Article

A DISSENT ON JOINT CUSTODY

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Joint custody is sweeping the country. In 1975 only one state had a statute providing for joint custody; today, well over half do, and "[r]ecent laws have become increasingly preferential toward joint custody."[1] Most joint custody statutes allow a court to impose joint custody even if one parent objects to it.[2] And an increasing number of statutes establish a legislative preference for joint custody or a presumption that joint custody is in the best interests of the children.[3] Even in states without joint custody statutes, courts have invoked their "inherent" authority to award joint custody.[4]

Two years ago, Maryland jumped on the joint custody bandwagon. In *Taylor v. Taylor*[5] the Court of Appeals held that courts of equity had the power to award joint custody if doing so would "accomplish the paramount purpose of securing the welfare and promoting the best interest of the child."[6] Moreover, the court ruled that neither a couple's lack of agreement, nor one parent's objection to joint custody, should disable a judge from exercising this power.[7]

We have serious reservations about joint custody, particularly if it is court-imposed. The *Taylor* decision, unfortunately, encourages its use. Worse, the opinion raises the possibility that joint custody could be awarded over the opposition of one parent, or even both. And worse may follow. Last year, the General Assembly considered

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1. Scott & Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 456 n.3 (1984); *see* Folberg, *Joint Custody Law—The Second Wave*, 23 J. FAM. L. 1, 1 (1984).

2. *See* Folberg, *supra* note 1, at 14-55 (from chart).

3. *Id.* at 2-3.

4. *See, e.g.*, Beck v. Beck, 86 N.J. 480, 432 A.2d 63 (1981).

5. 306 Md. 290, 508 A.2d 964 (1986).

6. *Id.* at 302, 508 A.2d at 970.

7. *See id.* at 307-08, 508 A.2d at 972-73.

legislation that would have created a presumption in *favor* of joint custody.[8] Although that legislation was defeated, it is clear that joint custody has acquired momentum in this state.

This paper first analyzes the *Taylor* decision. It then examines the arguments advanced by joint custody advocates. We conclude that these arguments are supported neither by data nor by common sense. We also examine other problems with joint custody arrangements, particularly arrangements imposed by courts. Finally, we describe briefly the "primary caretaker preference," and suggest that Maryland seriously consider adopting this method of resolving custody disputes.

I. THE TAYLOR DECISION

The marriage of Judith and Neil Taylor produced two children and lasted not quite five years. After the couple began experiencing marital difficulties, Judith left the marital home and moved to Newark, Delaware. Neil then filed for divorce in Maryland, seeking custody of the children; Judith, in her answer, also sought custody.[9] The trial court eventually ordered a "sort of joint custody," which seems, in fact, to have been an order awarding custody to the father.[10] The Court of Special Appeals affirmed,[11] and the Court of Appeals granted certiorari.

The court began by discussing generally the concept of joint custody, noting that there was no consensus as to the meaning of the term. The court observed that "custody" really has two components: "legal" and "physical" custody. Legal custody is "the right to make long range decisions on matters of major significance concerning the child's life and welfare." Physical custody, in contrast, is the right and duty "to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody."[12] Having split the concept of custody into its two components, the court held that "[p]roper practice in any case involving joint custody dictates that the parties and

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8. S.B. 277, Md. Gen. Assembly, 393d Sess. (1987). This bill was defeated, although a portion of it, unrelated to joint custody, was enacted. *See* Act of May 14, 1987, ch. 337, 1987 Md. Laws 1914 (codified at MD. FAM. LAW CODE ANN. § 9-104 (1987)). Two similar bills were introduced during the 1988 legislative session. *See* S.B. 404, H.B. 892, Md. Gen. Assembly, 394th Sess. (1988).

9. 306 Md. at 294, 508 A.2d at 966.

10. The "primary residence of the children" was to be the former marital home. *Id.* at 295, 508 A.2d at 966.

11. 60 Md. App. 268, 482 A.2d 167 (1984).

12. 306 Md. at 296, 508 A.2d at 967.

the trial judge separately consider the issues involved in both joint legal custody and joint physical custody, and that the trial judge state specifically the decision made as to each."[13]

After analyzing the relevant statutory and case law, the court concluded that a court of equity had power to award joint custody if doing so would secure the welfare and promote the best interest of the child.[14] After a brief discussion of the benefits and drawbacks associated with joint custody, the court held that "when appropriate, joint custody can result in substantial advantage to children and parents alike, and the feasibility of such an arrangement is certainly worthy of careful consideration."[15] That award can be made even over the objections of one parent.[16] Moreover, the court's opinion makes clear that judges in Maryland may award joint *legal* custody, without joint *physical* custody.

The court then turned to the considerations that should enter into the decision whether to award joint custody. After summarizing cases from several other jurisdictions, the court set forth a long list of factors that the trial judge should consider before making an award.[17] The factors listed by the court are so broad and so capable of manipulation that the decision on joint custody obviously has been committed to the sound discretion of the trial judges.[18] Although the court cautioned against awarding joint custody on a

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13. *Id.* at 297, 508 A.2d at 967.
14. *Id.* at 301-02, 508 A.2d at 969-70.
15. *Id.* at 303, 508 A.2d at 970.
16. *Id.* at 307-08, 508 A.2d at 972-73.
17. These factors, not listed in order of priority, are as follows:
(1) capacity of the parents to communicate and to reach shared decisions affecting the child's welfare;
(2) willingness of parents to share custody;
(3) fitness of parents;
(4) relationship established between the child and each parent;
(5) preference of the child;
(6) potential disruption of child's social and school life;
(7) geographic proximity of parental homes;
(8) demands of parental employment;
(9) age and number of children;
(10) sincerity of parents' request;
(11) financial status of the parents;
(12) impact on state or federal assistance; and
(13) benefit to parents.
Id. at 302-11, 508 A.2d at 970-74.
The court added a fourteenth consideration—"Other Factors." Only the first of the listed factors generated any significant discussion.
18. This is particularly true because Maryland appellate courts will not reverse custody awards made by trial judges unless there has been a clear abuse of discretion. *See* McAndrew v. McAndrew, 39 Md. App. 1, 9, 382 A.2d 1081, 1086 (1978).

"[b]lind hope that [it] will be successful,"[19] that certainly remains a very real possibility.

II. THE CASE FOR JOINT CUSTODY

Advocates of joint custody believe that an impressive number of benefits result from its use. On their face, these arguments make a strong case.

First, the child benefits from having "meaningful relationships and frequent contact with both psychological parents."[20] This common-sense observation is confirmed by a number of studies.[21] Research shows that children adjust better to divorce if they have frequent contact with both parents, a process hampered by the tendency of the noncustodial father to withdraw following divorce.[22] Joint custody, by ensuring continued contact with the father, counteracts this tendency and thus promotes the child's welfare.[23] Advocates like to quote the statement from Wallerstein and Kelly, prominent child development experts, that "divorcing parents should be encouraged and helped to shape post-divorce arrangements which permit and foster continuity in the child's relations with both parents."[24]

Second, joint custody benefits the parents. The court in *Taylor* focused heavily on this benefit.[25] Parents in successful joint custody situations feel better about themselves, about each other, and, as a

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19. *Taylor*, 306 Md. at 307, 508 A.2d at 972.

20. Blond, *In the Child's Best Interests—A Better Way: The Case for Presumptive Joint Custody in Missouri*, 52 UMKC L. REV. 567, 586 (1984).

