Nova Law Review

Volume 7, *Issue* 2 1983 *Article* 3

Shared Parental Responsibility: Florida Statutes Section 61.13

Renee Goldenberg*

*

Shared Parental Responsibility: Florida Statutes Section 61.13

Renee Goldenberg

Abstract

Utilizing a unique term "shared responsibility," the Florida legislature, by enacting Florida Statutes section 61.13(2)(b)(3), has joined the expanding number of states authorizing the elevation of joint custody to a preferred status.

KEYWORDS: parental, florida, responsibility

Shared Parental Responsibility: Florida Statutes Section 61.13

I. Introduction

Utilizing a unique term "shared responsibility," the Florida legislature, by enacting Florida Statutes section 61.13(2)(b)(3),[1] has joined

1. FLA. STAT. § 61.13 (1982) (effective July 1, 1982).

the expanding number of states[2] authorizing the elevation of joint custody to a preferred status.[3] The words "joint custody" are conspicuously and intentionally absent in the wording of the statute.[4] The absence allows courts to continue the exercise of broad discretionary powers when determining custody disputes involving children in Florida.[5] This statute establishes as the public policy of this state that each

---

2. The total number of states with some form of joint custody statute is 23: California (CAL. CIV. CODE § 4600.5 (West Supp. 1982)); Connecticut (CONN. GEN. STAT. § 46b-56 (1980)); Florida (FLA. STAT. § 61.13 (1982)); Hawaii (HAWAII REV. STAT. § 571-46.1 (1980)); Idaho (IDAHO CODE § 32-717B (1982)); Iowa (IOWA CODE ANN. § 598.21 (West 1979) (effective July 1, 1982)); Kansas (KAN. STAT. ANN. § 60.1610(b) (1979)); Kentucky (KY. REV. STAT. § 403.270(3) (1980)); Louisiana (LA. CIV. CODE ANN. art. 146, 157 (West 1981)); Maine (ME. REV. STAT. ANN. tit. 19, § 214 (1981)); Massachusetts (MASS. GEN. LAWS ANN. ch. 208, § 31 (West 1981)); Michigan (MICH. COMP. LAWS ANN. § 722.23(6a) (1981)); Minnesota (MINN. STAT. ANN. § 518.17 (West 1981)); Montana (MONT. CODE ANN. § 40-4-212 (1981)); Nevada (NEV. REV. STAT. § 125.140 (1981)); New Hampshire (N.H. REV. STAT. ANN. § 458.17 (1982)); New Mexico (N.M. STAT. ANN. § 40-4.9 (1981)); North Carolina (N.C. GEN. STAT. § 50-13.2(b) (1975)); Ohio (OHIO REV. CODE ANN. § 3109.04 (1981)); Oregon (OR. REV. STAT. § 107.105 (1979)); Pennsylvania (PA. STAT. ANN. tit. 23, § 1002 (Purdon 1981)); Texas (TEX. CIV. CODE ANN. § 14.06(a) (Vernon 1979)); and Wisconsin (WIS. STAT. ANN. § 247.24(1)(b) (West 1977)).

> Arizona had authorized joint custody awards by court rule. In Illinois, New Jersey and New York, court decisions broadly interpreted the language of existing custody statutes as giving the courts discretionary power to grant joint custody in appropriate cases . . . bringing the total number of states that have embraced the concept of joint custody to 27.

Joint Custody Legislation Passed By 23 States, 8 FAM. L. REP., June 29, 1982, at 2506, 2507.

3. *Id.* at 2506.

4. "In fact, the new law studiously avoids using the term "joint custody" in order to escape the detrimental connotations which that term may convey. . . ." Barkett, *From Custody to Shared Parenting - An Overview,* in ANATOMY OF SHARED PARENTAL RESPONSIBILITY 1.3a (Fla. Bar C.L.E. Course Manual 1982).

But see FLA. STAT. § 744.301(1) (1972) concerning natural guardians. The term "joint custody" appears in this statute, but a definition is not provided nor have courts in Florida used this statute as authorization for joint custody. The statute states in part: "[I]f the marriage between the parents is dissolved, the natural guardianship shall belong to the parent to whom custody of the child is awarded. If the parents are given *joint custody,* then both shall continue as natural guardians." *Id.* (emphasis added).

5. Judge Fleet of the First Circuit Court of Florida, stated on January 25, 1982 during his testimony in front of the Florida Judiciary Civil Committee meeting discuss-

minor child shall have frequent and continuing contact with both parents after a dissolution of marriage and that both parents shall be encouraged "to share the rights and responsibilities of child-rearing."[6]

Generally, joint custody statutes lack specific standards or criteria upon which the court can look for guidance in making custody determinations.[7] However, Florida's statute sets forth a non-exclusive list of specific factors for the court's consideration and evaluation.[8]

A conceptual analysis of shared responsibility is the focus of this note. A historical prospective of case law in Florida will highlight the reasons for the significant changes in the newly enacted statute. The legislature's textual changes will be discussed, in addition to a consideration of the potential ramifications of the changes mandated. Based on this analysis, recommendations are offered to facilitate the incorporation of shared responsibility into the area of child custody in Florida.

II. The Evolution of Florida Statutes Section 61.13

The 1967 amendment of Florida Statutes section 61.13 dealt with, as does the present statute, the court's power in determining custody of children in dissolution proceedings:

> In any action for divorce and alimony, the court has power at any stage of the action to make such orders about the care, custody and maintenance of the children of the marriage, and what security, if any, is to be given thereof, as from the circumstances of the parties and the nature of the case is equitable.[9]

---

ing Senate Bill 439 (adopted as FLA. STAT. § 61.13 (1982)): "Under the present law, the judges (the trial judges), could do what this bill provides. I think this bill attempts to generate some extra thinking on the parts of judges to get them thinking more on the lines of sharing parental responsibilities . . . it makes them think a little deeper and rightfully so." *Id.*

6. FLA. STAT. § 61.13(2)(b)1 (1982). The statute states in part: "It is the public policy of this state to assure each minor child 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." *Id.*

7. *See, e.g.,* CAL. CIV. CODE § 4600.5 (West Supp. 1982).

8. FLA. STAT. § 61.13(3)(a)-(j) (1982).

9. FLA. STAT. § 61.13 (1967).

This amendment renumbered former Florida Statutes section 65.14 as section 61.13 and substituted the word "equitable" in lieu of "may be fit, equitable and just, and such order touching their custody as their best spiritual as well as other interests may require."[10] Spiritual interests never again receive the attention of the legislature as a factor in determining custody.[11]

The 1971 amendment[12] provided a substantial rewording of Florida Statutes section 61.13. The prior text of section 61.13 became subsection (3). In subsection (2), the legislature codified the best interests of the child test[13] and gave the father equal standing with the mother in regard to custody.[14] Although the legislature had not yet enumerated the relevant factors[15] to be considered in determining the best interests of the child, courts, while exercising their discretion in deciding custody, continued to articulate factors they considered important.[16] Some

10. FLA. STAT. § 65.14 (1965).

11. Florida Statutes section 61.13(3) (1982) has two sub-sections under which a court may include "spiritual interests" in determining custody: "(f) The moral fitness of the parents" or "(j) Any other factor considered by the court to be relevant to a particular child custody dispute." *Id.*

12. FLA. STAT. § 61.13 (1971).

13. Florida Statutes section 61.13(2) (1971) read in part: "The court shall award custody and visitation rights of minor children of the parties as a part of proceeding for dissolution of marriage in accordance with the best interests of the child. . . ." *Id.*

See also infra notes 29-39 and accompanying text.

14. Florida Statutes section 61.13(2) (1971) read in part: "Upon considering all relevant factors, the father of the child shall be given the same consideration as the mother in determining custody." *Id. See also infra* notes 50-65 and accompanying text. *But see* Anderson v. Anderson, 309 So. 2d 1 (Fla. 1975), in which the Supreme Court of Florida announced this statutory mandate of equal consideration was not inconsistent with the tender years presumption in favor of the mother. It was still the case law in Florida that "other essential factors being equal, the mother of the infant of tender years should receive prime consideration for custody." Dinkel v. Dinkel, 322 So. 2d 22, 24 (Fla. 1975).

15. FLA. STAT. § 61.13 (1971).

16. *See, e.g.*, Goldstein v. Goldstein, 264 So. 2d 49 (Fla. 3d Dist. Ct. App. 1972) (preference of the mature child); Peterseil v. Peterseil, 307 So. 2d 498 (Fla. 3d Dist. Ct. App. 1975) (tender years); Jacobs v. Ross, 304 So. 2d 542 (Fla. 3d Dist. Ct. App. 1974) (stable environment); Anderson v. Anderson, 309 So. 2d 1 (Fla. 1975) (remaining in the marital home); Hosking v. Hosking, 318 So. 2d 559 (Fla. 2d Dist. Ct. App. 1975) (social investigator's report); Silvestri v. Silvestri, 309 So. 2d 29 (Fla. 3d Dist. Ct. App. 1975) (prior infidelity not a binding factor).

of these factors were codified in 1975[17] to define the best interests of the child for the purpose of determining the custody of children following a dissolution of marriage.[18]

In the last major amendment prior to the 1982 revisions, the legislature, in 1978, authorized courts in dissolution proceedings to award visitation rights to grandparents of a minor child.[19] Not until the 1982

---

17. FLA. STAT. § 61.13(3) (1975).

18. Florida Statutes section 61.13 (1975) stated in part:

(3) For purposes of custody, the best interests of the child shall be determined by the court's consideration and evaluation of all factors affecting the best welfare and interests of the child including but not limited to the following:

(a) The love, affection, and other emotional ties existing between the parents and the child.

(b) The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the educating of the child.

(c) The capacity and disposition of the parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home.

(f) The moral fitness of the parents.

(g) The mental and physical health of the parents.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

(j) Any other factor considered by the court to be relevant to a particular custody dispute.

Id.

