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Martha L. Ramey

Fay Stender

Deborah Smaller

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JOINT CUSTODY: ARE TWO HOMES BETTER THAN ONE?

Martha L. Ramey,* Fay Stender,** and Deborah Smaller***

In recent years, there has been an increasing demand among divorcing parents for joint legal and physical custody of their children. This parallels a growing interest among fathers in taking a more active role in parenting and a desire among mothers to share the responsibility for raising children. Despite this phenomenon, courts have been reluctant to award joint custody, both because of statutory limitations and also because of fear that the problems which destroyed the marriage would be perpetuated or exacerbated, to the detriment of the children involved.[1]

This article will first distinguish joint custody from other types of arrangements. It will then set forth the legal status of joint custody in California and other states as determined by statutory and case law. Next, the sociological and psychological implications of joint custody for parents and children will be considered, followed by a discussion of the particular significance of joint custody issues for women. Finally, the article will present some suggestions for reform in custody proceedings.

I. WHAT IS JOINT CUSTODY?

Legal analysts have differed in their descriptions of what identifies a joint custody arrangement,[2] and courts have used the

* J.D., Hastings College of the Law, 1977; Private Practice, San Francisco; Administrative Director, California Women Lawyers Child Custody Project.

** J.D., University of Chicago Law School, 1956; Private Practice, San Francisco; Co-Director, California Women Lawyers Child Custody Project.

*** Third Year Law Student, New College of California, School of Law.

1. M. Ramey, F. Stender, & G. Dunn, Report of the California Women Lawyers Child Custody Project 13 (1977) [hereinafter cited as Ramey]. For information on obtaining this report, contact the offices of Stender & Stender, 1714 Stockton Street, San Francisco, California 94133.

2. The differences are primarily semantic. For example, one guide for practitioners defines a joint custody arrangement as one in which "the child may reside most of the year with one parent, but the parents have joint control of its care, upbringing, and education, and equal voice in decisions pertaining to its health, religious training, vacationing, schooling, and the like." Fain, *Custody of Children*, in 1 The California Family Lawyer 539, 564 (Continuing Education of the Bar 1962). Shared or alternating physical

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terms "divided," "split," "alternating," and "joint" custody to describe similar arrangements.[3] Use of uniform language[4] would avoid the resulting confusion[5] and encourage courts to accept the concept of joint custody. The terms "divided," "split," and "alternating" custody should be used to refer only to physical

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custody is called "divided custody." *Id.*

Another commentator defines joint custody similarly, but uses the term to encompass shared physical custody as well. Gaddis, *Joint Custody of Children: A Divorce Decision-Making Alternative,* 16 CONCILIATION COURTS REV. 17, 20 (1978). Recognizing the confusion in the language of joint custody, Gaddis suggests that "joint legal custody" be used to indicate shared decision-making responsibility, that "residential care" denote "physical custody," and that "residential parent" replace "custodial parent." *Id.* at 19.

Even the broader definition of "custody" as it is used by family courts is difficult to describe precisely. One definition by an author of a treatise on domestic relations law is that "custody," in the broadest sense, refers to the "relationship which exists between parents and child in a normal, going family," that is, when the parents and child live together and the parents have the duty to support the child, as well as the right to his or her earnings. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 573 (1968).

After separation or divorce, when the "normal, going family" no longer exists, Clark describes the parent who performs most parental functions, and who lives with and cares for the child, as having custody whether or not the other parent has some of the usual parental rights or obligations. *Id.*

3. In Juri v. Juri, 61 Cal. App. 2d 815, 817, 143 P.2d 708, 709 (1943), the court used the term "divided" custody to describe a situation in which the mother had custody for four months of the year and the father had custody for eight months. The same term was used in Merrill v. Merrill, 167 Cal. App. 2d 423, 424, 334 P.2d 583, 584 (1959), to define a more traditional arrangement by which the father had physical custody on alternate weekends, certain holidays, and for six weeks during the summer.

An arrangement by which the parents shared physical custody was described as "split custody" in Green v. Davis, 451 S.W.2d 579, 586 (Tex. Civ. App. 1970); and "split" or "alternating" custody in Schilleman v. Schilleman, 61 Mich. App. 446, 232 N.W.2d 737, 738 (1975) and in DeForest v. DeForest, 228 N.W.2d 919, 925 (N.D. 1975).

4. Gaddis, for example, recommends that "parents" be used rather than "parties" and that "shared time" or "right of access" denote "visitation time." He also would eliminate the term "visiting parent." Gaddis, *supra* note 2, at 19-20.

5. Several cases illustrate how the elusive definition of joint custody complicates proceedings other than joint custody. In Burge v. City and County of San Francisco, 41 Cal. 2d 608, 262 P.2d 6 (1953), a personal injury action, the question before the court was whether former California Probate Code section 1431, which authorizes the parent having "care or custody" of the child to compromise the minor's claim, means that such parent must have sole legal custody. Although the divorce decree gave the parents joint legal custody and control of the child, the mother had complete physical custody. The court held that the custodial rights involved in the physical care and control of a child were equivalent to "care or custody" under the statute and that the mother therefore had authority to compromise her child's claim, despite the fact that she was not the sole legal custodian. *Id.* at 618-19, 262 P.2d at 13.

In Adoption of Van Anda, 62 Cal. App. 3d 189, 132 Cal. Rptr. 878 (1976), an adoption proceeding, one issue was whether, when parents are awarded joint custody with actual physical custody going to one, the child involved can be adopted if both parents do not agree. The adoption statute permits consent to adoption of a child by one parent if that parent has custody. CAL. CIV. CODE § 224 (West 1954). As in *Burge,* the *Van Anda* court struggled with the distinction between joint legal custody and actual physical custody, concluding that a parent with physical but not sole legal custody met the custody requirement of the statute. 62 Cal. App. 3d at 196, 132 Cal. Rptr. at 882.

custody, rather than legal custody,[6] inasmuch as these terms merely describe the amount of time the child spends with each parent. In this article, the term "joint custody" indicates joint legal custody, whereby parents share legal responsibility for all important decisions related to the upbringing of the child,[7] as well as some degree of shared physical custody.

There is also an important distinction between de jure joint custody and de facto joint custody. In the former joint custody situation, the arrangement is court mandated, and the terms are contained in a legal separation agreement or a divorce decree. De facto joint custody refers to an out of court agreement between the parents, independent of the court-issued custody order. Although a court is not required to honor private settlements by the parents,[8] these agreements are often incorporated into the order if they work and if the court believes the welfare of the child is advanced. Once the settlement becomes part of the decree, it is binding.[9] As with pretrial settlements, private agreements by parents after issuance of a court order are not binding for purposes of modification or enforcement unless recognized by the court.[10]

II. THE LEGAL PERSPECTIVE

Despite increased interest in recent years, courts have been reluctant to award joint custody in the absence of express statutory authorization. This section will explore the current legal status of joint custody both in statutes and in case law. While the primary focus is on California, a brief survey of other jurisdictions will also be included.