21. *See generally* Clingempeel & Reppucci, *Joint Custody After Divorce: Major Issues and Goals for Research*, 91 PSYCHOLOGICAL BULL. 102 (1982).

22. *See* Scott & Derdeyn, *supra* note 1, at 489 (and sources cited therein). These findings are regarded as contradicting the theory, prominently espoused in J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 35-37 (2d ed. 1973), that sole custody is best for the development of the child. *See* Blond, *supra* note 20, at 582-84. In the 1979 "Epilogue" to *Beyond the Best Interests of the Child*, the authors make clear that they do not oppose joint (physical) custody, as long as one parent has the legal authority to determine the relationship. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 116-21 (2d ed. 1979).

23. Blond, *supra* note 20, at 595-98 (listing a number of supposed benefits to the child: increased I.Q.; better "socialization"; less bewilderment; fewer loyalty conflicts; and a lessening of the feeling of loss and rejection).

24. J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 311 (1980). In a subsequent article, Wallerstein expressed strong opposition to both presumptive and court-imposed joint custody. *See infra* note 47.

25. 306 Md. at 306-07, 508 A.2d at 972.

result, they feel better about the child.[26] The child can only benefit from that improvement.[27]

Joint custody is also touted as a solution to the child support problem. The data on this problem are appalling. The failure of fathers to pay *any*, much less adequate, child support is a national disgrace. Some believe that at least part of the explanation lies in the fact that divorced fathers lack significant contact with their children under sole custody arrangements. Sharing custody, it is hoped, will encourage fathers to pay more regularly.[28]

Joint custody is also said to reflect modern changes in parental roles. Today's fathers spend more time with their children; today's mothers spend more time in the workplace. Joint custody is thought to be a proper way of reflecting modern reality and ensuring that custody decisions are not based on outmoded gender stereotypes.[29]

Finally, joint custody is said to ease judicial administration. A preference in favor of joint custody avoids the detailed inquiry necessary to determine the best interests of the children in each contested custody case. Where both parents are reasonably fit, determining who will make the "better" custodian is often time-consuming and difficult. Some judges simply are not well-suited, either by training or by temperament, to make this kind of decision. Joint custody makes easier the life of such a judge.[30]

Moreover, the certainty provided by a widespread regime of joint custody will tend to reduce litigation (and relitigation), thus decreasing costs to the parties and the judicial system.[31] And joint custody may also help alleviate some of the terrible uncertainty parents (and children) must feel as they await the decision of the court.[32]

These arguments have had a dramatic impact on custody law. Indeed, commentators have described the rise of joint custody as a

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26. Canacakos, *Joint Custody as a Fundamental Right*, 23 ARIZ. L. REV. 785, 787 (1981) (going so far as to argue that a parent has a constitutional right to joint custody).

27. A sole custody award, in contrast, "isolates children from their fathers and forces mothers into the work force." Bratt, *Joint Custody*, 67 KY. L.J. 271, 275 (1978-79).

28. *See* Comment, *The Unfulfilled Promise of Joint Custody in Montana*, 48 MONT. L. REV. 135, 138 (1987).

29. Proponents also claim, somewhat inconsistently, that joint custody avoids penalizing fathers who, because of their traditional role as family breadwinner, spend more time away from home. Bratt, *supra* note 27, at 276.

30. *See* Blond, *supra* note 20, at 569-70.

31. Scott & Derdeyn, *supra* note 1, at 69-70.

32. *See id.* at 470. A reduction in litigation would help prevent children from being treated as courtroom pawns.

"small revolution . . . in child custody law."[33] The basis for this revolution, however, is highly questionable.

III. AN EVALUATION OF JOINT CUSTODY

None of the arguments advanced by proponents of court-imposed or presumptive joint custody is persuasive. First, proponents of court-imposed joint custody use the term "joint custody" to cover several quite different types of custody arrangements. Most important, they fail to distinguish joint *physical* custody from joint *legal* custody, in which the child resides primarily (or exclusively) with one parent—usually the mother—while the nonresidential father retains joint decisionmaking authority over the child's upbringing.[34] Most "joint custody" arrangements—and virtually all court-imposed joint custody decrees—fall into the latter category.[35] This latter category closely resembles the traditional maternal-custody-with-liberal-paternal-visitation arrangement with one essential difference: it accords the nonresidential father almost all of the rights but few of the responsibilities that raising a child entails.

Second, joint custody proponents make an unjustified leap from the common sense proposition that children do better after divorce if they maintain frequent contact with both parents to the startling conclusion that joint custody is the only way to ensure such contact. Neither logic nor data support this leap.

Third, virtually all of the studies relied upon by joint custody proponents involve voluntary rather than court-imposed joint custody arrangements; the limited success of voluntary arrangements simply does not support the imposition of joint custody on parents who oppose it. Moreover, the studies indicate that even voluntary joint custody arrangements produce significant risks for children, and create serious problems for both divorced parents and the judicial system.

The possibility of court-imposed joint custody also introduces significant distortions into the judicial process. Awarding joint custody, particularly joint legal custody, affords judges an easy and fair-sounding "fix" for resolving difficult custody disputes. It creates the illusion of equality and Solomonic wisdom and improperly allows a

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33. *Id.* at 455.

34. For a discussion of the continued prevalence of mothers as the primary custodial parent, see *infra* part III *D* and text accompanying notes 74-75.

35. Schulman & Pitt, *Second Thoughts on Joint Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U.L. REV. 538, 542-43 (1982).

judge to avoid making a difficult—but often necessary—choice between two seemingly fit parents.

Finally, proponents of joint custody presumptions fail to consider the detrimental effect of their proposals on the already lopsided process of divorce bargaining. Proponents ignore what studies increasingly confirm: divorcing husbands routinely and successfully use the threat of a custody fight to reduce or eliminate alimony and child support obligations. The success of such "custody blackmail" has been identified as a major cause of the impoverishment of divorced women and their children.[36]

A. The Critical Distinction Between Joint Physical Custody and Joint Legal Custody

Proponents use the label "joint custody" to cover a multitude of quite different post-divorce custody arrangements. In particular, they fail to distinguish between joint *legal* custody and joint *physical* custody, and they have attempted to appropriate the benefits of both types of arrangements, while ignoring the shortcomings of each. More important, proponents have failed to acknowledge that the vast majority of court-ordered joint custody decrees provide for equal parental *rights*, but impose vastly unequal parental *responsibilities*. Joint *legal* custody denotes parents' equal authority, or legal right, to make the vital decisions affecting a child's life.[37] Joint *physical* custody refers to the approximately equal parental sharing of physical care and living time with the child—that is, to equal custodial responsibilities.[38]

Most joint custody arrangements, and virtually all court-imposed joint custody decrees involve joint *legal* custody only.[39] The

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36. *See* L. WEITZMAN, THE DIVORCE REVOLUTION 310-12 (1985); Neeley, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 168-69 (1984). A brief discussion of the questionable legal ethics of custody blackmail can be found in Crouch, *The Matter of Bombers: Unfair Tactics and the Problem of Defining Unethical Behavior in Divorce Litigation*, 20 FAM. L.J. 413, 416 (1986).

37. Schulman & Pitt, *supra* note 35, at 542.

38. *Id.* Joint physical custody does not necessarily entail an equal sharing of parental responsibilities. For example, the proposed 1987 Maryland joint custody bill provided that joint physical custody "includes an arrangement under which each of the parents or parties enjoy *significant periods of time* in which the child resides with or is under the care and supervision of each of the parents or parties." S.B. 277, Md. Gen. Assembly, 393d Sess. (1987) (emphasis added). Similarly, California's joint custody statute provides: " 'Joint physical custody' means that each of the parents shall have significant periods of physical custody. Joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents." CAL. CIV. CODE § 4600.5(d)(3) (West Supp. 1987).

