



1979

# Joint Custody

Carolyn S. Bratt

*University of Kentucky College of Law*

**Right click to open a feedback form in a new tab to let us know how this document benefits you.**

Follow this and additional works at: [https://uknowledge.uky.edu/law\\_facpub](https://uknowledge.uky.edu/law_facpub)



Part of the [Family Law Commons](#)

---

## Recommended Citation

Carolyn S. Bratt, *Joint Custody*, 67 Ky. L.J. 271 (1979).

This Article is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

# JOINT CUSTODY

BY CAROLYN S. BRATT\*

And the king said, Bring me a sword. And they brought a sword before the king.

And the king said, Divide the living child in two, and give half to the one, and half to the other.

Then spake the woman whose the living child *was* unto the king, . . . and she said, O my lord, give her the living child, and in no wise slay it. But the other said, Let it be neither mine nor thine, *but divide it*.

Then the king answered and said, Give her the living child, and in no wise slay it: she *is* the mother thereof.

And all Israel heard of the judgment which the king had judged; and they feared the king: for they saw the wisdom of God *was* in him, to do judgment.<sup>1</sup>

Custody battles have been with us for a long time; Solomon's wisdom in resolving the custody dispute before him is renowned. In today's society we place judges in our courts in Solomon-like positions, but without the comfort of such readily apparent solutions. If one parent of the two requesting custody is truly unfit, the question is similar to the one Solomon resolved and the decision is not difficult. But rarely do judges find themselves in such a position. More often, judges confront two custodians who appear to be fit. These cases, in which neither party is clearly "unfit," present the decision-maker with a perplexing problem that does not lend itself easily to solution by the application of law or legal precedent.

The legal standard given the judge to apply in child custody cases—"in the best interests of the child"—begs the question. The best interests of a child are determined by a complex combination of psychological, economic, and social factors. The interrelationship and relative importance of these factors are in much dispute. These factors have led to an ever-

---

\* Assistant Professor of Law, University of Kentucky. B.A. State University of New York at Albany, 1965; J.D. Syracuse University, 1974.

The valuable research of Susan Cammarata, second year law student, University of Kentucky, and the editorial suggestions of Carolyn A. Dye, J.D. 1976, University of Kentucky, in the preparation of this article deserve special recognition.

<sup>1</sup> 1 Kings 3:24-28.

changing collection of legal and psychological theories.<sup>2</sup> An additional complication is that the best interests must be determined in light of the facts and circumstances of the individual child and family before the court. Thus, the judge's experience in one case is of little value in deciding another.

Judges resolving these disputes are faced with an enormous task. Their decisions are made more difficult by limitations imposed by the forum—an adversary hearing—and the time constraints within which they must work.

The lives and personalities of at least two adults and one child are telescoped and presented to him in a few hours. From this capsule presentation he must decide where lie the best interests of the child or, very often, which parent will harm the child least. The judge's verdict is distilled from the hardest kind of fact finding. From sharply disputed evidence, he must predict the future conduct of parents on his appraisal of their past conduct. And his decision is disturbingly final. Since it is based fundamentally on factual findings, an appellate court will rarely disturb it.<sup>3</sup>

Furthermore, most judges have had little or no training in psychiatry, social work, or other nonlegal disciplines which might assist them in making the decision.<sup>4</sup>

The contested custody case is a many-headed hydra; any decision will have an impact on the lives of the children and parents involved that will continue for years. This Article does not purport to provide a solution which will satisfactorily resolve each and every custody dispute. Instead, this Article proposes a method which will prevent a certain class of custody cases from becoming part of the court's docket of seemingly insoluble contested custody cases. The method, simply stated, is judicial approval of shared custody arrangements—those in which two parents agree to share custody of the child or children of their marriage. Of course, this proposal would not relieve the court's burden of assessing the adequacy of the care the children will receive. But absent a factual find-

---

<sup>2</sup> See note 65 *infra* for five "factors" to be considered by the judge. See text at notes 106-48 for a general discussion of the psychological theories applicable in custody cases.

<sup>3</sup> B. BOTEIN, TRIAL JUDGE 273 (1952).

<sup>4</sup> Bratt, *Beyond the Law School Classroom and Clinic—A Multi-disciplinary Approach to Legal Education*, 13 NEW ENGLAND L. REV. 199 (1978).

ing that such an arrangement is more detrimental to the child than sole custody, no court should impose sole custody when the parents have agreed to shared custody.

Shared custody has traditionally been looked upon with disfavor by the courts.<sup>5</sup> Similarly, some professionals in the field of child development oppose the concept of shared custody.<sup>6</sup> There are, however, several advantages to shared custody. The legal system benefits, as judges escape the unenviable task of playing Solomon. The child benefits because both parents continue to have a voice in the child's upbringing, and the child continues to enjoy the love, advice, and companionship of both parents. In addition, because both parents share the responsibility of child raising, neither is faced with the loss of self-esteem which results from being designated a "visitor" to his or her child. Finally, all parties involved benefit significantly by avoiding a bruising custody battle with its attendant bitterness and emotional damage.

## I. PRESENT CUSTODY AWARDS: THE PROBLEM

### A. *The Statistics*

At the turn of this century approximately one in ten marriages ended in divorce;<sup>7</sup> the current ratio is one in three.<sup>8</sup> This increase has been attributed to causes as diverse as the resurgence of the feminist movement, the increased mobility of Americans, and the widespread adoption of "no-fault" divorce laws. Whatever the cause or causes, this increase has caused a seven-fold increase in the number of children affected by divorce since the turn of the century.<sup>9</sup> Currently, over one million children a year experience their parents' divorce.<sup>10</sup> Thus, an increasing number of child custody

<sup>5</sup> See cases cited in note 60 *infra*.

<sup>6</sup> J. GOLDSTEIN, A. FREUD & A. SOLINT, *BEYOND THE BEST INTERESTS OF THE CHILD* 37-38 (1973). Goldstein, Freud, and Solint have gone so far as to recommend that all custody determinations be made final with custody awarded to one parent. The non-custodial parent would have no legal right to visit the child and the custodial parent would decide whether visits by the noncustodial parent were desirable.

<sup>7</sup> Davis, *Sociological and Statistical Analysis*, 10 L. AND CONTEMP. PROB. 700, 711 (1944).

<sup>8</sup> M. ROMAN & W. HADDAD, *THE DISPOSABLE PARENT* 48 (1978).

<sup>9</sup> 1 U.S. COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, *DEMOGRAPHIC AND SOCIAL ASPECTS OF POPULATION GROWTH* 255 (1972).

<sup>10</sup> NATIONAL COUNCIL OF ORGANIZATIONS FOR CHILDREN AND YOUTH, *AMERICA'S CHILDREN* 1976 at 61 (1976) [hereinafter cited as *AMERICA'S CHILDREN*].

determinations must be made by the courts.

At present, an estimated ninety percent of all custody awards are made in favor of the mother.<sup>11</sup> Over ten million children under eighteen—one out of every six children under the age of eighteen—live in single parent families,<sup>12</sup> most of which are headed by women.<sup>13</sup> More than half of the children living in families headed by women are below the official poverty level; only fifteen percent of all families are below that level.<sup>14</sup> Thus, granting sole custody to a mother significantly increases the chances that the child will become another grim statistic by experiencing significant economic deprivation.

Courts usually grant sole custody to the mother on the theory that she will provide full-time nurturing. However, available data indicates that a child of divorce placed in the custody of the mother will not have the mother's full-time attention and companionship at home. In families headed by women in 1975, forty-seven percent of the mothers with pre-school age children were in the labor force and fifty-seven percent of the mothers with school-aged children were in the labor force.<sup>15</sup> Clearly, traditional sole custody awards placing full

<sup>11</sup> Roth, *The Tender Years Presumption in Child Custody Disputes*, J. FAM. L. 423 (1976-77).

<sup>12</sup> AMERICA'S CHILDREN, *supra* note 10, at 59.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 62.

Percent of Children in Official Poverty

	1960	1964	1966	1968	1970	1972	1974
In all families	26.5	22.7	17.4	15.3	14.9	14.9	15.5
In families headed by women	68.4	62.3	58.2	55.2	53.0	53.1	51.5

These statistics reflect the fact that women working full time outside the home earn, on the average, 60 percent of the wages of men working full time outside the home. *Id.* at 65. Also, many women are single heads of household comprised of pre-school age children, *id.* at 64, and are not able to work at all because of the demands of child care and lack of day care facilities.

<sup>15</sup> *Id.* at 64.

The comparison of the percentage of women who work full time outside the home in two-parent families to the percentage of women who work full time outside the home in female-headed families is startling. The following chart indicates the percent of women who work full time outside the home:

responsibility for child care on the mother guarantee the child neither a full-time custodial parent nor reasonable economic security. In addition, divorced mothers who have been awarded custody receive little financial assistance from their children's father after the divorce. Fathers regularly ignore their court-ordered responsibility for child support payments.<sup>16</sup> Apparently, the fathers feel they have not only divorced their wives, but also their children.

Thus, the sole custody award often isolates children from their fathers and forces mothers into the work force. The mother, as sole caretaker as well as breadwinner, is confronted with an overwhelming responsibility.

---

Married, Husband Present 1974

No Children	Children 6-17 yrs.	One or more under 6, none under 3	One or more under 3	One under 5 yrs.	Two under 5 yrs.
71%	54%	40%	31%	36%	26%

Divorced, Separated, Widowed

78%	71%	62%	46%	59%	38%
-----	-----	-----	-----	-----	-----

*Id.*

<sup>16</sup> Nagel & Weitzman, *Women as Litigants*, 23 HASTINGS L.J. 171, 190 (1971).

The Probability of a Divorced Woman  
Collecting Any Child Support Money  
(by years since the court order)

Years since court order	Number of open cases	Full Compliance	Partial Compliance	No Compliance	Non-paying fathers against whom legal action taken
One	163	38%	20%	42%	19%
Two	163	28	20	52	32
Three	161	26	14	60	21
Four	161	22	11	67	18
Five	160	19	14	67	9
Six	158	17	12	71	6
Seven	157	17	12	71	4
Eight	155	17	8	75	2
Nine	155	17	8	75	0
Ten	149	13	8	79	1

## B. *Changing Parental Roles*

Petitioners asking for joint custody must often overcome the judge's notion that fathers have little or no parenting skill. Custody awards are being made by courts still laboring under the romanticized notion of a family in which the mother is the sole full time nurturer while the father, employed outside the home, is the sole breadwinner.

