. Yet, the experienced family lawyer knows that artful drafting in the divorce decree must be necessarily tailored toward the particular needs of the parties for many reasons.

The well-rounded development of a normal child ordinarily demands an association with both parents. However, divorce inevitably disrupts the constant and continued contact between a noncustodial parent and the child.

The custodial parent usually assumes all parental responsibilities for the child except where financial support is received from the noncustodial parent. The noncustodial parent, however, other than support, has no obligations except moral ones.

Visitation times are fun times without the discipline found at home; there's no homework, no set hours, and no planned meals. These abrogations of the custodial parent's discipline often tend to confuse the child and make him resentful of the custodial parent's demands.

In addition to these reasons, some parents use visitation privileges as the battleground for continuing the fight after divorce.

How many times have attorneys advised a party who will be appointed conservator of the child that the court will allow every other weekend visitation, two weeks in the summer and alternate holidays? Of course, some variations are to be expected if the child is very young or has other recognizable characteristics that restrict visitation. Many times the client fails to tell the attorney of special visitation situations because they assume the court will always order the same schedule. This is not always the case and the court, with knowledge of special situations, will adapt the visitation orders accordingly.

In twentieth century marriages dissolved by divorce, custody to one parent and visitation rights to the other parent are the norm. However, this "norm" evolved from the ancient practices which varied from the Spartan system of state supervision of children from birth to the English Church Courts where divorce was only granted to wealthy lords who could obtain a private parliamentary bill. In neither case was visitation considered a topic of great importance.

MOBILITY CREATES PROBLEMS

In the twentieth century, a new dimension was added that brought its own special problem—mobility. Previously, except for migration to new lands, families almost without exception would live and die within a radius of a few miles. Mobility has not only brought jurisdictional problems but easy travel and business transfers have made it difficult, if not impossible, to draft orders that foresee all the migratory situations of the parties. These and other factors combined with a very unrealistic view that parents who are the bitterest of enemies are usually able to resolve matters of visitation between themselves without specific court order, have led to the development of *reasonable visitation* orders as follows:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the care, custody and control of the minor children born of this marriage should be awarded to the Petitioner, with the Respondent having reasonable visitation with such children; or
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the Petitioner shall have the care, custody and control of the minor child born of the marriage subject to reasonable visitation by the Respondent; or
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the Respondent be appointed possessory conservator of the minor child born of the marriage, having reasonable visitation with such child at reasonable times upon reasonable advance notice.

Many legislatures used the terminology of reasonable visitation in setting the standards for judges to apply to access privileges. As a consequence many attorneys and judges used that terminology in their decrees, without realizing that reasonable visitation should be specifically defined to fit the best interests of the particular parents and child involved. Use of reasonable visitation has often led to more litigation between "unreasonable" parents.

Sometimes appellate courts have used artificial distinctions to arrive at desired results. Two of these have been split custody and increase or change of visitation as a change in custody, thereby requiring a change of circumstances which must be alleged and proven. These distinctions have been used where the original court ordered reasonable visitation without ordering the specific terms that constitute reasonable visitation. In one case the appellate court reversed a trial court which

decided the original reasonable visitation order meant the first and third weekends from 10:00 A.M. Saturday until 6:00 P.M. Sunday. The appellate court viewed the father's application to define his visitation privileges as a change of custody attempt and held he had not proven his burden of change of circumstances. This logic comes from a court whose obligation is to see that the trial court does not abuse its discretion. In replacing its discretion for that of the fact finder, the court went further and said:

> [T]his child should be at home with its mother every night where her food and clothing will be provided as needed and its calls for "mama" will be answered.

In effect, the appeals court terminated the father's visitation rights except at the whim of the mother and stepfather.

In another case, the appellate court substituted its judgment for that of the trial court and actually reformed the reasonable visitation portion of an Alabama decree. The appellate court granted certain specific visitation while declaring the father's application for specific visitation to be a request for change of custody, and discussed the father's burden of proving a change of conditions. The court in effect became the trier of fact. Not only do reasonable visitation provisions often promote litigation, but they may also encourage a desperate noncustodial parent to kidnap the child.

"BEST INTERESTS"

In most jurisdictions, the "best interests" of the child is the test the court must apply. With the spiraling divorce rate, the court often lets the parties and their attorneys determine the child's best interests by means of defaults, waivers and agreed judgments. In large, metropolitan areas, family law courts could simply not handle the case load if they had to do an in-depth study of visitation in each situation. Parties are often so relieved to get some agreement, they are unwilling to delay the proceedings over visitation, often being of the opinion that it will work out after the emotional friction has dissipated. Unfortunately, in many cases, the friction never does dissipate and only causes the parents to realign their emotional battlefield toward visitation issues.

Often access (or denial of it) is a very real basis of one parent's fight to modify custody. Reasonable visitation often arises as a defense tactic for the noncustodial parent who is before the court on a nonsupport charge or an attempt to increase support. Most courts will listen to such arguments without affirmative pleadings and over objection so they can grasp as much of the situation as possible before making a decision. Some jurisdictions consider denial of visitation as a basis for change of custody, while other courts will approve a custodial parent's refusal of visitation based on the meretricious living arrangements of the noncustodial parent.

The Texas legislature attempted to do away with reasonable visitation in the new Texas Family Code. The code retains a change of circumstances test but provides for the court to set the time and conditions for possession of or access to the child. Even with the statutory demise of reasonable visitation some courts continue to authorize it in Texas.

Many states have now come to the realization that specified visitation, although not always perfect, does remove one important area of dispute between the parents.

WEEKENDS AND HOLIDAYS

It is difficult for a child to accept a threat to the security that comes from living with a united and loving mother and father. In most instances the parents do not wish to harm their child's emotional development but the shock of divorce can produce resentment and guilt feelings in a child. Often these feelings, with time, can be calmed by adequate visitation. Experts have differing ideas on what is best for children. Some hold the view that an equal division of time may confuse the child and that the child feels more secure spending most of his time in one home. The courts have generally adopted this rule and frown on split or divided custody. Because of this attitude, a typical order specifying visitation might provide for alternate weekends, alternate holidays and some time in the summer.

Weekend visitation has generally been handled in one of the following ways:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That Respondent shall have possession of the child on the first and third weekend of each month from 6:00 P.M. Friday, January 27, 1978.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That Respondent shall have possession of the child on every other weekend from Friday at 6:00 P.M. through Sunday at 6:00 P.M. commencing Friday, January 27, 1978.

To further limit conflict and for enforceability purposes, the following clause should be included in every visitation order:

> THE MANAGING CONSERVATOR IS HEREBY ORDERED, To surrender the child to the Possessory Conservator at the beginning of each period of possession.
>
> THE POSSESSORY CONSERVATOR IS HEREBY ORDERED, To return the child to the Managing Conservator immediately at the end of each period of possession.

Because such provisions require an affirmative duty on the parent, refusal to surrender or return the child is then punishable by the contempt process, in most jurisdictions.

Holiday visitation should be carefully considered before drafting. There are national, local and religious holidays to consider. Also, the careful planner should

make additional provisions for division of the Christmas holidays when school usually recesses two weeks. Christmas holidays can be divided in many ways. Some divisions are based on Christmas school vacation such as:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the Possessory Conservator shall have visitation for a period of one week during the child's Christmas school vacation, with said week to begin at _____ o'clock _____.M. on the first day that school recesses and to end at _____ o'clock _____.M. seven days later.

This provision could be a regular period or could be alternated yearly by insertion of the words *in even numbered years.* If the visitation is to be alternated yearly, the following clause should also be used:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the Possessory Conservator have visitation in the odd numbered years, for a period of one week during the child's Christmas school vacation, with said week to begin at _____ o'clock _____.M. on the day that is seven days prior to the day school reconvenes and to end at _____ o'clock _____.M. on the day before school is to reconvene.

There are instances when age, distance or employment creates difficulties and the week possessory period is unrealistic or burdensome. In such an event, Christmas vacation can also be divided on the basis of Christmas Eve/Christmas Day as follows:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the Possessory Conservator pick up the child at 9:00 o'clock A.M. on the 24th day of December of each year and return said child at 9:00 o'clock A.M. on the 25th day of December of each year.

This also could be made on an alternating basis by including the "odd numbered years" language and adding an "even numbered years" clause to switch the days.

Other holidays that might be assigned are Easter, Thanksgiving, or Rosh Hashanah. These can also be alternated yearly if desired.

The usual summer vacation period amounts to two weeks, sometimes correlated to the noncustodial parent's vacation but often to be designed upon thirty days written notice such as:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the Possessory Conservator have the child for a period of fourteen consecutive days during the period of June through August upon thirty days written notice to the Managing Conservator.

All of the foregoing provisions could be adapted to provide automatic increases in time for visitation as the child grows older.

In regards to specified visitation, generally only the noncustodial parent is considered. However, a new trend is developing wherein the courts, relying on the expert guidance of psychiatrists and psychologists, often consider the needs of the custodial parent. In the typical situations, the custodial parent has the tasks of feeding, clothing, schooling and disciplining, in addition to keeping a regular eight-hour a day employment. While a custodial parent may see a child more, they may be enjoying it less. Without some uninterrupted time for the custodial parent and child, they may never really develop a properly balanced relationship. More and more courts are taking the position that custodial parents should have a period of time during the summer, usually thirty days, uninterrupted by the visitation rights of the noncustodial parent.

Although courts have generally frowned on split or divided custody, in many situations the best interest of the child might well be served by a divided custody arrangement, depending on the child's age and the location of the parents. Joint managing conservatorship has been approved in some cases with possession remaining with one parent. In modification situations, either custody or visitation, such an arrangement might relieve the required proof from change of circumstances to a less stringent burden. In custody situations, this might not be desirable, but for visitation it would give the court the flexibility to reexamine access. Such an option might promote settlement of cases by allowing one parent to "save face."

SCHOOL ACTIVITIES

Courts are now considering the wishes of children regarding sports participation and other school-related activities in preference to stated visitation periods. Such activities are necessary for the child to develop a proper relationship with his peers.

However, if summer camp or summer school or work is the program, then there may be a clash with ordered visitation. Often a custodial parent is unwilling to force the child to abandon summer plans to comply. It may be necessary as the child grows older and more involved in outside activities to put the burden directly on the child to make arrangements with the noncustodial parent. Regular telephone contact would help to develop the necessary rapport. In one instance, the court reduced the ordered visitation from every other weekend to one weekend each month and two weeks in the summer. The mother and child had moved to a smaller town several hours drive away where the child became active in school sports and activities. The court followed advice from a psychologist in that particular case over strenuous objection from the father. Such a decision could have been acceptable with regular telephone contact, flexibility and understanding from the mother and stepfather, but that was not the situation in this case.

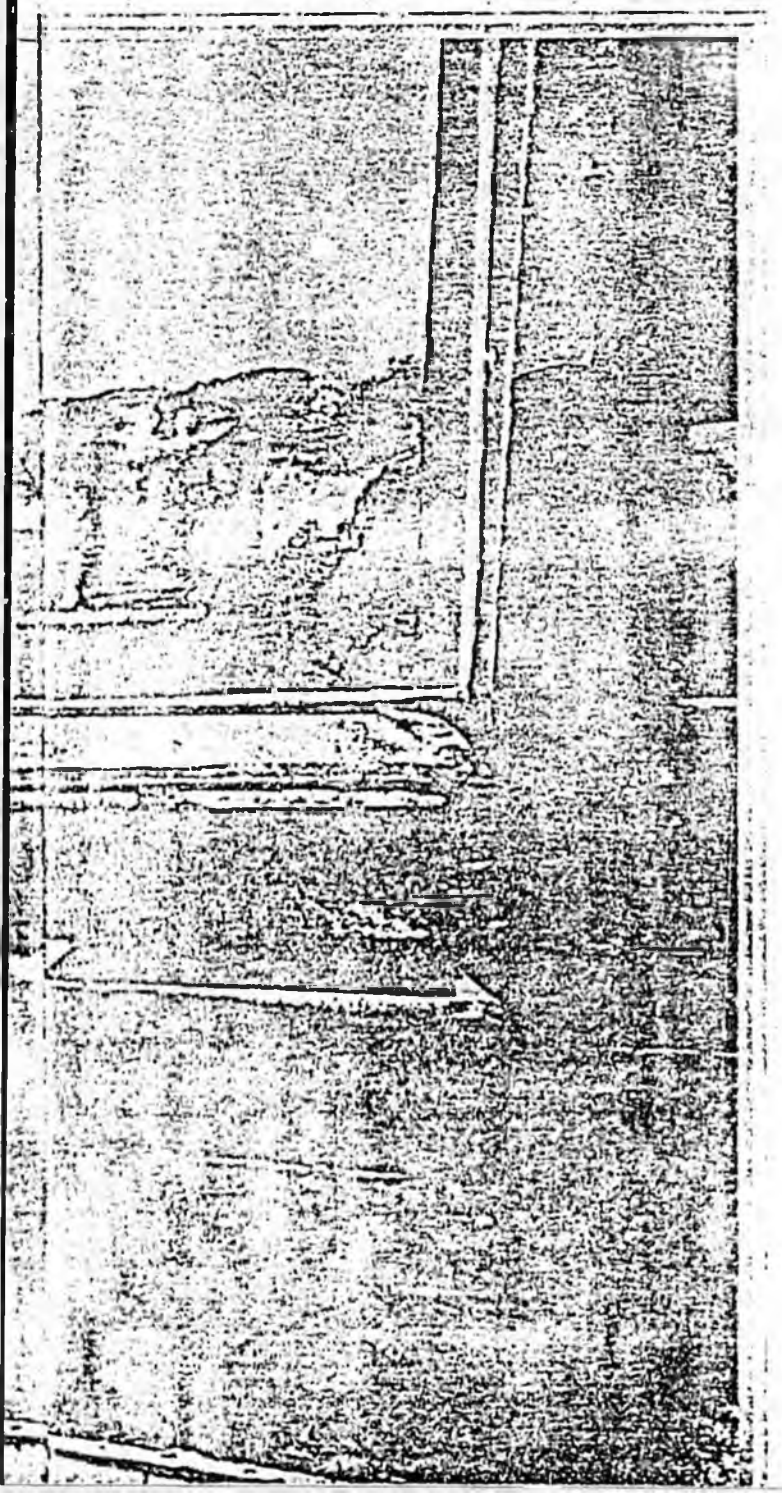
Many family law attorneys know of instances where custodial parents have thwarted visitation orders of the court. Specified visitation orders are not necessary for

(Continued on page 34)

Equal Rights, Visitation, and the Right to Move

BY BRIGITTE M. BODENHEIMER
Professor of Law, University of California, Davis

David Bentley



Few quarrel with the demand for equality of opportunity of fathers and mothers to obtain custody of their children at the time of divorce, but the quest for equality goes further. Some argue that equality of opportunity to become the custodial parent is not enough, and that to achieve real equality, there must be equal rights to custody *after* divorce. Child custody must be common and equal, they contend, although the common household has been dissolved, the marital relation has ended, and the spouses have gone their separate ways. Unfortunately, this is a practical impossibility. The closest approximation is joint custody, but it is already becoming clear that this requires a determined and sustained effort on the part of former spouses to transcend their differences and collaborate fully for the sake of their children. Few divorced couples are equal to the task. *Dodd v. Dodd,* which discusses the difficulties experienced, including harm to the children, is a case where joint custody was a failure.

Therefore we are left with the more traditional formula of legal custody to one parent and visitation rights to the other. This seems to be the only workable model for the great majority of ordinary mortals. Under this formula, there is ample room for the sharing of child care rights and responsibilities, but legally speaking, the custodial parent remains the primary caretaker.

Yet, persistent demands for "more" equality, and illusions about the practical attainability of this objective, have led some courts to blur the distinction between custodial and noncustodial parents. A court in New York, for example, elevated the stature of the right to visitation to a "right to raise one's children and to be with them," and characterized the change of residence of a parent who had custody as being "not dissimilar" to "child-snatching." *Entwistle v. Entwistle,* 402 N.Y.S.2d 213 (App. Div. 1978). And a Florida court abandoned prior case law and prohibited a custodial mother's change of residence because recent law had "substantially increased a father's rights to custody and visitation." *Scheiner v. Scheiner,* 336 So. 2d 406 (1976).

Both of these cases, and others like them, denied the custodial mother's freedom to move to another state.

Judicial restrictions on moving cannot be expected to be obeyed

Whether custodial fathers, whose number is growing, might also be forced to stay in the state where the marriage foundered remains to be seen.

Decisions like these are disturbing because the consequences for children are often disastrous. Parents who have virtually complete freedom to divorce find it hard to comprehend that, as a result, they may lose their freedom to move. Free and easy mobility is part of the way of life of the contemporary Western society. Parents do not willingly accept confinement within one state or county for perhaps fifteen or more years. Repressive measures of this kind breed evasion and resistance on the part of the most law-abiding citizens. Rather than face the possibility of a restraining order or to circumvent such an order, a parent may secretly move and thereby conceal the children's whereabouts. This sets the stage for an all-out battle for possession of the children.

Entwistle is a typical example. Prior to divorce, the father obtained a court order preventing the mother from removing the children, 2 and 6 years old, from New York. The parties then stipulated to the mother's custody and the father's visiting rights, and the mother's right to move to Greenwich, Connecticut, with the children. Upon court approval of the stipulation, the removal restriction was lifted. Soon after, the mother remarried and moved to Illinois with her new husband and the children. Although she immediately registered the New York divorce in Illinois and asked for a redefinition of visitation rights, she concealed her whereabouts for some time.

The father then asked the New York court to punish the mother for contempt and to have custody transferred to him because of the mother's disregard of his visitation rights. The court was incensed about the deception perpetrated on it, assuming the mother never intended to reside in Connecticut. Punishment by way of a contempt adjudication and a transfer of custody to the father was held justified.

If Illinois does not recognize the punitive custody change (*see Brooks v. Brooks*, and *Berlin v. Berlin*) the father in *Entwistle* may not let things rest. Anyone familiar with cases of this type can easily predict what will follow. Child-snatchings and counter-snatchings are likely, along with more litigation that may go on for years. In short, a life of misery and fear is forecast for two young children.

The father's lawyer will argue that all this is due to the fault of the mother; that she did violate the visiting provisions, and that she did move to a destination not permitted by the court. Had the father received custody and then secretly moved, contrary to a court order, he would have been treated no differently, he might add. Perhaps so. However, temporary moving restrictions will be lifted if "good reasons" for a change or residence are shown. In the only case I know of involving a custodial father, a court permitted the father to move from Wisconsin to New York with the children because of a betterment of his employment situation. *See Bennett v. Bennett*, 280 N.W. 363 (Wis. 1938). Custodial mothers have not fared as well—even when career opportunities were involved. *See Ryan v. Ryan*, 219 N.W.2d 912 (Minn. 1974). *Cf. Fritschler v. Fritschler*, 208 N.W.2d 336 (Wis. 1973).

Should we place the blame for the children's suffering primarily on the father or mother who resisted or circumvented the refusal (or the possibility of a refusal) of a court exit permit? True, court orders were violated. But the major cause of these unhappy cases are the moving restrictions themselves which cannot realistically be expected to be obeyed by freedom-loving Americans. The violation of the order in turn places the noncustodial parent in the advantageous strategic position of having the other parent branded as a lawbreaker and lining up on his side the court's wrath and moral indignation over the affront to judicial authority.

Nothing is gained and a great deal is lost by prohibiting changes of residence of custodial parents and their children. Law-abiding persons become criminals and fugitives, children are carried back and forth across the country and into hiding places, and a civilized solution to the custody and visitation question becomes impossible.

Proponents of moving restrictions say they are necessary to protect the visitation rights of the noncustodial parent. As the *Entwistle* case demonstrates, moving prohibitions do not, in fact, guarantee visiting rights. On the contrary, the apprehension of exit restraints deters proper parental planning prior to departure for out-of-state visits and the allocation of travel expenses.

Visitation rights are not lost by moving. Innumerable children travel to other states one or more times each year to see their absent parent. Moreover, visitation rights will be enforced in the twenty-one or more states which have adopted the Uniform Child Custody Jurisdiction Act (UCCJA), and in other states which follow the act's policies.

Some will insist that the right to convenient and frequent local visits in the state is lost if the custodial parent is allowed to move. The question is whether there is such a right to frequent visits in one particular locality that is enforceable by restraints on leaving the state.

