


5-15-1982

Joint Custody as a Parenting Alternative

Billy G. Mills

Steven P. Belzer

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/plr>

 Part of the [Dispute Resolution and Arbitration Commons](#), [Family Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Billy G. Mills and Steven P. Belzer *Joint Custody as a Parenting Alternative*, 9 Pepp. L. Rev. 4 (1982)

Available at: <http://digitalcommons.pepperdine.edu/plr/vol9/iss4/3>

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.

Joint Custody As A Parenting Alternative

JUDGE BILLY G. MILLS*
STEVEN P. BELZER**

Joint custody of children has been a recently accepted alternative to the traditional child custody/visitation orders that usually follow dissolution proceedings. In 1980, California became one of the first states to provide, by statute, a presumption in favor of an award of joint custody to the parents.

The authors present the legislative history of this joint custody statute and synthesize the various views that have been expressed on the subject of joint custody. Also presented is a discussion of the legislative intent behind the statute and whether the current law is the most effective means of protecting the best interests of the child and of assuring minor children of frequent and continuing contact with both parents after a marital dissolution.

I. INTRODUCTION

At the opening of the 1979-1980 session of the California Legislature, representatives of various groups of divorced fathers began to press for the introduction of a bill which would enable fathers

* Supervising Judge of Family Law Developments, Central District, Los Angeles County Superior Court.

** A.B. 1967, University of California; J.D. 1970, University of California, Davis, Supervising Research Attorney, Sacramento County Superior Court, former counsel, California Senate Committee on Judiciary, Subcommittee on Administration of Justice. Draftsman of Senate Bill 477 and of Assembly Bill 1480, as enacted.

The authors express their appreciation to Shary Klamer, a third-year student at Whittier College of Law, for her valuable research assistance.

to share the responsibilities of child rearing and to gain greater access to their children. These representatives believed that the traditional child custody-visitation orders being rendered by California Superior Courts ignored the desire of many fathers to take an active part in the rearing of their children.

A number of scholarly articles have discussed the divorced parent's physical custody. These articles have also considered the legal rights which the custodial parent enjoys with regard to the education, religious training, lifestyle, medical and dental care, and other aspects of their children's lives.¹ There has been considerable controversy among commentators as to the possible benefits and detriments of what has come to be called "joint custody." On the one hand, Goldstein, Freud, and Solnit² recommended that custody orders virtually eliminate any direct participation in child rearing by the noncustodial parent and, therefore, provide the child with a sense of stability due to the minimal amount of state intrusion into the life of the family. Others, such as Roman and Haddad,³ have posited that joint custody should be considered by courts as the best form of custody order in most, if not at all, cases. Roman and Haddad have argued that joint custody provides the child with a meaningful relationship with both parents, outweighing the potential damage that may be inflicted upon the child by being subjected to parental conflict.⁴ Still other commentators have fallen somewhere between these two extremes.⁵

Proponents of joint custody or "cooperative parenting," believe that it avoids the situation of the overburdened mother and the under-involved father by providing both parents with a definite role, a sense of involvement, and an opportunity to share responsibilities. Additionally, they favor joint custody because it offers legal protection for voluntary cooperative parenting and an opportunity for family self-determination.

In California, the issue of joint custody was complicated by both the language of the Family Law Act⁶ and disagreements

1. See, e.g., Foster & Freed, *Joint Custody—A Viable Alternative*, N.Y.L.J., Nov. 9, 1978, at 1 and Nov. 24, 1978, at 1.

2. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1979).

3. M. ROMAN & W. HADDAD, *THE DISPOSABLE PARENT* (1979); Roman, *The Disposable Parent*, 15 *CONCILIATION CTS. REV.* 1 (1977).

4. Benedek & Benedek, *Post Divorce Visitation: A Child's Right*, 16 *AM. ACAD. CHILD PSYCHIATRY J.* 256, 260 (1977).

5. For an extensive listing of commentaries on the subject, see Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 *U.C.D. L. REV.* 523, 523-24 nn. 2-6 (1979).

6. CAL. CIV. CODE §§ 4000-7028 (West 1970) (amended 1979). California Civil Code § 4600, as enacted, provided that custody of a minor child at issue in a pro-

among courts as to whether the Act authorized entering orders for shared custody.⁷ The time was right and the stage was then set for the California Legislature to reconsider the question of joint custody.⁸ What followed was the introduction of two bills with conflicting provisions. On March 1, 1979, Senate Bill 477 (hereinafter SB 477) was introduced by Senator Jerry Smith, and on March 29, 1979, Assemblyman Charles Imbrecht introduced Assembly Bill 1480 (hereinafter AB 1480). Both bills were eventually enacted in significantly modified form and ultimately AB 1480 became effective.

As of January 1, 1980, California became one of the first states to provide, by statute, a presumption in favor of an award of joint custody.⁹ Support to amend the original statute in favor of the presumption came from a variety of groups: fathers who felt that their rights were being violated by judicial predisposition to award custody to mothers; legal and mental health professionals who felt that joint custody should be clearly available in appropriate post-dissolution situations; parents who had defacto cooperative parenting arrangements and wanted court approval; and various attorneys and judges experienced in the family law field.

Although there have been a variety of opinions expressed on the subject, joint custody is a new legal concept, and its actual effectiveness has not been substantially proved. Therefore, any

ceeding under the Family Law Act, should be awarded in the following order of preference:

- (a) To either parent according to the best interests of the child, but, other things being equal, custody shall be given to the mother if the child is of tender years.
- (b) To the person or persons in whose home the child has been living in a wholesome and stable environment.
- (c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

7. The various permutations of what is perceived to be joint custody, as opposed to divided custody, are discussed in *In re Marriage of Neal*, 92 Cal. App. 3d 834, 155 Cal. Rptr. 157 (1979). In addition, joint custody awards were approved under former California Civil Code § 138 (repealed upon enactment of the Family Law Act) in *Rocha v. Rocha*, 123 Cal. App. 2d 28, 266 P.2d 130 (1954) (custody of two infant sons to the mother, except for two 15 day periods during the year when custody was awarded to the father); *Fahnestock v. Fahnestock*, 76 Cal. App. 2d 817, 174 P.2d 660 (1946) (custody of a 17-year-old son to the mother and the father).