When the wage labor of men and the private labor of women were split, parental roles were made mutually exclusive. The result has been to confuse two entirely separate phenomena. Because women did, and probably still do, most of the work of raising children, it was assumed that they and they alone were the natural (hence superior) caretakers of the young. Making . . . the *acts* of motherhood interchangeable with *facts*, our culture came to equate motherhood with parenthood.<sup>17</sup>

Just as mothers are assumed to lack job skills, fathers are assumed to lack child-rearing skills.

There are very few studies in social research on "fathering." In fact, studies on parents in America, patterns of child-rearing, and divorced parents have consistently relied on the mother to supply information on the father's thoughts and feelings.<sup>18</sup> The validity of the conclusions of such studies, stressing the primacy of the mother-child relationship to the almost total exclusion of the father's role in parenting, is obviously suspect.<sup>19</sup> Without attempting to explain the nature of the relationships between mother and child and father and child in psychological or sociological terms, a number of objec-

---

<sup>17</sup> ROMAN & HADDAD, *supra* note 8, at 85.

<sup>18</sup> See J. Grief, *Child Absence: Fathers' Perceptions of Their Relationship to Their Children Subsequent to Divorce*, 3-4 (1977) (unpublished doctoral dissertation, Adelphi University); H. Keshet, *Part-time Fathers: A Study of Separated and Divorced Men*, 14-15 (1977) (unpublished doctoral dissertation, University of Michigan). For an example of such a study, see T. PARSONS & R. BALES, *FAMILY SOCIALIZATION AND INTERACTION PROCESS* (1955).

<sup>19</sup> Recently there has been an upsurge in interest in the father-child relationship. See L. BENSON, *FATHERHOOD: A SOCIOLOGICAL PERSPECTIVE* (1968); H. BILLER & D. MEREDITH, *FATHER POWER* (1974); D. LYNN, *THE FATHER: HIS ROLE IN CHILD DEVELOPMENT* (1974); E.E. LEMASTERS, *PARENTS IN MODERN AMERICA* (1970); H. BILLER, *THE FATHER-CHILD RELATIONSHIP: SOME CLINICAL ISSUES IN THE FAMILY—CAN IT BE SAVED?* (Vaughan & Brazelton, eds. 1976).

tive factors can be examined which debunk the myth of mother-nurturer/father-breadwinner.

### 1. *The Changing Role of Women*

The Department of Labor reported in 1978 that more than fifty percent of all women over eighteen were in the labor force,<sup>20</sup> the largest percentage of female participation in the labor market this country has ever experienced.<sup>21</sup> From 1970 to 1975 the number of working mothers rose by seventeen percent, from twelve to fourteen million.<sup>22</sup> These working women in 1975 were the mothers of 27.6 million children.<sup>23</sup> In 1975 forty-five percent of all married women were in the labor force.<sup>24</sup> The increase in the number of working women should not be dismissed as an insignificant phenomenon; in 1975 working women in wife-husband families accounted for twenty-six percent of family income.<sup>25</sup>

The stereotype family of full-time housewife and sole breadwinner husband no longer reflects the family arrangement of many American marriages.<sup>26</sup> Because of this change, our traditional ideas of the division of parenting and household responsibilities may be obsolete, too. When women with children work, certain changes occur within the home in the assignment of household tasks such as child care, in the allocation of decision-making, and in attitudes about appropriate sex-role behavior.

Working wives and their husbands have significantly dif-

---

<sup>20</sup> U.S. BUREAU OF LABOR STATISTICS, 25 EMPLOYMENT AND EARNINGS 43, (Dec. 1978).

<sup>21</sup> *Id.*

<sup>22</sup> AMERICA'S CHILDREN, *supra* note 10, at 53.

Traditionally, labor participation rates are less for women in their childbearing years (ages twenty-five to thirty-four) than for other women. In 1950 the rate was twenty-five percent less; in 1974 it was only twenty percent less.

<sup>23</sup> *Id.* at 54.

<sup>24</sup> *Id.* at 55.

<sup>25</sup> *Id.* at 57.

<sup>26</sup> The Social Security Act of 1939 was predicated on the notion that all women were wives who stayed at home as dependents of their breadwinner husband. In *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975), the Supreme Court found that this stereotype of the "typical" family was insufficient to uphold the constitutionality of a provision of the Social Security Act granting benefits only to mothers. There have been numerous demands for reform of the Social Security Act because of its inaccurate presumption of role allocation within the family. *E.g.*, Martin, *Social Security Benefits for Spouses*, 63 CORNELL L. REV. 789 (1978).



ferent attitudes toward decision making, reflecting more equal authority expectations,<sup>27</sup> than nonworking wives and their husbands. While there is little reported difference in the actual power of working wives versus nonworking wives with respect to their husbands,<sup>28</sup> working wives make more family decisions than nonworking wives.<sup>29</sup>

Working wives tend to be less likely to endorse traditional sex role ideology than nonworking wives.<sup>30</sup> This change in attitude toward the traditional sex-based dichotomy of family roles is also evidenced in the altered parenting function of fathers in families with two working parents. Available evidence confirms that husbands of working wives are generally more active than husbands of nonworking wives in performing household tasks. Even though working wives still perform the majority of the household chores, their husbands are much more involved with the chores and childcare than other husbands.<sup>31</sup> Another study found that children, too, usually participate more in household activities if their mother works than when their mother does not work outside the home.<sup>32</sup> Thus, the division of labor within the home between husband and wife appears to be strongly affected by the wife's outside employment.<sup>33</sup>

Therefore the traditional wife-housewife/husband-breadwinner model is not applicable when the wife is employed

---

<sup>27</sup> Blood & Hamblin, *The Effect of Wife's Employment on the Family Power Structure*, 36 Soc. FORCES 347, 347-52 (1958).

<sup>28</sup> Hoffman, *Effects of the Employment of Mothers on Parental Role Relations and Division of Household Tasks*, 22 MARR. & FAM. LIVING 22, 27-35 (1960).

Power was defined as the extent to which one parent makes decisions affecting the other parent. This was determined by children's responses to questions about which parent decided certain issues and which parent acted in certain situations.

<sup>29</sup> See Heer, *Dominance and the Working Wife*, 36 Soc. FORCES 341, 341-47 (1958); D. Kligler, *The Effects of Employment of Married Women on Husband and Wife Roles: A Study of Cultural Change* (1954) (unpublished doctoral dissertation, Yale University).

<sup>30</sup> Hoffman, *supra* note 28.

<sup>31</sup> Kligler, *supra* note 29; Nolan & Tuttle, *Certain Practices, Satisfactions and Difficulties in Families with Employed Homemakers*, Bulletin No. 655, Agricultural Experiment Station, Pa. State Univ. (1959); Weil, *An Analysis of the Factors Influencing Married Women's Actual or Planned Work Participation*, AM. SOC. REV. 26, 91-96 (1961).

<sup>32</sup> S. Greenwald, *Family Responsibilities of Selected Working Mothers* (1959) (unpublished doctoral dissertation, New York University).

<sup>33</sup> F. NYE & L. HOFFMAN, *THE EMPLOYED MOTHER IN AMERICA* 215-305 (1963).

outside the home. As mothers continue to enter the labor force, judges can no longer realistically base custody decisions on such an increasingly inaccurate stereotype of the divorcing family.

## 2. *The Changing Role of Men*

Other kinds of evidence indicate that fathers are becoming more involved with childrearing. For example, increasing amounts of literature are encouraging greater involvement by men in parenting.<sup>34</sup> Some men have attempted to redefine "masculinity" by emphasizing expressive interpersonal skill development and active parenting.<sup>35</sup> Fathers are urged to learn and foster nurturing skills traditionally associated only with mothering.

The number of father headed homes has increased steadily, from 296,000 in 1960 to 836,000 in 1974.<sup>36</sup> More fathers are seeking and winning custody of children than in the past; between 1970 and 1974 the number of children under six living with a divorced father increased faster than the percentage of such children living with a divorced mother—thirty-seven percent versus thirty-one percent.<sup>37</sup>

Other observable phenomena indicate increased involvement of fathers in traditional childrearing activities. New organizations of and for men have appeared,<sup>38</sup> attempting to change antiquated divorce laws and lending support to men who want or have more than the traditional amount of child-care responsibilities. Similarly, the renewed feminist movement in this country has been advocating equal participation of both parents in childrearing for over a decade.<sup>39</sup>

The courts, always notoriously hesitant to reflect changes

---

<sup>34</sup> See, H. BILLER, *PATERNAL DEPRIVATION* (1974); BILLER & MEREDITH, *supra* note 19; F. DODSON, *HOW TO FATHER* (1974); M. FEIGEN FASTEAU, *THE MALE MACHINE* (1974); and LYNN, *supra* note 19.

<sup>35</sup> Greif, *supra* note 18, at 3.

<sup>36</sup> Keshet, *supra* note 18, at 5.

<sup>37</sup> *Id.*

<sup>38</sup> *E.g.*, Single-Fathers Research Project, Greenville, North Carolina; Fathers United for Equal Rights, Orange, New Jersey; The Society of Single Fathers, Toronto, Canada; and National Society of Fathers for Child Custody Divorce Law Reform, Miami, Florida.

<sup>39</sup> See, *e.g.*, Rossi, *Equality Between the Sexes: An Immodest Proposal*, 93 *DAEDALUS* 607 (1964).

in the social fabric of this country, have ignored changes in family roles in divorce decisions, even though the mother-nurturer/father-breadwinner image may not have accurately reflected division of parenting responsibilities for a significant period of time. Indeed, in 1952 a study drawn from fathers' responses on the activities and attitudes of men in regard to their paternal role showed as one of its conclusions that the father role is an active family role. The fathers who were polled actually participated in routine daily care of the child and a majority considered childrearing a part of the requirements of the father role. The author concluded that the study indicated "a changing pattern of paternity in the direction of a more equalitarian relationship rather than atrophy or abdication of the father's role in the family."<sup>40</sup>

This changing pattern has continued. Any child custody decision predicated on automatic application of traditional sex role stereotyping of parents' roles injures the child by casting the parents' functioning into molds that in most cases do not reflect the family's lifestyle.