The interests of the noncustodial parent and the children in free and easy access to each other clashes with the custodial parent's constitutional freedom to move. This freedom is clearly impaired if the parent is allowed to leave only without the children. Impediments on changes of residence held unconstitutional in recent years (e.g. *Dunn v. Blumstein*, and *Shapiro v. Thomp-*

son) are minimal, compared with the predicament placed upon a parent to make a choice between the children and freedom to move. *Cf. Ex parte Rhodes,* 352 S.W.2d 249, 251 (Tex. 1962). The imposition of such a choice places an intolerable burden upon the exercise of this freedom.

The final question is whether this abridgment of freedom may be justified by a legitimate, even compelling, state interest in keeping ex-spouses with children in the state. It is difficult to find a plausible justification for such a state objective. In the first place, no moving restrictions are placed upon noncustodial parents, although their departure also interrupts frequent and convenient child-parent contact. Second, moving restrictions are imposed at the request of the noncustodial parent and are enforced only if that parent sets the court process in motion—in other words—only if friction has developed between the parents. Hence, the court is being used to aid a private feud. In fact, there is good reason, in the case of dissension, "to put some distance between the parents" because friction between them causes emotional stress to the children. (*In re Guttemuth,* 246 N.W.2d 272 (Iowa 1976). *See also D'Onofrio v. D'Onofrio*, 365 A.2d 27, 30, *aff'd*, 365 A.2d 716 (N.J. App. 1976).) Finally, as has been shown, moving restrictions hardly ever achieve their purpose of safeguarding visiting rights within the state. On the contrary, such restraints fan the flames of conflict and fail to produce even that minimum degree of cooperation that is necessary to make visits possible.

There is justification, however, for some narrowly defined restraints. One is a restriction on moving while a custody proceeding is in progress. In cases involving the custody of children, it is important to have both parents and the children present. Several provisions of the UCCJA, while avoiding restraints on moving, are based on a policy to encourage the presence of all custody contestants and the children. Another legitimate restraint, of course, would be an injunction prohibiting departure of an abducting noncustodial parent. Beyond such specific narrowly limited situations, regardless of how the constitutional question will be authoritatively decided (so far there is no decision on the point), the states have a strong and growing interest in *avoiding* judicial control of credit in custody cases. Such controls, in many cases, are counterproductive and bring about the very evils which the UCCJA and other state and federal legislation is attempting to prevent.

We seem to live in a period of enhanced combativeness of divorced parents, whether they reside in different states or not. Not long ago, we thought that we had overcome the archaic notion that parents "owned" their children, and that the children's interest and the public interest in the growth of stable, healthy personalties was paramount in our society. Yet today, each parent demands "a part" of the child, and the cries for "equal rights to custody," 'fathers' rights," and "parents' rights" abound. Children's rights seem to be taking second place again. The question of child custody after divorce cannot be solved by reference to various kinds of "rights," all in collision with each other. A solution can only be found if combativeness is overcome and is replaced by parental planning, with the aid of attorneys and mediators, for the children's years of growth. ■

"Miss Williams, will you bring in my contract lenses?"

Making Visitation Work: Dual Parenting Orders

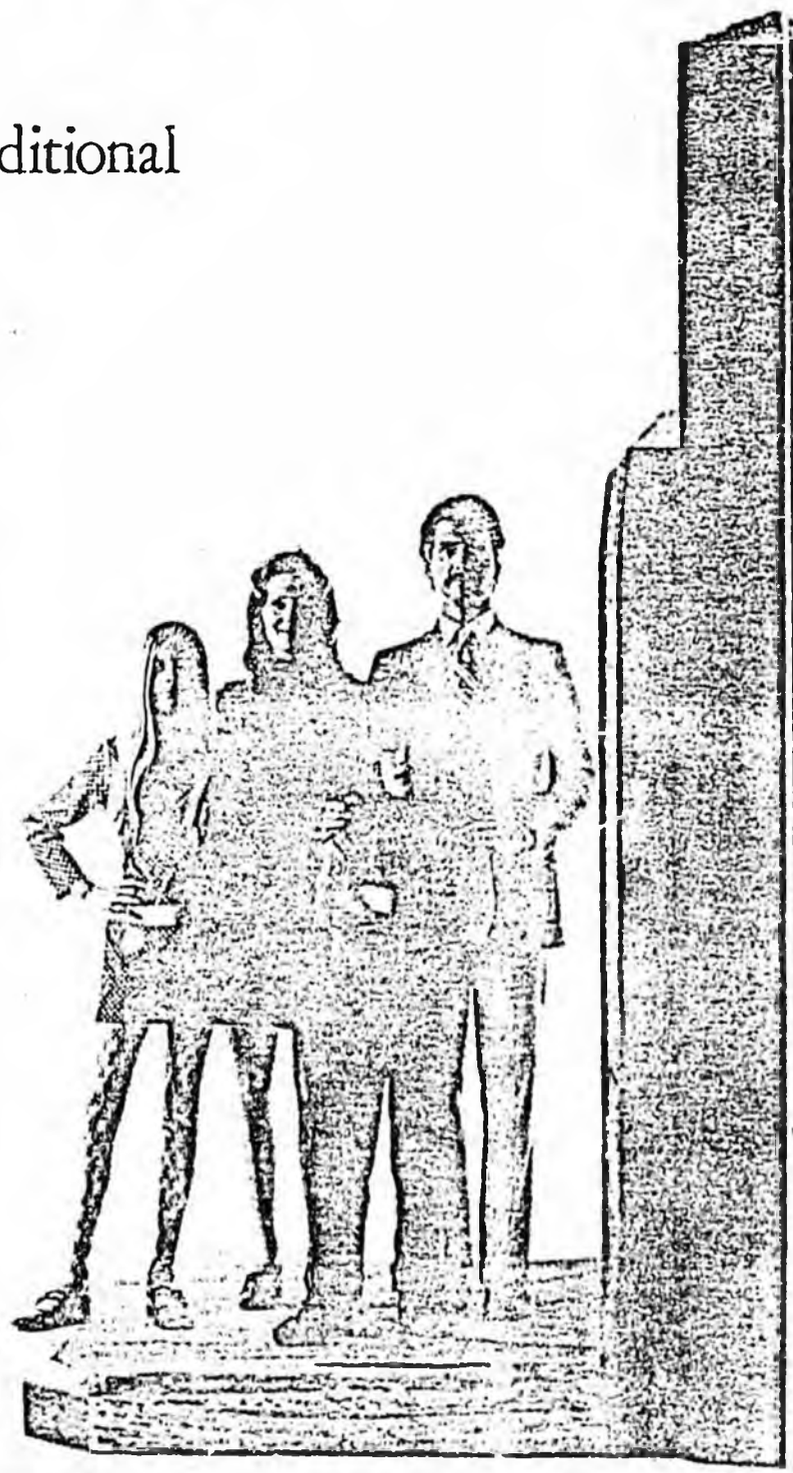
New Perspectives on the Traditional Tug-of-War

When James and Christine Wasko, both high school teachers, separated in 1972, they agreed that they should share both the costs and the child care responsibilities for their daughter, Sandra. Their separation agreement included a requirement that Mr. Wasko take custody of Sandra "on alternate weekends during the year . . . and for two weeks during the summer. . . ." Two years later, however, when Mrs. Wasko complained to a New York divorce court that Mr. Wasko had never taken custody of their children during the summer and had frequently changed his school-year plans on short notice, leaving her to cancel her own commitments or hire babysitters on his scheduled weekends with Sandra, the court refused her request for additional child support to cover her increased costs. An appellate court affirmed without opinion. (*Wasko v. Wasko,* Suffolk Co. No. 74-4558 (May 30, 1975), *aff'd mem.* 364 N.Y.S.2d 1007 (App. Div. 1975).)

More than a million additional children are affected by parental divorce each year in this country. For the Waskos and countless others, parent-child relationships will be maintained, if at all, in the context of custody and visitation arrangements. How can these parents, although divided, best preserve their ability to rear their children in as healthy an environment as possible? How can the law facilitate and encourage their efforts?

THE ROLE OF LAW

In general, law works in at least two ways. It sets standards for acceptable behavior and it resolves disputes. Most people simply prefer to do as the law requires, minimizing their interaction with legal proceedings. Only rarely do people choose to become directly involved with attorneys and courts—generally only when a



David Attie

BY CAROL S. BRUCH
Professor of Law, University of California, Davis

serious problem has arisen that they cannot resolve in any other way.

The typical involvement of the law in visitation matters provides an illustration. Most states, if they have specific laws concerning visitation at all, simply provide that a noncustodial parent will have a reasonable right to visit with the couple's children who are in the other parent's care. And, not infrequently, when custody orders are made, judges do not spell out exactly how often visits may take place, but instead order only that reasonable visitation be permitted by the custodial parent to the other parent.

How can such a vague order resolve anything? In the great majority of cases, a court order ends the matter so far as formal legal proceedings are concerned. Having been told by the court that he or she must allow the other parent time with their children, the custodial parent makes and lives with one scheme or another and the children are permitted to visit when the other parent wishes. These arrangements probably are permitted not so much because that is what the custodial parent would prefer, but because it seems a reasonable request for society to have made through the judge, and the custodial parent is used to living a life that comports with society's norms.

On the other hand, of course, there are the relatively infrequent but highly disturbing cases in which the custodial parent refuses to obey the court order either because that parent feels that it is unfair or because he or she is so angry with the other parent that paying any price (personal inconvenience, the children's unhappiness, or the court's displeasure) seems worth it. Anything to avoid sharing the children with the former spouse! These cases, of course, are the ones that are likely to end up back in court. When they do the court ordinarily attempts to use whatever means it has at its command to insure future compliance with its orders. Depending on the state, it may merely lecture the custodial parent, it may punish the custodial parent with a loss of support money if visits are not permitted, it may hold the parent who has disobeyed the court's order in contempt of court and place him or her in jail, or it may order a change of the children's custody to the other parent.

Between these two extremes—the typical case in which people abide by the court's standards without any undue discomfort and the less frequent but highly visible one in which a custodial parent will endure the court's displeasure rather than permit visitation—lies a third category. These parents, if left to their own devices, would avoid visitation regardless of society's expectations or a court order, were there not a sanction to enforce the court's decision. These are the parents who permit visitation reluctantly, but in the end do permit it precisely because they have been informed by the court or their attorneys (or their friends!) that they will be jailed or deprived of their children or support monies if they do not comply.

To the extent, then, that laws on visitation set standards for acceptable behavior, what is their impact? Their message for the parent who is given custody of the children is clear: permit the other parent to visit with the children as frequently as the court order requires. But what statement, if any, is made about the behavior of the parent who is not living with the children? What is expected of that parent? What should be expected?

To place the issue in perspective, let us review the roles of family members during the period when the family is intact, then ask what differences divorce ought to make in those roles.

GENDER-BASED PARENTING

Twenty or thirty years ago, it would have been a fairly simple matter to describe the typical family. Father worked to earn the living and mother remained at home to rear the children. World War II was behind Americans, and media as well as society at large agreed that this family structure was the correct order of things. Upon divorce, the theory was that fathers would continue to earn the living for their former families and mothers would continue to care for their children and remain at home.

Divorce law reflected these assumptions. It granted mothers custody in almost all cases, relying upon a presumption that children "of tender years" should stay with their mothers. It also authorized alimony awards that, when added to child support, in theory maintained the father's role as breadwinner and allowed the mother to maintain her full-time role as caretaker. Life was probably never as simple, however, as these stereotypes suggested. For example, although "alimony drones" become a popularized notion, it is unlikely that more than 10 or 15 percent of divorced women ever were awarded (let alone collected) any alimony at all, and it is not at all clear that fathers met these idealized obligations or that mothers could in fact afford to stay home with their children following divorce. (*See* Weitzman, *Legal Regulation of Marriage: Tradition and Change,* 62 CALIF. L. REV. 1169, 1186, 1195 (1974).) The model, however, was consistent and visitation schemes were a natural adjunct to it. Fathers were primarily responsible for financial comfort; if they chose to take paternal pride in their offspring, visitation was their prerogative. Women, on the other hand, were responsible for child and housecare functions. While they could not expect assistance from their former husbands with such activities, they could demand financial support.

Just when things began to change is not entirely clear. Perhaps it was with Dr. Spock and his generation of advisors on the tasks of parenthood. Perhaps it was with

cessary and the parent who chooses not to visit

the increasing participation of women in the work force and the resulting shortage of full-time caretakers within the home. Whatever the causes, the roles of husbands and wives began to change.

Increasingly, fathers in intact families were expected to share in the joys and burdens of child care. No longer was it sufficient to bring home the bacon on payday. From baby bottles to Little League to father-daughter activities, fathers too had a role in nurturing their children. By the time that notions of equality in housework and women's liberation appeared on the scene, fathers were already well-integrated into many aspects of child care that had once been the exclusive province of women. With the advent of concern for equality between the sexes, a movement firmly begun was accelerated. Women, too, were changing the nature of their contributions to the family. Increasingly, they participated in the work force during marriage and their earnings were essential to the family's economic survival.

This revolution, with its increased recognition of women's roles outside the family and its emphasis on sexual equality within the home, has prompted major changes in divorce laws. Interestingly enough, however, most of the changes have been at least initially to the benefit of men. First, new theories of spousal support recognized the growing economic activity of women by cutting back sharply on the availability of alimony. Although alimony may have been a hollow promise at best, new spousal support laws combined with no-fault divorce laws have led to a model of divorce that emphasizes the woman's return (if she had ever left) to the work force and economic self-sufficiency. At present, even those women who might wish to remain at home with their children are increasingly being encouraged or even forced to become wage earners.

At the same time, the increased interest of fathers in their children as persons rather than belongings has prompted attacks upon custody laws that give a preference to mothers simply because they are women. Because of stereotypes and because most families continue to place the majority of nurturing responsibilities upon mothers, however, this change has not yet had a significant impact on the percentage of custody awards going to mothers; it is still the norm for women to be awarded custody, almost always by agreement of the parties. There have been no revisions, however, of laws concerning visitation. Accordingly, noncustodial parents (who continue to be men primarily) continue to have visitation privileges that they may exercise at their option.

To summarize: during marriage, both women and men in contemporary society share to one degree or another both the financial support and the emotional and caretaker support of their offspring. Upon divorce, however, these roles may or may not continue, depending upon the pleasure of the noncustodial parent. Even where child support is collected regularly, the custodial parent continues to share the economic burden of the family with the other parent. But in almost all cases the custodial parent bears the sole defined responsibility for the care and nurture of the couple's children. This disparity has resulted in a phenomenon—today's single-parent family—that is increasingly drawing the attention of disciplines ranging from economics to mental health.

THE CHILD'S BEST INTERESTS

What is life like for the single parent, and of what relevance is the law of visitation? Government statistics establish that most single-parent families are poor. In 1976, the median income of female-headed families was $6,500, only about half of the $13,374 median for male-headed families. Given the striking disparity of wages for men and women, and the dismal statistics on the enforcement of child support obligations, these figures, though grim, are not surprising. What is, perhaps, surprising to those who are not members of the mental health professions or have not themselves experienced life in a single-parent household, is the impaired quality of emotional relationships for many members of these families.

In a series of articles that report the results of their studies on the impact of divorce upon children, scholars at the University of California at Berkeley and the University of Virginia have outlined multifaceted detriments to children of divorce. (*See, e.g.,* Wallerstein and Kelly, *Divorce Counseling: A Community Service for Families in the Midst of Divorce*, 47 AMER. J. ORTHOPSYCHIAT. 4 (1977); Hetherington, Cox and Cox, *Divorced Fathers,* 25 FAM. COORDINATOR 417 (1976).) There is, of course, the initial trauma of their parents' separation. There is, in addition, the anguish and grief over the loss, even in part, of the parent who will no longer live with them. While these pains are inevitable so long as parents divorce, there are other pains identified by these authors that may be avoidable, at least in part.

One of these problems is that of abandonment. Children are fully capable of distinguishing emotionally between the parent whose partial absence is necessitated by a divided living arrangement, and the parent who simply chooses not to visit with the child (even upon those occasions that remain available after divorce). Total absence of contact with the noncustodial parent is a gratuitous pain—one that divorce does not require the child to bear, or at least one that divorce should not require. In addition, in many families the Hetherington and Wallerstein studies have documented a striking decrease in the quality of the parent-child relationship between the child and the parent who *retains* custody!

(Continued on next page)

This finding suggests that children may be doubly bereft of their parents following divorce: the quality of their relationship with the parent who has left home is decreased as their time together is lessened; their relationship with the parent with whom they live may be injured in a way that these researchers tell us is significant.

This finding concerning the frequent deterioration of the parent-child relationship between those who remain together following divorce deserves analysis. The custodial parent, after all, is given a pretty heavy load to carry. Not only is he or she (most likely, she) *in fact* left with almost the entire financial support burden for the family in a society where a woman's earning capacity at best probably only allows her to skim somewhere slightly above the poverty line; she is left to handle the responsibilities of nurturing and caring for her children without reliable assistance from society or her former spouse. A recent Oxford Centre study found that fewer than 50 percent of the noncustodial parents in England and Wales whose cases were sampled were in fact visiting their children; the custodial parent had refused access in only 17 out of the 290 reported cases of nonvisitation. (*See* J. Eekelaar and E. Clive, CUSTODY AFTER DIVORCE, Table 16 (Oxford Centre for Socio-Legal Studies, Family Law Studies, Number 1, 1977).)

The rhetoric of the "joys of parenthood" has a hollow ring when one surveys the problems left to the custodial parent. This individual is expected to work full-time, to stretch limited funds, to care for the physical needs of the children and the household during off hours, and to supervise the children's intellectual, social, and moral growth. One wonders where any one person is to find the time, the skills, or the emotional and physical stamina for such demands. Surely there is no time left for personal growth or recreation, especially if money is in short supply and babysitters are a luxury for which there is no room in the budget. Is it any wonder that this person becomes less than the ideal parent and that relationships with children cannot be maintained as they were when both parents participated in at least some of these tasks?

Perhaps visitation following divorce has a more profound role than that of retaining access rights to children. The law requires that the "best interests of the child" dictate the nature of custody decisions, including visitation matters, in most states. In the majority of cases visitation is essential not as a matter of parental rights, but as one of children's rights—their best interests—for two reasons. First, through continuing contact with both parents, the children will be relieved of the specter of abandonment that haunts some children of divorce. At the same time, if the parent with whom the children live is given some respite, however brief, from the duties imposed by the single-parent household, there is an enhanced opportunity that the children's previous relationship with this parent will not be severely disturbed and the children will benefit.

DUAL PARENTING

If we can agree that in most cases it would be helpful to children—both in their relationshps with noncustodial parents and in their relationships with custodial parents—to have regular, generous visitation, what kind of legal structure is most likely to facilitate that result?

As mentioned earlier, reasonable societal expectations that are included in a court's judgment will be obeyed by the majority of people. And, for a smaller number, these will be obeyed even begrudgingly if there is a sanction that attaches to disobedience. Only in a small number of cases need we anticipate that active disagreement with the court's pronouncement will result.

Accordingly, my first suggestion is that courts begin to order noncustodial parents to visit with their children on a regular basis. (Of course, such orders would be made only when there is a reasonable possibility that parental cooperation can be secured and when the parties live nearby or can make reasonable transportation arrangements.) In my view, this is a tremendously important order, both as it affects the parent-child relationship directly and as it affects the child's welfare through its relationship with the custodial parent.

To be most meaningful, visitation should take place at times when normal parent-child interaction occurs. Thus, visits should take place both during playtimes and during times when chauffeuring of children, visits to the dentist, or trips to the grocery store are apt to take place. Children, in my view, need to know that the noncustodial parent is a whole person—one who may need to go to the hardware store, or one who may wish to go out with a friend at the cost of a babysitter—and not an idealized playmate who suddenly appears when it is convenient only for entertainment purposes. Not only will this provide the child with a more realistic picture of the two whole people who are his or her parents; it will provide a more meaningful break in routine for the parent who bears the responsibilities for the less glamorous aspects of child rearing during most of the week. At the same time, a good visitation program should leave some of the valuable weekend or vacation time to be shared by the child and the custodial parent. They, too, need time to play together.