19. Florida Statutes section 61.13(2)(b) (1978) stated:

The court may award the grandparents visitation rights of a minor child if it is deemed by the court to be in the child's best interest. Nothing in this section shall be construed to require that grandparents be made parties or given notice of dissolution pleadings or proceedings, nor shall such grandparents have legal standing as "contestants" as defined in § 61.1306, Florida Statutes. No court shall order that a child be kept within the state or jurisdiction of the court solely for the purpose of permitting visitation for the grandparents.

amendment, though, were grandparents awarded "legal standing to seek judicial enforcement of such an award."[20]

III. Historical Perspective: Florida Case Law Development

A. Scope of the Problem

Prior to a dissolution of marriage, both parents are considered joint natural guardians of their minor children.[21] They have joint and equal rights of custody, care and control.[22] Upon dissolution,[23] the court, with the judge acting in his traditional role of parens patriae,[24] determines the division of those jointly held parental rights and obligations.[25] Because of the dramatic increase in divorce,[26] courts are increasingly called upon to make difficult decisions regarding child custody;[27] an incorrect determination can have a devastating effect upon

---

Id.

But see, e.g., Putnal v. Putnal, 392 So. 2d 613 (Fla. 5th Dist. Ct. App. 1981) (Grandparents allowed to participate in postdissolution custody proceedings initiated by the father).

20. FLA. STAT. § 61.13(2)(b)2.c. (1982).

21. FLA. STAT. § 744.301(1) (1972).

22. Florida Statutes section 744.03(1) (1972) stated in part: "A guardian is one to whom the law has entrusted the custody and control of the person or of the property, or of both, of an incompetent." *Id.*

23. *See supra* note 4 for the text of Florida Statutes section 744.301(1) (1972).

24. Under the parens patriae doctrine the judge puts himself in the position of a "wise, affectionate and careful parent," and makes his determination concerning the child accordingly. This description appears in Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925).

25. A list of parental rights and obligations appears in Folberg & Graham, *Joint Custody of Children Following Divorce,* 12 U.C.D. L. REV. 523, 537-38 (1979). *See also* Frazier v. Frazier, 109 Fla. 164, 166, 147 So. 464, 466 (1933).

26. *See, e.g.,* Note, *Joint Custody: A Revolution in Child Custody Law?,* 20 WASHBURN L.J. 326 (1981).

27. Child custody disputes are all too often tragic theatre. The parties experience all the agonies of characters from a Greek drama. This, in itself, should give us cause to shudder; but there is more to the situation. A judge who must decide these disputes and attorneys who must counsel and advocate are all too frequently oracles without a hint of what to do. They are often overwhelmed by what is asked of them. Prevailing law requires that they focus on the "best interests of the child," but they are often ill-

the child.[28] In making these difficult decisions, courts through the years have employed a variety of methods to ensure a proper placement of the child.

B. Best Interests of the Child Test

The best interests of the child test[29] focuses on the child's interests as the primary consideration.[30] As early as 1913, the Supreme Court of Florida enunciated the principles of the test in review of a custody award.[31] The court emphasized a need to examine the fitness and condition of the parents in order to make a determination of what was best for the welfare of the child.[32] The court's discretion[33] was and contin-

---

equipped to do so. There is very little in the attorney's education and experience that prepares him to deal with such a delicate human matter; the same is true of the judge.

Batt, *Child Custody Disputes: A Developmental - Psychological Approach to Proof and Decisionmaking,* 12 WILLIAMETTE L.J. 491 (1976).

See also Brust v. Brust, 266 So. 2d 400, 402 (Fla. 1st Dist. Ct. App. 1972).

28. Note, *supra* note 26, at 327; Note, *Joint Custody: An Alternative for Divorced Parents,* 26 U.C.L.A. L. REV. 1084, 1092-93 (1979).

29. In Chapsky v. Wood, 26 Kan. 650 (1881) the Kansas Supreme Court focused on the welfare of the child, not the natural right of the father. Custody was awarded to the maternal aunt who had raised the child from infancy, making this case one of the earliest examples using the best interests of the child test.

30. In Finlay v. Finlay, 240 N.Y. 249, 148 N.E. 624 (1925), Judge Cardozo (quoting Queen v. Gyngall, 2 Q.B. Div. 232 (1893)) formulated the standard:

> [The Judge] does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as parens patriae to do what is best for the interest of the child. He is to put himself in the position of a "wise, affectionate and careful parent" and make provision for the child accordingly . . . He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights "as between a parent and a child" or as between one parent and another. . . . Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child.

240 N.Y. at 433-34, 148 N.E. 624, 626.

31. Harris v. Harris, 65 Fla. 50, 61 So. 122 (1913) (custody of minor son awarded to the mother).

32. *Id.*

> If the character of either the father, . . . or the mother, . . . of said minor child, shall become disreputable and unfit to have the care, custody, or

ues to be broad in this area which reflects the gravity of a custody decision.[34]

The Florida Supreme Court in *Green v. Green*[35] reiterated the controlling principle of the best interests of the child test: "We are committed to the doctrine that the welfare of the child is the principal feature in determining custody, and that a very large discretion is allowed the chancellor in this respect."[36]

The best interests of the child test remained a vague standard[37] and a general approach[38] to Florida custody decisions until the legislature enumerated the factors for determining best interests in 1975.[39] Prior to 1975, criteria courts eluded to included: (1) which parent could provide emotional, social, and spiritual guidance;[40] (2) a wholesome moral atmosphere and suitable educational facilities;[41] (3) stabil-

---

control of said child, or if their treatment of said child becomes other than parental, then they shall forfeit or lose all their rights, powers and privileges granted in this decree, and said rights, powers and privileges herefore belonging to said party shall revert to the other.

Id. at 50, 61 So. at 122.

33. Note, *supra* note 26, at 329.

This test, [referring to the best interests test], presupposes that it will be best for the child. This supposition forces a judge "to evaluate and choose between highly speculative and sharply conflicting 'expert' testimony regarding the personalities of the contestants and the predicted outcomes of various custody alternatives." The judge brings to the decision his personal opinions and feelings.

Id.

34. Frazier v. Frazier, 109 Fla. 164, 166, 147 So. 464, 466 (Fla. 1933). The court in *Frazier* noted that this discretion is subject to judicial review.

35. 137 Fla. 359, 188 So. 355 (1939) (custody of five year old daughter awarded to mother).

36. *Id.* at 360, 188 So. at 356.

37. Note, *Joint Custody: An Alternative for Divorced Parents, supra* note 28, at 1086: "The use of such a vague standard enables judges to rely on the mandates of their own consciences."

38. Folberg & Graham, *supra* note 25, at 532.

39. FLA. STAT. § 61.13(3) (1975).

40. Anderson v. Anderson, 309 So. 2d 1, 4 (Fla. 1975) (custody of two and one-half year old twin girls awarded to the father).

41. Baxter v. Baxter, 158 Fla. 886, 888, 30 So. 2d 492, 494 (1947) (custody of three year old son awarded to the father).

ity and discipline;[42] and (4) the advantage of the child remaining in the same neighborhood and association with a peer group conducive to the child's well-being.[43] Fitness of the mother[44] and father[45] were examined, and in rare instances when neither parent was considered fit, custody was awarded to a non-parent.[46] Alternative forms of custody were also examined, for example, split custody or divided custody.[47]

The best interests of the child test continued to be the paramount consideration for awarding custody after 1975,[48] and should remain so with the court's discretion intact under the newly enacted statute.[49]

---

42. Philips v. Philips, 153 Fla. 133, 134, 13 So. 2d 922, 923 (1943) (custody of 17 month old son awarded to the father).

43. Peterseil v. Peterseil, 307 So. 2d 498, 499 (Fla. 3d Dist. Ct. App. 1975) (custody of boys ages four and six awarded to the mother).

44. Teel v. Sapp, 53 So. 2d 635 (Fla. 1951) (mother morally unfit). *But see* Norris v. Norris, 202 So. 2d 899 (Fla. 2d Dist. Ct. App. 1967) (mother retained custody despite entertaining "nocturnal friends").

See also Green v. Green, 137 Fla. 359, 188 So. 355 (1939) (mother who devoted considerable time to child's supervision and training).

45. *See, e.g.,* Dinkel v. Dinkel, 322 So. 2d 22 (Fla. 1975):

> Even if the trier of fact determines that the spouse's adultery has an adverse effect on the child, other factors, ie. cruelty, neglect, parental unfitness, exhibited by the other spouse, may be present to tip the scales back in favor of the award of custody to the adulterous spouse. In the latter event, it may be that the best interest of the child would be served by awarding custody to a third party.

Id. at 24.

46. *Id. See, e.g.,* Cone v. Cone, 62 So. 2d 907 (Fla. 1953) (en banc) (boy, eleven, and girl, nine, awarded to the grandmother).

47. *See, e.g.,* Shores v. Shores, 69 So. 2d 312 (Fla. 1954) (policy of the court to keep the children together - no "split" custody); Jones v. Jones, 23 So. 2d 623 (Fla. 1945) (welfare of the children not best promoted by ordering divided custody between the parents).

48. *See, e.g.,* Rosenberg v. Rosenberg, 365 So. 2d 185 (Fla. 3d Dist. Ct. App. 1978) (nine year old son awarded to the father who could provide a more stable environment).

49. Florida Statutes section 61.13(3) (1982) states:

> For purposes of shared parental responsibility and primary physical residence, the best interests of the child shall be determined by the court's consideration and evaluation of all factors affecting the best welfare and interests of the child, including, but not limited to: (a) . . . to (j) Any other factor considered by the court to be relevant to a particular child custody dispute.

C. Tender Years Doctrine

Early English[50] and American[51] courts viewed paternal custody as a virtually absolute rule.[52] Later, however, under the tender years doctrine,[53] the mother of a minor child received custody unless it was shown she was not a "fit and proper person" to rear the children.[54] This became known as the "Other Things Being Equal Rule" in Florida,[55] meaning that presented with two equally fit parents requesting custody of a young child, courts would elect the mother.

When custody of a young child was awarded to the father, the welfare of the child under the best interests of the child test superceded the doctrine[56] or the "other factors" were not found to be equal as between the parents.[57] Employment of the tender years doctrine meant

---

Id.

50. *See, e.g.,* The King v. DeManneville, 102 Eng. Rep. 1054 (1804) (custody of infant awarded to father).

51. *See, e.g.,* Carr v. Carr, 63 Va. (22 Gratt.) 168 (1872) (custody of three year old child awarded to father).

52. The shift to favoring the mother began with Justice Talfourd's Act, 2 & 3 Vict., ch. 54 (1839). Custody could be awarded to the mother if the children were less than seven years old. This Act is the origin of the "Tender Years Doctrine" in England. Note, *supra* note 26, at 328.

