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Joint Custody Awards: Toward the Development of Judicial Standards

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JOINT CUSTODY AWARDS:
TOWARD THE DEVELOPMENT OF JUDICIAL STANDARDS

INTRODUCTION

The traditional approach to child custody following separation or divorce has been the designation of one parent as sole custodian to the exclusion of the other. Changing perceptions of parental roles, however, indicate that joint custody may in fact be preferable. The custody issue is usually resolved by parental agreement, but even when agreed to, final determination of the issue falls upon the courts. Although relatively unusual today, designation of the father as sole custodian was the rule at early common law because of his obligation to provide support. Today, whether by agreement or by adjudica-

1. No published information is available on the number of children not living in a sole custody arrangement following the divorce or separation of their parents. Abarbanel, Shared Parenting After Separation and Divorce: A Study of Joint Custody, 49(2) Am. J. Orthopsych. 320, 320 (1979).

2. Precise statistics on how custody is determined are not available. U.S. Bureau of the Census, Dept' of Com., Divorce, Child Custody, and Child Support (1979) [hereinafter cited as Custody Census]. The proportion reached by agreement, however, has been widely assumed to be quite high. Orthen & Lewis, Evidence of Single-Father Competence in Childrearing, 13 Fam. L.Q. 27, 27 (1979); Shepard, Solomon's Sword: Adjudication of Child Custody Questions, 8 U. Rich. L. Rev. 151, 161 (1974). Similarly, no statistics on the number of joint custody arrangements are available, Custody Census, supra; however, in 1976, Stanley F. Kaplan, chairman of the American Bar Association's Custody Committee, estimated that 95% of all joint custody arrangements were part of separation agreements which had survived the divorce decree. N.Y. Times, May 24, 1976, at 24, col. 1.

3. "A judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision he renders." B. Botein, Trial Judge 273 (1952).


If a custody contest develops subsequent to stipulation, a full custody hearing must be conducted. Marotz v. Marotz, 80 Wis. 2d 477, 483-84, 259 N.W.2d 524, 528 (1977). Cf., Boden v. Boden, 42 N.Y.2d 210, 366 N.E.2d 791, 397 N.Y.S.2d 701 (1977) (agreement between the parents, although binding on them, is not binding on the child and will be scrutinized to ensure that the child's welfare is protected).

4. Foster & Freed, Life With Father: 1978, 11 Fam. L.Q. 321, 322 (1978). The early English courts were rigid in their paternal preference. E.g., ex parte Skinner, 9 Moore 278 (Ch. 1824) (mother denied custody of six year old child in the physical custody of the incarcerated father's mistress, who took the child to jail for visits); King v. De Manneville, 5 East 221, 102 Eng. Rep. 1054 (1804) (nursing infant ordered returned to the French father, an enemy alien whose cruelty had driven the mother and children from his home).

Only Lord Mansfield rose above the paternal preference. Blissets Case, Lofft's Rep. 748, 98 Eng. Rep. 899 (1773) (although the father was found to have a natural right to custody, he could lose that right for failure to support or other improper conduct); Rex v. Delaval, 3 Burr. 1434, 97 Eng. Rep. 913 (1763) (father denied custody of 18 year old daughter upon her release from
tion, the mother is, with rare exception, designated sole custodian after parental divorce or separation. The basis of this choice is the maternal preference or tender years doctrine, predicated on the theory that the mother is the more natural parent and that the child's future health and happiness thus depend on his relationship with his mother.

Parental roles are no longer so clearly defined. Partly because an increasing number of mothers are gainfully employed and therefore unavailable to apprentice to master who had debauched her, because of father's involvement in the immorality.

