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Joint Custody

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I. INTRODUCTION

As divorce has become more prevalent during the twentieth century, courts and legislatures have increasingly been faced with the task of determining the fates of children of divided homes. The approved formulas for deciding which parent should be awarded custody have varied as widely as the social and psychological theories upon which they are based. The purpose of this article is to identify the current trend in custody results, to define a type of custody arrangement called joint custody, which allows both parents to contribute to the rearing of the children of a dissolved marriage, to recommend its judicial approval, and to propose a statute containing a presumption favoring joint custody.

II. CURRENT TRENDS IN CUSTODY RESULTS

Some parents, after dissolution of their marriage, are able to agree on a workable solution to the problems of child control and

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custody. Far too often, however, divorcing parents cannot or will not agree on who is to make the important as well as the trivial decisions on child rearing, or where the children are to live. In the latter case, the unpleasant task of choosing between the competing parents has, in the United States, traditionally fallen on the trial court's shoulders. In the midst of a maelstrom of heart-wrenching emotion, the trial judge is faced with the awesome responsibility of placing the children in an environment where they can develop without suffering unnecessarily due to the divorce. As the Supreme Court of Colorado has stated, "[n]o question ever submitted to the courts calls for greater care or wisdom in its decision, and none is more far-reaching in its consequences."[1] This decision is even more difficult because "[a] decree of divorce with its custody provisions cannot contrive a satisfactory substitute for a happy parental home,"[2] and "there are no reliable, empirical studies that can be used to predict the consequences of an adult's assumed future behavior upon a child."[3] Since the beginning of the twentieth century, the American judicial system has searched for, but failed to find, an acceptable solution to this dilemma.

The common-law rule awarded custody of children to the father, on the theory that he had a property interest in their services.[4] This rule was abrogated in the early twentieth century by state statutes, which typically provided that neither parent had a prima facie right to custody.[5] Since the state had an interest in fostering the growth of its future citizens, trial courts were directed to consider primarily the "best interests" of the child.[6] In the close

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1. Searle v. Searle, 115 Colo. 266, 273, 172 P.2d 837, 840 (1946) (quoting Brok v. Brock, 123 Wash. 450, ____, 212 P. 550, 551 (1923)).

2. McGetrick v. McGetrick, 204 Or. 645, ____, 284 P.2d 352, 355 (1955) (quoting Flanagan v. Flanagan, 195 Or. 611, 621, 247 P.2d 212, 217 (1952)).

3. J.B. v. A.B., ____ W. Va. ____, ____, 242 S.E.2d 248, 255 (1978).

4. Johnson v. Terry 34 Conn. 259, 263 (1867); Risting v. Sparboe, 179 Iowa 1133, ____, 162 N.W. 592, 594 (1917). *See also* 2 J. KENT, COMMENTARIES* 193-94; Jones, *The Tender Years Doctrine: Survey and Analysis,* 16 J. FAM. L. 695, 696 (1978).

5. For cases discussing some of these statutes *see* Risting v. Sparboe, 179 Iowa 1133, 162 N.W. 592 (1917); Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81 (1931), Rufer v. Rufer, 67 N.D. 67, 269 N.W. 741 (1931). *See also* Roth, *The Tender Years Presumption in Child Custody Disputes, 15 J.* FAM. L. 423, 429 (1977).

In discussing one such statute, one court made this all too accurate comment: "[i]n the effort to escape from the arbitrary rule laid down by the common law as to the father's right, the danger is lest the pendulum swing too far, under modern decisions, the other way." Sinquefield v. Valentine, 159 Miss. 144, ____, 132 So. 81, 83 (1931) (quoting Hibbette v. Baines, 78 Miss. 695, ____, 29 So. 80, 81 (1900)).

6. Wilson v. Mitchell, 48 Colo. 454, 111 P. 21 (1910). In *Wilson* the Colorado Supreme Court stated:

> In controversies affecting the custody of an infant, the interest and welfare of the child is the primary and controlling question by which the court must be guided. This rule is based upon the theory that the state must perpetuate itself, and good citizenship is essential to that end. Though nature gives to parents the right to the custody of their own children and such right is scarcely less sacred than the right to life and liberty, and

case, where both parents were relatively equally fit, trial judges were left with virtually undirected discretion, and the responsibility of making a choice was often based on nothing more than a hunch.

In order to make wise decisions in good faith, the judiciary turned to the neophyte social sciences of the day, and to the consensus of American culture. The "tender years" doctrine resulted[7] and soon took root in case law[8] and in statute.[9]

In its earliest days, the tender years doctrine awarded custody

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> is manifested in all animal life, yet among mankind, the necessity for government has forced the recognition of the rule, that the perpetuity of the state is the first consideration, and parental authority itself is subordinate to this supreme power. It is recognized that: "The moment a child is born, it owes allegiance to the government of the country of its birth, and is entitled to the protection of that government. And such government is obligated by its duty of protection, to consult the welfare, comfort and interest of such child in regulating its custody during the period of its minority."

Id. at 465, 111 P. at 25.

Similarly, the Iowa Supreme Court stated, "[i]n this class of cases three interests are involved, of the parents, of the state, and of the child, and of these, the most important and controlling is that of the child; for by a proper decision as to that, the other interests are best subserved." Risting v. Sparboe, 179 Iowa 1133, ____, 162 N.W. 592, 594 (1917).

7. Opinions approving the tender years doctrine rarely refer to any theoretical basis. Typical language giving reasons for adhering to the doctrine is purely conclusory. *See infra* note 10. An exception is this West Virginia Supreme Court of Appeals pronouncement:

> The socialization patterns which prevailed during the formative years of the current generation of parents with young children encouraged women to develop certain attitudes such as surpassing patience and a high tolerance for a close, grating, aesthetically unpleasant, and frequently oppressive, yet nonetheless absolutely indispensable physical relationship with children. We are not being normative in our reliance upon the socialization process; we merely avail ourselves of it for the benefit of young children in the same way that a physicist relies upon the law of gravity or a doctor relies upon osmosis. When the socialization pattern changes to the extent that the traditional roles of mother and father are reversed with such frequency that the presumption no longer bears any relation to reality, then the law, perforce of changed circumstances will inevitably change.