53. Helms v. Fransiscus, 2 Bland's Ch. 544 (Md. 1830), *quoted in* Note, *supra* note 26, at 328, provides what is considered the first American expression of the tender years doctrine:

> [Even] a court of common law will not go so far as to hold nature in contempt and snatch helpless, pulling infancy from the bosom of an affectionate mother, and place it in the coarse hands of the father. The mother is the softest and safest nurse in infancy, and with her it will be left in opposition to this general right of the father.

Id. at 563.

54. Jones v. Jones, 156 Fla. 524, 526, 23 So. 2d 623, 625 (Fla. 1945) (boy, six, and girl, four, awarded to mother).

55. Fields v. Fields, 143 Fla. 886, 197 So. 153 (1940) (three children, ages three, five and seven, awarded to mother): "Other things being equal . . . the mother of infants of tender years is best fitted to bestow the motherly affection, care, companionship, and early training suited to their needs." *Id.* at 887, 197 So. at 154.

56. Philips v. Philips, 153 Fla. 133, 13 So. 2d 922 (Fla. 1943) (custody of 17 month old son awarded to father).

57. *See, e.g.,* Brust v. Brust, 266 So. 2d 400, 401-02 (Fla. 1972) (custody to father of sons six, eight and ten).

"the pendulum of custody has swung from father to mother and has finally centered upon the principal question of the welfare of the child."[58]

After the 1971 Amendment to Florida Statutes section 61.13(2),[59] the Florida Supreme Court reaffirmed the principles of the tender years doctrine despite the statutory mandate of equal consideration for both the mother and father in custody disputes.[60] Despite the statute's express statement, it was still the case law in Florida that "other essential factors being equal, the mother of the infant of tender years should receive prime consideration for custody."[61]

However, in 1975, the legislature amended Florida Statutes section 61.13(3)[62] to include criteria to be considered when determining the welfare and best interests of the child. Courts then began use of those factors to apply "equal consideration."[63] The 1982 amendment to Florida Statutes section 61.13 states: "Upon considering all relevant factors, the father of the child shall be given the same consideration as the mother in determining custody *regardless of the age of the child.*"[64] Thus, the Florida legislature has expressly eviscerated the historical and judicially followed tender years doctrine.[65]

---

58. *Id.* at 402.

59. *See supra* note 14 for the text of Florida Statutes section 61.13(2) (1971).

60. Anderson v. Anderson, 309 So. 2d 1, 2 (Fla. 1975).

61. Dinkel v. Dinkel, 322 So. 2d 22, 24 (Fla. 1975). *See also* Corvison v. Corvison, 362 So. 2d 323 (Fla. 3d Dist. Ct. App. 1978) (custody of six year old and three year old awarded to mother). *But see* Snedaker v. Snedaker, 327 So. 2d 72 (Fla. 1st Dist. Ct. App. 1976) (custody of three year old awarded to father):

> When, as here, there is a dearth of evidence in support of the position of the mother, as opposed to overwhelming evidence indicating that it is for the best interests of the child for its custody to be awarded to its father, any 'presumption', 'prime consideration', or 'natural edge', abiding with the mother is overcome and custody should be awarded to that parent in whose custody the best interests of the child will be served, in the light of the evidence adduced.

Id. at 73.

62. FLA. STAT. § 61.13 (1975).

63. Kerschner v. Crocker, 400 So. 2d 126, 127 (Fla. 5th Dist. Ct. App. 1981) (custody of five year old daughter awarded to the father).

64. FLA. STAT. § 61.13(2)(b)1. (1982) (emphasis added).

65. Two open questions remain:

a) Since the 1982 amendment excludes the "sex" of the child as a factor for equal

D. Modification of Custody

Modification of custody, whether originally determined by an agreement between the parties[66] or by court decree,[67] traditionally has been the "proper subject for judicial consideration at any time by the court which granted the decree of divorce."[68] Since the award of custody is regarded as res judicata[69] as of the time of the decree, the court does not have the same degree of discretion to choose between the parents seeking modification as it did upon the initial custody determination.[70]

To warrant modification of a child custody decree, changed circumstances is the threshold requirement.[71] In order to warrant up-

---

consideration in its text of § 61.13(2)(b)1., will a mother still have the "natural edge" to be awarded a daughter? *See, e.g.*, Silvestri v. Silvestri, 309 So. 2d 29 (Fla. 3d Dist. Ct. App. 1975).

b) Since most custody arrangements are by agreement, will the mother still continue to be given "prime consideration" anyway by those unaware of the new statutory mandate: "Even though the tender years doctrine is waning, its effects are still present. In about 90% of custody cases, the mother is awarded sole custody, and the mother assumes sole custody in at least 90% of the cases that never reach the court." Note, *supra* note 26, at 328.

66. *See, e.g.*, Forte v. Forte, 320 So. 2d 446 (Fla. 3d Dist. Ct. App. 1975): "Interpretation or modification of a separate agreement affecting welfare of children is not only permissible, but obligatory where the circumstances so indicate." *Id.* at 448.

67. *See, e.g.*, Cone v. Cone, 62 So. 2d 907 (Fla. 1963) (en banc): "So long, then, as the minor child is within the jurisdiction of the equity court, such court may exercise its continuing jurisdiction to modify its decree as to the custody of the child, even though jurisdiction was not expressly retained therein." *Id.* at 908.

68. Frazier v. Frazier, 109 Fla. 164, 165, 147 So. 2d 464, 465 (1933), *reh'g denied*, April 19, 1933; Green v. Green, 307 So. 2d 246, 247 (Fla. 4th Dist. Ct. App. 1975).

69. *But see*, Taylor v. Schilt, 292 So. 2d 47 (Fla. 2d Dist. Ct. App. 1974): "Res judicata does not fit in custody matters, yet some barrier must be raised against too frequent petitions for modification." *Id.* at 49.

70. Green v. Green, 307 So. 2d 246, 247 (Fla. 4th Dist. Ct. App. 1975).

Courts are reluctant to disrupt a child's environment unless the circumstances clearly call for it. Arguably, therefore, a clear advantage goes to the parent who wins the initial custody determination, even if it is only a temporary custody determination until the actual dissolution proceedings.

71. Taylor v. Schilt, 292 So. 2d 47, 49 (Fla. 2d Dist. Ct. App. 1974); Philips v. Philips, 13 So. 2d 922, 923 (Fla. 1943). *See also, Frazier*, 109 Fla. 164, 147 So. 2d at 464.

rooting the child, there must be competent, substantial evidence that (1) there has been a substantial or material change in the conditions of the parties *and* (2) that the best interests and welfare of the child will be promoted by the change of custody.[72] Although a heavy burden is placed upon the parent seeking modification,[73] it can be justified by the protection of the child from disruption caused by too frequent modification petitions.[74]

Factors considered in making a determination of change of custody have included, but are not limited to: (1) preference of a mature child,[75] (2) psychological evaluation,[76] (3) stability of the living environment,[77] (4) sexual activity and cohabitation of the custodial par-

---

> [The final decree] is not to be materially amended or changed afterward, unless on altered conditions shown to have arisen since the decree, or because of material facts bearing on the question of custody and existing at the time of the decree, but which were unknown to the court, and then only for the welfare of the child.

Frazier, 109 Fla. at 164-65, 147 So. 2d at 464-65.

72. Sanders v. Sanders, 376 So. 2d 881, 882 (Fla. 1st Dist. Ct. App. 1980). *See also,* Bennett v. Bennett, 73 So. 2d 274 (Fla. 1954); Jones v. Jones, 156 Fla. 524, 23 So. 2d 623 (1945); Brush v. Brush, 414 So. 2d 37 (Fla. 3d Dist. Ct. App. 1982); Adams v. Adams, 385 So. 2d 688 (Fla. 3d Dist. Ct. App. 1980); Jacobs v. Ross, 304 So. 2d 542 (Fla. 3d Dist. Ct. App. 1974). *But see,* Goodman v. Goodman, 291 So. 2d 106 (Fla. 3d Dist. Ct. App. 1974) (discussing Hutchins v. Hutchins, 220 So. 2d 438, 439 (Fla. 4th Dist. Ct. App. 1969)):

> The Fourth District Court in Hutchins did state that in modification of child custody cases a showing must be made "not only that the general welfare of the children will be served by a change of custody, but that it will be detrimental to the children if custody is not changed."

Goodman, 291 So. 2d at 108.

73. *See, e.g.,* Stricklin v. Stricklin, 383 So. 2d 1183 (Fla. 5th Dist. Ct. App. 1980); McGregor v. McGregor, 7 Fla. Law Weekly 1656 (Fla. 5th Dist. Ct. App. Aug. 4, 1982) (No. 81-568).

74. Taylor v. Schilt, 292 So. 2d 47, 49 (Fla. 2d Dist. Ct. App. 1974). *But see,* Prevatt v. Penney, 138 So. 2d 537 (Fla. 2d Dist. Ct. App. 1962): "Custody of the child has been a continuing series of rounds characterized by animosity, charges and countercharges." *Id.* at 539.

75. Goldstein v. Goldstein, 264 So. 2d 49 (Fla. 3d Dist. Ct. App. 1972).

76. Garvey v. Garvey, 383 So. 2d 1172, 1173 (Fla. 2d Dist. Ct. App. 1980). *But see* the dissent in Green v. Green, 307 So. 2d 246, 247 (Fla. 4th Dist. Ct. App. 1975) criticizing the use of counselor's investigation as a factor in determining custody.

77. Rosenberg v. Rosenberg, 365 So. 2d 185, 186 (Fla. 3d Dist. Ct. App. 1978), *reh'g denied,* January 3, 1979.

ent,[78] and (5) changed needs of an older child.[79] Remarriage of a non-custodial parent, as well as increased material wealth and acquisition of a suitable home have not been found sufficient in and of themselves to fulfill the requirement of changed circumstances.[80] Finally, it is the trend in Florida that a custodial parent need not be proven unfit to have any factors in "changed circumstances" considered in a modification petition.[81]

The majority of past petitions for change of custody requested a transfer from sole custody in one parent to sole custody in another.[82] In cases in which the non-custodial parent requested split or divided custody,[83] the burden and factors used by the court remained the same.[84]

The newly enacted statute mandates shared responsibility as part of any proceeding under the chapter[85] unless the court finds that shared parental responsibility would be detrimental to the child's best interest.[86] It remains an open question whether the court will continue to follow the prior enumerated standards in a modification petition.[87]

---

78. Smothers v. Smothers, 281 So. 2d 359 (Fla. 1973); Young v. Young, 305 So. 2d 92 (Fla. 1st Dist. Ct. App. 1974).

79. McGregor v. McGregor, 7 Fla. Law Weekly 1656 (Fla. 5th Dist. Ct. App. Aug. 4, 1982) (No. 81-568).

80. Adams v. Adams, 385 So. 2d 688, 689 (Fla. 3d Dist. Ct. App. 1980); Stricklin v. Stricklin, 383 So. 2d 1183 (Fla. 5th Dist. Ct. App. 1980). *But see,* Hoffman v. Linley, 201 So. 2d 641 (Fla. 3d Dist. Ct. App. 1967) (mother was original custodian, lost custody upon a finding of unfitness, and finally upon re-petition after remarriage was again awarded custody).