## II. THE LAW'S ANSWER

### A. *Background*

Certainly no overpowering societal or historical force prevents courts from breaking out of the confines of sex role stereotypes. The law regulating child custody has not been static in the past, just as it should not be unchanging now. Changes in societal attitudes toward children's rights and changing economic conditions have resulted in changes in the legal approach to child custody.

For example, early English laws on child custody reflected the concepts of feudal patriarchy.<sup>41</sup> The children of vassals were property of the lord. Within the family, the powers of parents vis-à-vis their children were absolutely vested in the father. As feudalism eroded, society's perception of children began to change. The child slowly began to emerge as a person with certain rights and privileges as well as duties. Increased indus-

---

<sup>40</sup> Tasch, *The Role of the Father in the Family*, 20 J. EXPERIMENTAL EDUC. 319, 358 (1952).

<sup>41</sup> ROMAN & HADDAD, *supra* note 8, at 27-33; Roth, *supra* note 11, at 425-28.

trialization de-emphasized the family's role as the economic center of life by causing fathers to work outside the home. As the father's time away from the home increased, his absolute right to control of his children decreased.

In the nineteenth century the courts began at least to discuss, if not act on, the conflict between the father's absolute right to his children and the children's interests. Some mothers were awarded custody in cases of gross misconduct by the father or in cases of extremely young children, or both.<sup>42</sup> In the early twentieth century the nuclear family emerged, with its strict distinction between father's work outside the home and mother's work within the home. The courts suddenly divined that the mother role gave wives the superior position in custody disputes.<sup>43</sup> The tender years presumption, based on the idea that very young children should be with their mother, emerged.

Because this strict functional dichotomy between mother and father no longer exists, courts should now take the next step in this historical progression by allowing both parents to continue to function actively in their child's life. The court should both encourage and facilitate a new definition of parenting.

## B. *A Statutory Analysis*<sup>44</sup>

Despite innovative thought and law review articles advocating change, judges are not wont to move without being sure of their power and authority to do so. Does the court have the

---

<sup>42</sup> ROMAN & HADDAD, *supra* note 8, at 30-33.

<sup>43</sup> It is interesting to compare the courts' language from the days when a father's rights to custody were considered paramount to the language used when a mother's rights to custody emerged as superior—in either case God ordained it!

It [the authority of the father] is the doctrine of all civilized nations. It is according to the revealed law and the law of nature, and it prevails even with the wondering savage, who has received none of the lights of civilization.

Foster v. Alston, 4 Miss. (6 Howard) 406, 463 (1842) (Sharkey, J. dissenting).

There is but a twilight zone between a mother's love and the atmosphere of heaven, and all things being equal, no child should be deprived of that maternal influence unless it be shown there are special or extraordinary reasons for so doing.

Tuter v. Tuter, 120 S.W.2d 203, 205 (Tex. Ct. App. 1938).

<sup>44</sup> Research on the permissibility of a joint custody award in Kentucky was a result of work of this author and David A. Bratt, J.D. 1978, University of Kentucky, in preparation of a joint petition for joint custody of their son, Douglass. The custody arrangement was approved in Bratt v. Bratt, Fayette Circuit Court #77-2880 (Ky. Aug. 19, 1978).

power and authority to approve a petition from both parents for shared custody of their child?

Sharing of custody, both legal and physical, is not a new practice. Joint, divided, alternate, and split custody are terms used to describe various custodial arrangements which provide for a sharing of legal and physical custody between parents. These types of custody arrangements have been permitted from time to time in many jurisdictions.<sup>45</sup> Joint custody usually denominates that type of custody arrangement which gives both parents "legal responsibility for the child's care and alternating companionship."<sup>46</sup> Legal custody of the child is shared

---

<sup>45</sup> *E.g.*, Sneed v. Sneed, 26 So.2d 561 (Ala. 1946) (mother, nine months, father, three months); Henning v. Henning, 362 P.2d 124 (Ariz. 1961) (mother nine months, father, three months); Hewitt v. Morgan, 246 S.W.2d 423 (Ark. 1952) (mother, six months, father, six months); Winn v. Winn, 299 P.2d 721 (Cal. Dist. Ct. App. 1956) (legal custody to both parents, physical custody to mother); Searle v. Searle, 172 P.2d 837 (Colo. 1946) (mother, nine months, father, three months); Snow v. Snow, 280 F. 1013 (D.C. Cir. 1922) (mother, school year, father, school vacation); Dworkis v. Dworkis, 111 So.2d 70 (Fla. Dist. Ct. App. 1959) (mother, school year, father, summer); Bagley v. Bagley, 177 S.E.2d 255 (Ga. 1970) (father, nine months, mother, three months); Hellrung v. Hellrung, 72 N.E.2d 647 (Ill. App. Ct. 1947) (father, nine months, mother, three months); Stillmunkes v. Stillmunkes, 65 N.W.2d 366 (Iowa 1954) (mother, eleven months, father, one month); Lewis v. Lewis, 537 P.2d 204 (Kan. 1975) (father, nine months, mother, three months); Conlan v. Conlan, 293 S.W.2d 710 (Ky. 1956) (father, six months, mother, six months); Schilleman v. Schilleman, 232 N.W.2d 737 (Mich. Ct. App. 1975) (father, six months, mother, six months); Mansfield v. Mansfield, 42 N.W.2d 315 (Minn. 1950) (father, weekends and six weeks of school vacation, mother, the remainder); Baer v. Baer, 51 S.W.2d 873 (Mo. Ct. App. 1932) (father, weekends and summer, mother, remainder); Kinch v. Kinch, 95 N.W.2d 319 (Neb. 1959) (mother, nine months, father, three months); Perotti v. Perotti, 355 N.Y.S.2d 68 (App. Div. 1974) (joint custody); Guess v. Guess, 274 P.2d 369 (Okla. 1954) (mother, ten months, father, two months); Fortunes v. Manos, 13 A.2d 886 (Pa. Super. Ct. 1940) (father, eleven months, mother, one month); Zinni v. Zinni, 238 A.2d 373 (R.I. 1968) (mother, weekends and two weeks in summer, father, remainder); Wright v. Stahl, 39 N.W.2d 875 (S.D. 1949) (mother, ten months, father, two months); Grant v. Grant, 286 S.W.2d 349 (Tenn. Ct. App. 1954), *cert. denied*, Tenn. S. Ct. (Oct. 8, 1954) (mother, weekdays, father, weekends); McGarraugh v. McGarraugh, 177 S.W.2d 296 (Tex. Ct. App. 1943) (mother, nine months, father, three months); Mullen v. Mullen, 49 S.E.2d 349 (Va. 1948) (mother, ten months, father, two months); Brock v. Brock, 212 P. 550 (Wash. 1923) (father, every other weekend, mother, remainder); Settle v. Settle, 185 S.E. 859 (W. Va. 1936) (mother, nine months, father, three months). *Cf.* DeForest v. DeForest, 228 N.W.2d 919 (N.D. 1975) (alternating custody, when supported by substantial evidence, is not clearly erroneous and may be in the best interest of the child, case remanded); Holman v. Holman, 77 P.2d 329 (Utah 1938) (no good reason for denying father custody of child for a portion of the year, case remanded).

<sup>46</sup> Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody and Excessive Modifications*, 65 CAL. L. REV. 978, 1009 (1977).

at all times by both parents whereas physical custody is alternated according to the agreement of the parents. Alternate custody is a term used by courts when physical custody is placed in each parent alternately for equal periods of time.<sup>47</sup> Divided custody describes a custodial arrangement in which one parent has the child for part of the year (usually the school year) and the other parent has the child for the remainder (summers and vacations), each having reciprocal visitation privileges.<sup>48</sup> While the child is with a parent, that custodial parent exercises legal control over the child. Split custody is used to describe a situation where there is more than one child, and legal and physical custody of one or more of the children is given solely to one spouse and legal and physical custody of the others is given solely to the other spouse.<sup>49</sup> Often, when referring to one of these custody arrangements, courts use vague language or inadequately defined terms. The term "joint custody" is rarely used; "divided" and "alternate" custody are the terms most commonly used—often when the exact nature of the award is unclear. Some courts have approved custodial arrangements very similar to typical joint custody without

---

<sup>47</sup> *Priest v. Priest*, 202 P.2d 561 (Cal. Dist. Ct. App. 1949) (alternating three-month periods); *Watson v. Watson*, 15 So.2d 446 (Fla. 1943) (alternating six month periods); *Travis v. Travis*, 180 P.2d 310 (Kan. 1947) (alternating six month periods until school age, then mother, nine months, father, three months); *Heltsley v. Heltsley*, 242 S.W.2d 973 (Ky. 1951) (alternating two-month periods); *Babb v. Babb*, 293 S.W.2d 728 (Ky. 1956) (alternating three-week periods); *Mattox v. Mattox*, 264 P. 898 (Okla. 1928) (alternating one-year periods); *Hamer v. Hamer*, 184 S.W.2d 492 (Tex. Ct. App. 1944) (alternating six month periods); *Pressey v. Pressey*, 50 P.2d 891 (Wash. 1935) (equal time—actual time not given).