A. California Statutory and Case Law

The history of California's custody statute reflects many changes in sociological and psychological attitudes. The statutory history documents a gradual shift from the early common law preference for the father as custodian[11] to a preference for the

6. *See* Fain, *supra* note 2, at 564.

7. This is the definition utilized by Fain, *id.*

8. *See, e.g.*, Van der Vliet v. Van der Vliet, 200 Cal. 721, 254 P. 945 (1927); Stewart v. Stewart, 130 Cal. App. 2d 186, 278 P.2d 441 (1955); Hendricks v. Hendricks, 69 Idaho 341, 206 P.2d 523 (1949); Gafford v. Phelps, 235 N.C. 218, 69 S.E.2d 313 (1952).

9. *See, e.g.*, Edelen v. Edelen, 150 Cal. App. 2d 681, 310 P.2d 486 (1957).

10. *See, e.g.*, In re Arkle, 93 Cal. App. 404, 269 P. 689 (1928); Anderson v. Anderson, 56 Cal. App. 87, 211 P. 827 (1922).

11. At early common law, the courts based their decisions in custody matters primarily on the principle of the father's property right in the child. The father, by virtue of this

mother, to the current gender-neutral standard. The tender years doctrine or maternal presumption was introduced into the statute by an amendment in 1931.[12] The amendment provided that, while neither parent was entitled to custody as a matter of right, if all other factors were equal the child of "tender years" was to be placed in the custody of the mother; the common law preference for the father was retained if the child was of school or working age.[13]

In 1969, the custody statute was recodified as part of the new California Family Law Act and was amended to provide that custody be awarded to "either parent according to the best interests of the child."[14] The statute retained the maternal presumption but deleted preference for the father as custodian if the child was not of tender years. In 1972, the most recent amendment deleted the maternal presumption; the statute no longer contains any presumptions and provides in gender-neutral terms that custody is to be awarded to "either parent according to the best interests of the child."[15] Although the presumptions favoring either parent have been eliminated, the statutory language still seems to preclude a custody award to both parents. Efforts to amend the statute to include this alternative have failed.[16]

Although many judges may find that strict adherence to the statutory language precludes a joint custody award, others have concluded that the "best interests of the child" require such an award.[17] There are no reported appellate court decisions overrul-

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right, was considered the child's natural guardian and as such was entitled to custody. It was only upon proof of the father's misconduct that his natural guardianship would not prevail.

For a discussion of the changing views of child custody, see Foster & Freed, *Life with Father: 1978*, 11 FAM. L.Q. 321, 325 (1977); Walker, *Measuring the Child's Best Interests—A Study of Incomplete Considerations*, 44 DEN. L.J. 132, 133 (1967).

12. Ch. 930, § 1, 1931 Stats. 1928 (1931) (current version at CAL. CIV. CODE § 4600 (West Supp. 1978)). A second major feature of the 1931 amendment was the articulation of the "best interests of the child" standard. *Id.*

13. *Id.* § 1(1) & (2), at 1929. A pre-school aged child is considered a child of "tender years."

14. Family Law Act, ch. 1608, § 8, 1969 Stats. 3330 (1969) (current version at CAL. CIV. CODE § 4600 (West Supp. 1978)).

15. CAL. CIV. CODE § 4600 (West Supp. 1978).

16. In March, 1976, Assembly Bill #3475 was introduced in the California legislature by Ken Maddy to amend Civil Code § 4600 to provide for a custody award to either parent or "to both parents" according to the best interests of the child. The bill passed in the Assembly by a vote of 65 to 1 but the 1975-76 session ended without a vote on the bill in the Senate.

17. *See, e.g.*, Merrill v. Merrill, 167 Cal. App. 2d 423, 334 P.2d 583 (1959); Rocha v.

ing a joint custody award on the basis that such awards are forbidden by statute. Even when children were of tender years and the tender years doctrine was still incorporated in the statute, joint custody awards were upheld.[18]

The cases demonstrate that courts awarding joint custody lack rigid rules in making physical custody arrangements. In *Gudelj v. Gudelj,*[19] joint legal custody of the child was awarded but physical custody was given to the mother with reasonable visitation rights to the father. In *Priest v. Priest,*[20] the court found that both parents were equally fit, that it was in the three year old child's best interests that they have joint custody of her, and that physical custody should alternate every three months. More recently, in *Klemm v. Superior Court,*[21] the court noted that a couple had been awarded joint legal custody of their children, with alternating physical custody every two weeks. These cases indicate that joint legal custody may be accompanied by a wide variety of physical custody arrangements.

B. Other Jurisdictions: Statutes and Case Law

Iowa, Maine, Michigan, North Carolina, and Oregon are the only jurisdictions at the present time which expressly allow joint custody by statute.[22] The 1977 Oregon statute has had a marked

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Rocha, 123 Cal. App. 2d 28, 266 P.2d 130 (1954); Juri v. Juri, 61 Cal. App. 2d 815, 143 P.2d 708 (1943).

18. *See, e.g.,* Rocha v. Rocha, 123 Cal. App. 2d 28, 266 P.2d 130 (1954) (children were seven months and twenty months old); Juri v. Juri, 61 Cal. App. 2d 815, 143 P.2d 708 (1943) (children were two and three years old).

In *Rocha,* the court concluded that the joint custody arrangement provided the children with "an opportunity to know their father without creating any quarrels or emotional scenes of the sort which had taken place in their presence before this action." 123 Cal. App. 2d at 30, 266 P.2d at 131.

The opinion in *Juri* reflects both caution about the joint custody arrangement and deference to the trial court's finding that the best interests of the children would be served by dividing custody, giving both parents association with their children. 61 Cal. App. 2d at 820, 143 P.2d at 711.

19. 41 Cal. 2d 202, 259 P.2d 656 (1953).

20. 90 Cal. App. 2d 185, 202 P.2d 561 (1949).

21. 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977).

22. Iowa Code § 598.21 (Supp. 1978-79); Me. Rev. Stat. tit. 19, § 214 (Supp. 1978); Mich. Comp. Laws § 722.25 (Supp. 1978-79); N.C. Gen. Stat. § 50-13.2(b) (Replacement 1976); Or. Rev. Stat. §§ 107.095 and 107.105 (1977).

The North Carolina statute allows the court to grant exclusive custody of the children to one person, agency, or institution, or, "if clearly in the best interest of the child, provide for custody in two or more of the same, at such times and for such periods as will in the opinion of the judge best promote the interests and welfare of the child." N.C. Gen. Stat. § 50-13.2(b) (Replacement 1976).