39. Schulman & Pitt, *supra* note 35, at 543; *see also* L. WEITZMAN, *supra* note 36, at

children in such arrangements live with and are primarily cared for by one parent—usually the mother. The nonresidential parent—generally the father—enjoys liberal visitation rights, just as he does in most traditional sole custody arrangements. The critical difference is that under joint legal custody the nonresidential father also enjoys equal legal authority to control the child's upbringing.[40] This means that he must concur in—or at least not object to—all major decisions affecting the child's life. Thus, the nonresidential father has most of the privileges but few of the day-to-day responsibilities of raising a child. Conversely, the residential mother loses much of the decisionmaking authority generally enjoyed by other adults who assume the day-to-day responsibilities of caring for children.

Joint legal custody thus severely restricts the ability of the parent with whom the child lives to make significant decisions affecting both her life and the lives of her children. In essence, it gives the nonresidential father veto power over most major decisions regarding the health, education, and upbringing of children who are not in his physical care. Such veto power may be acceptable if both parents agree to it and are committed to making the arrangement work. To subject a nonconsenting physical custodian to such an arrangement, however, invites chaos and offends well-established principles of parental autonomy.[41]

253-54; Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. FAM. L. 625, 626-27 (1985-1986) ("Under most joint custody statutes, there exists no requirement that the parents share their children's time equally, but only that the children's time be divided between the parents 'in such a way so as to assure a child of frequent and continuing contact with both parents.' "); Phear, Beck, Hauser, Clark & Whitney, *An Empirical Study of Custody Agreements: Joint Versus Sole Legal Custody*, 11 J. PSYCHIATRY & L. 419, 425, 440 (1983) (finding that, in a study of 500 Massachusetts divorces, 90% of all "joint custody" awards involved joint legal custody only) [hereinafter *Empirical Study*].

40. *See, e.g.*, Folberg, *Custody Overview*, in JOINT CUSTODY AND SHARED PARENTING 7 (J. Folberg ed. 1984) ("The distinguishing feature of joint custody is that both parents retain legal responsibility and authority for the care and control of the child, much as in an intact family. Joint custody upon divorce is defined here as an arrangement in which both parents have equal rights and responsibilities regarding major decisions and neither parent's rights are superior.").

41. The Supreme Court has acknowledged that the right of parents to make decisions concerning the rearing of children in their care is of constitutional dimension. Moore v. City of East Cleveland, 431 U.S. 494, 503-04 n.12 (1977) (plurality opinion). *See also* Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."). *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972) (state cannot require members of the Amish Church to send their children to public school after the eighth grade); Meyer v.

Joint legal custody also impairs the ability of the physical custodian to choose where she and her children will live. Joint custody decrees commonly restrict geographical moves with the child, particularly out of state.[42] Courts generally enforce such restrictions unless the physical custodian is able to prove that a proposed move is in the child's best interest, a difficult burden to meet in light of the strong preference in most joint custody states for the continued proximity of the child to the nonresidential parent.[43] Many joint custody decrees also provide that if the parent with physical custody moves without court approval, sole custody will automatically vest in the other parent.[44] Significantly, no such restrictions apply to moves by the nonresidential parent, despite his status as joint legal custodian and even though a move by him may disrupt significantly the joint custody arrangement. Nor is there any way to force a joint legal custodian (or any other nonresidential parent) to exercise his right to "frequent and continuing contact" with his children, even if he remains in the same locale as the physical custodian. Once again, joint legal custody affords a nonresidential parent many privileges and a significant measure of control over his former spouse, but few parental obligations or responsibilities.

B. The Logical Leap

Joint custody proponents rely heavily on the common-sense assertion that children do better after divorce if they maintain meaningful contact with both parents.[45] But simply calling something "joint custody" is neither necessary nor sufficient to ensure this contact. Traditional sole custody arrangements with liberal visitation provide ample opportunity for the noncustodial parent to have significant contact with the child, *if* that parent chooses to stay in touch. Indeed, the study that proponents cite most frequently in support of their "meaningful contact" claim examined *only* sole custody arrangements.[46] As that study demonstrates, parents who are com-

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Nebraska, 262 U.S. 390 (1923) (state law forbidding the use of any language other than English to teach any child who has not passed the eighth grade was unconstitutionally violative of parents' liberty right under fourteenth amendment to control education of their children).

42. Folberg, *supra* note 1, at 8-11.

43. *Id.* at 8.

44. *Id.* at 9-10. Such a punitive rule completely ignores the best-interests-of-the-child doctrine.

45. *See* Blond, *supra* note 20, at 586.

46. *See id.*

mitted to sharing childrearing responsibilities after divorce do not need a joint custody order.

Nor does joint custody—particularly joint legal custody—guarantee continuing parental involvement. Neither the child nor the physical custodian can force a nonresidential parent to stay involved. Indeed, there simply is no reason to believe that anything short of "true" joint physical custody will necessarily increase parent-child contact after divorce. Joint custody proponents cite no data to back up their continuing involvement claim, nor do they explain why the interested noncustodial parent cannot increase contact under a sole custody arrangement.

C. *The Data*

Despite the popularity of "joint custody" as a legal concept, few empirical studies have actually examined how joint custody works in practice.[47] The studies that do exist fail to support either court-imposed or presumptive joint custody. First, virtually all the studies invoked by proponents of court-imposed joint custody involve *voluntary* joint custody arrangements, that is, joint custody arrangements initiated and agreed upon by the parties outside of court. The success of self-initiated arrangements (assuming they are successful) tells us little about the likely success or potential benefits of court-imposed joint custody. Parents who agree voluntarily, outside of court, to share custody of their children after divorce are generally highly motivated and cooperative, at least when dealing with their children. To extrapolate from the success of these voluntary arrangements to the desirability of imposing joint custody on parents who oppose it is both factually and logically flawed; it is equivalent to suggesting that the benefits associated with a healthy marriage justify court-imposed marriages regardless of "spousal" consent.

Moreover, in the only study which included a sample of joint custody arrangements that were ordered or strongly influenced by a

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47. *See* Clingempeel & Reppucci, *supra* note 21, at 103-04 ("Methodologically defensible studies focusing directly on the advantages of joint versus single-parent custody are virtually nonexistent."); Stahl, *A Review of Joint and Shared Parenting Literature*, in JOINT CUSTODY AND SHARED PARENTING 25, 35-36 (J. Folberg ed. 1984) ("In contrast to the expanding amount of writing about joint custody, there have been few formal research projects designed to study joint custody and its possible effects on families."); Wallerstein, *Children of Divorce: An Overview*, 4 BEHAVIORAL SCI. & L. 105, 106 (1986) ("An extensive review of joint custody research calls attention not only to the paucity of research altogether in this important public domain, but specifically to the very limited knowledge about the key figure of the child in the joint custody arrangement.").

court, *none* of the families with court-imposed or court-influenced joint custody was found to be "successful" one year after the arrangement began.[48] Indeed, the authors concluded that "the degree to which the court influenced the joint custody arrangement was negatively related to outcome."[49] In light of this evidence, it is hardly surprising that the leading clinical researchers of the children of divorce are unhappy with court-ordered or presumptive joint custody.[50]

The limited number of studies relied upon by joint custody proponents have other serious methodological shortcomings. First, the studies concentrate almost exclusively on middle class parents who were early joint custody enthusiasts, hardly a representative group.[51] Second, the studies are largely descriptive and the number of families involved in each study is too small to produce any generally applicable conclusions.[52] Moreover, the available research generally lacks control groups and is based largely on interviews (mostly with parents) as the primary data source.[53] Several of the most frequently cited studies are limited to interviews of parents (sometimes of fathers only); the children's adjustment to the joint custody arrangement is discerned only through parental reports.[54]

In addition, most studies indicate that even voluntary joint custody arrangements produce mixed results. There is some evidence that joint custody arrangements result in more child-related relitiga-

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48. Steinman, Zemmelman & Knoblauch, *A Study of Parents Who Sought Joint Custody Following Divorce: Who Reaches Agreement and Sustains Joint Custody and Who Returns to Court*, 24 J. AM. ACAD. CHILD PSYCHIATRY 554, 558 (1985).

