ALASKA LEGISLATURE COMMITTEE FILES 1981-1982 8672

1536 SHESS SB 723

SECOND THOUGHTS ON JOINT CUSTODY

(Con't. from p. 3)

The following is a digest of an in-depth article on this subject by Valerie Pitt, a law student at NCOWFL, which will be available for distribution in March, 1981.

JOINT CUSTODY AND WELFARE:

There are many unresolved issues when joint custody is ordered and one of the parents is receiving AFDC. For example: Which parent is entitled to the grant? Will it be split? Can both receive a grant? Will eligibility depend on which parent arrives first at the welfare office?

JOINT CUSTODY AND CHILD SUPPORT:

Joint custody may become a means of alleviating a non-custodial parent's support obligation. If, as some legislation has provided, support responsibility is to be shared equally between parents, courts could refuse to make any support order when joint custody is awarded on the grounds that both parents are equally responsible in the child's support. Consequently, women will be seriously disadvantaged by having to maintain a full time home/household while at the same time working at an outside job. Further inequity arises from the fact that while being expected to contribute equally to the support of the child, women do not command wages equal to men's on the job market.

JOINT CUSTODY AND UCCJA/CHILD-SNATCHING:

Joint custody may undermine the UCCJA (Uniform Child Custody Jurisdiction Act) since both parents would have the legal right to determine the residence of the children, absent a non-removal provision in the court order.

JOINT CUSTODY PROVIDES NON-CARETAKING PARENTS WITH AN UNFAIR BARGAINING TOOL:

Almost all joint custody legislation includes a provision that, if the court decides not to award joint custody, priority for sole custody shall be given to the parent who is most willing to provide continuing access to the other parent. Thus, a woman opposing joint custody will either agree to joint custody by settlement agreement (feeling that this is the best she could get in court), or will "bargain away" her alimony, child support and/or property rights in order to obtain sole custody.

JOINT CUSTODY AND BATTERED WOMEN:

In cases involving wife battering, joint custody guarantees continued access by the batterer to his victim, and gives him continued control over the battered woman's life through their children. In order to avoid such an order, the battered woman will have to testify to the abuse of which she has been a victim, which for many is very difficult. Furthermore courts rarely consider wife-beating an indication of poor parenting ability, especially when the father has never physically abused the child. In cases where wife beating is raised as an argument against joint custody, courts traditionally do not believe the accusations of the battered woman, refuse to take her plight seriously, and fail to consider psychological abuse and terrorization as battering.

CONCLUSION

While joint custody should be an option in appropriate cases where parents are in agreement and

(Con't. on p. 6)

We wish to call our readers' attention to a valuable new handbook on emergency and long-term housing for battered women prepared by the National Coalition Against Domestic Violence with the cooperation of HUD.

The book is a practical and detailed How-To manual which will equip persons working in this field to understand the workings of the Community Development Block Grant Program and how to use it to get dollars for shelters and service programs.

The title of the book is THE NCADV Handbook on Emergency and Long Term Housing and can be secured free from HUD, Housing Office of Public Policy Development and Research, 451 7th Street, S.W., Room 4212, Washington, D.C. 20410.

SECOND THOUGHTS ON JOINT CUSTODY

(Con't. from p. 4)

desire this arrangement, legislation is not necessary for these cases. Rather, the current joint custody trend serves only to reduce the custody rights of those women who have been and are the primary caretakers of their children and who do not feel that joint custody is in their children's best interests.

FOOTNOTE:

1. Joint custody gives both parents equal legal rights with regard to decision making and control of their children, regardless of where or with whom the children reside. While joint custody should imply equal responsibility for the day-to-day care of children, this is not required under most joint custody orders and all joint custody legislation. Thus, joint custody orders are, in effect, the same as traditional sole custody/visitation orders.

-ental kidnappings and interstate or international flight to avoid prosecution or giving testimony under state felony statutes. Section 1073 has been consistently interpreted by the Justice Department not to apply to domestic disputes, even when state felony statutes were involved. Adding parental kidnapping to the statute means that the Federal Bureau of Investigation can now be called into these cases pursuant to the provisions of 18 U.S.C. 3052.

For a discussion of the Parental Kidnapping Act see NCOWFL's March 1981 Clearinghouse Review column.

SHELTER BILL DIES

S. 1843, the bill to provide federal funding for shelters, died in the recent Congressional lame-duck session when opponents pledged to filibuster the Conference Report. Senator Alan Cranston (D-CA), the bill's sponsor, withdrew the legislation from the floor when it became clear that the Conference Report could not be approved. Thus any further domestic violence legislation will have to be brought anew in another session of Congress.

Resource packet on Joint Custody Legislation:

A Summary of Joint Custody Statutes and pending Legislation.

"Joint Custody and Battered Women" by Joanne Schulman.

Testimony by battered women's advocates before the New Jersey Committee on Judiciary Law, July 24, 1980, regarding pending legislation (AB 1471).

SENATOR PARR

RE: HOUSE BILL 210 — JOINT CUSTODY FOR CHILDREN

I DID NOT GET A CHANCE TO TALK TO REP CLOCKSIN BUT DID TALK TO HOLLI PLOOF. SHE SAID THEY WANTED TO STUDY THE BILL OVER THE SUMMER BEFORE ATTACHING A FISCAL NOTE.

IT WOULD BE NICE IF SOMETHING COULD BE PASSED THIS YEAR SO THAT IT WOULD ESTABLISH LEGISLATIVE INTENT.

LARRY SWEET

I WILL BE IN JUNEAU UNTIL NOON TOMORROW AND CAN BE CONTACTED AT BRIAN ROGERS OFFICE

And investigator [illegible] [illegible]
only 24% not
[illegible] out of
court

Martha Lewis
c/o Botany Dept.
Field Museum of Nat. History
Chicago, Ill. 60605

dear Senator Parr,

I hope you have a copy of the working draft to Brian Rodger's shared custody bill. I have enclosed a copy of the comments and suggested amendments which I sent him yesterday. Except for sec. 25.20.100 its very good. The whole idea can be summed up as encouraging parents to agree in out of court negotiations where they meet on equal terms, to sharing the care of their children after divorce. If our ideal is parents sharing and reaching agreements on caring for their kids after divorce then Rep. Rodger's Bill should be a major positive step towards changing attitudes and diffusing the custody war.

Sincerely,

Marty

PS - Also enclosed a copy of INITIATING JOINT CUSTODY - the first page is a good descrip. of how an Alaskan law should operate - the other pages at a glance you can see how parents can work out agreements

PPS - Still stuck in Chicago doing research. I should be back up north in April. 6" of snow here and the whole city closes down - what a life, heh?

QUOTATIONS FROM PROFESSIONAL ARTICLES SUPPORTING JOINT CUSTODY

* Richard A, Gardner of the Columbia Univ. Colege of Physicians and Surgeons wrote in the Journel of the American Academy of Psychoanaylasis April 1978:

"Divorce proceedings and child custody cases should no longer follow an an adversary model, but one of arbitration and mediation. Joint custody provides a reasonable approximation to the natural marital situation. "

* Alice Arbanel who studied Shared Parenting after seperation and divorce and published her findings in the American Journel of Orthopsychiatry 1979:

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

* Mel Roman of the Albert Einstein Colege of Medicine has studied 40 families who are presently practising joint custody and concludes in " The Case for Joimt Custody " :

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

* Judith Brown Greif , Div. of Child-Adolescent Psychiatry, Albert Einstein College of Medicine studied 40 middle class divorced fathers. She concludes in the American Journel of Orthopsychiatry 1979·

"Another belief about joint custody is that children end up being pawns in parental battles, and that this produces a situation of divided loyalties. Quite the contrary, children often seem used" in sole custody arrangements because of the inherently unequal distribution of power between parents. In joint custody arrangements, however, parental power and decision making are equally divided, so there is less need to use children to barter for more."

" We tend to approach families of divorce as though they truly consist of only "one parent" - as though the non custodial parent has ceased to exsist. Yet research is abundantly clear that, with few exceptions, the trauma of divorce can be minimised by the child's continuos open and easy access to both parents. We therefore have a responsibility to do what we can to support the involvement of the non custodial parent, both for the sake of that parent and for the benefits that accrue to the child.....Rather than support the imposition of legal visitation restrictions, we should do everything in our poer to maximize contact between the child and both parents. One clear way of doing that is through joint custody arrangements. "

* An article in the April 2, 1979 edition of BUSINESS WEEK States·

" The professionals agree and point to these trends in therapy-- Joint custody is in line with the trend in courts to award custody to the best prepared parent. It involves continued co parenting and extremely relaxed visitation rules and demands a strong committment in time and energy by both parents. The known results, thus far, are sucessful. "

* Dr. Lee Salk who we all know states ·

"Parents do not divorce their children, they divorce each other. "

* Judith Wallerstein and Joan Kelly who studied 60 families in the "Ch ldren of Divorce Project" and published their findings in Psychology Today January 1980 states :

" Many people object that parents who cannot agree during marriage ' certainly cannot be expected to reach agreement on child related matters after divorce. Indeed , some infuriated or disturbed parents will never chart a rational course with regard to their children. Yet it seems clear that our society must encourage fathers and mothers to aceept the importance of continuity in parent- child relationships after divorce."

* In a litigation known as People ex. rel Watt v. Watt, 77 Misc. 2d 178 (1976); Annot. 70 ALR 3rd 269 which was quoted in a recent Alaskan custody litigation, (4FA-80-506) it is stated:

"Hence, joint custody, under proper circumstances, may be the closest remedy to the shattered ideal and offers viable options in normally dichotimized custody dispositions. Morever, parents relegated to seeeing their children only intermitefently experiance feelings of deep loss and often react by limiting involvement with their children. Decidedly, conventional single parent custody arrangements not only debilitate sustained involvemnnt with both parents but tend to create de facto ex-parents and emotionally deprived children. " (quote from the Gaurdian ad litem report)

* Beatrice Thompson Ph. D. studied 105 3rd-5th grade children in western South Carolina, divided into two equal groups- father absent and father present to see if there was any differance in arithmatic achievement. A summary in Dissertations Abstract International June 1979 sums up:

" From the results of the survey it is concluded that father absense negatively affected the arithmatic achievment of elementry school children."

* Judith Wallerstein and Joan Kelley, mentioned before, also studied "The effects of Parental Divorce: Experiances of the Child in Early Latency " which was published in the American Journel of Orthopsychiatry January 1976. They find that:

"It was little comfort to these children that they saw their father on occassional visits. The typical visiting pattern of two weekends a month, established by custom and the court, was clearly not sufficient to fulfill the expectations of the seven and eight year-old boys. Such a pattern was experienced by most as depriving and as inadequete to nourish and make gratifying the relationships."

*

Dr. Diane Trombetta and Betsy Lebbos Ll. D. in an artcle for the Los Angeles Daily Journel Report state:

" Exclusive custody either intensifies the conflict and ill will so comman between divorced or divorcing parents. or leads to one parent effectively "dropping out."

" Dropping out may help clear the court calendar but it also clears one parent out of a child s life. Rather than forcing or encouraging one parent to give up responsibility and care of the child, current research indicates that if our primary concern truly is the best interests of children, we should be doing quite the opposite. "

The above represent conclusions from only a very few studies and articles supporting joint custody which have appeared in the past five years. A bibliography of 130 recent professional articles and books supporting joint custody will be made available upon your request. As Mom's House-Dad s House is able to dig out more referances they will be made available to you.

THE EVIDANCE IS CLEAR ! WE MUST REMOVE CHILD CUSTODY FROM A WIN/LOSE ALL/ NOTHING PRESUMPTION TO A PRESUMPTION OF CONSENSUS, EQUALITY AND THE PROTECTION OF PARENT-CHILD BONDS.

EFFECTS OF WIN/LOSE CUSTODY ON CHILDREN AND PARENTS

The Alaska State Legislature is to be applauded for considering legislation introduced by Representative Brian Rodgers of Fairbanks encouraging divorcing parents to make Joint Custody agreements. In joint custody both parents retain and share the responsibility and authority for care and controlof their children after divorce. The sharing of that responsibility can traverse a whole spectrum from casual cooperation to specifically delineated times and functions. The sharing of the child or children's time can be scrupuosly equal, or it may take an approach based on the time each parent has to assume custodianship. It is most important that the law encourage divorcing parents to form their own agreements on the basis of both parents maintaining a frequent and meaningful relationship with their children. Each joint custody agreement can be tailor made and each set of parents should be able to draw up a plan most practical and suitable to their situation.

The effect of sole custody on children has been studied extensively over the past ten years. Child psychologists have found long lasting negative affects on children stemming from divorce and the negation of the role of one parent by sole custody decrees. The effects include: deep seated feelings of loss and abandonment; loyalty conflicts; sorrow and depression; strained interaction with BOTH parents; promiscuity in girls; confusion of sex identification in boys; and disturbances in children's play, social relations and cognitiveperformance in school. On the other hand, a long term in depth study of 60 divorced families by Judith Wallerstein and Joan Kelley which appeared in the January 1980 edition of PSYCHOLOGY TODAY found that: " Thirty four per cent of the children and adolescents appeared to be doing especially well at the five year (after divorce) mark. Their self-esteem was high and they were coping competently with the tasks of school, playground and home.....Characteristic of these children was their sense of sufficiency: the divorce had not depleted their lives by removing a loving parent, or bypairing them with an angry, disturbed one." The same study found that the children who had only erratic or no contact at all with the absent parent continued to have serious problems after five years.

From Mom's House - Dad's House.