Obviously this approach is a far cry from our traditional model of visitation. Because it is predicated on the need for continuing cooperative parenting by divorced parties with children, I suggest a name for this proposal: dual parenting. ("Joint custody," sometimes called "shared custody," is a quite different legal concept, which calls for equal legal control over the child

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Making a Federal Case

by Harvey C. Dzodin
Council to the White House Conference
on Families

Recent unprecedented and profound changes have occurred in American families and the laws affecting them. In examining those changes, the White House Conference on Families announced by President Carter for 1981 will rely heavily on the expertise of the American legal community and the unique resources of the American Bar Association's Section on Family Law.

In announcing the conference, President Carter said that its main purpose "will be to examine the strengths of American families, the difficulties they face and the ways in which family life is affected by public policies. The conference will examine the important effects that the world of work, the mass media, the court system, private institutions and other major facets of our society have on American families."

The conference is now in its early planning stages. Our recent efforts have been focused on the selection of a permanent staff and identification of candidates for our National Advisory Committee. In addition, because we are committed to an open conference that reflects the pluralism and diversity of American families, we have been seeking the counsel of a broad spectrum of individuals and organizations such as the ABA. In this regard the Section on Family Law has been most cooperative in supplying help and advice and the conference staff members look forward to a continuing interaction.

As part of this interaction, the conference will be sending a representative to the ABA's annual meeting in New York, not only to speak but to hear from your speakers and especially from individual Family Law Section members. Your ideas and comments will be most helpful and welcome because laws affecting families promise to be an important component of the conference.

Possible topics of interest to the Section on Family Law that have been suggested to us include child advocacy, domestic violence, child snatching, parental and children's rights, foster care versus institutionalization, subsidized adoption, and an adoptee's rights to know his roots versus parental right to privacy. Also suggested as possible topics are nonjudicial settlement of disputes, family dispute settlement through arbitration and mediation, neighborhood justice centers as well as the diminution in the legal effects of marriage and the dejurification of family law. An important further possibility is the effect of legislation on families, e.g., tax and welfare laws.

We also project an international dimension for our conference. For instance, we have had enthusiastic contact with academics, lords, barristers and solicitors in Britain. Additionally, we hope to have significant input from the International Union of Family Organizations in Paris who are currently in the process of setting up an International Documentation Center which would gather and provide comprehensive information concerning the family from all countries.

Members of the legal profession can get actively involved in the White House Conference on Families in a number of significant ways. These will be discussed by our representative at the annual meeting. In the meantime, because many states are in the process of organizing their own state conference, those who are interested in participating are urged to write their governor and make their desires known. Those who have any questions about the conference should feel free to contact us at the White House Conference on Families, Room 541-F Hubert H. Humphrey Building, Washington, D.C. 20201.

We see the White House Conference on Families as a process that will include state conferences, regional meetings and privately-sponsored seminars and discussions. Rather than regarding the conference as culminating in a five-day meeting in 1981, we view this event as only the beginning of a continuing effort.

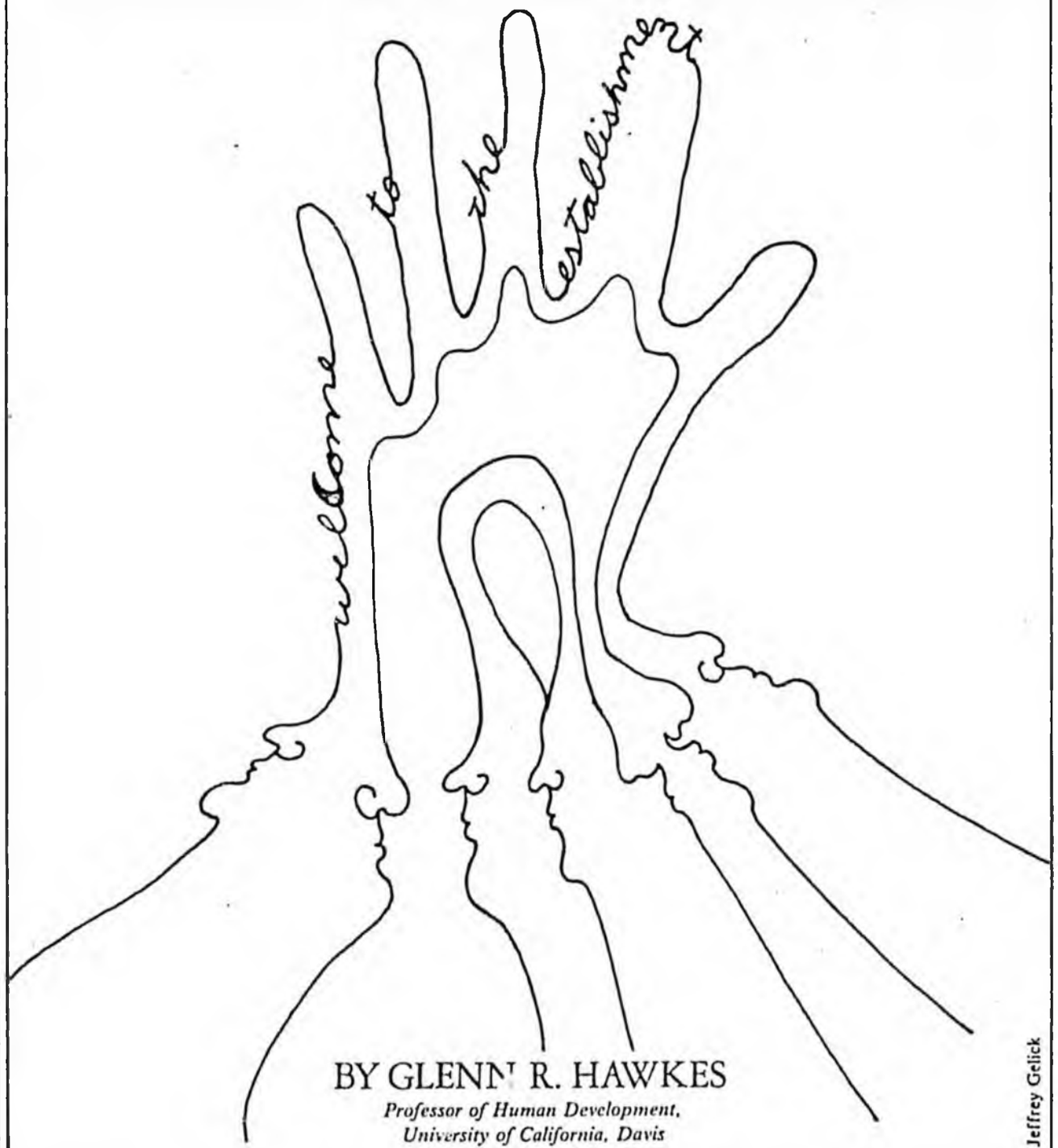
We see the conference as a significant opportunity—an opportunity for family members, researchers, policy makers and practitioners to examine the strengths and concerns of families. That opportunity must, however, achieve a balance which reflects input from all these important constituencies. This perception of the conference as an opportunity for initiating a process, rather than as a response to the pathology often attributed to the interest in families, is one that we hope will help set a positive tone for the White House Conference activities that will carry on long after the conference is ended.

As President Carter said: "Families are both the foundation of American society and its most important institution. In a world becoming more complex every day, our families remain the most lasting influence on our lives."

We look forward to working with you on this unique and exciting conference.

Working With Big Brother

Attorneys Are Now Counseling Families on How to Get the Most Out of Local Bureaucracies.



Jeffrey Gelick

BY GLENN R. HAWKES

Professor of Human Development, University of California, Davis

The concept of the family as a complete social unit with the virtues of autonomy, self-sufficiency, and the capacity to solve all of life's basic problems is a carry-over from the idealized myth associated with the agrarian past. It little resembles the bureaucratic pattern evolved in this era of industrialization and technological development.

Independence and autonomy may be desired by and for families, but for some families such independence may lead to more problems than it solves since the family lacks the resources to capitalize on independence. Under conditions of father absence, economic instability, and isolation some external help may foster sufficient resources to keep the family from becoming a casualty in a complex and perplexing world.

What is needed is a theory (and a program growing from it) that fosters a *fit* between the family and bureaucracies created to help and, in some cases, supplant the family in tasks traditionally tied to the family alone, such as social development.

In the early stages of its formation, the young family is usually operating with limited resources and developing a sense of its own autonomous structure and function. The period is characterized by the need for young parents to develop themselves further and to shape their roles as individual adults as well as mothers and fathers.

The theory of shared function is the notion that formal organizations and families coordinate their efforts if they are to achieve their goals. It calls for mutual planning and articulation. It suggests clarification of goals and the development of mechanisms to achieve goals.

The early stage of the life cycle is an optimum time for developing shared function. Attorneys counseling families faced with child-rearing problems should consider encouraging the idea which would allow the family to draw upon the economic and psychological resources of the agencies.

Whatever scheme is developed, it must be clear that the bureaucratic structure and the family are not in competition with each other; in many cases, their concerns will conflict, but a sense of cooperation must prevail. It must be explicit that a family has not failed simply because it is assisted by the bureaucratic segment of society. A family pays a high price for help if the members are allowed to feel inadequate and subordinate to the professional expertise of the bureaucracy. Guilt and hostility, consequences of such lopsided partnership, are disabling to the family, not facilitating. In advising clients seeking help, attorneys can point out that sharing involves a reciprocal process of being able to influence as well as being influenced.

An understanding of the goals and functions of both the bureaucracy and the family will enable attorneys to work with the two groups.

DEFINITIONS

Bureaucracies are social structures developed by society to achieve certain goals. They are instrumentally role-oriented in operation and emphasize objectivity and impersonality. They are usually built on merit, stressing performance as criterion for advancement in the organization and, for that matter, for perpetuation of the organization.

They are generally planned to have high stability and to exist for long periods. Codes and rules are part of their planned structure. They are also subject to public scrutiny. Whether part of the private or public sector, bureaucracies are developed with an eye to stability even though permanency of membership is generally not a common characteristic.

Families are primary groups usually described as a group of people living in a single household tied by bonds of marriage, blood, or deep commitment. They are expressive role-oriented and emphasize nepotism and subjectivity. The family provides continuing membership regardless of age or performance. It provides for primary face-to-face contact, and membership is retained merely through staying alive. Nepotism rather than objectivity characterizes its personal policies. Because of its size and the diffuse nature of its function, it is well-equipped to react with speed and flexibility to non-uniform events. It is a private operation and essentially not subject to scrutiny for efficiency or economy of operation. The family also provides a setting for the use of skills which a bureaucracy is ill-equipped to handle: feeding, elementary protection, exhibiting and reciprocating affection, etc.

Adapted from Professor Hawkes's article "Who Will Rear Our Children?" which appeared in the April 1978 issue of *The Family Coordinator.*

It would be very easy, given the nature of the bureaucratic spirit, to

Through the theory of shared function, the family and bureaucratic organizations can be examined in a way which maximizes the contribution each can make to the betterment of the human condition. For shared function to play such a role, the point at which the independent systems meet or interface must be developed so certain services are not overrepresented or wasted. It is also important that the autonomy of each sharer be protected and that the dominance of either in given circumstances be related to its function. It would be very easy, for instance, for the bureaucratic structure to attempt to standardize families. One function of a bureaucracy is standardization to ensure uniformity of response—a goal which tends to stifle the uniqueness and adaptability of the family unit.

REVIEW PROCESSES

The theory of shared function assumes also that needed services are constantly being reviewed in light of changing social conditions. A mechanism for such review seems to be one of the most difficult tasks. Leaving the review to the bureaucratic interface may, indeed, tend to give dominance to the bureaucracy. The family is at a disadvantage in that it has neither the expertise nor the resources to anticipate unmet needs and visualize ways in which these needs might be met.

One compelling reason for citizen participation on boards and regulatory agencies is to make certain that the needs of the citizenry are not overlooked. Another useful way of informing planning groups of the needs of a population is the public hearing. A recent requirement that planned social-service programs and expenditures be advertised and hearings be held may be developing a model that can be exploited in a theory of shared function. Such developments should be watched to determine whether this model can bring the bureaucrat and the citizen together.

How can a theory of shared function relate to the task of guiding the child's social development? Social development means equipping the child with the skills and attitudes basic to effective functioning in this culture. Socialization should focus on developing skills and fostering attitudes which will make a child a competent and productive member of society. Developing these competencies in the child calls for inculcating a strong learning drive, developing attitudes and skills which foster maximum physical growth and development, building a strong sense of emotional security, and laying a foundation for effective interaction with others. Individual priorities may vary, but they will generally contain elements of sound mental and physical health and techniques to foster their growth and development.

SUPPORT SYSTEMS

As men and women become parents they must develop roles for which they may have great or little preparation. Much disruption can be mitigated by the development of support systems in the bureaus of society. When support systems are nonexistent and families have dysfunctional child-rearing practices, familial stress can have a violent impact on young children. The disruptive potential that the birth of a child can have in a family is demonstrated in the 2300 cases of abuse and neglect of infants under the age of one reported in New York City in 1975.

Examples of support systems designed to ameliorate child-rearing, already implemented in England and the United States, include:

- Parental stress hotlines that are staffed by sympathetic volunteers trained to listen and refer clients to other social services.
- Parenting groups that are facilitated by city and county agencies to provide an intimate forum for voluntary discussion of parenting problems.
- Education for parenthood programs sponsored by state and federal agencies to provide adolescents with child-development background and experience in interacting with young children.
- Adult education programs that are sponsored by school districts to provide parents with participatory nursery school experience.
- Extended family centers that provide resources for isolated parents who are acting out violence against their children.
- Health visitor programs so that parents with newborn and young children are provided with a professional expert.
- Developmental family centers, such as the Martin Luther King Family Center, that provide home visits and pre-school facilities to "help families to help themselves."
- Child care services designed to provide for care for children, in and out of the home.

Bureaucratic support services for the early stages of social development have traditionally been of very limited diversity even if physical/medical evaluation of the newborn is included. Public health, as an example, is concerned with eliminating children's diseases. Toward that goal they have developed programs to blanket the young with immunizing shots. Pediatricians, school nurses, mass media, and religious and social groups have been recruited to urge acceptance and participation of the public in such programs. Success has been great when a clear and immediate threat has been perceived, as with polio, and less great when the threat has seemed vague.

A clear partnership between the bureaucracy and the family can often ensure greater success. If programs and procedures can be developed by both parties sharing responsibility, their chances of success are improved. In

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to attempt to standardize families

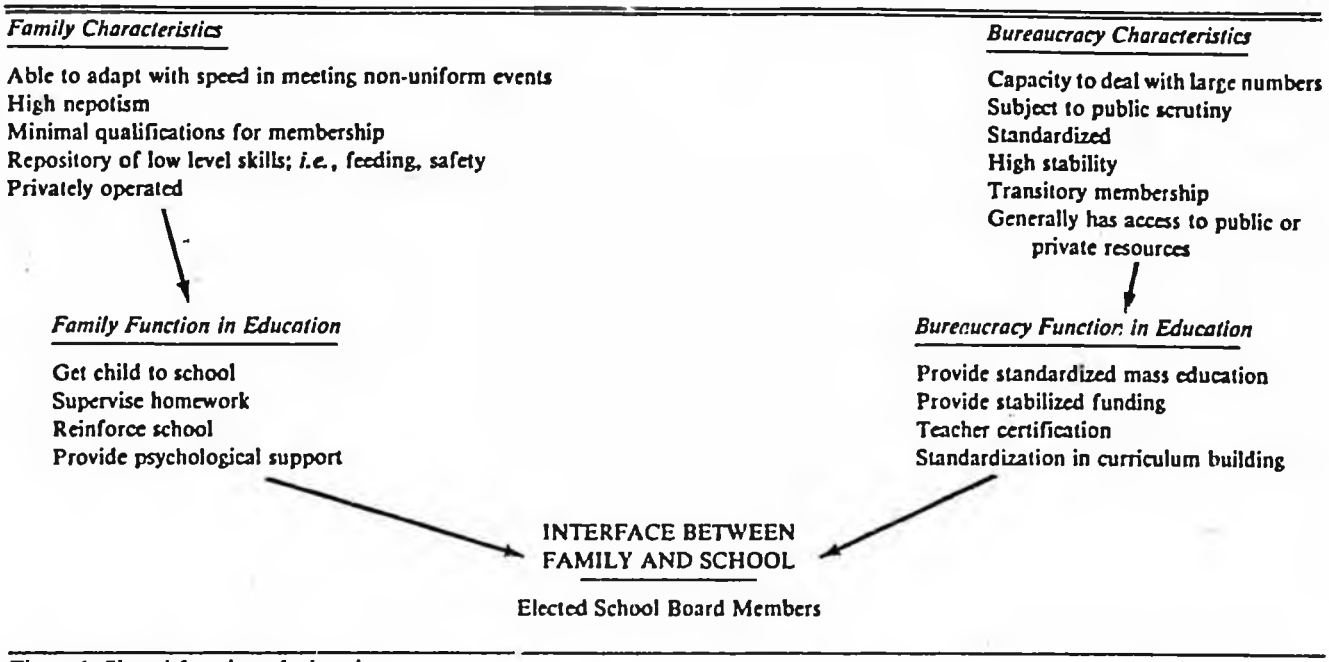


Figure 1. Shared function of education.

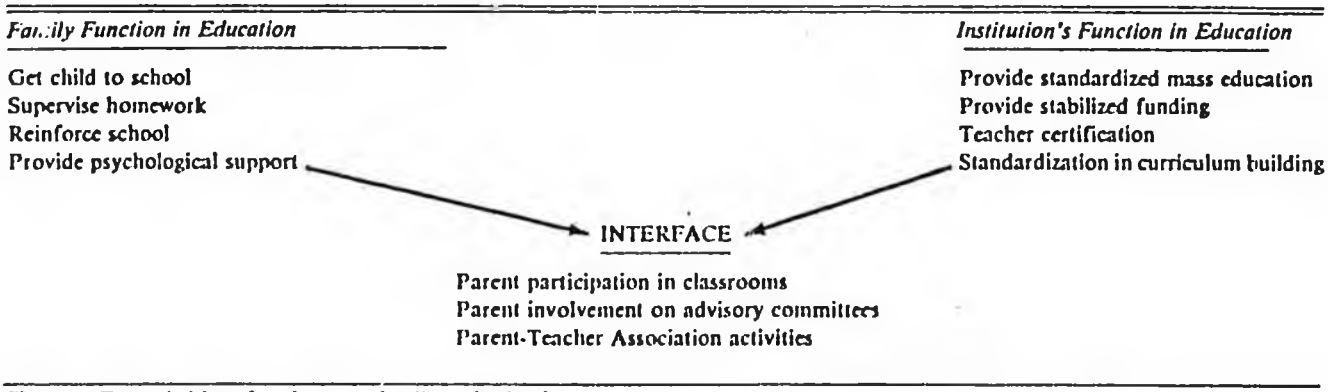


Figure 2. Expanded interface between family and schools.

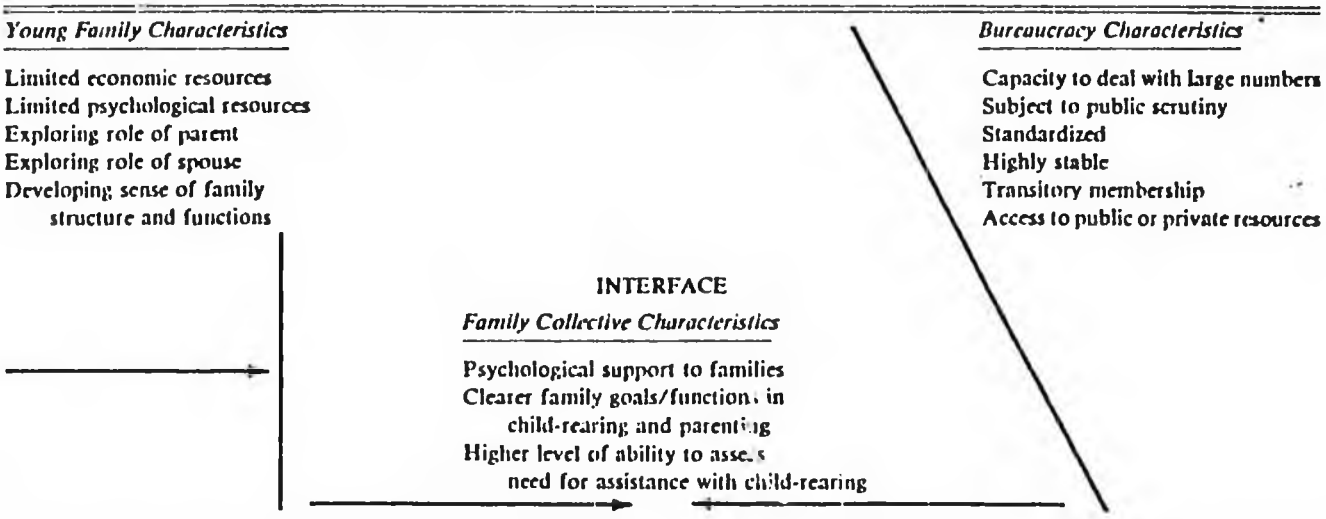


Figure 3. The Collective as an interface between family and bureaucracy as a mechanism for shared function of child social development.