8. Another joint custody bill, Assembly Bill 3475, was introduced in 1976 by then Assemblyman Ken Maddy. That bill passed the Assembly, but was held in the Senate Judiciary Committee.

9. See, e.g., OR. REV. STAT. § 107.105 (1977); WIS. STAT. ANN. § 2437.24 (West Cum. Supp. 1978-79).

conclusion at this time is most probably premature. Social and political pressures, rather than empirical research, appear to have been the main impetus behind the joint custody movement.

This article will present the legislative history of the joint custody statute and a synthesis of the various views that have been expressed on the subject of joint custody. Additionally, the article will present a discussion of the legislative intent behind the statute and whether the current law is the most effective means of protecting the best interests of the child and assuring minor children of frequent and continuing contact with both parents after a marital dissolution.

II. LEGISLATIVE HISTORY

A. *Senate Bill 477*

Senate Bill 477, as introduced on March 1, 1979,¹⁰ proposed the addition of section 4600.5 to the California Civil Code. In its original form, the bill provided that joint custody would be presumed to be in the best interests of the child if certain conditions existed. First, the parties to the custody proceeding must have agreed to an award of joint custody. Second, the parties must

10. As introduced, the bill reads:

4600.5. (a) Joint custody shall be presumed to be in the best interests of the child where all of the following factors are present:

(1) The parties have agreed in writing to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor children of the marriage.

(2) The parties have submitted to the court for its approval, a written plan for the implementation of the joint custody arrangement.

(3) Both parties presently reside in this state and state that they intend to reside in this state in the future. Such presumption is a presumption affecting the burden of proof.

(b) Joint custody may be awarded in other cases but in the absence of clear and convincing evidence shall not be presumed to be in the best interests of the child. For the purpose of assisting the court in making a determination as to an award of joint custody, the court may direct that an investigation be conducted pursuant to the provisions of section 4602.

(c) For the purposes of this section, "joint custody" means an arrangement whereby the minor child or children of the parents shall be in the physical custody of each parent for a period of time with the parents having equal control of the care, upbringing and education of the child or children.

(d) Any order for joint custody shall be terminated by the court if one parent establishes his or her principal residence in another state. Any such order may be modified or terminated upon the petition of one or both parents or the court's own motion if it is shown that the best interests of the child require modification or termination of the order. The court may consider evidence of any substantial failure of a parent to adhere to the plan for implementation of the joint custody arrangement in determining whether the joint custody order shall be modified or terminated.

S. 477, 1979-80 Cal. Leg., Reg. Sess., Senate Daily Journal 700 (March 1, 1979).

have submitted an implementation plan for the court's approval. Third, both parties were required to reside in California.

Under SB 477, joint custody awards were authorized in cases where the conditions did not exist, but joint custody was not presumed to be in the best interests of the child absent clear and convincing evidence to that effect. A joint custody order could be modified or terminated upon a showing that a parent had substantially failed to adhere to the approved plan, or upon one parent establishing residence outside of California.

On the date of introduction, the author, Senator Jerry Smith, issued a press release in which the purpose of SB 477 was described as conferring benefits on both parent and child.¹¹ It was clear from the initial form of SB 477 that the language of Civil Code section 4600 was considered adequate to make joint custody a possibility under its terms. However, after circulating SB 477 for comment, several problems were noted.

On April 16, 1979, prior to hearing in committee, SB 477 was amended in several significant respects.¹² In order for section

11. Senator Smith was quoted in the press release as saying, "This bill would be of benefit to both the parents and the children. It would eliminate the inequity under our divorce law which usually results in custody being awarded to the mother, and, at the same time, would give each parent an equal chance to participate in raising the children. The children would benefit because they would continue to have equal access to both parents."

12. The amended version of the bill was proposed to read:

4600.5. (a) *There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where all the following factors are present:*

(1) *The parents have agreed in writing to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage.*

(2) *If the wishes of the child have been consulted under the circumstances stated in section 4600, the child agrees to joint custody.*

(3) *The parents have submitted to the court for its approval, a written plan for the implementation of the joint custody award, including provisions for minimizing substantial disruption of the child's schooling, daily routine, association with friends, and religious training.*

(b) *Joint custody may be awarded in the discretion of the court in other cases. For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate under this subdivision, the court may direct that an investigation be conducted pursuant to the provisions of Section 4602.*

(c) *For the purposes of this section, "joint custody" means an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of close and continuing contact with both parents.*

(d) *Any order for joint custody may be modified or terminated upon*

4600.5, as proposed by SB 477, to work in conjunction with the existing section 4600 of the Civil Code, SB 477 had to amend section 4600(a)'s preference for awarding custody to *either* parent.¹³ Further, the conditions for application of the presumption favoring joint custody were significantly modified. The first modification was an addition that the wishes of the child be consulted where the child is of sufficient age and capacity to form an intelligent preference as to custody, and that the child agree to joint custody.¹⁴ Secondly, the implementation plan provision was modified to make more explicit what was required in the plan to minimize disruption of the child's usual routine, education, associations, and religious training.¹⁵ Thirdly, the provision barring joint custody where one parent lived out of state was eliminated.¹⁶ Finally, the clear and convincing evidence standard required to activate the presumption in cases lacking the requisite conditions was removed.¹⁷

One of the more important revisions made was the addition of a retroactivity clause.¹⁸ Another provision was added concerning the services of the conciliation courts. In counties having one, SB

the petition of one or both parents or on the court's own motion if it is shown that the best interests of the child require modification or termination of the order. The court may consider, among other factors, evidence of any substantial or repeated failure of a parent to adhere to the plan for implementing the joint custody order or evidence that one parent has established, or is likely to establish his or her principal residence in another state in determining whether the order should be modified or terminated.

(e) Any order for the custody of the minor child or children of a marriage entered by a court in this state or any other state may be modified at any time to an order of joint custody in accordance with the provisions of this section.

(f) In counties having a conciliation court, the court of the parties may, at any time, consult with the conciliation court for the purpose of assisting the parties to formulate a plan for implementation of the joint custody order or to resolve any controversy which has arisen in the implementation of a plan for joint custody previously approved by the court.