J.B. v. A.B., ____ W. Va. ____, ____, 242 S.E.2d 248, 252-53 (1978).

8. Jurisdictions vary strikingly in the evolution of case law and statutes and the effects of each upon the other. Some state appellate courts approved the tender years doctrine in seeming disregard of contrary legislative intent. *See, e.g.*, Clark v. Clark, 217 Va. 924, 234 S.E.2d 266 (1977); Harper v. Harper, 217 Va. 477, 229 S.E.2d 875 (1976); Burnside v. Burnside, 216 Va. 691, 222 S.E.2d 529 (1976).

In some states, case law seemed to *follow* legislative enactment in adopting the doctrine, *see infra* note 9, while in some jurisdictions case law approving the doctrine predated any mention of or reliance on statute. *See e.g.*, McGarraugh v. McGarraugh, 177 S.W.2d 296 (Tex. Ct. App. 1943), (making no mention of any statute) and Hamer v. Hamer, 184 S.W. 2d 492 (Tex. Ct. App. 1945), (citing a Texas statute expressing the tender years doctrine). For cases which do not cite a *statutory* preference for the tender years doctrine *see* Kilgore v. Kilgore, 54 Ala. App. 336, 308 So. 2d 249 (Civ. App. 1975); Wonsetler v. Wonsetler, 240 So. 2d 870 (Fla. Dist. Ct. App. 1970); Stillmunkes v. Stillmunkes, 245 Iowa 1082, 65 N.W.2d 366 (1954); Lewis v. Lewis, 217 Kan. 336, 537 P.2d 204 (1975); Babb v. Babb, 293 S.W.2d 728 (Ky. 1956); Jones v. Jones, 344 So. 2d 414 (La. Ct. of App. 1977); Sheil v. Sheil, 29 App. Div. 2d 950, 289 N.Y.S.2d 86 (1968); McGetrick v. McGetrick, 204 Or. 645, 284 P.2d 352 (1955); Commonwealth ex rel. Hubbell v. Hubbell, 176 Pa. Super. 186, 107 A.2d 388 (1954); Cherry v. Cherry, 384 S.W.2d 912 (Tex. Ct. App. 1964); and Lundeen v. Strumminger, 209 Va. 548, 165 S.E.2d 285 (1969).

9. These statutes took several forms. The Arizona and North Dakota statutes were almost identical. The Arizona statute provided as follows:

> As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child is of tender years, it shall be given to the mother. If the child is of an age requiring education and preparation for labor or business, then to the father.

and control to the mother due to a nearly unrebuttable[10] presumption that a child of "tender years"[11] needed and craved the peculiar love which only a mother could give.[12] Some writers attributed the tender years doctrine to the sociological changes in the gender role brought about by the industrial revolution. With the husband more often concerned with making a living away from the family, domestic supervision was predominately the mother's prerogative, by default, if for no other reason.[13]

At its strongest, the tender years doctrine has prevailed in the face of statutory language to the contrary,[14] but as the twentieth century has passed, the effect of the tender years doctrine has been weakened. For example, many states have at one time or another restricted the doctrine's use to situations where two suitable parents presented similar living conditions, with the result that the trial court considered the doctrine's preference for the mother only if it found that all other factors were equal,[15] or at least that both

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ARIZ. REV. STAT. § 14-846 (B) (current child custody statute at ARIZ. REV. STAT. § 25-332 (1976)).

For cases interpreting § 14-846 *see* Dunbar v. Dunbar, 102 Ariz. 352, 429 P.2d 949 (1967); Olsetyn v. Olsetyn, 20 Ariz. App. 545, 514 P.2d 498 (1976).

The North Dakota statute provided as follows:

> As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but other things being equal, if the child is of tender years, it should be given to the mother, and if it is of an age to require preparation for labor or business, then to the father.

N.D. CENT. CODE § 30-10-06(2) (repealed 1973).

10. The Superior Court of Pennsylvania stated, "[t]he needs of a child of tender years are best served by its mother, and, unless *compelling* reasons appear to the contrary, such child should be committed to the care and custody of its mother." Commonwealth ex rel, Hubbell v. Hubbell, 176 Pa. Super. 186, ____, 107 A.2d 388, 390 (1954) (emphasis added).

11. Most courts do not attempt to define the age at which the doctrine ceases to apply. *But see* Dunbar v. Dunbar, 102 Ariz. 352, 429 P.2d 949 (1967), and DeForest v. DeForest, 228 N.W.2d 919 (N.D. 1975), which looked at statutes which seem to indicate that the tender years doctrine is no longer applicable to a child as he prepares to make his way in the world. *See also* Mansfield v. Mansfield, 230 Minn. 574, 42 N.W.2d 315 (1950) (suggests that older boy needs father's companionship); E.C.S. v. J.D.L., 529 S.W.2d 423 (Mo. Ct. App. 1975) (father's guidance and discipline important for boy of sixteen); Baer v. Baer, 51 S.W.2d 873 (Mo. Ct. App. 1932) (twelve year old is no longer of tender years); J.B. v. A.B., ____ W. Va.____, 242 S.E.2d 248 (1978) (upper limit for tender years is fourteen).

12. One court described the nature of the mother's love by stating, "[t]here is but a twilight zone between a mother's love and the atmosphere of heaven, all things being equal, no child should be deprived of the maternal influence unless it be shown there are special or extraordinary reasons for so doing." Tuter v. Tuter, 120 S.W.2d 203, 205 (Mo. Ct. App. 1938).

13. *See infra* note 24.