The "Sunday father" is a sad sight to see trying to hold on to the threads of love. "Visitation" is discouraging and demeaning to a parent who enjoys and wants the role of being a full parent. It is a brief and superficial encounter either resented or looked upon as a burden by a growing child. Visitation is used as bribery by the custodial parent or as a lever to hurt the excluded parent. A great many visitation fathers feel so emotionally drained by having to deal with hostile custodial parents that they eventually stop visiting their children . The loser is thrown into the trash heap, effectively excluded from any meaningful relationship with his or her children while the winner gets the joy of raising the children, child support payments and the use of the children to hurt their absent parent. No wonder court battles are vicious and ugly.The carefree divorced father is a myth. Judith Brown Greif, a child psychiatrist at Albert Einstein College of Medicine studied fathers and children after divorce. Her findings parallel those of Kelley and Wallersteir . In addition she found that most fathers suffered feelings of loss and serious depressionafter separation from their children. The symptoms were often physical: wieght loss, eye and dental problems, arth ritis, difficulties in breathing, eating, sleeping, working and socializing were all frequently reported. "The parent, usually the father, who is sep rated from his children often feels rootless, alone and chronically depressed. Many deal with the pain by distancing themselves from their children and abondoning child support payments. " Ms. Greif concludes, " Denied contact with their children, being forced into the situation of getting permission from the custodial parent for extra time, often being denied access to their child's teacher who won't discuss school performance with non custodial parents, these fathers see themselves less and less as parents and eventually act in accordance with the role that has been assigned to them; the absent parent." While a few parents abandon their children because they are disinterested, the great majority wish to maintain contact. A law encouraging joint custody would go a long way towards keeping both parents involved. Aside from the burdens on the individual family members sole custody extracts a burden from society which must support abandoned children with welfare payments.

In the meantime, the custodial mother is kept in her place, often over burdened, unstable eco-omically or on welfare, often feeling tied down, physically unattractive and unable to cope. Sole custody historically proceeds from the now invalid social concept that a woman's only worth is as a child

rearor and domestic drudge and a man's only worth is as a breadwinner. Even (Moral Majority take note), if one believes a woman's place is raising children (alone after divorce?) we must remember that the Bible repeatedly commands children to respect and obey their mother AND their father. Moses brought this commandment down carved in stone. How can a child, who isn't allowed by decree of civil law to respect one of his or her earthly parents, truly learn to respect Our Father in Heaven? Sole custody laws enforce disobediance and disrepect .

An increasing frustration and outrage amongst non-custodial parents has reached an epidemic proportion. The most visible and horrifying result of this frustration is seen in the great increase of parents who resort to child snatching. An estimated 150,000 parents will feel forced to kidnap their own children in 1981. Faced with the possibility of being essentially excluded from their children's lives, having relationships confined to unnatural, minimal visitation schedules, frustrated by not having even these minimal orders complied with by a vindicitive custodial parent, and hurt by having primary love bonds torn away by artific ial and unwanted court decrees, it is not surprising that many parents fearful of losing in court run away with their children. Child snatching adds up to a tremendous amount of trauma for the snatching parent who must change his or her identity and live in continuos fear like a criminal, for the parent who is unable to find his or her child, and for the child whose life is often ruined by fear, the always present possibility of being snatched back and forth, and the denial of access to a loved parent. The children are a helpless pawn i a game for the most part caused by the legal insistance on viscious court battles followed by sole custody decrees. If both parents are assured of maintaining an important role in the upbringing of their children through legal encouragement of joint custody, there will be little reason for child snatching

The legislature does well to consider solutions to the multitude of problems inherent in the present sole custody legal code. A law encouraging divorcing parents to meet on an equal footing and work out a practical and suitable arrangement for their children is much needed. It is needed to discourage a vindictive , disagreeable parent from thinking they can speed into court and assuredly achieve sole custody as a means of harassment or destruction of the other, excluded parent without regards to the children's welfare. It needs to recognize that joint custody is the preferred solution after divorce and that to assure children of frequent, meaningful and continuing contact with both parents is in their best interests.

Reactions by children to sole parent custody

1. Feelings of loss and abandonment.
2. Attachment and separation anxiety.
3. Loyalty conflicts, particularly among latency-age children (from 5 to puberty).
4. Strained interactions with custodial and non-custodial parents.
5. Disturbance in children's play and social relations.
6. Disturbance in cognitive performance and changes in IQ.
7. COnfusion in sex role identification. (especially sons with sole custodial mothers).

Problems for the individual parent in sole custody situations

1. Loss of familiar activities and habit systems.
2. Loss and separation anxiety.
3. Role loss, particularly among non-custodial parents.
4. Decline in ability to parent.
5. Physical symptoms related to separation and loss of parental role.
6. Practical problems, such as economic instability.
7. Lowered self-concept.
   Fathers: Greater initial changes, rootlessness.
   Mothers: Feeling physically unattractive.
8. Declining feelings of competence.
9. Loneliness.
10. Non custodial parents are frequently so frustrated by vindictive, uncooperative custodial parent that they frequently abandon visitation + child support. This is a widespread reaction especially in Alaska.
11. Child snatching is another unfortunate and increasingly common reaction to sole custody.

Creating a joint custody legislative statute?

"Joint Custody - Sole Custody" paper and - Marks

Uniformity among the states is advantageous, given the mobility of America's population and convenience of implementation under the Uniform Child Custody Jurisdiction Act. Otherwise, peevish and vindictive parents may move to states with the least comprehensive joint custody statute.

From:
James A. Cook
10606 Wilkins Ave.
Los Angeles, Calif.
90024

November 13, 1980

Be sure it contains these eleven elements:

1. Establish joint custody as in the 'best interests' of the child(ren).

   (The overwhelmingly negative evidence of damage for children and parents that arises from sole parent custody continues to make joint custody a much more preferred solution.
   - Do not be diverted into the relatively minor inconveniences of joint custody without firmly establishing the much more significant psychological, emotional and social problems of the alternative of sole parent custody.)

2. Establish as a policy of the state that joint custody is a mechanism to assure children of frequent and continuing care and contact with both parents.

   (The establishment of a state-endorsed policy facilitates the follow-on development of counseling, conciliation, legal and welfare services that aid parents and children in achieving and maintaining joint custody

3. Establish joint custody as first in the order of preference among a descending order of alternatives in the decree of custody for children of divorce.

   (First preference joint custody dissolves the expectation by a vindictive or peevish parent that they can speed into court and assuredly achieve sole parent custody as a means of harassment or destruction of the other, excluded, parent without regard to the children's welfare.)

4. Establish joint custody as a presumtpion when both parents agree in advance, or during court appearance.

   (A presumption during the emotional pinnacle of court appearance enables a judge to encourage both parents to acquiesce to the humane option of joint custody, now that the parents have completed the cathartic of humiliation and confrontation in court.)

5. Assure joint custody as a preferential consideration of the court when one parent requests joint custody, placing the burden of proof upon that parent who opposes joint custody.

   (A joint custody preference, in response to one parent's request, removes the burden upon a cooperative parent to attack and disparage the alternate parent which thereby diminishes the possibilities for joint custody. The burden of proof upon the opponent protects the interests of a well-meaning and cooperative parent and child desirous of joint custody.)

6. When the court's recourse is to sole parent custody, require the court's preferential consideration of the parent most likely to cooperatively allow the child(ren)'s frequent and continuing contact with the noncustodial parent.

   (Unless this condition is specifically stated, there is little or no encouragement for a parent to demonstrate and take the initiative in the socially-desirable goal of cooperation.)

7. Assure that previous custody decrees may be modified to a decree of joint custody.

   (This requirement assures that grievously unfair and punitive former decrees may be altered to the advantage of children heretofore deprived of equitable access to both parents.)

8. If the court declines to award joint custody (in cases where (1) both parent have agreed to joint custody, and/or (2) an individual parent has requested joint custody) require that the court state its reasons for declining joint custody.

   (Less expensive and more specific access to appellate court review of questionable trial court decrees is enhanced if the review can be tailored specifically to the adequacy of the stated reasons for denial.)

9. Enable a court to modify a joint custody decree into a sole custody decree, but also require the court to state its reasons for doing so if one or both parents object to a modification from joint to sole custody.

   (Protect a cooperative joint custody parent from capricious attack and permit more efficient appellate review if necessary.)

10. Assure that joint custody is a single unified concept embodying both joint physical and joint legal custody within a decree and without differeniation.
    - If there is insistence that joint legal custody be available separately, assure within the statute that joint legal custody is available solely for a parent requesting joint legal custody and who has established a reason for not being available, also, for joint physical custody.

      If this precaution is not taken, a parent seeking a combination of both joint physical and legal custody is in jeopardy of being awarded merely joint legal custody.

(Cautions about [illegible]y joint legal custody:

1. The concept [illegible]s a parent, who has only joint legal custody, with all the obli[illegible]ns of delinquency, truancy, and financial and responsibility matters [illegible]thout any opportunity to participate jointly in the physical custody aspects which might ameliorate or alleviate those problems.

2. A child...who experiences a relationship with a parent primarily from the standpoint of physical contact, personal concern, and joint participation in events...receives almost no solace or emotional assurance from the remoteness of knowing vaguely that the absent parent is participating in such joint legal decisions as religion, or medical, or education.)

Important: Overwhelmingly, the anxiety previously experienced by a parent and a child isolated through sole parent custody is largely diminished by shared physical contact in joint physical custody....thereupon the joint legal decisions are easier to achieve and become of less consequence because the joint physical presence is the prime interest.

However, when joint legal custody is the only sharing which occurs, and joint physical custody does not occur concomitantly, the difficulties of achieving agreement on esoteric legal issues increase because they are the only arena of contention and power-play remaining.

Almost the only proponents of merely joint legal custody are:

1. A few of the more highly litigious attorneys who foresee a continued opportunity for costly adversary competition if parents, who might not otherwise be overwhelmingly concerned with some of the esoteric or combative possibilities in remote joint legal matters, can be diverted into the joint legal concept without participation in joint physical contact.

2. A few of the older judges who are still constrained to justify their philosophy of decrees made in the era before joint custody, or who, for resentful, power-control, or possibly sadistic reasons are inclined to make one or both parents squirm in a subservient role before the court.

11. Advocate open access to all records pertainting to the child(ren) by both parents.

(This diminishes the controlled coveting of information by a sole parent for intimidation purposes.)

Here is a copy of the California Bill. Be sure to read the note on "joint legal custody" on the next page.

Mahn

CHAPTER 915

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

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

Digest

AB 1480, Imbrecht. Child Custody.

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

AB 1480 specified circumstances in which a presumption favoring an award of joint custody shall operate, as well as specifically authorizing such an award in other cases, as designated. AB 1480 also specified that access to records and information pertaining to a minor child shall not be denied to a parent because such person is not a child's custodial parent.

AB 1480 also incorporated further changes in Sec. 4600, Civ.C. by AB 167, contingent upon enactment and prior chaptering of AB 167.

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

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

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

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

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

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

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

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

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

(c) Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

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

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

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

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

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

← This should read: "only if both parents request this arrangement." Joint legal without joint physical defeats the purpose of the bill.

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

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

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

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

Marko Lewis
SR Box 10065
Fairbanks, Alaska 99701

In way of introduction :

I have lived in Alaska for twelve years. I built a cabin and lived in the Mentasta Mts. near Tok for five years, acquired a homesite and lived on the Mauneluk River near Kobuk for three years and have resided the past three years in Hyder, Alaska near Ketchikan. I am formally trained as a botanist and do research and field work under the auspices of the Field Museum of Natural History I worked four summers at Eneput Children s Center in College, Alaska and have done volunteer work for the Child Abuse Task Force and as the present Hyder Children's Librarian. I maintain contact with many single parents both male and female and with many children from broken homes as well as joint custody homes.

I have enclosed some extra information. I hope I haven't overloaded you all at once. Brian Rodgers has sent a Pennsylvania bill for drafting. I haven't read that bill. This Calif law has been in effect over a year and is operating successfully. Recidivism - parents returning to court to try + change custodial court order has been halved! Without a joint custody law to supplement the no fault divorce law the incidence of bitter battles over custody of children INCREASES SUBSTANTIALLY. Instead of fighting over the car etc. the children have to suffer as the focale of a battle. I do hope you will sponsor a bill similar to the California bill. Thanks,

Marko

Hope you don't mind my use of xeroxgraphy. all funds used are personal.

dear Senator Parr:

The enclosed information I hope will serve as an aid in deciding wheter to introduce presumptive joint custody legislation in the current legislative session. I have enclosed a discussion of the law recently passed in California and will send other information every few days as well as answer any questions you may have.

The lack of a joint custody option is the single greatest inequity remaining when no-fault divorce is imposed. The California law encourages divorcing parents to sit down and agree to an equitable custody arrangement. It discourages long drawn out and viscous court battles. It insures that a parent who is fit and wishes to retain a close and loving relationship with their children can do so. Research shows that joint custody lessens loyality conflict in children in most cases and that the children of joint custody homes do better in school and in adjustment to the post divorce situation. . The emotional stability for a child of knowing that he or she will be able to maintain a close and loving relationship with both parents after divorce has been found to be the uppermost factor in the adjustment of children to divorce (see Wallerstein and Kelly, California's Children of Divorce, PSYCHOLOGY TODAY Jan. 1980). Other research over the past five years points to sole custody as the cause of a multitude of long and short term problems in both children and their parents. I have enclosed a short summary of some of these problems.

I hope you will read the enclosed material and consider sponsering and supporting a presumptive joint custody bill. I will gladly answer any questions you may have and continue to send information.

With best wishes,

Marko Lewis

Charlie,

Marko Lewis called and wants me to relay this message to you.

1. He would like you to introduce a bill on presumptive joint custody.

2. He is sending our office a copy of the bill that passed in California last year, plus additional information.

3. He says Brian Rogers is having a similar bill drafted, based on Pennsylvania law.

Rocky
4:25 p.m. Jan. 15

This was a good discussion of what joint custody is. It also discusses the problem of "joint legal custody" without joint physical custody. Marbo

DEFINITIONS OF CHILD CUSTODY

Marbo

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

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

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

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

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

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

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

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

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

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

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Sole Custody

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

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

Divided or Alternating Custody

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

Divided or alternating custody is not joint custody.

Split Custody

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

Joint Custody

California's Civil Code Section 4600, Section I, taking effect January 1, 1980 opens with a public policy statement of intent "...to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy." In addition, Section 2, Section 4600.5 (c) defines joint custody: "...an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with both parents;" Consequently, joint custody, as intended by the California statute is initially and primarily concerned with the joint physical aspect of custody described below under joint physical and legal custody.

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

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

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

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

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

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

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

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

Joint Legal Custody

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

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

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

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

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

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

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

Joint Physical Custody

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

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

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

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

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

Variations for sharing joint physical custody include:

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

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

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

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

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

Joint Physical & Legal Custody

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

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

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

March 4, 1981

Mr. Larry Sweet
1850 Roberts Road
Fairbanks, Alaska 99701

Dear Mr. Sweet:

I have not had a chance to study HB 210, but do have a lot of material in my file on this subject.