SEC. 3. The Legislature finds and declares that it is the public policy of this state to assure minor children of close and continuing contact with both parents after the parents have separated or dissolved their marriage. The Legislature further finds and declares that it is the public policy of this state that there exists no preference in law that the custody of minor children be ordered or awarded to one parent because of that parent's gender.

S. 477 1979-80 Cal. Leg., Reg. Sess., Senate Daily Journal 1814-17 (April 16, 1979) (emphasis in original).

13. CAL. CIV. CODE § 4600 (West 1970). Under the amended version of S. 477, § 4600(a) of the California Civil Code would be modified to read: "(a) To either parent, or to both parents jointly, pursuant to section 4600.5, according to the best interests of the child."

14. S. 477 § 2(a)(2), 1979-80 Cal. Leg., Reg. Sess., Senate Daily Journal 1815 (as amended April 16, 1979).

15. *Id.* § 2(a)(3), Senate Daily Journal 1815-16.

16. *Id.*

17. *Id.* § 2(b), Senate Daily Journal 1816.

18. *Id.* § 2(e).

477 extended the services of these courts to parents for purposes of assisting in formulating joint custody plans and in resolving implementation problems which might later arise.¹⁹

A statement of public policy was added at the end of SB 477, making two distinct findings. The first finding was reflected in the original version of the bill and stipulated that children of divorce should be assured close and continuing contact with both parents after separation or dissolution of marriage. The second was a new statement reaffirming the requirement of law that neither parent should be preferred as custodian based upon the parent's sex.²⁰

While the original bill had defined "joint custody," the definition was too general.²¹ As a result, the amended version of SB 477 attempted to arrive at a workable definition of the term.

Senate Bill 477 was heard in the Senate Judiciary Committee in this form, and was voted out to the senate floor with a "do pass" recommendation.²² Witnesses who testified at the committee hearing suggested additional amendments to the bill which were accepted by the author. These amendments were incorporated into SB 477 on April 24, 1979, and on May 3, SB 477 was passed by the senate without a dissenting vote.²³ Senate Bill 477 included a group of amendments which had been suggested at the Judiciary Committee hearing.²⁴

By the time SB 477 passed out of its house of origin, the relative simplicity of its underlying idea had been consumed in hypertechnical requirements tied to a joint custody award. This became a serious problem with SB 477. Ultimately, the objective of maintaining parent-child relationships after separation and dis-

19. *Id.* § 2(f), Senate Daily Journal 1816-17.

20. *Id.* at § 3, Senate Daily Journal 1817.

21. S. 477 § 2(c) 1979-80 Cal. Leg. Reg. Sess., Senate Daily Journal 1816 (as amended April 16, 1979).

22. Senate Daily Journal 1918 (April 23, 1979).

23. The amendments incorporated in the April 24, 1979 version of Senate Bill 477 brought the portion of the legislative policy statement barring sex-based custody awards into the text of Civil Code § 4600(a); eliminated the requirement that the child, if consulted, agree to the order, (*see* CAL. CIV. CODE § 4600.5(a)(2) (West Supp. 1981), made more explicit the provisions which may be included in the implementation plan and required a judge who declined to order joint custody when the presumption applied, to state in the order his reasons for denial, made awards in other cases available only upon request of either party, and made the retroactivity provisions subject to the jurisdictional requirements of California Civil Code § 5152 a part of the Uniform Child Custody Jurisdiction Act.

24. Senate Daily Journal 2763 (May 3, 1979).

solution of the marriage was obscured by the vehicle proposed to accomplish that objective.

Senate Bill 477 underwent substantial changes before its hearing in the Assembly Committee on Judiciary. On June 4, 1979, the final set of substantive amendments was made.²⁵ Those amendments eliminated excess verbiage in section 4600.5(a), eliminated the need for written agreement by the parties, made the requirement for an implementation plan discretionary, added a proviso that joint legal custody could be awarded without awarding joint physical custody, and eliminated the enumeration of the kinds of evidence which a court could consider in modifying or terminating a joint custody order.²⁶ In this final amended form, SB 477 was referred out of the Assembly Committee on Judiciary on June 11, 1979, with a unanimous "do pass" recommendation. On June 14, 1979, the bill passed the Assembly without a dissenting vote.²⁷ The senate, again without dissent, concurred in the assembly amendments on June 20, and sent the bill to the Governor's desk.²⁸ On July 3, 1979, California had its first joint custody law.²⁹

25. These amendments were drafted into the bill in part as an accommodation to requests by so-called fathers' rights groups who opposed the bill but wished to have it amended to more closely resemble Assembly Bill 1480, which they supported. One such group, Equal Rights for Fathers, employed a contract lobbyist who suggested and advocated some of the amendments incorporated into the bill and others which were not acceptable to the author.

26. Probably the most controversial amendment was the addition of the proviso at the end of § 4600.5(a). It has also become one of the greatest stumbling blocks of joint custody legislation because the term "legal custody" is not defined. For a discussion of what it might be, see *In re Marriage of Neal*, 92 Cal. App. 3d 834, 155 Cal. Rptr. 157 (1979).

27. Assembly Daily Journal 6654 (June 14, 1979). It is interesting to note that before adoption by the Assembly, Senate Bill 477 was again amended. In a refreshing display of legislative efficiency, the amendment, requiring full reprinting of the bill, changed a comma to a semicolon.

28. Senate Daily Journal 4790 (June 20, 1979).

29. 1979 Cal. Stat. 683 sets out the final text of Senate Bill 477:

SECTION 1. Section 4600 of the Civil Code is amended to read:

4600. In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding, or at any time thereafter, make such order for the custody of such child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof. Custody should be awarded in the following order of preference:

(a) To either parent, or to both parents jointly pursuant to section 4600.5, according to the best interests of the child, provided, however, that in making such an award to either parent, the court shall not prefer a parent as custodian because of that parent's sex.

(b) To the person or persons in whose home the child has been living in a wholesome and stable environment.

(c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

Before the court makes any order awarding custody to a person or per-

*B. Assembly Bill 1480*³⁰

At the request of a constituent, Assemblyman Charles Im-

sions other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

SECTION 2. Section 4600.5 is added to the Civil Code, to read:

4600.5. (a) There shall be a presumption affecting the burden of proof, that joint custody is in the best interest of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage.