American courts were somewhat more flexible than their British counterparts. In one case, custody of an infant of twenty-one months was awarded to the mother, partly because the court found that her refusal to accompany her husband from New York to Nova Scotia was justified. Barry v. Mercein, 8 Paige Ch. 47 (N.Y. 1839). Custody of the child was transferred to the father, however, when he subsequently relitigated the matter. The child was then four years old and the court no longer considered the mother's refusal to relocate defensible. Barry v. Mercein, 3 Hill 399 (N.Y. 1842). Typically, however, custody was awarded to the father. E.g., Latham v. Latham, 71 Va. (30 Gratt.) 307 (1878) (custody of four year old boy awarded to father because no evidence showed the father to be unfit); Carr v. Carr, 63 Va. (22 Gratt.) 168 (1872) (three year old child required moral training from the father, rather than the mother's tender nursing). Moreover, even when custody was awarded to the mother, the father's inherent right to custody was never questioned. E.g., Adams v. Adams, 62 Ky. (1 Duv.) 167 (1864); Commonwealth v. Addicks, 5 Binn. 519 (Pa. 1813).

In 1978, of the 7,666,000 children under age 18 who continued to live with either parent after divorce or separation, 94.5%, or 7,240,000, were living with their mothers. Only 5.5%, or 426,000, were living with their fathers. Custody Census, supra note 2, at 11.

A broad-based movement away from the unquestioned preference for paternal custody began in 1817 with the case of Shelley v. Westbrooke, Jacob 266, 37 Eng. Rep. 850 (Ch. 1817). The poet Percy Bysshe Shelley, who had deserted the mother while she was pregnant, was denied custody of the child when the mother committed suicide. The paternal grandparents retained custody. It was not, however, until 1839 that legislation was passed empowering the chancellor to award custody of children younger than seven to the mother. Justice Talfourd's Act, 1839, 2 & 3 Vict. c. 54.

6. "The so-called 'preference' for the mother as the custodian particularly of younger children is simply a recognition by the law, as well as by the commonality of man, of the universal verity that the maternal tie is so primordial that it should not lightly be severed or attenuated." Kirstukas v. Kirstukas, 14 Md. App. 190, 196, 286 A.2d 535, 538 (1972). For other statements of the doctrine, see cases cited in Roth, The Tender Years Presumption in Child Custody Disputes, 15 J. Fam. L. 423, 436-37 nn. 50 & 51 (1977).

In Helms v. Franciscus, 2 Bl. Ch. 544, 563 (Md. 1830), the court wrote: "[E]ven a court of common law will not go so far as to hold nature in contempt, and snatch helpless, pining 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 of infancy, and with her it will be left in opposition to this general right of the father." This language is reportedly the earliest American statement of the tender years doctrine. Kurtz, The State Equal Rights Amendments and Their Impact on Domestic Relations Law, 11 Fam. L.Q. 101, 137 n.123 (1977). The doctrine is based on the presumption that maternal custody is in the best interests of a child of tender years. The meaning of "tender years" is not, however, altogether clear; it certainly applies to children younger than six, but it has also been applied to children as old as fourteen. H. Clark, Handbook on the Law of Domestic Relations 585 & n.14 (1968).

7. In 1975, 52.3% of all married women with children aged six through seventeen, and 36.6% of those with children under six, were in the labor force. At that time, 80.1% of all divorced or separated women with children aged six through seventeen, and 65.6% with children under six,
provide their children with full-time attention and nurturing, many fathers have assumed a more active parenting role. Having discovered the virtues of extensive contact with their children, fathers are demanding equal rights and roles in child custody matters.

The legal system is adapting to these changing social patterns. In twelve of the seventeen states in which equal rights provisions have been enacted, the unquestioned preference for awarding custody to the mother has been eliminated. Moreover, at least one lower court has held that, independent of any


For a discussion of empirical research on the effects of paternal deprivation on children, see Bradbrook, The Relevance of Psychological and Psychiatric Studies to the Future Development of the Laws Governing the Settlement of Inter-Parental Child Custody Disputes, 11 J. Fam. L. 557, 579-585 (1971). The author notes that before 1960 the role of the father in the development of the child was thought to be negligible. Id. at 580. Recently, the Council of Representatives of the American Psychological Association passed a resolution "recogniz[ing] officially and making[ing] suitable pronouncement of the fact that it is scientifically and psychologically baseless as well as in violation of human rights to discriminate against men because of their sex in assignments of children's custody." L. Salk, What Every Child Would Like Parents to Know About Divorce 97 (1978).

10. Although the number of children under age 18 living with one or both parents declined by 9.4% between 1970 and 1978, from 67,138,000 to 60,842,000, the number in the father's sole custody following a divorce more than doubled, increasing from 201,000 to 426,000. Custody Census, supra note 2, at 11.