Oregon amended its custody statute in 1977 to permit a court to grant joint custody

impact on custody cases.[23] The Family Court Services Department of Domestic Relations in Marion County, Oregon, is now seeing "more referrals by attorneys . . . to meet informally, prior to court hearings and orders, to discuss joint custody on a consultative basis."[24] Moreover, Vicki Eder, of the Family Court Services, reports recommending joint custody for the first time in 1977 and in five out of twenty-one cases in 1978.[25]

There are at least eighteen other jurisdictions which have rejected the tender years doctrine by statute or judicial decision.[26] The current custody statutes in these states do not indicate a preference for either parent and do not explicitly sanction joint custody awards. A number of them incorporate a provision that the child's best interests shall govern[27] and some specify that

if it deems it just and proper, before and/or incident to a decree of annulment, separation, or dissolution of marriage. OR. REV. STAT. §§ 107.095 and 107.105 (1977).

In Maine, if parents are living apart, the court "may apportion the care and custody of the said minor between the parents, as the good of the child may require." ME. REV. STAT. tit. 19, § 214 (Supp. 1978).

23. Telephone interview with Vicki Eder, M.Ed., of Family Court Services, Department of Domestic Relations in Marion County, Oregon, June 20, 1978.

24. Letter from Vicki Eder to Deborah Smaller (July 6, 1978).

25. *Id.*

26. ALASKA STAT. § 09.55.205 (1977); ARIZ. REV. STAT. § 25-332 (1976); CAL. CIV. CODE § 4600 (West Supp. 1978); COLO. REV. STAT. § 14-10-124 (Cum. Supp. 1976); CONN. GEN. STAT. ANN. § 46-42 (West 1978); DEL. CODE tit. 13, § 701 (Supp. 1977); D.C. CODE § 16-914 (Supp. 1978); GA. CODE ANN. § 74-107 (Supp. 1978); HAW. REV. STAT. § 571-46 (1976); ILL. ANN. STAT. ch. 40, § 602 (Smith-Hurd Supp. 1978); IND. CODE ANN. § 31-1-11.5-21 (Burns Supp. 1977); MASS. GEN. LAWS ANN. ch. 208, § 31 (West Supp. 1978-79); NEB. REV. STAT. § 42-364 (Cum. Supp. 1978); N.H. REV. STAT. ANN. § 458.17 (Supp. 1977); N.Y. DOM. REL. LAW § 240 (McKinney 1977); OHIO REV. CODE ANN. § 3109.03 (Page 1972); TEX. FAM. CODE ANN. tit. 2, § 14.01(b) (Vernon 1975); WASH. REV. CODE ANN. § 26.16.125 (1961).

Where the tender years doctrine still exists, it often functions only as a "tie-breaker" when all other factors are equal. However, inasmuch as all factors are rarely equal and rejection of the maternal presumption is relatively recent, the tender years doctrine is still often determinative, whether or not expressly articulated. Moreover, the doctrine has even persisted in some states which have amended their statutes to prohibit the maternal presumption. For a discussion of this point, see Foster & Freed, *supra* note 13, at 331-32.

27. ALASKA STAT. § 09.55.205 (1977), for example, provides in typical language that "[t]he court shall determine custody in accordance with the best interests of the child." Relevant statutes in other jurisdictions which have adopted the best interests of the child doctrine are: ARIZ. REV. STAT. § 25-332 (1976); CAL. CIV. CODE § 4600 (West Supp. 1978); COLO. REV. STAT. § 14-10-124 (1973); CONN. GEN. STAT. ANN. § 46-42 (West 1978); DEL. CODE tit. 13, § 722 (Supp. 1977); D.C. CODE § 16-914 (Supp. 1978); GA. CODE ANN. § 74-107 (Supp. 1978); HAW. REV. STAT. § 571-46 (1976); ILL. ANN. STAT. ch. 40, § 602 (Smith-Hurd Supp. 1978); IND. CODE ANN. § 31-1-11.5-21 (Burns Supp. 1977); NEB. REV. STAT. § 42-364 (Cum. Supp. 1978); N.Y. DOM. REL. LAW § 240 (McKinney 1977); N.C. GEN. STAT. § 50-13.2 (Replacement 1976); OHIO REV. CODE ANN. § 3109.04 (Page 1972); TEX. FAM. CODE ANN. tit. 2, § 14.07 (Vernon 1975); WASH. REV. CODE ANN. § 26.09.190 (Supp. 1977).

Three states have enacted statutes containing language similar to the "best interests of the child." ME. REV. STAT. ANN. tit. 19, § 214 (1964); MASS. GEN. LAWS ANN. ch. 208, §

custody should go to "either parent."[28] Twelve states expressly prohibit a presumption in favor of either parent.[29]

Regardless of statutory language, decisions of courts in states other than California reflect broad judicial discretion. Some courts, in denying joint custody, have emphasized the disruptive effect on the child of living in two different homes. In *Ponder v. Rice,*[30] the court reversed a joint custody award in Texas, a state with a statute similar to California's,[31] and commented:

> Numerous factors militate against the idea of division of custody. . . . [I]ncluded in these factors are changes of discipline; changes of authority; sense of values; changes of habits and association with friends; changes of associations with activities in church, boy scouts, etc.;. . . . and finally the fact that the child is constantly reminded that he is from a broken home, and that he is the subject of the parents' antagonisms and bitterness toward each other.[32]

Other courts are strongly influenced by traditional ideas of the role of the mother. The Mississippi Supreme Court, acting pursuant to Mississippi decisional law,[33] which still recognizes the

31 (Supp. 1978-79); N.H. REV. STAT. ANN. § 438.17 (Supp. 1977).

28. *See, e.g.,* CONN. GEN. STAT. ANN. § 46-42 (West 1978); HAW. REV. STAT. § 571-46 (1976).

29. ALASKA STAT. § .09.55.205 (1977); DEL. CODE tit. 13, § 701 (Supp. 1977); GA. CODE ANN. § 74-107 (Supp. 1978); IND. CODE ANN. § 31-1-11.5-21 (Burns Supp. 1977); ME. REV. STAT. ANN. tit. 19, § 211 (1964); MASS. GEN. LAWS ANN. ch. 208, § 31 (West Supp. 1978-79); NEB. REV. STAT. § 42-364(2) (Cum. Supp. 1976); N.H. REV. STAT. ANN. § 458.17 (Supp. 1977); N.Y. DOM. REL. LAW § 240 (McKinney 1977); OHIO REV. CODE ANN. § 3109.03 (Page 1972); TEX. FAM. CODE ANN. tit. 2, § 14.01(b) (Vernon 1975); WASH. REV. CODE ANN. § 26.16.125 (1961).