The court in its discretion, may require the parents to submit to the court a plan for the implementation of the joint custody order. If the court declines to enter an order awarding joint custody pursuant to subdivision (a), the court shall state in its order the reasons for denial of an award of joint custody.

(b) Upon the application of either parent, joint custody may be awarded in the discretion of the court in other cases. For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate under this subdivision, the court shall, upon the request of either party, direct that an investigation be conducted pursuant to the provisions of section 4602.

(c) For the purposes of this section, "joint custody" means an order awarding legal custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of continuing contact with both parents; provided, however, that such order may award joint legal custody without awarding joint physical custody.

(d) Any order for joint custody may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interests of the child required modification or termination of the order.

(e) Any order for the custody of the minor child or children of a marriage entered by a court in this state or any other state may, subject to the jurisdictional requirements set forth in sections 5152 and 5163, be modified at any time to an order of joint custody in accordance with the provisions of this section.

(f) In counties having a conciliation court, the court or the parties may, at any time, pursuant to local rules of court, consult with the conciliation court for the purpose of assisting the parties to formulate a plan for implementation of the joint custody order or to resolve any controversy which has arisen in the implementation of a plan for joint custody.

SECTION 3. The Legislature finds and declares that it is the public policy of this state to assure minor children of close and continuing contact with both parents after the parents have separated or dissolved their marriage. The Legislature further finds and declares that it is the public policy of this state that there exist no preference in law that the custody of minor children be ordered or awarded to one parent because of that parent's sex. 1979 Cal. Stat. 683.

30. See AB 1480, 1979-80 Cal. Leg., Reg. Sess. (1979) (as amended May 14, 1979).

brecht³¹ introduced Assembly Bill (AB) 1480 on March 29, 1979. Assembly Bill 1480 amended California Civil Code section 4600 to alter the order of preference in which child custody would be awarded. The bill³² set forth a new order of preference: joint physical and legal custody was given first preference; sole custody was given second preference, upon a showing that sole custody is in the best interests of the child; and custody to other suitable persons was given third preference. Eliminating the former second preference for the award of child custody to the person in whose home the child had been living, AB 1480 also contained a statement of legislative intent that children of divorced parents be assured of having equal access to both parents whenever possible.

Assembly Bill 1480 was heard in the Assembly Committee on Judiciary on May 9, 1979.³³ At that hearing, amendments were suggested to the author. It being apparent that there were not sufficient votes on the committee to move the bill out in its original form, the author accepted the amendments. On May 14, 1979, the first preference was amended to provide for "joint physical and legal custody" or "joint legal custody with physical custody awarded to one parent."³⁴

31. Assemblyman Art Torres joined as coauthor.

32. As introduced, AB 1480 reads:

SECTION 1. It is the intention of the Legislature by this act to insure that, to the extent possible, despite dissolution of the marriage of a child's parents, the child shall have equal access to both parents.

SECTION 2. Section 4600 of the Civil Code is amended to read:

4600. In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of such child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof. Custody should be awarded in the following order of preference:

(a) *To both parents in joint physical and legal custody.*

(b) *To either parent if a preponderance of the evidence established that it is in the best interest of the child that custody should be awarded to one parent or if the parents agree that one parent shall assume custody.*

(c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion exclude the public from the hearing on this issue. A.B. 1480, 1979-80 Cal. Leg., Reg. Sess., Assembly Daily Journal 1480 (March 29, 1979) (emphasis in original).

33. It should be noted that SB 477 had already passed the senate and was in the assembly, assigned for hearing to the Judiciary Committee.

34. AB 1480, as amended May 14, 1979, added the phrase "according to the best

With this amendment, AB 1480 was referred out of committee with a "do pass" recommendation on May 17, 1979.³⁵ The assembly passed the bill unanimously on May 25, 1979.³⁶ Assembly Bill 1480 came before the Senate Judiciary Committee on August 28, 1979,³⁷ and it became immediately apparent that AB 1480 would encounter some difficulty in the Committee.³⁸

Prior to the hearing, a number of amendments to AB 1480 were discussed by Senator Smith, Mr. Imbrecht, and their respective staff members. These discussions resulted in agreement that the bill would be amended to a form substantially the same as SB 477, with some additional amendments. On August 28, 1979, AB 1480 was amended in committee,³⁹ and was referred out with a "do pass" recommendation on a unanimous vote. Senator Smith became the principal coauthor of the bill and carried it to the senate floor.⁴⁰ On September 5, 1979, AB 1480 was passed by the senate without a dissenting vote⁴¹ and was returned to the assembly for concurrence in amendments, again on the consent calen-

interest of the child" at the end of the introductory portion of section 4600 and added subsection (a) to provide: (a) To both parents in joint physical and legal custody or to both parents in joint legal custody with physical custody awarded to one parent. Assembly Daily Journal 4731 (May 14, 1979).

35. The vote was not recorded in the Assembly Journal; however, the author recalls that it was unanimous in the Committee. The amendments also resulted in the addition of nine assembly coauthors and three senate coauthors. Pursuant to Joint Rules 22.1, 22.2, and 22.3, the Committee recommended that the bill be placed on the consent calendar of the Assembly File. AB 1480, 1979-80 Cal. Leg., Reg. Sess., Assembly Daily Journal 4970-71 (May 17, 1979). This procedure has the effect of submitting the bill to a pro forma vote on the floor of the assembly without debate.

36. Assembly Daily Journal 5492 (May 25, 1979).

37. The Senate Judiciary Committee was chaired at the time by Senator Smith, the author of SB 477. It should be noted that SB 477 had already been signed into law by the Governor.

38. By August 28, 1979, formal opposition to the bill in its amended form had been lodged by the Family Law Section of the State Bar of California, the California Judges Association, the Executive Committee of the Santa Clara County Bar Association Family Law Section, the Northern California Chapter of the American Academy of Matrimonial Lawyers, and some individual superior court judges.

39. The final amended version of the bill was somewhat confused because of the pendency of Assembly Bill 167, a Law Revision Commission Bill dealing with guardianship and conservatorship. Because of conflicting provisions between versions of CAL. CIV. CODE § 4600, AB 167 and AB 1480 were "double joined." Double joining is a process by which conflicting bills are harmonized by providing which version of an amendment will be effective in the event both bills are enacted and approved by the Governor.