<sup>48</sup> I.A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS, §§ 14-60 (rev. ed. 1977). See, e.g., *Davis v. Davis*, 52 So.2d 387 (Ala. 1951); *Henning v. Henning*, 362 P.2d 124 (Ariz. 1961); *Drewry v. Drewry*, 216 S.W.2d 888 (Ark. 1949); *Searle v. Searle*, 172 P.2d 837 (Colo. 1946); *Dworkis v. Dworkis*, 111 So.2d 70 (Fla. Dist. Ct. App. 1959); *Bagley v. Bagley*, 177 S.E.2d 255 (Ga. 1970); *Hellrung v. Hellrung*, 72 N.E.2d 647 (Ill. App. Ct. 1947); *Stillmunkes v. Stillmunkes*, 65 N.W.2d 366 (Iowa 1954); *Lewis v. Lewis*, 537 P.2d 204 (Kan. 1975); *Barrier v. Brewster*, 349 S.W.2d 823 (Ky. 1961); *Stamper v. Stamper*, 216 S.W.2d 936 (Ky. 1949); *Roberts v. Roberts*, 194 S.W.2d 1003 (Ky. 1946); *Menke v. Menke*, 6 N.W.2d 470 (Minn. 1942); *Fago v. Fago*, 250 S.W.2d 837 (Mo. Ct. App. 1952); *Kinch v. Kinch*, 95 N.W.2d 319 (Neb. 1959); *Guess v. Guess*, 274 P.2d 369 (Okla. 1954); *Raw v. Raw*, 245 P.2d 431 (Öre. 1952); *Wallace v. Wallace*, 128 N.W. 143 (S.D. 1910); *Sprague v. Bucher*, 270 S.W.2d 565 (Tenn. Ct. App. 1953); *McGarraugh v. McGarraugh*, 177 S.W.2d 296 (Tex. Ct. App. 1943); *Sampsell v. Holt*, 202 P.2d 550 (Utah 1949); *Semmes v. Semmes*, 109 S.E.2d 545 (Va. 1959); *Reynolds v. Reynolds*, 275 P.2d 421 (Wash. 1954); *Settle v. Settle*, 185 S.E. 859 (W. Va. 1936).

<sup>49</sup> LINDEY, *supra* note 48.

using the term.<sup>50</sup> In this Article, "joint custody" is used to mean concurrent legal custody and alternating physical custody.<sup>51</sup>

Some type of shared custody has been judicially recognized in at least twenty-eight states.<sup>52</sup> This arrangement is not expressly prohibited by statute in any jurisdiction. North Carolina,<sup>53</sup> Oregon,<sup>54</sup> Iowa,<sup>55</sup> and Wisconsin<sup>56</sup> statutorily provide the court with this option. Only in Louisiana is the concept of shared custody categorically rejected by the courts.<sup>57</sup> Because of their very nature, shared custodial arrangements where proposed by the parents and approved by the courts are not appealed. For this reason, there may be more joint custody awards than are apparent in the reported cases. Also, judicial skepticism in an appellate situation may be justified, inasmuch as appellate decisions which discuss shared custody primarily deal with a shared custody arrangement that has been imposed upon at least one unwilling party.<sup>58</sup> In such circumstances, where one party has appealed the trial court's decision, the appellate court has reason to question the appropriateness of a shared custody arrangement.

Courts which have awarded shared custody have pro-

---

<sup>50</sup> *E.g.*, *Hockensmith v. Hockensmith*, 151 S.W.2d 37 (Ky. 1941); *Riggins v. Riggins*, 287 S.W.2d 715 (Ky. 1926); *Baer v. Baer*, 51 S.W.2d 873 (Mo. Ct. App. 1932); *Zinni v. Zinni*, 238 A.2d 373 (R.I. 1968); *Grant v. Grant*, 286 S.W.2d 349 (Tenn. Ct. App. 1954); *Brock v. Brock*, 212 P. 550 (Wash. 1923).

<sup>51</sup> The type of joint custody referred to in this article is that which the parties have agreed upon themselves; it is not judicially imposed, but approved. It is important to note that joint custody does not require alternating residences. However, as it does often result in some shared physical custody arrangement, this article will treat joint custody as if there are alternating homes in evaluating the psychological impact on the child. See text accompanying notes 106-48 *infra* for a discussion of the psychological impact of joint custody.

<sup>52</sup> See cases cited in note 45 *supra*. See also Note, *Divided Custody of Children After Their Parents' Divorce*, 8 J. FAM. L. 58, 63 n.26 (1968), in which the author states that thirty-seven jurisdictions have permitted some type of shared custody.

<sup>53</sup> N.C. GEN. STAT. § 50-13.2 (1976).

<sup>54</sup> OR. REV. STAT. § 107.095 (1977).

<sup>55</sup> IOWA CODE ANN. § 598.21 (West Supp. 1978-79).

<sup>56</sup> WIS. STAT. ANN. § 247.24 (West. Supp. 1978-79).

<sup>57</sup> *Newson v. Newson*, 146 So. 472 (La. 1933).

<sup>58</sup> See, e.g., *Searle v. Searle*, 172 P.2d 837 (Colo. 1946); *Settle v. Settle*, 185 S.E. 859 (W. Va. 1936). In both cases the trial court awarded sole custody and on appeal the court imposed divided custody. In *Sneed v. Sneed*, 26 So.2d 561 (Ala. 1946), and *Mullen v. Mullen*, 49 S.E.2d 349 (Va. 1948), the trial court's award of divided custody was upheld over objections by parents on appeal.

ceded under statutory authority which directs that the award be made " 'as the case may warrant,' or as 'is necessary and proper' or as the children's 'spiritual as well as other interests may require.' "59 In spite of the existence of this or similar authority in most jurisdictions, parents have had to overcome an almost universal disapproval of shared custody. Indeed, many of the jurisdictions that have approved some type of shared custody have also indicated judicial hostility toward shared custody.<sup>60</sup>

Does the Uniform Marriage and Divorce Act (the Uniform Act) permit approval of a joint custody petition? The Uniform Act's scheme, using the "best interest" test, requires that the court determine *custody*.<sup>61</sup> Note that this is distinguishable from a direction to designate a *single* custodian. The court is directed to construe liberally the statutory scheme to promote its underlying purposes.<sup>62</sup> Two of these purposes are to mitigate

---

<sup>59</sup> Note, *supra* note 52, at 63.

<sup>60</sup> *E.g.*, *Aaron v. Aaron*, 305 S.W.2d 550, 552 (Ark. 1957) ("[d]ivided custody of a minor child is not favored, unless circumstances clearly warrant such action"); *Rudolph v. Rudolph*, 146 So.2d 397, 399 (Fla. Dist. Ct. App. 1962) ("periodic removal from familiar surroundings is not desirable nor conducive to a child's welfare"); *Merrill v. Merrill*, 362 P.2d 887, 890 (Idaho 1961) ("divided custody should not be encouraged"); *Mason v. Zolnosky*, 103 N.W.2d 752, 755 (Iowa 1960) ("divided custody is to be avoided if reasonably possible"); *Ralston v. Ralston*, 396 S.W.2d 775, 778 (Ky. 1965) ("Under ordinary conditions we condemn [joint custody for] any child."); *McLemore v. McLemore*, 346 S.W.2d 722, 724 (Ky. 1961) ("avoided if possible"); *Towles v. Towles*, 195 S.W. 437, 438 (Ky. 1917) ("Nothing can be more demoralizing . . . than to have children . . . going from one home to another each month."); *McCann v. McCann*, 173 A. 7, 9 (Md. 1934) ("avoid, whenever possible"); *Schilleman v. Schilleman*, 232 N.W.2d 737, 739 (Mich. Ct. App. 1975) (generally disfavor alternating custody); *McDermott v. McDermott*, 255 N.W. 247, 248 (Minn. 1934) ("As a general rule, divided custody of . . . a child is not for its best interest"); *Kennedy v. Kennedy*, 76 So.2d 375, 375 (Miss. 1954) ("It is not to the best interest of a young child that it be alternatively shifted from parent to parent."); *Mixson v. Mixson*, 171 S.E.2d 581, 586 (S.C. 1969) (should be avoided where possible, allowed only in exceptional circumstances); *Bronner v. Bronner*, 278 S.W.2d 530, 533 (Tex. Civ. App. 1954) ("divided custody . . . of children of tender years should not be permitted 'except under special conditions in which there is no reasonable alternative and it is made essential and absolutely necessary'.") (quoting *Anderson v. Martin*, 257 S.W.2d 347, 353 (Tex. Civ. App. 1953); *Lumbra v. Lumbra*, 5 FAM. L. REP. (BNA) 2169 (Vt. Nov. 2, 1978) (the court presumed that "joint custody is against the best interests of the child as a matter of law," and stated that it should only be "decreed in cases where there is a finding of extraordinary circumstances.").

<sup>61</sup> UNIFORM ACT § 402 provides in part: "The court shall determine *custody* in accordance with the best interests of the child . . ." [emphasis added].

<sup>62</sup> *Id.* § 402.



potential harm to the spouses and children and to promote amicable settlement of disputes between spouses.<sup>63</sup> When parents agree to a joint custody arrangement, refusal to grant their petition forces them into the adversarial posture of a custody battle. Such a refusal, when made without a finding that joint custody would be more harmful to the child than sole custody, flies in the face of these two purposes behind the Uniform Act's adoption.

Joint custody is consistent with the Uniform Act's entire scheme on child custody:

*Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, health care and religious training, unless the Court after hearing, finds upon motion by the non-custodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical health would be impaired, endangered or his emotional development significantly impaired.*<sup>64</sup>

This provision contemplates mutually agreed upon custody arrangements between the parents as well as joint decisions by more than one custodian. Also, it should be noted that, as one factor in determining joint custody, the court must consider the wishes of the child's parents.<sup>65</sup>

Ultimately, the standard provided the court, the child's "best interests," is a summation of all the factors the court must examine to determine this interest. The five factors in the act are those most commonly relied upon in appellate opinions, but the court is not limited by statute to the consideration of only those five.<sup>66</sup> The court's discretion in deciding custody is consistently recognized as being very broad. One appellate court has said:

---

<sup>63</sup> *Id.* § 102(2),(3).

<sup>64</sup> *Id.* § 408.

<sup>65</sup> *Id.* § 402(a).

<sup>66</sup> *Id.* § 402. The court is directed to consider all relevant factors including:

- (a) The wishes of the child's parent or parents as to his custody;
- (b) The wishes of the child as to his custodian;
- (c) The interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interests;
- (d) The child's adjustment to his home, school and community; and
- (e) The mental and physical health of all individuals involved.

[T]he trial judge's discretion in determining the best interest and welfare of the child when making a custody award is indeed broad . . . . [T]his Court has continually refused to establish rigid guidelines which a trial court should follow when determining questions of child custody.<sup>67</sup>

Clearly, in light of the diverse family situations coming before the court, there can be no one custody arrangement which is, as a matter of law, in the best interests of the child. Conversely, because the court must make a case-by-case determination, neither can a particular arrangement be presumed to be against those interests. The statute's grant of discretion requires the court to consider a joint custody proposal and allows the court the statutory option of approving joint custody awards.