11. With the exceptions of Utah and Wyoming, the additions of equal rights provisions have been fairly recent: Alaska Const. art. 1, § 1 (1959); Col. Const. art. 2, § 29 (1972); Conn. Const. art. 1, § 20 (1965); Hawaii Const. art. 1, § 4 (1958), § 21 (1972); Ill. Const. art. 1, § 18 (1970); La. Const. art. 1, § 3 (1974); Md. Const. Decl. of Rts., art. 46 (1978); Mass. Const. art. 1 (1976); Mont. Const. art. 2, § 4 (1972); N.H. Const. art. 2 (1974); N.M. Const. art. 2, § 18 (1972); Pa. Const. art. 1, § 25 (1971); Tex. Const. art. 1, § 3a (1972); Utah Const. art. 4, § 1 (1896); Va. Const. art. 1, § 11 (1971); Wash. Const. art. 31, § 1 (1972); Wyo. Const. art. 1, § 3 (1889).


The positions of Montana, Maryland and Pennsylvania have been modified. The current rule in Montana is that "the presumption in favor of granting custody to the mother is never conclusive. . . . The maternal preference presumption still exists, but its use is limited to those cases in which the father has not overcome it by a preponderance of the evidence showing him to be the more fit parent to have custody. . . . [T]he father need not show that the mother is unfit but only that the children would be better off with him." Wilson v. Wilson, Mont. , 550 P.2d 1136, 1138-39 (1979) (citations omitted).

Maryland eliminated the maternal preference doctrine by statute. Md. Parent & Child Code Ann. art. 72A, § 1, by an amendment effective July 1, 1974, provides in relevant part that "in
equal rights provision, the maternal preference doctrine violates the father's right to equal protection under the fourteenth amendment.\textsuperscript{13}

Parents and courts have thus begun to experiment with various alternatives to maternal custody,\textsuperscript{14} one of which is joint custody. As when they were any custody proceeding, neither parent shall be given preference solely because of his or her sex." In McAndrew v. McAndrew, 39 Md. App. 1, 382 A.2d 1081 (1978), it was held that this statute effectively overruled the position taken in Cooke, that the maternal preference doctrine would act as a tie-breaker in a custody dispute between two equally qualified parents.

In Pennsylvania, the maternal preference doctrine was flatly rejected as "offensive to the concept of the equality of the sexes which we have embraced as a constitutional principle." Spriggs v. Carson, 470 Pa. 290, 300, 368 A.2d 635, 639-40 (1977).

The maternal preference doctrine continues in full force in Louisiana. Schexnayder v. Schexnayder, 371 So. 2d 769 (La. 1979). In that case, the mother was found unfit to be sole custodian because of her openly adulterous relationship with a lover of another race. The court, however, carefully distinguished these facts from those in Fulco v. Fulco, 259 La. 1122, 254 So. 2d 603 (1971), in which the mother was found fit. The Fulco court held that custody should be granted to the mother, especially when the child is of tender years, unless she is unfit or otherwise unsuitable.

The Utah Supreme Court has reaffirmed its position that "everything being equal preference should be given to the mother in determining custody." Henderson v. Henderson, 576 P.2d 1289, 1290 (Utah 1978) (emphasis omitted).

There appear to have been no cases on point from the high courts of New Mexico, Virginia, or Wyoming since Professor Foster's article was published. Moreover, the courts which continue to adhere to the tender years doctrine notwithstanding constitutional equal rights provisions have generally failed to address the inherent contradiction of their position. E.g., Schexnayder v. Schexnayder, 371 So. 2d 769 (La. 1979); Ettinger v. Ettinger, 72 N.M. 300, 383 P.2d 261 (1963); Henderson v. Henderson, 576 P.2d 1289 (Utah 1978); McCreery v. McCreery, 218 Va. 352, 237 S.E.2d 167 (1977); Butcher v. Butcher, 363 P.2d 923 (Wyo. 1961).