14. *See, e.g.*, Clark v. Clark, 217 Va. 924, 234 S.E.2d 266 (1977); Harper v. Harper, 217 Va. 477, 229 S.E.2d 875 (1976); Burnside v. Burnside, 216 Va. 691, 222 S.E.2d 529 (1976).

15. Wonsetler v. Wonsetler, 240 So. 2d 870 (Fla. Dist. Ct. App. 1970); Davis v. Davis, 354 S.W.2d 526 (Mo. App. 1962); Hamer v. Hamer, 184 S.W.2d 492 (Tex. Ct. App. 1944).

Maryland courts credited the tender years doctrine with even less weight just before its abolition in 1974. After concluding that the maternal preference doctrine was to serve a limited function as a tiebreaker, the court stated as follows:

> We concede that it is unlikely that litigants will have parental qualities so equally balanced that resort to the maternal preference will be necessary. It should therefore

parents were fit and proper.[16]

It is not clear whether the modern "no preference" statutes are a cause or an effect of the decline of the tender years doctrine, or both, but certainly, as more states have enacted statutes providing for an equal parental right to control and custody,[17] the tender years doctrine has been falling from favor in appellate court opinions. These opinions usually mention a "no preference" statute as one reason for disapproving the tender years doctrine.[18] Some states still cling to the tender years doctrine,[19] while some courts have rejected it without reference to statute or constitution.[20]

Just as social sciences and the state of American culture gave rise to the tender years doctrine, changes in the American culture and the pronouncements of social science apparently underlie its demise. People in all walks of life have more leisure time today than their predecessors did fifty years ago, and fathers are spending their leisure time on child rearing. One result is that fathers today have more effect on their children's development,[21] more of a stake in

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not be expressed as a consideration at all, except in those limited instances where it would be impossible to decide upon the evidentiary facts.

Cooke v. Cooke, 21 Md. App. 376, ____, 319 A.2d 841, 844 (1974).

16. Reynolds v. Reynolds, 45 Wash. 2d 394, 275 P.2d 421 (1954).

17. Some states which have or have had a statute providing for an equal parental right to custody and control of children of a divorce include Arizona, California, Colorado, Connecticut, Hawaii, Illinois, Nebraska, New Hampshire, New York, North Dakota, Rhode Island, and Texas. It is interesting to note that the Uniform Dissolution of Marriage Act has no such provision. The Colorado Legislature repealed the existing "no preference" statute when the Uniform Dissolution Act was adopted, but results similar to those under the statute have been based on Article II, section 29 of the Colorado Constitution, prohibiting discrimination based on sex, and on the fourteenth amendment of the United States Constitution. *See* In re Marriage of Franks, 189 Colo. 499, 542 P.2d 845 (1975), *stay denied*, 423 U.S. 1043 (1976); Menne v. Menne, ____ Colo. ____, 572 P.2d 472 (1977); Pacheco v. Pacheco, 38 Colo. App. 181, 554 P.2d 720 (1976). In contrast, Indiana did not repeal its "no preference" statute when the Uniform Dissolution of Marriage Act was enacted. This statute has continued to be cited in cases. In re Marriage of Myers, ____ Ind. App. ____, 387 N.E.2d 1360 (1979).

In North Dakota, a statute providing, "[b]etween the mother and father, whether natural or adoptive, there is no presumption as to who will better promote the best interests and welfare of the child," took effect in 1979. N.D. CENT. CODE § 14-09-06.1 (Supp. 1979).

18. *See, e.g.*, Neal v. Neal, 92 Cal. App. 3d 834, 155 Cal. Rptr. 157 (1979); Raver v. Raver, 32 Colo. App. 400, 512 P.2d 637 (1973); Braiman v. Braiman, 44 N.Y.2d 584, 387 N.E.2d 1019, 407 N.Y.S.2d 449 (1978).

19. To the best knowledge of these writers, at least Alabama, Florida, Louisiana, and Virginia still approve the tender years doctrine.

20. Folsom v. Folsom, 228 Ga. 536, 186 S.E.2d 752 (1972); F.F. v. F.F., 37 App. Div. 2d 893, 325 N.Y.S.2d 291 (1971). New York cases disapproving the tender years doctrine decided after *F.F. v. F.F.* have mentioned New York domestic relations law section 240 (no prima facie right to custody in either parent). Braiman v. Braiman, 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978).

21. Starkeson v. Starkeson, ____ N.H. ____, 397 A.2d 1043 (1979) (Douglas, J., dissenting). Another court noted the fathers' effect on their children's development when it stated the following:

> The court is persuaded that the role of the father is no less important in his daughters' lives than that of the mother. . . . Girls need to learn not only what it will be like to be a woman, but what to look for and expect in a man. In the Dodd family, the father has dominated the mother, has forced his views on her, threatened her and belittled her. It is important, for the children's emotional health, that they view their mother as the

the children's control,[22] and more to lose if deprived of control and custody, as do their children.[23] As more women join the work force, the "mother as homemaker" justification for the doctrine is greatly weakened.[24] In addition, social science tells us that most, if not all, of the benefits of "mother love" can be conferred on a child by a parent of either sex.[25]

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competent person she has shown herself to be and their father as a person who can treat women with kindness and respect.

Dodd v. Dodd, 93 Misc. 2d 641, ____, 403 N.Y.S.2d 401, 406-07 (1978). *Contra*, J.B. v. A.B., ____ W. Va. ____, 242 S.E.2d 248 (1978). For a collection of authorities on the psychological importance of the father-child relationship, *see* Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 448-57 (1977); *see also* Note, *Divided Custody of Children After Their Parents' Divorce*, 8 J. FAM. L. 58, 60 (1968).

22. Dobb v. Dobb, 93 Misc. 2d 641, 403 N.Y.S.2d 401 (1978). *Contra*. J.B. v. A.B., ____ W. Va. ____, 242 S.E.2d 248 (1978).

