

COMMENT

NEW JERSEY CUSTODY DETERMINATIONS: A RESPONSIBLE APPROACH

I. INTRODUCTION

As the national divorce rate increases,¹ the number of children involved in a divorce parallels this growth.² Because divorce does not end a child's relationship with other family members, but simply alters the family relationships,³ a pressing issue arises as to what becomes of these children in a post-divorce setting after the family structure has been redefined.

In recent years numerous changes have affected the family. The rise in divorce rates and an increase in working mothers are just some of the changes which have altered the traditional husband-provider-wife-homemaker family.⁴ Social and economic forces have changed the status of women, resulting in many women giving up their role as

¹ Statistics indicate that the national divorce rate per 1000 total population was 5.2 in 1978 (1,130,000) and 5.0 in 1977 (1,091,000). DEPARTMENT OF HEALTH AND HUMAN SERVS., 3 VITAL STATISTICS OF THE UNITED STATES: MARRIAGE AND DIVORCE table 2-1 (1978) [hereinafter cited as VITAL STATISTICS]. This was a +4.0 percent change in the rate of divorces. *Id.* A comparison with the 1968 statistics even more dramatically illustrates the rising rate; 2.9 per 1000 total population (584,000) divorces occurred in that year. *Id.* Although the rate of divorces in New Jersey is not as high as the national average, the increase in divorces is still evident. *See id.* table 2-2. In 1978 the divorce rate in New Jersey was 3.6 per 1000 total population (26,575) as compared to a rate of 2.8 in 1977 (20,493). *Id.*

² Estimates show that approximately 18.1 per 1000 children under 18 years of age were involved in a divorce in 1978. *Id.* table 2-8. This statistic translates into approximately 1,147,000 children being affected by a divorce. *Id.* The corresponding statistics were 17.0 for 1977 (1,095,000) and 11.1 for 1968 (784,000). *Id.*

³ Abarbanel, *Shared Parenting After Separation and Divorce: A Study of Joint Custody*, 49 AM. J. ORTHOPSYCHIAT. 320, 321 (1979).

⁴ It is estimated that in 1970 25,554,000 children under 18 years of age had mothers in the labor force. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, PERSPECTIVES ON WORKING WOMEN: A DATABOOK table 30 (1980). This was approximately 40% of the total child population. *See id.* By 1979, the figures indicated that roughly 30,105,000 children had mothers working; *id.*, i.e., approximately 51% of all children under 18 years of age. *See id.* The New Jersey Supreme Court Committee on Matrimonial Litigation [hereinafter the Pashman Committee] recognized the family structural changes and noted the complications caused in the child custody area. SUPREME COURT COMMITTEE ON MATRIMONIAL LITIGATION, PHASE TWO, FINAL REPORT 6 (June 10, 1981), reprinted as a supplement to 108 N.J.L.J. 41 (July 16, 1981) [hereinafter cited as FINAL REPORT]. For further discussion on societal changes, see *infra* notes 5 & 6 and accompanying text.

primary caretaker of the children.⁵ In response, fathers have become more actively involved in parenting. Simply stated, when the wife is employed outside the home, the husband becomes more involved in household chores and child care.⁶ As a result of these societal changes, the long-standing presumption that the mother should be awarded custody⁷ should not stand unquestioned.⁸ Joint custody has been her-

⁵ In March 1975 nearly two-thirds of mothers with preschool children worked full time. Hayghe, *Families and the Rise of Working Wives—An Overview*, MONTHLY LAB. REV. 12, 16 (1976). Shifts in labor patterns were attributed to the onset of high inflation and a decline in the birth rate during the 1960's. *Id.* at 13.

Several major factors are responsible for the increase in the number of working women. Kreps & Leaper, *Home Work, Market Work and the Allocation of Time*, in WOMEN AND THE AMERICAN ECONOMY: A LOOK TO THE 1980s, at 61, 63 (J. Kreps ed. 1976) [hereinafter cited as *Home Work*]. The Second World War opened the job market to women who remained in the labor force after the War. *Id.* at 63-64. More service positions, traditionally women-oriented, were available. *Id.* at 64. Improved household technology gave women more time to work outside the home. *Id.* at 64-65. Finally, the decline in the birth rate meant women spent a smaller proportion of their lifetime caring for children and more time was available to enter the labor market. *Id.* at 65.

The Women's Movement was another factor in opening positions for women. Miller, *Joint Custody*, 13 FAM. L. Q. 345, 365 (1979). One author believes that the movement accentuated changes which had occurred in previous years. Chafe, *Looking Backward in Order to Look Forward: Women, Work and Social Values in America*, in WOMEN AND THE AMERICAN ECONOMY: A LOOK TO THE 1980s, at 6, 23 (J. Kreps ed. 1976). "Ever since World War II the reality of women's 'place' had ceased to conform to the stereotype." *Id.* (emphasis in original). For a discussion as to effects of the women's movement see generally Friedan, *Twenty Years After The Feminist Mystique*, N.Y. Times, Feb. 27, 1983, § 6 (Magazine), at 35.

⁶ Bratt, *Joint Custody*, 67 KY. L.J. 271, 278 (citing S. Greenwald, *Family Responsibilities of Selected Working Mothers* (1959) (unpublished doctoral dissertation, New York University)); see also Benedek & Benedek, *Joint Custody: Solution or Illusion?*, 136 AM. J. PSYCHIATRY 1540, 1540 (1979) (traditional roles of father and mother are no longer as distinct as in past); Greif, *Fathers, Children and Joint Custody*, 49 AM. J. ORTHOPSYCHIAT. 311, 311 (1979) (fathers are becoming more involved in family life with father-child relationships being redefined); Taussig & Carpenter, *Joint Custody*, 56 N.D.L. REV. 223,227 (1977) (changes in American culture account for increased leisure time; many fathers use time for child care).

⁷ It has been estimated that mothers receive sole custody of their children in over 90% of divorce proceedings. M. ROMAN & W. HADDAD, THE DISPOSABLE PARENT 36 (1978); see also *Sex Discrimination in Marriage and Family Law: Public Hearing Before Commission on Sex Discrimination in the Statutes*, 198th Leg., 1st Sess. 17 (1980) (statement of Howard Danzig ("nine out of every ten custody cases results in the mother getting custody"); accord *id.* at 25 (statement of Anthony Gil) (custody awarded to mother "probably somewhere in the area of 95%").