The Bottom Line

A report recently published by the Bureau of the Census presents a statistical portrait of young Americans. "Characteristics of American Children and Youth: 1976" includes data compiled from U.S. government sources such as surveys, decennial censuses, and vital statistics.

The majority of the data has been published previously in Bureau of the Census or other government reports but this information is collectively published as a matter of convenience to the interested user. The report also includes some data published for the first time.

Focusing on persons under 25 years of age, the report traces changes among children and youth in the areas of population growth and distribution, migration, education, marital status and living arrangements, the birth rate, mortality and health, labor force participation, occupation, income and poverty status, voting, and crime and victimization.

Some of the highlights of the report are:

• On July 1, 1976, American children under 14 years old totaled 48.3 million. As a result of the decline in the birth rate over the past decade and a half, children have become a steadily decreasing proportion of the total population (from 30 percent in 1960 to 23 percent in 1976). Under the Series II population projections, the number of children would drop to about 46.2 million in 1980 and then rise to 52.9 million by the year 2000.

• Data collected in the October 1974 and February 1975 Current Population Surveys indicated that of the approximately 40.8 million children 3 to 13 years old in the United States, about 8 out of 10 were generally cared for by one of the parents while the children were not in school. Fairly small proportions were taken outside their home for care; for example, to the home of a relative or to the home of someone who is unrelated to them (about 3 percent to each), or to an organized day care center (about 1 percent).

• Eighty percent of the children under 18 years old in 1976 lived in families with both of their parents present. Most children not living with both parents lived with their mother.

• In 1976, about 28.2 million children, or 46 percent of all children under age 18, had mothers who were working or seeking work, up from 39 percent in 1970.

• The American youth population 14 to 24 years old on July 1, 1976, was estimated to be 45.1 million. This figure represents an increase of roughly 20 million, or about 84 percent, over the 24.5 million in 1950. Under the Series II projections, the youth population 14 to 24 years old would decline by about 7.1 million persons by 1990 from its 1976 level of 45.1 million. Between 1990 and 2000, the number of youth would increase by 2.8 million.

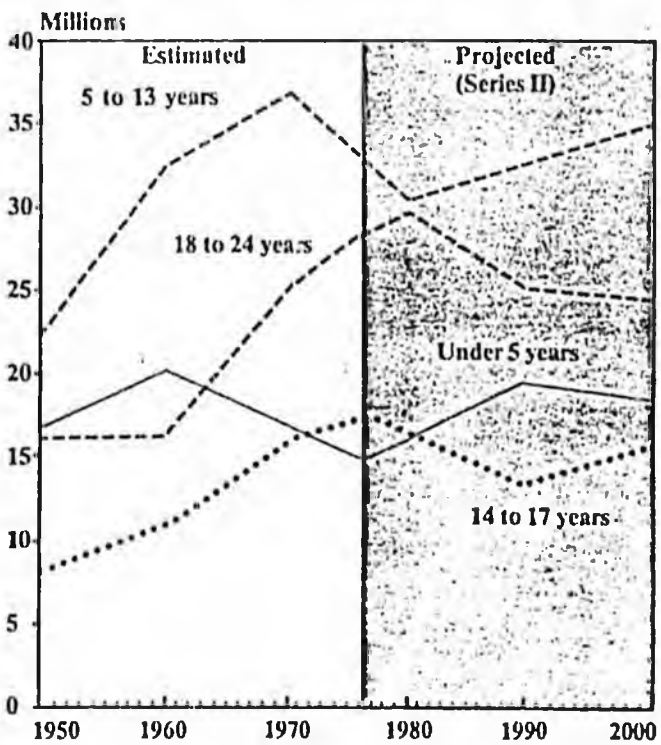
• American youth are a highly mobile group. Rates of residential mobility over a 1-year interval reach their peak at ages 20 to 24; at this age group the rate of moving within the United States in 1975-76 was 38 percent.

• The vast majority of America's youth in 1976 lived in families (generally either their own or their parents'). About 87 percent of young men and 89 percent of young women were members of families. About 25 percent of the men 18 to 24 years old were maintaining a family, and about 38 percent of the women were wives in husband-wife families.

• The median income of husband-wife families with a husband 14 to 24 years old who worked year round full time in 1975 was $12,090. If the wife was in the paid labor force in a husband-wife family, the median income was $13,185.

Population Growth and Distribution of Persons Under 25 Years Old By Age: 1950 to 2000

(Estimates and Series II projections as of July 1, including Armed Forces overseas)



Shared Custody

(Continued from page 9)

One of the major arguments put forth to support this assumption is that people who can't agree to stay married aren't going to be able to cooperate in child-rearing once the marriage is over. This presupposes that the *only* thing married adults can agree to amicably is to stay together and that anything else must be seen as pathologically unsound. Thus divorcing parents are immediately cast in the role of enemies, an idea fostered by the adversary system. While it may be logical for an attorney to view the situation this way, it may be very inappropriate for the needs of the family involved.

Secondly, one continually hears divorcing parents referred to as too immature, too unstable, and far too emotionally upset to work out some reasonable arrangement for the children. But even though the adults may not be successful marriage partners, that doesn't mean they can't be successful parents once the pressures of the marriage are diminished.

Characterizing all divorcing parents as neurotically selfish antagonists who don't care about scarring their offspring as long as they get revenge on each other is highly unfair to the many parents who don't wish to use their children as weapons of power.

A third reason why lawyers are hesitant to encourage joint legal and physical custody is fear that the judge won't consider it as a viable solution. In many cases the parents, who practiced sharing during the months of separation prior to filing for dissolution, were counseled by their attorneys that such solutions were unsuitable, unrealistic and likely to be thrown out by the judge currently hearing family law matters. One lawyer said, "I don't want to raise my client's hopes, only to have everything fall apart when His or Her Honor lets out a hoot of dismay and refuses to consider the question further."

Although I have observed and then talked with some judges who are opposed to any form of sharing, I have also found many who will award joint legal *and* physical custody *provided* that the parents (and their attorneys) know what they are getting into. If the parents are in agreement about who will take responsibility for what aspects of child-rearing, what kind of after-school care is needed, how the bills will be divided, and any other pertinent things the judge wants to ask about, the magistrate is more likely to accept their plan than if they simply petition for some vague, utopian equality of parenting but haven't done their homework about making it a reality.

FATHER'S FIGHT

In one case the judge denied joint custody after both parties had stipulated to it, only to be confronted by the father appearing In Pro Per with numerous letters, witnesses and a very firm appeal for the judge to reconsider. Among those letters was one from the day care center where the shared child had been enrolled for the last year and a half. The teacher made a very telling point when she pleaded with His Honor "to recognize and validate the cooperation and consideration these parents have been willing to show in order to arrive at their request for shared custody." The judge did indeed reconsider and that family now has the security of legal sanction for what the parents might have continued doing anyway.

PSYCHOLOGISTS SKEPTICAL

The idea of providing the children of divorce with two separate but equal homes meets with a fair amount of skepticism within the psychological community as well. Yet just as the attorneys' arguments against sharing are largely based on assumptions of hostility and the inability to cooperate between divorcing parents, the psychological arguments assume parents are unable or unwilling to consider the needs of their children as well as their own.

Psychologists generally attack the idea of dual households as being detrimental to the children for a variety of reasons. It was cautioned that the youngsters wouldn't know where "home" was, would become manipulative or devious in order to promote fighting between the parents, or would suffer from divided loyalties and end up feeling insecure about who has what authority over them. Added to all this was the automatic assumption that the youngsters would be shuttled back and forth, "like a yo-yo" as one professional put it, and forced to comply with some arbitrary timetable set up for the convenience of the parents.

A brief examination of these attitudes in the light of the reality of shared custody puts an end to some of these erroneous suppositions. To begin with, one of the major reasons for sharing custody is to allow the offspring more natural and comfortable interaction with each parent. Consequently the sharing parents I spoke with worked with the children to determine actual timetables of exchange once the system got started. Far from adhering to a rigid schedule, most of these adults were anxious to find whatever method seemed to work best for everyone. Some reviewed their situation on a regular basis, while others simply tried new arrangements when the old ones no longer seemed suitable.

The question of divided loyalties simply did not seem to exist for the children I interviewed. They felt free and comfortable about loving each parent. The youngsters had none of the usual guilts and resentments that stem from continuing to love a noncustodial parent in the traditional sole custody situation. One little girl explained that sharing evolved in her case because "my parents love me enough to let me love both of them."

As far as knowing where "home" was or who has what authority, this problem also appears to be more

theoretical than real. All the families had a firm policy of "when in Rome, do as the Romans do." Children readily understand that certain rules which hold in one home may be different from rules in the other.

Where the youngsters are concerned, consistent communication between the adults generally avoids either accidental or intentional manipulation on their part.

Sharing also has the effect of disarming the child of one very classic angry reaction. The cry "I want to go live with Daddy!" doesn't carry much weight as a threat if, in fact, she is going to live with her father in another few days or weeks anyway.

It should be stated that shared custody as a means of rearing children is not without its problems. But they appear to be the normal, human hazards encountered by any family, whether "intact" or not. And certainly sharing does seem to do away with a number of the negative situations that sole custody usually creates.

There are two arguments advanced by lawyers and psychologists which deserve to be looked at separately because they are both valid and important considerations in every case. Attorneys warn that joint legal and physical custody opens the door for one parent to legally snatch the child and move to another state, wherein he or she can file for sole custody. And psychologists point out that if one or both of the parents has not been able to accept the divorce emotionally he or she may use a sharing arrangement as a way to keep track of the activities of the former spouse.

CONSIDER MOTIVATION

Both of these considerations boil down to a question of motivation; are the parents seeking shared custody for the children's sake or simply as a ploy to mask other intentions? It's quite probable that there have been and will be in the future cases where the good faith of the parties is questionable and these people may see shared custody as a means to other ends. Yet can one honestly suppose that such parents won't find ways to snatch the children, to spy on their ex-partners, or to continue their battles whether or not sharing is available to them? Is it fair or reasonable to deny so many other parents the opportunity to implement sharing simply because a few people *may* seek to misuse it?

Obviously shared custody is not for everyone. Some couples are indeed so locked into their personal battles that they forget their responsibilities as parents. Others simply can't find a way to fit it comfortably into their concepts or expectations of divorce. And some children refuse to participate in such arrangements, particularly if they do not get on well with one of their parents.

But for an increasing number of people it is proving to be a workable and positive solution, one which benefits not only the children but the parents and state as well. Fathers who share are far less likely to disappear, leaving their ex-wives and youngsters to rely on welfare. Mothers who are not burdened by the sole responsibility of raising their children alone are less likely to hassle and harangue either offspring or ex-husbands, creating endless battles over money, visitation hours and various other complaints. And the children have the advantage of two loving and supportive homes, a real knowledge of and interaction with each parent, and the security of experiencing both parents' love in action, not just in words.

Surely it is time for the professionals in the divorce field to recognize the validity of shared custody and be willing to suggest it as an option to their divorcing clients. Not every family can or will want to make use of it but for those who are interested in exploring the possibilities, working out the details of a sharing arrangement can be the first step in turning an angry battle into a constructive situation. To fail to point out this alternative to the traditional sole custody system is to continue to rob the children of divorce of half their birthright and thereby add needless trauma to an already painful situation. ■

Visitation

(*Continued from page 17*)

parents who can work together but it seems that those are few indeed. Orders must be drafted with the thought of enforcement and the careful draftsman must also consider such items as travel expenses and mode of travel provisions if one parent moves. Also, a clause allowing a noncustodial parent access to a sick child can cause remarkable recoveries.

No visitation discussion would be complete without consideration of grandparents. Many states now recognize grandparent visitation as an independent right. Access for grandparents of noncustodial parents could vary from one weekend per month when they reside in the same area to one week in the summer. Some factors to consider are allowing the grandparent to pick up the child when the parent is unable and the subsequent rights of grandparents where a noncustodial parent dies and adoption by a step-parent looms on the horizon. Careful planning can provide the grandparents with a court ordered relationship that at the minimum would require notice to them and an opportunity to contest such an adoption.

When considering visitation privileges, attorneys should remember that people can and do change and careful reflecting on future changes is essential. Judges are always appreciative of well-thought-out recommendations and with careful draftsmanship, a knowledgeable family law attorney can anticipate many of the problems ahead and plan for them. ■

(*Continued from page 5*)

added, with some disdain, "They fight over little things." When asked what she does when they fight, she retorted, "What do you think I do? I leave the room, of course." The only clue she gave to continued underlying upset was her response when asked for advice regarding what to tell a six-year-old whose parents were undergoing divorce. She hesitated considerably and then offered, "I'd tell her a joke, or make her laugh. I don't like to see children unhappy. It makes me nervous." At school, Karen was reported to be an excellent student but given to tense, shrill verbal outbursts and having some difficulty in making and holding friends. The teacher found that she could calm the child best by placing her on her lap and did so on occasion. The school was also aware that the child spent a lot of time after school without adequate supervision, and that she sometimes came to school without lunch, at which time the teachers scurried about to provide for her. Sometimes the child would suddenly make remarks to the teacher: "My mother bought me fifteen dresses yesterday." Or, "My mother gave me lots of money yesterday. Just lots and lots." The teacher had been moved to considerable caring and compassion by what she sensed as Karen's loneliness. Some mothers in the neighborhood will not permit their children to play with Karen because, in their view, she has so little supervision.

This case highlights several conceptual issues in this subsample of the children who improved. Karen has been able to get and maintain adult attention, to use adults as resources, to learn well, to show pride in her achievement, and to express a desire and interest in growing up. She has demonstrable competence in her capacity to deal successfully with her environment, in response to the perceived threat. Specifically, Karen makes good use of her intelligence, perceptiveness, clarity, excellent memory, aggressiveness, courage, and flexibility, and of her capacity to reach out and maintain emotional contact with people. Yet, she has been and remains lonely and at times intensely unhappy. Much of her neediness, her unfulfilled longing to be cared for, her desperate concern with what belongs reliably and predictably to her, is in the process of being covered up, denied, and transmuted into a bratty, sometimes hard, sometimes jaunty early independence, reflected in her manner and in her precocious, almost adolescent, jaundiced view of her parents. Her interviewer remarked wryly, "This is no child to entrust with family secrets at a party." Karen's need to avoid and deny emerges most clearly in her suggestion that the unhappy child whose parents are divorcing should be told a joke, as well as in her sudden assertions to the teacher of her mother's extraordinary indulgence and bounty. We may ask, what is this youngster's capacity to be responsive to her own feelings, to her needs for comforting, to many needs that remain unmet? To what extent, also, is it possible for Karen and other children like Karen to receive from other adults, namely from teachers and other people in their environment, the affectionate care and consistent concern that Karen feels are lacking in significant ways at home, despite the efforts of both her parents and their genuine, albeit conflicted, concern and affection.

Finally, we must ask, at what point in her development is it appropriate to observe and assess outcome? For example, the degree to which Karen's defensiveness is related to her entry into latency and her consequent need to resist regressive pulls and reject intense feelings may only become evident from the hindsight of observation in later life stages.

Karen's overall psychic state at this time can best be summarized by her parting story at our last interview. She drew a building on the blackboard and told the following story: "It's a hospital. A little boy just came home from the hospital. He was hit by a car, but now he's OK." And she sailed out.

If we look at the other improved children in this youngest subgroup, at least three are bright and perceptive and well able to make use of language to communicate with their parents and with us. "Daddy, let's have another talk," Jimmy said, as he started to cry on the way home from their visit with his mother. These children showed a good sense of reality discrimination and seemed able at an early age to separate fantasy and reality. They did not seem to take blame for the divorce in their family. We were somewhat surprised at their responsiveness and pleasure in their contacts with us, some of which must also have been evident in their relationships with their teachers and baby-sitters and may well have resulted in the development of their own support system. Only a few weeks after his mother had suddenly left the family, Jimmy, with sweetness and not a little flirtatiousness, threw his arms around the interviewer and surprised her with a kiss as he left his second hour. All of these children struggled hard to understand and explain the family disruption and to deal with the loss. They used projection: "My sister is a crybaby. *She* cries for my daddy." They used denial through fantasy: "My daddy sleeps in my bed every night." But when pushed, the child admitted sadly, "I don't really see him enough." They reversed the loss and transformed it into a gain: "I have two families now. I have two mommies and one daddy." And they held steadfastly and loyally to their relationship with their mothers and fathers. Karen rejected her mother's boyfriend's overtures crossly: "You are not my daddy!" Among the responses we saw at the end of the first year in many of the improved children were stoical acceptance, courage,

early independence, sometimes brattiness, an early capacity to modulate needs and feelings in relation to others, and a capacity to bear loneliness and psychic hurt without enduring regression.

THE MIDDLE PRESCHOOL GROUP

The middle preschool group consisted of 11 children, five boys and six girls, age three years, nine months to four years, 10 months at the time of the first assessment. Although the turmoil around these children was moderate and no custody battles were threatened, the incidence of poor outcome in this group was dismayingly high. Seven of the ten children whom we reached at follow-up, two boys and five girls, were worse than when first seen. Three children appeared better: two boys and one girl. And of these, one boy who had initially been considered by us in serious psychological difficulty, had been referred at the assessment time for psychotherapy. Accurately, therefore, only two children of 11, one boy and one girl, in this middle preschool group can be considered within a category of relative stress-resistance.

The two children shared at the outset the worries, fears, and preoccupations of their peers who became worse. Like all the children in this group, they, too, were initially painfully bewildered by the family disruption, and frightened at what they considered to be their own replaceability and the possible loss of the remaining custodial parent. Unlike the other children in this group, these two children who improved seemed less blaming of themselves for the family disruption and the father's departure.

Frank was one of the children who improved. First seen at age four years, three months, Frank had been his mother's favorite child, and his self-esteem, although shaken, was still high. At the time that we saw him, he was frightened. He was fearful of losing both parents and had become clinging, tearful, petulant, and sulky at home. He refused to discuss the family rupture with our interviewer and denied any unhappiness, although he was obviously in considerably psychic pain. He offered, with a conscious effort to save face, "I don't miss my father. I see him all the time. It's just like always." Our gentle efforts to probe led him to question his mother on the way home from the interview. He asked, "Is Daddy going to get another wife? Another dog? Another little boy? Who is to blame?" Although he allowed himself to ask these questions of his mother, at no time with us or with his mother did he express the many acute feelings attached to these questions. Throughout his several hours of contact with us, Frank produced many drawings of animals, of flowers, sometimes a family portrait that included both parents. Otherwise he spent his time straightening up the office, lining up pens, papers, and toys in rows to his liking. We were interested in his nonexpression of fears, anger, or concerns directly, either in conversation, play, or art, and his use of the office as a microcosm in which he could reestablish the order, continuity, familiarity, and control that were absent in his world at that time. We were also interested that he complained when his sessions ended.

By the first follow-up, Frank had reorganized. He appeared charming, confident, calm, serious, and poised. He seemed to have made an early entry into latency, was proficient in sports and considered an excellent student. He was intensely competitive in school and with his peers.