49. *Id.*

50. *See, e.g.*, Emery, Hetherington & Dilalla, *Divorce, Children and Social Policy*, in 1 CHILD DEVELOPMENT AND SOCIAL POLICY 189, 225-26 (H. Stevenson & A. Siegel eds. 1984) (concluding that "joint custody does not appear to be the solution to the indeterminacy confronting judges who hear custody disputes"); Wallerstein, *supra* note 47, at 106 ("There is, in fact, no body of scientific knowledge that supports either a presumption of joint custody or the imposition of joint physical custody over the objection of one parent.").

51. Scott & Derdeyn, *supra* note 1, at 484.

52. Twiford, *Joint Custody: A Blind Leap of Faith?*, 4 BEHAVIORAL SCI. & L. 157, 163-65 (1986).

53. The absence of control groups confirms that the families most likely to be involved in joint custody are the ones identified (either by themselves or by judges) to have the greatest chance for making it work. Nevertheless, the data does not show joint custody to be a very successful option.

54. Scott & Derdeyn, *supra* note 1, at 484; Wallerstein, *supra* note 47, at 106. For a general discussion of the difficulties and dangers of using social science data in the formulation of custody rules, see Fineman & Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 124-39.

tion than sole custody decrees.[55] This is hardly surprising—one inescapable consequence of joint custody is that two people who are no longer married to each other must concur in most major decisions affecting a child's life. The potential for disagreement is enormous, and the incentive to "work out" those disagreements within the post-divorce family may be minimal:

> Under joint custody every decision, no matter how minor, can be argued and fought. Joint custody gives sanction to parents who file application after application with the courts because they cannot agree about the littlest aspect affecting the lives of their children. Joint custody, unlike sole custody, legitimizes those applications and then expects our judiciary to take on the role of parent. In addition, the children witness and become part of the litigation process, viewing themselves as the root of those hostilities.[56]

Several real life examples demonstrate the force of these concerns. In one situation, parents with joint custody enrolled their children in two separate schools. The children attended a parochial school during the two weeks each month they resided with one parent and a public school during the other two weeks. When the children attended one school, they were truant from the other. They were failing in both schools and traumatized psychologically, yet each parent was exercising his or her "rights" under a joint custody decree.[57]

In another, more life-threatening, situation a hospital refused to perform surgery on a child with joint legal custodians because while one parent consented to the procedure, the other parent refused consent. The hospital was forced to summon a judge to order the surgery. Fortunately, the judge reached the hospital before the

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55. *See Empirical Study*, *supra* note 37, at 436. *But see* Ilfeld, Ilfeld & Alexander, *Does Joint Custody Work? A First Look at Outcome Data of Relitigation*, 139 AM. J. PSYCHIATRY 62 (1982) (finding that exclusive custody awards are more litigated than joint custody awards). The latter study, however, involved a smaller sample and different sampling techniques; moreover, it found relitigation of court-ordered joint custody to be at the same rate as for custody relitigation generally. *Id.* at 64-65.

56. Skoloff, *Joint Custody: A Jaundiced View*, TRIAL, Mar. 1984, at 52, 53-54.

57. *See* Levy & Chambers, *The Folly of Joint Custody*, FAM. ADVOC., Spring 1981, at 6, 8 (discussing Griffin v. Griffin, 699 P.2d 407 (Colo. 1985)). Because the parents could not agree on a school for the child, the *Griffin* court let the mother decide; it held that the agreement with respect to schools was unenforceable. The court noted that enforcing such an agreement "exposes the child to further discord and surrounds the child with an atmosphere of hostility and insecurity." *Griffin*, 699 P.2d at 410.

child's appendix ruptured.[58]

Research also indicates that joint custody arrangements may be stressful for children. This is particularly true of joint physical custody, in which the children typically shuttle back and forth from one parental residence to the other. A 1981 study of twenty-four families with voluntary joint custody arrangements found that one-third of the children experienced significant loyalty conflicts.[59] Moreover, one quarter of the children expressed confusion and anxiety about moving between two homes. They worried about themselves, their parents, and their possessions, and they showed an overall sense of instability.[60] The author concluded that although the parents in her sample were committed to joint custody, the children's experience was not wholly satisfactory and that the arrangement was not suitable for all children.[61] She also found, in a one-year follow-up study, that about one-third of the families eventually shifted to an arrangement in which the child lived primarily with one parent.[62]

Another study of twenty-five *voluntary* joint custody families found that joint custody did not lessen the stress of divorce for young children. Instead, the authors concluded that children in joint custody were "indistinguishable in their initial distress and early responses to marital rupture from their counterparts in sole custody arrangements."[63] In particular, the joint custody children were acutely aware of the marital separation and of conflict between their parents.[64] The authors concluded that parents who hope joint custody will spare their children the pain of divorce "will be disillusioned."[65]

Moreover, joint custody offers many possibilities for manipulation. Flexibility of living arrangements enhances the child's ability

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58. *See* Levy & Chambers, *supra* note 57, at 8.

59. Steinman, *The Experience of Children in a Joint-Custody Arrangement: A Report of a Study*, 51 AM. J. ORTHOPSYCHIATRY 403, 409 (1981).

60. *Id.* at 410.

61. *Id.* at 414.

62. Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739, 748 (1983).

63. McKinnon & Wallerstein, *Joint Custody and the Preschool Child*, 4 BEHAVIORAL SCI. & L. 169, 179 (1986).

64. *Id.*

65. *Id.* The study also found that parents agree to share custody for a variety of reasons other than a genuine wish for a continued close relationship with their children. These reasons included financial concerns, a limited commitment to parenting, guilt about initiating the divorce, and fantasies about preserving the marriage. *Id.* at 172-74, 182.

to manipulate the parents.[66] One psychiatrist observed of joint custody:

> [I]t increases the chances that they [children] will be used as weapons or spies in parental conflicts; because no restraints are placed on noncooperating parents, such use of the children is likely. Certainly *sole custody* arrangements cannot protect children from this situation, but *it does reduce the opportunities for parents to involve their children in such manipulations*.[67] Joint custody arrangements are also particularly vulnerable to disruption when parents establish new relationships.[68]

Other studies suggest that, particularly for young children, frequent shuttling from one parental residence to another may conflict with the child's need for stability and continuity of surroundings.[69] Older children may also find residential "musical chairs" stressful; changing residences every few days or weeks may disrupt school activities, strain friendships, and impair social and recreational activities. Structure, in other words, is important to children, but "structure may be shaken by a joint custody decree."[70] Finally, children simply do better in "harmonious single-parent families than in intact families with a high level of interparental conflict."[71] The failure of most courts and legislatures to consider these concerns in setting joint custody standards may reflect the current emphasis on joint custody as a parental (particularly a paternal) "right," rather than as a means of securing the child's best interests after divorce.