Typical of a number of these statutes is Delaware's, which provides that "neither [parent] has any right, or presumption of right of fitness, superior to the right of the other concerning such child's custody." DEL. CODE tit. 13, § 701 (Supp. 1977). Another example of explicit statutory language is found in N.H. REV. STAT. ANN. § 458.17 (Supp. 1977), which states that the court "shall not give any preference to either of the parents of the children because of the parent's sex."

30. 479 S.W.2d 90 (Tex. Civ. App. 1972).

31. The Texas statute provides that the primary consideraton in awarding custody should be the best interest of the child. TEX. FAM. CODE ANN. tit. 2, § 14.07 (Vernon 1975). In determining which parent to appoint as managing conservator, the statute directs that neither parent shall be favored on the basis of sex. *Id.* § 14.01(b).

32. 479 S.W.2d at 95.

33. The Mississippi custody statute contains neither the tender years doctrine nor a preference for either parent. MISS. CODE ANN. § 93-5-23 (1972). However, the courts employ the doctrine when making custody awards. *See, e.g.,* Brown v. Brown, 237 Miss. 53, 112 So. 2d 556 (1959), in which the Mississippi Supreme Court noted that Mississippi courts are to exercise their broad discretion in custody matters in light of the general rule

tender years doctrine, reversed a modification order granting divided custody. The court returned sole custody to the mother because "[t]he child's welfare is inextricably bound up with that of its mother."[34]

On the other hand, many courts have awarded joint custody, recognizing the growing interest of fathers in parenting,[35] as well as the psychological benefits for the child and both parents.[36] In Idaho, where courts often apply the tender years doctrine if all other factors are equal,[37] the Idaho Supreme Court observed that the "parental relationship of a devoted father should be preserved, not destroyed, if such can be done without otherwise unduly disturbing the children involved."[38] In *Perotti v. Perotti*,[39] a New York court reflected favorably and at length on the merits of joint custody in a jurisdiction with a statute[40] similar to California's:

> [T]he concept of "joint custody" can serve to give that measure of psychological support and uplift to each parent which would communicate itself to the children in measure of mutual love, mutual attention and mutual training. The string of security and stability that would flow from mother to child to father, with "joint custody" serving as the emotional fulcrum, would but strengthen the parent-child unit in what otherwise could be a completely destroyed marital home.[41]

that custody of children of tender years should be awarded to the mother. *Id.* at 58, 112 So. 2d at 559.

34. Brocato v. Walker, 220 So. 2d 340, 344 (Miss. 1969).

35. *See, e.g.*, Nielsen v. Nielsen, 87 Idaho 578, 394 P.2d 625 (1964).

36. *See, e.g.*, Perotti v. Perotti, 78 Misc. 2d 131, 355 N.Y.S.2d 68 (Sup. Ct. 1974).

37. The Idaho Code does not incorporate the tender years doctrine within it but instead merely provides that custody be awarded "as may seem necessary or proper." IDAHO CODE § 32-705 (1948). However, a number of courts have applied the tender years doctrine and the Idaho Supreme Court has stated that "all other considerations being equal a mother will not be deprived of the custody of a child of tender years unless it clearly appears that the welfare of the child demands it." Angleton v. Angleton, 84 Idaho 184, 198, 370 P.2d 788, 796 (1962).

38. Nielsen v. Nielsen, 87 Idaho 578, 579, 394 P.2d 625, 626 (1964). In another case, the Idaho Supreme Court upheld an award of divided custody but commented that "divided custody of children should not be encouraged." Merrill v. Merrill, 83 Idaho 306, 311, 362 P.2d 887, 890 (1961).

39. 78 Misc. 2d 131, 355 N.Y.S.2d 68 (Sup. Ct. 1974).

40. The New York statute provides that there shall be no "prima facie right to the custody of the child in either parent" and that in awarding custody courts should take into account the "best interests of the child." N.Y. DOM. REL. LAW § 240 (McKinney 1977).

41. 78 Misc. 2d at 135, 355 N.Y.S.2d at 72-73.

Perotti clearly indicates that lack of express statutory authorization does not preclude joint custody awards.

III. THE SOCIOLOGICAL AND PSYCHOLOGICAL PERSPECTIVE

The concept of joint custody involves the most intimate and important human values and concerns. The legal issue it presents involves not only parents, children and family relationships, but also attitudes of legal and mental health professionals. This section will explore those professional concerns about joint custody and the extent to which criticisms are justified by the actual experience of joint custody families.

The controversy surrounding the issue of joint custody is illustrated by the wide range of opinions articulated by legal and mental health professionals.[42] The distinguished authors of BEYOND THE BEST INTERESTS OF THE CHILD[43] flatly rejected the notion of joint custody, asserting that a child can freely relate to more than one adult only if the adults are not in conflict with each other.[44] Custody, they said, should therefore be awarded exclusively to one parent who has sole authority to make decisions about the child's upbringing and about visitation rights of the child's other parent.[45] Despite the esteemed reputation of the authors, many professionals have criticized the book as overly simplistic and devoid of empirical data.[46]

In distinct contrast to the approach taken in BEYOND THE BEST INTERESTS OF THE CHILD, Melvin Roman, Ph.D., has concluded, as a result of his studies of divorced fathers, that all custody decisions should begin with a preference for joint custody.[47] In his view, only if this option proves unworkable should

42. *See, e.g.*, Eder, *Shared Custody—An Idea Whose Time Has Come*, 16 CONCILIATION COURTS REV. 23 (1978); Gaddis, *supra* note 2; Grote & Weinstein, *Joint Custody: A Viable and Ideal Alternative*, 1 J. DIVORCE 43 (1977); Kremer, *Opposition to Joint Custodial Time*, 4 FAM. L. COMMENTATOR 1 (No. 6, 1975); Lawrence, *Divided Custody of Children After Their Parents' Divorce*, 8 J. FAM. L. 58 (1968); Plant, *The Psychiatrist Views Children of Divorced Parents*, 10 LAW & CONTEMP. PROB. 807 (1944); Quinn, *Fathers Cry for Custody*, 6 JURIS DOCTOR 42 (No. 5, 1976); Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107 (1978).

43. J. GOLDSTEIN, A. FREUD & A. SOLNIT (1973) [hereinafter cited as GOLDSTEIN].

44. *Id.* at 38.

45. *Id.* at 37.

46. *See, e.g.*, RAMEY, *supra* note 1, at 8-12.