Frank was eight years old and in third grade when he was seen again in the second follow-up. He had sustained severe stresses in his life in the intervening years, including one parent's major operation. He had begun to show some strain, which was reflected in complaints of fatigue, difficulty in concentrating at school, and preoccupation with fantasy superheroes. Yet, in all, he was still doing exceedingly well. He had entered a new class that year, in a new school, with very aggressive boys who banded together to exclude him. Frank had learned judo, and by the end of the year had established himself by "socking a kid in the mouth." His intense competitiveness with peers continued in school and on the playground. He was described as having good relationships with parents and teachers. The interviewer commented, "Frank struck me as a fine boy with a great deal of intelligence, sensitivity, and good looks. Yet, I missed a sense of humor and the playlike features that one finds in many eight-year-olds whom I see. His pleasures seem tied to competition—hard competition—and winning." When asked for advice for a child whose parents were divorcing, Frank said seriously and stoically, "I'd tell the kid to live with it (the divorce)—to try not to worry. It will turn out OK." For the parents, he advised, "Take care of him. Have fun with him. Have some treats for him, too." Frank also raises issues similar to those represented in Karen, namely, the question of the extent to which his capacity for pleasure and play may have been sapped by his extraordinary and successful response to the many severe stresses of the past few years. His intense competitiveness and drive to win may have served him in good stead in maintaining his developmental course. They may propel him to very high achievements but may also have a psychological toll, whose full effects on his emotional life and capacity for contentment may not yet be evident.

Although we shall not attempt to generalize about this group from these two children, Frank also illustrates one of the important findings with these children, namely, that there is little evidence in our study that preschool children who are able to articulate their feelings necessarily do better than those who deny, avoid, or otherwise shy away from such expression. It is difficult to assess how much of any child's behavior reflects restraint, reserve, conscious avoidance, and/or denial, or an admixture of these. Nevertheless, the fact remains that several of the preschool children who improved were not able or willing, in their contacts with

us, to express in play or conversation or drawing the feelings that could be inferred from their tenseness, restlessness, and symptomatic behaviors. Our evidence is that they did not talk to other adults, either, at this time.

These improved or stress-resistant children, by and large, did have, in our experience, a remarkably clear and differentiated perception of happenings in their particular world and of many of the details and implications of the family rupture. This clarity was often not found in their peers who did poorly, in whom we more often found a denial of the events, a clinging to fantasy remarriage or reconciliation, and a lack of clarity in separating wishes from reality. It seems important, in this regard, to distinguish denial of the reality from denial of painful feelings or fears. The improved children seem clear about reality but are able, often, to avoid, deny, or conceal painful feelings until they can deal with these in their own good time. These observations have obvious implications for clinical assessment as well as programming. It is important to intervention theory that such avoidance or denial of feelings at the initial contact, namely at the time when the stress is at its height, is not predictive either of the adjustment at a later date, or of the later capacity to deal with these feelings successfully.

THE OLDEST PRESCHOOL GROUP

The oldest group of preschool children included 14, nine boys and five girls, whose ages ranged from five years to five years, 11 months at the initial assessment. At the time of the parental separation, many of these children experienced heightened anxiety and aggression, which became manifest in their restlessness, whininess, moodiness, general irritability, and symptomatic behaviors that included phobias, sleep disturbances, compulsive eating, aggressive outbursts, and a driving search for physical contact and attention from adults. These initial responses to the family rupture seemed more diverse, from the outset, when compared with those of the younger children.

In addition, one of the distinguishing attributes of this older preschool group was the greater consistency between their predominant psychological stance at first observation and the characteristic patterning of defensive and coping mechanisms evident at the year's end. The children who were worse at follow-up were, with one exception, very troubled at the initial counseling. Similarly, all but one child in this age group were improved or in relatively good shape at the initial counseling. Therefore, these initial clinical findings may have somewhat greater predictive value and can, perhaps, be used somewhat more reliably for early intervention and referral than those of the two younger preschool groups.

Several of the oldest children seemed, from the start, capable of maintaining some degree of psychological distance or perspective vis-a-vis the parental conflict. One boy expressed what seemed to be genuine relief at being separated from his father. Several others, despite their anxiety, sadness, and anger, appeared able to continue their lives in school, play, and with peers without significant impediment. At follow-up, these children were members of the group that was doing well. In all, seven of the 14 children in this older preschool group (50 percent), six boys and one girl, may be considered to come within a subgroup of stress-resistant children who had indeed been able to experience the family separation and the ensuing year of disequilibrium without evident long-term detriment to their psychological development. The vulnerable children included four girls and one boy who appeared significantly worse at the first follow-up, and two additional children, both boys, who continued to appear as vulnerable at follow-up as they had at the earlier examination, although they had not lost ground.

Much like that of the younger improved children, the mother-child relationship of these improved youngsters seemed to have improved by follow-up. The intense turmoil and parental fighting present in five of the seven children's families at the time of the initial evaluation had diminished. And in all except one of the families, the mother was feeling better than at the time of the initial examination.

Several of these mothers had special relationships with the boys who improved. Of the six boys in the improved group of older preschool boys, three were the only boys in a sibship of three and enjoyed a preferred relationship with their mothers, especially when compared with their older sisters, whose relationship with their mothers was burdened by overt conflict and anger. The pattern of preferential treatment of the boy was particularly evident in the two families in which the one boy was also the youngest child. The one girl in this group of children who improved was also the youngest child and had been, from the start, closely identified with her mother. Her older brother was encountering considerable difficulty in his adjustment in the family.

Yet, by and large, it should be said that most of the six mothers of the improved children were undergoing considerable stress in the year following the parental separation. Only one mother was, in fact, competent and intact in her functioning at follow-up. Three mothers had a history of serious somatic illness complicated by psychological components and sequelae. two of these families were in serious economic straits; after painfully extricating themselves from a humiliating marriage in which they had suffered physical and psychic abuse over many years. A fifth woman was suffering from chronic depression. At least two of these families were in serious economic straits; three mothers had begun to work for the first time after the parental separation; all but two were worried about finances. Yet, with one exception, none of these women burdened their children's visitation with their fathers, nor were the children subjected to criticism or rejection if they expressed interest or eagerness in seeing their

fathers. In brief, these children were not made to feel central in the continuing parental struggles, despite resentments that continued to smolder in four of the six families.

Of the six oldest preschool boys who improved or held on to previous good adjustment, two openly regarded the diminished contact with the father as an opportunity to establish a not unwelcome distance. David, age five, the youngest of four children, had been the object of his father's most significant attachment during the marriage, as well as the target of his frequent, bitterly sarcastic, critical outbursts. His mother attributed the deterioration of the marriage in part to parental rivalry over the child's affection. David appeared, in his initial contact with us, as a whiny, immature, unhappy little boy who was anxiety-ridden at school and on the playground and stridently tyrannical at home. After the parental separation, the father began to visit weekly, but his visits included all of the siblings together, and the relationship with David became, as a result, less intense, less all-encompassing, and less geared to serving the father's changing moods and pressing needs. David expressed satisfaction with this new arrangement. At the end of the first year, the boy appeared to have made almost two years of growth; he was significantly freer to use aggression in his relationship with his peers, considerably less fearful, and surging ahead in academic and social learning. At the four-year mark, the report we have indicates that the boy, now age nine, is still doing splendidly and is a source of pride to his mother and his teachers. Before the second follow-up, the family had been living for several years at a considerable distance from the father. It may well be that circumscribing the pathological relationship with the father has promoted this youngster's development.

If one looks at the quality of relationship between these fathers and the improved subgroup of oldest preschool boys, it seems that four among six had fathers whose relationships with these children were profoundly disturbed. The attenuation of these relationships, however painful to the children, may have nevertheless set the children free from bonds that were impeding their development. All but one of the children in this subgroup saw their fathers four times a month during the first year. None of these fathers deserted or overtly rejected their children. One father moved to a distant city and saw his son on holidays and weekends. The father's relationship with the one little girl in this improved group was closer and warmer at follow-up than at the time of the separation, when he refused to visit for several months because of his pain and jealousy.

Of the three mothers who had remarried at the time of the first follow-up, two of the children had important and loving relationships with their stepfathers. For example, Frances, whose mother remarried shortly after the divorce, acquired a new stepfather and several older brothers at the same time. Frances occupied a special place in this household as the only girl and the youngest child. This role seemed to enhance her feminine identification as well as her closeness to her mother. The child's unusual prettiness, charm, and warmth were significant factors in evoking the gratifications she received.

At least three of the children in this oldest preschool group seemed to have been protected from the pressure of parental needs and from exposure to parental violence and seduction by the presence of another sibling who more directly sustained the pressures of the parental needs and conflicts. It is of interest that of two brothers in one family in this oldest preschool group, the older boy showed signs of considerable psychological deterioration at the end of the first year, whereas the younger one seemed to have negotiated the year's hurdles with more success.

Academically and socially, the seven improved children in this older preschool group were doing well at follow-up. One child had a minor speech problem for which he was in therapy, and another seemed to have some minor reading difficulty. Three of the children about whom there had been mixed reports at the time of the initial evaluation were now considered excellent students. Larry, for example, whose teacher had reported mood swings, daydreaming, and reading difficulties at the time of the first assessment, was considered a model student at follow-up. By and large, these children related well to peers and to their teachers. These reports stand sharply in contrast with the findings regarding the children in this age group who deteriorated, where we were particularly concerned with the number of serious learning difficulties and disturbed relationship with peers.

These children were using their relationships with teachers and other students to provide themselves with needed supports and were, in effect, constructing their own support systems. This emerged in part from the pleasure and warmth with which many of their teachers discussed these youngsters. Furthermore, the reports on these children who were doing well at school were sometimes at minor variance wth their behavior at home, suggesting that these children were able to shift their behavior in response to the demands and gratifications of the setting. Our finding regarding the significance of the school in providing support for these children has important implications for the school and for the teacher. It seems that the school and the classroom often provide the only continuity available to the child at the time of the divorce.

In noting other support systems available, it should be mentioned that a somewhat higher percentage of these children than the children who did poorly had grandparents who were concerned with their welfare and were helpful to the children directly or to the custodial parent. Two of the extended families lived close by, and the children visited them frequently. Others provided vacation homes and financial help.

An accelerated push toward increased maturity seems

to characterize the older preschool children who improved. In a sense, their turning away from the stresses of the family disruption, and their wish to escape the conflicts between their parents, moved them more quickly into the next developmental stage, whose hallmarks are increased independence from the family, diminution in the intensity of parent-child relationships, and movement outward toward school and playground with new adult models and new peers.

Each of these children seemed able to make his way into the new early-latency territory, to perform at least adequately in various new roles, and to become the kind of child who engenders positive responses from the new adults, in effect to be bright, responsive, highly motivated, and capable of mastering the rules and meeting the requirements of her or his peer society. Moreover, these same children were able to adapt to new stepparents without overwhelming conflict and without sacrificing their attachment to the noncustodial visiting parent.

We were often impressed with the acute social sensitivity of these children. Tom drew himself with large eyes and enormous ears, reflecting perhaps both the intensity and the strain of needing constantly to assess the world around him. The children seemed able, despite their own pain, to distinguish clearly their wishes for reconciliation from the reality they perceived. John told us how much he missed his father and how much he wished to live with him. He added, with great sadness, "But, he does not want to live with us anymore." The children worked hard at explaining the separation, even when it made no sense to them at all. Frances insisted that her parents divorced because of fights about "mail and taxes." The children made judgments about right and wrong. Tom, who was surrounded by adult violence which included gun possession and threats of killing, told us that it was wrong to give vent to anger. Several children showed a capacity for planful, independent, multistep activities.

Of the entire group of 14 improved children at the one-year point, we were able to reach 13 at the four-year mark. For these, our very preliminary analysis reveals that a goodly number of family changes have occurred in their young lives, including several remarriages, a second divorce for one, a pending divorce for another parent, and a partial reconciliation. Only three of the 13 children were found to be in overt distress. The remainder, who were examined by the original clinician, were considered to be still within appropriate developmental norms and doing adequately or well in their psychological and social functioning. All three of the children who had deteriorated in this interval seem profoundly affected by what they felt to be their fathers' disinterest or rejection.

SUMMARY

Of 34 preschool children seen shortly after the parental separation, a total of 14 seemed one year later to have weathered the initial postseparation period and to have resumed the developmental progress which had been briefly interrupted in most instances. Factors that emerged as important in the environment of these improved children included the capacity of the divorcing parents to keep continuing anger and conflicts separate from their relationship with the children; the availability of a good school system and teachers with time and sensitivity to offer individual support and encouragement to the child; appropriate distancing from a pathological parent-child relationship, where this preceded the divorce; and the absence of overt rejection or desertion by either parent. Siblings seemed, as well, to offer a buffering support to younger children, sometimes at the price of their own increased conflict with a distressed parent. Relationships with a stepparent, particularly the marriage partner of the custodial parent, seemed also to have growth-promoting and comforting potential for some children.

The initial responses of the younger preschool children who improved at one year were indistinguishable at the time from those whose psychological and social functioning later declined. By kindergarten age, differences could more often be distinguished at the outset, with the children who declined during the first few months after the separation showing more troubled behavior a year later.

The children who seemed to cope successfully with the stress of the family disruption were intelligent, perceptive, and courageous, and they had the capacity to make do with less time and less caretaking and to become increasingly independent, as well as to develop their own supports outside of the immediate family. They were propelled by this adaptation along the developmental ladder toward greater independence and earlier entry into the next developmental stage. Some seemed able to make this complex adaptation without openly expressing their intense feelings and fears, as long as they were able, cognitively, to face the reality of the divorce and to be assured by trusted parents of continued love and care.

Our findings are that the children who were improved at about 18 months after the parental separation had, by and large, fought a successful battle to overcome their initial acute fright, conflict, self-blame, and grief. As part of this adaptive process they were able to circumscribe, to bypass, or to deny their wishes and/or their expectations for the parenting and caretaking that had been their experience before the family rupture. It seems likely that a significant underlay of sadness, neediness, and unfulfilled longing is a significant aspect of their childhood experience during the several years following the parental divorce. This persistent underlying sadness, combined with early self-reliance and early entry into the next developmental stage, seemed to have important implications for character development, including particularly self-concept and relationships with adults and peers. ■

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but does not necessarily resolve questions of physical placement.) Because this model focuses on the continuing role of parents in the nurturing function, I prefer dual parenting to an equally precise but more legalistic term (such as dual custody) that might be developed. Dual parenting implies that both parents have an important role to play in the rearing of their children following divorce. This role continues without regard to the legal custody arrangements that are made for the child. I envision court orders that will read, for example, "Dual parenting is ordered with custody to the mother, the child's periods with the father to be as follows. . . ." From the child's point of view, this is clearly desirable. I believe that the parent who will not live with the child during much of the year will be equally pleased with dual parenting. It recognizes both the child's needs for two parents and that adult's continuing parental responsibilities. Indeed, the availability of dual parenting orders may well result in fewer requests for joint custody, a model that frequently poses more difficulties than it resolves.

RELUCTANT VISITATION

If my thesis is correct, and many people do what is expected of them, a reasonable dual parenting order pronounced by a judge at the time of divorce (one that emphasizes the benefits to the child that derive from a continuing relationship with both parents) will prompt many more absent parents to visit than now do so. But what of those parents who would resist visitation unless forced? What would be the impact on a child of spending time with a parent who does not want to be there? While I do not dismiss lightly the specter of unwilling parents, I am not very concerned that this "horrible" occurrence will often come to pass.

Probably all parents have had many days when they have not wanted to be with their children. Many of us, for example, have had to cancel social plans in order to care for a child who was ill or to attend an open house at school. Children know and appreciate it when they are important enough to come above other more pleasurable activities in their parents' schedules. Consequently, some sense that a parent might have been elsewhere were it not for parenthood is not a startling prospect. Undue concern with this possibility overlooks the fact that the child's alternative is to spend those very hours when visitation might have taken place in the care of a probably harried custodial parent. Indeed the mental framework of this overworked custodian might well be much less cheerful than that of the parent who is asked to take out only a day or a few hours during the week in the child's behalf. Finally, those who shy away from regular visitation ignore the fact that parents who spend time with their children on a regular basis are less likely to become alienated from their children and resentful of the caretaking functions associated with visitation than are parents who have had a complete break from such duties.

Except in the case of divorced parents, our society has never accepted the proposition that parents should be free to ignore the care or needs of their children simply because it is inconvenient or unpleasant for them as adults. A societal norm that condones total parental freedom for selfish purposes simply because divorce has occurred is far from desirable. The supposed obligation of a custodial parent to do all for his or her child because of the attendant "joys" has a certain self-serving air. Children are a joint undertaking; no logic requires that an inevitable consequence of divorce be the replacement of two parents by one.

SANCTIONS

If these arguments, or at least some of them, are persuasive, how would courts go about enforcing shared parenting orders? As I have suggested, courts currently enforce visitation *rights* by imposing contempt or financial sanctions against a custodial parent who interferes with the other parent's visitation. Would similar sanctions make sense when visitation *obligations* were breached?

Contempt, of course, is rarely used because of its drastic nature. One may well question its advisability in any visitation context, where extreme disagreement with a court's order will probably result in various kinds of mental warfare, even when pro forma compliance is undertaken in order to avoid incarceration. One must seriously wonder how children can ever benefit when their parents are fighting so desperately.

There are, however, other means that make very good sense in this context. Divorce laws have increasingly taken the battle out of the courtroom. Fault is now irrelevant in many states and courts do not wish to hear the sordid details of the marital breakdown. However, in the custody area parental indiscretions and misbehavior remain the subject of judicial scrutiny in many instances. And a marriage that is dead in all other senses may remain a veritable battlefield for years to come as former spouses wage a running war, with the children turned into both the armaments and the carnage of the battle. Failure to visit is all too often one such tool. Many are the cases in which the visiting parent does not appear just when the custodial parent has a final examination or a planned social event. Many are the children who become innocent victims when the noncustodial parent stays away not out of disinterest in them, but because he or she begrudges the custodial parent free time and its implication of a new life.

Parents who do not visit, whether for these reasons or merely because they have a social engagement, are in

fact utilizing custodial parents as unpaid babysitters. Just as custodial parents must hire outside help when their personal plans prevent their exercise of custodial duties, noncustodial parents should be expected to take on the responsibility of hiring babysitters if they wish to be away over the weekend or for the evening scheduled for visitation. If they do not do so, it is entirely appropriate for court orders to specify an amount that must be paid to the custodial parent as an increment of additional child support to cover the costs of increased child care requirements that such decisions have imposed upon the custodial parent. Such financial costs, in addition to recognizing the economic reality and the moral obligation of the parties' responsibilities, have an additional attraction.

What will happen in these cases when noncustodial parents realize that a failure to visit will only increase financial support burdens and not keep custodial parents at home? After all, custodial parents will be entitled to increased support, and can use those funds to hire babysitters. (All of this is predicated, of course, upon the assumption that child support monies can be collected. Although historically that has not been a correct assumption, as more and more states improve their collection mechanisms, it is a realistic possibility in many cases.) My sincere belief is that once noncustodial parents are told by the court that their presence is essential to the growth of their children and that their children will benefit to the fullest only if they continue to provide assistance and support to custodial parents in their functions as nurturing parents, and once they realize that their absence cannot harm custodial parents, more and more absent parents will assume a continuing role in their children's development following divorce.

Perhaps it is premature to think that state laws on visitation might be interpreted to permit such court orders in all appropriate cases; I think not. But surely there is no reason for a court to refuse to enforce an agreement entered into between the parents themselves that requires visitation on a regular basis.

Divorce is a fact of life in our society. Children of divorce surround us in increasing numbers. The quality of life for these children cannot be maintained exclusively by concern for their monetary support, although such support is vital. Courts cannot expect custodial parents to be all things to all people without the active support of noncustodial parents. Through counseling, through statements of reasonable goals, and through even-handed enforcement of visitation obligations under dual parenting orders, much of the human devastation that follows divorce for children may be alleviated. To quote Elizabeth Dancey, "[A]t least we should demand that the law doesn't compound our injuries and intensify our pain." ■

Joint Custody

(*Continued from page 13*)

tion of custody has been criticized by both opponents and proponents of joint custody.

The main argument of opponents of joint custody is that two people who couldn't get along well enough to stay married cannot agree on how to rear their children. Some maintain that joint custody might be tough on parents since the other parent's wishes must always be considered. Another argument is that children need the stability of one residence and one parent making major decisions.