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66. *See* Gardner, *Joint Custody Is Not for Everyone*, FAM. ADVOC., Fall 1982, at 7. His example is, "If you make me turn off the television set, I'm going to go to Daddy's house!" *Id.*

67. *Id.* at 8 (emphasis added). A recent study also suggests that some parents, particularly those who oppose the divorce, may use joint custody as a way to prolong the marital relationship, to the detriment of both parents and children. McKinnon & Wallerstein, *supra* note 63, at 173-74. *See also* Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 762 (1988) ("Traditional divorce was an emancipatory process that terminated the relationship and freed lives for rebuilding.").

68. McKinnon & Wallerstein, *supra* note 63, at 178. For example, one joint custodial father's passionate attachment for his daughter evaporated when he found a girlfriend, leaving the child bereft. *Id.* at 176-77. Of course, this problem can also arise in sole custody situations.

69. *See, e.g.*, L. WEITZMAN, *supra* note 36, at 252-53; Steinman, *supra* note 59, at 408-13; Miller, *Joint Custody*, 13 FAM. L.Q. 345, 366 (1979).

70. Levy & Chambers, *supra* note 57, at 6, 10. Many parents, as well, find extremely difficult the repeated transitions that joint physical custody entails. McKinnon & Wallerstein, *supra* note 63, at 175.

71. Scott & Derdeyn, *supra* note 1, at 491.

Judge Breitel of the New York Court of Appeals expressed his concern this way:

> Entrusting the custody of young children to their [divorced] parents jointly . . . is insupportable when parents are severely antagonistic and embattled . . . . [I]t can only enhance family chaos. . . . 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.[72]

In sum, the evidence supports neither court-imposed joint custody nor a statutory presumption in favor of joint custody. As one expert has written:

> The evidence we currently have does not support a legal presumption in favor of joint custody, particularly where parents are in dispute. Rather, a legal presumption would be based on hope: the hope that the hostility and conflict between the disputing parents will die down, the hope that parents can be forced by a court order to cooperate in the best interest of the child, and the hope that a joint physical custody arrangement will still be beneficial to children under these circumstances.[73]

D. The Questionable End of Stereotypes

Many joint custody proponents speak eloquently of the new egalitarian marriage in which both parents work, and mothers and fathers spend equal time caring for children. Unfortunately, this model does not reflect the reality of most marriages—modern or otherwise. Studies show that women still spend far more time than men keeping house and caring for children, even in families where both parents work.[74] Women are also far more likely than men to leave the workplace to care for children, and to work part-time for

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72. Braiman v. Braiman, 44 N.Y.2d 584, 587-89, 378 N.E.2d 1019, 1019-21 (1978).

73. Steinman, *supra* note 62, at 758; *see also* Wallerstein, *supra* note 47, at 106; Ester, *Maryland Custody Law—Fully Committed to the Child's Best Interests?*, 41 MD. L. REV. 225, 258-59 (1982).

74. *See, e.g.*, S. BECK, THE GENDER FACTORY 7-10 (1985) (extensive empirical evidence shows that husbands participate minimally in household labor and child care, regardless of wives' employment status); Liefland, *Career Patterns of Male and Female Lawyers*, 35 BUFFALO L. REV. 601, 607-08, 613-17 (1986) (noting that women lawyers continued to be the primary childcare providers within their families); Pleck, *Men's Family Work: Three Perspectives and Some New Data*, 25 FAM. COORDINATOR 481, 487 (1979) (noting that although husbands of employed wives have begun to increase their family role, "there is no question . . . that wives continue to hold the primary responsibility for family work."). *See generally* Fineman & Opie, *supra* note 54 (citing studies); Frug, *Securing Job Equality for*

childcare reasons. Thus, women are more likely to be both the primary caretaker[75] and the lower wage-earner in the family. Divorce rarely alters this pattern; indeed, there is some evidence which indicates that joint custody mothers spend as much time with their children as maternal custody mothers.[76]

Moreover, joint custody is not likely to encourage equal parenting during marriage. Indeed, a rule favoring joint custody is likely to have the opposite effect.[77] A presumption in favor of joint custody, regardless of which parent has provided care during marriage, sends a clear message to fathers that they have a right to claim their children upon divorce—if they choose to exercise that right—no matter how detached they are from the ongoing care of those children during the marriage.[78]

In marriages where there exists real sharing of parental duties joint physical custody may be appropriate to reflect that reality.[79] The evidence suggests that it is precisely in these situations that parents are likely to adopt a voluntary joint custody plan.[80] Even there, however, a court must be careful to see that it does not let the new egalitarian stereotype obscure the child's best interests.[81]

Women: Labor Market Hostility to Working Mothers, 59 B.U.L. REV. 55, 56-57 (1979) (same).

Indeed, the continuing responsibility of women for childcare has been identified as one of the causes of the persistent wage gap between men and women. *See* Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1785-87 (1986).

75. At least as between the two parents; schools, grandparents, day care centers, and housekeepers may also help raise the child.

76. *See* Lowery, *Maternal & Joint Custody: Differences in the Decisional Process*, 10 LAW & HUM. BEHAV. 303, 311 (1986). This study compared various characteristics of couples entering sole and joint custody arrangements. Because the participants were both few and voluntary, the results of the study are only suggestive.

77. Of course, rules governing divorce may not influence conduct during marriage at all.

78. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 242 (1982).

79. One recent commentator has made the interesting suggestion that states should adopt a presumption in favor of joint *physical* custody, with sole *legal* custody to the parent who was the primary caretaker during marriage. Cochran, *The Search for Guidance in Determining the Best Interests of the Child at Divorce: Reconciling the Primary Caretaker and Joint Custody Preferences*, 20 U. RICH. L. REV. 1, 47, 53-58 (1985). *See infra* part V.

80. *See* Steinman, *supra* note 59, at 406 (describing characteristics of 24 families who adopted voluntary joint custody plans). *But cf.* McKinnon & Wallerstein, *supra* note 63, at 172 (finding that desire to nurture child in continuing close contact with both parents is *not* the primary motivation for most voluntary joint custody arrangements).

81. How many advocates of joint custody would argue that custody in the more traditional family (the converse of the new model) should go to the primary caretaker?

E. The Financial Burden

Joint custody is expensive, at least if done according to the glowing picture that its advocates usually paint. Seriously shared physical custody requires two units large enough to house parent and child on a permanent basis—along with lots of childrearing accoutrements (toys, books, and health items, for example) which must be present in both units.[82] No longer can the child be crammed into a small apartment, satisfactory for weekend visits but not for longer stays; instead, each residence has to provide adequate space for a long-term stay.[83]

Even more expensive is the need for counseling. On this need, the experts are emphatic: to work, joint custody requires extensive, lengthy, and continuous professional counseling.[84] *That* is an expensive proposition.

No doubt the extra financial burden joint custody imposes on two divorcing partners in a law firm is comparatively small,[85] but for the vast majority of families doing it right is expensive, perhaps prohibitively so.[86] Joint custody advocates rarely discuss financial concerns;[87] that lacuna is perhaps due to a recognition that most joint custody arrangements are "joint" in name only.[88]

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82. This would not be necessary if the child stayed in one place and the *parents* shifted residences. This scenario is rarely pictured by joint custody advocates.