23. Starkeson v. Starkeson, ____ N.H. ____, 397 A.2d 1043 (1979) (Douglas, J., dissenting). The dissent in *Starkeson* noted the potential loss to the child when it stated, "[t]here is solid evidence that most children experience pain when their fathers are absent. . . . Children view their father's absence as abandonment, and this may lead to erratic emotional behavior. The children who are free to develop full relationships with both parents fare best after divorce." *Id.* at ____, 397 A.2d at 1046. *See* Wallerstein & Kelly, *The Effects of Parental Divorce: The Adolescent Experience*, in THE CHILD IN HIS FAMILY, 479-505 (E. Anthony & C. Koupernik eds. 1974).

24. Starkeson v. Starkeson, ____ N.H. ____, 397 A.2d 1043 (1979) (Douglas, J., dissenting). In *Starkeson* a dissenting opinion elaborated on women in the work force when it stated:

> The tender years doctrine developed when industrialization split the labor force into paid labor for men and unpaid home labor for women. . . . The classic contrast between the breadwinner and the bottlewarmer created "an ideology that now victimizes. . . both (sexes).". . . Viewed from a modern perspective, this theory appears sexist. By capitalizing on the theory that "someone has to take care of the children," society can attempt to "keep women in their place." Women, however, are joining the labor force in ever-increasing numbers. Fifty percent of all women and sixty-seven percent of divorced women are employed. . . . The hand that rocks the cradle is, in short, also punching a time clock. Our family structure is evolving into dual career households where parenting will and should be shared even if the marriage does not remain intact.

Id. at ____, 397 A.2d at 1046. (quoting M. Roman, The Disposable Parent, manuscript of lecture presented at the Association of Family Conciliation Courts, Minneapolis, Minnesota, May 11, 1977, at 4-8.) *See also* Jines v. Jines, 63 Ill. App. 3d 564, 380 N.E.2d 440 (1978).

25. As one court stated when it found that the tender years presumption denied the father of his right to equal protection of the law:

> Later decisions have recognized that this view [the tender years presumption] is inconsistent with informed application of the best interests of the child doctrine and out of touch with contemporary thought about child development and male and female stereotypes.
>
> In *Garrett v. Garrett*. . . the court stated: "The rule giving the mother preferential right to custody is considerably softened by the realization that 'all things never are exactly equal' and is predicated upon the acts of motherhood — not *the fact of motherhood*. Likewise, the rule will yield if the welfare of the children demands it, because this is not a presumption of law but a simple fact of life gleaned from human experience, and the courts are not timid in entrusting children into their father's care and custody when their best interests will be served thereby." (Citations omitted and emphasis added.)
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> Eminent psychologists and anthropologists, including Margaret Mead, have also acknowledged and asserted that both female and male parents are equally able to provide care and perform child-rearing functions.
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> "At present, the specific biological situation of the continuing relationship of the child to the biological mother and its need for care by human beings are being hopelessly confused in the . . . insistence that the child and mother or mother surrogate must never be separated; that all separation even for a few days is ultimately damaging

Thus, although mothers are still awarded sole custody of young children in ninety percent of all cases,[26] a definite trend towards a weakening of the appellate, judicial, and statutory approval of the presumption in favor of mothers can be discerned in most jurisdictions.

The same courts approving the tender years doctrine have generally disapproved awards of "divided," "alternating," or "split" custody.[27] The disapproval has often been voiced without any discussion of its reason. Thus, a Texas Appellate Court disapproved divided custody for reasons which are "obvious."[28] The discussions that have been on point have seemed to draw on infant social science and cultural consensus, much like the discussions of the tender years doctrine, and, until recently, to assume that children would be harmed by the lack of environmental stability if custody was not vested in a sole custodian.[29] Although contact with both parents was seen as

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> and that if long enough it does irreversible damage. This is a mere and subtle form of anti-feminism which men — under the guise of exalting the importance of maternity — are tying women more tightly to their children than has been thought necessary since the invention of bottle feeding and baby carriages. . . ."
>
> Studies of maternal deprivation have shown that the essential experience for the child is that of mothering — the warmth, consistency and continuity of the relationship rather than the sex of the individual who is performing the mothering function.

State ex rel. Watts v. Watts, 77 Misc. 2d 178, ____, 350 N.Y.S.2d 285, 289-90 (1973).

26. Starkeson v. Starkeson, ____ N.H. ____, ____, 397 A.2d 1043, 1046 (1979) (Douglas, J., dissenting) (citing M. Roman, The Disposable Parent, manuscript of lecture presented at the Association of Family Conciliation Courts, Minneapolis, Minnesota, May 11, 1977, at 2).

In an interesting case in which a father contested the constitutionality of the Colorado version of the Uniform Dissolution of Marriage Act based on statistics concerning actual custody awards, the Colorado Supreme Court had this to say:

> Appellant's statistics do show that in a vast majority of the custody cases over the past few years, the wife has been awarded custody of the children. From this he leaps to the conclusion that the courts improperly favor women in dissolution proceedings. What the bare statistics do not show, however, is whether custody was contested or even desired by the husbands in any significant number of cases. The fact of the grant of custody itself has no great significance unless seen in light of the circumstances of the case which underlies such grant. Appellant has failed to demonstrate that he was discriminated against on the basis of his sex. We find no violation of Art. II, Sec. 29.

In re Marriage of Franks, 189 Colo. 499, ____, 542 P.2d 845, 852 (1975), *stay denied*, 423 U.S. 1043 (1976).