DISCRIMINATION AGAINST FATHERS

The concept of joint custody has not been readily accepted by society, according to reports of parents who are giving it a try. One father reports that teachers and other mothers discriminate against him when he has physical custody. They view the father's desire for joint custody as an act of revenge against his former wife at the child's expense. One manifestation of this attitude is the school's insistence on calling only the mother when there is a problem at school or the child is ill. If this negative attitude of the schools and the mothers in the neighborhood affects the children, then it is an argument against joint custody. Also, fathers with joint custody have encountered suspicion from social acquaintances of the opposite sex. Reasons for this are only speculative. Perhaps other women are afraid that he is only looking for a housekeeper or a babysitter or perhaps they are uncertain about the nature of his relationship with his former wife.

When the subject of joint custody was brought up at a Family Law Section meeting of the American Bar Association in 1975, negative opinions were expressed.

The Honorable Referee Frank Conry of the Denver District Court in Colorado, who hears non-contested dissolution actions, feels that couples who agree to joint custody are just delaying a final decision because they are not ready to dissolve their relationship with each other. He opposes joint custody because he fears it will result in further litigation when the court must modify to provide for sole custody. However, if the separation agreements provide for shared custody arrangements, he usually will approve them.

It is obvious that for joint custody to work, the children must agree to spending time with each parent and the problems of access and arriving at mutual decisions regarding the child must be minimal. Opponents do not think the problems will be minimal.

MORE RESEARCH NEEDED

In deciding if joint custody is in the best interests of the child, the legal profession should consult the profes-

sionals in the behavioral science field where psychologists have been able to identify children's needs at each developmental phase. Psychological theory appears to be consistent with judicial guidelines in deciding custody, i.e. children need love and adequate care as well as stability and continuity in their relationships and environment. The interrelated needs of love and adequate care are considered more important than continuity. There is some agreement by theorists that there may be periods in a child's life when the need for stability and continuity is greater than at other times. But there is no overall agreement as to the ages when continuity is more or less important beyond the widely held view that a child's ability to tolerate interruptions in relationships increases as he grows older. Theory also postulates that normal sexual identification is facilitated by the presence of a role model of the same sex in the child's family environment.

Unfortunately, the psychological theory and the judicial guidelines work only in the easy cases, not the hard ones, because psychological theory is too general in its formulations and the consequential harms are too vague. The invalidity of the method of psychologists interviewing parents and children and then predicting future behavior on present personality theory has been established in well-documented studies. More important, even if one could predict how the adults would act, there is no information on how the adult actions affect the children. In addition, psychological tests to form judgments about future behavior are not eligible because the evaluator would have to draw on personality theory to interpret the tests.

Empirical findings directly or indirectly relevant to difficult cases are virtually non-existent. Probably the best source of data would be studies of the long-term effects on children of various court-ordered custody arrangements. Few have been done. However, it is generally well-accepted that children of divorce can experience a mourning reaction at the loss of the noncustodial parent. Some studies have been done on the effect on children because a father is absent from the home, but this is not sufficient research to predict the effect of joint custody, or for that matter, sole custody, on children. Courts are left with the task of balancing the possibility that children might experience disorientation and a lack of a stable example because of joint custody against the advantages of giving the child the advice and training of both parents.

"NO-FAULT" CUSTODY

It is too soon to determine if joint custody will become *the* solution to the custody dilemma. It should be noted, however, that House Bill 2601 was introduced in the Commonwealth of Massachusetts proposing that the probate court of that state be allowed to award joint custody. Two earlier Massachusetts joint custody bills were not passed. It has also been proposed that uniform statutes regarding child custody be adopted, providing that joint custody be given to parents, unless the courts find an overriding reason why it would be in the child's best interests to award custody of the child to only one parent, or unless one of the parents waives his or her right to custody.

Perhaps public acceptance that marriages do not always last for lifetimes will affect the area of child custody, as it has influenced the adoption of no-fault divorce laws and the courts' recognition that fathers are often as capable as mothers in nurturing their children. Maybe the next step is "no-fault" custody laws. Regardless of a court's decision, parties to a divorce still remain the only parents the children of the dissolved marriage have.

DRAFTING AGREEMENTS

Because a practitioner may be faced with the need to draft separation agreements with joint custody provisions at the request of clients, it is important to know what to include and what the possible pitfalls are.

Guidelines for how the children's time with their parents is to be split should be spelled out carefully with a clause allowing flexibility of physical custody when mutually agreeable to all and when it is in the children's interests. These guidelines may be required to obtain the court's approval of the separation agreement, but more importantly they force the parents to give serious thought to how they are going to parent after the divorce. Consideration of the child's needs are crucial at this stage. Not only must the child's modeling needs be considered, but also his social needs. The Honorable Judge Luis Rovira of the Denver District Court cautions divorcing parents that as the child grows older, more and more of his time naturally will be spent in activities outside the home or with people other than his family members so parents should accept and plan for that.

It is necessary to prepare for the possibility that joint custody may not work. When a party who has agreed to joint custody later desires sole custody, the courts have required that the change of circumstances burden be met. Nevertheless, so stating this requirement in the agreement may help protect a client from losing joint custody. Clients should be counseled that at a modification hearing, the court will again look at what arrangement will be best for the child. Perhaps the clients will want to suggest other provisions, such as counseling or arbitration in the event they experience disagreement. Any provision for a change of custody should include court approval if both parties consent or a court order if they cannot agree.

The separation agreement should provide that neither parent shall take the child from the state except for specified vacations, unless the parent has the written consent of the other party or a court order. Failure to include this provision affords either parent the opportunity and right to take the child away from the other party and "child-snatching" laws would be unenforceable as would be the Uniform Child Custody Act.

Support provisions also need to be included. Only in the rare instance where both parents have equal earnings and have agreed to have custody of the children for equal periods of time, should an agreement provide that each party shall meet the children's expenses for the time he or she has physical custody. Even then, provisions should be made for the sharing of extraordinary expenses.

The more common situation is when one parent, usually the father, has a greater income than the other. Then the agreement should spell out the exact amount of money the wealthier parent plans to pay to the other parent and exactly the amount that would abate if the children stayed a specified length of time with the wealthier parent. Depending upon the situation, it is suggested that not all support abate since the parent who does not actually have the children may still have the on-going expense of rent or house payments in order to provide a home for the children when they return. By setting these amounts, the less wealthy parent and the children are protected if the other parent decides not to exercise his right to physical custody.

Specific provisions for the periods of physical custody, suggested earlier, make the support provisions workable.

Clients might benefit from meeting with a skilled counselor. Counselors who do custody assessments for the court are frequently also able to give guidelines for joint custody arrangements. The function of this counselor might be that of educator, furnishing parents with reading materials about their child's needs at various developmental stages and discussing how joint custody parenting might meet those needs. After an agreement has been reached, the counselor might define each parent's responsibilities toward the child and explain to the child each parent's responsibility. Unfortunately, there may be few mental health professionals prepared for such work, but a child psychiatrist or psychologist certainly would be helpful if furnished with guidelines as to what the parents wish to gain from counseling.

CONCLUSION

Since courts generally approve custody agreements entered into by the parties, lawyers need to be aware of the possible situations where it appears the parties might want or could handle joint custody. Attorneys can then explain it, simultaneously pointing out the need for a session with a counselor. If the facts warrant, an attorney might also be successful in asking a court to award joint custody in a contested case, especially if he or she suggests an arrangement which would maximize the child's security and stability.

Perhaps the time has come for no-fault custody. Conceivably, the burden of proof on the parent seeking sole custody should be to show why joint custody will not work rather than why he or she is the most fit parent. Unfortunately, psychology can offer the legal field and the public little assistance in knowing which custody arrangement is best for children. This is a fertile field for research.

In the meantime, it seems preferable for courts to decide custody by closely examining the facts of each case, but including the alternative of joint custody. Hopefully, future research will show whether the present laws favoring sole custody reflect human nature. Perhaps the animosity demonstrated in custody proceedings is a result of laws and practices which allow only one parent to win. ■

Big Brother

(Continued from page 30)

addition, the nuclear family should understand that the social services bureaucracy has a responsibility in certain measures. This is where the attorney, in his or her role as a counselor, can assist the client. Take, for example, the case of a father who has custody of his child. The lawyer can direct the parent to helpful agencies for information and at the same time point out that the individual need not lose his independence in seeking support.

Figures 1-3 summarize essential differences between families and bureaucracies and suggest ways in which the two groups might interface. Figure 1 shows public education's relationship to the primary group with Figure 2 representing an expansion of that interface. The third diagram suggests the possible contributions toward social development by the family unit and groups outside the home. Both figures 2 and 3 demonstrate the interrelatedness that these complementary groups must arrange to achieve satisfactory goals in child socialization.

Shared function not only has strong implications for the way in which families and bureaucracies interface but also describes the interface between mother and father roles. In view of emergent lifestyles and dual-career marriages, shared parenting is becoming an important dimension in the present alteration of family structure. Males and females can be complementary, not competitive, organisms when dealing with the task of child-rearing. Because each sex has instrumental and expressive characteristics, matching these functions to child-development tasks requires thoughtful attention to the profile of the individual family. It is important that the counseling attorney recognize the significant contributions that a bureaucracy or an ex-spouse can make towards helping his client solve child-rearing problems. By understanding and interacting with others, a parent can take advantage of the resources they offer. ■

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.

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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.

THIS SUBSTITUTES FOR FACTORS FOR CONSIDERATION BY COURT

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: Name:
Address: 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	

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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.

Relationships

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 with 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 those 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 ha ₂ 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.

This is a detailed discussion of the California law.

JOINT CUSTODY, SOLE CUSTODY: A NEW STATUTE REFLECTS A NEW PERSPECTIVE

The legislative evolution of the new California custody law; origins and intent as a guide to understanding and administering joint or sole custody.

James A. Cook*

The greatest impact of California's new child custody Statute is the effect it will have upon the expectations and conduct of parents prior to a court hearing. Secondarily, the new law modifies the options available to the court and the considerations which must be weighed in disposing of custody cases. Transition into the new concept may initially be difficult for the courts. However the burden of change will be lessened as the divorcing public becomes aware, in advance of custody proceedings, of the Statute's intent. The new Statute facilitates preservation of the child's needs for contact with both parents; it reduces use of the courtroom by one parent to destroy the other parent, to the detriment of the child's best interests. This new Statute's emphasis on joint custody is intended to alleviate other problems frequently generated under the former law:

1. Defusing child-stealing and support-avoidance

This legislative recognition of joint custody and its implementation by the courts may defuse and reverse the increasingly menacing recourse by excluded parents to "child stealing" and/or abandonment of financial support for lack of meaningful, frequent and extensive contact with their children. Legal practitioners have been reluctant to apply punitive or confiscatory sanctions in cases of child-stealing or abandonment of support. Observers have been uneasy about a legal solution that focused solely on punishment and support-collection on behalf of custodial parents, when many custodial parents share the responsibility for the provocation. Instead, joint custody provides an opportunity to demonstrate and increase respect for equality under the law while effecting a possible reduction of child-stealing and support-avoidance.

2. Redressi the imbalance between mother vs father custody fights.

Additionally, it is intended that this new emphasis upon joint custody will result in tempering a recent trend of fathers to strive for sole custody. While the opportunity for fathers to compete for sole custody tests the equality of the sexes insofar as sole-custody decrees are concerned, the result is increasingly hostile custody battles because of a heightened expectation of unilateral victory by both parents. The new law will shift the view of equality – from a statistical determination of how frequently fathers rather than mothers achieve sole custody – to a decision based on protecting a child's access to both parents and on encouraging parental sharing of respo sibility for the child.

*James A. Cook initiated and authored the initial version of AB 1480, secured sponsorship by California Assemblyman Charles Imbrecht of Ventura, encouraged the fourteen additional Senators and Assemblymen who became cosponsors, and coordinated and monitored the endorsements, hearings and amendments that resulted in passage and signature into law of AB 1480.

James A. Cook, 10606 Wilkins Avenue, Los Angeles, California 90024
Home: (213) 475-5352, Office: (213) 772-4200

3. Discouraging the use of child custody for intimidation.

The most immediately apparent feature of California's new child custody law is "the message it sends in advance to divorcing parents": a power-play for exclusive child custody, either for purposes of intimidation or to force subservience in negotiation, is less likely to be tolerated by the court. Therein, the new Civil Code Section 4600 and 4600.5 is regarded as one of the most significant evolutions of California's family law since the advent of "no fault" divorce in 1970, which eliminated the airing of "faults" as justification for divorce. Henceforth, the new child custody Statute will largely dissolve the recourse to winner-take-all custody litigation that has heretofore been substituted for the catharsis of airing "faults."

Preference is likely to favor joint custody, or sole custodianship for that parent who demonstrates the most cooperation and tolerance for the child's frequent and continuing contact with the alternate parent. Consequently, an antagonistic and covetous parent is likely to be denied sole custody and may jeopardize the opportunity to participate equally in joint custody.

The intentions and consequences of the legislation, as they evolved during the legislative process and as amended into Section 4600 and Section 4600.5 of the Civil Code, are itemized below. The itemization is not necessarily in the order of importance to petitioners or counselors. For ease of reference the items are in the same sequence as the issues occur in the new Statute.

Policy Statement

Intent

The intention of the original version of AB 1480 was to establish a guide, a goal, and a preference for divorcing parents. By making sole custody less likely to be decreed by the courts, the intent of the original as well as the final version of AB 1480 is to caution divorcing parents who would otherwise be prone to pursuing sole parent custody for purposes of vindictiveness, leverage or extortion. Since the advent of California's "no fault" divorce a decade ago, there has been widespread supposition that the battleground has subtly shifted from personal accusations to custody and visitation fights thus confounding rather than resolving the divorce process.

While serving as a guide to divorcing parents, the original version of AB 1480 placed no restraints on the discretion of the judiciary other than a first preference consideration of joint custody before recourse to sole parent custody.

As an early endorser of AB 1480, Professor Jay Folberg of the Lewis & Clark College, Portland, Oregon, and Executive Director of the Association of Family Conciliation Courts, characterized the intent succinctly: "We too often forget that one of the most noble functions of law is to provide a model of what is expected of people. I believe that the approach of AB 1480, creating a 'preference' for joint custody, is the best alternative."

SB 477, which also made joint custody available to the court, placed constraints of justification on the court's selection of sole parent custody rather than making joint custody a preferred alternative. SB 477 required that the court must state the reasons denying joint custody in cases where (a) both parents sought joint custody, (b) one parent petitioned for joint custody, (c) or a termination or modification of joint custody was objected to by a parent. The legislative conference which resulted in the final version of AB 1480, and which incorporated most of the provisions of SB 477 to assure the likelihood of passage, resulted in AB 1480 adopting these same restraints upon the court's discretion. Thus, although sole and joint custody are co-equal preferences in the new law, the court must justify its decision to award sole custody in specified situations.

The policy statement which introduces the new Statute makes clear the intent of the new law, despite the court's continued discretion to award sole custody.

Frequent and continuing contact

Section I. Section 4600. 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. . . .

Originally, a policy statement describing custody intent appeared as a concluding paragraph of SB 477, while a briefer policy statement intending "equal access" by a child to both parents appeared at the outset of AB 1480.

In the final version of AB 1480, the policy statement of SB 477 was adopted as the opening and guiding heading to the statute: ". . . to assure minor children of frequent and continuing contact with both parents . . ."

Prior to amendment, the policy statement contained the phrase "close and continuing contact." However, it was conjectured that "close" might be erroneously interpreted to imply a requirement of physical proximity of residence for both parents and, as such, place a proximity qualification on the availability of joint custody. But it was subsequently stressed that physical proximity was not essential for implementation of joint custody, given the availability of modern transportation, and that "frequent and continuous contact" was a goal worthy of precluding any possible misinterpretation of "close" contact.

"Equal access" succumbs to reasonableness

Fairness has been an influential stimulus in the quest for joint custody legislation. Consequently, equality of contact by each parent with the child or children was an initial preoccupation of the proponents. Nevertheless, the proponents also did not want to obscure or jeopardize this humanitarian concept by attempting to define with precision an equal allocation of time. While balance of contact is encouraged by the new law, the limiting requirement of "equal" has been removed, and instead parents are encouraged to seek, and to offer, time with the child or children on the basis of that which is practically and conveniently available. Parents are encouraged not to be exclusively concerned with equitability. This opportunity for flexibility should allow both parents an escape-hatch from the slavery of equitability if it is within their ability to assume more time with a child, or to offer more of such time to the alternate parent.

Encourage parents to share

Section I. Section 4600 . . . and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

Encouragement of joint custody, in the opening policy statement, occurs because of the desire by proponents to enlist the aid of judges, Conciliation Court counselors, and private practitioners to encourage divorcing parents to opt for or acquiesce to the joint custody solution.

The necessity of encouragement and the preferable goal of joint custody now places upon the State, in the form of a policy statement, the obligation to develop imaginative methods for inducing parents to voluntarily prefer joint custody. While the Statute has not specified the mechanism for doing so, the new law may cultivate imaginative means of encouragement.

Initially, the burden will fall heavily upon Conciliation Courts and jurists during hearings. Eventually, a more widespread awareness of the Statute by the divorcing public is likely to precondition divorcing parents to an expectation of joint custody.

The combination of "no fault" divorce and equal division of community property had diminished the courtroom airing of "faults" and reasons for unequal divisions. Faults and contentions are still voiced, but to a lesser degree. Similarly, although reasons for not granting an alternate parent joint custody are likely to be aired, it is hoped that courtroom practice will reflect the spirit and intent of this Act, as occurred with the "no fault" law, with expectation of a joint custody resolution of child care by divorcing parents.

Order of preference: To both parents jointly or to either parent

Section 1. Section 4600. 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. Custody should be awarded in the following order of preference, according to the best interests of the child:

(a) To both parents jointly pursuant to Section 4600.5 or to either parent.

The new law did not spring full blown without attention to previous phraseology. On the contrary, if there was any single phrase in the prior Statute that spawned AB 1480's concept, it was the long adhered-to directive which is repeated in the new law, "Custody should be awarded in the following order of preference." The previous statute permitted no other alternatives than: (a) To either parent, (b) To the person or persons in whose home the child has been living, (c) To any other person or persons deemed suitable.

Proponents of joint custody assumed that the most desirable goal with the least likely trauma for child and parents would be to list joint custody as the first preference, ahead of the other alternatives. An interim version of SB 477 specified "to either parent or to both parents jointly." The word order was reversed when adopted from SB 477 into the final version of AB 1480, so that "To both parents jointly" appears prior to the alternative of "to either parent."

No single issue within this legislation was more vigorously debated than whether "To both parents" should be listed separately and unequivocally as the first preference, or if there should be equal consideration, within the same paragraph, of the alternative of sole parent custody. Ultimately, the "both parents jointly" provision was further secured as a preferred goal by provisions in Section 4600.5 and by the addition of a qualification that if joint custody is not decreed the court must consider which parent will be most likely to facilitate contact between the child and non-custodial parent.

The intention of the proponents for a separate, unequivocal and first preference of joint custody is worth reporting. The intent was to establish a goal that would minimize the necessity for adversary litigation. Presumably, a parent seeking joint custody and willing to tolerate the alternate parent in joint custody would be less likely to conduct an aggressive, adversary litigation attack and consequently be less effective as a litigant. A preference for joint custody was also viewed as the best way to guarantee equal protection of both parental roles in those cases where two parents are competing for the exclusive care of their child.

When given equal ranking with joint custody, the presence of a sole custody alternative inspires an ominous spectre of needing to attack the alternate parent as unfit to be a sole custodian. In addition, an apprehensive parent who would otherwise consider joint custody as acceptable, may be fighting for sole custody because of a fear that an uncertain evaluation between joint and sole custody may result in their loss of custody together.

Conscientious jurists, mindful of the public policy goal of the new Statute, will have to discern whether a parent litigating custody is doing so for purposes of protective self-defense because the new Statute has not clearly and separately itemized joint custody as a first priority consideration of the court.

Considering the parent most likely to allow frequent and continuing contact

Section 1. Section 4600. In making an award of custody to either parent, the court shall consider which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent . . .

The caveat of cooperation as a character trait in selecting a sole custodian, if joint custody is not to prevail, had its origin in simple wisdom.

Responding to the wrangles and dissension that evolved from the leverage inherent in sole parent custody, Dr. Jose Santiago of the University of Arizona Department of Psychiatry suggested (during a Phoenix, Arizona conference on May 22, 1976, at a time when the joint custody concept was still a rarity), "give the child to the parent who will tolerate the most the child's relationship with the other parent." This proposal became known colloquially as 'favoring the most tolerant parent' as a means of both rewarding and inducing cooperation.