47. Dr. Roman is Professor of Psychiatry, Director of Group and Family Studies, Albert Einstein College of Medicine, New York, New York. He discusses the results of his studies in the forthcoming book, THE DISPOSABLE PARENT, adopted from a paper of the

a more traditional arrangement be adopted. A middle ground is held by those who, although not flatly opposed to the concept of joint custody, have voiced concerns about whether joint custody is a viable solution.[48] Many of these professionals have dealt primarily with the problems that arise when a custody agreement either cannot be reached or does not work.

Although families are opting more frequently for joint custody arrangements,[49] either court-sanctioned or informal, research on the effects of joint custody on parents and children is still in an early stage. For the most part, this research has not yet produced results conclusive enough to convince the courts that joint custody is an acceptable alternative.

The concerns and objections most often expressed in considering joint custody fall into two categories: parental conflict and disruption to the child. It is feared that parents who could not get along during the marriage will continue to be antagonistic after the divorce, using the child as a weapon against each other and creating loyalty conflicts in the child. Disputes about the child's upbringing and about financial arrangements for child-related expenditures are often mentioned as potential sources of discord. Great concern is also expressed that joint custody will disrupt the child's life, in that frequent transition from home to home may make the child feel like a visitor in each.

The information available to the authors from informal surveys and systematic research indicates that, in many cases, these concerns are not justified by actual experience. The authors of the studies described below[50] have concluded that in most cases in which families are committed to making joint custody work, conflict diminishes or is dealt with in a constructive fashion, differ-

same title presented at the Fifteenth Annual Conference of the Association of Family Conciliation Courts, held in Minneapolis, Minnesota on May 11, 1977, *reprinted in* 15 CONCILIATION COURTS REV. 1 (No. 2, 1977). Subsequent page references are to Roman's paper and to the published version in CONCILIATION COURTS REV.

48. RAMEY, *supra* note 1, at 13-16.

49. One Bay Area attorney has found that more than 50% of the couples who come to her for a dissolution want a joint custody arrangement. Interview with Harriet Whitman Lee, Family Law Counseling Services, Inc., formerly Directing Attorney for Consumers Group Legal Services in Berkeley (June, 1978).

50. A. ABARBANEL, JOINT CUSTODY: WHAT ARE WE AFRAID OF?, paper presented at the 1978 Annual Meeting of the American Orthopsychiatric Association in San Francisco (unpublished paper available from author at 2820 College Avenue #3, Berkeley, California 94705); P. WOOLLEY, SHARED CUSTODY: HOW IT WORKS (unpublished paper available from author at 190 Paso Robles Avenue, Los Altos, California 94022); Roman, *supra* note 47.

ences are resolved by negotiation or acceptance, and children are made to feel loved and secure in two homes.

A. THE ROMAN STUDY

A unique perspective on joint custody comes from the study of divorced fathers conducted in New York by Melvin Roman.[51] Because the father is traditionally the non-custodial parent, his needs are seldom considered, despite the fact that whatever happens to the father will ultimately affect the child. Roman thus approached his study with the intention of determining the impact of child absence on the father rather than father absence on the child.[52]

As a result of his research, Roman advocates adoption of a presumption in favor of joint custody in all cases. He concluded that the two objections most often voiced in opposition to joint custody, continued conflict between the parents and the disruption to the child, have generally either failed to materialize or are outweighed by the benefits of joint custody. Roman found in his study that conflict between the parents was often diminished by a decision to opt for joint custody.[53] In these families, the parents

51. Roman, *supra* note 47.

52. A summary of Roman's study and findings can be found in RAMEY, *supra* note 1, at 13-15. Fifty middle-income fathers, divorced no more than two years, with children between the ages of three and twelve, were interviewed in depth about their divorce, the custody decision, and their perceptions of their children's development before and after the divorce. Researchers found that there was a significant difference in attitudes and perceptions between fathers in traditional custody situations (custody in the mother, visitation by the father) and those in joint custody situations.

The majority of the fathers were non-custodial parents who had wanted joint custody but were dissuaded by legal and/or mental health professionals and the courts. They had taken a less active parenting role during the marriage, but often tended to work harder at parenting following the divorce. Many of these fathers were severely depressed and withdrawn and frequently found visitation to be a painful event. Feelings of anger and frustration were exacerbated by societal attitudes and biases of the courts which perceive the mother as the primary caretaker and the father as a "disposable parent." Fathers were often disoriented by the loss of their homes and children as well as their wives and reacted to the pain of loss with avoidance and withdrawal. As a result, their children were made to feel abandoned and angry.

Ten of the fifty fathers had joint custody of their children as well as joint living arrangements, including such divisions of time as four days/three days, six months/six months, or nine months/three months with either parent. These fathers had been very much involved in raising their children before the divorce end actively sought joint custody arrangements when the marriage was dissolved. All joint custody agreements had geographical constraints on the parents' living situations and most parents lived within walking distance of each other. Significantly, these fathers were the only fathers in the study who were not seriously depressed after the divorce.

53. Roman, *supra* note 47, at 8-9.

were able to separate their own conflicts from their dealings with and about their children, which enabled them to make joint child-rearing decisions. Many times, the efforts of parents to maintain a harmonious relationship in front of their children became a self-fulfilling prophecy.[54]

There is no guarantee that such harmony will exist in traditional arrangements. Sole custody and visitation are often used by the custodial parent as a weapon against the non-custodial parent, and the children are caught in the middle. Conversely, a low level of conflict between the parents contributes to the continued involvement of the father and better adjustment of the child. Thus, asserts Roman, traditional custody situations work best when they are similar to joint custody.[55] Finally, parental conflict may be diminished by joint custody because it more fully satisfies parental needs. In a traditional situation, the mother is, in effect, shut in with the children, while the father is shut out.[56] Joint custody, on the other hand, allows both parents to be involved with their children and to share the burden of child rearing.

Critics of joint custody often voice the objection that shifting back and forth between two parents and two homes, which Roman denominates the "child as yo-yo" objection,[57] is a serious source of disruption and loyalty conflicts.[58] Roman found that these fears are largely unjustified. In fact, he infers that it is the flexibility of joint custody which allows the most satisfactory living arrangements to evolve at different stages of the children's growth and development.[59] Thus, in the case of very young children who are more parent-oriented and who have a child's rather than an adult's sense of time,[60] divided weeks might be the best arrangement. On the other hand, an adolescent involved in numerous peer group activities may want to make one parent's house home base, while maintaining free and open access to the other parent.

In Roman's opinion, sole custody, rather than joint custody, is more likely to produce loyalty conflicts. If both parents want

54. *Id.* at 9.
55. *Id.*
56. *Id.* at 5.
57. *Id.* at 9.
58. *See, e.g.*, GOLDSTEIN, *supra* note 43, at 32-39.
59. Roman, *supra* note 47, at 9.
60. GOLDSTEIN, *supra* note 43, at 40-41.

custody, the battle for sole custody may be bitter and prolonged, with the child the ultimate loser. Although there has been "virtually no social science data to support the proposition that a single official parent is preferable to two,"[61] most courts persist in the view that custody should be awarded to either parent, but not to both.