13. In Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (Fam. Ct. N.Y. County 1973), custody of the children was awarded to the father, although the mother also sought custody. Relying on Frontiero v. Richardson, 411 U.S. 677 (1973), the court stated that "differential treatment on the basis of sex of the kind created by the 'tender years presumption' is 'suspect' and therefore subject to the strictest judicial scrutiny." 77 Misc. 2d at 182-83, 350 N.Y.S.2d at 290. The Watts court concluded that the tender years presumption did not withstand strict scrutiny since it did not serve the best interests of the child. But see Arends v. Arends, 30 Utah 2d 328, 517 P.2d 1019, cert. denied, 419 U.S. 881 (1974), in which a challenge by a divorced parent to a state statute which incorporated the tender years presumption was rejected because the challenged statute, by its terms, applied to cases of separation and void or dissolved marriages, not to divorce. Id. at 329, 517 P.2d at 1020. The court further noted that the father is not "equally gifted in lactation as is the mother." Id. The Supreme Court recently expounded on the acceptability of gender-based classifications. In Orr v. Orr, 99 S.Ct. 1102 (1979), an Alabama statute was held to be violative of equal protection because it authorized alimony awards only to women. The Supreme Court reiterated that "'[t]o withstand scrutiny' under the equal protection clause, 'classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.'" 99 S.Ct. at 1111 (citations omitted). It is yet to be proved that the maternal preference doctrine is "a necessary means of enforcing the important governmental objective of protecting the welfare of children.

14. One such alternative is for the father to take full custody of the child under an agreement between the parties. Warren, Father Takes Custody of Children—and Mother Thinks it Best, N.Y. Times, June 24, 1975, at 33, col. 1. In other cases the court awards sole custody to the father. E.g., Bailey v. Bailey, 361 So. 2d 204 (Fla. Dist. Ct. App. 1978); Adams v. Adams, 357 So. 2d 881 (La. Ct. App. 1978); Allen v. Allen, 198 Neb. 544, 253 N.W.2d 853 (1977); Allen v.
JOINT CUSTODY

married, both parents in a joint custody arrangement share legal responsibility for the child; they also share physical custody. The amount of financial support each parent provides the child depends, as in any divorce case, on each parent's financial circumstances.

Although becoming more frequent, joint custody awards remain the exception. The typical judicial approach has been either outright rejection of joint custody or acceptance of it only in very limited circumstances. Most such arrangements are made by the private agreement of the parents without the imprimatur of a court.

This note contends that a court should consider the possibility of joint custody in every case before it. When suited to the needs of the individuals involved, joint custody is the most effective way to serve the best interests of a child whose parents have separated or divorced. Part I compares joint custody with sole custody and considers the two current approaches to joint custody. The psychological and economic factors supporting the contention that joint custody is, in most instances, in the child's best interests, are discussed. In Part II, a three-tier test is developed to assist in determining whether a voluntary or court-imposed joint custody arrangement is appropriate for a particular family. The first two criteria are concerned with the parents' ability to function in a joint custody arrangement: each parent must be able to cooperate with the other and each must be individually fit to be sole custodian of the child. Upon finding that these criteria are satisfied, the court must ensure that the actual mechanics of the custodial arrangement are reasonable and protective of the child's best interests.

I. CURRENT APPROACHES TO CUSTODY AWARDS

In an action for legal separation or divorce, parents often attempt to resolve voluntarily the issue of child custody. In determining whether to accept the parents' agreement or, absent an agreement, whether to award custody to


15. Braiman v. Braiman, 44 N.Y.2d 584, 589, 378 N.E.2d 1019, 1020, 407 N.Y.S.2d 449, 450 (1978); Dodd v. Dodd, 93 Misc. 2d 641, 644-45, 403 N.Y.S.2d 401, 403 (Sup. Ct. N.Y. County 1978). Various other terms, including "split," "divided," and "alternating" custody have been used to describe similar arrangements. Ramey, Stender & Smaller, Joint Custody: Are Two Homes Better Than One?, 8 Golden Gate L. Rev. 559, 559-61 (1979) [hereinafter cited as Two Homes]. In this Note, the terms "joint custody" and "joint custody arrangements" refer to those situations in which each parent has some degree of physical custody as well as shared legal responsibility for important decisions concerning the child.