The reported cases that have disallowed joint, divided, or alternate custody<sup>68</sup> should be construed to mean only that, in those cases, the "best interests" test was not met. These outcomes, as contrasted with situations where shared custody was approved, only indicate that families are different and that no one rule can be applied to fit all situations. The court's statutory authority to exercise broad discretion on a case-by-case basis encompasses these differences.

Many jurisdictions no longer recognize a tender years presumption<sup>69</sup>—a presumption that may have caused some courts to disfavor joint custody. For example, in 1978, the Kentucky legislature, responding to the decision in *Casale v. Casale*,<sup>70</sup> enacted a law which ensures that there is no prima facie right to the custody of a child in *either* parent. The court is now specifically directed to give equal consideration to each parent.<sup>71</sup>

It is not known how many joint custody awards are made by the courts or how many of those that are made work. They

---

<sup>67</sup> *Dudgeon v. Dudgeon*, 458 S.W.2d 159, 160 (Ky. 1970). See cases cited in 27B C.J.S. *Divorce* § 310 (1959).

<sup>68</sup> *E.g.*, *Ralston v. Ralston*, 396 S.W.2d 775 (Ky. 1965); *McLemore v. McLemore*, 346 S.W.2d 722 (Ky. 1961). See also cases cited in note 60.

<sup>69</sup> *Freed & Foster, Divorce in the Fifty States: An Overview as of August 1, 1978*, 4 FAM. L. REP. (BNA) 4033, 4039-40. (Twenty-six states have expressly rejected the tender years presumption by statute or court decision).

<sup>70</sup> 549 S.W.2d 805 (Ky. 1977).

<sup>71</sup> KY. REV. STAT. § 403.270(1) (Supp. 1978) [hereinafter cited as KRS]. See also *Freed & Foster, supra* note 73, at 4040. (Twenty states have equalized parental rights).

probably comprise a relatively small percentage of all custody arrangements at the present time.<sup>72</sup> Legal commentators agree that a joint custody request and award appears, at present, to be limited to a small number of highly sophisticated couples, frequently professionals.<sup>73</sup>

In any case, it is clear that courts have been authorizing joint custody, under a variety of labels, for some time. It is also clear that statutory authority exists which gives courts discretion to *impose* a joint custody provision upon unwilling parents. As a corollary to the power to impose this type of arrangement, the court has the authority and discretion to approve a joint custody agreement between parents who seek to cooperate in childrearing.

### C. *The Constitution and Joint Custody*

Ironically, if it were not for the fact that two parents who propose joint custody are seeking dissolution of the wife-husband relationship, the state's power to intrude on parental allocation of childrearing decisions and living arrangements would be recognized by all as severely circumscribed under the due process clause of the fourteenth amendment. The Supreme Court has consistently recognized that the relationship between parent and child and relationships within the family enclave are constitutionally protected from state intrusion.<sup>74</sup> Termination of the wife-husband relationship does not dissolve this protection. Therefore, denial of two parents' joint custody petition, absent a finding that joint custody is more detrimental to the child than sole custody, contravenes constitutional guarantees of liberty and privacy.

The situations vary widely in which the insulation of the

---

<sup>72</sup> However, the amount of mass media attention to this type of custody arrangement would indicate an increase in such awards. See Levine, *Parents Agree to Joint Custody*, CHRISTIAN SCIENCE MONITOR, May 5, 1975 at 7; Holley, *Joint Custody: The New Haven Plan*, Ms., Sept. 1976 at 71; Fager, *Co-Parenting: Sharing the Children of Divorce*, SAN FRANCISCO BAY GUARDIAN, Feb. 1977 at 9; Baum, *The Best of Both Parents*, NEW YORK TIMES, Oct. 31, 1978 (Magazine), at 45; Molinoff, *Joint Custody: Victory for All?*, N. Y. Times, March 6, 1977, at 18.

<sup>73</sup> Bodenheimer, *supra* note 46, at 1011, n.188.

The fact that parents who have been seeking joint custody are usually professionals is not meant to imply that this author believes that only such couples are capable of or entitled to this type of custody award.

<sup>74</sup> See *Quillon v. Walcott*, 434 U.S. 246, 255 (1978).

parent-child relationship and family have been recognized. An examination of these cases shows a deference to parental decisions as to what values and living arrangements parents wish to provide for their children. In *Meyer v. Nebraska*<sup>75</sup> the Supreme Court upheld the parents' right to have their children taught the German language. The Court noted that the liberty guaranteed under the fourteenth amendment "denotes not merely freedom from bodily restraints but also the right of the individual to marry, establish a home and bring up children."<sup>76</sup> In *Pierce v. Society of Sisters*<sup>77</sup> the Supreme Court found that an Oregon statute requiring children to attend public schools interfered with "the liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>78</sup> In *Prince v. Massachusetts*,<sup>79</sup> the Court upheld a state law banning street solicitation by children when applied to a Jehovah's Witness family. It noted, however, that:

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . . And it is in recognition of this that these decisions [*Meyer* and *Pierce*] have respected the private realm of family life which the state cannot enter.<sup>80</sup>

More recently in *Wisconsin v. Yoder*<sup>81</sup> the Court upheld the claim of Amish parents to remove their children from state compulsory education after the eighth grade. The Court said that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society."<sup>82</sup> The Supreme Court's invalidation of a statute which allowed sterilization of habitual criminals in *Skinner v. Oklahoma*<sup>83</sup> was premised on the fundamental nature of the right to marry and to procreate.<sup>84</sup> In

---

<sup>75</sup> 262 U.S. 390 (1923).

<sup>76</sup> *Id.* at 399.

<sup>77</sup> 268 U.S. 510 (1925).

<sup>78</sup> *Id.* at 534-35.

<sup>79</sup> 321 U.S. 158 (1944).

<sup>80</sup> *Id.* at 166.

<sup>81</sup> 406 U.S. 205 (1972).

<sup>82</sup> *Id.* at 213-14.

<sup>83</sup> 316 U.S. 535 (1942).

<sup>84</sup> *Id.* at 541.

*Cleveland Board of Education v. Laflour*,<sup>85</sup> a mandatory leave provision for pregnant school teachers was invalidated because it unnecessarily interfered with the decision to raise a family. The Court reiterated that the "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."<sup>86</sup>

Other Supreme Court decisions similarly protect the family from state intrusion.<sup>87</sup> In *Stanley v. Illinois*<sup>88</sup> the Court preserved the family unit's integrity from unwarranted state intrusion even though the family relationship was not legitimized by a marriage ceremony. The challenged Illinois statute, as applied, created a presumption that the father of illegitimate children was unfit to raise his children. The Court, in striking down this statute, based its decision on the due process and equal protection clauses of the fourteenth amendment and on the ninth amendment. The Court said:

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'<sup>89</sup>

The state was required to afford the father a hearing on his fitness—rather than presuming his unfitness—before it had power to dismember the father's family.

In *Moore v. City of East Cleveland, Ohio*<sup>90</sup> the Court recognized that a "family" can be defined more broadly than the nuclear family unit. It invalidated a zoning ordinance which imposed criminal sanctions on a grandmother who was living

---

<sup>85</sup> 414 U.S. 632 (1974).

<sup>86</sup> *Id.* at 639-40.

<sup>87</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (right of woman to obtain an abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right of unmarried adults to purchase contraceptive devices); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married adults to purchase contraceptive devices).

<sup>88</sup> 405 U.S. 645 (1972).

<sup>89</sup> *Id.* at 651.

<sup>90</sup> 431 U.S. 494 (1977).

with her son, the son's child, and another grandchild, the son of a deceased daughter. The Court reasoned:

But unless we close our eyes to the basic reason why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.<sup>91</sup>

The Constitution, then, guarantees the individual the right to decide whether to create a family at all. Parents' decisions about value transmission, and indeed, life style and definition of the family unit, are accorded great deference. The Constitution guarantees parent and child a zone of privacy which surrounds the "family" and protects it from state intrusion.

The "family" and the parent-child relationship are not absolutely immune from state intrusion. However, any state intrusion on choices affecting family living arrangements or traditional parental decision-making areas will be subject to close judicial scrutiny.<sup>92</sup> For an intrusion to be sustained, a legitimate state purpose must exist.<sup>93</sup> The means chosen to advance that purpose must be more than tenuously related to its achievement.<sup>94</sup>

The Supreme Court has reached divergent results when using this test. For example, in *Moore v. City of East Cleveland*,<sup>95</sup> the state attempted to justify the challenged zoning ordinance as a means of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on the school system—all of which were legitimate state interests. However, because the ordinance interjected the state into family living arrangement choices among blood relatives, the usual deference accorded state decisions was put aside. The Supreme Court closely scrutinized the means chosen to attain the articulated ends. It found that, although the goals were legitimate, the ordinance failed because only a tenuous relationship to the achievement of those

---

<sup>91</sup> *Id.* at 501.

<sup>92</sup> *Id.* at 499.

<sup>93</sup> *Id.* at 500.

<sup>94</sup> *Id.*

<sup>95</sup> 431 U.S. 494.

goals was demonstrated.<sup>96</sup>

In *Prince v. Massachusetts*<sup>97</sup> the state's power to regulate children's employment prevailed over parents' assertions of the right to control their children and over claims of freedom of religion. Forbidding street solicitation by children was a permissible means to curtail the crippling effects of child labor. Contrast that case with *Wisconsin v. Yoder*.<sup>98</sup> Because of the intense conviction of Amish parents that secondary education was at odds with their religious faith and an infringement on their parental prerogatives as to value transmission, it was impermissible for a state to require Amish children to attend school until age sixteen. Such a requirement was an invalid means of achieving the legitimate state purpose of educating children.

No easy solution or handy rule is available to aid the courts when the state attempts to act to protect children's welfare. Each attempt must be examined with respect to the means employed. An examination of the area of education provides an analogy that is helpful in analyzing the state's interest in custody arrangements. No one seriously challenges the legitimacy of the state's right to require that children be educated. However, the state cannot choose a law as a means of achieving that important interest which requires all children to attend the state's public schools. The Constitution "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."<sup>99</sup> Even though the state's interest in education is a legitimate one, the integrity of the family and the parent-child relationship necessitates that the means chosen to achieve state purposes must be carefully structured to minimize the intrusion into this relationship.