Roman is one of many in the legal and mental health professions who advocates non-adversarial resolution of custody disputes.[62] Rather than waging protracted court battles for custody, parents should be encouraged to work out their own arrangements with the aid and support of family conciliation courts,[63] family counselors, and mental health professionals. Roman argues that diminished involvement of the courts and increased participation of the parents in determining what is in the best interests of their children will lead to more amicable resolution of disputes and to a fuller, more satisfying relationship between parents and children.[64] Whether court bureaucracies or other social service agencies or private practitioners can implement this goal remains to be seen.

B. The Abarbanel Study

The first in-depth study of joint custody was conducted in the San Francisco Bay Area by Alice Abarbanel, Ph.D.[65] Abarbanel explored the actual practice of joint custody by four families and analyzed the effects of such arrangements on both parents and children. For the purposes of her study, she defined joint custody as a "situation in which both parents agree that they exercise both physical and 'responsibility' custody, even if legally the arrangement is different."[66] The four families studied included seven children, aged four to twelve. In each family, the parents had been married six to seven and a half years and had been separated between one and two years. Individual living arrangements varied and the allocation of childcare responsibility between the parents ranged from 50/50% to 66/33% in all four

61. Roman, *supra* note 47, at 10.

62. *See also* Ramey, *supra* note 1, at 30.

63. For a discusson of the workings of the Conciliation Court, Superior Court of Los Angeles County, established by Meyer Elkin, Chief Counselor (retired), see *id.* at 30-32.

64. Roman, *supra* note 47, at 10-11.

65. Dr. Alice Abarbanel is affiliated with the Family Law Counseling Services, Inc., of Berkeley and has a private practice in Berkeley, California.

66. A. Abarbanel, *supra* note 50, at 1.

families. All parents were committed to living in close geographical proximity.[67]

Abarbanel found that the children were generally well adjusted and comfortable in their situations. They were unhappy with the separation of their parents, but, with the exception of the twelve year old, responded positively to living in two homes, despite variations in their parents' personalities, lifestyles, and home environments.[68] The children continued to have two psychological parents and were able to experience each parent in a normal living situation, with discipline, play and daily routine. Abarbanel noted that this factor greatly diminished the potential for loyalty conflict found in traditional custody arrangements,[69] in which the non-custodial parent may be idealized as the source of only pleasure. Furthermore, direct communication between the parents thwarted most efforts on the part of the children to play one parent off against the other. Abarbanel concluded that one of the advantages of two psychological parents is that the child experiences a limited amount of ambivalence, which is necessary for growth.[70]

Several factors were deemed crucial to the success of joint custody arrangements.[71] Parents must make a realistic assessment of alternative forms of custody. There must be commitment on the part of both parents to make joint custody work. Each parent must support the other and encourage a positive and realistic relationship between the children and the other parent. There should be flexibility in sharing responsibility, coordinating schedules, and logistics planning. Parents must agree on the overall terms and parameters of their present relationship as parents and must be able to distinguish this relationship from their past roles as spouses. Finally, they must accept some loss of control over their children's lives, while resisting any temptation to use their children as weapons or go-betweens.

Abarbanel concluded that joint custody is at least as desirable as any other form of custody.[72] It is neither inherently "good" nor "bad," but it works under certain conditions. Both legal and

67. *Id.* at 14.
68. *Id.* at 27.
69. *Id.* at 9.
70. *Id.*
71. *Id.* at 21-24.
72. *Id.* at 27.

mental health professionals must be open-minded and supportive in counseling families who have the potential to make joint custody work.

Although Abarbanel's study is a much-needed first step, it is limited in scope, as she herself points out. Further research is needed to determine the long-range effects of joint custody on children and to compare families in which joint custody is working with those in which it has failed.

C. THE JOINT CUSTODY STUDY PROJECT

The Joint Custody Study Project,[73] co-sponsored by Jewish Family and Children's Services and California Women Lawyers, is a comprehensive study of joint custody now in its initial stages in San Francisco. One of the goals of the Project is to gather concrete information and make it available to those representing and counseling parents who seek joint custody. Pinpointing factors characteristic of successful families will facilitate the development of guidelines for determining when joint custody would be in the child's best interests. The study should also provide a foundation for continued research and for a much needed analysis of long-term joint custody arrangements.

Criteria in selecting the twenty-five families to be interviewed include: parents have been separated and have had a joint custody arrangement for at least six months; children are between four and eighteen years old; both parents agree that they will make major decisions about their child's life jointly and that the child will live in two homes; division of childcare responsibility and time spent with the child is between 50/50% and 66/33%. Researchers will explore the effect of continued conflicts between the parents and the disruption to the child of moving between two homes and environments. In addition, the study will examine the following: motivations and expectations of parents seeking joint custody; special attributes or characteristics, if any, of parents with successful and unsuccessful joint custody situations; problems peculiar to children of different age groups in joint custody arrangements; the effect or significance of similar and dissimilar home environments; the extent to which it is necessary for par-

73. Muriel Brotsky, M.S.W., Project Supervisor; Susan Salter, D.S.W., Project Coordinator; Martha L. Ramey, Esq., and Fay Stender, Esq., Legal Consultants. Information on the Project may be obtained from Jewish Family and Children's Services, 1600 Scott Street, San Francisco, California 94115.

ents to live within close geographical proximity of each other; the effect of joint custody on pre-divorce and post-separation conflict between the parents; and the functions of joint custody in the transition to post-divorce family life.[74]

D. Preliminary Conclusions

There are no easy solutions to problems of child custody. The process of marital breakdown, divorce, and readjustment is always difficult and can inflict long-lasting psychological injury on every member of the family. However, the initial studies show that in a number of cases joint custody may help to soothe these wounds and make the transition to post-divorce life a smoother one.

Parental conflict seems no greater in a joint custody situation than in a traditional arrangement, or even than in some "intact" families. Conflict may be diminished if parents are willing to be flexible and open to amicable resolution of differences. The disruption caused by moving a child back and forth between two places in which he or she feels loved and at home may be preferable to a situation in which the child feels uncomfortable in the home of the parent who only has visitation rights. Children in a joint custody situation who are able to go to school and have one circle of friends may feel less disrupted than the children of military or corporate personnel who must change homes, schools, and friends as often as every year.

Although an individual custody arrangement may, of necessity, evolve as the children grow and change, joint custody may be a practical solution to many problems created by marital breakdown. It may not be desirable in every case, but the satisfaction of parents and children indicates that joint custody should certainly receive serious consideration.