83. *See* Patterson, *The Added Cost of Shared Lives*, FAM. ADVOC., Fall 1982, at 10 (calculating that joint custody increases "family" costs significantly).

84. *See* Nestor, *Developing Cooperation Between Hostile Parents at Divorce*, 16 U.C. DAVIS L. REV. 771, 775 (1983); Steinman, *supra* note 62, at 759-60.

85. One early study found joint custody limited to educated and affluent couples. Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C. DAVIS L. REV. 523, 562 (1979) (citing Nehls, Joint Custody of Children: A Descriptive Study 7 (1978) (unpublished manuscript)).

86. The financial consequences of joint custody may be particularly devastating for recipients of federal welfare assistance. For many needy families, eligibility for federal Aid to Families with Dependent Children (AFDC) benefits depends upon one parent's "continued absence from the home." 42 U.S.C. § 606(a) (1982). Joint custody may well jeopardize this eligibility, particularly if the parents share substantial decisionmaking authority or the child spends time at the home of the nonresidential "joint" custodian. *See* Johnson, *Joint Custody Arrangements and AFDC Eligibility*, 18 CLEARINGHOUSE REV. 3, 7 (1984).

87. *But see* Taylor v. Taylor, 306 Md. 290, 310, 508 A.2d 964, 974 (1986).

88. The Internal Revenue Service recognizes this reality. Generally, the parent with custody during the "greater portion of the calendar year gets the dependency exemption." I.R.C. § 152(c)(1) (1982). In cases of "split custody," however, *physical* custody controls who gets the exemption. Treas. Reg. § 1.152-4(b) (as amended in 1979). Joint *legal* custody, in other words, is irrelevant to the dependency determination.

F. Joint Custody Does Not Increase Child Support

Nor does joint custody—even voluntary joint custody—significantly increase compliance with child support awards. Despite proponents' extravagant claims on this subject, the one systematic study of custody arrangements and support payments found that the type of custody arrangement a couple accepts is a far less significant predictor of support complicance than are factors such as parental cooperation and the financial resources of the obligor.[89] The significance of those findings is emphasized by the fact that all of the joint custody families in the study had voluntary joint custody arrangements. The study also showed that even where fathers had joint legal custody, the mothers with whom the children resided received full court-ordered support only sixty percent of the time, and even those payments were frequently late.[90] These data demonstrate that joint custody is not an answer to the serious problem of divorced fathers who fail to comply with their court-ordered support obligations.

Perhaps more disturbing, the same study suggests that courts may be using joint custody to justify inappropriately low child support awards. Courts awarded no child support in more than half of the cases designated as "joint residential custody," for example, despite the fact that the children in those cases spent on average only fifty-one weekdays and eighty-four nights per year with one "joint" custodian. The children, in other words, were living with one parent more than two-thirds of the time, yet that parent was receiving absolutely no support.[91] Labeling an arrangement "joint custody" also significantly reduced the amount of child support ordered. In cases of "joint residential custody" where there was a support order, the amount of visitation averaged only twenty-three weekdays and fifty-eight overnights a year—not an unusual amount of visitation for a sole custody decree. The fathers in these "joint custody" arrangements, however, were required to pay only fourteen percent of their net income in child support; in contrast, the fathers whose former wives had sole custody paid an average of twenty-six percent of

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89. Pearson & Theonnes, *Child Custody, Child Support Arrangements and Child Support Payment Patterns*, 36 JUV. & FAM. CT. J. 49 (1985); *see* Polikoff, *Custody and Visitation: Their Relationship to Establishing and Enforcing Support*, 19 CLEARINGHOUSE REV. 274, 274-75 (1985).

90. Polikoff, *supra* note 89, at 274. In contrast, mothers who were sole legal and physical custodians received the full court-ordered support only 45% of the time.

91. *Id.* at 275.

their net income.[92] Thus, simply labeling an arrangement "joint residential custody" reduced both the likelihood and the amount of court-ordered support, without significantly altering the children's day-to-day living arrangements.

G. Court-Imposed Joint Custody Improperly Enables Judges to Avoid Resolving Difficult Custody Disputes

The disappearance of the maternal preference, and the rise of the no-fault custody decision means that today's judges must make real decisions when the parents contest custody. Many judges feel ill-trained to resolve such personal social problems, and others agonize over difficult decisions. Joint custody offers an easy out.[93] As one judge has observed, "Joint custody is an appealing concept. It permits the court to escape an agonizing choice, to keep from wounding the self-esteem of either parent and to avoid the appearance of discrimination between the sexes."[94]

A child in a custody dispute needs the full protection of the court. The parents, generally distraught and in emotional conflict, may have trouble seeing that their anger and frustration can harm the child. Moreover, either or both parents may be willing to barter the child's welfare for their own financial advantage. Society has placed on the judge the responsibility of seeing that the child's interests are protected. The judge's duty cannot be fulfilled as easily as joint custody proponents would have it.

Nor should an alleged reduction in litigation, even if true, support joint custody. Ease of judicial administration is a worthwhile goal, to be sure, but justice should be the ultimate goal of the judicial system. In the custody arena, that means deciding what is best for the child. Custody disputes *are* difficult, and they do require real decisions, now that the easy rules of thumb are gone.

H. Court-Imposed Joint Custody Distorts the Negotiating Process and Exacerbates the Danger of Custody Blackmail

Proponents of court-imposed and presumptive joint custody also fail to consider the detrimental effects of their proposals on the already lopsided process of divorce bargaining. Recent studies confirm what anecdotal evidence has long indicated: divorcing fathers routinely and successfully use the threat of a custody battle to ex-

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92. *Id.*

93. Gardner, *supra* note 66, at 8.

94. Dodd v. Dodd, 93 Misc. 2d 641, 643, 403 N.Y.S.2d 401, 402 (Sup. Ct. 1978).

tract damaging financial concessions from their ex-wives during divorce negotiations.[95] These concessions encompass child support obligations as well as alimony demands; they thus contribute substantially to the impoverishment of divorced women and their children.

In a recent article, Chief Justice Richard Neely of the West Virginia Supreme Court of Appeals, formerly a practicing domestic relations lawyer, explains how this process of "custody blackmail" works:

> Divorce decrees are typically drafted for the parties after compromises reached through private negotiation. These compromises are then approved by a judge, who generally gives them only the most perfunctory sort of review. The result is that parties (usually husbands) are free to use whatever leverage is available to obtain a favorable settlement. In practice, this tends to mean that husbands will threaten custody fights, with all of the accompanying traumas and uncertainties . . . as a means of intimidating wives into accepting less child support and alimony than is sufficient to allow the mother to live and raise the children appropriately as a single parent. Because women are usually unwilling to accept even a minor risk of losing custody, such techniques are generally successful.[96]

Recent studies confirm the success of these negotiating tactics. In an extensive study of divorcing couples in California, one-third of the divorced women reported that their husbands had threatened to ask for custody as a ploy in negotiations.[97] One attorney disclosed the standard "form letter" used for this purpose:

> I could write the blackmail letter by heart (although I haven't written one in a long time), but this is how it goes: "Dear Mrs. Jones' lawyer, I received the proposal you offered on behalf of your client, and my client is willing to agree to everything. Although he would prefer to have custody of the children, he realizes it is probably not in the best interest of the children to contest custody. However, my client is not interested in paying alimony, and if your client is willing to waive alimony, we would be willing to accept the proposal which you suggest; if not, then all the

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95. *See* L. WEITZMAN, *supra* note 36, at 310-18; Neeley, *supra* note 36, at 177-79.