Of the 4,922,000 divorced women living with at least one child under 18 in 1976, an estimated 3,576,000 received no funds from the father for child support in 1975. The average annual support contribution received was $2,432. Custody Census, supra note 2, at 12.

17. See notes 45-70 infra and accompanying text.


19. See note 2 supra.

20. See note 3 supra and accompanying text.
the mother, father, or both, the foremost consideration in most American jurisdictions is the "best interests" of the child.\textsuperscript{21} The judge "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."\textsuperscript{22}

The application of the best interests standard has traditionally resulted in sole custody awards.\textsuperscript{23} Under a sole custody arrangement, the custodial parent, typically the mother,\textsuperscript{24} retains all the rights and obligations shared by the parents during marriage—authority and control over the child’s education, religious instruction, and medical care, as well as responsibility for daily care.\textsuperscript{25}

The noncustodial parent is entitled to visitation privileges as a matter of right unless the court determines that serious harm to the child’s physical, mental, moral, or emotional health would result.\textsuperscript{26} Nevertheless, even when

\begin{itemize}
  \item \textsuperscript{21} A. Lindey, Separation Agreements and Antenuptial Contracts 14-71 to-75 (1978); Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 L. & Contemp. Prob. 226, 236-37 (Summer 1975).
  \item In Mayer v. Mayer, 150 N.J. Super. 556, 376 A.2d 214 (Ch. 1977), joint custody was ordered based on an analysis of the facts which persuaded the court that joint custody was in the child's best interests. In Braiman v. Braiman, 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978), the court reversed a joint custody order, acknowledging that joint custody might be in the child's best interests where the parents are stable and relations between them are amicable. Dodd v. Dodd, 93 Misc. 2d 641, 646, 403 N.Y.S.2d 401, 404-05 (Sup. Ct. N.Y. County 1978), rejected joint custody after an extensive analysis of the facts, but stated that "[j]oint custody, under the proper circumstances, may be the closest it is possible to come to the shattered ideal" of "two loving parents . . . devoted to . . . the children's welfare."
  \item Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925) (citation omitted). Judge Cardozo made this classic statement in the context of a habeas corpus proceeding.
  \item See note 1 supra and accompanying text.
  \item See notes 4-6 supra.
  \item See H. Clark, supra note 6, at 573.
  \item Some commentators sharply criticize the notion that the noncustodial parent should ever be entitled to visitation with the child on the theory that such visitation interferes with the custodial parent's relationship with the child and creates loyalty conflicts. J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 38 (1973) [hereinafter cited as Best Interests].
  \item Courts have not been widely persuaded by the logic of the position advocated in Best Interests regarding visitation rights. In Pierce v. Yerkovich, 80 Misc. 2d 613, 623, 363 N.Y.S.2d 403, 413 (Fam. Ct. Ulster County 1974), the court rejected the opinion of author Solnit, who had been called as an expert witness, that the least detrimental alternative for the illegitimate child was to deny visitation rights to the father. Commentators have also pointed out several flaws in the argument against visitation by noncustodial parents. For example, Professor Foster, in reviewing Best Interests, points out that "[s]uch a position ignores the child's needs and desires, as well as those of the other parent, and in the name of continuity and autonomy encourages spiteful behavior. Given such power, one can visualize the blackmailing, extortion, and imposition which might be visited upon the noncustodial parent who wants to maintain contact with his or her child." Foster, Book Review, 12 Willamette L.J. 545, 551 (1976). Other reviewers remark upon the lack of scientific data offered in Best Interests to support the position "that the legal death of one parent . . . is invariably the preferable step for [the child's] future development." Strauss & Strauss, Book Review, 74 Colum. L. Rev. 996, 1002 (1974).
  \item Furthermore, it has been argued in the context of searches by adoptees for their natural parents that a child has a deep psychological need to know his parents. Comment, Confidentiality
the past conduct of the noncustodial parent seemingly renders him a poor companion for a child, denial of visitation rights is rare.\textsuperscript{27} The sole custody award may be specific, delineating the scope of visitation,\textsuperscript{28} or flexible, providing for "reasonable" privileges which the parents themselves define.\textsuperscript{29}

In either case, sole custody places severe qualitative and physical limitations on the noncustodial parent's access to the child. He is relegated to the status of mere visitor to his child; he is a weekend, holiday, and vacation parent rather than an integral part of the child's life.