⁸ In custody determinations judicial preference for the father or mother has been the result of prevailing attitudes regarding parental roles and economic circumstances. Foster & Freed, *Joint Custody: A Viable Alternative?*, 15 TRIAL 26, 27 (1979). Industrialization and urbanization caused men to work outside the home and women inside the home. *Home Work*, *supra* note 5, at 61. This pattern established the mother as the primary caretaker of the children. Miller, *supra* note 5, at 352. The fixing of roles caused judicial recognition of a mother's right to custody, resulting in the tender years presumption. Bratt, *supra* note 6, at 281; see *infra* notes 50-52 and accompanying text. Since family roles are again changing it has been suggested that custody decisions should reflect these changes. Bratt, *supra* note 6, at 279-81.

alded as the solution for both parents⁹ as well as children after a divorce.¹⁰ Before accepting this alternative as a panacea, however, the custody issue must be explored in the context of the child's best interests.¹¹ This Comment will discuss the history of custody determinations as well as the current state of the law in New Jersey. Emphasis will be placed on the practicality of joint custody in light of pending legislation in the New Jersey Senate.¹²

Joint Custody

The phrase "joint custody" lacks a definitive meaning.¹³ In essence, joint custody is "a cooperative venture"¹⁴ with an unlimited potential to assume various forms.¹⁵ Complications may develop be-

⁹ One commentator contends that parents have a fundamental right of parental autonomy which is constitutionally protected; a presumption of joint custody logically flows from this right. Canacakos, *Joint Custody As A Fundamental Right*, 23 ARIZ. L. REV. 785 (1981). The fundamental right of parents to the companionship and care of their child has been recognized as constitutionally protected by at least one New Jersey court. See *In re J. S. & C.*, 129 N.J. Super. 486, 489, 324 A.2d 90, 92 (Ch. 1974) ("right may not be restricted without a showing that the parent's activities may tend to impair the emotional or physical health of the child"), *aff'd*, 142 N.J. Super. 499, 362 A.2d 54 (App. Div. 1976). *But cf.* *DeVita v. DeVita*, 145 N.J. Super. 120, 128, 366 A.2d 1350, 1354 (App. Div. 1976) ("personal wishes of a parent do not govern the conditions of custody").

¹⁰ See generally M. ROMAN & W. HADDAD, *supra* note 7; Bratt, *supra* note 6; Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C.D. L. REV. 523 (1979); Taussig & Carpenter, *supra* note 6; Comment, *Joint Custody Awards: Toward the Development of Judicial Standards*, 48 FORDHAM L. REV. 105 (1979).

¹¹ Gardner, *Joint Custody Is Not For Everyone*, 5 FAM. ADVOC. 7, 8 (1982). The "best interests of the child" standard is recognized in a majority of the states either by case law or statute. Miller, *supra* note 5, at 354. In addition, the standard appears in § 402 of the Uniform Marriage and Divorce Act. UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 197 (1979). The classic statement as enunciated in New Jersey can be found in *Fantony v. Fantony*, 21 N.J. 525, 122 A.2d 593 (1956). "Our law in a cause involving the custody of a minor child is that the paramount consideration is the safety, happiness, physical, mental and moral welfare of the child." *Id.* at 536, 122 A.2d at 598. It has been claimed, however, that the best interests standard "is merely a cloak for judicial discretion and intuition." Miller, *supra* note 5, at 354.

¹² S. 598, 200th Leg., 1st Sess. (1982). See *infra* notes 141-48 and accompanying text.

¹³ Berman & Kirsh, *Definitions of Joint Custody*, 5 FAM. ADVOC. 2, 2 (1982); see also Benedek & Benedek, *supra* note 6, at 1540. Joint custody is also referred to as shared custody, co-custody or co-parenting. Folberg & Graham, *supra* note 10, at 528. A variety of terms has been confused with joint custody. See Miller, *supra* note 5, at 360. Among them is the concept of divided or alternating custody which is the periodic change of physical custody in each parent with reciprocal visiting privileges. Folberg & Graham, *supra* note 10, at 526. The parent with whom the child lives has complete control over the child. *Id.* Another concept, split custody, does not involve any sharing. Bratt, *supra* note 6, at 283. One parent has sole custody of one or more children, while the other parent receives sole custody of the remaining children. *Id.* Confusion has been furthered by the use of these terms interchangeably. Folberg & Graham, *supra* note 10, at 525.

¹⁴ Carroll, *Ducking the Real Issues of Joint Custody*, 5 FAM. ADVOC. 18, 20 (1982).

¹⁵ See *id.*; For examples of joint custody arrangements see M. ROMAN & W. HADDAD, *supra* note 7, at 123-48.

cause the parents seeking joint custody, as well as the judge hearing the matter, have divergent expectations and objectives.¹⁶ Differing views as to whether the arrangement is advantageous or harmful creates additional problems when considering a joint disposition.¹⁷

An enumeration of the beneficial aspects of the joint custody arrangement appears in numerous articles¹⁸ and in at least two books.¹⁹ Advocates contend that a joint custody disposition results in a reorganization of the family structure²⁰ in a manner which most closely resembles the pre-divorce situation.²¹ Shared custody, with its continuing contact between the child and both parents, enhances the child's emotional stability;²² the child receives love, care, attention and guidance from *both* parents.²³ Furthermore, retaining a meaningful relationship with both parents may ease the traumatic experience of the parental divorce.²⁴ Proponents also claim that parents are more effective in carrying out their responsibilities toward the child,²⁵ mothers are not overburdened by sole custody²⁶ and fathers are not

¹⁶ Divorced parents contemplating joint custody have been found to manifest different perspectives, objectives and expectations. See Benedek & Benedek, *supra* note 6, at 1540.

¹⁷ See *infra* notes 18-33 and accompanying text.

¹⁸ See, e.g., Abarbanel, *supra* note 3; Bratt, *supra* note 6; Gardner, *supra* note 11; Greif, *supra* note 6; Miller, *supra* note 5, at 361-66; Comment, *Joint Custody—An Alternative for Louisiana*, 7 S.U.L. REV. 127 (1980).

¹⁹ See M. ROMAN & W. HADDAD, *supra* note 7; C. WARE, *SHARING PARENTHOOD AFTER DIVORCE* (1982), excerpts reprinted in *Sunday Record*, Feb. 13, 1983, at F11, col. 2, and *The Record*, Feb. 14-17, 1983.

²⁰ M. ROMAN & W. HADDAD, *supra* note 7, at 104.

²¹ Gardner, *supra* note 11, at 7; see also Miller, *supra* note 5, at 363.

²² Bratt, *supra* note 6, at 298. The child's sense of security is important to his or her emotional stability. *Id.* The child's knowledge that he or she has a home with both parents and is wanted by both parents creates a sense of security. *Id.* In addition, one study has shown that the psychological relationship of parent and child is emotionally important to the child. Ilfield, Ilfield & Alexander, *Does Joint Custody Work? A First Look at Outcome Data of Relitigation*, 139 AM. J. PSYCHIATRY 62, 63 (1982) (citing J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAK-UP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980)) [hereinafter cited as Ilfield]. For these reasons, the best interests of the child, in the long run, are best served by continuing contact with both parents. See *id.*

²³ Miller, *supra* note 5, at 362; see also Bratt, *supra* note 6, at 300-01. Involvement with two parents provides psychological advantages and diminishes the sense of loss suffered by the child. Benedek & Benedek, *supra* note 6, at 1541; see also Abarbanel, *supra* note 3, at 325.

²⁴ Comment, *supra* note 18, at 130; cf. Bratt, *supra* note 6, at 303 (trauma eased by lack of custody fight).

²⁵ E.g., Bratt, *supra* note 6, at 301.

²⁶ Studies indicate that mothers who are awarded sole custody are overburdened by the demands of single parenthood. Abarbanel, *supra* note 3, at 321. Divorced mothers must cope with increased responsibility for their children at a time when discipline problems may increase

relegated to a visitor status.²⁷ Finally, the flexibility of the arrangement allows for adaptation to the evolving needs of all family members.²⁸

Commentators critical of joint custody are not as numerous as proponents of the arrangement.²⁹ Critics believe joint custody creates instability in a child's life.³⁰ Disciplinary problems may arise because two sources of authority exist.³¹ It is contended that parents who could not sustain a marriage will not be able to cooperate in childrearing matters or parental decisions.³² The necessity for continuing contact between the divorced parents may intensify an already stressful situation.³³

The relative merits of joint custody are still unknown.³⁴ Therefore, the viability of this alternative arrangement will only be known after both the long and short term effects of custody determinations have been more fully researched.³⁵

because of the emotional turmoil the mother and children are experiencing. See M. ROMAN & W. HADDAD, *supra* note 7, at 73-80.