81. Goodman v. Goodman, 291 So. 2d 106, 108 (Fla. 3d Dist. Ct. App. 1974); Taylor v. Schilt, 292 So. 2d 47, 49 (Fla. 1st Dist. Ct. App. 1974).

82. *See supra* note 72.

83. *See infra* notes 98-114 and accompanying text.

84. *See, e.g.,* Jacobs v. Ross, 304 So. 2d 542, 543 (Fla. 3d Dist. Ct. App. 1974).

85. 1982 FLA. LAWS ch. 82-96 (amending § 61.13(2)(b)3. (1982)).

86. FLA. STAT. § 61.13(2)(b)2. (1982).

87. Two additional open questions remain:

a) Will courts now entertain modification petitions of once "boiler-plate" sole custody agreements, thereby flooding the courts?

b) Is the newly enacted Florida Statutes section 61.13 (1982) alone enough of a changed circumstance to reach the threshold requirement for a modification petition?

E. Grandparent Visitation Rights

Historically in Florida, grandparents were treated as any other non-parents and were denied visitation rights.[88] Courts recognized the emotional bonds between the grandparents and grandchildren, yet found visitation rights were unjustified and unenforceable.[89] Until 1978, when legislation[90] was passed permitting an award of visitation if it was in the child's best interests, visitation rights of grandparents were always struck down by courts.[91]

---

88. In Parker v. Gates, 89 Fla. 76, 103 So. 126 (1925), the Supreme Court refused visitation rights to a non-parent who had raised a nine year old child for most of his life. The court enunciated the principle cited numerously to deny grandparents and non-parents visitation rights: "[t]he order . . . cannot legally be enforced against the wishes of the child's mother." *Id.* at 76, 103 So. at 126.

89. *See, e.g.,* Lee v. Kepler, 197 So. 2d 570 (Fla. 3d Dist. Ct. App. 1967):

> This decision . . . need not operate to prevent the maternal grandmother from seeing the child, for whom she has shown great interest and affection, nor deprive the child of the benefit and pleasure to be derived therefrom . . . (but) the father and his wife — he as a natural parent and she as a parent by adoption are entitled to determine the frequency, time and the place of visitation with the child. . . ."

Id. at 573.

See also Rodriguez v. Rodriguez, 295 So. 2d 328 (Fla. 3d Dist. Ct. App. 1974); Sheehy v. Sheehy, 325 So. 2d 12 (Fla. 2d Dist. Ct. App. 1975); Tamargo v. Tamargo, 348 So. 2d 1163 (Fla. 2d Dist. Ct. App. 1977). In all cases, custody was had by *fit* parents. *But see* Behn v. Tummons, 345 So. 2d 388 (Fla. 1st Dist. Ct. App. 1977), which recognized the authority of the trial court to award custody to grandparents and non-parents limited to cases in which either or the parents are *unfit* to raise the child.

90. Florida Statutes section 61.13(2)(b) (1978) read in part:

> The court may award the grandparents visitation rights of a minor child if it is deemed by the court to be in the child's best interest. Nothing in this section shall be construed to require that grandparents be made parties or given notice of dissolution pleadings or proceedings, nor shall such grandparents have legal standing as "contestants" as defined in § 61.1306, Florida Statutes. No court shall order that a child be kept within the state or jurisdiction of the court solely for the purpose of permitting visitation for the grandparents.

Id.

See also Florida Statutes section 61.1306(1) (1977) which defines, "contestant" as follows: "(1) 'Contestant' means a person, including a parent, who claims a right to custody or visitation rights with respect to a child."

91. *See supra* note 89.

Since the grandparents could now only be heard in the context of a divorce or custody proceeding,[92] this lack of standing as contestants[93] to maintain an independent civil action to achieve visitation rights, effectively continued to cause denial of those rights.[94]

Florida Statutes section 61.13(2)(c)[95] now provides that necessary legal standing and should therefore fulfill the legislature's intent to provide for the best interests of the child.[96] It remains to be seen whether the legislature shall follow the trend begun to extend visitation rights to non-parents, other relatives of the child.[97]

---

92. *See supra* note 90.

93. *See supra* note 90.

94. Osteryoung v. Leibowitz, 371 So. 2d 1068 (Fla. 3d Dist. Ct. App. 1979), *reh'g denied,* July 5, 1979; Shuler v. Shuler, 371 So. 2d 588 (Fla. 1st Dist. Ct. App. 1979). *But see* Whitehead v. Hewett, 380 So. 2d 492 (Fla. 1st Dist. Ct. App. 1980), *reh'g denied,* March 18, 1980 (award of visitation rights to grandparents held not an abuse of discretion as grandparents were legal custodians under a prior order and modification proceedings were instituted by the child's father); Putnal v. Putnal, 392 So. 2d 613 (Fla. 5th Dist. Ct. App. 1981) (court concluded that in entertaining a joint motion allowing grandparents participation in a proceeding initiated by the father, in which he and another couple were contestants, the trial court did not err. It added the trial court would have erred had it refused to allow the grandparents to participate).

Against all prior precedent and without a statutory basis (as grandparents then had), a non-parent was granted visitation rights on the basis of the child's best interests. *See* Wills v. Wills, 399 So. 2d 1130 (Fla. 4th Dist. Ct. App. 1981), in which the court in a dissolution proceeding granted a step-mother visitation rights with her husband's adopted daughter.

95. 1982 FLA. LAWS ch. 82-96 (effective July, 1982).

96. Florida Statutes section 61.13(2)(c) (1982) states in part: "The court may award the grandparents visitation rights of a minor child if it is deemed by the court to be in the child's best interest. Grandparents shall have legal standing to seek judicial enforcement of such an award."

See also 7 FAM. L. REP., *Trends In Grandparent Third-Party Visitation Rights Legislation,* July 21, 1981, at 2587:

> As the nation's divorce rate has climbed, the issue of grandparents' visitation rights has grown in importance. Out of concern for maintaining a family relationship that can provide emotional security for the children of divorced parents, most states over the last decade have considered legislation to establish procedures by which grandparents and other family members can petition for visitation rights.

Id. at 2587.

97. Other relatives may include "great-grandparents, stepparents, half-brothers and half-sisters." *Trends In Grandparent Third-Party Visitation Rights Legislation,*

F. Alternative Forms of Custody

While the norm in Florida has been to grant sole custody to the mother,[98] courts, upon considering individual circumstances, have also awarded sole custody to the father.[99] The best interests of the child test has been the basis for the courts to order "divided" custody, "rotating or alternating" custody.[100] The various terms are used interchangeably and inexactly in courts in Florida.[101] Case law in Florida has dealt almost exclusively with forms of "divided" custody, where one parent is still the sole custodian over a distinct period of time.

The Florida Supreme Court in 1933,[102] recognized a father must be afforded an opportunity to exercise his paternal rights[103] and be-

---

supra note 96, at 2587.

98. *See, e.g.*, Shores v. Shores, 60 So. 2d 313 (Fla. 1954); Teel v. Sapp, 53 So. 2d 635 (Fla. 1951).

99. *See, e.g.*, Jobe v. Jobe, 202 So. 2d 791 (Fla. 1st Dist. Ct. App. 1967); Klein v. Klein, 204 So. 2d 239 (Fla. 3d Dist. Ct. App. 1967), *reh'g denied*, December 12, 1967.

100. These terms need to be distinguished from each other. Divided (or alternating or rotating) custody is when each parent has sole custody of the child for a distinct portion of the year. The parent in whose home the child resides has sole legal authority (care, custody and control) during that period. Of course, the other parent has visitation rights. Split custody refers to "the situation where custody of one or more children is awarded to one parent and the remaining children to the other parent." Gerscovich v. Gerscovich, 406 So. 2d 1150, 1151-53 (Fla. 5th Dist. Ct. App. 1981).

Joint custody "leaves the parental rights and obligations toward the child the same as existed during the marriage . . . both parents have equal authority and responsibility for all facets of raising the child . . . the child's upbringing is a cooperative project; both parents agree on the important decisions concerning the child's life. . . . Joint custody entails the division of physical custody at relatively brief intervals, with the child's time roughly divided equally between the parents and spread evenly throughout the year." Note, *Joint Custody: An Alternative for Divorced Parents, supra* note 28, at 1104-05.

101. Gerscovich v. Gerscovich, 406 So. 2d 1150, 1151 (Fla. 5th Dist. Ct. App. 1981).

102. In Frazier v. Frazier, 109 Fla. 164, 147 So. 464 (1933) both parents were, under the divorce decree, afforded six months each with the eleven year old daughter. The modification order only allowed the father two weeks visitation.

103. The father is not only entitled to have "leave" for the child to visit him for two weeks each year, but is entitled to have and enjoy her society for a reasonably sufficient length of time each year to enable him to inculcate in her mind a spirit of love, affection, and respect for her father. . . .

cause neither parent was considered a "good example of conduct or character,"[104] the court approved a divided custody plan.[105] Ten years later the Supreme Court[106] made an about face and took a definitive stand *against* divided custody:

> There can be no doubt that experience shows that it is detrimental to the best interests of a young child to have its custody and control shifted often from one household to another and to be changed often from the discipline and teachings which are attempted to be imparted by one custodian to that other discipline and teachings sought to be imparted by another custodian. . . . It has been written on the pages of all time that no man can serve two masters and it is certainly true that no child can pursue a normal life when subjected to the precepts, example and control of first one person and then another, regardless of how well intentioned those persons may be.[107]

In another vacillation later that same year, the Florida Supreme Court approved a divided custody award because both parents "*were* of highly respectable character."[108]

On the whole, the case law presumption in Florida against divided custody was reaffirmed numerous times by the Supreme Court[109] and

---

> Parental rights of the father growing out of the father's legal responsibility, as well as recognized moral obligation, to maintain and care for both the mother and their children, when other considerations do not materially preponderate against it in the interest of the welfare of children must be accorded due consideration by a court in making an order, as to the custody of children heretofore enjoyed by the father.