I expect to introduce a bill in the Senate which will probably be very similar, but not identical, to HB 210.

Sincerely,

Charles H. Parr

CHP:vc

COPY

April 28, 1981

Ms. Patty Meritt
Play 'N Learn, Inc.
547 7th Avenue
Fairbanks, Alaska 99701

Dear Ms. Meritt:

This is in response to your message of April 23 about HB 210.

If this bill does pass the House and come to the Senate, I will certainly be happy to give it consideration.

Sincerely,

Charles H. Parr

CHP:vc

1850 Roberts Road
Fairbanks, Alaska 99701
May 10, 1981

House Judiciary Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Representative Brown and Members of the Committee:

The purpose of this letter is to urge that you act on House Bill 210 this year which will provide joint custody for children. California has had a similar law in existence since January 1, 1980, and they have in their legislature at the present time a bill to add presumptive joint custody to their current law.

Nevada signed into law a joint custody bill last month; the states of New York, Florida, and Georgia are actively working on joint custody bills.

Presumptive joint custody is analogous to no fault divorce in that it takes the positive approach. Today it is no longer necessary to prove that one individual in a marriage is bad or wrong. Similarly it should not be necessary to prove that one parent or the other is unfit. But that is what we have today. In recent tradition mothers have always received custody. How can a father have a chance to get one half time with his children? By proving that the child's mother is an unfit person? In what percentage of situations is this actually the case? A Fairbanks judge recently told me that in his experience only 1 or 2% of cases he has seen is one parent unfit. This makes sense to me. Why must we then prove unfitness?

Presumptive joint custody takes the positive approach and can act to defuse manipulation, maneuvering, coercision or threat. It can remove the children from being used as tools for psychological or material gain. It can curtail child stealing.

I can speak from my own experience in obtaining joint custody in Fairbanks two years ago which left four individuals with shattered, bitter and acrimonious feelings. The text books say that joint custody can not exist without cooperation; that is not correct and I can speak for that.

I have found out in recent months that the Third Judicial District handles divorce entirely differently than the Fourth Judicial District. I am convinced that if HB 210 had existed as law at the time of my divorce then it would have been handled with some degree of ration, reason, and planning and four people would be in a better place then they are today.

For the legal professionals who are opposed to certain wording in this bill I urge them to suggest alternative wording rather than just being against it, and I further urge them to talk to the counselors, psychologists, and child psychiatrists about what is in the best interests of children. My own discussions with both groups shocks me to see how far apart some of their thinking is with respect to the impact on children.

Please pass some version of HB 210 this year.

Sincerely,

Larry R. Sweet

Larry R. Sweet

cc: B Rogers, C. Parr

SURVIVING THE BREAKUP

How Children and Parents Cope with Divorce

Judith S. Wallerstein

and

Joan Berlin Kelly

Basic Books, Inc., Publishers *New York*

The convergence of many factors led us to undertake a systematic investigation of the divorce-related experience of children and adolescents and their parents. Our study, which began in 1971 and ended in 1977, was designed to follow sixty divorcing families and their 131 children who were between three and eighteen years old at the time of the marital separation—following them from this beginning through their first five years within the divorced family.*

Initially, the plan had been to close the inquiry at the end of the first year. In accord with both conventional wisdom on these matters and crisis theory, we fully expected the transition period for most families

* For further particulars about both the design of the study and its population, see appendix A.

to have ended by that time, and we were eager to observe the process of the disruptions of divorce being resolved. We discovered that we were mistaken. Eighteen months after the separation many issues still remained unresolved in the lives of both parents and children. Feelings of anger, humiliation, and rejection were still running high; most adults had not yet reestablished stability and continuity in their lives, or order in their households. Moreover, an unexpected number of the children were on a downward course, compared with their overall functioning before the separation, and had not yet recovered their earlier developmental stride. For these reasons, our project was adjusted to conform to a more extended and realistic view of the postdivorce transition period, and redesigned to encompass the transition and the early years within the new family structure.

This book chronicles the experiences of sixty California divorcing families and their children. They granted us the singular privilege of significant access to their private lives, first during the difficult period of marital rupture, and then at specified intervals during the five years that followed. The project has no counterpart in the United States or in Europe because of the many years over which the cooperation of the divorcing families was sustained, the participation of so many children of different ages, and the kinds of questions which were posed. The findings provide the basis for this book: a detailed report of the continuity and discontinuity that occurred over the turbulent postdivorce years and insights into the consequences of these changes for children and adults, from which we derive certain conclusions and make certain proposals.

The study of divorce and children has been and remains a lonely field. As we end this decade the number of investigations, given the magnitude of the problem, is perilously low. Divorcing parents and their children have for some time been a population that is expanding explosively; yet its special needs are insufficiently recognized, little studied, and poorly served. Moreover, of those divorce-centered investigations that have been undertaken, only a fraction have examined the impact of divorce on children. One of the unhappy consequences is that the findings of this study in California, drawn primarily, but not entirely, from a white and middle-class population, must await comparison with those of families from other significant segments of the population whose experience may resemble or may diverge from these in important regards. For the present, we cannot know.

Chapter 17

The Implications of the Findings

In his first year at high school, five years after his parents separated, Jeremy chose to write a term paper entitled, *What Is Divorce Like In California Today?* In his preface, he explained, "I was interested in divorce because my mother and father had a divorce and I had a vague idea of what was going on, but I did not fully understand and now I do." "In this research paper," he continued, "I shall examine such aspects of the problem as statistics, causes of divorce, and psychological inferences." He concluded his introduction with, "Some joker has said the major cause of divorce is marriage. However, we all know this joke is no joke, especially when children are involved."

After a scholarly review of divorce statistics, the provisions of family law in California, and various theories of marital disruption carefully footnoted and referenced, Jeremy concluded, "My personal experience has been a sad one. My father picked up his suitcases one day and walked out, because, as he said, he wanted his 'freedom.' We thought we were a close-knit family and it was an unexpected shock. I was only nine and my brother was six and a half. It was the death of our family. Today we see him on visitation day, but it is an artificial situation. He doesn't really know what I'm all about. I have actually lived without a real father for five years; perhaps the most important years of my male life. My luck has been that I have a mother who picked up the pieces. She acted as both parents and made her goal to bring me up as a man with true values. Divorce can destroy. It has not destroyed me. I

was lucky. In my case, I think it added to my awareness and comprehension of what people and life are all about. Mainly trying to be less selfish, try to understand, rather than condemn. This is very difficult, sometimes impossible, but all I can do, right now, is to try a little harder everyday."

Divorce as an Extended Process

Although five years, or one-third of his life, have elapsed since the marital rupture, Jeremy's attitudes and feelings are not significantly changed. His anger at his father, his sense of rejection and betrayal by his father, and his strong attachment to his mother remain relatively undiminished by the passage of time or his developmental progress into adolescence. The carefully researched school paper also represents his active and resourceful efforts at mastery of the divorce experience; efforts which must continue over many years. These youngsters taught us a lot about the extended aftermath to the marital disruption: the staying power of feelings and the repeated and enduring efforts at mastery, which are brought into play at each successive developmental stage throughout the child's growing up years and perhaps into adulthood as well.

It is just this kind of experience, multiplied many times, that has not only affirmed our view of divorce as a process that takes place over time, but has also demonstrated that the timetable of the divorcing process is considerably longer than we initially supposed. The multiple changes in the individual lives of the adults and the children and in their relationships with each other, which were set into motion by the decision to divorce, exceeded our expectations in their drama, their complexity, and their widening effects. As we bring our study to a close, it is obvious that, for many children such as Jeremy, as for many of the adults, the divorce-related issues remain open and still infused with strong feelings. Perhaps this extended timetable is realistic and expectable, and we and others have been naive in expecting quicker integrations of these major changes precipitated by the divorce.

Divorce as a Several-Stage Process

The five-year perspective of our study enabled us to distinguish several stages in the trajectory of the divorcing process and to report separately on the experiences of the children and the adults during each of these separate, although overlapping, periods. We could follow the participants as they progressed from the initial stage of high stress to the transition period that followed and finally to living within the postdivorce or remarried family.

The initial period, following the decision to divorce and the parental separation, was profoundly stressful for almost all of the children and adolescents and for many of the adults. Feelings ran high in most families, and sexual and aggressive behaviors were no longer constrained by the marital structure. As a result, conflict often escalated and unhappiness was widespread. The children's acute responses to this stress were magnified by the parents' diminished capacity to parent at this time of crisis in their own lives.

By the end of the first year following the separation, the acute responses among the children had subsided or disappeared altogether. Many children recovered their usual functioning faster than their parents. Another unexpected finding was that girls recovered faster than boys. Those symptomatic behaviors of the children that remained after the initial phase were likely to have become chronic. The persistence of the acute early distress responses could no longer be attributed entirely to the stress of the family dissolution, but was now rather to be attributed to long standing stresses prior to the divorce or new ones in the postdivorce family.

The transition period which, in over half the families, lasted two to three years, was marked by many external changes in the social, economic, and family circumstances, as well as by changed relations within the family. Because the adults face a great many decisions which will affect the lives of the family members for many years to come and because of the relative fluidity of the family relationships at this time, we have come to consider not just the early crises but the transition period as well as the optimum time for interventions. We have attempted to capture the ambiance of this transition time in our separate reporting of the families' experiences at eighteen months after the separation, and particularly the shifting patterns in parent-child relationships which were characteristic of this period.

The third stage of the divorcing process that we observed at the five-year-mark and reported is that of the early years within the re-

stabilized postdivorce family or the new marriage. These families were a diverse group. Some of them had succeeded in creating a stable and loving home and in improving the quality of life for all of the family members. At the other end of the wide spectrum, the adults or the children, or both together, were unhappy or were no happier than they had been during the failing marriage.

There are significant differences in the experiences of adults and children during each of these three phases of a divorcing process, which is sometimes overlooked by researchers and obscured by the general question regarding the effects of divorce. Although the initial breakup of the family is profoundly stressful, the eventual outcome depends, in large measure, not only on what has been lost, but on what has been created to take the place of the failed marriage. In full and proper perspective, the effect of the divorce is an index of the success or failure of the participants, parents and children, to master the disruption, to negotiate the transition successfully, and to create a more gratifying family to replace the family that failed.

Perhaps we should add that there might, indeed, be an additional stage. We are aware, and Jeremy's paper reminds us, that the five years of the study represent our own stopping place and not the end of the divorcing process. It may well be that some important, undetected effects, whether beneficial or detrimental, will emerge at some future time, perhaps only when these youngsters marry and become, in turn, parents in their own right.

Differing Responses of Parents and Children

The troubling divergence between the wishes and attitudes of the children and their parents in regard to the divorce, which we noted at the time of the divorce decision, diminished somewhat by the end of five years, but had far from disappeared. We were surprised at first to find that many marriages that had been unhappy for the adults had been reasonably comfortable, even gratifying for the children, and that very few of the children concurred with their parents' decision or experienced relief at the time of the separation. Five years after the separation, most of the adults approved the divorce decision and only one fifth of them felt strongly that the divorce had been ill-advised. Among the children, however, over one-half did not regard the divorced family as an improvement over their predivorce family. Many of these young-

sters, some of whom were doing well, would have preferred to turn back the clock and return to the predivorce family, despite its remembered failings.

Furthermore, most of the adults, especially the women, were feeling better, despite the greater economic pressures and the many stresses of their lives in the postdivorce family. Their self-esteem was higher and their overall psychological adjustment was considerably improved. And, as we have described, many of their somatic symptoms and their psychological dysfunctions disappeared during the postdivorce years.

Unlike the adults who felt considerably improved after the divorce, the children and adolescents did not, as a group, show an improvement in their psychological health during the years following the separation. Only those children who were physically separated by the divorce from a rejecting, or a demeaning, or a psychiatrically disturbed father showed improvement comparable to that of the adults.

At the five-year-mark, one-third of the youngsters were lively, well adjusted, and content with the general tenor of their lives. Matching these in number were youngsters who were unhappy, still angry at one or both parents, still yearning for the presence in the family of the departed parent, still lonely, needy, and feeling deprived and rejected. We have attempted at some length to demonstrate the particular combination of factors during the divorce crisis and the postdivorce evolution that led to these different outcomes.

Perhaps it should be emphasized here, however, that over and beyond the psychological functioning and developmental progress of the children even among those who had made splendid progress and certainly among those youngsters whose adjustment was only adequate or barely holding, that all had the sense of having sustained a difficult and unhappy time in their lives which had cast a shadow over their childhood or their adolescence. For some, this divorce stress eventuated in greater sensitivity and compassion. For others, the continued stress was too great to master and proved overwhelming. But for all, a significant part of their childhood or their adolescence had been a sad and frightening time.

There is considerable evidence in this study that divorce was highly beneficial for many of the adults. There is, however, no comparable evidence regarding the experience of the children. There is, in fact, no supporting evidence in this five-year study for the commonly made argument that divorce is overall better for children than an unhappy marriage or, for its opposite argument, that living within an unhappy marriage is by and large more beneficial or less detrimental than living in the divorced family. Taking the population of the children as a whole, while noting considerable individual change, the distribution of healthy and impaired functioning among children and adolescents within the conflicted marriage when compared to that five years following the marital separation strongly suggests that the divorced family was

neither more nor less beneficial or stressful for the children than the unhappy marriage. Unfortunately, as we have noted throughout this book, neither unhappy marriage nor divorce are especially congenial for children; each imposes its own set of stresses.

Perhaps we should add as a cautionary note that the children within our study probably emerged at least somewhat or perhaps considerably better than a comparable group of children from nonstudied divorcing families by virtue of our limited intervention; the fact that we attracted parents with some continuing commitment to their children to participate in the study in the first place; and that the children were a relatively sturdy group of youngsters in that they had not been referred for psychological treatment at any time in their lives and had achieved age-appropriate learning and behavior within the school, despite their experiences and unhappiness within the failing and conflicted marriages. They were, moreover, drawn from a predominantly white, middle-class population and had been relatively protected from economic and social privation. It may well be that there would be considerably greater emotional decline among children in a general population.