IV. JOINT CUSTODY: WHAT IT MEANS FOR WOMEN

Within the growing body of literature about joint custody, the emphasis so far has been on the effects that this alternative arrangement has on children,[75] on fathers,[76] and on family sys-

74. Susan Salter, D.S.W., Proposal to the San Francisco Foundation for Funding of Jewish Family and Children's Services and California Women Lawyers Joint Custody Project 8-9 (unpublished) (on file at the offices of Golden Gate University Law Review).

75. Goldstein, *supra* note 43.

76. Roman, *supra* note 47.

tems.[77] There is a conspicuous absence of comprehensive analysis of the ways in which joint custody affects women. The authors hope that the following discussion will encourage further investigation and analysis.

A. Psychological Implications

Sharing child-rearing responsibility in a joint custody situation may allow or force a woman who has been at home as a full-time mother to resume or commence an education or career outside the home. The psychological effects of this can be extremely positive, raising a woman's self-esteem and enabling her to satisfy intellectual and emotional needs which may have been neglected while she worked in the home as a full-time mother. As joint custody becomes a more socially acceptable alternative, many women will feel less guilty for making such a choice, and will work outside the home in addition to raising their children.

It seems inevitable that a woman who is not required to fulfill the roles of both parents will be happier and less resentful, and consequently a better mother.[78] This, in turn, will positively affect her feelings about herself. Joint custody may also help a woman deal with her feelings toward her ex-spouse, since it facilitates resolution of resentment and provides an incentive to work cooperatively with the father, rather than against him. A joint custody arrangement may free her from feeling that she is depriving her children of a male role model or of the father's love and attention. It could also preclude feelings of guilt for depriving an ex-spouse of an active role in raising his child.

A new variation on an old theme is the situation in which a woman consents to sole custody of her children by the father in order to devote herself to education or career. She may find that she is a stranger to her children, as so many fathers have been in the traditional custody arrangement. Joint custody for her would mean the opportunity to build a stronger relationship with her children without having to abandon the personal goals necessary to her self-fulfillment.

Joint custody may, however, have a negative psychological impact in some cases. For the woman who has derived her iden-

77. A. Abarbanel, *supra* note 50.

78. Roman discusses the anger, depression, and frustration felt by the mother as sole custodian in traditional arrangements. Roman, *supra* note 47, at 5.

tity and sense of self-worth primarily from her role as mother, a joint custody arrangement could, at least temporarily, cause confusion and lower her self-esteem. A woman who has been out of the job market for many years while raising children is particularly vulnerable to these feelings and may have difficulty filling the emotional void which has been created. Additionally, to equalize custody between men and women at a time when employment opportunities are not yet equal creates for some women a situation in which they are forced to relinquish one function but are unable to assume another.

Another possible disadvantage to some women is the restriction joint custody may place on geographic mobility. If the parents agree that they will both take an active role in the upbringing of their child, they must live close enough to each other to facilitate this agreement. For many women, a joint custody arrangement creates the opportunity to continue an education or pursue a career. It would be ironic indeed if a woman were unable to take advantage of new opportunities because they involve geographical relocation which makes the joint custody agreement unworkable.[79]

B. Legal Implications

On balance, the advantages of the cooperative aspects of joint custody would appear to weigh in favor of such an arrangement legally as well as psychologically. A joint custody agreement usually arises out of a mutually acceptable plan, in which the parents negotiate their own working relationship and resolve their own differences. Therefore, it is far less likely that they will repeatedly return to court. This may reduce trauma and permit earlier establishment of new lives following the divorce.

Joint custody arrangements, however, pose a potentially serious problem for women. A woman may decide to move for sole custody because of unwanted estrangement from her children, unresolvable major disagreements with her ex-spouse, or a desire

79. Brigitte M. Bodenheimer has raised a related issue in her article, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 Calif. L. Rev. 978 (1977). She sees joint custody arrangements as problematic under the Uniform Child Custody Jurisdiction Act because "if one of the parents moves and the other seeks to enforce the decree in another state, it will be impossible for that state to comply with the Uniform Act's enforcement provisions." *Id.* at 1011. *See* Bodenheimer's article for a full discussion of the Act and its implications for joint custody.

to move away from the area in which the father lives. But if she does seek sole custody, she runs the risk of either being forced to remain in the joint custody arrangement unwillingly or, if the father also wants sole custody, losing the children to him completely in the ensuing custody battle. Several cases suggest that this is a very real danger.

Childers v. O'Neal[80] involved a six month alternating joint custody arrangement. The mother filed a motion for sole custody because of difficulty in exercising her visitation rights. Her motion was denied because she failed to show that there was a sufficient change of circumstances to justify an award of sole custody.[81] In *McCrery v. McCrery*,[82] the mother had gone back to school and the father had physical custody of the child pursuant to a joint custody decree. The court refused to uphold the mother's visitation rights on weekends and during the summer, reasoning that such extensive visitation rights would "give the father little free time to spend with his child and restrict her [the mother's] opportunity for other social contacts."[83]

Other economic and social factors may work to the detriment of the mother in a joint custody situation. Some have argued that feminists, in striving to eliminate sex roles, should exercise caution in attempting to do away with the maternal presumption in states in which this has not already occurred.[84] Although the presumption reflects earlier male/female stereotyping, to give all fathers equal legal footing with mothers for custody at this time may be a tactical error. The fact that women have not yet achieved social and economic equality outside the home puts them at a disadvantage in custody disputes due to their inferior earning capacity.[85] The strong judicial preference for two-parent families and non-working mothers also puts divorced women at a disadvantage, since the available evidence shows that men are

80. 251 Ark. 1097, 476 S.W.2d 799 (1972).

81. *Id.* at 1098, 476 S.W.2d at 800. *See also* Roth v. Roth, 52 Ill. App. 3d 220, 367 N.E.2d 442 (1977).

82. 258 Iowa 354, 138 N.W.2d 876 (1965).

83. *Id.* at 358, 138 N.W.2d at 878.

84. *See, e.g.*, Uviller, *supra* note 42, at 108-09.

85. A related problem arises when parents agree that whoever has custody at the time will bear the financial burden for the child during that period. Such an agreement will generally place a heavier burden on the mother due to the fact that men's incomes are still usually greater than women's. One solution might be an express agreement that this difference in economic positions will be considered when allocating child-rearing expenses. Gaddis, *supra* note 2, at 21.

much more likely to remarry than are women.[86] Finally, however gender-neutral a custody statute appears to be on its face, courts scrutinize the mother's lifestyle and mores more critically than those of the father.[87]

The effect of discarding the maternal presumption in states in which it is still in effect may leave nothing to balance against discriminatory attitudes toward the mother. Since most judges are middle-aged men, covert judicial preference for the male remains a vitally important reality and requires in-depth articulation and exposure. As more feminists, men and women, are appointed to the bench and attitudes change, this problem may lessen in intensity.