96. Neeley, *supra* note 36, at 177. These concerns led the West Virginia Supreme Court of Appeals to adopt a primary caretaker presumption in contested custody cases. Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981); *see infra* part V.

97. L. WEITZMAN, *supra* note 36, at 310.

issues will have to be litigated.[98]

Legislation skewed toward awards of joint custody increases the ability of the parent requesting joint custody to engage in this type of extortion.[99] Professor David Chambers has noted that "[a] parent who is not really interested in having joint custody may use the threat of demanding it as a tool to induce the other parent to make concessions on issues of property division and child support."[100] The downside risks of such a strategy are minimal: even if the strategy fails and the husband is "stuck" with joint (legal) custody, he will not have to assume a major childrearing role.[101]

The effect of a joint custody preference on divorce negotiation is particularly pernicious when that preference is coupled with a "friendly parent" provision, such as the one found in the proposed Maryland joint custody bill.[102] A friendly parent provision directs the court, in awarding sole custody as an alternative to joint custody, to consider which parent is more likely to allow the children "frequent and continuing contact with the noncustodial parent."[103] When only one parent seeks joint custody, the court, pursuant to the "friendly parent" provision, is likely to favor that parent in a sole custody award. This reality further increases the risks of opposing joint custody; not only may the court impose such an arrangement over the opposing parent's objection, but the mere fact of opposition is likely to diminish her chances of receiving sole custody. An extraordinary situation is created. A parent who does not believe that joint custody would be in her child's best interests is put in the difficult negotiating position of either "accepting" her spouse's request for joint custody or risking the loss of custody altogether in a contested trial.[104]

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98. *Id.* at 224. Other attorneys interviewed said they dismissed such threats as "hot air" and "posturing." *Id.*

99. The problems associated with a presumption of joint custody are canvassed more fully in Dodson, *Joint Custody in Missouri*, 31 ST. LOUIS U.L.J. 111, 114-15 (1986).

100. Chambers, *Rethinking the Substantive Rules for Child Custody Disputes in Divorce*, 83 MICH L. REV. 477, 567 (1984).

101. *Id.*

102. S.B. 277, Md. Gen. Assembly, 393d Sess. (1987).

103. *Id.* at 1916; *see* Schulman & Pitt, *supra* note 35, at 554.

104. Schulman & Pitt, *supra* note 35, at 550-51. In an irony suitable for Solomon, the parent *least* fit for custody may benefit most from this type of statute. A parent opposed to joint custody might be more willing to risk loss of sole custody if she feels that the other parent is capable of providing satisfactory care for the child. The parent opposed to joint custody cannot, however, and probably will not, take that risk where the other parent would not provide minimally sufficient care as a sole custodian. Thus, the less fit the parent requesting joint custody, the more bargaining leverage that parent gains under this type of statute. *Id.*

IV. JOINT CUSTODY: A SUMMARY

No doubt joint custody can work well. Motivated, caring, and wealthy parents can manage a true sharing of the children. That sharing, unaccompanied by strife, may even benefit the children. But those parents do not need a judicial order to achieve joint custody; such arrangements can be accommodated easily under the existing umbrella of sole custody *cum* liberal visitation rights.[105]

But joint custody, for the overwhelming majority of families, is a snare and a delusion. It is wrong to think that joint custody can work without committed parents, that it is likely to be in the best interests of the child, or that it will likely result in true sharing of parenting. Rather, joint custody is all too likely to be another millstone around the neck of the real custodial parent, who will find she has to share rights (but not responsibilities) with a recalcitrant former spouse, yet who is likely to find lessened support payments the real payoff to her of the arrangement. The sincerity of many joint custody advocates cannot conceal the reality that joint custody creates many harmful effects, and that a court order cannot overcome the difficult problems presented by a disintegrating family. Presumptive joint custody is an idea whose time has come and gone.

V. THE PRIMARY CARETAKER PREFERENCE

Opposition to court-imposed or presumptive joint custody need not be an endorsement of the current rules for resolving custody disputes. To the contrary, many of the criticisms of the current system made by joint custody proponents have considerable merit. But mandatory joint custody is not the answer. More promising is the limited custody preference in favor of the "primary caretaker parent" that has been adopted in two states—Minnesota and West Virginia.[106]

The history of the law of custody disputes shows a steady move from bright line rules to highly discretionary decisionmaking,

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105. *See* Levy & Chambers, *supra* note 57, at 10. These authors explain:

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

Id. See also Carroll, *Ducking the Real Issues of Joint Custody Cases*, 5 FAM. ADVOC. 18, 20 (1982) (calling this arrangement "de facto joint custody" and claiming that it often arises when "the passage of years has eased the pain and anger of the failed marriage").

106. *See* Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985); Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981).

guided only by general principles.[107] At common law fathers had an absolute right to custody of their children.[108] During the first half of this century, the paternal preference was replaced by a series of custody presumptions. The best known was the "tender years" doctrine, under which mothers, if fit, were the preferred custodians of children of "tender years."[109] That doctrine co-existed with a number of other custody presumptions. In many states fathers were the preferred custodians for older children.[110] Moreover, adulterous parents, particularly mothers, were presumed unfit in many jurisdictions.[111] These presumptions simplified judicial decisionmaking and led to predictable results in most custody cases.

Today, almost all states use a best-interests-of-the-child standard.[112] That standard has several significant weaknesses. First, it is indeterminate and speculative.[113] Judges must make an individualized prediction about the future—with which parent will this child be better off in the years to come?[114] Judges often lack both the tools and the information to make this prediction with any degree of confidence. "In the average divorce proceeding intelligent determination of relative degrees of fitness requires a degree of precision of measurement which is not possible given the tools available to judges."[115]

Even if accurate predictions were possible in more cases, our society lacks any clear-cut consensus about what is "best" for children.[116] This lack of consensus has led many people to complain that courts, in applying the best interests standard, simply impose their personal values on the dispute, a problem exacerbated by the multitude of factors that judges typically are directed to consider in ascertaining a child's best interests.[117]

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107. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 233 (1975).

108. *Id.* at 233-34.

109. *Id.* at 235. While "tender years" is rarely defined, the age of seven is often cited, perhaps as a derivation from the first English statute on the subject. *See* Polikoff, *supra* note 78, at 235.

110. Polikoff, *supra* note 78, at 235.

111. *See* Ester, *supra* note 73, at 233-36. Maryland cases for many years recognized a presumption against an adulterous parent. That presumption was eliminated in Davis v. Davis, 280 Md. 119, 372 A.2d 231 (1977).

112. Mnookin, *supra* note 107, at 236-37.

113. *Id.* at 229.

114. *Id.* at 251. This type of prediction differs from most other adjudication, which requires a determination of *past* acts and facts.

115. Garska v. McCoy, 278 S.E.2d 357, 361 (W. Va. 1981).

116. Mnookin, *supra* note 107, at 229.

117. For example, the Maryland Court of Special Appeals held that the judicial crite-

Application of the best interests test is also time-consuming and intrusive. The detailed factual inquiry necessary to determine which placement will serve a child's best interests is likely to disrupt already fractured family relationships.[118] Money that could be used to ease the transition from joint to separate households is often diverted to lawyers, court fees, and expert witnesses.