27. The variety and confusion of terms concerning child custody and control is truly bewildering. The rarer terms include "splitting custody," Kilgore v. Kilgore, 54 Ala. App. 336, 308 So. 2d 249 (1975), and "possessory conservatorship," Adams v. Adams, 519 S.W.2d 502 (Tex. Ct. App. 1975). We will adopt the definitional scheme proposed by Alexander Lindey. "Joint custody" means the child resides most of the year with one parent, and the spouses have joint control. "Divided custody" means the child lives with each spouse for part of the year and during that time that spouse has control of the child. "Split custody" means there are several children, and custody of one or more is given to one spouse, and custody of the rest to the other spouse.1 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS § 14 at 60. (1977). Divided custody is also known as alternating custody. *See, e.g.*, Griffin v. Griffin, 237 N.C. 404, 75 S.E.2d 133 (1953).

28. McGarrough v. McGarrough, 177 S.W.2d 296, 299 (Tex. Ct. App. 1943).

29. *See, e.g.* Wood v. Wood, 400 S.W.2d 431 (Mo. Ct. App. 1966); Brooks v. Brooks, 201 Va. 731, 113 S.E.2d 872 (1948).

beneficial to most children,[30] custody was somewhat paradoxically viewed as properly awarded to only one parent.[31]

The disapproval of divided custody is based in part on a lack of definitional clarity.[32] Although cases and statutes speak of custody and control,[33] many courts have traditionally spoken of custody as a unitary concept, without differentiating between the rights of control and decision making vis-a-vis a child's rearing, and the right to have a child live in one's home.[34] Decisions deploring the effects of "shuttling" on a child's health and development seem to speak of custody most often in terms of the child's physical environment.[35]

If a definition of custody acknowledges separable elements of child-rearing, decision making, and physical residence; the conflict in decisions between disapproval of divided custody on one hand, and recognition of the benefit to children of contact with and influence by both parents on the other, can be reconciled. In other words, perhaps these cases have been approving joint decision making, while disapproving extensive division of the child's physical residence due to its supposed unsettling effect.

III. JOINT CUSTODY

Joint custody is usually not a fifty-fifty division of a child's residence.[36] Those courts that have grown to accept or favor joint

30. The Colorado Supreme Court commented on the child's need for both parents when it stated:

> The court must consider that the child is entitled to the love, advice, and training of both father and mother, and the custody should be divided between parents exhibiting great solicitude for the child if no good reason otherwise appears. . . . In determining what is for the best welfare of a child of tender years, the courts must consider not only food, clothing, shelter, care, education, and environment, but must also bear in mind that every such child is entitled to the love, nurture, advice and training of both father and mother, and to deny to the child an opportunity to know, associate with, love, and be loved by either parent, may be a more serious ill than to refuse it in some part those things which money can buy.

Searle v. Searle, 115 Colo. 266, 273, 172 P.2d 837, 839-40 (1946).

Some jurisdictions have given much weight to such considerations. *See, e.g.*, Cascio v. Cascio, 485 S.W.2d 857 (Mo. Ct. App. 1972); Baer v. Baer, 51 S.W.2d 873 (Mo. Ct. App. 1932).

31. Rickard v. Rickard, 7 Wash. App. 907, 503 P.2d 763, 766 (1973).

32. *See supra* note 27 for various definitions.

33. *See, e.g.*, Kockrow v. Kockrow, 191 Neb. 657, 217 N.W.2d 89 (1974).

34. Searle v. Searle, 115 Colo. 266, 172 P.2d 837 (1946). One early case making this distinction is Baer v. Baer, 51 S.W.2d 873 (Mo. Ct. App. 1932). *See also* Dunbar v. Dunbar, 102 Ariz. 352, 429 P.2d 949 (1966).

35. An example of this sort of language can be found in Heltsley v. Heltsley, 242 S.W.2d 973 (Ky. 1951), which states that the usual deleterious effects of divided custody, arising from a child's insecurity at being forced to move from home to home, were ameliorated by close proximity of the homes of these parents. *Id.* at 973. Some cases have, however, placed the blame for instability in divided custody on changes in control and supervision. *See, e.g.*, McGetrick v. McGetrick, 204 Or. 645, 284 P.2d 352 (1955); Rickard v. Rickard, 7 Wash. App. 907, 503 P.2d 763 (1973).

36. Starkeson v. Starkeson, ___ N.H. ___, 397 A.2d 1043 (1979) (Douglas, J., dissenting).

custody have done so based on a divided definition of custody with separable elements of control and physical custody.[37] It follows from this dual definition that a child can be allowed to benefit from contact similar to pre-divorce contact with both parents, without any necessity for a court to feel obligated to deprive the child of the stability of fairly constant, familiar surroundings, by dividing the time of the child's physical residence evenly between the parents.[38]

As was the case with the tender years doctrine, developing social science concepts and changing cultural norms have led and informed the development of the joint custody doctrine. As noted previously, at least one substitute for mother love exists — and that is father love.[39] Fathers do typically have a direct role in child-rearing which has greatly increased since the early 1900's. Correspondingly, children, fathers, and mothers have a greater amount of emotional investment to lose, and more damaging trauma to suffer, if the father-child relationship is summarily severed by an award of sole custody to the mother.[40] Similar considerations apply if the father is given sole custody.

The New Hampshire Supreme Court emphasized that point when it stated, "[a]n award of joint custody does not require that children spend three and one-half days per week with each parent, but allows flexibility in the determination of the child's living situation." *Id.* at ____, 397 A.2d at 1047. For example of factual situations depicted as joint custody, *see infra* note 38.

37. *See, e.g.*, Neal v. Neal, 92 Cal. App. 3d 834, 155 Cal. Rptr. 157 (1979) and cases cited therein; Braiman v. Braiman, 44 N.Y.2d 584, 378 N.E. 2d 1019, 407 N.Y.S.2d 449 (1978) and cases cited therein. *See supra* note 27.