²⁷ The divorced father experiences many problems, see M. ROMAN & W. HADDAD, *supra* note 7, at 80-83, with the most significant being the sense of loss suffered when separated from his children. Abarbanel, *supra* note 3, at 321. Typically, the non-custodial father is limited to visitation time with his children which is often spent entertaining rather than using the allotted time to develop a relationship. See M. ROMAN & W. HADDAD, *supra* note 7, at 74-75; see also Greif, *supra* note 6, at 311. One study indicates that joint custody results in increased involvement and more effective fathering. *Id.* at 313.

²⁸ Miller, *supra* note 5, at 361. Although sole custody may be modified, the family must resort to the courts. *Id.* at 362. In a joint custody situation where the parents are responsible for living arrangements, modification is simplified. *Id.*

²⁹ A 1973 book, J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973), is frequently cited to support arguments which disfavor joint custody. Folberg & Graham, *supra* note 10, at 557. Although joint custody is not mentioned in the book, the authors' premise is that a child of divorce should have only one "psychological parent." *Id.* at 557-59. This is the antithesis of the joint custody concept.

³⁰ E.g. Miller, *supra* note 5, at 366. Movement between two homes where a child is subject to different rules, disciplinary procedures and parenting methods may result in instability. Benedek & Benedek, *supra* note 6, at 1541.

³¹ Miller, *supra* note 5, at 367. Commentators believe children may view shared custody as an opportunity to manipulate their parents. *Id.* at 367-68; Gardner, *supra* note 11, at 7.

³² Miller, *supra* note 5, at 367.

³³ *Id.*

³⁴ The lack of data concerning the effects of joint custody is well recognized. Ilfield, *supra* note 22, at 62. Advocates claim that skepticism is based on conjecture, but the same can be said of their position. Benedek & Benedek, *supra* note 6, at 1542. The lack of research in the area is not owing to the lack of shared custody arrangements in practice. See Bratt, *supra* note 6, at 282. However, reasons for the shortage of studies are not apparent. The various arrangements of shared custody are discussed *supra* note 13.

³⁵ See Abarbanel, *supra* note 3, at 328; see also Benedek & Benedek, *supra* note 6, at 1542.

II. HISTORY OF CUSTODY IN NEW JERSEY

A. Statutory History

Prior to the nineteenth century, custody of a child was customarily awarded to the father.³⁶ The common-law rule granted the superior right of custody to the father as head of the family³⁷ based on the theory that the father had a property interest in the child's services.³⁸

Although the common-law rule was followed in New Jersey,³⁹ it was early recognized that the father's legal right to custody was not an absolute property right.⁴⁰ For example, the father could be denied custody if he was found to be unfit.⁴¹ Moreover, an 1860 New Jersey statute⁴² concerning separation provided that children "within the age of seven years" be placed with the mother.⁴³ This maternal preference

³⁶ M. ROMAN & W. HADDAD, *supra* note 7, at 22-23.

³⁷ *State v. Baird*, 21 N.J. Eq. 384, 388 (Ct. Err. & App. 1869); *Clemens v. Clemens*, 20 N.J. Super. 383, 390, 90 A.2d 72, 75 (App. Div. 1952); *State v. Stigall*, 22 N.J.L. 286, 288 (Sup. Ct. 1849).

³⁸ Taussig & Carpenter, *supra* note 6, at 244; *see also State v. Baird*, 21 N.J. Eq. 384, 399 (Ct. Err. & App. 1869) (Dalruple, J., dissenting) (father's right to services and society of daughter is no less than right to those of son). *Contra Bennet v. Bennet*, 13 N.J. Eq. 114, 118 (Ch. 1860) (father has no property right in children, but rather "a qualified right to the services of the child").

³⁹ *See cases cited supra* note 37.

⁴⁰ *See Bennet v. Bennet*, 13 N.J. Eq. 114, 118 (Ch. 1860); *Lippincott v. Lippincott*, 97 N.J. Eq. 517, 519, 128 A. 254, 255 (Ct. Err. & App. 1925) (stating that right of father to custody was "a trust reposed in the father by the state, as *parens patriae* for the welfare of the infant"). For a discussion on *parens patriae*, *see infra* note 60 and accompanying text.

⁴¹ *State v. Baird*, 18 N.J. Eq. 194, 197-98 (Ch. 1867) (father may be unfit because of "notorious grossly immoral character or great impurity of life"), *rev'd on other grounds*, 21 N.J. Eq. 384 (Ct. Err. & App. 1869); *see also State v. Stigall*, 22 N.J.L. 286, 289 (Sup. Ct. 1849) (children's exposure "to cruelty or gross corruption, immoral principles or habits" or inability of father to provide for and support children).

⁴² Act of Mar. 2, 1860, ch. 167, 1860 N.J. Laws 437.

⁴³ *Id.* The relevant text of the statute reads:

That when any husband and wife shall live in a state of separation, without being divorced, and shall have any minor child or children of the marriage, the chancellor, the supreme court of this state, or any justice of the said supreme court, upon the said child or children being brought before them upon habeas corpus, shall make an order for the access of the mother to her infant child or children at such times and under such circumstances as they may direct; and if the said child or children be within the age of seven years shall make an order that the said child or children be delivered to and remain in the custody of the mother until said child or children shall attain such age, unless said mother shall be of such character and habits as to render her an improper guardian for said child or children.

Id. (emphasis added).

was known as the tender years presumption.⁴⁴ Thus, the statute, by taking away the court's discretion in certain circumstances, further eroded the father's paramount right to custody.⁴⁵

In 1871, the New Jersey Legislature enacted a statute declaring the rights of both parents to be equal in a custody proceeding,⁴⁶ with the happiness and welfare of the child being the determinative standard.⁴⁷ The apparent purpose of this statute was to abolish both the father's common-law superior right to custody and the mother's statutory tender years presumption.⁴⁸ The father's rights were abolished;⁴⁹ however, the tender years presumption persisted⁵⁰ primarily because of the belief that a young child's best interest necessitated a mother's care.⁵¹ In fact, as late as 1979 the tender years presumption had survived, with one court noting that "[a]lthough our personal views may be contrary, the Supreme Court has still not displaced the doctrine that custody of a young child 'is normally placed with the mother, if fit.'"⁵²

⁴⁴ See *infra* notes 50-52 and accompanying text.

⁴⁵ *Bennet v. Bennet*, 13 N.J. Eq. 114, 116 (Ch. 1860).

⁴⁶ Act of Feb. 21, 1871, ch. 48, 1871 N.J. Laws 15, 16, § 6. The pertinent language states: That in making an order or decree relative to the custody of the children pending a controversy between their parents, or in regard to their final possession, the rights of both parents, in the absence of misconduct, shall be held to be equal, and the happiness and welfare of the children shall determine the custody or possession.

Id. at 16.

⁴⁷ *Id.*

⁴⁸ Although this is the apparent purpose of the statute according to a literal reading, one court stated that the only effect of the statute was to give direction to the Chancellor in equitable proceedings. *Landis v. Landis*, 39 N.J.L. 274, 276-78 (Sup. Ct. 1877). The 1860 statute remained in effect in technical and legal proceedings. *Id.* at 277.