The best interests test also encourages litigation. Because each parent can often make plausible arguments why a child would be better off with him or her, the test creates a greater incentive to litigate than would a more determinate custody standard.[119] This increased potential for litigation causes substantial psychological harm to children.[120] In addition, the best interests test contributes to the judicial delay and lack of finality that plague custody law.[121]

The indeterminacy of the best interests standard also affects pre-divorce negotiations. Uncertainty about the outcome of custody disputes creates the irresistible temptation to trade custody for lower alimony and child support payments.[122] This uncertainty is particularly damaging to the primary caretaker parent who may be willing to sacrifice everything in order to avoid the terrifying prospect of losing custody through the unpredictable process of litigation. Moreover, it is likely that the primary caretaker, who has traded career for childraising, will be less able financially to sustain the expense of a custody fight.[123]

A custody presumption in favor of the primary caretaker parent responds to many of these concerns, without the severe disadvan-

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ria for determining a child's best interests include, but are not limited to (1) fitness of the parents, (2) character and reputation of the parties, (3) desire of the natural parents and agreements between the parties, (4) potentiality of maintaining natural family relations, (5) preference of the child, (6) material opportunities affecting the future of the life of the child, (7) age, health, and sex of the child, and (8) residences of parents and opportunity for visitation. Montgomery County Dep't of Social Servs. v. Sanders, 38 Md. App. 406, 419-20, 381 A.2d 1154, 1163 (1978). The *Sanders* court acknowledged that "[p]resent methods for determining a child's best interest are time-consuming [and] involve a multitude of intangible factors that ofttimes are ambiguous." *Id.* at 419, 381 A.2d at 1163. *See also* Ester, *supra* note 73, at 226-27 (discussing "the many intangible factors" that a judge must weigh in determining a child's best interests).

118. Neeley, *supra* note 36, at 173-77.

119. Mnookin, *supra* note 107, at 262.

120. Cochran, *supra* note 79, at 17-20.

121. *See* Mnookin, *supra* note 107, at 282. ("Given a hopelessly ambitious standard that asks the impossible, judges may seek to avoid making an initial determination in a private custody dispute and may be more willing later to reopen and reconsider an initial decision.").

122. Cochran, *supra* note 79, at 14-17; *see* Garska v. McCoy, 278 S.E.2d 357, 360 (W. Va. 1981).

123. *Garska*, 278 S.E.2d at 362.

tages of joint custody.[124] West Virginia and Minnesota have already adopted such a primary caretaker presumption.[125] Under the West Virginia scheme, the parent who has been the primary caretaker of a child of tender years is entitled to custody of that child, if he or she is a fit parent. With respect to older children, who may be able to form an intelligent opinion about their custody, the rule is more flexible. A child fourteen years or older may choose his or her custodian if both parents are fit. A judge may also award custody of a child under fourteen to the parent who was not the primary caretaker if the child has a "justified desire" to live with that parent, and the child is old enough to formulate an opinion.[126]

The primary caretaker is generally easy to identify. In West Virginia it is the parent who: (1) prepares and plans the meals; (2) bathes, grooms, and dresses the child; (3) provides medical care, including nursing and trips to physicians; (4) arranges babysitting and after-school activities; (5) puts the child to bed and wakes the child in the morning; (6) disciplines the child; and (7) teaches elementary skills such as reading and writing.[127] Lay testimony can generally demonstrate which parent performs the lion's share of these tasks, without lengthy court hearings.[128] Moreover, because the primary caretaker preference increases the predictability of custody decisions, the incentives to litigate decrease.

Awarding custody to the primary caretaker furthers a child's paramount interest in stability and continuity.[129] It preserves the

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124. *But see* Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987) (setting forth an interesting attack on both the best interests standard and the primary caretaker preference).

125. Garska v. McCoy, 278 S.E.2d 357 (W. Va 1981); Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985). Courts in a number of other states have held that a parent's primary caretaker status is an important factor to be considered in applying the best interests test. *See, e.g.*, Gatrix v. Gatrix, 652 P.2d 76, 78 (Alaska 1982) (affirming trial court's award to mother based largely on her role as primary caretaker and the child's tendency to look to her as the "primary parent resource"); *In re* Marriage of Maddox, 56 Or. App. 345, 641 P.2d 665 (1982) (commenting that when other factors bearing on child's best interests are relatively equal, court will give considerable weight to which parent was the primary caretaker); Jordan v. Jordan, 302 Pa. Super. 421, 448 A.2d 1113 (1982) (indicating that where natural parents are both fit, and child is of tender years, court must give positive consideration to parent who has been primary caretaker). *See generally* Annotation, *Primary Caretaker Role of Respective Parents as Factor in Awarding Custody of Child*, 41 A.L.R. 4th 1129 (1985).

126. *Garska*, 278 S.E.2d at 363.

127. *Id.*

128. Neeley, *supra* note 36, at 181.

129. *See, e.g.*, J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 23, at 31-32 ("Continuity of relationships, surroundings, and environmental influence are essential for a child's normal development.").

child's bond with the parent who has provided daily care and nurturing during marriage and continues, to the extent possible, the childrearing arrangements in effect prior to divorce.[130] Moreover, because the primary caretaker has met the child's food, clothing, and medical needs in the past, that parent is likely to be more familiar with those needs and better able to meet them in the future.[131] Even if there are some instances in which the non-primary caretaker would be the better custodian, the exhaustive and destructive hearings necessary to identify those cases outweigh any marginal benefits gained.[132]

Adoption of a primary caretaker preference also limits the opportunities for using child custody as a bargaining chip. A mother (or father) who has been the primary caretaker during marriage knows that, if she is a fit parent, she has little chance of losing custody. She will be less likely, therefore, to bargain away valuable support rights in order to avoid a custody fight. Conversely, a non-primary caretaker parent will have less incentive to threaten a custody fight in order to gain bargaining leverage.[133] The result is that questions of alimony and child support will be settled on their own merits, and children will benefit from the increased financial resources available to their custodians.

Although the primary caretaker, even today, is likely to be the mother, the preference is not discriminatory. Rather, it reflects the reality that women in most families still bear primary responsibility for childcare. This is true even in two-career families.[134] In the unusual families where fathers are the primary caretakers of children, they will benefit from the presumption. Where child care is shared equally during marriage, neither parent will qualify as the primary caretaker and neither will be entitled to a presumption. Indeed, in these families, voluntary joint physical custody may well be a viable option.

Finally, it is the primary caretaker preference—not court-imposed joint custody—that is most likely to encourage true co-parenting during marriage. Under a primary caretaker regime, parents know that only if they assume substantial parenting responsibil-

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130. Cochran, *supra* note 79, at 34-36; Polikoff, *supra* note 78, at 241.

131. Cochran, *supra* note 79, at 34.

132. One well-known commentator, after exhaustively canvassing empirical studies, developmental theory, and the "practical values that a preference can serve," has endorsed a limited preference for the primary caretaker of children between the ages of six months and five years. *See* Chambers, *supra* note 100, at 561.

133. Cochran, *supra* note 79, at 36; Neeley, *supra* note 36, at 180.

134. *See supra* note 74.

ities during marriage will they have a realistic chance of gaining custody at divorce.[135] The impact of the primary caretaker presumption is thus likely to change as male and female roles within the family change. When (and if) women and men truly act as co-parents, there will be no primary caretaker, and the presumption will no longer be useful. But that day has not yet arrived. Until it does, men who are upset by the thought of losing custody of their children under a primary caretaker regime should begin not by challenging the legal standard, but by changing their behavior within the home.[136]

135. *See* Polikoff, *supra* note 78, at 242-43.
136. *Id.* at 243.