The discord which permeates family life prior to parental separation\textsuperscript{30} is succeeded by a sense of loss when the child is placed in the custody of only one parent. The child's loss is the clearest: he needs two caring parents, each


Although discussion in Best Interests acknowledges the fact of such searches, the authors' position is not articulated. Best Interests, \textit{supra}, at 23, 118-19.

\textbf{27.} Judicial reluctance to deny visitation rights is evidenced by one court's award of visitation rights to an alcoholic father who had physically abused the mother and sexually molested his stepson because there was no evidence of any misconduct toward his own six year old son. Blazina v. Blazina, 42 Ill. App. 3d 159, 356 N.E.2d 164 (1976). Another court allowed two children, aged six and nine, to visit their father, who was in prison following a plea of guilty to rape and kidnapping charges. McCurdy v. McCurdy, \textit{\textendash\textendash} Ind. App. \textit{\textendash\textendash}, 363 N.E.2d 1298 (1977). \textit{But see} Ervin v. Ervin, 45 Ala. App. 313, 229 So. 2d 813 (Civ. App. 1969), in which the noncustodial father, who was frequently unemployed, behind in making support payments, and guilty of assault, was denied visitation rights.

The court, however, may consider potential harm to the child when structuring the visitation. Factors to be considered include the age of the child and the traveling distance between the parents' homes. \textit{E.g.,} Porter v. Porter, 577 P.2d 111 (Utah 1978) (visitation order allowing the father to see the children from 2 P.M. until 8 P.M. on the first and third Saturdays of each month found too restrictive in light of the distance the father was required to travel—from Utah to Texas—to exercise his visitation); \textit{In re Jacobs}, 20 Wash. App. 272, 579 P.2d 1023 (1978) (award to the father of six weeks visitation each summer upheld on the ground that the two sons were old enough not to be harmed by a separation of that duration from their mother).

\textbf{28.} \textit{E.g.,} Liphan v. Liphan, 50 Ala. App. 583, 281 So. 2d 437 (Civ. App. 1973) (noncustodial father allowed visitation on the second and fourth weekends of each month, Thanksgiving holidays, and the month of July); Faro v. Faro, 579 P.2d 1377 (Alaska 1978) (noncustodial mother awarded visiting rights every other weekend from 6 P.M. on Friday until 6 P.M. on Sunday, two weeks during the summer, and specified privileges on Christmas and the children's birthdays); Gullett v. Gullett, 251 Ark. 497, 473 S.W.2d 180 (1971) (award of visitation rights to the noncustodial parent every other Saturday from 9 A.M. to 4 P.M. expanded to every Saturday).

\textbf{29.} \textit{E.g.,} Ellison v. Ellison, 48 Ala. App. 80, 261 So. 2d 911 (Civ. App. 1972) (grant of reasonable visitation rather than fixed visitation times held not to be an abuse of discretion); Tschappat v. Kluver, 193 N.W.2d 79 (Iowa 1971) (noncustodial father granted right to see the three children and have them in his home at reasonable times agreed upon by both parents, but upon failure to agree, visitation rights to be fixed by the trial court); Rogers v. Rogers, 430 S.W.2d 305 (Mo. Ct. App. 1968) (noncustodial mother granted right to visit the children at reasonable times).

At least one appellate court has ordered reasonable visitation in addition to the times specified by the lower court—one weekend each month, three named holidays, and two weeks each summer. \textit{In re Roff}, 228 N.W.2d 98 (Iowa 1975).