⁴⁹ *English v. English*, 32 N.J. Eq. 738, 743 (Ct. Err. & App. 1880) (best interests of child outweigh either parent's claim of custody rights).

⁵⁰ In *Dixon v. Dixon*, 71 N.J. Eq. 281 (Ct. Err. & App. 1906), the court awarded custody to the mother because the children were of tender years. *Id.* at 282; see also *Fiore v. Fiore*, 49 N.J. Super. 219, 225-26, 139 A.2d 414, 417 (App. Div.) (law recognizes mother as natural custodian), *certif. denied*, 28 N.J. 59, 145 A.2d 168 (1958); *Sheehan v. Sheehan*, 38 N.J. Super. 120, 126, 118 A.2d 89, 92 (App. Div. 1955) (customary to award mother custody of child of tender years); *Wojnarowicz v. Wojnarowicz*, 48 N.J. Super. 349, 353, 137 A.2d 618, 620 (Ch. 1958) ("... the courts, in recognition of an inexorable natural force, customarily award the custody of a child of tender years to its mother . . .").

⁵¹ *Schwartz v. Schwartz*, 68 N.J. Super. 223, 233, 172 A.2d 97, 102 (App. Div.) ("The rationale is that the mother will take better and more expert care of such a child than the father."), *certif. denied*, 36 N.J. 143, 174 A.2d 926 (1961); *Seitz v. Seitz*, 1 N.J. Super. 234, 240, 64 A.2d 87, 89 (App. Div. 1949) (mother does not receive custody of tender years children because of a rule of law; rather, mother will take better and more expert care); *Wojnarowicz v. Wojnarowicz*, 48 N.J. Super. 349, 353, 137 A.2d 618, 620 (Ch. 1958) ("child's well being is better safeguarded in the hands of the mother.")

⁵² *M.P. v. S.P.*, 169 N.J. Super. 425, 435, 404 A.2d 1256, 1261 (App. Div. 1979) (quoting *Espósito v. Espósito*, 41 N.J. 143, 154, 195 A.2d 295, 296 (1963)).

The 1871 statute remained intact⁵³ until a 1921 amendment added language which "equally charged" both parents with the child's "care, nurture, education and welfare."⁵⁴ In determining which parent should receive custody, the child's happiness and welfare remained the standard.⁵⁵ The statute currently in effect is identical to the 1921 amendment in its relevant portion.⁵⁶ Although the statute does not explicitly authorize any specific type of custody arrangement,⁵⁷ its language has been interpreted as a strong indication that joint custody is a permitted disposition.⁵⁸

The statutory grants of judicial authority to determine custody⁵⁹ supplement the inherent *parens patriae* jurisdiction of the courts⁶⁰ and

⁵³ See Act of Apr. 2, 1902, ch. 92, 1902 N.J. Laws 259, 264, § 9.

⁵⁴ Act of Mar. 31, 1921, ch. 107, 1921 N.J. Laws 204, 205, § 2. The applicable amendment states:

In making an order or decree relative to the custody of the children pending a controversy between their parents, or in regard to their final possession, the rights of both parents, in the absence of misconduct, shall be held to be equal, and they shall be equally charged with their care, nurture, education and welfare, and the happiness and welfare of the children shall determine the custody or possession.

Id. at 205.

⁵⁵ *Id.*

⁵⁶ Compare N.J. STAT. ANN. § 9:2-4 (West 1976) with Act of March 31, 1921, ch. 107, 1921 N.J. Laws 204, 205, § 2.

⁵⁷ N.J. STAT. ANN. § 9:2-4 (West 1976) is clearly related to N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1982-1983). *Beck v. Beck*, 86 N.J. 480, 485, 432 A.2d 63, 65 (1981). N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1982-1983) provides in pertinent part: "[T]he court may make such order . . . as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just. . . ." N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1982-1983). These closely related statutes allow the judiciary extensive leeway in making custody decisions. *Beck v. Beck*, 86 N.J. 480, 485, 432 A.2d 63, 65 (1981).

⁵⁸ See *Beck v. Beck*, 86 N.J. 480, 488, 432 A.2d 63, 66 (1981) (endorsing joint custody; refusing to establish presumption for any one type of custody); cf. Miller, *supra* note 5, at 380. But see *Beck v. Beck*, 86 N.J. 480, 502, 432 A.2d 63, 73 (Sullivan, J., dissenting) ("I do not consider [joint custody] 'the preferred disposition' in custody cases as the majority opinion, despite some restrictive language, seems to suggest."). See *infra* notes 101-29 and accompanying text for a discussion of the *Beck* case.

⁵⁹ See N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1982-1983); N.J. STAT. ANN. § 9:2-4 (West 1976).

⁶⁰ *Fantony v. Fantony*, 21 N.J. 525, 535, 122 A.2d 593, 598 (1956); *Salmon v. Salmon*, 88 N.J. Super. 291, 305, 212 A.2d 171, 178 (App. Div. 1965); *Parens patriae* jurisdiction is more extensive than the statutory grant of jurisdiction. *Clemens v. Clemens*, 20 N.J. Super. 383, 389-90, 90 A.2d 72, 75 (App. Div. 1952). This jurisdiction allows the state to determine custody of infants within the state regardless of the parents' domicile. *Fantony v. Fantony*, 21 N.J. 525, 535, 122 A.2d 593, 598 (1956); *Hachez v. Hachez*, 124 N.J. Eq. 442, 448, 1 A.2d 845, 847 (1938). *Parens patriae* is "the equitable power of the state to protect children and act in their welfare according to their best interests. . . ." Boskey & McCue, *Alternative Standards for the Termination of Parental Rights*, 9 SETON HALL L. REV. 1, 18 (1978). For a discussion of the possible origins of this jurisdiction see *id.* at 18 n.119.

result in considerable judicial discretion in this sensitive area.⁶¹ The traditional best interests of the child standard is not a precise legal standard; complex social, psychological and economic factors must be evaluated to determine the child's best interests.⁶² Judges understandably often lack training in the many disciplines relative to custody determinations,⁶³ thus rendering the decision-making process quite formidable in most instances.⁶⁴ As a result, the judiciary finds itself acting in an extralegal as well as a legal capacity in a custody determination.⁶⁵

B. Case Law

Shared custody is not a recent phenomenon.⁶⁶ Although not in a traditional divorce setting,⁶⁷ New Jersey's highest court ordered a divided arrangement⁶⁸ as early as 1925.⁶⁹ In *Lippincott v. Lippincott*⁷⁰ an orphaned child was the subject of a custody dispute.⁷¹ Four years prior to his death, the father had executed papers appointing the paternal grandparents as the boy's guardian in the event of the father's death.⁷² After the father died, the maternal grandparents sought custody of the young boy.⁷³ The court, exercising its *parens patriae*

⁶¹ The legislature intended to give the "courts wide latitude to fashion creative remedies. . . ." *Beck v. Beck*, 86 N.J. 480, 485, 432 A.2d 63, 65 (1981); see also *State v. Stigall*, 22 N.J.L. 286 (Sup. Ct. 1849). "The discretion is pretty broad, and perhaps extending with the improvements and refinements of the age, yet it is not arbitrary, but based on sound principles, yet, like all other discretionary proceedings, will take its hue from the officer exercising it." *Id.* at 289.