Id. at 167, 147 So. at 467.

104. *Id.* at 167, 147 So. at 467.

105. *Id.* The daughter would spend nine months with the mother and three months with the father.

106. Phillips v. Phillips, 153 Fla. 133, 13 So. 2d 922 (Fla. 1943).

107. *Id.* at 134, 13 So. 2d at 923.

108. Watson v. Watson, 153 Fla. 668, 669, 15 So. 2d 446, 447 (1943) (emphasis added). The children would spend six months with the mother and six months with the father. A major factor was the fact both parents worked. The court stated: "This case is typical of many that have from time to time changed the current of some phase of the law;" the mother's working caused her to lose her preferential standing. *Id.*

109. Hurst v. Hurst, 158 Fla. 43, 27 So. 2d 749 (1946) (en banc) (tender years doctrine used to invalidate divided custody), *reh'g denied,* Nov. 19, 1946; Jones v.

the district courts of appeal.[110] Despite this reaffirmation, courts *did* express approval of divided custody in certain situations having "special circumstances or legally unequal facts."[111] Thus divided custody was not absolutely prohibited, and various forms were awarded by the courts.[112] The test seemed to be a weighing of factors including the desire of the parties to have divided custody, the proximity of custodial domiciles, the reasonableness of the periods of divided custody, the ages and preference of the children, and, especially, the specific circumstances of each case.[113]

Jones, 156 Fla. 524, 23 So. 2d 623 (1945).

110. Bienvenu v. Bienvenu, 380 So. 2d 1164 (Fla. 3d Dist. Ct. App. 1980) (not in best interests of child due to mutual antagonism between the parents); Garvey v. Garvey, 383 So. 2d 1172 (Fla. 2d Dist. Ct. App. 1980) ("joint" custody order reversed based on psychologist's report); Peterseil v. Peterseil, 307 So. 2d 498 (Fla. 3d Dist. Ct. App. 1975); Unger v. Unger, 306 So. 2d 540 (Fla. 3d Dist. Ct. App. 1975); Ritzi v. Ritzi, 160 So. 2d 159 (Fla. 3d Dist. Ct. App. 1964); Rudolph v. Rudolph, 146 So. 2d 397 (Fla. 3d Dist. Ct. App. 1962) (best interests of child used to invalidate divided custody).

111. *Wonsetler,* 240 So. 2d at 871.

112. Gerscovich v. Gerscovich, 406 So. 2d 1150 (Fla. 5th Dist. Ct. App. 1981) (parents to alternate custody of eleven year old girl and fifteen year old boy on a yearly basis), *as clarified,* Dec. 7, 1981; Forman v. Forman, 315 So. 2d 9 (Fla. 3d Dist. Ct. App. 1975) (mother to share joint custody of minor son with maternal grandparents), *reh'g denied,* July 22, 1975; Hare v. Potter, 233 So. 2d 653 (Fla. 4th Dist. Ct. App. 1970) (remanded to determine periods of custody), *reh'g denied,* Apr. 30, 1970; Lindgren v. Lindgren, 220 So. 2d 440 (Fla. 2d Dist. Ct. App. 1969) (mother and father alternate custody four days one week and three days the next week of twin daughters); Bolton v. Gordon, 201 So. 2d 744 (Fla. 4th Dist. Ct. App. 1967) (mother awarded custody nine months to coincide with school year and father to have custody during the three summer months); Udell v. Udell, 151 So. 2d 663 (Fla. 2d Dist. Ct. App. 1963) (joint custody awarded to both parents of thirteen year old and the court would "provide definite periods of time that each parent should have custody of this child if they could not agree among themselves as to the hours of custody, etc." *Id.* at 865); Hutchinson v. Hutchinson, 127 So. 2d 136 (Fla. 3d Dist. Ct. App. 1961) (father awarded custody during school term and mother awarded custody during summer vacation); Metz v. Metz, 108 So. 2d 512 (Fla. 3d Dist. Ct. App. 1959) (father allowed to have daughter with him in his home outside state during part of the summer vacation), *reh'g denied,* Feb. 16, 1959.

See also, Brown v. Brown, 7 Fla. Law Weekly (Fla. 4th Dist. Ct. App. Nov. 24, 1982) (No. 82-771) (for award of split custody: fourteen year old daughter and sixteen year old son to live with father, and three year old daughter to live with mother).

113. *See, e.g.,* Gerscovich v. Gerscovich, 406 So. 2d 1150, 1151-52 (Fla. 5th

Since none of the above alternative forms of custody previously awarded in Florida totally embrace the concept of shared responsibility,[114] the courts in Florida will be applying an innovative concept.

IV. The Concept of Shared Parental Responsibility: Florida Statutes Section 61.13[115]

A. Purposes of the Amendments

The purposes of the 1982 amendments are set forth in Florida Statutes section 61.13. The intent of the legislature is clearly stated: "It is the public policy of this state to assure each minor child 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."[116] This portion of the statute recognizes the child's right to have access to both parents[117] and requires each parent to acknowledge and recognize the other as a full

---

Dist. Ct. App. 1981). *See also supra* note 103.

114. FLA. STAT. § 61.13(2)(b)2. (1982). It is impossible to determine the number of separation *agreements* between parents in Florida which may have heretofore incorporated this concept as these are not reported.

115. On October 8, 1982, the Florida Bar Continuing Legal Education Committee and Family Law Section presented a lecture program called *The Anatomy of Shared Parental Responsibility*. The speakers will be quoted extensively in this section. Their statements will be reflected in footnotes by citation to their name. They were in order of their presentations:

Honorable Rosemary Barkett, Circuit Judge, 15th Judicial Circuit, West Palm Beach, Florida.

James Fox Miller, Attorney, Hollywood, Florida.

Honorable Frank A. Orlando, Circuit Judge, 17th Judicial Circuit, Fort Lauderdale, Florida.

Melvyn B. Frumkes, Attorney, Miami, Florida.

Honorable Lewis Kapner, Circuit Judge, 15th Judicial Circuit, West Palm Beach, Florida.

A course manual, also entitled ANATOMY OF SHARED PARENTAL RESPONSIBILITY, 1982, was distributed and contained articles by the speakers above, as well as other contributors [hereinafter cited as MANUAL]. A copy of the MANUAL is on file in the Nova Law Review office.

116. 1982 FLA. LAWS ch. 82-96 (effective July 1, 1982).

117. Judge Barkett.

parent and partner in the rearing of the child.[118] Implicit in the statute is the recognition of the need to reeducate lawyers, judges,[119] parents, and the public in this "emotional field of the law."[120] The problems caused by sole custody[121] should be abrogated by the shared parenting aspect of the statute.

Looking to the construction of the language of this section, as well as all the other sections of Florida Statutes section 61.13, it becomes evident that an entirely new vocabulary is now to be incorporated into Florida domestic relations law.[122] Custody disputes are not suited to the adversary system. Custody is not a vested right or award "fostered by the present system which has awarded the 'prize' to the 'winner'."[123] No longer will "custody be awarded" or "visitation rights" be delineated.[124]

The statute has more depth than just the matter of the above stated semantics — it focuses on the child and who will be responsible for raising the child.[125] The term "children" in the plural form has been changed to "each [minor] child"[126] used in the singular form, her-

---

118. Judge Kapner.

119. "The legislature addressed the concept of shared parental responsibility not because the courts were *making* such awards in inappropriate cases but because some courts *refused* to do so even when clearly warranted." Kapner, *Shared Parental Responsibility: Is It For Everyone?,* MANUAL, *supra* note 115, at 5.12 (emphasis in original).

120. James Fox Miller.

121. For example, (1) the stigma attached to a mother without custody, (2) that fathers who were just "visitors" acted as such, (3) that mothers who were "custodians" used that power against the fathers, and (4) the custody battles and contempt orders that accompanied the former. Barkett, *From Custody to Shared Parenting - An Overview,* MANUAL, *supra* note 115, at 1.3(a).

122. Judge Barkett.

123. Barkett, *From Custody to Shared Parenting - An Overview,* MANUAL, *supra* note 115, at 1.3(a).

124. Florida Statutes section 61.13(2)(b)1. (1982) states "the court shall determine all matters relating to custody. . . ." The words "award custody and visitation rights" were deleted.

Suggested new terminology includes "access and contact" instead of the word visitation. Melvyn Frumkes.

125. Judge Barkett.

126. Florida Statutes section 61.13(2)(b)1. (1982) states in part: "The court shall determine all matters relating to custody of *each* minor *child* of the parties. . . ."

alding a shift in focus from the needs of the children of a dissolved marriage as an entity to be examined, to a recognition that each child's needs in a family unit be examined separately to provide properly for his welfare.[127]

Since the purpose of the statute is to focus on each individual child rather than rely on generalizations, the statute mandates the end of the tender years doctrine.[128] In this substantive change, the statute abrogated the judicial presumption that the mother of a child of tender years shall be the designated custodian.[129]

Further reinforcement of the policy of encouraging shared participation in child-rearing can be found in Florida Statutes section 61.13(2)(b)3.[130] By giving both parents access to all records and information pertaining to a child, this section eliminates the "ownership" aspect of child custody and makes possible effective co-parenting.[131]

Finally, by speaking in general terms of rights and responsibilities of the child to be shared by the parents, the legislature, through Flor-

---

The word "children" was deleted.

127. "Florida courts have routinely held that it is error to divide children between parents. However, it is to be noted that Cha. 82-96 has reworded Section 61.13(2)(b), Florida Statutes, from 'rights of children' to 'custody of each minor child.' Does this subtle change indicate a legislative intent to abrogate the former case law? Your authors take no position and will wait appellate clarification thereof." Knight & Pollock, *Shared Parental Responsibility,* MANUAL, *supra* note 115, at 1.31.

128. Florida Statutes section 61.13(2)(b)1. (1982) states in part: "Upon considering all relevant factors, the father of the child shall be given the same consideration as the mother in determining custody *regardless of the age of the child.*" (emphasis added).