The Continuing Psychological Importance of Two Parents

Within the postdivorce family, the relationship between the child and both original parents did not diminish in emotional importance to the child over the five years. Although the mother's caretaking and psychological role became increasingly central in these families, the father's psychological significance *did not* correspondingly decline. Even within remarriages, at least during the earlier years of these remarriages, though the stepfather often became very quickly a prominent figure to the children, the biological father's emotional significance did not greatly diminish, although his influence on the daily life of the child lessened. It has been, in fact, strikingly apparent through the years that whether or not the children maintained frequent or infrequent contact with the noncustodial parent the children would have considered the term "one parent family" a misnomer. Their self-images were firmly tied to their relationship with both parents and they thought of themselves as children with two parents who had elected to go their separate ways. It should be noted that all of these children, except for brief separations, had lived continuously with both parents prior to the divorce.

Perhaps, given the vicissitudes of divorce and the postseparation years,

each parent-child relationship is thrown in bolder relief. Lacking the intact family structure and physical presence of both parents, each parent-child relationship which is taken for granted in the intact family may become suddenly highly visible and may, in fact, be accentuated following divorce and even grow in importance, or at least be maintained in importance, by the child.

Certainly one characteristic of so many of these children was their acute, conscious, sometimes hyperalert monitoring of their parents and their parents' attitudes over the years. The cruel, erratic, openly rejecting behavior—or even abandonment—by a parent did not seem to dim the child's awareness of that parent and often did not diminish the child's compassion or longing. And as we have reported, only a few children when they reached adolescence were able to counterreject a rejecting parent with a conscious resolve to follow another road in their life by choosing to emulate another adult whom they had come both to love and respect.

Regardless of the legal allocation of responsibility and custody, the emotional significance of the relationship with each of two parents did not diminish during the five-year period that we have studied.

The Special Vulnerability of the Divorced Family

A further consideration is the fact that the developmental needs of children do not change in accord with changes in the family structure. Unfortunately, it appears clear that the divorced family is, in many ways, less adaptive economically, socially, and psychologically to the raising of children than the two-parent family. This does not mean that it cannot be done. The children in our study who made excellent progress attest to its feasibility and to the combination of heroic efforts of parents with the resiliency of children. And, as we have seen, where one or more children were of the age, the capacity, and the inclination to take responsibility for themselves and others and to contribute to the work and emotional support of the household, the divorced family provided not only a "good enough" milieu, but one that fostered maturity and mutual devotion between parent and child. But, the fact remains that the divorced family in which the burden falls entirely, or mostly, on one parent is more vulnerable to stress, has limited economic and psychological reserves, and lacks the supporting or buffering presence of the other adult to help meet the crises of life—especially, as we have shown, the crises of physical or psychiatric illness. Even when two parents share custody and

maintain their love and commitment to the children, the responsibility for raising the children usually devolves more on one parent than on the other and rarely, if ever, approaches the mutual support that parents provide for each other within the stable marriage. And, as we have reported, the chronic emotional and economic overload was frequently intolerable for the custodial parent, and the cumulative effect on the children was all too visible in their unhappiness and depression.

Our considerable concern increased over the years as we became familiar with the extraordinary absence of supports in the social surround, which appeared to be characteristic of so many middle-class families within our population. Perhaps the absence of supports places children in white, middle-class families in some ways more at risk during periods of stress than children in other socioeconomic and ethnic groups who have a sense of extended family and community.

Furthermore, our findings reflect the significance of the parenting that is going on within the present. Those children who did well were well-parented by at least one parent at that time. It appears that the nurturance provided during earlier years will hold the child for a while, but that good, or at least "good enough," parenting continuing over time is needed to safeguard and to maintain good developmental progress in children.

More than any other constellation of factors the disrupted or diminished parenting by one or both parents was associated with the dismayingly high incidence of depression which we found at each of the checkpoints of the study and most especially at five years. In fact, the five-year postseparation incidence of depression which was higher than that observed at eighteen months postseparation reflects the stresses and emotional deficits of the postdivorce family well after the acute responses to the breakup have subsided or disappeared altogether.

This ongoing need by the child for competent, nurturant parenting places a continuing demand on the parent who assumes full or major responsibility for the child's upbringing. In order to fulfill the responsibility of childrearing and provide even minimally for the needs of the adult, many divorced families are in urgent need of a formal and informal network of services not now available to them in the community. The first steps toward easing the burdens of the parent and enhancing the quality of life within the family should include, our findings indicate, setting child support payments at a level that reflects realistically the cost of raising children; providing educational, vocational and financial counseling combined with training and employment programs for adults returning to the economic or professional marketplace after a several-year absence; enriched child-care and after-school programs and facilities for children of various ages as well as divorce specific counseling programs (which we will describe later in this chapter). Although it is still not clear whether and to what extent supportive services are able

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

Issues of Custody

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

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

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

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

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

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

Building Blocks for Constructing Preventive Intervention

We began this work with the conviction that divorce is and should remain a readily available option to adults who are unhappily married. Our findings, although somewhat graver than expected, have not changed our conviction. They have given greater impetus to our interest in easing the family rupture for children and adults alike and in providing a knowledge base in the real experiences of divorcing families for informed parenting as well as for improved legal, educational, and psychological interventions which can prevent, or at least mitigate, unhappy and psychopathological outcomes for the children.

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

Therefore, a major goal of our work, which we described at the outset, was to formulate beginning models of expectable response or norms for divorce-related reactions of children and adolescents and their expectable duration following the marital rupture. The unavailability of such formulations or norms has severely handicapped parents and those who undertake to help parents in their efforts to fashion appropriate measures which will provide comfort and relief to the children. Additionally, in the absence of knowledge regarding normative responses and the expectable duration of these responses, it has been difficult to identify those children whose behavior reflected the need for special interventions.

Our study has indicated that divorce is predictably extremely stressful to most children and adolescents and that the physical separation of the parents, which was regarded by most youngsters as the central divorce event, precipitated a wide range of feelings and behavioral changes at home, at school, and on the playground. Despite significant individual differences, the children's age and developmental stage appeared to be the most important factors in governing their initial responses. The stage of development profoundly influenced the child's need of the parents and perception of the stress, as well as the child's understanding, coping, and defensive strategies.

The patterning of response into these four age-related groupings—preschool (two and a half to five), early school age (six to eight), later school age (nine to twelve), and adolescence—may provide the basis for the beginning norms which we have sought. Precisely because we did not start out with these a priori groups and because the patterns which we have conceptualized did not primarily reflect the individual's family experience or the child's predivorce experience, and did reflect the age and developmental achievement of the child, we propose that these groupings are likely to have wide applicability to children in many divorcing families. They may reflect children's responses to acute stress within a more general framework—and not only to marital rupture. Perhaps their usefulness will extend only to predominantly white, middle-class children in communities where the nuclear family is the predominant family structure. Or it may be that we will find that some major experiences, such as loss, death, and divorce, and the feelings that they evoke in children span broad social, economic, racial, and ethnic differences.

As an example of one such formulation, we have suggested that the preschool child, following the marital rupture, is likely to regress behaviorally; is likely to be preoccupied with anxiety about who will provide the continued care which the child feels that he or she requires; is likely to worry about being abandoned by both parents; is more likely than his or her older siblings to feel responsible for causing the divorce and driving one parent away; is likely to be troubled at the many

separations of day and bedtime and to find these threatening and distressing; is likely to be tearful, irritable, and more aggressive; and is likely to suffer an inhibition in play. Although the preschool children often suffer more intense fears than their older siblings, and have fewer inner resources to help them, their fears are more easily allayed by concerned parents and their symptoms yield more quickly to appropriate reassurance and continued contact with both parents.

The findings among children within the other age groups can be similarly extrapolated to suggest a particular range of expectable behaviors. There is not enough evidence at this time to suggest that behavior that does not fall within these ranges is deviant. Nor is there evidence to suggest that children who show little or no overt change in feelings are either more or less troubled than their peers who appear more openly distressed. The considerable usefulness of these norms that we have suggested is that they may serve to alert adults toward future behavior of the children and to facilitate sensitive and informed parenting as well as professional advice.

When to Divorce

Within this frame of reference of beginning knowledge of responses and expectable outcomes, and drawing on our findings at the five-year mark, we can approach the question parents frequently ask, namely, "Should the children's ages govern the timing of our divorce decision?" or, as more frequently put, "Should we wait for the children to reach a particular age before divorcing and what would that age be?"

Our findings suggest that in the long run neither age nor sex are central factors in determining outcome. At the onset young children tend to show more acute and more global responses to the divorce than their older brothers and sisters. And girls, as we have described, tended to recover significantly faster than boys from the initial unhappy reaction to the parental separation. But, by five years, the factors that contributed to good outcome and to poor outcome were related to the configurations of factors which we have elaborated and which reflect primarily the quality of the relationship with both parents, the quality of life within the divorced family, and the extent to which the divorce itself provided the remedy which the adults sought. Neither the age nor the sex of the child were as relevant at this time.

Thus, the age of the child should be carefully considered in anticipating expectable early responses to the parental separation and the average

duration of these responses. Further, the age of the child should be considered carefully in providing the appropriate explanation of the parental decision, in supporting the child, and in establishing appropriate postdivorce family arrangements. The readiness of the parents to provide the appropriate supports to the children and to make and implement careful planning on behalf of the children should enter prominently into the timing of the divorce decision.

Perhaps we should add that little is known of the psychological effects of burdening children with the knowledge that their parents remained together within an unhappy marriage on their behalf. Our sense is that this would tax the child heavily.

At What Age Should Children's Preferences Be Followed

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

One unexpected finding which emerged serendipitously in our search for norms was the dividing line between those children in the first three grades and those in the fourth to sixth grades in their responses to the family rupture and in their relationships with both parents. Psychological theory, while recognizing the continued developmental progress of the child, does not shed light on some of the significant attributes of children at the threshold of adolescence. The long-lasting anger of children in the nine-to-twelve-year-old group at the parent whom they held responsible for the divorce; the eagerness of these youngsters to be co-opted into the parental battling; their willingness to take sides, often against a parent to whom they had been tenderly attached during the intact marriage; and the intense, compassionate, caretaking relations which led these youngsters to attempt to rescue a distressed parent often to their own detriment have led us to rethink our expectations of these children. Furthermore, their particular age-related propensity to split the parents into the "good parent" and the "bad parent" (which was often at odds with the role of the respective parents over the years and which seemed to be rooted primarily in the children's own acute fears) led us further to doubt their capacity to make informed judgment about plans which would be in their own best interests. These observations, and the fact

that several of the youngsters with the most passionate convictions at the time of the breakup later came shamefacedly to regret their vehement statements at that time, have increased our misgivings about relying on the expressed opinions and preferences of youngsters below adolescence in deciding the issues which arise in divorce-related litigation.

Some Expectable Changes in the Parent-Child Relationships

The many observations about parent–child relationships which we have attempted to report in detail offer another set of building blocks for preventive or clinical intervention and enlightened parenting.

We have reported as widespread a diminished capacity to parent at the time of the family breakup which, while often temporary, may have long-lasting implications and may significantly affect the coping capacities of both children and adolescents and the perseverance of symptomatic behaviors and distressed feelings.

Additionally, a range of expectable patterns of behavior parallel to those which we have proposed for the children's reactions emerges regarding the child's relationships with each parent at nodal points during the divorcing process. We have at some length considered the visiting relationship, spurred on by our surprising discovery that by eighteen months after the separation there was no correlation between the regularity or frequency of the visits by the parent and the predivorce relationship. Recognizing that the part-time parent/part-time child visiting relationship has no real counterpart within the intact family, we have attempted to elicit those factors which promote and foster the continued relationship of the visiting parent and the visited child and those factors which are likely to contribute to its diminution. These and related findings regarding the difficulties inherent in the visiting relationship, its early fragility, combined with its long-term importance for the child and perhaps the father and mother as well, all have many implications for parents, for those who aid parents, and for the courts. Our findings argue against burdening the visiting relationship with severe restrictions of legal constraints which make it more difficult for parents and children to seek out each other's company in response to their own wishes or needs.

Similarly, we have been impressed with the vicissitudes of the relationship between the custodial parent and the child. Such relationships may cause distress and confusion for many parents which decrease their

capacity to distinguish the children's needs from their own and which are detrimental to discipline and orderly household routines. However as the changed perceptions that occurred in the wake of the parental separation were accepted, there gradually (sometimes very gradually) emerged improved relationships and a real sense of a "new chance."

The psychological consequences of these changes for the children and for the adolescents have held our attention as we have come to regard these changes as centrally significant—and as expectable components of the divorcing process. Although these changes and their respective outcome reflected age and developmental differences among the children, they also reflected sex differences and sibling order and sibling relations as well as considerably individual variation.

The Postdivorce Family

A major conclusion regarding the effects of divorce is that the relationships within the postdivorce family are likely to govern long-range outcomes for children and adolescents. Put simply, the central hazard which divorce poses to the psychological health and development of children and adolescents is in the diminished or disrupted parenting which so often follows in the wake of the rupture and which can become consolidated within the postdivorce family. Thus when the divorce is undertaken thoughtfully by parents who have carefully considered alternatives; when the parents have recognized the expectable psychological, social, and economic consequences for themselves and the children; when they have taken reasonable measures to provide comfort and appropriate understanding to the children; where they have made arrangements to maintain good parent-child relationships with both parents—then those children are not likely to suffer developmental interference or enduring psychological distress as a consequence of the divorce. Even though the children may still regret the divorce and continue to wish that their parents had been able to love each other, some of these children may nevertheless grow in their capacity for compassion and psychological understanding.

Alternatively, if the divorce is undertaken primarily as a unilateral decision which humiliates, angers, or grieves the other partner and these feelings continue to dominate the postdivorce relationship of the divorced partners; if the divorce fails to bring relief from marital stress or to improve the quality of life for the divorcing adults; if the children are poorly supported and poorly informed or co-opted as allies or fought over

in the continuing battle and viewed as extensions of the adults; if the relationship with one or both parents is impoverished or disrupted, and the child feels rejected; if the stresses and deprivation of the postdivorce family are no less than those of the failed marriage—then the most likely outcome for the children is developmental interference and depression.

The end result of a successfully established postdivorce family can be an improved quality of life for adults and for children. The results of the failed divorce are likely to be low self-esteem and depression, accompanied by a continued feeling of deprivation or continued anger for children and adolescents which can endure for many years.