⁶² *Bratt*, *supra* note 6, at 271. The importance and relationship of these factors is not known. *Id.* For a discussion on the use of psychology in custody determinations, see generally Okpaku, *Psychology: Impediment or Aid in Child Custody Cases?*, 29 RUTGERS L. REV. 1117 (1976).

⁶³ *Bratt*, *supra* note 6, at 272.

⁶⁴ *Willis v. Willis*, 118 A. 333, 333 (Ch. 1922) ("Probably the most difficult questions that come before this court are questions of this nature"); *State v. Baird*, 21 N.J. Eq. 384, 388 (Ct. Err. & App. 1869) ("the duty of arbitrating . . . is felt to be one of painful responsibility").

⁶⁵ *Bratt*, *supra* note 6, at 271-73, 296.

⁶⁶ See *Bratt*, *supra* note 6, at 282. The various arrangements of shared custody are discussed *supra* note 13.

⁶⁷ In *Lippincott v. Lippincott*, 97 N.J. Eq. 517, 518, 128 A. 254, 254-55 (Ct. Err. & App. 1925), the custody dispute was between maternal and paternal grandparents.

⁶⁸ Divided custody is an arrangement whereby the child lives with each custodian for part of the year. *Bratt*, *supra* note 6, at 283.

⁶⁹ *Lippincott v. Lippincott*, 97 N.J. Eq. 517, 128 A. 254 (Ct. Err. & App. 1925).

⁷⁰ *Id.*

⁷¹ *Id.* at 517-18, 128 A. at 254.

⁷² *Id.* at 518, 128 A. at 254.

⁷³ *Id.* The maternal grandparents later amended their petition requesting only partial custody. *Id.* at 518, 128 A. at 255.

jurisdiction,⁷⁴ ordered that it was in the child's best interests to be placed in the maternal grandparents' custody for two months of each year.⁷⁵

A later case⁷⁶ similarly illustrates judicial awareness of the benefits inherent in continued attachment to both parents.⁷⁷ Although the father had been awarded partial custody⁷⁸ of his son, the mother began to refuse the father his weekend visitation privileges.⁷⁹ The father resorted to the courts to enforce his privileges, but an Advisory Master denied him all custody and visitation rights.⁸⁰ The denial was based on the child's agitation and resistance when his father called for him.⁸¹ The appellate court determined that the child's adverse reaction to the father was the product of the mother's conduct.⁸² In reversing and remanding to the chancery division, the appellate division suggested that the father's partial custody be increased rather than decreased.⁸³

Joint custody was first squarely addressed in *Mayer v. Mayer*⁸⁴ where the custody of two children, ages 11 and 13, was in dispute.⁸⁵ The mother, who had recently undergone a cancer operation and had continuing health problems,⁸⁶ requested permission of the court to

⁷⁴ *Id.* at 519-21, 128 A. at 255-56. The father's appointment of a guardian could not determine the custody disposition. *Id.* at 521-22, 128 A. at 256. The determination had to be made by the court based on the child's best interests. *Id.* at 522, 128 A. at 256. See *supra* note 60 for a discussion of *parens patriae*.

⁷⁵ 97 N.J. Eq. at 522, 128 A. at 256.

⁷⁶ *Turney v. Nooney*, 5 N.J. Super. 392, 69 A.2d 342 (App. Div. 1949).

⁷⁷ *Id.* at 397-98, 69 A.2d at 344-45. For a discussion of these benefits see *supra* notes 18-28 and accompanying text.

⁷⁸ The court did not define partial custody; however, the specific details of the arrangement allowed the father custody every weekend from Saturday morning until Sunday morning as well as two weeks in July and two weeks in August every year. *Turney v. Nooney*, 5 N.J. Super. 392, 394, 69 A.2d 342, 343 (App. Div. 1949). The case does not mention whether a specific provision was made for legal custody during the time the child was in the care of the father.

⁷⁹ *Id.*

⁸⁰ *Id.* at 394-95, 69 A.2d at 343.

⁸¹ *Id.* at 395, 69 A.2d at 343. There was adequate evidence that the child's disturbance was only an initial reaction to the father. *Id.* Once the child was left with the father the reaction subsided and the child appeared happy. *Id.* at 395-96, 69 A.2d at 343.

⁸² *Id.* at 397-98, 69 A.2d at 344-45. The mother had an obligation to enhance the relationship between the child and father—an obligation which she had failed to fulfill. *Id.* at 397, 69 A.2d at 344.

⁸³ *Id.* at 398, 69 A.2d at 345.

⁸⁴ 150 N.J. Super. 556, 376 A.2d 214 (Ch. 1980), *rev'd on other grounds*, 180 N.J. Super. 164, 434 A.2d 614 (App. Div. 1981). The court commented that joint custody had never been examined in a reported New Jersey decision. *Id.* at 561, 376 A.2d at 217.

⁸⁵ *Id.* at 559, 376 A.2d at 216. The children were in the mother's custody at the time of the trial. *Id.*

⁸⁶ *Id.* The mother was under medical and psychiatric care. *Id.*

move with the children to Pittsburgh to be near her parents.⁸⁷ During settlement negotiations the trial judge suggested joint custody as an appropriate alternative under the circumstances.⁸⁸ In trial summations the mother requested that if joint custody were ordered one parent be named sole legal custodian.⁸⁹ The father, however, desired a joint custody disposition.⁹⁰

The *Mayer* court found judicial authority to permit shared forms of custody in N.J. Stat. Ann. § 2A:34-23, which allowed "fit, reasonable and just" custody awards.⁹¹ After reviewing the "best interests" standard,⁹² the tender years presumption⁹³ and the statutory equal rights of parents,⁹⁴ the court focused its attention on joint custody awards in other states⁹⁵ in order to determine which factors should be considered in a disposition of this kind.⁹⁶ Two principles emerged. First, the primary consideration must be the welfare and best interest of the child and second, any determination must be based on the particular facts of each case.⁹⁷ The *Mayer* court granted joint custody⁹⁸ because the children were of such an age that the arrangement would not be harmful.⁹⁹ Also, since the mother would be taking the children out of the state, joint custody was the only reasonable alternative allowing the children to know and enjoy the father's love and respect.¹⁰⁰

⁸⁷ *Id.* at 568, 376 A.2d at 220.

⁸⁸ *Id.* at 560, 376 A.2d at 216.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 561, 376 A.2d at 217 (construing N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1982-1983)). See *supra* note 57 for text of N.J. STAT. ANN. § 2A:34-23. If joint custody, in the particular circumstances, meets this standard the court has the authority to award it. 150 N.J. Super. at 561, 376 A.2d at 217.

⁹² 150 N.J. Super. at 561-63, 376 A.2d at 217. See *supra* note 11 for discussion on best interests standard.

⁹³ 150 N.J. Super. at 563-64, 376 A.2d at 218. See *supra* notes 50-52 and accompanying text for a discussion of the tender years presumption.

⁹⁴ 150 N.J. Super. at 564-65, 376 A.2d at 218-19. See *supra* notes 46, 53-57 and accompanying text.

⁹⁵ 150 N.J. Super. at 565-67, 376 A.2d at 219-20. The court noted that other states either dislike the concept or "demonstrate . . . a guarded acceptance." *Id.* at 565, 376 A.2d at 219.

⁹⁶ These factors include the parental wishes, the age of the child and the geographical proximity of the parental homes. *Id.* at 566-67, 376 A.2d at 219.