\textbf{30.} At least one psychiatrist has concluded that a child's long-term psychological health suffers more when the parents continue to live together in a poor marriage than when they divorce. L. Despert, \textit{The Children of Divorce} 18 (1953).
of whom complements the support and nurture available from the other. 31
Logically, this need can be satisfied only when each parent is closely involved
with the child's life on an ongoing basis, a circumstance rendered virtually
impossible by the very nature of the sole custody arrangement. 32

The authors of a study of 131 children from sixty families undergoing
divorce report:

The central event of the divorce process for most children is the parental separation.
. . . The child frequently perceives the parent's departure as a departure from him
personally. . . . [T]he central event of divorce for children is psychologically comparable
to the event of death, and frequently evokes similar responses of disbelief, shock,
and denial. 33

Among the twenty-six seven and eight year old children studied, the most
pronounced reaction to the parental divorce was the sense of loss suffered
with regard to the departed father. 34

31. Grote & Weinstein, Joint Custody: A Viable and Ideal Alternative, 1 J. Divorce 43, 48
(1977). "An infant is not confined to just one bond . . . : once he has reached the stage of forming
specific attachments, he is capable of maintaining a number at the same time . . . Moreover,
being attached to several people does not necessarily imply a shallower feeling toward each one."
R. Schaffer, Mothering 100 (1977).

The importance of a child's relationship with his mother has been widely recognized: "barring
starvation, disease or actual physical injury, no other factor is capable of so influencing the
child's development in every field as its relation to its mother." Spitz, The Role of Ecological
Factors in Emotional Development in Infancy, 20 Child Dev. 145, 151 (1949). The mother is
important not only because of her biological role, but also because she represents the security of
the familiar to the child.

The father's importance to the child is equal to that of the mother. "The research on the
relationship between father absence and the general level of the child's adjustment reveals that
the loss of father for any reason is associated with poor adjustment, but that absence because of
separation, divorce, or desertion may have especially adverse effects." D. Lynn, The Father: His

32. A study of 165 Michigan school children in grades three through six from both divorced
and intact families indicated that 47% of the boys in the divorce group and 63% of both sexes in
the intact group would prefer a joint custody arrangement, if their parents were divorced with physical
custody alternating twice weekly. None of the 82 families in the divorce group had this arrangement. 5

33. Kelly & Wallerstein, The Effects of Parental Divorce: Experiences of the Child in Early
Latency, 46(1) Am. J. Orthopsych. 20, 21-22 (1976) [hereinafter cited as Early Latency].
Early Latency is one of several published reports dealing with various aspects of the same
study. The others are Wallerstein & Kelly, The Effects of Parental Divorce: Experiences of the
Child in Later Latency, 46(2) Am. J. Orthopsych. 256 (1976) [hereinafter cited as Later
Latency]; Wallerstein & Kelly, The Effects of Parental Divorce: Experiences of the Preschool
Wallerstein & Kelly, The Effects of Parental Divorce: The Adolescent Experience, reprinted in E.
Anthony & C. Koupernik (eds.), The Child in His Family: Children at Psychiatric Risk 479
(1974).

34. Almost all of the group were eager for greater interaction with their fathers, whom they
typically saw two weekends a month; only the children who could visit their fathers several times
a week were even moderately content. Early Latency, supra note 33, at 26-27. "More than half of
the children missed their father acutely. Many felt abandoned and rejected, and expressed their
longing in ways reminiscent of grief for a dead parent . . . . The degree of closeness and
gratification in the pre-divorce father-child relationship, at least from our perspective, was not a
Separation and divorce are also likely to induce a devastating sense of loss in both the custodial and the noncustodial parent, the effects of which will be felt by the child. The sole custodian, often overburdened with financial responsibilities, is likely to be overwhelmed by the enormity of his obligations as caretaker of the child. Because the custodial parent may have great difficulty providing the emotional support required by a child experiencing the trauma of divorce, the child suffers in this situation.

The noncustodial parent may also be overwhelmed when deprived of extensive contact with the child. According to a recent study of noncustodial fathers, those whose visitation privileges were severely restricted after divorce were frequently subject to severe depression attributable to the feeling of having lost their child. One possible response by such parents is withdrawal from the child as a barrier against further pain, a process which necessarily increases the difficulties experienced by the child.

Acknowledging the difficulties inherent in sole custody arrangements, some courts have begun to find that joint custody is preferable to sole custody and better serves the best interests of the child in certain circumstances. Moreover, the number of voluntary plans is steadily increasing. This development results from the growing recognition that the sense of loss suffered by each member of the postdivorce family is minimized by allowing the child to maintain a close relationship with each parent.

factor in determining this acute reaction. One father had been quite remote and occupied himself out of the home, another had been abusive and intolerant, a third loving yet psychologically obtuse." Id. at 26.