The opportunity of giving this proposal the force of law occurred during a final amending session of AB 1480, in August 1979, when Dr. Diane Trombetta of Los Gatos, California suggested this terminology in the version of AB 1480 that succeeded SB 477. This particular provision favoring the tolerant and cooperative parent in sole custody decisions could become one of the most significant and influential changes in evaluating the suitability of sole custodians. As a minimum, it may inspire more guarantees and demonstration of tolerance and cooperation than has been customary of sole custody seekers heretofore.

At a concluding amendment conference, Judge David B. King of the San Francisco Superior Court's Domestic Law Court cautioned that, although important, he didn't consider the cooperation criterion as overriding, that there were also other worthy considerations, and that demonstrated tolerance of the alternate parent should be "among other considerations" and not the sole determinant.

No preference of a custodian because of that parent's sex

Section 1, Section 4600. In making an award of custody to either parent, the court . . . shall not prefer a parent as custodian because of that parent's sex.

This qualifier was adopted during an early amendment to SB 477 and ultimately included in its entirety within AB 1480.

In the court's discretion, a plan for implementation of custody

Section 1, Section 4600. (b) (i) The court, in its discretion, may require the parents to submit to the court a plan for implementation of the custody order.

One of the unique effects of allowing the court to require a custody implementation plan is that it may also require the submission of a plan for the implementation of sole custody before, or after, decreeing sole custody. In addition, the opportunity of the court's discretion in requiring a custody plan is another means to discern how cooperatively an individual parent would subsequently administer custody.

Heretofore, although the court might hear all manner of testimony about the worthiness, or lack thereof, of a parent to be sole custodian, it was neither required nor customary for the sole custodian to give any of his/her plans for implementing sole custody. Implementation decisions were solely at the discretion of the recipient of custody, frequently to the pain of the excluded noncustodial parent. Challenges and a return to court for new hearings were often fomented by implementing sole custody, without such a plan.

The genesis of a discretionary requirement for submission of a plan was an outgrowth, however, of hearings and debate about provisions suggested for inclusion in an early version of SB 477. The initial version of SB 477 also proposed topics for evaluation within mandatory joint custody plans, while such topics may be prudent for divorcing parents to consider voluntarily when creating a joint custody plan, they were ultimately eliminated from SB 477 as being too great a potential incursion into private decision-making, as being culturally biased against some parents upon whom they would impose, and as requiring more flexibility to accommodate changing economic conditions and the evolution of growing children's interests.

The plan provisions amended into SB 477 in April, 1979, but later removed in response to objections during hearings, were not mandatory

nor essential to the court's granting of joint custody. The provisions were suggested to enable parents to determine the manner of carrying out (a) "the child's education," (b) "daily routine," (c) "association with friends," (d) "religious training," (e) "and other activities." Considering the differences of opinion that most couples ordinarily experience during divorce, the itemization was sardonically characterized as a new selection of controversial topics that the divorcing couple might not have otherwise considered, and sufficiently provocative to make joint custody agreement virtually unattainable. If consensus on such topics is not forthcoming, it may be prudent merely to allow most or all of these considerations to be resolved by each parent for that period of time when the child is in the respective parent's care.

The fact that the plan topics were eliminated from SB 477 during its legislative processing and were never a requirement of AB 1480 may imply to the court that, as such, these topics are not an influential determinant of joint custody but that divorcing parents are prudently advised to consider these issues voluntarily even though they do not influence a decision for or against joint custody.

Out of state residence not a barrier to joint custody. An initial version of SB 477 excluded joint custody when one of the parents lives out of the state and also provided for termination of joint custody if a parent established or was likely to establish a residence in another state. Both of those provisions were eliminated during the amendment process of SB 477. The reasons for their elimination are a useful instruction to individuals administering or adjudicating the new law.

First, the provision would have provided a perverse opportunity for a recalcitrant parent to defeat the implementation of joint custody merely by leaving the state.

Second, a requirement of residence within the state for both parents and children could defeat the availability of joint custody for the numerous families living in California border communities wherein one parent might be living a short distance away in the bordering state. The family would be denied the opportunity of joint custody while other parents residing hundreds of miles apart within California could avail themselves of joint custody.

Third, the prevelance and availability of travel and transportation, regardless of state borders, is already facilitating an exchange of children between parents that should not be denied future petitioners of joint custody.

Plans subsequent to custody orders

Section 1. Section 4600. (b) (1) The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

The version of AB 1480 that was ultimately passed was careful not to specify that, as a condition of granting joint custody, a custody plan must first be submitted to and approved by the court.

A requirement of a plan in advance was considered as potentially hamstringing the goal of joint custody for at least two reasons: First, plans prior to order could tend to inspire the thwarting of joint custody if one party or the other took that opportunity to insist on implementing provisions that would make joint custody unfeasible. Second, the requirement of a plan in advance might redirect the court's energies from the preferred public policy goal of encouraging joint custody into being an arbiter of plan details – a time-consuming task that might make the court long for the expediency of the past wherein a sole parent was decreed custodian, the alternate parent was restrained to visitation, and the custodian was given the relatively unexamined implementation of a plan.

Thus, in the new law the court is permitted to discern whether joint custody would be in the best interests of the child, to so decree, and to require a plan from the parents subsequently.

On the other hand, during the first several months of hearings under this new Code Section, courts may be asking for plans in advance as a means of determining how cooperative the parents

are likely to be, and which parent is more likely to facilitate frequent and continuing contact with his or her co-parent. Since non-cooperation could jeopardize custody altogether, the request of a plan in advance of order could induce cooperation for fear of the alternate consequences.

Custodianship in the home where the child has been living.

Section 1. Section 4600. (b) (2) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.

With the exception of the opening phrase, "If to neither parent," the remainder of the statement is derived, in its entirety, from the prior law. Customarily, and almost universally, this decision is applied when the child is not awarded jointly or to either parent.

The opening qualifier, "If to neither parent," was added as a precaution just in case a narrow interpretation of the statement without that phrase gave an undue opportunity for sole parent custodianship to the parent who had obtained initial and temporary custody, pending resolution in trial, because of the advantage of an interim period of residence. AB 1480 proponents urging such a qualifying phrase were painfully aware of how influential upon an ultimate custody decision the obtaining of temporary but exclusive custody has been in administering the prior statute.

Custody to other persons; no new 4600 changes

Section 1. Section 4600. (b) (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.

This section is repeated, without change, from the prior law.

A presumption of joint custody where both parents agree.

Section 2. Section 4600.5 is added to the Civil Code to read: 4600.5 (a) There shall be a presumption affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage.

Reportedly, there have been instances of the court previously refusing to grant joint custody although both parents had volunteered a joint custody resolution of the custody decision. The reasons for refusal covered a broad spectrum, ranging from a lack of authority for the court to do so in the previous law to a supposition about the inability of divorced parents to share parenting decisions.

This portion of 4600, granting joint custody to parents who so agree, was the least controversial provision of the proposed joint custody legislation. Both AB 1480 and SB 477 started with this assumption, and from this base of agreement some of the less tractable proposals emanated.

One observer commented, "It hardly seems necessary to lecture the court about presumption when both parents agree."

". . . or so agree in open court. . ." is the provision within this portion that will probably give jurists the greatest opportunity to advise, guide, caution and to strike a phrase for 4600's policy statement. At the moment of court appearance, the tension and emotion of the events is frequently a high-water mark of both resentments and expectations wherein the voice of authority, prudently

restrained, may elicit the agreement resulting in joint custody. For this reason, the proponents of this measure purposely did not limit agreement solely to that achieved prior to appearance in court.

Court statement of reasons for denial of joint custody.

Section 2. Section 4600.5 (a) 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.

This is the first of three times within 4600 wherein the court is required to state reasons for denying joint custody. This portion refers to situations wherein both parents agree to joint custody. The addition of this "reasons for denial" requirement occurred midway in the amendment process, and was accepted without objection when referring to two parents who agreed to joint custody.

Later, during the concluding amendment sessions that led to acceptance of an AB 1480 that would be superseding SB 477, the "reasons for denial" requirement became a vigorously pursued last minute addition to subsequent portions of 4600.5.

Philosophies are legislated as much by coincidence as by deliberate intent. The evolution of the "reasons for denial" requirement is an interesting case in point. Originally, AB 1480 sought a clearcut first-priority, preferential consideration of joint custody by the court before recourse to other custody alternatives. Options other than joint custody were not foreclosed from the court's discretion, however. The intent had been encouragement and inducement toward a joint custody consideration, first. Opponents contended that AB 1480 was imposing mandatory joint custody, presumably in every case, although there was no word or phrase combination in the original version of AB 1480 that imposed a categorical demand upon the court for joint custody. Most significantly, there was no requirement upon the court to justify why joint custody had not been ordered.

On the other hand, SB 477, which was being attacked as not sufficiently assuring of joint custody placated some opponents by amending-in the "reasons for denial" obligations, at least within the portion wherein both parents have agreed to joint custody.

Ironically, SB 477 which initially imposed the least change from prior practice, ultimately became the vehicle that would require the court to justify its 'no joint custody' reasons. In other words, these obligations upon the court's discretion were ultimately to be adopted by AB 1480, a bill which did not originally require the court to justify decisions, but which superseded SB 477 in passage through the legislature.

The effect of this present legislation seems to be a Statute that more narrowly defines the court's goal and discretion, as well as justification for doing otherwise, than any party to the legislation at the outset had envisioned.

But, does a "reasons for denial" requirement make joint custody any more assured? A theory, voiced at the time the phrase was amended-in, contended that such a requirement provided a specific record that could be questioned upon appeal, that it might lead to more joint custody decisions because of the appeal scrutiny and, to a certain extent, diminish the frequency of "reasons for denial" in situations wherein both parents were more nearly equal and fit.

The prime aim: application for joint custody by either parent

Section 2. Section 4600.5 (b) Upon the application of either parent, joint custody may be awarded in the discretion of the court in other cases.

No other issue was so vigorously debated than whether an individual parent (as compared to both parents petitioning concurrently) could apply for and successfully achieve joint custody.

Given the competitive and adversary dynamics of divorce, proponents of joint custody contended that joint custody would be less likely to occur if

agreement by both parents were required: such a requirement would leave the power of decision solely within the hands of the least cooperative parent to the disadvantage of children and an alternate cooperative parent.

Altruism rather than antagonism is more likely to "win" something for each parent by permitting either to apply. The new Act encompasses a principle of successful negotiation: an opportunity for either party to propose a solution that results in both "winning" something from a less than ideal situation.

Heretofore, the decree of sole custody resulted in the appearance of a "winner" and an excluded parent who resentfully nurtured plans and hopes that fueled repeated court appearances. While joint custody may not entirely eliminate return engagements in the courtroom, it is likely that most such hearings will revolve around plan modification rather than another round of the zero-sum game of "exclusion" versus "access."

The court may investigate

Section 2. Section 4600.5 (b) 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.

This provision, enabling the court to initiate and direct an investigation to determine the appropriateness of joint custody, resulted from the amendment of a slightly different concept contained in SB 477. SB 477 permitted either party to initiate such an investigation through a request to the court. However, it was feared that giving opposing parties the opportunity to initiate investigations might inspire a wave of costly investigations strategically initiated to catch the other party at a moment when they are less equipped to accommodate joint custody, such as shortly after they are excluded from the former home and while one party had possession of the child's customary living quarters.

By giving the court the discretion of initiation, it was intended to relieve the excluded parent from the implied pressure of scrambling to establish and assume the expense of creating living quarters that would appear, upon investigation, as suitable for a joint custodian even before the parent had been assured of the likelihood of a joint custody decree. Although it is hoped that investigation would center on the quality and sincerity of the eventual joint custodian's parenting, it is recognized that the politics of investigation, as inspired by opponents, seek to reveal inadequate physical quarters, inconveniently located and at variance with the child's pre-separation home.

The court's denial reasons when one parent applies for joint custody.

Section 2. Section 4600.5 (b) 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.

This is the second of the three provisions in the new statute requiring the court to spell out justifications if joint custody is denied. Some observers concluded that this provision would permit a parent who had applied for joint custody, and who had been denied, the opportunity to evaluate the possibilities of appeal.

The intent of this statute is not to increase the incidence or provocation of appeal.

It is hoped that, in those situations wherein a denial of joint custody is likely to occur, the court will probe the reasons for denial during hearings wherein interpretations may be resolved, or confirmed, rather than entering the order and leaving appeal as the only recourse for clarifying misinterpretations.

Sharing physical custody, integral to 'joint custody'

Section 2. Section 4600.5 (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;

During drafting, this paragraph became the so-called "definition" of joint custody that links physical custody with the goal of the opening policy statement: "assure the child or children of frequent and continuing contact with both parents." The purpose of the paragraph is primarily aimed at an understanding and consideration of the physical aspect of joint physical custody. However, the paragraph purposely does not elaborate with constraining prerequisites such as scrupulously equal contact or conditions of residence. Instead, the parents are encouraged to work out personally the details of sharing physical custody as best befits their circumstances, or through counselors or other helpful intermediaries who will aid the parents in traversing the antagonisms of the just-divorcing period into the implementation of joint custody.

Joint legal custody for parents unavailable for joint physical custody

Section 2. Section 4600.5 (c) . . . provided, however, that such order may award joint legal custody without awarding joint physical custody.

Of all the provisions of Section 4600 and 4600.5 that may be productive of mischief, or antagonistic interpretation or decree, the opportunity for the court to award joint legal custody without awarding joint physical custody could intrigue the most litigious of counselors and parents.

Curtailment of the opposite parent's 'access' in joint custody to mere legal participation was not the intent of this wording. The opportunity for joint legal custody was inserted in response to the few requests of divorced parents who wished to participate jointly in the legal decisions of custody but, by reason of distance, isolation, circumstances of remarriage or other restraints, were unable to participate in joint physical custody.

Three months after AB 1480 and SB 477 were underway in the legislative process and had left their respective legislative houses of origin, Division Four of California's First Appellate District, on May 9, 1979, handed down a decision In Re Marriage of Neal. In view of the extensiveness of the comments within In Re Marriage of Neal, readers can draw innumerable inferences from the ruling. For divorcing parents the most anxiety-producing observation was that joint legal custody was, in effect, meaningless in comparison with the practical, day-to-day presence of sole parent physical custody. The few individual parents who had joint legal custody were increasingly apprehensive that their sharing opportunities were non-existent. (AB 1480, which was legislatively considered after the In Re Marriage of Neal decree of May 9, 1979 and chaptered on September 21, 1979, supersedes In Re Marriage of Neal as well as imposes a policy that a child must be assured of frequent and continuing contact with both parents regardless of joint legal custody.)

Furthermore, there was, and is, concern that a joint legal custodian will have acquired all the legal responsibilities and obligations of a child's conduct, encounters with the law, creditors and litigants but with none of the frequent and continuing physical relationship that might enable such a custodian to forestall or ameliorate in advance the delinquency resulting in the child's legal problems.

A succinctly worded resolution of this phraseology problem was proposed during the final amendment scramble, and practitioners may wish to adopt the intent of the proposal, although this particular phrase did not find its way into the final text in competition with numerous other considerations elsewhere in the legislative bill. The resolving proposal: That joint legal custody be awarded to a parent who requests joint legal custody only, without awarding joint physical custody.

Modification or termination of joint custody orders upon petition

Section 2. Section 4600.5 (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.

Of all the paragraphed provisions within AB 1480, few are more cautionary to parents about assuring "the best interests of the child" than that regarding modification or termination of joint custody orders.

One parent, both parents, or the court can move for modification or termination, but the operative consideration for change is a showing of detriment to the child's best interests. Heretofore, an excluded parent frequently "gunnysacked" a reserve of complaints about the sole custodial parent's presumed violation of the child's best interests, as ammunition toward a reversal of sole custody or liberalization of visitation rights. At least in joint custody situations the parents can "keep book on each other" with some equality, and perhaps eventually with tolerance and practicality as each experiences similar responsibilities. If each is nevertheless tempted to scrutinize the other parent's child-rearing toward the goal of threatening modification or termination, the overall effect may be a better attention to parenting, responsibility, and moral and ethical conduct than occurs in conventional families. The spectre of "answering up" in court is chastening.

But the deciding proof will lie in "the best interests of the child." There is no certainty that "best interests" are served by isolating a child from experience with conflict, by imposing sameness rather than diversity, by labeling one parent to be "visited" and the other to be custodian, and by depriving a child from access to the alternate parent for substantial periods of time.

Previous interpretations of "best interests" placed more emphasis on routine, discipline and isolation than upon tolerance, forgiveness and accommodation. The latter trio may be among the better interests in preparing a child for survival in a crowded, changing adult world.

Contentions for and against joint custody will probably unearth more novel and provocative insights into a child's best interests than we have heard in the past.

Unilaterally, the court by its own motion will have some difficulty demonstrating that a modification or termination of joint custody is in the best interests of the child if both parents have agreed to joint custody, since Section 4600.5 (a) presumes that under circumstances of such agreement joint custody is in the best interests of a minor child.

Opposition by a parent to modification requires a court's justification

Section 2. Section 4600.5 (d) 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.

The third situation in which the court is required to state reasons substantiating orders other than joint custody comes into play if either parent opposes modification or termination of joint custody. Consequently, there is a strong likelihood that for purposes of appeal or remodification, attorneys representing clients about to be excluded from joint custody will oppose modification from joint custody as a matter of protective procedure.

The penalties for objection to an alternate parent who desires to cooperate in joint custody are so uncertain, and so potentially counterproductive as implied by 4600 (b) (1) with its favoritism for the cooperative parent that, rather than moving directly for modification or termination, an unhappy co-custodian is better advised to first test the possibilities of drawing a tighter fence around the alternate parent's freedom of action or of negotiating tradeoffs during conciliation.

Previous orders modifiable to joint custody

Section 2. Section 4600.5 (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.

Will the court be swamped with requests for modification to joint custody? Probably, but requests will be tempered by a consideration of the expense of successful modification, or by apprehension about how successful modification is likely to be. Non-custodial parents who have adapted to the expectation that sole parent custody would always prevail and who have developed another lifestyle may not now seek joint custody.

Because of the incessant requests for information about retroactivity during the legislative process, an accommodation for modification was assured. Since divorce is better comprehended in retrospect than in prospect, and though AB 1480 is intended to benefit children and parents who are not yet aware they will be divorced, it is understandable that most of the followers of this legislation were doing so from retrospect.

The court may not necessarily bear the brunt of the first wave of modification actions. A parent desirous of joint custody may find it expensive, antagonistic, and of uncertain outcome to make the first overture to the alternate parent through court ordered hearing. Instead, the resourceful, parent who does not enjoy easy rapport with the other parent may find it productive to have a counselor (marriage, family, religious or legal) make the initial overture for exploratory conversations leading to joint custody. Joint custody implementation plans worked out between parents, as directly as possible, are probably preferable to risking the court's arbitrariness in decreeing implementation.

California's joint custody decree affecting another state's

Section 2. Section 4600.5 (e) Any order for . . . custody . . . entered by a court in . . . 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 . . .

Qualms about the ability to enforce a California custody decree in other states led proponents of SB 477 to author into an early version the provision that joint custody could not be ordered if one parent lived in another state, and that joint custody could be terminated if one of the co-custodians moved to another state. A similar restraint was not a part of AB 1480, and AB 1480 proponents opposed such provisions in SB 477. The outcome was to mesh these considerations with the protections of the Uniform Child Custody Jurisdiction Act.

Section 5152 of California's Civil Code is similar to Section 3 of the Uniform Child Custody Jurisdiction Act, while Section 5163 is similar to Section 14 of the Uniform Child Custody Jurisdiction Act. Section 5152 requires that California be the home state of the child at the time of commencement of the proceedings or within six months prior to commencement of the proceeding. Or, California could assume jurisdiction if the child and the child's parents have a significant connection with California. Physical presence of the child within the state is influential but that criterion alone is not sufficient to confer jurisdiction.

Section 5163 restrains California from assuming jurisdiction over custody decrees made by another state unless it appears that the court which rendered the decree does not now have jurisdiction or has declined to assume jurisdiction. Even so, California is obligated to give due consideration to the transcript and proceedings that have occurred in another state if California assumes jurisdiction.