38. One court discussed the division of a child's physical residence as follows:

> Joint or divided custody decrees generally give both parents legal responsibility for the child's care, but when physical or actual custody is lodged primarily in one parent, custody may be "joint" in name only.
>
> In the *Perotti* case, the parents were given shared responsibility, with physical custody to the father, visitation to the mother. In *Woicik*, the child was to be in boarding school in the winter, camp in the summer, with the parents sharing only the child's vacation time. In *Ross*, custody was awarded to both parties on a temporary basis, apparently to "afford the child an opportunity to adjust himself, in due time, to one or both parents." Ross v. Ross, 4 Misc. 2d 399, 405, 149 N.Y.S.2d 585, 591. The actual division of time was left to the parties, and if the parties were unable to agree, then sole custody was to be given to the father with week-end visitation rights to the mother. In Odette R. v. Douglas R., the court directed the parties to make all decisions jointly for the benefit of the children, but divided physical custody by allowing the children to live with their father and visit their mother. In *Krois*, there was court ordered joint guidance for a boy of 17 and a handicapped girl of 20, but both children were to remain physically with the father. In the *Levy* case, the court gave joint control of a 13-year-old boy to both parents, but directed that he stay with his mother for two years to give him a chance to decide where to live. In the *Schack* case, where joint custody was awarded, the children were to live with the mother from Monday through Friday, the father on Saturday and Sunday, with vacation to be split.

Dodd v. Dodd, 93 Misc. 2d 641, ____, 403 N.Y.S.2d 401, 403-04 (1978).

39. *See supra* note 25.

40. One dissenting opinion noted the changed roles in child rearing when it stated the following:

> Our family structure is evolving into dual career households, where parenting will and should be shared even if the marriage does not remain intact. . . .
>
> Our current legal customs tend to make ex-parents of fathers, overburden

Most writers still acknowledge the notion that stability is vital to a child's adequate adaptation to the parents' divorce.[41] Nevertheless, the best method for achieving maximum stability in the child's post-divorce environment is in dispute.[42] After all, the argument in favor of joint control goes, although parents do not always agree on child-rearing decisions after divorce, such disagreement does not usually make a child's environment dangerously unstable *before* divorce.[43] The fact that the parents may

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> mothers, and deprive children of full emotional support from both parents. The sole parent, usually the mother, must bear tremendous psychic and economic costs, and must fulfill all family functions. Children cannot provide emotional support to a single parent, for their love is demanding of the parent rather than supportive. The sole parent not only has to fulfill all family functions, but has little release from his or her burden. Thus one parent becomes overburdened and the other, in a sense, underburdened.

Starkeson v. Starkeson, ___N.H. ___, ___, 397 A.2d 1043, 1046 (1979) (Douglas, J., dissenting). *See supra* note 23.

41. M. ROMAN & W. HADDAD, THE DISPOSABLE PARENT (1978).

42. Those jurisdictions in the majority espouse the view that stability and security are usually maximized by vesting one parent with custody and awarding visitation to the other. *See supra* notes 28, 29, 31.

Occasional opinions through the years have suggested that joint or divided custody would increase a child's security after divorce. The Supreme Court of Appeals of Virginia stated the following:

> The advisability of dividing or alternating the custody of the child has been seriously considered. While there are certain disadvantages in such division.. there are also important advantages and benefits. It gives the child the experience of two separate homes. The child is entitled to the love, advice, and training of both her father and her mother. Frequent associations, contact, and friendly relations with both of her parents will protect her future welfare if one of her parents should die. It gives recognition to the rights of parents who have performed obligations as parents.

Mullen v. Mullen, 188 Va. 259, ___, 49 S.E.2d 349, 355 (1948).

More recently the Supreme Court, Queens County, of New York stated:

> In the posture of this case, were this court to refuse to award "joint custody" to both parents, the custody issue would have to be litigated in what could become a most caustic atmosphere. The emerging bitterness and emotional explosions inherent in these tense matters would unquestionably contaminate the future relationship of the parents. Such contamination would infiltrate and spread eventually to the children, with its resulting negative effect on their future security, stability and sense of well-being. Clearly, such an unfortunate result would be most antagonistic to the very interests that this court is sworn to protect.
>
> Moreover, common sense and experience suggests that the traumatic upheavals brought about by a "broken home" are difficult enough for young children or even older ones, to understand and accept. By contrast the 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 measures 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. The parents of these young children expect no less from this court than the award to them of "joint custody." The court, in the interests of justice and the infants involved, can order no less. Let "joint custody" therefore issue in accordance with this decision.

Perotti v. Perotti, 78 Misc. 2d 131, ___, 355 N.Y.S.2d 68, 72-73 (1974).

43. Starkeson v. Starkeson, ___N.H.___, 397 A.2d 1043 (1979) (Douglas, J., dissenting).

> This objection to joint custody presumes that parents who could not reconcile conflicts

disagree after divorce if they both have a say in child rearing is not nearly as disruptive as the change occasioned by a totally new environment in which one parent rules supreme. In addition, a joint custody decree can reduce the amount of "bartering" (using custody as a tool to further other ends), and the incidence of one parent's disparaging the other parent in order to turn the children against that parent.[44]

Obviously, children are better off if the parents can agree to share child-rearing control and physical custody. Some authorities assert that joint custody, however defined, cannot work without parental agreement.[45] The problem with this assertion as an unvarying rule is that the children's need for love and influence from both parents does not disappear in the face of the parent's inability to agree. This realization has caused some courts to suggest enforced joint control even in the absence of agreement,[46]

> while living together are even less likely to resolve conflicts while living apart. . . . This argument ignores the fact that parents disagree on childrearing issues whether or not they are married and living in the same household. Professor Roman found that there is no empirical data which shows that parents cannot isolate their marital conflict from their parental responsibilities. . . .
>
> Indeed, joint custody may limit disagreements to childrearing concerns rather than marital problems, which may have become more frequent during marriage because of the daily contact between the mother and father.

Id. at ____, 397 A.2d at 1047 (Douglas, J., dissenting).