129. Judge Barkett.

Arguably, even though the legislature has mandated the demise of the tender years doctrine, trial judges may continue to order custody of young children to mothers, supporting it on theories of bonding between the mother and child due to the care and feeding of tiny infants more typically done by the mother than by the father. Even if there were evidence of shared responsibilities, some judges are constitutionally more likely to believe that meaningful nurturing was done by the mother, i.e., if the child was breast fed.

130. Florida Statutes section 61.13(2)(b)3. (1982) states: "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 primary residential parent."

131. Barkett, *From Custody to Shared Parenting - An Overview,* MANUAL, *supra* note 115, at 1.3(b) and in presentation.

ida Statutes section 61.13, "will signal to the public an expressed public policy recognizing that divorcing parents do not divorce their children in the process and that they continue to be jointly responsible for them."[132]

B. Changes Mandated: The Statute and Its Implementation

1. *Unrestricted Shared Parental Responsibility*[133]

Florida Statutes section 61.13 creates a statutory presumption in favor of sharing parental responsibility: "The Court *shall* order that parental responsibility for a minor child *shall* be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child."[134] Use of this mandatory language makes clear that a simple custody-visitation arrangement is no longer viable in Florida.[135]

Shared parental responsibility is defined to mean "that both parents retain full parental rights and responsibilities with respect to their child, and requires both parents to *confer* so that *major decisions* affecting the welfare of the child will be determined jointly."[136] Because the statute specifically separates the areas of "primary physical residence [and] shared parental responsibility,"[137] this amendment and definition contemplate the concept of joint legal custody rather than the term joint custody itself, which connotes a combination of joint legal and joint physical custody.[138] The absence of the term "joint custody" in the statute and the use of clearly defined new vocabulary precludes

---

132. *Id.*

133. This term appears in the MANUAL at page 4.18, adopted from the guidelines prepared by the Family Law Division, 13th Judicial Circuit, Hillsborough County, Florida. Its definition follows the statute stating "both parents retain legal responsibility and authority for the control and care of their child as they did when the family was intact." *Id.*

134. FLA. STAT. § 61.13(2)(b)2. (1982) (emphasis added).

135. Judge Barkett.

136. FLA. STAT. § 61.13(2)(b)2.a. (1982) (emphasis added). It is anticipated the meaning of the emphasized words will be heavily litigated.

137. FLA. STAT. § 61.13(3) (1982).

138. Melvyn Frumkes, Judge Kapner. *See also* Knight & Pollock, *Shared Parental Responsibility*, MANUAL, *supra* note 115, at 1.5.

any "preconceived connotations of shared parenting or joint custody"[139] in Florida.

An order for shared parental responsibility may be established by the court or by agreement by the parties,[140] after review of the individual circumstances of each case.[141] The best interests of the child remains the primary consideration of the court.[142] Because the parents are in the best position to determine what is best for their own participation in child-rearing, agreements between the parents are encouraged.[143] Therefore, there is no one "shared parental responsibility" formula and arrangements will vary considerably.[144]

Courts consider a number of factors when determining whether shared parenting is appropriate, including: (1) fitness of the parents,[145]

---

139. Barkett, *From Custody to Shared Parenting - An Overview,* MANUAL, *supra* note 115, at 1.3(b).

140. Florida Statutes section 61.13(2)(b)2.a. (1982) states in part: "In ordering shared parental responsibility, the court may consider the *expressed desires* of the parties. . . . Where it appears to the court to be in the best interests of the child, the *court may order or the parties may agree.* . . ." (emphasis added).

141. Kapner, *Shared Parental Responsibility: Is It For Everyone?,* MANUAL, *supra* note 115, at 5.41. *See also* pages 5.15 - .16 of the MANUAL quoting judicial attitudes from a survey conducted among Florida Circuit Judges in 1977.

> [V]irtually *all* the judges would grant shared parental responsibility, so as defined, if the best interests of the children are served (95%), the parties are agreeable to it (85%), or the children, being of sufficient age and maturity, desire it, and the parties do not object (90%). The most popular physical arrangement was nine months with one parent and three months with the other. Most judges (80%) eschewed a general unspecified order of shared parental responsibility or a six months - six months alternating arrangement, and a slight majority opposed Monday through Thursday with one parent and Friday to Monday with the other. Not surprisingly, the more mature the parents and the better the parent-child relationships, the more likely the judges were to order shared parental responsibility.

Id. at 5.15 - .16.

142. FLA. STAT. § 61.13(2)(b)1. (1982).

143. All the speakers stated this at one point in their discussions.

144. "The truth is that responsibility arrangements are as varied as are the situations and personalities of divorced parents, and more than one arrangement can be fairly described as a 'true' shared parental responsibility arrangement." Kapner, *Shared Parental Responsibility: Is It For Everyone?,* MANUAL, *supra* note 115, at 5.2.

145. *Id.* at 5.23-.24.

(2) positive agreement of the parents,[146] (3) preference of the children,[147] (4) ability and willingness of the parents to cooperate with each other,[148] (5) the particular psychological and emotional needs of the children,[149] (6) the degree to which possible divided residential care would disrupt the child's normal school and schedule,[150] and (7) the age and maturity of the children.[151] In the alternative, courts may employ a three prong test which directs the court to consider three essential factors. First, each parent must be individually fit to act as custodian of the child. Second, the parents together must demonstrate an ability to cooperate on matters affecting the child's welfare. The areas in which cooperation is necessary range from practical considerations to agreement on such fundamental issues as education, health care, discipline and religious training. Finally, if the above personal criteria are met, the court, to protect the child's best interests, must be satisfied that the proposed custodial arrangement is reasonable, and, on its face, workable.[152] Finally, the statute itself provides a guiding, but not exclusive, list of ten factors affecting the best interests of the child.[153]

---

146. *Id.* at 5.25-.27.
147. *Id.* at 5.27-.29.
148. *Id.* at 5.30-.33.
149. *Id.* at 5.33-.34.
150. *Id.* at 5.34-.36.
151. *Id.* at 5.36-.40.
152. Knight & Pollock, *Shared Parental Responsibility,* MANUAL, *supra* note 115, at 1.20.
153. Florida Statutes section 61.13(3) (1982) states:

> (3) For purposes of shared parental responsibility and primary physical residence, the best interests of the child shall be determined by the court's consideration and evaluation of all factors affecting the best welfare and interests of the child, including, but not limited to:
>
> (a) The parent who is more likely to allow the child frequent and continuing contact with the nonresidential parent.
>
> (b) The love, affection, and other emotional ties existing between the parents and the child.
>
> (c) The capacity and disposition of the parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining

Because the statute places a high standard of cooperation on parents, specificity is imperative (1) in the delineation of what shared responsibility is to constitute for a given family and (2) for the continuing success of the arrangement decided upon.[154] In addition, since the statute contemplates joint legal custody and a judicial presumption exists in Florida against "divided" custody,[155] it is probable a child may properly reside most of the year with one parent (i.e. primary residence), subject to reasonable "contact" (visitation) with the other parent (i.e. secondary residence). However, both parents should have shared control of the child's upbringing, care and education and equal voice in decisions pertaining to the child's health, education, religious training, vacations, etc.[156]

The statute requires parents to *confer* on these major decisions. The requirement to confer, and the absence of the word "agree" in the statute, provides legislative recognition that parents who are divorced may be unable to agree but *can* be expected to confer and cooperate

---

continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home.

(f) The moral fitness of the parents.

(g) The mental and physical health of the parents.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

(j) Any other factor considered by the court to be relevant to a particular child custody dispute.

Id.

154. James Fox Miller, Melvyn Frumkes. *See also* Frumkes, *Negotiating and Drafting a Shared Parental Responsibility Agreement,* MANUAL, *supra* note 115, at 4.1-.34 (therein are sample clauses to provide for any possible contingency, i.e. "emergency decisions — unilateral permitted; [minimum] contact and access by the non-residential parent; name to be maintained; failure to exercise [contact and access], no waiver; daily decision- making responsibility; contingency for future change in circumstances; provision for future possible necessity of mediation and conciliation") (text relating to each of these clauses has been deleted).

155. Judge Barkett.

156. Knight & Pollock, *Shared Parental Responsibility,* MANUAL, *supra* note 115, at 1.5.

with each other on major decisions in the best interests of the child.[157] As a practical matter, minor decisions "such as what and when to eat, when to do chores, and when to go to bed (i.e. day to day disciplines) should be decided by the parent with whom the child's primary physical residence is maintained."[158]

Shared parental responsibility allows each parent to have his or her wishes heard. Perhaps more importantly for the child, shared parental responsibility attempts to approximate as much as possible the prior intact family unit.[159] Additional benefits of the thus created greater stability of the parental relationship, along with great psychological, philosophical, and physical involvement with the child by *both* parents, hopefully will perpetuate the cycle of shared parenting cooperation and flexibility[160] and outweigh any risks.[161]

2. *Restricted Shared Parental Responsibility*[162]

If it is determined by a Florida court that "shared parental re-

---

157. Judge Barkett, Judge Kapner.

158. Knight & Pollock, *Shared Parental Responsibility*, MANUAL, *supra* note 115, at 1.5.

159. Kapner, *Shared Parental Responsibility: Is It For Everyone?*, MANUAL, *supra* note 115, at 5.8.

160. *Id.* at 5.6-.13.

161. *Id.* at 5.13-.14.

> For example, if factors such as parental maturity or fitness are negative, shared responsibility, because of its greater reliance on cooperation and flexibility, could run the risk of greater manipulation and arguments by both the child and the parents. A child who is shuttled back and forth between hostile parents of sharply different life-styles and disciplinary attitudes can only experience more difficult adjustment problems than otherwise. Some critics have opposed shared or joint responsibility on the grounds that "change and discontinuity threaten the child's emotional well-being; that joint custody requires the 'shuttling back and forth' of children, leading to lack of stability in the home environment; that children may become prey to severe and crippling loyalty conflicts."

Id.