Just as education of children vitally effects the state's welfare, children's shelter and care arrangements are important and legitimate state interests. The state's real interest is that the child have adequate physical and emotional care. No one form of custody can be applied to every situation to achieve this purpose and still satisfy the requirement that the means

---

<sup>96</sup> *Id.* at 500.

<sup>97</sup> 321 U.S. 158 (1944).

<sup>98</sup> 406 U.S. 205 (1972).

<sup>99</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

chosen be more than tenuously related to the state's purpose so as to minimize the intrusion on the parent-child relationship. This purpose can be achieved when two parents request joint custody by giving deference to the parents' choice of the style and structure of the post-divorce environment of their children, unless joint custody is found to be more detrimental to the child than sole custody.

Absent the divorce action, assuming no abuse or neglect allegations, the state could not justify any intrusion into allocations of decision-making between the parents. The parents may decide to share the responsibility for decisions concerning the education, religious training, and health care of the children. They may send their children to boarding schools and completely delegate day-to-day care to third parties. They may also decide that only one parent should decide issues of religious training, while the other should determine education and health care issues. Even if the parents in an ongoing marriage decide that their children should live half the time with one parent and half the time with the other parent, each half in separate residences, the state would have no power to override that decision.

Initiation of the divorce proceeding gives the court the power to review the proposed custody arrangement. The court should not, however, substitute its judgment for that of the child's parents unless the facts show the proposed arrangement will result in harm to the child. This principle has been recently articulated by the Supreme Court on two occasions. In other than a divorce proceeding the Court recognized that the state cannot, under the guise of acting in the "best interests" of the child, intrude on the family without a showing of unfitness:

One of the liberties protected by the Due Process Clause . . . is the freedom to 'establish a home and bring up children' . . . . If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'<sup>100</sup>

---

<sup>100</sup> 431 U.S. 816, 860-63 (1977) (Stewart, J., concurring). See also *Quilloin v. Wal-*



In a neglect proceeding, the state bears the burden of showing the parent's unfitness before it can interfere in the parent-child relationship or terminate parental rights. Recently much has been written on what due process rights should be accorded to parents in these neglect proceedings.<sup>101</sup> Commentators as well as the courts<sup>102</sup> have been groping for a way to protect the parent-child relationship and the family from unwarranted state intervention while protecting the child from neglect. In neglect proceedings, parents come before the court tainted with allegations of improper or inadequate parenting, allegations that there is a real danger to their child's health or physical safety. These parents are recognized as having certain minimal constitutional rights which must be protected; yet, in a divorce proceeding, the state's power to disrupt totally the parent-child relationship with an award of sole custody has gone unchallenged.<sup>103</sup>

How does the courts' general refusal to consider joint custody as an option square with the treatment of parents in neglect and other proceedings? Simply, it does not. The effect of the court's operational assumption in a divorce proceeding is to create a presumption against joint custody. Using due process concepts of liberty and privacy as gleaned from the case law, this is impermissible.

Some may argue that due process notions are inapplicable because, by virtue of the divorce proceeding, the family unit is dissolved. It is true a nuclear family no longer exists but the protected zone extends to family life. The private realm which

---

cott, 434 U.S. 246, 255 (1978).

<sup>101</sup> See Singleman, *A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings*, 17 ARIZ. L. REV. 1055 (1975); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1975-76); Note, *Dependency Proceedings: What Standard of Proof? An Argument Against the Standard of "Clear and Convincing"*, 14 SAN DIEGO L. REV. 1155 (1977); Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383 (1973-74); Note, *State v. McMaster: Due Process in Termination of Parental Rights*, 8 WILLAMETTE L.J. 284 (1972).

<sup>102</sup> See, *Roe v. Conn*, 417 F. Supp. 769 (M.D. Ala. 1976); *Alsager v. District Court*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd* 545 F.2d 1137 (8th Cir. 1976).

<sup>103</sup> *But see Starkeson v. Starkeson*, 5 Family L. Rep. 2403 (N.H. Sup. Ct. Feb. 14, 1979) (Douglas, J., dissenting); TIME, Jan. 29, 1979, at 61 (six Texas fathers and Fathers for Equal Rights have brought a class action challenging state district court judges refusal to grant joint custody).

has been protected from the state's intrusion is limited to neither the nuclear family nor one legitimized by the law. Such an argument also fails to appreciate the dynamics of the continuing parent-child relationship. The child's parents ought not be subjected to the threat of the court's power to affect vitally their relationships with their children when the sole reason the parents are before the court is to request the termination of the wife-husband relationship.

A decision to award sole custody has the effect of drastically altering, or, at least, severely curtailing the parent-child relationship of the non-custodial parent. Because the custodian is given the power to determine the child's upbringing, including education, health care, and religious training, and that parent has the continuity of companionship with the child,<sup>104</sup> the non-custodial parent no longer functions in a "parental" role.

An intrusion of this magnitude cannot be justified by the court's beliefs or assumptions that the arrangement is ill-advised. The state must find from the facts that joint custody would result in more harm to the child than if an award of sole custody were made. Only then would it not be in the best interests of the child. Otherwise, the parents' choice of life style and allocation between themselves of their respective responsibilities must be respected. This assertion is buttressed by recent data which suggest that joint custody may be more beneficial to the child of a divorce than the traditional sole custody award.<sup>105</sup> The filing of a divorce petition unarguably gives rise to a permissible inference that the state may scrutinize arrangements for the children's care to determine if the children are in need of the state's protection. However, unless there is a finding that mutually requested joint custody is more detrimental than sole custody the court has no power, constitutionally, to deny the request.

---

<sup>104</sup> See 9 UNIFORM LAWS ANNOTATED 510 (1973). Section 408(a) of the Uniform Act provides in part that "the custodian may determine the child's upbringing, including his education, health care, and religion."

Section 407 of the Uniform Act provides that "[a] parent not granted custody of the child is entitled to *reasonable* visitation rights." (Emphasis added). It also allows the court to deny or modify visitation rights if to do so would be in the best interest of the child.

<sup>106</sup> Grief, *supra* note 18; Keshnet, *supra* note 18.

### III. JOINT CUSTODY AS A SOLUTION

#### A. *The Psychological Problems With Sole Custody*

The judge has authority to grant a petition for joint custody. Given the constitutional deference to parental choices, a judge can not reject this proposal out of hand. No empirical evidence justifies a belief or assumption that joint custody is more harmful than sole custody.

When judges make custody decisions, they act in an extra-legal capacity. The standard given them does not require the application of law, but the application of psychological principles with which to deduce, or perhaps divine, what is best for the child. The standard principles are that the children need love and nurture together with stability and continuity.<sup>106</sup> The court's goal is to place the child in the environment where these needs will be best met.

These needs are met by the formation of a warm, intimate, and continuous relationship described as an attachment bond.<sup>107</sup> Children look to their parents, the persons closest to them, to supply this relationship. The court also views the parents as the source of this bond. Ninety percent of the time, the court attempts to ensure this relationship by placing the children with their mothers in permanent, single custody.<sup>108</sup> The mother is presumed to be the better provider of love and child care. It is also presumed that the physical stability and continuity of living in a single home promotes emotional stability and continuity of the parent-child attachment bond. The court's designation of a custodian, regardless of which parent is selected, is no guarantee that the children's needs will be met. It is certain, however, that a sole custody award does not take into account the children's existing attachment to the parent relegated to visitor status.

Generally, children develop an attachment to *both* parents, even though one parent may play an inactive role in the child's development. These attachments are different from others because children depend on them for their security or well-being. If either of these attachments is severed, children

---

<sup>106</sup> See E. ERIKSON, *IDENTITY AND THE LIFE CYCLE* (1959); GOLDSTEIN, FREUD & SOLINT, *supra* note 6.

<sup>107</sup> M. RUTTER, *MATERNAL DEPRIVATION REASSESSED* 15 (Penguin Educ. 1972).

<sup>108</sup> Roth, *supra* note 11.

suffer greatly.<sup>109</sup> Not only do they hurt from the present loss, their future relationships may be jeopardized. For example, once these attachments are broken, children may become reluctant to place their trust in someone else as completely. They will form new attachments, but in all probability these ties will not be as strong as they would have been if the early attachment bond had not been severed.<sup>110</sup>

Studies of children in post-divorce situations often find them longing for the missing parent. In one study, it was noted that "[w]hile it is not surprising that most children miss their father as a result of the separation inherent in a divorce action, the intensity of the response . . . was striking."<sup>111</sup> The children often feel abandoned and rejected. It shakes their basic sense of security to see someone they have loved and trusted gone from their lives. One researcher observed: "His father is part of the constellation which represents the child's security. It is just at this moment, when he is faced with the apparent loss of his father, that he most needs evidence of his father's love."<sup>112</sup>

When placed in sole custody, children often see the absent or "visiting" parent as a second-class person; if the children have identified with this parent, they may feel inferior also. Reducing this bond to a second-class status produces "difficulties which . . . can be traced through later years and even into the ultimate marriage of these children."<sup>113</sup>

Another problem that arises when children are placed in sole custody occurs when the custodial parent begins to seek companionship with other adults. The children feel threatened; they see this other adult as a rival for the parent's affection and generally have a difficult time handling this added measure of fear. With only one parent upon whom to rely, the children fear that something may happen to that parent and

---

<sup>109</sup> J. DESPERT, CHILDREN OF DIVORCE 83 (1959); R. WEISS, MARITAL SEPARATION 42-44 (1975); Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 161 (1963).

<sup>110</sup> See J. BOWLBY, I ATTACHMENT AND LOSS: ATTACHMENT (1969); GOLDSTEIN, FREUD & SOLINT, *supra* note 6, at 32-34; Note, *supra* note 109, at 161 n.44.

<sup>111</sup> Wallerstein & Kelly, *The Effects of Parental Divorce, Experiences of the Child in Early Latency*, 46 AM. J. ORTHO-PSYCHIATRY 20, 26 (1976).

<sup>112</sup> DESPERT, *supra* note 109, at 49.

<sup>113</sup> Kubie, *Provisions for the Care of Children of Divorced Parents: A New Legal Instrument*, 73 YALE L.J. 1197, 1199 (1964).

that they will be left alone.<sup>114</sup>

Compounding the problem of the children's insecurity is the common feeling of personal fault for the divorce. The children of divorce often feel that they have contributed to the breakdown of the family. "Daddy or Mommy is leaving because I have been bad." This feeling of culpability can give rise to the fear that perhaps the parent who remains will leave also.