44. Perotti v. Perotti, 78 Misc.2d 131, 355 N.Y.S.2d 68 (1974). In *Perotti* the court observed the following:

> [M]any children have been innocent dupes and victims of those parents who have used their custodial rights as bargaining agents and instruments of intimidation in seeking an unfair advantage over the other parent. Therefore, where joint custody could properly be employed, would it not serve to remove the psychological "abrasiveness" that one parent may utilize as against the other?

Id. at ____, 355 N.Y.S.2d at 72.

45. Braiman v. Braiman, 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978). In *Braiman* the court recognized the need for agreement when it stated the following:

> It is understandable, therefore, that joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion. . . . As a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, joint custody can only enhance familial chaos.
>
> More than four years since their separation, the parents are evidently still unable to manage their common problems with their children, let alone trust each other. Instead, they continue to find fault and accuse. They have failed to work out between themselves even a limited visitation with the children. To expect them to exercise the responsibility entailed in sharing their children's physical custody at this time seems beyond rational hope. It would, moreover, take more than reasonable self-restraint to shield the children, as they go from house to house, from the ill feelings, hatred, and disrespect each parent harbors towards the other.

Id at 589-90, 378 N.E.2d at 1021, 407 N.Y.S.2d at 451.

46. *See* Stamper v. Stamper, 3 FAM. L. REP. 2541(Mich. BNA 1977),in which the court adopted the recommendation of the child's attorney that the mother have physical custody during the school year, the father to have liberal visitation; with a switch in physical custody to the father during the summer. The parents were to have joint custody as to control. This decree was entered in the face of

and some writers and courts to propose a statutory[47] or judicial[48] presumption in favor of joint custody.

Although complete agreement between parents to implement joint custody may not be necessary, effective joint custody requires two capable parents with some degree of respect for one another's abilities as parents, together with a willingness and ability to work together to reach results on major decisions in a manner similar to the way married couples make decisions.[49] It is believed that there are many families fitting these criteria. Additionally, there are other families that would benefit from joint custody after a supervised delay.

It cannot be ignored that joint custody would require substantial adjustment, effort, imagination, cooperation, compromise, and maturity; but so do courtship, marriage, divorce, standard custody, and parenting in general.

For these reasons, we propose a statute containing a presumption to give both parents an important voice in child-rearing decisions.

Like the present system, the determination of the appropriateness of joint custody for specific families would be the task of the trial bench.[50] The task would be difficult, and the process imperfect, as it already is. But trial judges today undoubtedly struggle with custody decisions because of their "all or

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trial court findings that both parents were less fit than the average. *See also* Odette R. v. Douglas R., 91 Misc.2d 792, 399 N.Y.S.2d 93 (1977). *See Supra* note 5.

47. Language in statutes enacted as a refutation of the common-law preference for the father, *see supra* note 5, and to make both parents joint guardians of the children concerned have not been cited in support of a *preference* for joint custody to the best of the writer's knowledge. *See, e.g.*, Antedomenico v. Antedomenico, 142 Conn. 558, 115 A.2d 659 (1959); Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81 (1931).

A California statute which took effect on January 1, 1980, includes a preference for joint custody. The changes that this statute will cause on actual custody decisions are uncertain. *See* 1979 Cal. Legis. Serv. 683 (West) (to be codified as CAL. CIV. CODE § 4600.5 (West)). *See also* Griffin v. Griffin, 237 N.C. 404, 75 S.E.2d 133 (1953), mentioning a statutory reference to alternating custody.

48. Recent authority includes Perotti v. Perotti, 78 Misc. 2d 131, 355 N.Y.S.2d 68 (1974), where the court states " '[i]n all cases there shall be no prima facie right to the custody of the child in either parent. . . .' " *Id.*

"Clearly, then, the parties in a matrimonial action, prior to any judicial determination directing custody, are cloaked with the mantle of 'joint custody' of the infant issue." *Id.* at ____, 355 N.Y.S.2d at 70. In *Starkeson*, the dissent stated the following concerning a presumption of joint custody: "'[t]he consideration of a presumption of joint custody by trial judges and attorneys may further the best interests of children in divorce cases and assure that equality of rights under the law in this State will not be abridged or denied because of sex.'" Starkeson v. Starkeson, ____N.H.____, ____, 397 A.2d 1043, 1048 (1979) (Douglas, J., dissenting).

See also Mandatory Joint Custody Bill Faces Opposition in Massachusetts, 2 FAM. L. REP. 2561 (BNA 1976).

49. "Of course, if the level of parental conflict is so high that the parents are emotionally unable to assume joint custody, sole custody will still be appropriate." Starkeson v. Starkeson, ____ N. H. ____, ____, 397 A.2d 1043, 1048 (1979) (Douglas, J., dissenting). *See also* Fuhrman v. Fuhrman, 254 N.W.2d 97, 100 (N.D. 1977).

50. *See, e.g.*, COLO. REV. STAT. § 14-10-106 (Supp. 1979).

nothing'' aura and results. A presumption in favor of joint custody would ease this pressure on the trial bench, thus allowing judges greater latitude in choosing the best possible custody solution in each case.

Dealing with unresolved details of physical placement would be similar to the present determination of the details of visitation. Usually, most important details in a joint custody determination are worked out by the parents and merely presented to the court for its approval. Even if the problems of adjudication are increased, the benefit to the concerned families should offset an increase in effort as to quality and quantity from the trial bench and bar.

IV. PROPOSED STATUTE

The proposed statute reads as follows:

> In cases of dissolution of marriage where there are minor children, the trial court shall, unless it finds that it would be detrimental to the child, award the right to make child-bearing decisions jointly to both parents.
>
> The specific arrangement of the joint custody shall be set by agreement of the parties which the court shall accept and approve unless it finds that the agreement of the parties is unconscionable.[51] A lack of agreement between the parents may be taken into account by the court in deciding whether to award joint child-rearing rights. Aspects not agreed upon by the parties shall be decided by the court.
>
> In determining the unresolved details where joint custody is awarded, whether to award joint custody, and the arrangements and details of custody and visitation the court on hearing shall determine the matters consistent with the best interests of the child, parents, and society, in that order. The court shall consider all relevant factors; the wishes of the child's parents as to his custody; the wishes of the child as to his custodian; the interaction and inter-relationship of the child with his parents, his siblings, and any other person who may significantly affect the child's best interests; the child's adjustment to

51. Such unconscionability is to be defined as follows: "[a] court may set aside as unconscionable any agreement that is not 'fair, reasonable and just.'" In re Marriage of Wigner, ___Colo. App. ___, ___, 572 P.2d 495, 496 (1977).