162. This term appears in the MANUAL, *supra* note 115, at 4.18, adopted from the guidelines prepared by the Family Law Division, 13th Judicial Circuit, Hillsborough County, Florida. Its definition follows Florida Statutes section 61.13 (1982):

> In restricted shared parental responsibility, each parent's division of responsibility is set out. Areas of decision-making include, but are not lim-

sponsibility" is inappropriate in a given situation, the next statutory alternative is *not* sole responsibility.[163] Rather, "parents may agree as to the division of various aspects of parental responsibility although the court has authority to reject and/or modify any such agreement"[164] or "the court may apportion the various aspects of parental care and control between the parties if such apportionment is: a) agreed to by the parties or b) found by the court to be in the best interests of the child."[165]

Restricted shared parental responsibility is provided for in Florida Statutes section 61.13(2)(b)2.a.[166] This section of the statute is of prime importance. It recognizes individual family uniqueness and gives statutory authority for the myriad of orders that now can arise from Florida Statutes section 61.13. Most importantly, it can be the basis for awarding physical custody six months to one parent and six months to the other or monthly variations thereof.[167]

---

ited to: residential care, education, religious, moral, disciplinary, medical and dental, social, recreational, legal, travel and financial. Where the court designates one parent as having primary responsibility, the court should do so *only* after a finding that that parent is more likely to allow the child frequent and continuing contact with the other parent.

Id. at 4.18-.19 (emphasis original).

163. FLA. STAT. § 61.13(2)(b)2.a. (1982).

164. Knight & Pollock, *Shared Parental Responsibility,* MANUAL, *supra* note 115, at 1.19.

165. *Id.* at 1.18.

166. Florida Statutes section 61.13(2)(b)2.a. (1982) states in part:

In ordering shared parental responsibility the court may consider the expressed desires of the parents and may grant to one party the ultimate responsibility over specific aspects of the child's welfare or may divide those aspects between the parties based on the best interests of the child. When it appears to the court to be in the best interests of the child, the court may order or the parties may agree how any such responsibility will be divided. Such areas of responsibility may include primary physical residence, education, medical and dental care, and any other responsibilities which the court finds unique to a particular family and/or in the best interests of the child.

Id.

167. *Id.*

3. *Sole Parental Responsibility*

The final statutory alternative of sole parental responsibility is not favored in the statute and may only be ordered where the court has determined that shared parental responsibility, whether unrestricted or restricted, would be *detrimental* to the child.[168] Detrimental is a stronger term than "against the best interests of the child"[169] and carries with it a higher burden of proof on the parent requesting sole parental responsibility or on the court ordering it.[170] It is suggested that a balancing test be applied and only when the risks of shared parenting outweigh the benefits can the presumption in favor of shared parental responsibility be overriden.[171]

Sole parental responsibility implies parents are incapable of conferring and cooperating and also "implies that the relationship with one parent will-and-should be limited."[172] Arguably, it may even be required[173] that an agreement by the parents, who desire and have mutually agreed upon sole responsibility, shall state a finding "that shared parental responsibility would be detrimental to the child."[174] This may

---

168. Florida Statutes section 61.13(2)(b)2. (1982) states in part: "If the court determines that shared responsibility would be *detrimental* to the child, the court may order sole parental responsibility." (emphasis added).

Sole parental responsibility is defined in section 61.13(2)(b)2.b. as: "responsibility for the minor child . . . given to one parent by the court, with or without rights of *visitation* to the other parent." (emphasis added).

In section 61.13(2)(b)2.b., the word "visitation" is used. It is the opinion of this author that the word as used in this section is in direct conflict with the deletion of the same word in section 61.13(2)(b)1., and in conflict with the recognized need for new terminology in the statute. It is therefore this author's recommendation that the word "visitation" be replaced with the words "contact and access" by the legislature. "Contact and access" are words borrowed from Melvyn Frumkes and appear in the MANUAL, *supra* note 115, at 4.2-.3.

169. Judge Kapner.

170. Kapner, *Shared Parental Responsibility: Is It For Everyone?*, MANUAL, *supra* note 115, at 5.7.

171. *Id.* at 5.14.

172. *Id.*

173. Divergence of view exists regarding whether an agreement or order for sole responsibility must track the words "detrimental to the child" if both parents have agreed that the sole responsibility is best for them. Judge Barkett and Melvyn Frumkes said the words must appear; Judge Kapner said they need not appear.

174. FLA. STAT. § 61.13(2)(b)2. (1982).

raise a constitutional issue. Parents may balk at being required to track the words of the statute in a voluntary agreement for sole responsibility. If challenged, a requirement of including the exact language of the statute in an agreement could be found to be an unconstitutional usurpation of parental rights when forced on parents against their will.[175]

4. *Modification of a Previously Rendered Custody Award*

Until the 1982 enactment of Florida Statutes section 61.13, Florida case law prescribed a material change of circumstances to warrant modification of child custody. This may no longer be true in Florida; there are three possible approaches to modification of custody as a result of the 1982 revisions to the statute.[176]

Chapter 82-96, section 2 states that "the provisions of this act shall be applicable to all proceedings under Chapter 61, Florida Statutes, that are *pending* on the effective date of this act,"[177] and section 4[178] provides for a liberal construction of the statute. The above sections read in conjunction with the discretionary powers vested in the courts by the legislature[179] furnish the basis for the alternative argu-

---

175. Santosky v. Kramer, 102 S. Ct. 1388 (1982). Based on this case, the State of Florida may have to justify by clear and convincing evidence the intrusion on parental rights if the statute is interpreted to require a statement of a finding that shared responsibility is detrimental to the child, if forced on parents against their wishes and belief when they both *desire* sole responsibility for personal reasons.

Arguably, though, *Santosky* may not be applicable; it is a termination of parental rights case and the issues as to custody and visitation may be considered entirely different. Appellate review may clarify this issue.

176. Until a case reaches the Florida District Court of Appeal on this issue for clarification, it is uncertain as to which standard will apply. This was a topic of discussion at the Florida Bar Continuing Legal Education Committee Course on October 8, 1982. The possible positions discussed *infra* pages 306-309 come either from that course or from the course manual.

177. 1982 FLA. LAWS ch. 82-96, § 3 (emphasis added). The word "pending" is not defined by the legislature.

But see Knight & Pollock, *Shared Parental Responsibility,* MANUAL, *supra* note 115, at 1.24-.25 for Florida case law definitions of "pending."

178. Florida Laws chapter 82-96, section 4 (1982) states that "the provisions of this act shall be *liberally construed* in order to effectively carry out the purposes of this act." (emphasis added).

179. FLA. STAT. § 61.13(2)(b)1. (1982).

ments on the central issue: In a court determination of a previously rendered custody award, is the newly amended Florida Statutes section 61.13 enough of a changed circumstance itself to sustain a petition for modification?

An unchanging court, following established case law,[180] would say no.[181] A well-established rule of statutory construction states "that in the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively."[182] This is to enable parties to rely on the substantive rights created by the statute prior to the 1982 revisions.[183] Therefore, the prior two-prong test for modification[184] would remain the standard of review under this view and "the provisions of Cha. 82-96 should not be applied to proceedings for modification begun prior to the effective date of Cha. 82-96 if a final judgment of dissolution of marriage awarding custody has previously been rendered."[185] Under this conservative view, Florida Statutes section 61.13 cannot be the sole basis for modification of a prior custody award.[186]

On the other hand, a liberal court could find that there is clear legislative expression in the statute[187] to warrant finding the statute

---

180. *See, e.g.,* Frazier v. Frazier, 109 Fla. 164, 147 So. 464 (Fla. 1933).

181. "Where child custody award is rendered prior to the effective date of chapter 82-96, such child custody award may not be modified without a substantial change of circumstances." Knight & Pollock, *Shared Parental Responsibility,* MANUAL, *supra* note 115, at 1.26. Melvyn Frumkes also holds this view.

182. *Id.* at 1.23. But by examining the statute itself, it could be argued the legislature, by specific changes, has implied the contrary. Florida Statutes section 61.13(2)(b)1. (1982) which states in part: "The court shall determine all matters relating to the custody of each minor child of the parties as a part of *any* proceeding *under this chapter.* . . ." The words emphasized were added in the 1982 revision. In addition, the words that had previously followed *chapter* — "for dissolution of marriage" — were deleted. These changes could indicate a broader, rather than narrower, reading of the above phrase.

183. Knight & Pollock, *Shared Parental Responsibility,* MANUAL, *supra* note 115, at 1.23.

184. *See supra* note 72 and accompanying text.

185. Knight & Pollock, *Shared Parental Responsibility,* MANUAL, *supra* note 115, at 1.25.

186. *Id.* at 1.26. Two additional arguments are set forth on pages 1.26-.27.

187. Florida Statutes section 61.13(2)(b)1. (1982) states in part: "It is the public policy of this state . . . to encourage parents to share the rights and responsibilities of child-rearing." *See also supra* note 183.

alone provides standing to seek modification. Under this view, because the legislative public policy statement is clear and the provisions of the act are to "be liberally construed to effectively carry out the purposes of this act,"[188] it could be argued the aforementioned rule of statutory construction is inapplicable. Therefore, a court adhering to this broad view would allow a modification proceeding based solely upon the changed circumstance of the revised Florida Statutes section 61.13,[189] even if a final judgment of dissolution of marriage awarding custody has previously been rendered.[190]

Adhering to a middle-of-the-road view, a moderate court may find standing to seek modification dependent on the specific circumstances in each case.[191] A threshold of changed circumstances would probably still be required.[192] If a prior modification order came about after litigation of a custody dispute and the court based its decision on the prior facts and law, the court may be able to review the order if it appears the parties requested and were refused shared parental responsibility because of the then existing law.[193]

Until this issue receives appellate review in Florida, no clear standard may exist as to modification of a previously rendered custody

188. FLA. STAT. § 61.13(2)(b)1. (1982).

189. Judge Barkett holds this view. Judge Barkett also stated that where a prior custody order was followed by numerous contempt hearings, review should be allowed.

190. Thus, a judge could give retroactive application to chapter 82-96 and not address the issue of impairment of vested rights. Knight & Pollock, *Shared Parental Responsibility,* MANUAL, *supra* note 115, at 1.28-.29.

191. Judge Kapner holds this view.

192. According to Judge Kapner, if the child is now much older than when the original custody agreement was made, this fact alone could be enough of a changed circumstance to authorize standing to seek modification. This would seem to be a lesser burden of proof than substantial or material change required by prior Florida case law. *See supra* notes 72-74 and accompanying text.

Also, Judge Kapner suggests the intent of the original agreement between the parties could be examined. Even though a pre-existing agreement does not reflect the language of shared responsibility, if the parties intended to share parental responsibility, the order may be changed to reflect the new terminology of Florida Statutes section 61.13 (1982).