Help for Divorcing Parents and Their Children

During the next decade the expectable life cycle of a significant proportion of American families is likely to include divorce and remarriage. Perhaps it is time to take their needs seriously--to provide help which will safeguard the children and provide guidance to their concerned parents. Our findings amply document the freestanding character of the nuclear family at these critical junctures; the striking unavailability of supports for the children, and the absence of resources for information and guidance. Parents who are uncertain about what to do have no reliable place to turn. Most cannot draw on their own personal histories for models in their new situation; there is little accumulated wisdom and the many new roles of the visiting parent, joint custody, father custody, and stepparent are in the process of evolving—and the rules are not clearly defined. As a result, people are thrown back even more on the passions or anxieties of the moment in making decisions with long-range consequences for themselves and their children.

It is a curious phenomenon that family policy in this country has recognized the state's responsibility to offer services in family planning, for prospective children still unborn, but has left parents alone to deal with most of the issues that arise after the children are born. Perhaps the time has come for a more realistic family policy, one that addresses the expectable metamorphoses of the American family and the stress points of change.

Divorcing parents, as we have seen, face a bewildering array of tasks in putting their own lives in new and better order and in shaping the relationships of the postdivorce family. Many will need help in setting up postdivorce arrangements for the children and especially in arriving

at the mutual understanding on which such arrangements must be based in order to endure. For people who have decided to separate from each other in sorrow and anger, joint planning is very difficult to achieve.

Many adults will need the skilled help of a neutral counselor or clinician who is well versed in the psychology of children and in the knowledge of the expectable effects of divorce on the child's development and the parent-child relationship. Such help, we propose, should be made available to divorcing families. We have come to regard the ready availability of such services as a necessary adjunct in a responsible society to the accessibility of divorce. As our experience has convinced us, guidance for parents is needed, welcomed, and well used if offered appropriately at the right time and within the right context. The timing of the help early in the divorcing process is crucial to its success.

Even within our own very limited intervention, two-fifths of the men and a somewhat greater number of the women characterized the counseling which was offered as useful and supportive and were still following suggestions which had been made at the first meetings five years earlier. Long before we knew what we have since learned, one of our first surprises was the avidity with which parents, especially fathers, whipped out pad and pencil and wrote down our suggestions. We wondered then what we had said that they considered worth noting. Gradually, we realized the extent of their perplexity and their great need for guidance which led them to grasp at our sometimes very obvious advice.

People need help as the marriage declines and at the point that they decide to divorce. They don't know how to tell their children and, as we have seen, they often neglect to do so. They need help in providing proper support to the children during the transitional time. They need help for themselves and their children, in preparing for the many changes (economic, social, and psychological) which are expectable in the postdivorce family and in setting up appropriate joint plans for continued care of the children when at all possible. Parents may also need help later on as they contemplate remarriage and wish to prepare themselves and their children for the gratifications and tasks which they are likely to encounter within the remarried family. They will also need help for themselves at each of these junctures. We are hopeful that the findings of this study can provide beginning guideposts at the critical turns along this road.

Finally, it should be noted that divorcing with children requires of the adults who had once been together the capacity to maintain entirely separate social and sexual roles while continuing their cooperation as parents on behalf of their children. This is difficult and requires the kind of commitment that parents have often, but not always, made to their children. Perhaps only a society which values continuity in relationships and steadfast commitment to its children is likely to reward such complex behavior with approval sufficient to enable it to happen.

ughout the centuries of recorded history, law has been tra- ly interested, as a matter of public policy, in the strengthening of fe, an attitude that has always regarded the family as a source of h and stability in our society. Today, family law continues to be a ensitive area of public and personal law, where we deal with the notional and personal aspects of our lives. If our legal system is to l constructively and flexibly to Americans' evolving life-style, we ovide leadership to strengthen the family with psychological and ical support and meaning to meet out challenges of today and w.

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Joint Custody:

A Viable and Ideal Alternative

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ABSTRACT. This article will attempt to define and restructure the custodial rights and remedies of parents involved in a divorce proceeding. The purpose of the article is to convey an alternative to custodial awards as they exist today, and to point toward joint custody as an ideal solution and viable alternative that cries out for acceptance. Joint custody, as shown hereinbelow, is viable and practical because it maintains the much-needed familial structure in our society.

The issue of custody in matrimonial proceedings demands more than our present judicial systems offers. Custody hearings have been under close scrutiny from concerned laymen and professionals. A most poignant criticism of the hearings is that they tend to perpetuate prolonged hostilities and unnecessary trauma. The divorce rate continues to climb, and the nuclear family system continues to falter. Moreover, new concepts of manhood and womanhood are challenging and changing traditional expectations of parenthood. Though our judicial system is trying to adapt, the system needs a new conceptual outlook toward custody awards in divorce if it hopes to help recently divorced parents find stability for their future relationship with their children. At present, however, a basic inequity thwarts stability of postdivorce family relationships: custody awards are made to one parent only, and thus the relationship between the noncustodial parent and his child becomes one whose existence is dependent upon the benevolence of the custodial parent. Our present judicial system thereby dictates that postdivorce families are unbalanced families.

Custody means having possession, power, authority, and responsibility for the children. The noncustodial parent's relationship with his children is usually, though not entirely, repres ed, caref lly delineated, and

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narrowed by the power and extent of the custodial parent's desires. The custodial parent unilaterally possesses the power to determine the child's life, for better or worse. This article will analyze the present structure and system in an attempt to point toward joint custody as an ideal solution to the present inequities.

Changes in the competition for parents' custody rights have been an evolutionary development. In the nineteenth century and the beginning of the twentieth, the prevailing cultural attitude was profoundly different from today's. Custody then was arbitrarily awarded to the father as a matter of course. (For a fuller discussion of the historical perspective, see Derdeyn 1976.) Children were considered to be the father's property, and mothers were considered incapable of supporting the children. These dogmas were challenged and eventually destroyed by the movement toward equal rights for women and by the impact upon the judicial system of the study of psychology. Consequently, society's views were reflected in the "tender years" doctrine, wherein it was suggested that a mother should presumptively be given custody when children were in their tender years, usually up to the age of six or seven. Thus, mothers were then able to wrest the power of being the primary parent away from the father.

Partially because of the ongoing equal rights movement for women, the evolutionary change continuing today is that fathers are competing for the same custodial power they once had almost by divine right. This power struggle leaves the judicial system in a quandary. No matter which parental mode is considered superior, the effect is that the excluded parent and his relationship with his child is arbitrarily denied natural rights and needs. The problem is exaggerated, moreover, by the collateral beliefs that one parent must be awarded custody and the other excluded; and in order to make this one-sided award, one parent must be declared superior to the other. These beliefs are antiquated and wrong. The ideal solution to the problem is joint custody; that is to say, if an award must be made, the award must be made to both the mother and the father for custody of the children for their postdivorce family relationships. This solution is an obvious answer to present challenges and past disastrous experiences. The concept and ideal of joint custody more nearly reflects the psychological and legal realities of the family-oriented society wherein we live.

Joint custody is a new way of defining and structuring a postdivorce family's relationships. The concept of joint custody has received some publicity and support from practitioners (see Baum 1976; Dwyer 1974; Holly 1976), and it is being met so far with both welcome and skepticism. Essentially, joint custody means that divorced parents agree to continue to act as parents and share as equally as possible the responsibility for the

decisions concerning their children's health, education, and welfare. Both theoretically and in practice the parents must agree to act in concert, between themselves and among their children, on decisions affecting the children's place of residence, the amount of time spent with each parent, the quality of life of the children, and the financial responsibility that each owes to their children. Joint custody simply does not mean that one person is to have a child for six months and the other for another six months, though it can mean a sharing of the living arrangements. Joint custody is more than an arrangement wherein one child resides with two parents—it is a flexible and open arrangement for living, sharing, and loving. No one model is adequate to describe the possibilities opened by joint custody arrangements to postdivorce families, because the ultimate decision of the practical aspects concerning joint custody must rest with the individual family, and its actuality is hence dependent upon the family's own talents, values, needs, and resources. In principle, therefore, both the mother and the father must have equal power, liability, and responsibility. The divorced parents must choose to exercise this power and responsibility according to their individual preferences, needs, and desires.

Joint custody is not a solution for all people but rather must be the product of an "agreement" entered into by the divorced parents. The skepticism toward joint custody rests upon the expectation that divorced couples would be least able to enter into a joint custodial agreement. This argument is specious. To divorce is not necessarily an immature decision. A divorced couple must be able to negotiate and compromise. In all matrimonial proceedings where children are involved, aside from the cause of action, the parties must concern themselves with financial as well as custodial issues. If the parties can reach accord on financial decisions, the far greater issue of custody, though more complex, may be negotiated. That is to say, if the best interest of the child is the primary motivating factor, that interest must be decided by the persons most familiar with the issue, the parents. The parents, in negotiating an agreement, can and should call upon the use of experts such as attorneys, counselors, psychiatrists, psychologists, clergymen, and social workers. Parents are capable and must make those decisions.

The soaring rate of divorce, the rapidly changing definition in the roles of womanhood and manhood, and the subsequent effect of these changes upon the traditional models of motherhood and fatherhood are bringing our culture to the point where we must sooner or later realize that instead of trying to force new wine into old wineskins we must point to new methods of aiding postdivorce families to restructure their primary relationships in life. To do otherwise is to perpetuate needless repression, as exemplified by the contest of superiority between

motherhood and fatherhood, and unnecessary trauma, as exemplified by the resulting disruption to a family's homeostasis when one parent is considered superior to the other.

Since our culture is changing its basic family relationships faster than the legal system can and should perceive the emergent patterns of these changes, not only are new definitions of family structures necessary, but the ideal of joint custody is a potentially major new aspect of these needed definitions and structures that our present culture is demanding. Joint custody may not be the answer for all people, but one must realize that society will respond maturely when a viable and wholesome alternative is offered to the present inequities and seemingly chaotic changes.

Divorce has been recognized as a major life trauma, psychologically comparable to the death of a loved one. As a trauma, it is an experience imbued with the emotional reactions of loss, shock, and grief associated with death, as well as with the hopes and dreams associated with rebirth. A divorced couple with no children may cope with this emotional process by never seeing one another again, but a postdivorce family with children must live with the loss, and struggle to find new familial stability. Divorce does not end relationships in postdivorce families, it changes them. A postdivorce family is still a family, and a family by anydefinition is a unit of intimate, interdependent relationships. Even though the man and the woman are no longer husband and wife, they are still, and must be, mutually dependent upon one another, in very practical ways, as father and mother to their children. This mutual dependence is shared, in turn, by the children in their relationships with their parents, and the whole unit of interdependent relationships is psychologically irreducible and inseparable. The reality of this interdependence is thus the soil for either continued pain, bitterness, hostility, and resultant courtroom battles, or it is the soil for acceptance and regeneration. Joint custody is a concept that provides a better opportunity for the children to maintain a close relationship with each parent and thus gain the benefit of two separate but interdependent homes. It is thus incumbent upon the judicial system to adapt to the reality of the process of loss and new life, and to the reality of the irreducible nature of the mutual dependencies in the family system, by adjusting the system accordingly.

The point of this article is not to deliver a condemnation of the judicial system. The reality is not that simple, for the legalities of the situation are merely reflections of sociological values. As the custodial trend shifted toward the mother during the turn of the century it was then a reflection of cultural changes. A primary reason for the trend toward awarding custody to the mother was the development of the science of psychology. As the science of psychology developed, old and traditional human values of acceptance, warmth, respect, and love became newly

defined in the langauge of repression and free association, as well as of id, ego, and superego. When these essential and traditional human values were not experienced by an individual, psychology was able to describe and envision the effects of this deprivation upon human personality. At bottom, psychology demonstrated that individuals need to feel wanted and loved, and to have a sense of dignity and self-esteem because of the love they give and receive. This attitude toward life is hopefully learned and basically patterned in the early parent-child relationship, but it is ultimately the individual's own choice and responsibility. Without a "basic trust," in the Erikson sense, without faith, hope, and love the world appears to be threatening and hostile; against such a world one would need to build internal defenses that can distort not only the appearance of the world but also our basic characterological structure. Thus the extent of our isolation from the real world, and the extent of our defensive structures, can lead us to become neurotic, psychotic, or have a personality disorder.

Therefore, psychologically at least, the quality of mothering took on a new dimension and importance. Because a mother was the primary parent to the infant, the mother's emotional responses to the infant were found to have an immense impact not only upon the infant's degree of basic trust in life but also upon his emotional dependence and independence, his amount of curiosity, his basic sexual identification, his strivings for competition and compromise, his relation to authority, his degree of emotional expression and control, his capacity for intimacy, and the amount of satisfaction and security he gleans from life. In effect psychology revalidated the fact that good mothering produces emotionally healthy children.

The focus on mothering, while helpful and needed, has in part produced the present overemphasis upon motherhood. The result of this overemphasis has had dramatic effects in our society and hence in our legal system; consequently, by an overwhelming majority, custody awards have been made in favor of the mother. There is a growing body of psychological literature now concentrating on fatherhood, however, and its dominant message is to the effect that fatherhood is as important as motherhood. Psychology is once again reaffirming and redefining common sense.

The roles of parents in many ways should and do overlap. Children need the basics, that is, nurturance, attention, caring, guidance, and warmth, from both parents, but there are stylistic differences. Traditionally, mothers have been the caretakers of the home, and the fathers have been the breadwinners. These roles have their biologic roots in the fact that women have the physical capacity to give birth and nurse, whereas men, because of their usually larger physical size, greater muscle mass, higher energy level, and greater aggressiveness, have been

the main protector of the home and the breadwinner (Lynn 1974, pp. 23-24). Recent studies have enlarged upon this picture of fatherhood by showing that fathers are more likely than mothers to be the parent more concerned with the child's sex role identification (Lynn 1974, p. 154) and with the child's eventual place in society (Lynn 1974, p. 166). Traditionally, as well, the father has been the final authority in the home. Used constructively, this authority is of great benefit to a child's sexual identification, for it may be used to enhance the child's personal sense of femininity or masculinity (Lynn 1974, pp. 154, 159). Moreover, this authority is a necessary enabling factor to a child's future role in society, for it may be used to enhance a child's moral development as well as his ability to express or to inhibit his aggressiveness in appropriate ways (Lynn 1974, p. 213). Good fathering produces children who are secure and have a purpose and direction in life and who are competent in what they do. Bigner (1970) sums it up this way: "Research has shown that the father's greatest impact on his children occurs primarily in those areas involving psychosexual, personality, social and intellectual development. In essence, current research has suggested that there is more to the parent-child relationship than that involving the mother and the child." Succinctly, good fathering produces emotionally healthy children.