> his home, school, and community; and the court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.[52]
>
> In cases where the parents have joint custody, they shall collectively determine the child's upbringing, including his education, health care, and religious training, subject to court supervision with power of modification.[53]

The purpose of the statute as proposed is to create a presumption of joint parental control of child-rearing decisions without forcing joint control in cases in which parents absolutely cannot get along, or for some other reason one parent should be excluded from child-rearing rights and responsibilities. No special recommendation is made for physical custody in order to avoid adverse reaction to the statute based on fears of damaging the children due to an unstable environment ("shuttling").

It should be obvious, however, that a parent who has little contact with his children will not be able to contribute intelligently to child-rearing decisions. A common solution is to provide one "primary residence," for the school year (or the week) and one "secondary residence" for the summer (or weekend).[54] The parent with whom the child is not residing is usually afforded liberal visitation rights. An alternative beginning to enjoy some widespread use provides that the children stay in one home, with the parents alternating between that home and another residence.[55] Due to the variety of familial situations, the physical residence of the children is best left to the ingenuity of parents and the trial judge, within the discretion of the court.

Determining the effect of such a statute in advance of enactment is very difficult. Such a determination is even more difficult than assessing the previously discussed effects of "no preference" statutes on the tender years doctrine long after their enactment. These writers assume that a joint custody statute would have some effect on custody awards, however, and profess the hope that such a statute would be employed by the trial courts to benefit all parties to every dissolution of marriage.

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52. These relevant factors are codified at COLO. REV. STAT. § 14-10-124 (1973).

53. *See* COLO. REV. STAT. § 14-10-130 (1973).

54. *See supra* note 38 for one court's discussion of this solution.

55. In Fuhrman v. Fuhrman, 254 N.W.2d 97 (N.D. 1977), the trial court ordered a plan where the children would reside in the family residence and the parents would alternate residing with the children on a monthly basis. The North Dakota Supreme Court remanded the case because the parties were unable to cooperate with each other to make the arrangement work. *Id.* at 100.

APPENDIX

The following is an example of a joint custody agreement used by the authors of this article:

The parties have carefully weighed the question of the custody of the minor children. In doing so, they have been guided solely by considerations touching upon the best interest and welfare of the children. They are convinced that the following disposition will be for their best interest.

Accordingly, the parties will exercise jointly custody and control of the minor children of the marriage including but not limited to the powers set forth in Colorado Revised Statutes 1973, § 14-10-130(1).

It is the desire of the parties hereto to afford their minor children, as nearly as is possible, residual to dissolution of their marriage, the benefits of being raised with substantial contact with both parents. It is therefore agreed that as nearly as possible, the parties will mutually consult with each other regarding decisions of the type that parents who live together would confer on in regard to child raising.

The parties hereto recognize that the court has continuing jurisdiction over all matters pertaining to the children herein; and upon any failure of the parties hereto to agree as to specifics or define generalities, either party may apply to the court for resolution. However, the parties believe and are committed to the proposition that the various decisions pertaining to the raising of the children can be made jointly by them in an informal manner. The parties agree that they will make every endeavor to resolve differences, if any, without court intervention.

At this time the children have a primary residence with the wife. This primary residential status will continue with an alternate residence with husband. The children will be with husband and wife respectively at this time in a manner set forth in Exhibit "A" attached hereto.

Neither party shall remove either child from either the State of Colorado or the County of Boulder for residential purposes without the consent of the other party. The foregoing will not limit the right of the parties to take the children with them any place geographically for vacations that do not interfere with school and other important schedules. However, the parties will confer with one another regarding any prolonged vacation plans with the children.

Each party agrees to keep the other party informed at all times of the whereabouts of the children, and welfare and general concern thereof.

Both parties agree that they will support the other party in all aspects of parenting and parental decisions, and not demean the other parent in any manner.[56]

EXHIBIT A

The children will be with husband on alternate long weekends, commencing Thursday afternoon and ending Tuesday morning, except for vacations and holidays otherwise scheduled below.

In regard to three holidays of primary concern to the parents herein, namely Christmas Eve and Day, New Year's Eve and Day, and the Thanksgiving extended weekend; in the year 1979-80 wife will have the children for the Christmas holiday including one-half the children's school vacation, and the husband will have the children for the New Year's holiday and the other one-half of the children's school vacation, and for the Thanksgiving holiday. This will be alternated each year hereafter and these holiday schedules supersede the regular schedule.

Other holidays (*e.g.*, birthdays, Mother's Day, Father's Day, Fourth of July, etc.) will be enjoyed as per their occurrence with the schedule set forth above except as otherwise modified by the parties. The parties will endeavor to adjust the regular schedule and provide each with a reasonable share of such holidays to the extent that the formal schedule does not so provide from time to time.

The foregoing schedule is intended as a guide but may be modified at any time by the parties' mutual consent. This may be as minor as a verbal agreement to alter matters by an hour or by days. Also, the parties will cooperate in making the children available for vacations with each parent of an extended nature as well as brief excursions. The parties will at all times cooperate and plan and will make the children readily available to the other party on transitions as well as cooperate in every manner to render any transitions as smooth and convenient to all parties as possible. Unless otherwise agreed, in transitional period the children will be made available in the location of the residence.

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56. For another joint custody agreement *see* 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS § 14 at 9, 10 (1977).