Thirty-nine states have now adopted the Uniform Child Custody Jurisdiction Act drafted in 1968. California adopted the UCCJA in 1973. States adopting in 1979 include Arkansas, Illinois,

Maine, Nebraska, New Jersey, North Carolina, Tennessee, Virginia and Washington.

The states that are outside of the UCCJA agreement, as of Fall 1979, are Alabama, District of Columbia, Kentucky, Massachusetts, Mississippi, New Mexico, Oklahoma, Puerto Rico, South Carolina, Texas, Utah, Vermont and West Virginia.

If a parent intends to use the new California law to achieve a joint custody decree not awarded in another state, the provisions of the UCCJA are the first of the obstacles to be considered.

On the other hand, the UCCJA will assist in protecting a California decree in other UCCJA-endorsing states as long as the parents and child adhere to the prerequisites for California to retain jurisdiction.

Using conciliation to ease the court's burden

Section 2. Section 4600.5 (f) In counties having a conciliation court, the court or the parties may, at any time, pursuant to local rules of court, consult with the conciliation court for the purpose of assisting the parties to formulate a plan for implementation of the custody order or to resolve any controversy which has arisen in the implementation of a plan for custody.

The new law could facilitate access to conciliation court consultation regarding any custody plan, whether sole parent or joint. "Local rules of court" may limit the availability of court-assisted conciliation as well as the procedures for such access. In California only the larger metropolitan jurisdictions maintain conciliation court services thus far.

At least five consequences are likely to evolve from the new statute, and in particular from paragraph 4600.5 (f):

1. Burden reduction. Utilization of conciliation court assistance will likely have the potential of substantially reducing the hearing court's burden, the consumption of time through adherence to courtroom procedure, and the issuance of decrees that may be unpalatable to one or both parents.

2. Active assistance. ". . . assisting the parties to formulate a plan . . ." places the conciliation court in a more active, goal-oriented role than it has occupied since an earlier era when the court was known colloquially as reconciliation rather than conciliation court. In other words, rather than primarily serving as an instrument for the parties to recognize, accept and "live with" a pending or previous court order, the possibility now exists for a conciliation court to assist parties in formulating plans for submission to the court.

3. Resource accumulating. Implementation plans, particularly for joint custody, are expected to be diverse, individualized, and probably novel. Since parents are invited to participate in the planning, the relative simplicity of the traditional sole parent custody decree will no longer prevail. Consequently, conciliation court personnel are likely to become repositories and resources for a wide range of concepts that can be used to stimulate parental imagination about ways to resolve and implement joint custody. Information exchange about joint custody planning will, by necessity, increase dramatically.

4. Private counseling. There was no known or purposeful intent to exclude access to privately-reimbursed conciliation counseling or to impose exclusive recourse to public, tax-supported conciliation court services. Although passage of the new law will increase the clamor for expansion of conciliation court services, the availability of funds and competing political considerations may restrain the ability of the public system to expand in the same ratio as parental interest in achieving joint custody decrees. The result will probably be increased gravitation to privately-paid counseling as well as that available from non-governmental charitable organizations. The new custody law implies the potential of considerable growth for such private and philanthropic services

5. Stature opportunity. Since so much of the possibility for success in joint custody planning and implementation will hinge on negotiation effectiveness during the planning process, and since

this conciliation service can be such an important assist to jurists, there is now a substantial opportunity for conciliation courts and counselors to achieve a greatly increased appreciation and recognition.

Furthermore, the "resolving of controversy" portion of paragraph (f) could shunt to the conciliation court first those requests for modification or termination that might ordinarily go directly to the hearings court. Arrangement for and success of joint custody is a highly personal matter for the participants. However, skeptics are likely to question the efficacy of joint custody, based on the statistical reoccurrence of hearings requests. The magnitude of those statistics may be affected substantially by how readily joint custodial parents can utilize the conciliation courts prior to hearings.

Access to records by noncustodial parents

Section 2. Section 4600.5 (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.

The statute's concluding paragraph requiring records about the child to be accessible to noncustodial parents was also one of the last amendments proposed at a concluding amendment-drafting session. As such, the proposal represented the reaction of noncustodial parents to that which they have perceived as an abuse of the exclusivity of sole parent custody. Some observers contended that the provision was not strictly necessary in view of other means available to achieve the same effect. As a caution to the custodial parent, however, the paragraph does imply a measure for evaluating the cooperation of a custodial parent with a noncustodial parent.

Since the paragraph does not limit information to merely medical, dental and school records, it does open up the possibility of seeking information about such other topics as diet, clothing purchases, income, religious activity, clubs and camps, work and rest, and similar inquiries.

Evaluate in its entirety

Because the version of AB 1480 that ultimately passed into law has so many more provisions than the simplicity of the originally introduced version, there may be a tendency to become preoccupied with the ramifications and opportunities for litigation in specific clauses. Therefore, it behooves all parties to pause, place in perspective, and view the statute in its overriding intent. AB 1480 affords a rewardable premium for cooperation and accommodation, to the advantage of a child's continued access to both parents. Frequent and continuing contact, through joint custody or sole custody, is preferred. The opportunity is now available to parents and the court to reduce post-divorce tension and antagonism through joint custody.

Fate of the 1977 proposal

During the 1976-77 two-year session of the California legislature a Joint Senate-Assembly Committee on Judicial Equality was created to examine inequality in California laws and to propose rectification. California's 'no fault divorce' Family Act of 1970 was particularly singled-out for examination. The lack of a joint child custody option was regarded as the single greatest inequity left unrectified when 'no fault' divorce was imposed in 1970. In 1974 the "mother's preference doctrine" (regarding children of tender years) was modified to permit the designation of either parent as custodian based on the child's best interests. But, the statute still provided that custody could be awarded only to either parent or to an outsider just as it had when so-called 'fault' was a consideration in designating a custodian. Thus a parent who demanded it of the court would receive a divorce without showing of cause, while the other parent (who may not have been consulted or wittingly given cause for divorce) could promptly be excluded from the child's life, except for 'visitation' based on a schedule decreed by the court without consulting the excluded parent.

Consequently, a joint custody bill, AB 3475, was submitted and processed through the California legislature in 1977. The bill captured wide public attention when enroute from passage by the Assembly to the Senate it was discerned that the measure capitalized on the humanitarianism of joint custody but made the achievement of joint custody virtually unattainable. 1977's AB 3475 required that both parents agree to petition the court simultaneously for joint custody before the court would consider decreeing joint custody. Instead of facilitating agreement and cooperation toward a goal of benefit to the child, the measure gave a unilateral power of veto to the most recalcitrant, possessive and uncooperative parent with no similar or offsetting advantage for the cooperative and sharing parent.

Several individuals, groups and organizations, including the southern California representative of the National Organization for Women coalesced to endorse and seek a single amending phrase permitting either parent to petition for joint custody. Such an amendment would have cultivated a socially desirable goal: recognition by the court for a cooperative and accepting parent. The California legislative system permits a bill's sponsor to refuse an amendment and to refuse to carry a bill further, regardless of majority legislative support for the amendment and for an amended bill. Amendment of 1977's AB 3475 was categorically refused and the bill remained in the Senate Judiciary Committee until the end of the session a month and a half later whereupon the joint custody issue was effectively dead, legislatively.

Although no publicly outspoken opposition to joint custody was identified at any legislative forum or hearings, the legislative quest for joint custody was foreclosed at the end of 1977 for another year and a half because of doubt that a sponsoring legislator could be identified who would dedicate the energy required to assure passage of such a measure.

Postponement builds demand for specificity

The new California statute is unique in its constraints on the court's latitude, although California is not the first state with a joint custody statute. The intensity of demand for and scrutiny of joint custody legislation in California during 1979 probably spawned the specificity missing in the statutes of the five other states recognizing joint custody (Iowa, Maine, North Carolina, Oregon and Wisconsin.) Most of the five passed joint custody legislation starting in 1977, before the demand had become so insistent as to place specific procedural requirements on the court, as does the California statute. Generally, the other five states simply grant a court the power to decree joint custody or imply the availability of joint custody by defining joint custody.

Pressure for specific legislative support of joint custody and specific constraints on the court's discretion came from a wide range of sources. The initiating or authoring of AB 1480 was not the product of a fathers' rights group, although remarks by opponents following passage of AB 1480 might

lead the public to believe so. At the time AB 1480 was submitted and acquired its initial endorsers I was not an active member of such a group, although as the following implies, their support was crucial. The earliest supporters were among the professionals. A number of professionals in the psychiatric, sociological and counseling fields endorsed the concept of joint custody. A gratifyingly large number of lawyers also endorsed the necessity of joint custody. But the intensity of the need was most vividly evident in both the ad hoc and the formal groups of divorced fathers. I was also to find this intensity matched by divorced mothers who, (voluntarily and involuntarily) did not have custody. The divorced mother without custody has an interest in joint custody as intense as the divorced fathers who have garnered the lion's share of publicity for warranting joint custody.

The indignation of the ostracized parent has the intensity of the self righteous because a tenet of "no fault" divorce is that a parent can be divorced and deprived of access to an offspring. Hence, innumerable fathers' rights groups are populated by law-abiding and otherwise circumspect fathers who have been deprived of access to their children through imposition by the legal system of a "no fault" divorce.

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 these men had committed a crime. The result was acute disdain for the law as practiced from the bench.

Politicians and propagandists sense the power inherent in justified indignation. Scholars know the dangers to a nation when its legal system is more convenient for severing a family than preserving it.

A rage from righteousness is also dangerous and dedicated. It can also transcend personal safety and self-preservation, as was evident among fathers who spoke threateningly.

Such was the atmosphere within which the ameliorating proposal that became AB 1480 was introduced, and none too soon. As I indicated to the California Senate Judiciary Committee's Advisory Committee at their March 5th San Diego meeting, "It is imperative that the Legislature enact a genuinely equitable joint custody statute before the summer is out because dedicated but disenfranchised fathers are becoming so numerous and the anguish so intense that the reaction is cresting toward personal, unilateral action that will be widely evaluated as justified."

The disdain for "the system" and the skepticism of effecting any peaceful change through the legislature (after the 1977 experience) had become so widespread that, as I told a May 9th Assembly Judiciary Committee hearing, "More than once I have been grabbed by the lapel in men's group meetings with a demand that my diversion of their anxieties toward AB 1480 better damn well not be just another hoax!"

Such was the pressure valve threatening release, or resolution, in early 1979.

Satisfactory joint custody legislation would have another virtue, or diversion . . . depending on your view . . . as expressed to me by Vert Vergon, the pioneer organizer of Fathers Demanding Equal Justice and advocate of joint custody since 1974. "If you succeed in getting joint custody implemented, most of the men's rights groups will probably cease to exist since child custody is the single most important issue that holds them together."

Thus, the scrutiny of the judiciary's latitude that occurred during legislation of AB 1480 might not have been nearly so specific if California had adopted the milder version sought two years earlier.

Sponsorship in 1979

In February and March, 1979, Assemblyman Charles Imbrecht of Ventura offered to assure that the concept and wording proposed to him would be submitted to the Legislative Counsel's office for review and deposited in the legislative bill hopper. Assemblyman Imbrecht's position as Vice Chairman of the Assembly Judiciary Committee was crucially important since that Committee was the legislative forum in which the bill would first be

heard. Thirteen additional Assembly members and Senators were encouraged to become co-sponsors. The first of those co-sponsors was Assemblyman Art Torres of Los Angeles, also a member of the Assembly Judiciary Committee.

The extensive burden of bills processed by California legislators requires that the obligation of sponsoring and guaranteeing a new measure is not lightly assumed. 3,546 measures were introduced into the California legislative process during 1979, of which 1,843 were passed during the 139 days the legislature was in session. As a consequence, the sponsor's burden is numerically large for nearly every legislator. Assemblyman Imbrecht's legislative burden is typical. At any one time during the 1979 legislative session he was sponsoring over 100 different bills and was the primary and lead sponsor of over 30 measures of varying degrees of complexity. In view of these obligations, it is important to a legislator's credibility and effectiveness that a bill's initiating constituents be prompt in response, accurate in representations, comprehensive in gaining adherents, and cooperative in accommodating a legislator's schedule.

In a search for legislator sponsors, the text that eventually became AB 1480 was delivered to all Assembly members and Senators who had seats on the Judiciary Committees in their respective houses. Support for the concept was expressed informally and provisionally during personal follow-up visits with the Assembly members and Senators. During this routine procedure we learned that the Senate Judiciary Committee staff was researching the joint custody topic for possible submission of such a bill by the Senate Judiciary Committee Chairman. Copies of joint custody measures legislated by other states and a copy of 1977's AB 3475 had been received by that staff.

Several months prior, a blue ribbon Citizens' Advisory Committee had been created by the Senate Judiciary Committee to meet monthly for the evaluation of a broad range of proposed family law legislation topics. The Advisory Committee consisted of two Superior Court judges, a law professor, a director of counselling for a county conciliation court, a deputy county clerk, a psychologist and a family law attorney. Los Angeles County Superior Court Judge Robert Fainer served as the Chairman.

Monday, March 5th was indicated as the date for consideration in San Diego by the Committee of child custody concepts, presumably to be considered in creating a joint custody bill. But that presumption subsequently appears to have been misinterpreted. Proponents of the text that became AB 1480 appeared at the March 5th San Diego Advisory Committee meeting, but on the previous Thursday, March 1st, SB 477 had already been placed in the Senate's bill hopper by Judiciary Committee Chairman Jerry Smith. Consequently, the Advisory Committee moved on to family law topics other than child custody during the March 5th meeting after the Advisory Committee Chairman recommended to the proponents of the alternate text that they deliver their concept to the Assembly Judiciary Committee since a Senate version was already underway.

Prior to March 1st, the text that became AB 1480 was already being favorably considered for sponsorship by several Assembly members. While the extensiveness of support was being evaluated, Assemblyman Imbrecht's office temporarily held the text in abeyance until the last calendar date for submitting a text to the Legislative Counsel's office for approval prior to delivery of a bill to the Assembly. Consequently, SB 477 started the formal legislative cycle (on March 1) ahead of the temporarily delayed AB 1480, which was filed with the Assembly on March 29. The effect of this lack of synchronization was that the two bills never coincided for simultaneous consideration in the respective policy committees. Examination and eventual passage of SB 477 occurred without concurrent comparison with AB 1480. Thereupon, AB 1480 became the bill for making changes in SB 477 because it became the last of the two bills to be considered for passage.

That which some observers characterized as the distinctly opposing character of both bills, in their initial versions, increased the intensity of debate and attention to the topic by child custody advocates.

Comparisons & consequences: the original AB 1480

The original version of AB 1480 was succinct. The original merely added new subparagraphs (a) and (b) to the order of preference statement in California's long standing Section 4600 of the Civil Code:

"Custody should be awarded in the following order of preference:

(a) to both parents in joint physical and legal custody.

(b) to either parent if a preponderance of the evidence establishes that it is in the best interest of the child that custody should be awarded to one parent or if the parents agree that one parent shall assume custody."

Subsequently there was concern that subparagraph (b) imposed the burden of an evidence test on custody litigation. Persia Woolley, author of "The Custody Handbook", had a similar proposal: place the burden of proof on the parent seeking sole custody.

Ultimately, the criteria for sole custody that evolved from amended versions of SB 477 were adopted within AB 1480. For no discernible reasons, the one seemingly agreeable second criterion for sole custody of the original AB 1480, "if the parents agree that one parent shall assume custody" disappeared during hearings and amendment sessions.

Comparisons & consequences: the original SB 477

The original version of SB 477, which was lengthier, did not amend Section 4600 of the Civil Code with its order of preference awarding custody to either parent. Instead SB 477 added Section 4600.5 to the Civil Code spelling out the circumstances wherein joint custody would be presumed in the best interests of the child, ". . . where all of the following factors are present:

1. The parties have agreed in writing to an award of joint custody or so agree in open court. . .

2. The parties have submitted to the court for its approval a written plan for the implementation of the joint custody arrangement.

3. Both parties presently reside in this state and state that they intend to reside in this state in the future."

The proposal also defined joint custody as, ". . . an arrangement whereby the minor child or children of the parents shall be in the physical custody of each parent for a period of time with the parents having equal control of the care, upbringing, and education of the child or children."

Additionally, SB 477 proposed that ". . . joint custody shall be terminated by the court if one parent establishes his or her principal residence in another state." The proposed bill also permitted termination of joint custody by the court after consideration of ". . . evidence of any substantial failure of a parent to adhere to the plan for implementation of the joint custody arrangement . . ."

The ensuing hearings and amendment debates substantially changed most of those provisions. The reasons for doing so are instructive of the legislative intent behind Chapter 915 as enacted in the Statutes of 1979. The major changes to SB 477:

- A coincident series of preconditions were not required to establish a presumption for joint custody.

- Agreement by the parents to joint custody was not to be required since it gave a disproportionate leverage to the recalcitrant parent, to the disadvantage of children and of a cooperative parent.

- Implementation plans are not necessarily required in advance by the court and may be developed subsequent to court order, but the requirement of a plan in advance could result in delays by a litigious parent.

- Residence within the state, and the opportunity to terminate joint custody by moving or threatening to move from the state, were also

dropped since they suggest mechanisms for defeating joint custody, to a child's disadvantage, and with no compensating opportunity for the other parent to protect and ensure joint custody.

• The emphasis on "equal" periods of physical custody or of control in care, upbringing and education were also dropped. The qualifying word "equal" was eliminated so that the focus of the parents would be on such practical considerations as sharing the available time and apportioning responsibilities reasonably rather than scrutinizing the division of time and responsibilities. Trading of duties and responsibilities, one for the other, was considered as desirable as the splitting of a particular duty.

• Failure to adhere to a joint custody plan was eliminated as a cause for terminating joint custody lest antagonistic parents "keep book on each other" with the intent of contesting for sole custody based on plan performance rather than accommodating the vagaries of life

Following the passage of AB 1480, proposals are now being offered for counseling of parents by public and private counselors about the creation of custody implementation plans. Simultaneously, another conclusion for the disposal of such parenting provisions is being voiced: let each parent determine the parenting decisions and styles that take place while the child is with the respective parent.

The omissions that were debated and determined during amendment are as instructive as the final version of AB 1480 which passed into law. The omissions dealt with so many issues that are likely to arise during hearings brought under the new statute that the reasons for eliminating such provisions provide an additional guide to the intention of the statute.

Dissimilar bills but unanimous votes

It is presumptive of me to assign simplistic but different motives to each of the two bills that were so dissimilar at the outset. At the risk of ignoring the complexities, I will assert that AB 1480 sought a clearcut acceptance of joint custody (as the first in a series of considerations) on the confident assumption that there was sufficient approval of the concept to assure the necessary legislative votes in both houses for passage. On the other hand, SB 477 with its many preconditions and hurdles to joint custody, appears to have been predicated on a belief that there were insufficient votes for joint custody to assure passage, that SB 477 could overcome objection by selling it as a modest change merely confirming the few joint custody decrees that were occurring recently in the courts, and that SB 477 could become the first in a series of amendments that would make joint custody legislation more unequivocal in subsequent years, in the style of AB 1480.

The vote intrigues observors. The vote particularly baffles observors who were concerned about the distinctly different consequences of the two bills. Each measure, SB 477 and AB 1480, was voted on, separately, five different times (both Judiciary Committees, both houses, and concurrence). And although slightly out-of-synchronization, the legislative processing alternated back and forth (first on SB 477, then upon AB 1480, back to SB 477, etc.), but never in the same forum simultaneously. Yet, if I am correct in recall, both measures always received a unanimous approval, each of five times, with no objection publicly voiced in debate. (Observors are reminded that the amendment battles, which were vigorous, took place in the respective Judiciary Committees.)

Explanation for such voting patterns depend upon one's point of view. One explanation is that the legislature was prepared to accept any joint custody bill, with the content a matter for the proponents to negotiate. Both passed and both were signed by Governor Brown, although AB 1480 had the more tortuous requirement of passing through the Senate Judiciary Committee, at the expense of assuming many of the provisions of the previously-passed SB 477, whereupon AB 1480 prevailed to become California's second joint custody statute within a month and a half. The competitiveness of the two brought more enlightened debate than might have occurred if only one bill was heard, the exercise worried proponents of AB 1480 into taking less for granted about passage, and it is a credit to the legislators that the competitive nature