40. In his floor statement, Senator Smith described the bill as a supplement to SB 477.

41. Senate Daily Journal 7163 (September 5, 1979).

dar. Assembly Bill 1480 was passed by the assembly on September 10, 1979,⁴² and signed into law on September 21, 1979.⁴³

In its final form, AB 1480 brought the legislative policy state-

42. Assembly Daily Journal 9505 (September 10, 1979).

43. For the final version of AB 1480, See 1979 Cal. Stat. 3479.

SECTION 1. Section 4600 of the Civil Code is amended to read: The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and in order to effect such policy, it is necessary to encourage parents to share the rights and responsibilities of child rearing.

In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of the child during minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an award of custody or modification thereof. Custody should be awarded in the following order of preference, according to the best interests of the child:

(a) To both parents jointly pursuant to section 4600.5 or to either parent. In making an award of custody to either parent, the court shall consider which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of that parent's sex.

The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

(b) If to neither parent, to the "person or persons in whose home the child has been living in a wholesome and stable environment."

(c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearings on this issue.

SECTION 2. Section 4600.5 is added to the Civil Code, to read:

4600.5. (a) There shall be a presumption affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage.

If the court declines to enter an order awarding joint custody pursuant to this subdivision the court shall state in its decision the reasons for denial of an award of joint custody.

(b) Upon the application of either parent, joint custody may be awarded in the discretion of the court in other cases. For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate under this subdivision, the court may direct that an investigation be conducted pursuant to the provisions of section 4602. If the court declines to enter an order awarding joint custody pursuant to this subdivision, the court shall state in its decision the reasons for denial of an award of joint custody.

(c) For the purpose of this section, "joint custody" means an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with

both parents; provided, however, that such order may award joint legal custody without awarding joint physical custody.

(d) Any order for joint custody may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interests of the child require modification or termination of the order. The court shall state in its decision the reasons for modification or termination of the joint custody order if either parent opposes the modification or termination order.

(e) Any order for the custody of the minor child or children of a marriage entered by a court in this state or any other state may be subject to the jurisdictional requirements set forth in Section 5152 and 5163, be modified at any time to an order of joint custody in accordance with the provisions of this section.

(f) In counties having a conciliation court, the court or the parties may, at any time, pursuant to local rules of court, consult with the conciliation court for the purpose of assisting the parties to formulate a plan for implementation of the custody order or to resolve any controversy which has arisen in the implementation of a plan for custody.

(g) Notwithstanding any other provisions of law, access to records and information pertaining to a minor child, including but not limited to medical, dental, and school records shall not be denied to a parent because such parent is not the child's custodial parent.

SECTION 3. Section 4600 of the Civil Code is amended to read:

(a) The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of the child during minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an award of custody or modification thereof. In determining the person or persons to whom custody should be awarded under paragraph (2) or (3) of subdivision (b), the court shall consider and give due weight to the nomination of a guardian of the person of the child by a parent under Article 1 (commencing with Section 1500) of Chapter 1 of Part 2 of Division 4 of the Probate Code.

(b) Custody should be awarded in the following order of preference according to the best interests of the child:

(1) To both parents jointly pursuant to Section 4600.5 or to either parent. In making an order for custody to either parent, the court shall consider among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of that parent's sex. The court in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

(2) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.

(3) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

(c) Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best in-

ment into the text of section 4600.⁴⁴ It also required the court to consider, among other factors, which parent is more likely to allow the noncustodial parent frequent and continuing contact, where a sole custody order is made.⁴⁵ In section 4600.5, AB 1480 makes a custody investigation discretionary rather than mandatory when requested by a party.⁴⁶ Other amendments require a judge denying,⁴⁷ modifying, or terminating⁴⁸ a joint custody order to state the reasons for the decision. Finally, a provision was added affirming a noncustodial parent's right to access to his or her child's records, including medical, dental and school records.⁴⁹

It is clear that the basic intent of both joint custody bills was to provide a vehicle by which parents could share the upbringing of their children. That intent was overshadowed by the panacea of joint custody, and assumed a significance secondary to the formulation of technical rules to achieve the goal.

A combination of heavy lobbying and unfortunate legislative timing served to bring about a legally unsatisfactory solution to an emotionally charged human problem. In a legal sense, the final product lacked clarity. Neither bill adequately defined "legal" or "physical" custody,⁵⁰ and neither bill satisfied the wishes of its proponents. The issue remains one of continuing legislative interest.⁵¹

terests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

SECTION 4. It is the intent of the Legislature if this bill and Assembly Bill 167 are both chaptered and become effective January 1, 1980, both bills amend Section 4600 of the Civil Code, and this bill is chaptered after Assembly Bill 167, that the amendments to Section 4600 proposed by both bills be given effect and incorporated in Section 4600 in the form set forth in Section 3 of this act. Therefore, Section 3 of this act shall become operative only if this bill and Assembly Bill 167 are both chaptered and become effective January 1, 1980, both amend Section 4600, and this bill is chaptered after Assembly Bill 167, in which case Section 1 of this act shall not become operative. 1979 Cal. Stat. 3479.

(Sections 2 and 3 went into effect).

44. CAL. CIV. CODE § 4600(a) (West 1980).

45. *Id.* § 4600(b)(1).

46. *Id.* § 4600.5(b).

47. *Id.*

48. *Id.* § 4600.5(d).

49. *Id.* § 4600.5(g).

50. A bill now pending in the California Assembly, Assembly Bill 2202, was authored by Assemblyman Imbrecht and attempts to define these terms.

51. In addition to AB 2202, another bill, AB 1706, introduced by Assemblyman Lawrence Kapiloff, is pending. Its provisions would enact a first preference for joint custody and would remove authority for split legal-physical joint custody awards. This bill does not attempt to define the difference between those terms.

III. LEGISLATIVE INTENT

The legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.⁵²

While it is clear that joint custody was the vehicle adopted by the California Legislature to carry out this policy, it is doubtful that it was meant to be exclusive.