⁹⁷ *Id.* at 565, 376 A.2d at 219.

⁹⁸ *Id.* at 568, 376 A.2d at 220. The specific terms of the arrangement allowed the father physical custody in July and August and the mother physical custody for the remainder of the year. *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

Mayer, a trial court decision, was an important step toward the acceptance of joint custody as a possible alternative arrangement in New Jersey. Nevertheless, the leading case is *Beck v. Beck*,¹⁰¹ decided one year after *Mayer*, in which the New Jersey Supreme Court finally endorsed the joint custody concept.¹⁰² In *Beck*, the husband sought liberal visitation rights of the couple's two adopted daughters.¹⁰³ The trial court *sua sponte* ordered joint legal and physical custody.¹⁰⁴ The mother opposed the decree and a plenary hearing was ordered on the custody issue.¹⁰⁵ The trial court again awarded joint custody¹⁰⁶ but the holding was reversed on appeal.¹⁰⁷ Due to the novelty and importance of the issues,¹⁰⁸ the supreme court granted certification.¹⁰⁹

Citing *Mayer*, the court found the judicial authority to decree joint custody.¹¹⁰ The court relied on N.J. Stat. Ann. § 2A:34-23 which gives the court broad discretion in making such awards¹¹¹ and N.J. Stat. Ann. § 9:2-4 which indicates that both parents should remain fully involved with their children after a divorce.¹¹²

The *Beck* court adopted a definition of joint custody which was comprised of two elements, legal custody and physical custody.¹¹³ The legal component encompasses the sharing of legal responsibility and authority for all major decisions concerning the child.¹¹⁴ The physical component of the definition entails a logistical arrangement of sharing

¹⁰¹ 86 N.J. 480, 432 A.2d 63 (1981).

¹⁰² *Id.* at 488-89, 432 A.2d at 67.

¹⁰³ *Id.* at 488, 432 A.2d at 67.

¹⁰⁴ *Id.* at 489, 432 A.2d at 67.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 492, 432 A.2d at 68-69.

¹⁰⁷ *Id.* at 494, 432 A.2d at 69. The appellate decision is reported at 173 N.J. Super. 33, 413 A.2d 350 (App. Div. 1980).

¹⁰⁸ 86 N.J. at 485, 432 A.2d at 65.

¹⁰⁹ *Beck v. Beck*, 84 N.J. 451, 420 A.2d 348 (1980).

¹¹⁰ 86 N.J. at 485, 432 A.2d at 65.

¹¹¹ *Id.* N.J. Stat. Ann. § 2A:34-23 "evinces a legislative intent to grant courts wide latitude to fashion creative remedies in matrimonial custody cases." 86 N.J. at 485, 432 A.2d at 65. See *supra* note 57 for text of N.J. STAT. ANN. § 2A:34-23.

¹¹² 86 N.J. at 485, 432 A.2d at 65. The relevant text of the statute reads:

In making an order or judgment relative to the custody of the children pending a controversy between their parents, or in regard to their final possession, the rights of both parents, in the absence of misconduct, shall be held to be equal, *and they shall be equally charged with their care, nurture, education and welfare*, and the happiness and welfare of the children shall determine the custody or possession.

N.J. STAT. ANN. § 9:2-4 (West 1976) (emphasis added).

¹¹³ 86 N.J. at 486-87, 432 A.2d at 65-66.

¹¹⁴ *Id.* at 487, 432 A.2d at 66. The court distinguished legal from physical custody by emphasizing that both parents share legal custody at *all* times. *Id.* (emphasis added).

the child's companionship.¹¹⁵ The parent with physical custody is also responsible for minor decisions affecting the child's daily activities.¹¹⁶ Because in certain cases the arrangement could foster the child's best interests, the court endorsed the joint custody alternative.¹¹⁷

The *Beck* court proceeded to discuss the guidelines which must be followed when joint custody is being considered as an alternative.¹¹⁸ Initially a court must determine whether a relationship exists between each of the parents and their child so that the child would profit from a joint custody arrangement.¹¹⁹ Only after the court is satisfied that the child would benefit from a continuing relationship with both parents does the court consider the additional factors¹²⁰ such as whether both parents are fit, willing to accept custody¹²¹ and potentially cooperative in child rearing matters.¹²² When these factors are not present, joint custody may not be appropriate.¹²³

An arrangement of joint physical custody, however, necessitates additional considerations.¹²⁴ A court must consider financial status¹²⁵ as well as the demands employment makes on each parent in order to ensure the child's adequate care.¹²⁶ Proximity of the parental homes must be examined to determine how it will affect the child's education and relationship with friends and other family members.¹²⁷ Finally, the number of children involved and their ages would affect the court's decision.¹²⁸ Even if joint physical custody is adjudged impracticable joint legal custody should remain a possibility.¹²⁹

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 488, 432 A.2d at 66. The court declined to establish a presumption for any form of custody because meticulous fact finding is necessary in every case. *Id.*

¹¹⁸ *Id.* at 497, 432 A.2d at 71.

¹¹⁹ *Id.* The necessary relationship is characterized as one in which both parents are viewed by the child as sources of love and security. *Id.* at 497-98, 432 A.2d at 71.

¹²⁰ *Id.* at 498, 432 A.2d at 71.

¹²¹ *Id.* at 498, 432 A.2d at 71. The parents may be opposed to joint custody, but as long as each individual parent is willing to accept custody, a joint arrangement is possible. *Id.*

¹²² *Id.* The parents need not like each other; the parents need only show the potential to cooperate as parents regardless of their personal conflicts. *Id.* at 498, 432 A.2d at 71-72.

¹²³ *Id.* at 497, 432 A.2d at 71.

¹²⁴ *Id.* at 500, 432 A.2d at 72.

¹²⁵ *Id.* See generally Patterson, *The Added Cost of Sharing Lives*, 5 FAM. ADVOC. 10 (1982).

¹²⁶ 86 N.J. at 500, 432 A.2d at 72.

¹²⁷ *Id.*

¹²⁸ *Id.* The court indicated that the impact these factors would have on a court's subsequent determinations was not clear, therefore the court suggested that expert testimony be introduced for each particular case. *Id.* One study suggests older children may need the stability and continuity of one home. Abarbanel, *supra* note 3, at 327. Also, the negative effects of joint custody may be heightened as the number of children involved increases. *Id.*

¹²⁹ 86 N.J. at 500, 432 A.2d at 72-73.

The inappropriateness of joint custody was evident in *Mastropole v. Mastropole*¹³⁰ in which a chancery court order, modifying a divorce judgment to require joint custody, was reversed¹³¹ on the ground that the child did not have the requisite relationship with his father.¹³² Moreover, the parents had not demonstrated the potential to cooperate in matters relating to their son.¹³³ Under these circumstances, the appellate division found that the *Beck* criteria for a joint custody award had not been met.¹³⁴ Since *Beck*, the *Mastropole* decision has been virtually the only application and discussion of the joint custody issue in the New Jersey courts.¹³⁵

III. DISCUSSION

The *Beck* court's endorsement of joint custody¹³⁶ has not ended judicial hesitation in considering this type of custody arrangement even when parental agreement leads to a request for joint custody.¹³⁷ Moreover, the tender years presumption¹³⁸ continues to be a factor in custody determinations despite the statutory equal rights of parents.¹³⁹ In response to this situation, legislation has been introduced in the New Jersey Senate to clarify state policy in the custody area.¹⁴⁰

¹³⁰ 181 N.J. Super. 130, 436 A.2d 955 (App. Div. 1981).