193. Judge Kapner. Shared parental responsibility may now only be refused upon a finding that such an order would be detrimental to the child. FLA. STAT. § 61.13(2)(b)2. (1982).

award.[194]

5. *Grandparents Given Standing to Enforce Visitation*

Florida Statutes section 61.13 has been amended to provide grandparents with "legal standing to seek judicial enforcement" of an award of visitation.[195] "It is unclear whether or not grandparents have legal standing to file or participate in an initial petition or a petition for modification of a final judgment so as to obtain visitation privileges."[196] Since, under Florida Statutes section 61.13, the court shall determine all matters relating to custody in accordance with the Uniform Child Custody Act[197] which provides that all parties with an interest in the proceeding should be named, there is an argument for allowing grandparents to participate in either petition.[198] Also, "if the grandparents do not commence a proceeding, there seems to be no prohibition against a trial court modifying a custody award so as to grant grandparents visitation and allowing grandparents to participate in the proceeding."[199]

C. Can It Work?: Problems and Their Possible Resolution

Florida Statutes section 61.13 now specifically encourages parents to share all the rights and responsibilities of raising a child,[200] and recognizes that a myriad of alternative orders may result.[201] Setting aside the major unresolved judicial issue of modification,[202] there will be three general problem areas for parties in reaching an agreement of shared parental responsibility: "(1) division of time; (2) issues concern-

194. The entire panel of speakers agreed to the lack of consensus as to how this issue will be resolved in the courts.

195. Florida Statutes section 61.13(2)(b)2.c. (1982) states in part: "Grandparents shall have legal standing to seek judicial enforcement of such an award."

196. Knight & Pollock, *Shared Parental Responsibility,* MANUAL, *supra* note 115, at 1.29-.30.

197. FLA. STAT. § 61.13(2)(b)1. (1982).

198. MANUAL, *supra* note 115, at 1.30, (citing Putnal v. Putnal, 392 So. 2d 613 (Fla. 5th Dist. Ct. App. 1981)).

199. *Id.*

200. FLA. STAT. § 61.13(2)(b)1. (1982).

201. FLA. STAT. § 61.13(2)(b)2. (1982).

202. *See supra* notes 176-94 and accompanying text.

ing the child's welfare; and (3) money."[203] Again, all of these can be handled in an infinite number of ways depending on the specific circumstances of each family.

In a proceeding for dissolution of marriage where there are minor children, the court has the authority to: "Order either or both parties to consult with a marriage counselor, psychologist, psychiatrist, minister, priest, rabbi or any other person deemed qualified by the court and acceptable to the party or parties ordered to seek consultation,"[204] to aid the parties in coming to an agreement. Extra judicial means of resolution are necessary both to reach such an agreement and to decide any unforseeable disputes.[205]

In conjunction with the amendments Florida Statutes section 61.13 passed under 1982 Florida Laws chapter 82-96, Florida Statutes section 61.21 was created to authorize the counties in Florida to "establish a family mediation or conciliation service to assist parties in resolving any controversy involving the family."[206] This statute also provides that the court can refer the parties to the service upon motion of a party or upon its own motion;[207] that all verbal and written communications which occur during the mediation or conciliation proceedings be considered confidential and inadmissible as evidence in subsequent legal proceedings, unless the parties agree otherwise;[208] and that

---

203. Knight & Pollock, *Shared Parental Responsibility,* MANUAL, *supra* note 115, at 1.22. Specificity in all three general areas of potential dispute is absolutely necessary for shared responsibility to be successful.

A major *specific* problem to be addressed relates to Giachetti v. Giachetti, 416 So. 2d 27 (Fla. 5th Dist. Ct. App. 1982), a recent decision which appears to inhibit the ability of the primary residential parent to leave Florida, notwithstanding the absence of specific words in an agreement to that effect. Melvyn Frumkes suggested that specificity in an agreement on this issue is necessary as a result of *Giachetti.*

204. FLA. STAT. § 61.052(2)(b)(1) *quoted by* Knight & Pollock, *Shared Parental Responsibility,* MANUAL, *supra* note 115, at 1.32.

205. Knight & Pollock, MANUAL, *supra* note 115, at 1.22.

206. Florida Statutes section 61.21(1) (1982) states: "Counties *may* establish a family mediation or conciliation service to assist parties in resolving any controversy involving the family." (emphasis added).

207. Florida Statutes section 61.21(2) (1982) states: "The court on its own motion or on motion of a party may *refer* the parties to this service." (emphasis added).

208. Florida Statutes section 61.21(3) (1982) states: "All verbal or written communications in mediation or conciliation proceedings shall be confidential and inadmissible as evidence in any subsequent legal proceeding, unless both parties agree

a family mediation and conciliation service serves a valid purpose and is authorized to be funded either by general county revenues or by levying a service charge of no more than two dollars on any circuit court proceeding.[209] This "court-connected alternative to the adversary process" is the legislative answer to the unique problems in the area of domestic relations.[210]

Florida Statutes section 61.21 contains no provision mandating mediation or conciliation. Also, this statute does not effectuate the court's determination because all happenings during mediation are confidential and inadmissible in court unless the parties agree otherwise. This is where this new shared parental responsibility statute falls short. Recognizing that agreements between the parties are to be encouraged and that very few of the shared responsibility agreements will be done within the framework of the adversary system in court,[211] the implementation of the purposes of Florida Statutes section 61.13 cannot be accomplished without further action by the legislature. Arguably at least one mediation session, preferably a minimum of three should be required.[212] Although a counter-argument can be made that parties should not be forced into mediation,[213] in order to (1) identify the par-

---

otherwise."

209. Florida Statutes section 61.21(4) (1982) states: "A family mediation or conciliation service is hereby declared to serve a valid public purpose. The board of county commissioners may support such a service by appropriating moneys from county revenues or by levying a service charge of no more than $2 on any circuit court proceeding."

210. Orlando, *Mediation and Conciliation Under Section 61.21,* MANUAL, *supra* note 115, at 3.1. Judge Orlando defines mediation and conciliation, and distinguishes them from negotiation and arbitration. *Id.* at 3.1-.2.

211. Judge Orlando.

212. Judge Orlando said that ninety-five percent of the parties after three sessions of mediation come to some agreement or overcome post-judgment problems. *See also Joint Custody Legislation Passed by 23 States, supra* note 2, at 2507:

> The new Iowa statute which takes effect July 1, 1982 . . . stipulates that on the application of either parent, the court shall consider granting joint custody even in cases where the parents do not agree to it. Before ruling on the petition in such a case, the court may require the parties to participate in custody mediation counseling to determine whether joint custody is in the best interests of the child.

Id. at 2507.

213. Judge Orlando.

ties as good candidates for shared parental responsibility,[214] (2) aid parties in the stress of divorce to reach the specificity of agreement that will be necessary on the logistics of shared parental responsibility, (3) resolve problems, and (4) to truly lessen litigation in this area,[215] mandatory mediation sessions with some form of court access to recommendations of the mediator, will assist in making the shared parental responsibility enactment, Statutes section 61.13, workable in the state of Florida.[216]

V. Conclusion

With the enactment of the 1982 revisions to Florida Statutes section 61.13, the Florida legislature reaffirmed the court's wide discretion in the area of child custody to focus on the specific circumstances of the case and to determine what is in the best interests of the child. The legislature has incorporated by statute joint legal custody, using the innovative terminology of shared responsibility.

By creating a presumption for shared parental responsibility and expressing, in mandatory language, Florida's public policy of encouraging both parents to share the rights and responsibilities of raising the child, courts must make all efforts to accomplish that end. Specific

---

214. Knight & Pollock, *Shared Parental Responsibility,* MANUAL, *supra* note 115, at 1.21-.22.

215. There is concern that Florida Statutes section 61.13 (1982) will result in an overload of cases flooding the courts. During the panel discussion on October 8, 1982, a suggestion arose that Florida should join many other states in creating a family court division in which judges would only hear domestic relations problems. To prevent high "burn-out" of judges in this emotional area, it was suggested also that this division be "underloaded." Melvyn Frumkes and James Fox Miller agreed with creating a family court division in Florida.

216. In California, mediation is mandatory where there is a custody issue. CAL. CIV. CODE § 4607 (West Supp. 1982).

Judge Orlando stated that at the present time it would appear that private practitioners in Florida cannot provide mediation services because of ethics problems. Orlando, *The Nuts and Bolts of Mediation,* MANUAL, *supra* note 115, at 3.6. As mediation becomes a more widely used tool and recognized as a means to incorporate shared parental responsibility in agreements thus lessening litigation, alternatives to the ethics problems facing attorneys arguably should be considered. The county-formed family mediation or conciliation service may not be able to handle alone the large number of possible parties. FLA. STAT. § 61.21(1), (4) (1982).

guidelines are provided to aid the court in its determination. The judicial presumption against divided custody makes it unlikely that the physical residence of the child will be equally shared six months with each parent. But if the circumstances so warrant, i.e. equally divided physical custody is workable for the family, the statute provides the authority for the courts to so order.

Parents are now expected to confer on major aspects of child-rearing although agreement between the parents is not required in the statute. Should it become evident to the court that the parents are unable to confer, a variety of orders may result, thus dividing ultimate responsibility for aspects of child-rearing between the two. Sole responsibility is the last alternative, only ordered upon a showing that shared responsibility would be detrimental to the child's best interests.

In addition to the changes in semantics and the increased emphasis on individual circumstances, the Florida legislature has accomplished specific substantive changes. The demise of the tender years doctrine is statutorily mandated. Grandparents now have standing to seek judicial enforcement of a visitation award. The parent with whom the child does not primarily reside now has access to records pertaining to that child.

However, certain problem areas remain. Until a modification petition receives appellate review, the standard of review for modification of custody remains uncertain. Although the legislature authorized a new statute providing for mediation and arbitration, there is no mandatory participation required as an extra-judicial means for the parents in executing and implementing a custody agreement. Until re-education of parents, citizens, and attorneys occurs regarding the meaning of shared responsibility, the fears and reluctance related to this joint legal custody statute will slow its total implementation by the courts and full incorporation in agreements. Finally, we must await judicial clarification of the 1982 revisions of Florida's shared parental responsibility statute through appellate review to provide full understanding and consistency in application of the statute in Florida.

Renee Goldenberg