Although the basic standard for determining who should be awarded custody, "the best interests of the child," was left unchanged, the major change in the law was that joint custody was expressly authorized as an equal preference with custody awardable to either parent. California Civil Code section 4600.5 also creates a presumption affecting the burden of proof that joint custody is in the best interests of the child where the parents agree to such an arrangement.⁵³ This section clearly contemplates, however, that even when both parents agree, the court may decline to enter a joint custody award, subject only to the requirement that the court state its reasons for the denial.⁵⁴ The court also has authority to award joint custody even when both parents do not agree.⁵⁵ Although the statute contemplates such an award, upon the motion of one parent its feasibility must be carefully examined.

The presumption in favor of joint custody is overcome if the parties agree, or the court determines that joint custody would not be appropriate. In addition to the preference for joint custody where both parents agree, the statute also provides that in determining who shall be awarded sole custody, the court must consider "which parent is more likely to allow the child . . . frequent and continuing contact with the noncustodial parent."⁵⁶

In a recent case, the California Supreme Court stated that in awarding custody, the central question to be considered is which parent will provide the child with ethical, emotional, and intellectual guidance.

"The source of this guidance is the adult's own experience of life; its motive power is parental love and concern for the child's well being; and its

52. CAL. CIV. CODE § 4600(a) (West Supp. 1981).

53. *Id.* § 4600.5(a).

54. *Id.*

55. *Id.* § 4600.5(b).

56. *Id.* § 4600.5(c).

teachings deal with such fundamental matters as the child's feelings about himself, his relationships with others, his system of values, his standards of conduct, and his goals and priorities in life."⁵⁷

Assuming that by encouraging an award of joint custody, the legislature intended to protect the "best interests of the child" and "to assure frequent and continuing contact of minor children with both parents," it must now be examined whether these goals can be met, and whether a presumption in favor of joint custody is the most effective means to that end. The question squarely posed by the wording of the legislative policy statement when compared with the language of section 4600.5, is whether joint custody as formulated by the statute adequately fulfills the policy behind it.

*In re Marriage of Neal*⁵⁸ considered an order for joint legal custody with physical custody awarded to the mother. The California Court of Appeal held that the overlapping award was an abuse of discretion but declined to reverse, saying that physical custody gave the mother "'custody' which is real." This case highlights the flaw of the statute caused by its failure to define the distinction between joint legal custody and joint physical custody.

Because there is no definition of these terms, and the statute authorizes the court to make such overlapping awards,⁵⁹ *Neal* will very likely control in future cases even though it was decided prior to the effective date of AB 1480. Application of the *Neal* holding would render the statute meaningless as a vehicle for carrying into effect its public policy statement, since the parent with only joint legal custody would actually have no custody at all.

Later cases have apparently misconstrued the statute by assuming from the policy statement that joint custody has now become *the* preferred award.⁶⁰ Joint custody is but one of many possible forms of child custody arrangements available to effectuate the policy. Other situations, such as liberal visitation or allowing free access between the child and the noncustodial parent, could accomplish the intended result. The statute does not prefer joint custody, but rather, only presumes joint custody to be in the best interests of the child where the parents have so agreed.⁶¹

If the parents have not agreed to joint custody, or in cases where for other reasons the court finds that joint custody is not in

57. *In re Marriage of Carney*, 24 Cal. 3d 725, 739, 598 P.2d 36, 44, 157 Cal. Rptr. 383, 391 (1979).

58. *In re Marriage of Neal*, 92 Cal. App. 3d 834, 155 Cal. Rptr. 157 (1979).

59. CAL. CRV. CODE § 4600.5(c) (West Supp. 1981).

60. *In re Marriage of Levin*, 102 Cal. App. 3d 981, 162 Cal. Rptr. 757 (1980).

61. See *In re Marriage of Murga*, 103 Cal. App. 3d 498, 504, 163 Cal. Rptr. 79, 81 (1980) for an example of a correct application of the policy.

the best interests of the child, the court may attempt to formulate an order which will nevertheless assure the child of frequent and continuing contact with the noncustodial parent. It should also be noted that the policy statement does not raise the right in the child to insist that a noncustodial parent maintain close contact or any contact at all.⁶² Thus, it appears that the legislature did not intend to make joint custody a preference exclusive of other effective means to assure the proper application of public policy.

An effective joint custody arrangement makes tremendous demands on parental capacity, measured by concern for the children and the ability of the parents to interact with each other concerning the manner in which children will be reared. To ensure the success of a joint custody order, two essential requirements must be fulfilled. The parents must have the ability to plan for the welfare of the children, and they must be able to communicate and negotiate regarding solutions to unanticipated problems. It is important to remember, however, that to effectively accomplish the above, the parents must perform these tasks objectively. Such objectivity necessitates that they be minimally influenced by their personal conflicts and different attitudes, values, or whatever other problems contributed to the marital dissolution.

When one combines the normal human emotions which arise in the context of the dissolution of a marriage with the demands placed on parents by the stresses of everyday living, the burden can be overwhelming. It may not be reasonable to assume that presumptive joint custody will be appropriate in all, or even most family situations. Is the present legislation based on an in-depth analysis of the most effective means of parenting in a given situation, or did the legislature assume that since joint custody is the ideal arrangement, it should therefore be state policy?

The bulk of public support for the joint custody presumption has come from fathers' rights groups. Many feel that without it, judges would follow precedent favoring women in custody awards and both parties would ultimately be treated unfairly. Leading advocates of the statutory presumption have enumerated its benefits as reducing the imbalance between mothers and fathers in custody suits, discouraging the use of custody battles as a means

62. *Loudin v. Olpin*, 118 Cal. App. 3d 565, 173 Cal. Rptr. 477 (1981).

of intimidation, and preventing fault-finding litigation.⁶³ However, even if these arguments are valid, they tend to elevate parental rights over those of the children, thus departing from the intent of the legislature.

In reality, child custody is not simply a "legal" problem; it is a human problem. Child custody is an interpersonal problem, a psychological problem, and a child development problem.⁶⁴ The role the court plays in the custody issue, has the nonlegal effect of laying a foundation for a post-divorce family, affecting the ability of its members to reorder their lives in such a way that the welfare of the children is protected.

Studies have indicated that five years after the divorce the children who were found to have adjusted more readily were those who felt that the divorce had served a useful purpose (i.e., parents were happier, there was less conflict, etc.), and those who were able to retain continuity in their relationships with both parents.⁶⁵ It was found that where parents and children participated together in arriving at a custody arrangement, the parents were more likely to abide by schedules, visitation arrangements and obligations, than in situations where the court had imposed a custody arrangement.