¹³¹ *Id.* at 142, 436 A.2d at 961.

¹³² *Id.* at 137-38, 436 A.2d at 959-60. The child wished to remain with his mother and was ambivalent toward his father. *Id.* See *supra* note 119 and accompanying text.

¹³³ 181 N.J. Super. at 138, 436 A.2d at 960. The parents had a history of using their son as a pawn in their disagreements. *Id.*

¹³⁴ 181 N.J. Super. at 137, 430 A.2d at 959. See *supra* notes 118-28 and accompanying text.

¹³⁵ The lack of reported cases has been attributed to the nature of joint custody. Bratt, *supra* note 6, at 284. Shared custody is most often awarded when the parents request the arrangement. *Id.* Reported cases result from continued disagreement and uncooperative parenting. Folberg & Graham, *supra* note 10, at 540.

Joint custody was under consideration in one other recent New Jersey case. The parties assumed they would have joint custody of their children until a pre-trial conference revealed significant disagreement as to the financial support of the children. *Fehnel v. Fehnel*, 186 N.J. Super. 209, 212, 452 A.2d 209, 210 (App. Div. 1982). Since custody had become an issue, the wife's attorney requested an adjournment for a probation investigation, family evaluations and arrangement for expert testimony. *Id.* at 212-13, 452 A.2d at 210-11. The trial judge denied the adjournment, by the appellate division found this was an abuse of discretion. *Id.* at 214, 452 A.2d at 211. The continuation of the trial under the circumstances could not foster the best interests of the children. See *id.* at 215, 452 A.2d at 212.

¹³⁶ See *supra* note 102 and accompanying text.

¹³⁷ COMMISSION ON SEX DISCRIMINATION IN THE STATUTES, SEX DISCRIMINATION IN MARRIAGE AND FAMILY LAW, SECOND REPORT 6 (1981) [hereinafter cited as SECOND REPORT].

¹³⁸ See *supra* notes 50-52 and accompanying text.

¹³⁹ SECOND REPORT, *supra* note 137, at 6. See *supra* notes 46 & 53-57 and accompanying text.

¹⁴⁰ See S. 598, *supra* note 12. The legislative history states that each case should be decided on an individual basis. SECOND REPORT, *supra* note 137, at 7. The best interests standard remains "the guiding principle." *Id.*

Senate Bill 598 provides the judiciary with three options when faced with a custody decision.¹⁴¹ The courts are empowered to award joint legal and physical custody,¹⁴² joint legal and sole physical custody¹⁴³ or sole legal and physical custody with visitation rights for the noncustodial parent.¹⁴⁴ The bill also retains the statutory mandate that each parent shall have an equal right to the custody of his or her child.¹⁴⁵

The proposed legislation sets out several factors to be examined when considering a custody alternative.¹⁴⁶ The factors include, *inter alia*, parental wishes and ability to cooperate in childrearing matters, parental fitness, family relationships, and the child's needs and preferences.¹⁴⁷ Additional factors are considered when physical custody is being assessed, including the proximity of parental homes, the par-

¹⁴¹ The proposed legislation states:

In any proceeding involving the custody of a minor child, the rights of both parents shall be equal and the court shall enter an order awarding either:

- a. Joint custody of a minor child to both parents, with an equitable sharing of living experience in time and physical care, except joint legal custody may be awarded without joint physical custody. The court shall order joint custody when it is requested by both parents unless it is contrary to the best interests of the child; or
- b. Legal and physical custody to one parent with appropriate visitation for the noncustodial parent.

In making an award of custody, the court shall consider various factors, including parental desire for joint custody; the parents' ability to agree, communicate and cooperate in matters relating to the child; the interaction and relationship of the child with its parents and siblings; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; and the fitness of the parents. A parent shall not be deemed unfit unless the parent's conduct has a direct adverse effect on the child.

The court, in determining the physical custody element of a joint custody award, shall consider, but not be limited to, the following factors: the geographical proximity of the parents' homes, the financial resources of the parents, their employment responsibilities and the age and number of the children.

S. 598, *supra* note 12, at 2-3.

¹⁴² *Id.* at 2. The statute does not provide a definition for the various custody options which are authorized.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 2-3.

¹⁴⁷ *Id.* The statutory definition of unfitness relates only to parental conduct which "has a direct adverse effect on the child." *Id.* at 3. This definition is a departure from earlier case law which defined the statutory meaning of misconduct. *Grove v. Grove*, 21 N.J. Super. 447, 91 A.2d 363 (App. Div. 1952). " 'Misconduct,' as used in the statute (R.S. 9:2-4, as amended by L. 1948, c. 321), means such conduct as to deprive the parent of a moral right to the child's custody." *Id.* at 454, 91 A.2d at 367.

ents' financial means, the parents' employment demands and the number and ages of the children involved.¹⁴⁸

As an initial attempt to deal with a complex social problem, the proposed legislation is adequate. The bill does not create a preference¹⁴⁹ or presumption¹⁵⁰ for any one form of custody and it does not define any one of the options. The judiciary is thus permitted to retain its broad discretion,¹⁵¹ allowing it to be creative in structuring the specific arrangement.¹⁵² Ideally, this flexibility will result in a custody determination tailored to the needs of the child and the parents.¹⁵³ The term joint custody should reflect the idea of a sharing of parenting time and responsibility; joint custody need not be limited to rigidly symmetrical divisions of time and authority.¹⁵⁴ Instead, the actual arrangement may take any practicable form the family desires.¹⁵⁵

The Commission report on Senate Bill 598 indicates that the *Beck* ruling was based on its unique facts.¹⁵⁶ As a result, it is possible that joint custody would have only limited application.¹⁵⁷ Although the *Beck* court did "perceive that the necessary elements [for an award of joint custody] will coalesce only infrequently,"¹⁵⁸ the decision itself was never expressly limited to its facts. In light of this confusion, the proposed legislation clarifies the state policy on custody and allows all custody options to be considered on an equal basis.¹⁵⁹

¹⁴⁸ S. 598, *supra* note 12, at 3. These are the same considerations the *Beck* court recognized as important. See *supra* notes 124-28 and accompanying text.

¹⁴⁹ Several states have enacted statutes providing for a joint custody "preference." See, e.g., CONN. GEN. STAT. ANN. § 46b-56 (West Cum. Supp. 1982). Preference statutes allow joint custody to be the first alternative considered. Schulman, *Who's Looking After the Children?*, 5 FAM. ADVOC. 31,33 (1982).

¹⁵⁰ The statutes of Florida and Idaho provide that joint custody be the presumed arrangement in the absence of compelling reasons for the award of another form of custody. See FLA. STAT. ANN. § 61.13 (West Cum. Supp. 1983); IDAHO CODE § 32-717B (Cum. Supp. 1982).

¹⁵¹ See *supra* note 61 accompanying text.

¹⁵² The phrase "joint custody" evokes a range of expectations and objectives among involved parties. See *supra* notes 13-17 and accompanying text. By not imposing a standard definition, the custody decree can provide for as much or as little involvement in time-sharing and decision-making as each parent desires. See Benedek & Benedek, *supra* note 6, at 1540-41. On the other hand, the *Beck* definition, see *supra* notes 113-16 and accompanying text, provides the courts with some direction when formulating a custody plan.