It is clear, then, not only from psychological studies but also from common sense, that both mothering and fathering are essential to a child's emotional well-being. Motherhood and fatherhood, though they may overlay one another, are also separate and unique. In practice they tend to complement one another for the child's optimum development. Essentially, though, and beyond stylistic differences between mothering and fathering, parenting is a learned form of behavior. The most important factor involving parenting is "the personality of the person doing the feeding and the environment inwhich the child is fed" (Farrell 1974, p. 113). It follows, then, that the more fathers become experienced parents, on a daily interactional basis with their children, the more they become unwilling to divorce their children when they divorce their wives.

The psychological impact of divorce upon a child is also becoming more researched and well known. The basic loss a child experiences is the stability of the parenting, and this happens most profoundly in the absence of one of the parents from the home. In psychological literature the loss is called "father absence." Lynn (1974, p. 279) describes the state of the literature this way:

The research on the relationship between father absence and the general level of the child's development reveals that the loss of a father for any reason is associated with poor adjustment but that absence because of separation, divorce, or desertion may have especially adverse effects. The consequences may be more pronounced in general for boys than girls. However, father loss seems especially detrimental to the adolescent girl's ability to interact appropriately with males. The younger the child when father absence occurs and the longer the extent of his absence, the greater may be the resultant disturbance.

If the custom of maternal custody awards were reversed, we might have literature on "mother absence," but the loss of either would probably be the same. The Children of Divorce Project, from Marin County, California, reports that its studies show, in part, that the effect of the loss of a parent upon a child is demonstrated by feelings of anxiety, fear of losing love for himself, guilt, shame, and profound sadness (Wallerstein and Kelly, forthcoming). Each child must struggle in one way or another with his new reality and find a manner of coping with this loss. The manner of coping may be either healthy or disturbed, for the manner depends upon the real parental support he receives to help him cope. Other studies show that the predominant patterns of disturbed functioning in boys, especially those whose father left the home before they were six, seem to be found either in a feminization of their maleness (Bigner 1970, p. 359) or in a rebelliousness to society in the form of juvenile delinquency (Farrell 1974, p. 117). In girls, the impact of a father's absence is again felt to be more acute in the early years, and its effects, according to Hetherington (1976), "appear during adolescence and manifest themselves mainly as an inability to interact appropriately with males." More specifically, these effects appear in insecurity with men to the point of immature seductiveness, increased sexual activity with their adolescent male peers, and in adverse feelings toward their fathers (Hetherington 1976, p. 51). Lastly, the real emotional impact of divorce and the loss of a parent upon children is just beginning to be known. Hetherington (1976, p. 52) says: "Although research on boys found that the effects of father absence tend to appear early and decrease with age, the effects on girls remain latent until adolescence. Our study suggests that future work on the effects of father absence on females may find its most important evidence in the lives of mature women."

The least we may be able to formulate from these studies is that if children are not able to cope with the loss of a parent, they risk not only [illegible]ating their parents' emotional conflicts in their own lives but also [illegible]ng some degree of impairment in their psychological development because of their traumatic loss. Moreover, the risk is real, and acute. Kalter (1977), for example, reports that children of divorce are referred for outpatient psychiatric evaluation at nearly twice the rate of occurrence in the general population. And Wallerstein (1974) reports that 47 percent of the children in a sample study of preschool children of divorce "appeared in considerably worsened psychological or developmental state at the checkpoint of a year following the initial findings."

Children need a balanced set of parents to interact with them constantly and continually. In divorce a major trauma occurs that upsets this balanced need, and unless major supports are adequately given to a family in the midst of divorce, the strong likelihood is that the trauma will linger on long after the actual divorce and thereby be destructive to both the family and society. This is why we feel that if parents divorce, joint custody helps answer the needs of the child, of the whole family unit, and of society.

If not joint custody, then matrimonial courts must face and make Solomon-like decisions. That is to say, the courts must weigh one spouse's rights against the other, one spouse's abilities against the other, one spouse's assets against the other, and one spouse's liabilities against the other, in order to determine what is in the best interest of the child, so that custody may be awarded to one and not to the other. To some, namely, Goldstein, Freud, and Solnit (1973, p. 53), this burdensome situation is the "least detrimental alternative." They support one-parent custody awards because they fear further immobilizing of children's psychological adaptiveness in divorce by compounding their trauma with loyalty conflicts (Goldstein, Freud, and Solnit 1973, p. 38). Joint custody would ameliorize this potential conflict since equalized parental power over the long run would create détente, not continued hostilities. Moreover, their concept of excluding the noncustodial parent from having legally enforcible visiting rights out of a desire to provide continuity to the child (Goldstein, Freud, and Solnit 1973, p. 38) can only be seen as a highly misplaced and distorted way of loving; to try to erect such broad and permanent obstacles to natural human relationships is simply barbaric. True emotional stability occurs in an atmosphere of respect, trust, and love, not in an atmosphere of outright repression and rejection.

To others, however, the need of "having" parents is absolute. Boszormenyi-Nagy (1977) states: "The child's main interest throughout the phases of parental strife and divorce [is] the preservation of his organic community, his family of origin." He goes on to stress the importance of the "availability of relationship with as much of his integer family of origin as possible. It amounts to irrational grandiosity on the part of either a spouse or of a court to believe that the parent-child relationship involving the other spouse should or could ever be really made non-existent." From a family therapist's point of view, then, the continuity a child needs in postdivorce living is in the availability of all relationships, not in repression as we practice today in one-sided custody awards.

How our judicial system might effect this new stability of joint custody may be seen by analyzing the present structure from a psychological point of view. The responsibility upon judges in deciding custody matters is especially quite burdensome. Like children running to their parents to complain about their sibling, parents go to court to settle those disputes they cannot amicably settle themselves. This parent-child relationship between the judge and the litigants is given legal substance by laws imbuing the judge with the power of *in parens patriae*. On the one hand, this is proper since someone must be called upon to decide custodial matters with authority. The parents, by their lack of agreement, do in effect give their authority to the judge. But, on the other hand, the courts cannot hope to settle custody disputes amicably when parents cannot do that themselves.

The adversary system may endeavor to promote equity in custody proceedings, and resolve this circular quandary, if it were to look toward joint custody as a viable alternative. No one, least of all the children, "wins" or "loses" when the general parental relationship is encouraged by the judicial system to be hostile, faultfinding, conceited, and game playing (see, for example, Lindsley 1975; Noble and Noble 1975). Judges themselves are sensitive to this fact, and they know their limits (Lindsley 1975, p. 1). In this regard Goldstein, Freud, and Solnit (1973, pp. 49–50) aptly stated: "While the law may claim to establish relationships, it can in fact do little more than give them recognition and provide an opportunity for them to develop. The law, so far as specific individual relationships are concerned, is a relatively crude instrument." Even with such a "crude instrument" judges must judge, if only for the reason that parents compel society to settle what they themselves cannot settle. The power judges do have in this situation is considerable, however, if we place emphasis on power to provide an opportunity for relationships to develop.

To be sure, there are many divorced couples who perennially choose to bicker and fight, as if they were still married. However, we cannot expect peace and order when one-sided decisions create imbalance and disharmony in the postdivorce family structure. A normal response to a threat of loss is to fight, and a structured imbalance in the emotional sense thus means sowing the seeds for a disturbance in the finely woven set of interdependent relationships that families have as their basic emotional matrix for their lives. Joint custody does away with the threat of loss of parent or of child by structuring *in* relationships instead of structuring them *out*.

In the light of this psychodynamic between the court and the litigants, we feel that joint custody would provide a better opportunity for relationships to develop. In reality, it means giving the divorcing couple, who are in shock and trauma, no threat of loss, but an opportunity to wield the parental authority only they can best wield. However, joint custody cannot happen easily; it mandates supplements to the adversary system, such as a marriage and divorce counselor to confer with the judge on decisions (Fisher 1968) or a family therapy and family systems

expert to participate in these decisions (Boszormenyi-Nagy 1977). These suggestions, and more, should and must occur amongst concerned parties. With divorce happening at its present increasing speed, our stability as a family-oriented society is weakened. We desperately need new ways of adapting to the changes as well as new ways of defining postdivorce family strucutres.

We feel that a potentially central feature of new structures for postdivorce families is joint custody. We cannot expect every parent to choose to be mature about being a father or a mother, but we can expect them to try to act like mature parents if we give them the legal coequal power that is their physical and emotional right and responsibility. We must be able to teach them that a family is still a family, even though a husband and wife may divorce. Such a family has dramatically changed, so much so that the fundamental basis of the family, the husband-wife relationship, is dissolved legally and, hopefully, emotionally. But it is still a family when seen through the eyes of the next fundamental family relationship, that between the parents and the children. From the point of view of the children's emotional and developmental needs, this family system still needs to function and operate on a freely interacting, evolving basis. Moreover, the children's developmental needs will continue to operate in this manner no matter what artificial means we use to separate them. These needs may function pathologically, but function they must. Therefore, we believe that joint custody more nearly reflects a family's basic needs for openness and change on the one hand, and for the stability of having parents on the other, in the interdependent and growing nature of family systems. Joint custody is thus a viable alternative because, however ideal it may be in the present, it is also a highly pragmatic way of helping and expecting divorcing couples to be responsible, involved, and loving parents.

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

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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

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0009-4021/81/100669-09 $01.25

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. [9:63]

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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Spring 1981
Vol. 3, No. 4
ISSN 0163-710X

Family Advocate

A Practical Journal by the ABA Family Law Section

SPECIAL ISSUE
ON CONFLICT OF LAWS

BY BOBETTE ADLER LEVY AND CAROLE R. CHAMBERS

The Folly of Joint Custody

Children Are Not Negotiable; Bartering Them in Divorce Actions Is Bad Law and Even Worse Psychology

Forsyth/Woolley

And when they had brought a sword before the king, he said, "Divide the living child in two, and give half to the one, and half to the other." But the woman whose child was alive, said to the king, "I beseech thee, my lord, give her the child alive and do not kill it." But the other said, "Let it be neither mine nor thine, but divide it."

In this first recorded child custody case, King Solomon points out the futility of attempting to split a child in half. But even today, thousands of years later, the bar, bench, and psychological experts have still not mastered the lesson of this parable.

Joint custody has become one of the most publicized placebos and least understood issues in the field of family law. Some attorneys and judges view joint custody as a way of reducing acrimony at the time of divorce. They harbor the pious hope that the parents will work it all out for themselves. This view may be particularly appealing to some attorneys when the litigants cannot afford high fees for protracted contests.

Sometimes attorneys also urge their clients to accept an agreement for joint custody as a bargaining lever. They may tell a woman, for example, that they will offer joint custody to get a larger settlement in negotiations with opposing counsel. In other situations, they may urge a male client to accept "joint" rather than "sole" custody, in order to bargain for his wife's compliance in a divorce action. But children are not negotia-

A joint custody award may temporarily silence a custody

ble and their custody should not be an issue for blackmail or barter.

When the issue of custody may be contested, the attorney should not even suggest joint custody as an alternative. Instead of acquiescing to the idea of a joint custody agreement, the attorney should urge the client to seek therapeutic help from a local family service, private practitioner, or conciliation service to work out acceptable custody arrangements. Failing agreement of the parties on custody, the attorney should move to get a court order immediately for psychological evaluation for court testimony to assist in determining which parent's custody will be optimal for the child.

RESOLVING OLD CONFLICTS

A joint custody award may temporarily silence a custody dispute today, but what happens tomorrow? The concept simply sweeps the custody issue under the rug while ignoring the fact that the parents may not have resolved the neurotic conflicts of their former relationship. Awarding joint custody judicially condones two parents exercising their old battles for control. The children may be severely victimized in the process.

It is easy to understand why attorneys, judges, and psychotherapists would seek to diminish acrimony in a case. Yet it is fantasy to believe that changing labels changes feelings and behaviors at a profound level. The professionals are often dealing with enraged, affronted, hurting persons who seek vengeance and protracted litigation that they can ill afford. While professionals attempt to reduce the conflict with joint custody awards, in the long run their efforts may produce greater and more long-lasting nightmares for the children and adults involved in the cases.

Legal edicts cannot force parents to agree on child rearing questions. Sometimes therapeutic intervention or mediation may indeed produce great success in helping the parties co-parent, but the fate of children should not rest on that possibility of success.

Legal orders cannot be predicated on good intentions, but must take into account existing facts and behaviors. A joint custody award should not rest on the ultimate hope that successful co-parenting may result. When all available evidence indicates that the parents cannot agree that the sun will come up in the morning, much less on the handling of their children, a joint custody order will not change anything.

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This article was adapted from "The Folly of Joint Custody," published in the March issue of the Illinois State Bar Journal.

How does joint custody serve the child's best interest or needs? In one of the more grotesque examples of joint custody, we have seen a judge at a hospital at 3:30 A.M. signing consent for an emergency appendectomy. The child's life was threatened, but the hospital did not want to assume liability when one parent said "yes" and the other "no" on a consent form. Fortunately, the judge was reached by the hospital in time, since the child's appendix was about to rupture.

In another instance, two children were enrolled in separate schools by the mother and father who had joint custody. The children were enrolled by one parent in a parochial school and by the other in a public school. Since the custody order stated that the children would live alternating weeks with each parent, the parents felt free to exercise their differences on the youngsters. When the children attended one school, they were truant from the other. They were failing in both schools and deeply traumatized psychologically. Yet each parent was exercising his or her "rights" under a joint custody decree.

IN THE BEST INTEREST?

How does it serve the child's best interest or needs if, as Justice Felice K. Shea points out below, it may well deprive that child of "stability, serenity and continuity"? *Dodd v. Dodd*, 403 N.Y.S.2d 401 (1978), a major holding in New York regarding joint custody, points out its potential horrors. Justice Shea stated that joint custody may be in defiance of the children's best interest, making them prey to division, as the adults' hostility focuses on the manipulation of the children.

> It is well recognized that the children of divorce are subjected to severe strain, and that children often experience loss of security and feelings of rejection as a concomitant of their parents' separation. Experts in the field have expressed opposition to divided custody on the ground that change and discontinuity threaten the child's emotional well-being. It is argued that joint custody between parents usually requires that "shuttling back and forth" of the children which must inevitably lead to the lack of stability in home environment which children require. Moreover, joint or divided custody may exacerbate the adults' use of the children to defeat each other in defiance of the children's interest in stability, serenity and continuity. In attempting to maintain positive emotional ties to two hostile adults, children may become prey to severe and crippling loyalty conflicts.