In their study, Wallerstein and Kelly indicate that for twenty-five percent of the families they studied, joint custody may be appropriate.⁶⁶ They appear to identify one particular finding, however, to support joint custody as a suitable means of encouraging post-divorce parent-child contact. "There is evidence in our findings that lacking legal rights to share in decisions about major aspects of the children's lives . . . many non-custodial parents withdrew from their children in grief and frustration. Their withdrawal was experienced by the children as a rejection and was detrimental in its impact."⁶⁷ Wallerstein and Kelly's findings demonstrate that the child's effective relationship with his or her custodial parent (or parents) is essential to the child's successful post-divorce development.

It has been suggested that if joint custody is feasible only in a relatively small number of post divorce families, an alternate approach may be needed. Under the alternative approach, contact

63. Cook, *Joint Custody, Sole Custody: A New Statute Reflects a New Perspective*, 18 CONCLINATION CTS. REV. 31 (1980).

64. King, *Child Custody—A Legal Problem?*, 54 CAL. ST. B. J. 156 (1979).

65. J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAK-UP: HOW CHILDREN AND PARENTS CAN COPE WITH DIVORCE* 215 (1980) (based on studies conducted since 1971 in the Children of Divorce Project at the Community Mental Health Center in Marin County, California).

66. *Id.* at 310.

67. *Id.*

should be encouraged between children and noncustodial parents, and relationships within single parent households should be enhanced to reduce the burdens that impair a custodial parent's effectiveness.

A dual parenting approach is a possible suggestion, in which one parent assumes the role of custodial parent, but traditional "visitation rights" are replaced with "parenting responsibilities," thus emphasizing continued parent-child interaction on a meaningful level and avoiding the "Disneyland Daddy or Mommie" syndrome.⁶⁸ Wallerstein and Kelly have also recommended exploring alternate means of providing more sharing of child rearing responsibilities and encouraging the noncustodial parent to remain active in his or her child's life.

In another recent study conducted to gather empirical evidence regarding divorced fathers and how they perceived themselves as either joint custody or visitation fathers, the results seemed to indicate that joint custody fathers had a higher level of self-esteem and often tended to be more involved with their children a year after separation than did visitation fathers. Increased satisfaction with the role he plays in the life of his child seems to increase the quality of interaction with his child making the father a more effective parent. More of the visitation fathers tended to have a low sense of self worth as parents and tended to pull away from involvement with their children.⁶⁹

The term "custody" encompasses all the tangible and intangible qualities of a parent-child relationship.⁷⁰ "Custody embraces the sum of parental rights with respect to the rearing of a child, including the care, . . . rights to the child's services and earnings . . . and the right to direct his activities and make decisions regarding his care and control, education, health and religion."⁷¹

In recent years, the term "joint custody" has come to denote a division of physical as well as shared legal custody.⁷² Whether or not it is a viable option for divorced parents depends on the maintenance of a meaningful distinction between legal and physical

68. See, e.g., Bruch, *Parenting At and After Divorce: A Search for New Models*, 79 MICH. L. REV. 707 (1981).

69. D'Andrea, *Joint Custody Fathers: Paternal Involvement and Paternal Self-Esteem as related to Custody Matters* (doctoral dissertation) (1981).

70. Comment, *Joint Custody: An Alternative for Divorced Parents*, 26 U.C.L.A. L. REV. 1084, 1086 (1979).

71. *Burge v. City of San Francisco*, 41 Cal. 2d 608, 617, 262 P.2d 6, 12 (1953).

72. Roman, *The Disposable Parent*, 15 CONCILIATION CTS. REV. 1 (1977).

custody.⁷³

By its definition, joint custody requires extensive parental cooperation.⁷⁴ By perpetuating an attempt at joint custody between embattled divorced parents, the arrangement can only serve to engender more animosity between them.⁷⁵ Has the legislature contemplated the serious damage that may be inflicted upon children drawn into an emotional maelstrom, involving parents who do not have the capacity to parent cooperatively?

Can parents really isolate their marital conflicts from their roles as parents? It has been suggested that joint custody eliminates the need for, and likelihood of, power plays. With the power more equally divided, the possibility of using the children as "pawns" decreases.⁷⁶

It has also been expressed that an incentive for parental cooperation may be created by an award of joint custody, in that a breakdown of the arrangement will most likely result in a sole custody decree in favor of the parent who did not precipitate the failure. This leads one to question whether it really is in the best interest of the child to place him in the position of "guinea pig," so to speak, in a situation where the failure of a cooperative parenting arrangement has to be proved before it is modified. Is the child placed in the very position that the joint custody presumption was designed to eliminate—that of a pawn in litigation? By the time the matter is tried, the child will have suffered more anxiety, trauma, and problems in addition to those inflicted upon him by the initial divorce.

Divorce does not necessarily end relationships in families; it changes them. Patterns of parental relationships following marital dissolution are undergoing a significant evolution. A new concept is emerging that views post-divorce as a crisis event in the life cycle, requiring a rearrangement of the interdependent relationships.⁷⁷ A child's "best interest" is interdependent with, and a product of, the "best interests" of all family members.⁷⁸

The joint custody situation should be viewed, not in comparison to an idealized intact family, but rather relative to the less ideal alternatives of sole custody, litigation, and disposable parents.⁷⁹ However, this is only valid in a situation where there are two parents with apparent maturity, wisdom, and ability to put their own

73. See Comment, *supra* note 70, at 1086-90.

74. *Dodd v. Dodd*, 93 Misc. 2d 641, 647, 403 N.Y.S.2d 401, 405 (1978).

75. See Comment, *supra* note 70, at 1106-20.

76. See Folberg & Graham, *supra* note 5, at 551.

77. *Id.* at 552.

78. *Id.* at 553.

79. *Id.* at 581.

feelings and prejudices aside. Unfortunately, this is a very difficult goal to achieve in an intact family situation, much less in a divorced family:

A successful cooperative parenting arrangement requires the acknowledgement that both parents assume appropriate responsibility for the physical, emotional, and moral development of the child. It requires shared rights and responsibilities for making decisions that directly affect the child and provides an opportunity for the child to live with each parent a substantial amount of time. In determining whether joint custody is feasible in a given situation, it is essential that the objectives of the parties involved be determined. There is a need to explore the potential for achieving these objectives through joint custody as well as alternative arrangements.⁸⁰ The question then arises as to whether the statutory presumption allows this type of analysis to take place.