### B. *The Benefits of Joint Custody*

Thus, while single-custody may be characterized by physical stability and continuity, the child's emotional well-being may not be enhanced. Children in single-custody homes may feel rejected, unloved, and insecure. It is not surprising that a recent study found the happiest children in post-divorce situations were those who had the most access to their other, *i.e.*, noncustodial, parent.<sup>115</sup> Similar findings were reported in a study of 63 father-child relationships in post-divorce situations. That study questioned whether conventional custody and visitation arrangements actually serve "the best interest of the child":

Children need active involvement with both parents and the findings clearly indicate that fathers with joint custody and/or high contact with their children continue to have a high degree of influence in the child's growth and development. Rather than impose legal visitation restrictions, the courts should do everything in their power to further contact between the child and both parents, including the appointment of conciliation counselors to help work out custody disputes in favor of joint custody.<sup>116</sup>

No evidence supports the argument that it is harmful to let a child live with both parents. It is apparent that the "stability" which is important is not physical stability but rather *emotional* stability. Emotional stability is a function of the child's sense of security. If the child knows that he or she is wanted by and can live with both parents, the child's sense of security will be enhanced. If a parent becomes ill or must leave for a short period, the other is there to take over. The

---

<sup>114</sup> DESPERT, *supra* note 109, at 33.

<sup>115</sup> Wallerstein & Kelly, *supra* note 111, at 27.

<sup>116</sup> Grief, *supra* note 18, at 96.

child is not confronted by the threat of abandonment.

Joint custody provides for continuing contact between parent and child. It is reasonable to infer that this contact increases the probability that the children will maintain attachment bonds to both parents. Goldstein, Freud, and Solint in their book, *Beyond the Best Interest of the Child*, argue that shared custody, with its time splits between parents, disrupts the continuity necessary for the maintenance of the attachment bonds to either parent.<sup>117</sup> In essence, they say no one wins in shared custody, and it is better to sacrifice one relationship than to risk disrupting two. They go on to state that sole custody is necessary for a child because even short separations disrupt the attachment bond.<sup>118</sup> The concomitant admitted effect of sole custody is that the child's relationship with the non-custodian will be drastically affected. Interestingly, these authors offer no evidence to support their theory that sole custody is desirable to facilitate the remaining attachment bond. It is directly contradicted by studies of children who regularly experience separation from their parents.

A study of infants in a day care center found no less of a mother-child attachment than that of infants who were reared at home.<sup>119</sup> Similar reports have been made from other studies of children in day care programs.<sup>120</sup> Children in a kibbutz had strong attachments to their parents even though they saw them only a few hours each day and on weekends.<sup>121</sup>

The general feeling expressed by those doing research in this area is that it is the quality of the time the parent spends

---

<sup>117</sup> GOLDSTEIN, FREUD & SOLINT, *supra* note 6, at 32-34.

<sup>118</sup> *Id.*

<sup>119</sup> Caldwell, Wright, Honig & Tannenbaum, *Infant Day Care and Attachment*, 40 AM. J. ORTHO-PSYCHIATRY 397, 406, 410 (1970).

This study involved 41 children averaging 30 months of age and compared the mother-child attachments of 18 who had day care and 23 who stayed at home:

[C]hild-mother and mother-child attachment were not adversely affected by the kind of early day care experience provided in this setting. We have further shown that attachment patterns are to some extent associated with the developmental level of the child and are rather strongly associated with amount and quality of stimulation available to the child within the home.

*Id.* at 409.

<sup>120</sup> See Segal & Haas, *The Working Mother: A Review of Research*, 34 CHILD DEV. 513 (1963); Stolz, *Effects of Maternal Employment on Children: Evidence from Research*, 31 CHILD DEV. 749 (1960); Yarrow, *Maternal Employment and Child Rearing*, 8 CHILDREN 223 (1961).

<sup>121</sup> Y. TALMON, *FAMILY AND COMMUNITY IN THE KIBBUTZ* 13-14 (1972).

with the child, rather than the quantity, which maintains the relationship<sup>122</sup> and thus the attachment. A study of fathers having joint custody found that the fathers' relationships to their children actually became closer than before divorce.<sup>123</sup> In another recent study, those fathers who were able to have significant involvement with their children found they had "a sense of loving their children more" and did not take them "for granted anymore."<sup>124</sup> For several reasons, the quality of time that both parents spend with their children will probably be greater with joint custody than with sole custody and visitation rights. Parents sharing custody must cooperate with each other: a sharing, positive attitude between the parents is far more likely than in a sole custody situation. Also, since children are less likely to view one parent as a "second-class" parent, each parent will have more respect in the children's eyes.

Thus, the idea that uninterrupted physical custody is necessary for continuity of relationships is simply not supported by the evidence. As a practical matter, uninterrupted physical custody is a rare occurrence, even under a traditional custody arrangement. Usually visitation rights are awarded by the court or agreed to between the parents. The courts are seemingly not troubled by the child's sense of continuity or stability if visitation results in what is, in fact, shared custody. Thus, children may "visit" their noncustodial parent every weekend or three months every summer, but they may not "live" with that parent for similar periods of time. It is hard to imagine that children will suffer instability only if their stay is with a parent who has custodial rights but not be affected if the parent has visitation rights.

Even though sole custody with visitation rights may be similar to joint custody in the amount of time parents and child spend together, the many advantages of joint custody make it preferable. Not only will the quantity and quality of time spent together increase and the attachment bond with both parents continue to be strong, but the child is assured of the continued care and guidance from both parents. By being exposed to the uniqueness of each parent, children's life experiences are en-

---

<sup>122</sup> RUTTER, *supra* note 107, at 18; Mahoney & Mahoney, *Psychoanalytic Guidelines for Child Placement*, 19 SOC. WORK 688-93 (1974).

<sup>123</sup> Keshet, *supra* note 18, at 53.

<sup>124</sup> Greif, *supra* note 18, at 89.

larged. Children will have an extended family from which they can receive the care, guidance, love, and affection necessary to emotional development.<sup>125</sup> Putting aside these benefits to the child, why would parents choose this structure in which to raise their children?

For those parents who are willing to expend the physical and emotional energy to make a joint custody arrangement work, there are benefits which provide incentive for the parties to cooperate. First, it saves one parent from being forced either to give up the child or to proceed into a custody battle. Even the winner of a custody battle is not assured permanency. Bitter feelings engendered by the dispute can provide fuel for a desire to get even and the loser may try later to win the child back. In joint custody neither parent loses the child, but in order to ensure that it will work, parents must be willing to cooperate with each other.

Another incentive is the fact that joint custody gives each parent some free time—to rebuild a new life and establish relationships with other adults.<sup>126</sup> Most single parents must work full time and, in addition, care for their children. Few feel they have enough time for their children, much less for themselves.<sup>127</sup>

Joint custody helps relieve the incredible pressure the single parent faces. Given time to pursue their own interests, parents can be more effective with their children when they have them. It can also give parents an added sense of security to know there is someone else that they can rely upon to care for the children. The result can be a more relaxed parent and a better atmosphere for the children.

There is evidence which shows that women are finding childrearing responsibilities increasingly difficult to manage as more of them seek careers.<sup>128</sup> Because some social scientists have asserted that motherhood is not instinctive but rather learned behavior,<sup>129</sup> there is good reason to believe that not all

---

<sup>125</sup> ROMAN & HADDAD, *supra* note 8, at 119-20.

<sup>126</sup> Eder, *Shared Custody—An Idea Whose Time Has Come*, 16 CONCILIATION COURTS REV. 23, 24 (1978).

<sup>127</sup> WEISS, *supra* note 109, at 84.

<sup>128</sup> ROMAN & HADDAD, *supra* note 8, at 40.

<sup>129</sup> See, e.g., Benedek, *Motherhood and Nurturing*, in PARENTHOOD ITS PSYCHOLOGY AND PSYCHOPATHOLOGY 153, 154 (E.J. Anthony & T. Benedek eds. 1970).



mothers want sole custody of their children. Yet, our society would severely sanction the mother who openly admits she does not want the total responsibility of her children. Few women would be willing to face this kind of criticism or self-imposed guilt. It is likely that such a mother would seek custody despite her own true feelings. A judge probably would not be able to discern this attitude in an adversary setting. Even though it is never desirable for parents who do not want their children to have custody, a joint custody arrangement may work to give each parent the degree of responsibility desired.

It is not difficult to see why parents, who have both demanding careers and equally demanding children, have begun to seek alternatives to the traditional sole custody arrangement. It is also unrealistic and even harmful to assume that fathers, who have become involved in raising their children during marriage, will be willing to let go and end meaningful contact with their children at divorce. In speaking in favor of joint custody, one researcher remarked that "the lives that are being lived in America today are already phenomenally different from the assumptions that are governing custody decisions at present. The nuclear family . . . composed of the bread winner, bottle warmer and children is already a nostalgic dream."<sup>130</sup>

The idea that sole custody must be given to one parent and financial responsibility to the other, which is done today in ninety percent of all custody awards,<sup>131</sup> significantly ignores the fact that the parents no longer live that way during their marriages. There is no reason to assume they will want to adopt this role upon divorce. According to one authority, in the dual career household, "parenting will inevitably be shared whether, in fact, the marriage remains intact or not."<sup>132</sup>

When parents seek joint custody they present the court with an opportunity to continue the attachment bond with both parents. The children's relationship with their parents has not been substantially altered by the divorce.<sup>133</sup> Both parents are seeking legal sanction merely to continue sharing their parental responsibilities. The family is altered in its physical

---

<sup>130</sup> Roman, *The Disposable Parent*, 15 CONCILIATION COURTS REV. 1, 4 (1977).

<sup>131</sup> Roth, *supra* note 11.

<sup>132</sup> Roman, *supra* note 130, at 4.

<sup>133</sup> ROMAN & HADDAD, *supra* note 8, at 112-13; Eder, *supra* note 126, at 23.

structure, as it is no longer contained in the same home, but the parent-child relationship can continue. It is anomalous that, under the guise of preserving stability and continuity, the courts insist upon disrupting an intact parent-child bond.