Court opinions make it clear that interests of the child is a separate issue from parental fitness. An award of custody to one parent does not legally imply that the other is unfit. Both attorneys and psychotherapists need to help parents understand that custodial awards are for

dispute today, but what happens tomorrow?

the benefit of the child and not the parents, and that no stigma attaches to being noncustodial. The order is rather a demonstration of concern of the needs of the children.

There are two basic versions of joint custody: joint "legal" custody and joint "physical" custody. Joint "legal" custody is the shared decision making of the parents regarding upbringing, education, religion, and medical, financial and recreational requirements of the children. Joint "physical" custody consists of children living with each parent for equal periods of time.

It is ironic that the terms *co-parenting* and *joint parenting* have been used synonymously with "joint custody" in legal terminology and in many articles in the lay press. Co-parenting or joint parenting is the practice of divorced or separated parents who mutually choose to remain actively involved in the lives of their children. Many share equal rights and responsibilities in decision making and care-taking of their offspring, even though legal custody has been granted to one or the other parent.

In these instances, the parents have made an emotional and moral commitment to their children. They recognize that the children have the right to ongoing parenting from both of them, but that it is the parents' responsibility to work out achieving that together.

This moral agreement cannot be dictated by the courts. It cannot be legislated. It may, and optimally should, be achieved by the parents. But the court cannot make it happen by its own order.

CALIFORNIA'S NEW STATUTE

In January 1980, California enacted joint custody legislation (Assembly Bill No. 1480). As defined by this bill, joint custody means, "An order awarding custody of the minor child or children to both parents, . . . physical custody shared . . . to assure the child . . . frequent and continuing contact with both parents; provided, however, *that such order may award joint legal custody.*"

Obviously, this distinction may create much confusion both in law and for children. Who will oversee the parents' agreeing on schools, religious training, clothing needs, pediatricians, orthodontists, vacations, haircuts, *ad nauseum*? Yet, guidelines for these everyday realities should be determined if there is to be joint legal custody. Dissension in these matters may rip children just as much as bouncing them from house to house.

Unfortunately, judges cannot really predict the capacity of the adult parties to co-parent and should not issue joint custody awards since they cannot be assured that they will operate in the interest of the children. Justice Shea, in *Dodd*, points out that while the concept of joint custody sounds like a good idea, the parents' self-esteem should not take precedence over the interests of the child in judicial deliberations.

Joint custody is an appealing concept. It permits the court to escape an agonizing choice, to keep from wounding the self-esteem of either parent and to avoid the appearance of discrimination between the sexes. Joint custody allows parents to have an equal voice in making decisions and it recognizes the advantages of shared responsibility for raising the young. But serious questions remain to be answered. How does joint custody affect the children? What are the factors to be considered and weighed?

When joint custody is awarded as a means of assuaging the pain of both parents to prevent "wounding the self-esteem" of the litigants, we are not consistent with our primary concern which is the best interests of the children. Too often, acrimony of the marriage is carried into the resultant divorce. Parents all too readily bring the pathology of the marriage into later interactions and the children are torn between the two.

Let's suppose the parents have an "amicable divorce" (at the time), and believe that they can live by a joint custody agreement. They have their attorneys submit that to the judge as an agreed order. Even in this situation the court would be abdicating judicial responsibility if it did not clearly designate a parent with both legal and physical custody of the child.

(Continued on next page)

Joint custody orders are not needed to co-parent

The parents who are morally committed to sharing the rearing of their children, and emotionally able to co-parent, will not require a joint custody order to do so. They will interact and agree on child rearing issues without violating an award of custody—both legal and physical—to one parent. If the parents cannot interact productively, then joint *anything* will be damaging to a child.

NOT REALLY JOINT CUSTODY

What presently occurs under the label of joint custody is a smokescreen whereby parents are given the award because of their expressed good intentions or because they cannot resolve between them who the custodial parent should be. Then, by the interjection of a picket fence around the words "joint custody," one parent is granted physical custody by judge's fiat or by attorney's urging. By so doing, the court has allowed the parents to be duped into believing that what exists is joint custody, a term which has really been undermined.

Children suffer either way, as each parent insists on controlling plans or whereabouts of the child. Thus, post-decree litigation proliferates. Awarding joint custody while specifying separate physical custody is an instance of, "What the large type hath given, the small type hath taken away."

Some judges and attorneys are supportive of the concept of joint custody. On closer examination, however, they are still operating under the assumption that there should be a primary home and a primary parent, with liberal visitation rights for the other parent. *This is not joint custody.* As the court noted in *Dodd v. Dodd*, "when physical or actual custody is lodged primarily in one parent, custody may be 'joint' in name only."

It is dishonest to state that parents have joint custody, but separate physical custody. In fact, they then have a custodial parent and a noncustodial parent wrapped together in a joint custody agreement which by legal definition is rendered meaningless. Ultimately, when the first crisis arises, the duplicity of terminology will result in exactly what the courts do not want—a return by the parents for enforcement, interpretation or reversal as a post-decree or appellate matter.

CONCLUSION

One can sympathize with judges, attorneys, and legislators who wish to reduce the acrimony and court contests by considering joint custody. But the courts should not act upon such agreements with favor—particularly when parents are extremely contentious. The battles of the marriage, long after, will take their toll on the children in a joint custody agreement, especially if the parents must return to the courts for the adjudication that did not occur at the time of the dissolution.

There is no question that divorce may be a bitterly painful experience to all involved—children, parents, and grandparents. But adults can change and can become more effective parents when the turmoil of an unhealthy marriage is ended. This is most likely when each goes into therapy or when they jointly seek therapeutic help.

An ailing marriage affects the ability of the parents to relate not only to each other, but to their children as well. People do have the ability to deal with and surmount crises, and to grow as a result of them. Usually they need some supportive therapeutic assistance to achieve growth in the experience.

Children, like their parents, can grow as a result of successfully coping with the divorce crisis. However, they also may need some psychotherapeutic intervention in the process. Optimally, they should have two concerned parents explaining that they both love the children and that their marital problems are with each other. Ideally, the parents' ability to co-parent is an expression of their concern to the youngsters.

But court orders cannot produce the optimal. That is why it behooves the court to provide a firm structure by which the children, as well as their parents, can begin to rebuild their lives. This structure may be shaken by a joint custody decree, when parents are ordered to agree on substantive issues of child rearing. Thus the court should determine which parent ultimately will have the final responsibility for the caring and rearing of the children. Judges may order an evaluation by a psychologist, psychiatric social worker, or psychiatrist to help determine the best psychological parent. The award for custody should be based on the capacity to carry the major load in parenting. Visitation is still crucial so that the child does not feel "dumped" by either parent.

Parents may divorce, but parenting is forever. They do not divorce their children, or should not if they really have any emotional investment in their youngsters.

Professionals should explain that joint decision making can be of more value than joint custody. Two divorced parents who amicably can make joint decisions are better than two contradictory parents.

We, as therapists, attorneys or judges, must try to help parents to achieve the ability to co-parent. As children grow, parents need all the help they can get—particularly when dealing with adolescents.

It is the parents' responsibility to remain actively involved in a constructive manner in the lives of their children. The courts can and must, however, provide a basic framework whereby the children and parents have the greatest opportunity to rebuild and function productively after the termination of the marriage. This is best done by clear and separate orders for custody and visitation, but not by making the children the victims in joint custody awards.

Attorneys should explain that separate custodial and visitation orders do not prevent their co-parenting. They do not need a joint custody award in court in order to co-parent or to be good parents. ■

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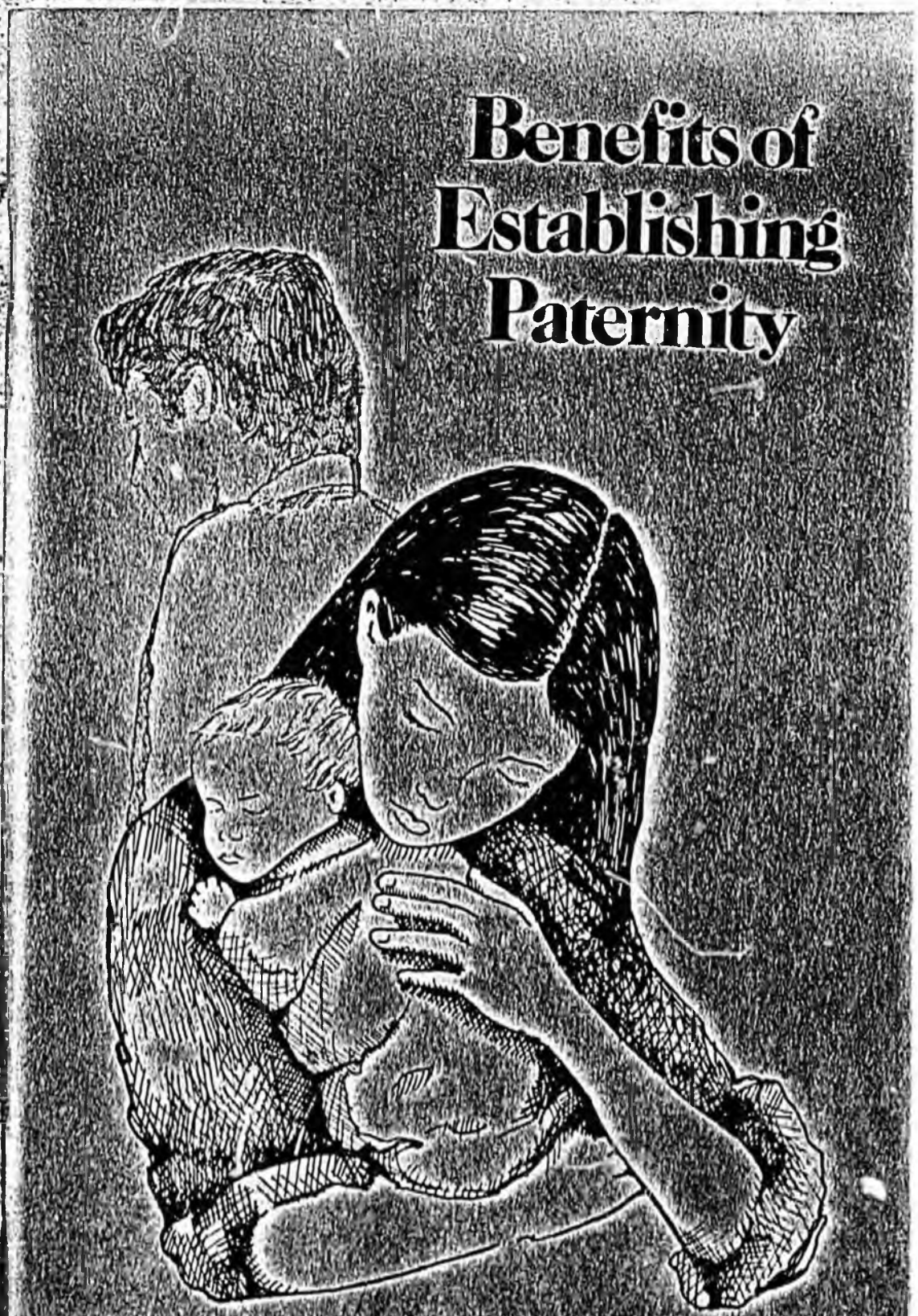
Benefits of Establishing Paternity



DEPARTMENT OF HEALTH AND HUMAN SERVICES
NATIONAL INSTITUTE FOR CHILD SUPPORT ENFORCEMENT

MONOGRAPH SERIES NO 1

BENEFITS OF ESTABLISHING PATERNITY

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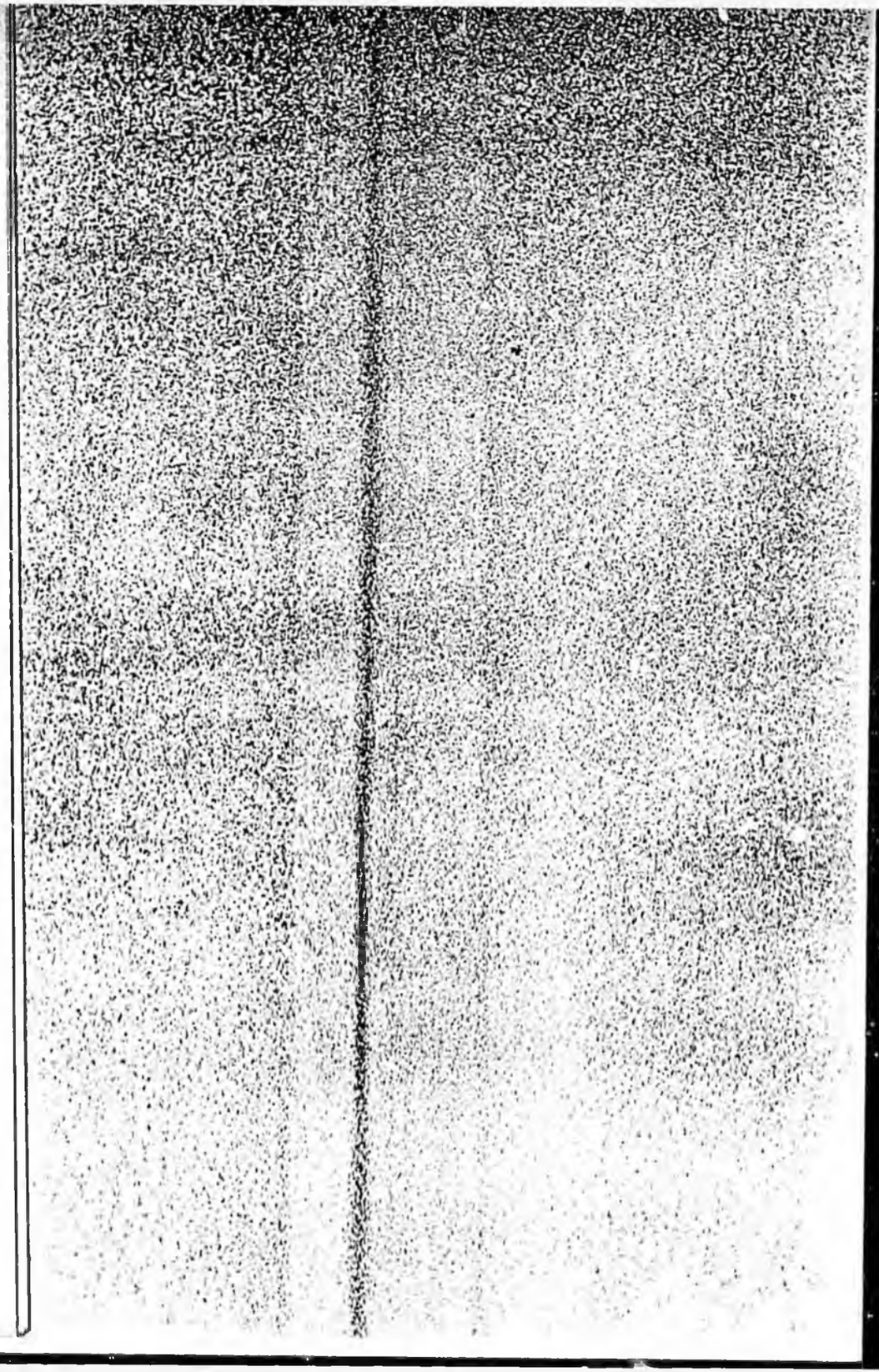

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Marko Lewis
100 Yarrow Cabin Bridge
Hyder, Alaska 99923

Hon. State Senator Charlie Parr
State Senate
Juneau, Alaska

dear Senator Parr:

Many congratulations on your apparent victory in the Senate race. (I say "apparent" because of news is so spotty here). It was the only real good news in the entire election.