V. SUGGESTIONS FOR REFORM IN CUSTODY PROCEEDINGS

In 1964, Lawrence S. Kubie, M.D., proposed that there be a presumption of joint custody, an appointment of a confidential adult-ally for the child, and a committee chosen by the parents to decide questions which the parents are unable to resolve.[88] Kubie argued that not only would this process be faster, less expensive, and more private than the judicial machinery, but it would also evoke the trust and cooperation of the parents in a way that a judge could not. Important and often very difficult decision making would not be vested in one person, but instead in a group of people. Such a procedure would place primary emphasis on the child's changing needs, enable the parents to work cooperatively to meet those needs, and help ensure well-reasoned decisions.[89]

The recommendations of Robert Mnookin, a law professor and authority on family law, are similar.[90] Mnookin advocates that parents negotiate their own child custody settlements, instead of relying on the courts. The resulting agreements would more likely "match the parents' capacities and desires with the child's needs."[91] The parents would be less likely to emerge from

86. Uviller, *supra* note 42, at 122, quoting statistics from U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, No. 223, at 55 (1971).

87. *Id.* at 124.

88. Kubie, *Provisions for the Care of Children of Divorced Parents: A New Legal Instrument*, 73 YALE L.J. 1197 (1964).

89. *Id.* at 1199-2000.

90. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB. 226 (Summer, 1975).

91. *Id.* at 288.

the divorce process as a "winner" and a "loser" in relationship to the child. Mnookin also recommends that mediators or family counselors adopt as their goal "parental resolution of the custody dispute, rather than the broader task of 'curing' or 'treating' the parents or saving the marriage."[92] If parents cannot agree on a settlement themselves, Mnookin suggests "informal adjudication"; the parents choose a third party to arbitrate those disagreements they cannot resolve themselves.[93]

Meyer Elkin, retired Director of Family Counseling Services in Los Angeles, has offered another proposal which emphasizes the advantages of ex-spouses "exercising self-determination" instead of relying on a judge to tell them what to do.[94] Elkin focuses not on the legal divorce process but on the post-divorce emotional process, which he believes invariably continues beyond the legal experience and is equally important. His experience with the Los Angeles Conciliation Court's post-divorce counseling service, introduced in 1974 for families who return to court for post-divorce litigation regarding custody and/or visitation problems, has led Elkin to conclude that this kind of counseling as a means of resolving legal issues is far superior to a court imposed solution. He also feels that

> [c]ustody/visitation problems are usually not the real issue . . . but are old wars being fought on new battlefields. Post-divorce litigation is most often a smoke screen that hides the real problem, which is that two divorced people are still very much connected by anger and other factors that bind people together as much as love or any other strong emotion.[95]

Elkin believes that post-divorce counseling recognizes this psychological reality and provides a method of dealing with it.[96]

In the opinion of another family counselor, Vicki Eder, affiliated with the Family Court Services of Oregon, "[t]here should be more separation of divorce/property matters from custody matters, the latter not to be determined until both parents have

92. *Id.* at 288-89.

93. *Id.* at 289.

94. Elkin, *Postdivorce Counseling in a Conciliation Court*, 1 J. DIVORCE 55 (1977).

95. *Id.* at 56.

96. Elkin also asserts that since, in California, "no-fault divorce laws no longer allow the parties to vent their anger in court and to cite specific acts of misconduct, the need to tear the ex-spouse down may be displaced onto custody/visitation conflicts." *Id.* at 62.

Golden Gate University Law Review, Vol. 8, Iss. 3 [1979], Art. 7

made the full transition to two separate households."[97] At that time, the court can better evaluate what is in the best interests of everyone involved in restructuring the post-divorce family. Eder also feels that one of the disadvantages of the present court system is that it does not allow time for change. If joint custody is contemplated, time is often needed to allow the arrangement to evolve gradually before a final court decision is made.[98]

There are other more technical suggestions which focus on drafting the joint custody decree. One attorney suggests that "since an important part of the joint custodial process is to encourage private decision making rather than litigation . . . there should be a mediation/arbitration clause which describes the procedure for the parents to follow when they alone cannot resolve a conflict."[99] Such a clause might require that, prior to requesting relief from the court, the parents seek mediation and, if necessary, arbitration from some person(s) skilled in the area of family/custody problems.[100] When agreed upon by the parents, the decree might specifically require renegotiation or review of the arrangement if certain contingencies occur, such as one parent wanting to remove the child from the jurisdiction, remarriage by one of the parties, or a major change in one of the parent's lifestyles.[101]

VI. CONCLUSION

Opponents and advocates of joint custody agree that there is insufficient statistical data at this time to evaluate the feasibility and desirability of joint custody as an alternative custody arrangement. Further, the phenomenon of joint custody itself is relatively recent, and it is therefore difficult to project its long-term success rate,[102] both in terms of parental satisfaction and impact on the children involved.

According to the experience of some professionals, joint custody has already proven itself successful. A survey of couples who had joint custody arrangements revealed that the majority began with a traditional custody arrangement but were dissatisfied with it.[103] In the experience of one attorney, few cases in which joint

97. Eder, *supra* note 24.
98. Eder, *supra* note 42, at 25.
99. Gaddis, *supra* note 2, at 20.
100. *Id.*
101. *Id.* at 21.
102. *Id.* at 19.
103. Interview with Persia Woolley (June, 1978).

custody has been utilized have come back for redetermination of custody or resolution of post-dissolution problems.[104]

It is generally characteristic of family law that cases which have been mediated or negotiated to a settlement have a much lower recidivism rate; that is, they do not return to adversary proceedings as often as those cases which have been litigated.[105] Why then are mental health practitioners and law practitioners so wary of joint custody? Professional impressions depend, for the most part, on personal contact with joint custody arrangements that are not working.

Until more reliable findings on joint custody are available, professionals should realize that the more visible joint custody cases are the ones which are emotionally and/or legally problematic. Judges especially should be aware of this fact because they have the discretion to award joint custody when it is in the best interests of the child to do so. A two-year scheduled court review might be adopted. Even though this defeats one purpose of family law settlements, which is to keep cases out of the courts, the benefits of joint custody might be worth the expense of additional court review.

We have, of course, not dealt with the more complex problem which arises when one parent urges joint custody and the other opposes it. Exploration of this situation must await more evidence on joint custody as it is practiced by parents who agree to that form of custody. The positive findings of the studies to date on the effects of joint custody, the satisfaction derived from such arrangements by parents and children alike, indicate that joint custody, when mutually desired, should receive thorough consideration as a legally sanctioned option.

104. Gaddis, *supra* note 2, at 19.
105. *Id.*