Another benefit of joint custody is that the initial trauma of the divorce may be reduced. This result springs from the difference between a joint custody request and a contested custody situation. The only similarity is that both parents are seeking to retain custodial rights. Unlike the contested custody situation, parents petitioning for joint custody have agreed to share the responsibility for, rather than fight over, the children. The children are not in limbo, wondering with whom they will live. The only uncertainty is whether the joint custody proposal will be approved by the court. The children are assured of having two homes where they are wanted and loved.<sup>134</sup> Reducing the uncertainties engendered by divorce is a positive factor which may decrease the trauma of the parent's divorce.

### C. *Possible Problems With Joint Custody*

Joint custody cannot be viewed by the courts as a panacea for all custody cases. There are situations in which joint custody is not appropriate. Sometimes a parent does not want the responsibility of children.<sup>135</sup> In that situation, the children's relationship with that parent is already inhibited. There is little chance that attachment bonds can be maintained with both parents. No matter how damaging this is to the children, there is little a court can do to encourage the maintenance of the parent-child bond if a parent chooses not to do so. Similarly, joint custody is inappropriate when one or both parents do not want the other to have custody. The essence of an effective joint custody arrangement is cooperation between the parents. A court cannot order cooperation between parents who refuse to cooperate. For example, parents who have joint custody find that their children depend on their schedules and become upset when they are disrupted.<sup>136</sup> If parents are

---

<sup>134</sup> See ROMAN & HADDAD, *supra* note 8, at 120; Eder, *supra* note 126, at 23; Weinman, *The Trial Judge Awards Custody*, 10 LAW AND CONTEMP. PROB. 721, 726 (1944).

<sup>135</sup> Keshet, *supra* note 18, at 24 (citing W. GOODE, *WOMEN IN DIVORCE* 330 (1956)); WEISS, *supra* note 109, at 163; P. Bart, *Divorced Men and Their Children: A Study of Emerging Roles* (a paper presented at the meeting of the American Sociological Association, Washington D.C., 1970).

<sup>136</sup> Keshet, *supra* note 18, at 134-42.

unable to agree to take on the burden of maintaining a strict schedule so that their children will not be left wondering where to go, joint custody will not work. In fact, when joint custody breaks down, scheduling and transportation problems are often cited as the reasons.<sup>137</sup>

Parenting in joint custody arrangements is no easy job. Probably the greatest fear courts have of joint custody is that it will create in the children a conflict of loyalties. However, recent studies indicate that conflicts of loyalties exist no matter what the custody arrangement. Young children in post divorce situations often maintain secret loyalties to the absent parent at considerable psychic cost.<sup>138</sup> At least in the joint custody situation children maintain their loyalties openly; they are expected to love and want to be with each parent.

Joint custody can also place a child in a conflict of authority. However, the essence of joint custody is that the parents agree to share the decision-making power. Realistically, children obey the parents with whom they are staying. Major issues, if the parents want them enforced in their absence, will be agreed upon with the other parent. Thus, conflicts can be avoided through agreement.

Maintaining authority may be a problem with joint custody. Parents who have had little experience in day-to-day child care may not feel secure in their new role. They may try too hard to please, and lose their children's respect for their authority.<sup>139</sup> These problems of authority are not, however, limited to joint custody. Single parents express difficulty in controlling their children, who often show their displeasure with the divorce by unruly behavior.<sup>140</sup> Visiting parents have a hard time gaining respect for their authority because their children know that the visiting parent's word is not binding on them. Such parents all too often become the "Santa Claus" figure to the children; someone who offers treats and outings.<sup>141</sup>

Joint custodians, having the advantage of the children living with them, can continue to discipline the children as they

---

<sup>137</sup> *Id.*

<sup>138</sup> Wallerstein & Kelly, *supra* note 111, at 29.

<sup>139</sup> See I. VICTOR & W. WINKLER, *FATHERS & CUSTODY* 153 (1976).

<sup>140</sup> WEISS, *supra* note 109, at 179-80.

<sup>141</sup> VICTOR & WINKLER, *supra* note 139, at 126.

were disciplined prior to the divorce. Children are able to learn to adapt to what is expected of them.<sup>142</sup> Even the development of different standards in each home is not extraordinarily burdensome to children. Differing standards of behavior are expected all during a child's life. When at school or when visiting relatives and friends, the child must conform to certain standards—all of which may be different. Parents living together are not always consistent with their children.

Sharing responsibility for decision-making is not easy. In order for parents to continue to be effective parents they must feel secure in themselves and be able to trust each other.<sup>143</sup> It is especially important that the parents make all necessary decisions. They cannot leave this to their children. Children forced to make decisions are often placed in a double bind, that is, a situation in which any decision will hurt at least one parent.<sup>144</sup>

The authors of *Beyond the Best Interest of the Child* assert that it is not possible for children to maintain ties with adults who are not friends with each other.<sup>145</sup> Again, they offer no support for this theory. Even if there were support for this theory, the likelihood of animosity is less between parents who can maintain joint custody than those who cannot, given the cooperation that must exist to make joint custody a success.

Another argument against joint custody has been based on the general assumption that the parties to a divorce have already demonstrated that they cannot get along in marriage. The argument, then, is how can they expect to be able to maintain contacts with each other and reach agreements in a post-divorce setting? The success of any custody situation turns on the emotional maturity of the parties and their willingness to provide a good home for their children. Problems of parents using their children as "tools" for revenge are legion. Whether there is more chance of this occurring in joint custody is not clear. The parents may argue over the details of the arrangement but may actually have less chance to take advantage of each other as both have legally recognized rights. The parents

---

<sup>142</sup> Mahoney & Mahoney, *supra* note 122, at 694.

<sup>143</sup> Eder, *supra* note 126, at 23.

<sup>144</sup> For example, allowing a child to choose which parent to see on a particular weekend forces the child to make a choice that will hurt the parent not chosen.

<sup>145</sup> GOLDSTEIN, FREUD & SOLINT, *supra* note 6, at 12.

are subject to a strong discentive; if joint custody proves unworkable and both parents want the children, a contested custody battle is their only resort.

This is to be contrasted with the power dynamics of sole custody. In sole custody, the custodial parent can frustrate the visiting rights of the non-custodial parent, and short of going back into court, the visitor has no way of enforcing his or her rights. The sole custodial parent also has more opportunity to present a negative or distorted picture of the absent parent. In joint custody, neither parent has a superior legal advantage and is therefore less likely to take unfair advantage of the other. Because both parties have legally established rights to care for their child and to make decisions about their child's welfare, neither parent can obtain concessions by threatening to prevent the other from seeing the child; nor can one make a major decision without consulting the other.

The strength of this arrangement is also its basic weakness. Because of the balance of power, deadlocks can frustrate the whole idea of shared responsibility. Courts may fear that deadlocked couples will continually resort to the courts for dispute resolutions. A study of joint custody parents belies this fear. It found that the parents were able to solve their differences by extrajudicial means using psychologists and social workers as third party mediators. Only one of the eight pairs studied returned to court.<sup>146</sup> This is not surprising. Generally, parties who agree to settlements out of court are less likely to return than parties who have fought over custody in court.<sup>147</sup>

It appears the parents' individual animosity is overcome by their concern over the children. In his studies and interviews with parents utilizing joint custody, Dr. Melvin Roman observed that:

---

<sup>146</sup> Keshet, *supra* note 18, at 151-52.

It is important to note that even though the parents were able to settle their differences out of court, the men reported that discussions with their wives during the first year were often "conflictual and anxiety-provoking." As time passed and routines were established (which lessened the need for frequent contact), the tensions also diminished. Some fathers admitted to having initiated contact with their ex-spouses either to gain closer ties with them or to punish them for leaving their marriage. Once new relationships were started with others, the need for contact with their ex-spouses declined. *Id.* at 69-70.

<sup>147</sup> See Freed & Foster, *The Shuffled Child and the Divorce Court*, TRIAL, 26, 34 (May/June 1974).

When couples want to share custody of their children, they are able to isolate out their marital conflicts from their parental responsibilities. In fact, it is not uncommon for joint custody parents to frankly admit their antipathy toward one another, but to maintain, at the same time, that they do not intend to harm their children just because they might like to harm one another.<sup>148</sup>

If courts allow joint custody as an alternative to the traditional sole custody awards, there is no reason to believe it will be misused more than sole custody has been. It may, in fact, offer a solution for those parents who actually want the responsibility associated with custody but do not feel capable of caring for their children alone.

Overall, more studies and data will be needed to assess the long range impact of joint custody upon children of divorced parents. However, from the data available, fears expressed by courts and some psychologists are not borne out. Moreover, the studies do indicate the children are actually happier in a situation where they can maintain ties with both parents. Such signs are encouraging. It shows that even though divorce ends a marriage, it need not necessarily terminate the family.

### CONCLUSION

The mechanics of parental functioning are changing. Children today are more likely to have mothers who have substantial employment outside the home and fathers who play active, nurturing roles in their lives than ever before. It is also more likely that children today will be required to deal with their parents' divorce as another growth event in their lives than were children in the past. Despite these changes in society and within the home, a child's need for warm, intimate relationships with both parents remains constant. Parents contemplating divorce must consider how to continue to meet their children's needs in light of the termination of their relationship with each other. Joint custody is one solution chosen by more and more parents. In most states, joint custody is already an option available to the courts. It, in fact, can even be imposed on reluctant parents. It is the subject of much judicial skepticism as well as criticism from psychologists.

---

<sup>148</sup> Roman, *supra* note 130, at 8.

When two parents request joint custody, they have made a choice that warrants great deference from the courts. The court must give this request not only serious but enlightened consideration. The child's needs must be met with minimal interference into the family's zone of privacy. To deny such a request the court must find that more harm would befall the child under a joint custody arrangement than if sole custody were awarded.

The court cannot rely on broad assumptions to make this finding. No empirical data exist which shows that joint custody is per se harmful to the child. The court in its discretionary review may certainly examine the logistics of the custody proposal. It may also question the parents on their dedication to effectuate the proposal. But ultimately the courts must facilitate the parents' choice unless facts are found which warrant a conclusion of harm to the child.

The real goal is to promote the child's emotional stability by facilitating the maintenance of the parent-child relationship. This may not be synonymous with assumptions of mother/nurturer, father/breadwinner or the assumption that having one home is more beneficial than having separate homes with two active, concerned parents.