¹⁵³ The best interests of the child is a product of and dependent on the best interests of the family. Folberg & Graham, *supra* note 10, at 553.

¹⁵⁴ Benedek & Benedek, *supra* note 6, at 1541. In its recommendations the Pashman Committee advised that "joint participation in child raising does not necessarily mean that an equal amount of time must be spent with each parent . . ." FINAL REPORT, *supra* note 4, at 9.

¹⁵⁵ See Benedek & Benedek, *supra* note 6, at 1541.

¹⁵⁶ SECOND REPORT, *supra* note 137, at 7.

¹⁵⁷ *Id.*

¹⁵⁸ 86 N.J. at 497, 432 A.2d at 71.

¹⁵⁹ SECOND REPORT, *supra* note 137, at 7.

Joint custody is fashionable at the present time.¹⁶⁰ The concept has, as an important feature, an inherent continuing parent-child relationship; consequently, the arrangement has been considered as the preferred alternative by some states.¹⁶¹ Yet at least one study suggests that joint custody, rather than being better or worse, is only equally as desirable as other custody options.¹⁶² In order for a joint custody arrangement to be effective, each parent must want the child to preserve the relationship with the other parent.¹⁶³ The parents must want to be actively involved in the child's upbringing.¹⁶⁴ Both parents are obliged to communicate and cooperate with each other with regard to the child's concerns.¹⁶⁵ There must be a high level of commitment toward maintaining the arrangement.¹⁶⁶ Additionally, the parents must abide by the negotiated guidelines encompassing both practical logistics and matters of control and authority.¹⁶⁷ Clearly, joint custody demands considerable effort on the part of the parents.¹⁶⁸ A joint custody scheme involves numerous considerations, therefore making it difficult to predict in which situations it will be successful.¹⁶⁹

To reach a rational decision, the parents should be apprised of all custody options.¹⁷⁰ The optimal setting for a custody determination would allow the parents, their attorneys and court-appointed behavioral scientists¹⁷¹ to meet, assess the family's situation and decide which option best suits the family and their particular objectives.¹⁷² "[T]he great potential of the trained psychiatrist, psychologist and social worker in aiding the court in resolving delicate issues of child custody," has been recognized by the New Jersey Committee on Mat-

¹⁶⁰ E.g., Gardner, *supra* note 11, at 46.

¹⁶¹ See *supra* notes 149 & 150; cf. Greif, *supra* note 6, at 319; see also, e.g., Taussig & Carpenter, *supra* note 6, at 234 (proposing a statutory presumption for joint custody).

¹⁶² Abarbanel, *supra* note 3, at 328. The arrangement "works under certain conditions." *Id.* But cf. Gardner, *supra* note 11, at 46 (when successful, joint custody provides maximum protection from damages divorce can cause).

¹⁶³ Abarbanel, *supra* note 3, at 325-26.

¹⁶⁴ Folberg & Graham, *supra* note 10, at 579.

¹⁶⁵ Mills & Belzer, *Joint Custody As A Parenting Alternative*, 9 PEPPERDINE L. REV. 853, 869, 872 (1982).

¹⁶⁶ Abarbanel, *supra* note 3, at 325-26.

¹⁶⁷ *Id.*

¹⁶⁸ Mills & Belzer, *supra* note 165, at 869; see also Abarbanel, *supra* note 3, at 326-27.

¹⁶⁹ Benedek & Benedek, *supra* note 6, at 1542.

¹⁷⁰ *Id.*

¹⁷¹ The employment of court-appointed professionals allows the state retain its *parens patriae* interest in the welfare of the child. See *supra* note 60.

¹⁷² See Benedek & Benedek, *supra* note 6, at 1542-43.

rimonial Litigation (Pashman Committee).¹⁷³ Behavioral scientists with expertise in the custody determination area will have the ability to educate the parties and help them reach a mutually acceptable decision to realize their goals and expectations.¹⁷⁴ It has, in fact, been stated by the Pashman Committee that "[t]he use of professionals trained to assist family members to resolve their problems is . . . an idea whose time has come."¹⁷⁵

A mediation approach to custody determinations is particularly beneficial when joint custody is the form chosen by the parents. Joint custody appears to be most successful when parents themselves develop the arrangement.¹⁷⁶ The court's role in this process would primarily be advisory such as appointing and supervising the required professionals. Ultimately, however, the court would have the responsibility of approving the final custody plan. Surprisingly, mediation of this type is not addressed by Senate Bill 598.¹⁷⁷ Legislation is necessary to provide for such a mediation process¹⁷⁸ because it provides the opportunity and potential for "fashioning ways to create a cooperative and conciliatory environment for the benefit of parents and children."¹⁷⁹

An additional benefit of mediation for all custody options is the opportunity for the preservation of family autonomy. Parents have a constitutionally protected right to make decisions concerning the

¹⁷³ FINAL REPORT, *supra* note 4, at 7.

¹⁷⁴ See Benedek & Benedek, *supra* note 6, at 1542-43; cf. Ilfield, *supra* note 22, at 66 (mental health professionals can help meet needs of family through development of plan). New Jersey judges have employed trained psychiatrists, psychologists and social workers to assist in the custody decision. FINAL REPORT, *supra* note 4, at 7.

¹⁷⁵ FINAL REPORT, *supra* note 4, at 7.

¹⁷⁶ Mills & Belzer, *supra* note 165, at 874.

¹⁷⁷ It should be noted that the Pashman Committee endorsed the mediation approach. FINAL REPORT, *supra* note 4, at 7.

¹⁷⁸ California has already provided for a mediation process through legislation. California Civil Code § 4607 became effective January 1, 1981. The statute provides:

Section 4607(a): Where it appears on the face of the petition or other application for an order or modification of an order for the custody or visitation of a child or children that either or both such issues are contested, . . . the matter shall be set for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing. The purpose of such mediation proceeding shall be to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children's close and continuing contact with both parents after the marriage is dissolved. The mediator shall use his or her best efforts to effect a settlement of the custody or visitation dispute.

CAL. CIV. CODE § 4607 (West Supp. 1981).

¹⁷⁹ FINAL REPORT, *supra* note 4, at 7.

child's needs and living arrangements.¹⁸⁰ Upon institution of a divorce action, the state makes these decisions.¹⁸¹ By employing a mediation format, however, the state will not automatically intrude into family decisions by determining custody. Instead, the family will have the ability to decide its future with professional help and guidance.

IV. CONCLUSION

The *Beck* decision and the proposed Senate legislation indicate that the concept of joint custody has state approval as an alternative in New Jersey custody actions. Nevertheless, further long and short term research is necessary to ascertain when joint custody is, in fact, a realistic alternative. Legislative consideration of the mediation process for custody determination should be pursued as a further safeguard of a child's welfare in the wake of a parental divorce.

New Jersey has taken a responsible approach in refusing to create a presumption or preference for the increasingly popular joint custody alternative. Allowing all custody options to be considered equally is most conducive to serving the child's best interests.

Janet L. Spies

¹⁸⁰ The parent-child relationship is entitled to constitutional protection from intrusion by the state. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). Prior to a divorce, states rarely intrude into the affairs of the intact family. Bratt, *supra* note 6, at 293. State intrusion into the parent-child relationship is only justified when a legitimate state purpose exists. *Id.* at 291. This is normally limited to instances of abuse or neglect. *Id.* at 293. See generally *id.* at 288-95.

¹⁸¹ See N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1982-1983). For the text of this statute see *supra* note 57.