Benedek and Benedek have noted that since parents cannot be prevented from implementing an informal joint custody arrangement, it therefore makes sense to provide them with legal sanction and encouragement.⁸¹ They suggest that joint custody prevents the profound sense of loss that children often suffer in divorce situations, and it preserves the advantages of involvement with both parents (love, role models, etc.). Parents with joint custody tend not to experience the sense of loss and feelings of loneliness often experienced by a non-custodial parent, and the burdens and expenses of child care are shared. Win/lose contests and the role of fault in custody hearings are eliminated. In addition, the legal rights of both parents are recognized, thus providing psychological benefits to all parties involved. The need to rely on sexual stereotyping is also eliminated.⁸²

Those who oppose joint custody note that shuttling a child between parents invites the child's continual insecurity and instability. Because of the possibility that one or both parents may remarry or that the previously unemployed mother may obtain employment outside the home, the problem of temporariness is increased. If the parents separate geographically, the arrangement may have to be revised. Another major objection is that ef-

80. Benedek & Benedek, *Joint Custody: Solution or Illusion?* 12 AM. J. PSYCHIATRY 1540 (1979).

81. *Id.* at 1543.

82. See Comment, *supra* note 70, at 1120-25.

fective decision making regarding the child will be a serious problem unless there is complete cooperation.⁸³

While the limited amount of research that has been done has indicated that idealistically a joint custody arrangement can have positive consequences for all involved, it seems apparent that the main prerequisites for success in a joint custody arrangement is parental cooperation, and not a legislative mandate.

A recent publication has stated:

[A] "small number of mavericks or 'radicals' in the legal and mental health professions have been recommending joint custody as a means of undoing the blanket lack of consideration for the rights of fathers often evidenced by the courts. This has made joint custody into a pseudo-political issue, and a rallying point for many angry and frustrated fathers who had been unable, for whatever reason, to arrive at a satisfactory solution to their marital conflict either legally or informally."⁸⁴

If this assertion is true, does statutorily mandated joint custody preserve the rights of parents or children, and does it fulfill legislative intent?

IV. CONCLUSION

Under the best circumstances, raising children calls for self-confidence, patience, skill and the sense of when to leave well enough alone. During a crisis period—like the transition process of divorce—the parents' emotional state can blind them to their basic parenting work. Crisis or not, parents are still parents . . .⁸⁵

After divorce, each parent has the right to a new start as an independent individual. Each child has the right to a fulfilling and continuing relationship with both parents. The best interests of the child are dependent on the *continuity* and duration of the joint custody arrangement, which in turn is partially dependent on the continued satisfaction of the parents.

To provide this essential ingredient of continuity, in the context of a joint custody arrangement, parents must have a cooperative working relationship which allows them to make well-reasoned decisions regarding the welfare of their children. They must both have the desire to continue in an active involvement with the day to day lives of their children, sharing the burdens along with the delights of parenthood.

Parents should have a workable plan with objectives spelled out, as to how the responsibilities will be shared. Ideally, it appears that the best situation would be to have parents work under their own plan to achieve a cooperative parenting arrangement, rather than to have a plan imposed by the court. The court's role

83. See Benedek, *supra* note 80, at 1541-42.

84. K. ROSENTHAL & H. KESHET, *FATHERS WITHOUT PARTNERS* 79 (1981).

85. I. RICCI, *MOM'S HOUSE, DAD'S HOUSE* 175 (1980).

should be advisory, possibly through a conciliation court arrangement, and should help parents arrange a satisfactory program which could then be given approval by the court with resulting enforceability.

The best illustration of this principle is the mediation and conciliation services implemented through the "Sieroty Bill," Senate Bill 961, requiring mediation in all contested custody and visitation matters.⁸⁶ The insertion of a conciliation or mediation process preserves the family's right of self-determination, when possible, and gives the families the skills required to conduct their own "private ordering."⁸⁷

In this system, the forum shifts from the trial court where decisions are imposed to the family where the decisions are self-determined with the help of a neutral third party. The advantage of this system is that it removes the parental role from the divorce process, provides a flexible, inexpensive forum for the resolution of these disputes, models the skills required by the parties to resolve disputes in the future, rewards settlement, and focuses on the future conduct of the parties, rather than on the negative conduct of the past. Separating the parental role from the divorce that occurs in the spousal role helps to bring to a conclusion those decisions which must be made by the court regarding property and support, which take place in a relatively narrow span of time.

The Los Angeles Conciliation Court has reached a written agreement signed by the parties and has made an order of the court in fifty-five to sixty percent of the matters referred. Los Angeles has developed a marathon bargaining model which involves

86. Section 4607 of the California Civil Code was added, operative on January 1, 1981, and 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, as provided in Section 4600, 4600.1 or 4601, 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).

87. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: A Case of Divorce*, 88 YALE L.J. 950 (1979).

all members in the family in the dispute resolution process and takes place over a period of three or four hours with additional sessions scheduled, if necessary. During the process, the children are interviewed first, and the parents are then interviewed, either together, separately, or both. The final process includes drafting a written agreement which is then signed by the parents, reviewed by the attorneys, and made an enforceable order of the court by the judge. This agreement can be modified at any time without returning to court; however, terminating the agreement requires an additional court hearing. The counselor is also available to the family at any later date. If problems arise, additional conferences are scheduled. Preliminary studies indicate these families are one-third less likely to return to court as compared to those whose disputes have been resolved through the adversary process.⁸⁸

The joint custody and mandatory mediation legislation are complementary, and both represent quantum changes: the former defines a new status of parenting following divorce, while the latter defines a new means by which this status is achieved and these decisions are made. Both pieces of legislation favor the private ordering of the parents and recognize that the divorce occurs in the spousal role, not the parental role.

88. McIsaac, *Mandatory Conciliation of Custody and Visitation Matters: California's Bold Stroke*, 19 CONCILIATION CTS. REV. 73, 73 (1981).