I dont know if you remember talking to me at the State Fair about introducing legislation to change child custody legislation. I have worked at Ketchikan over many years and know your grandkids + son. My own recent experiance with the custody process found it to be biased in favor of women over men and Suburban people over bush people. The last bias is built into the notion that obviously city raised judges feel that the way of life in the bush is not

as good for kids as the suburban way. For example: living in the bush very often ones income is about at poverty level and employement is neither steady nor does it last more than a couple months in the season. The court system doesn't consider hunting or building a cache as being employment.

The system is unfair to children and parents. The bulk of clinical research over the past 3 to 5 years and a reinterpretation of data from older studies show that the most important factor to the well-being of children after a divorce is that frequent meaningful contact with both parents is maintained. The most negative factor is giving custody to a hostile parent who tries to negate the role of the other. Our present system encourages a hostile, adversary atmosphere.

I personally feel that the whole custody situation needs a radical change. California, I understand, passed a joint custody bill in 1979. I don't have the bill number or the bill. This is in part probably a reaction to the "California Children of Divorce" study which results were summarized in January 1980 Psychology Today

In Oregon (House Bill 2532, 1977) a bill was proposed and not passed. I will enclose a Xerox of the relevant passages.

In Pennsylvania a bill was proposed - sorry no year or number. One section is very good:

Section 17(b) Both parents shall have an equal right to seek and be granted custody, and to be fully considered for custody, and both shall enter the proceedings as fully fit and competent until proven otherwise. Neither parent shall be presumed to have the right to custody, or to serve the best interests or welfare of the child or children better merely because of their sex, or the sex and age of the child or children.

In the best interest and permanent welfare of the children every effort shall be made and taken to continue the relationship of the parent and child, and the possibility of joint, equal, co-custody shall be given First consideration.

My own commentary on the above is that in Alaska the words " ... or children better merely because of their sex ..... or the facts pertaining to a rural, bush or city lifestyle." should be specifically included.

Last, and perhaps most important, The whole litigation process should be Maximally taken out of the court system. My own case is still not decided NINE MONTHS from the first filing of papers. Although both myself and my daughters mother received counseling no attempt at mediation with professional counselors ~~was~~ took place. When I tried to set up mediation I was told that it was against the right to privacy act and

* Though the present legal opinions state there is to be no bias as to sex of parent or lifestyle in reality there is that bias.

the other party refused. The entire proceeding has cost the state of Alaska probably close to $10,000 in court costs, legal fees and so on.

In Minnesota the state funds a counseling/mediation service attached to the courts: "The focus upon self-determination by parents in the process of mediation is consistent with the intent of no-fault divorce, the emphasis upon best interests of children, and identification of parenting qualities rather than marital discord."

In disputed custody cases, ~~court ordered~~ attendance at court-connected or private mediation/counseling clinics should be mandatory.

Well, I'm sorry about the length of this. I am interested in getting legislation introduced for this coming session. I have ready a list of all the "Parents For Equal Rights" type organizations in the U.S.A - about 150 of them

and would want to contact them for a special lobbying effort, as well as put ads in Alaskan newspapers for input from parents who feel they were unfairly treated. I also am readying a summary of all recent research in the area, as well as a surge of popular interest as testified to in numerous supportive articles in popular magazines from Redbook and Harper's Bazaar to New West. I have contacted Brian Rodgers + Terry Gardiner (and will write Dick Randolph, Ken Fannin and Nels Koponen).

If there is any question, & you'd like xerox copies of research papers, or if you have a serious objection to presumptive joint custody legislation & may will do whatever I can.

Sincerely,

M

From The Disposable Parent - The Case for Joint Custody by Mel Roman and William Haddad ©1978 Holt, Rinehart + Winston N.Y.

fect a child's future and, at the most discrepant, a two-to-one parental split with regard to child care, joint custody should be made the presumptive choice in our courts. Unless there are compelling reasons to the contrary involving, for instance, the physical or psychological incapacity of one parent, chronic alcoholism, drug addiction, or absolute—and proven—disinterest in caring for the children, courts should proceed with a presumption in favor of joint custody of children after a divorce. And just as all laws pertaining to marriage and divorce ought to be made uniform throughout the land, joint-custody legislation should be nationwide in scope and application.*

Joint-custody bills are slated for consideration in Cali-

* The National Conference of Commissioners on Uniform State Laws, Chicago, Illinois, has proposed the one example of a Uniform Marriage and Divorce Act (1970) that we have. In their version, child custody is handled as follows:

"Section 402 (Best Interest of the child). The court shall determine custody in accord with the best interest of the child. The court shall consider all relevant factors including:

(1) the wishes of the child's parent or parents as to his custody;
(2) the wishes of the child as to his custodian;
(3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
(4) the child's adjustment to his home, school and community; and
(5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship with the child."

Other than this last stipulation, which at least safeguards against punitive custodial awards, these guidelines obviously are of little help to judges faced with difficult custody decisions. Although we applaud the move to institute *uniform* custodial legislation, this particular proposal is in essence no different from the amorphous, and abused, state legislation that now exists. It still encourages an either/or view of child custody and offers no way to implement what is, after all, an unsatisfactory arrangement.

Oregon Reform Bill HB 2532, 1977

fornia and Pennsylvania. The following, excerpted from relevant passages in a proposed Oregon reform bill (House Bill 2532, 1977—a compromise bill was adopted by the legislature instead), is quoted here as one model (the italics are ours):

(1) In determining custody of a minor child, . . . the court shall give primary consideration to the best interests and welfare of the child. In determining the best interests and welfare of the child, the court may consider the following relevant factors:
   (a) The emotional ties between the child and other family members;
   (b) The interests of the parties in and attitude toward the child; and
   (c) The desirability of continuing (an) existing (relationship) *relationships.*
(2) The best interests and welfare of the child in a custody matter shall not be determined by isolating any one of the relevant factors referred to in subsection (1) of this section, or any other relevant factor, and relying on it to the exclusion of other factors.
(3) No preference shall be given to the mother over the father for the sole reason that she is the mother.
(4) *Joint custody shall be encouraged. In determining the desirability of joint custody, the best interests and welfare of the child as described in subsection (1) of this section shall be of primary consideration. Joint custody may be appropriate under one or more of the following circumstances:*
   (a) *Where there exists an amicable relationship between the parties and they are able to communicate and generally agree with each other concerning joint decisions affecting the welfare of the child.*
   (b) *Where both parties are employed and the child*

would benefit by the assumption by both parties of joint responsibility for care and maintenance of the child.

(c) *Where the child is of such age or emotional development that the child would benefit from experiencing the advantages of joint custody.*

(d) *The health or other conditions of one party are such that custody of the child by that party alone may be undesirable.*

(e) *Where legal conditions exist such that the interests of the child would be best served by joint custody.*

(f) *Where the parties live in sufficiently close proximity to each other that the child's life is not disrupted to any significant degree by joint custody.*

(g) *Any other circumstances that the court may deem appropriate.*

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

This last stipulation is meant to further support Oregon's no-fault divorce laws and undermine the customary, though waning, relevance of marital fault as applied to custody decisions. Elsewhere this bill provides "for the care, custody, support and maintenance of the minor children of the marriage *by one party or by the parties jointly*.

* Oregon Legislative Assembly, 1977 Regular Session. House Bill 2532. This bill failed to pass. A compromise, Senate Bill 446, did pass and became effective law on October 4, 1977. It simply provides that the judge may decree joint custody. The language of the bill does not expressly encourage joint custody, nor does it set forth the criteria for when it would be appropriate to decree joint custody.

Nothing in a provision for joint custody precludes the court from specifying which parent is to provide the primary housing or from leaving such decision to the parties [italics ours]."

We are in accord with all the provisions of the Oregon bill but would make them stronger. Rather than "encourage" joint custody we would argue that it should be the legislated presumption. In the words of the proposed Pennsylvania Bill:

> Section 17 (b) Both parents shall have an equal right to seek and be granted custody, and to be fully considered for custody, and both shall enter the proceedings as fully fit and competent until proven otherwise. Neither parent shall be presumed to have the right to custody, or to serve the best interest or welfare of the child or children better than the other parent merely because of their sex, or the sex and age of the child or children. In the best interest and permanent welfare of the children every effort shall be made and taken to continue the relationship of the parent and child, *and the possibility of joint, equal, co-custody shall be given first consideration* [italics ours].*

It has, of course, been argued that to call for a presumption in favor of joint custody is coercive. But those who argue along these lines conveniently forget that the current bias in favor of the mother is itself coercive. They forget, too, that the lives of families are increasingly, even radically, subject to outside influence, whether from rock music, television, peer groups, or any number of social

* We omit the last sentence of this part of the proposed Pennsylvania Bill as we are not in agreement with it. It states: "Under a co-custody arrangement one parent shall have primary custody and the other secondary custody; child or children shall reside with parent having primary custody." [sic] of proposed bill from personal communication with George Doppler

children of divorce, groups are being held on an experimental basis in some of the Minneapolis schools. All these programs are free and all are professionally staffed. Assisting the staff are considerable numbers of volunteers, themselves trained by the Domestic Relations Division of Hennepin County, Minneapolis's Department of Court Services.

While each of these programs is extremely valuable, we will examine a few that are most relevant to our concerns in order to give some idea of what court-connected family services can do successfully. In describing its custody mediation program, the Minneapolis family court states that:

> Mediation counseling is a method used by the Family Court and Domestic Relations Division of the Department of Court Services to assist parents with conflict resolution in contested custody issues. The focus upon self-determination by parents in the process of mediation is consistent with the intent of no-fault divorce, the emphasis upon best interests of children, and identification of parenting qualities rather than marital discord. If parents can be helped to arrive at their own decisions, continued responsibility and accountability for the effectiveness and viability of their decisions remain with them—not the external agencies of Court and Court Services.
>
> Mediation, an alternative to investigation, recommendation and court decision, is based upon the assumption that in the vast majority of cases, both parents are capable custodians. Further, experience confirms that parents are often able to reach decisions in a neutral facilitating setting with skilled counseling toward custody resolution.
>
> Self-determination of the custody issue is a primary goal in mediation counseling, but other benefits are also apparent.

Mediation Service - Minnesota

- Self-determination is far more effective and lasting in the ongoing relationship of parents with the children and each other.
- Parents are involving themselves in the process of considering the issues relevant to the best interests of their children.
- Children are given an opportunity to provide active and direct input into the decision-making process.
- Parents taking responsibility for the custody decision can be affirmative of their love and concern. It may reduce children's fears of abandonment and guilt about the "losing" parent.
- Acrimony and stress associated with dissolution proceedings are likely to be reduced substantially.
- Later visitation problems may be ameliorated.
- Needless court litigation by reason of stipulation arising from agreement can be avoided.

> In some instances, mediation will not result in agreement, and therefore determination of primary custody is still necessary. The counselor is then responsible for proceeding with a more traditional study, evaluation, and recommendation for the Court's consideration.[2]

It should be added that preliminary statistics suggest that mediation has been much more successful than the older investigatory model. Of course, from our point of view, all mediation/counseling services should be voluntary except when custody is disputed. In disputed cases, we believe attendance at court-connected or private mediation/counseling clinics should be mandatory (where clinics exist!).

A second Minneapolis program sponsored by the family courts is called "Divorce Experience," a three-session program focusing primarily on the emotional experience

PLEASE NOTE: THE PRECEDING PAGES WERE TREATED AS A UNIT IN THE ORIGINAL DOCUMENT.

Judge Schultz - Ketchikan

Larry Sweet
479-6762
1850 Roberts Rd. 99701
[redacted] JBLS.
479 2241 (W)

James Cook - Calif.
"Joint Custody Assoc."
10606 Wilkins Ave
Los Angeles, Calif 90024
(213) 475-5352
analysis of HB 310

and may prescribe rules/procedures.

2) award joint custody
OR
3) if the parents do not agree.

get copy of bill
Rick Barrier
fiscal note for bill.

To: Charlie
From: Nancy
Re: Child Custody draft bill

Tam Cook drafted this bill, taking the refernces to mediation from the statute on mediation in divorce proceedings. It has become apparent that requiring mediation will be ineffective if there is no money to pay for the services of mediators. Even though mediators for divorce have been in the statutes for some time, they have never been used as far as I can determine.

Disregarding that issue, I would like to change the draft as follows:

Pg. 3, line 4: "The court may appoint any person the court finds suitable to act as mediator"
Perhaps a section should be added that the judicial system will set up rules of procedures and standards for mediators.

Pg 3, line 8: "Counsel for the parties may attend all conferences"
Attornies present may destroy mediation attempts through limiting what their clients say. They should not be allowed to attend, or it should be stipulated that they may attend only as observers.