The study also indicated that among a group of 29 children aged eight and nine, "relatively few were able to maintain good relationships with both parents." Later Latency, supra note 33, at 269.

35. Bratt, supra note 8, at 274-75; see note 16 supra and accompanying text.


Single parents in California have reportedly established a successful communal arrangement for themselves and their children in response to the difficulties each parent faced when living alone. Each parent—all mothers at present—assumes an equal share of the housekeeping and childrearing responsibilities for the group. They operate under a highly specific written agreement which governs all matters from the number of times the kitchen floor is cleaned each week to whether spanking is allowed. N.Y. Times, Aug. 21, 1979, § C, at 13, col. 1.


38. Greif, supra note 8, at 316.

39. Id. at 316-17. Of the 27 families in the sample of preschool children studied by Wallerstein and Kelly, however, only one father had abandoned his child. "Despite wide geographic separation in some instances, a high potential for mobility, and many obstacles to continued contact created by angry mothers, very few fathers chose to move away from their children . . . ." Preschool Child, supra note 33, at 613.

40. Early Latency, supra note 33, at 27.

41. Two Homes, supra note 15, at 568; see note 2 supra. Examples of joint custody agreements are generally found in the popular press rather than in official reporters. E.g., N.Y. Times, May 24, 1976, at 24, col. 1 (six year old boy moved daily between his parents); id., Oct. 1976, § 6 (Magazine), at 45 (author's three children, aged 14, 12 and 8 in 1976, had been spending half of each week with each parent since the parents' separation in 1971).

42. M. Roman & W. Haddad, supra note 36, at 104.
There are two essential characteristics of joint custody. Each parent shares in the decision-making function that belongs to only one parent in a sole custody situation. Furthermore, both parents retain a certain amount of responsibility for physical custody of the child.

Nevertheless, many courts and commentators remain unconvinced that joint custody is a workable alternative to sole custody. No court has adopted a policy of considering joint custody in every instance. Rather, an analysis of the small number of reported decisions dealing with joint custody arrangements reveals two approaches to the issue: joint custody is either impermissible under all circumstances or it is permitted on a case-by-case basis.

The first approach echoes the claim of some commentators that the joint custody arrangement does not serve the best interests of the child. Accord-

43. See note 15 supra and accompanying text.
44. See note 15 supra and accompanying text. Joint custody must be distinguished from "divided" and "split" custody. Divided custody gives each parent custody for part of the year, with reciprocal visitation rights; each parent has full authority over the child while he is in the parent's custody. Under a split custody arrangement, each parent has custody of at least one of the several children. A. Lindey, supra note 21, at 14-60.

Although rejected as a viable alternative in both Braiman and Dodd, discussed at notes 54-71 infra and accompanying text, the appellation "joint custody" has been applied to custody orders issued in other New York cases. In each of these, however, the joint custody award apparently resulted from the court's unwillingness to deny either parent the custodial rights sought by each, rather than from an analysis of the parents' ability to act effectively as joint custodians. Their ability to share decision-making authority, the sine qua non of joint custody, was not examined, and it would appear that the custodial arrangements would have been more accurately characterized as sole custody with extensive visitation.

In one case the mother of a twenty year old handicapped daughter had moved out of the marital home. Apparently reluctant to deprive an otherwise fit mother of custody, yet equally reluctant to move the handicapped daughter from her accustomed surroundings, the court's order provided for "joint custody" with a provision that the daughter continue to live with her father in the marital home. Krois v. Krois, 4 Fam. L. Rep. 201( N.Y. Sup. Ct. Queens County 1977).

Joint custody was ordered in the case of a thirteen year old boy whose mother's adultery, as well as her admittedly false accusations of the father's adultery, caused the marital failure. Apparently reluctant to deprive the mother of all custodial rights, the court's order provided for the boy to live with his mother for two years and then decide with which parent to live. Levy v. Levy, 2 Fam. L. Rep. 2229 (N.Y. Sup. Ct. N.Y. County 1976).

In another case psychiatric testimony indicated that the mother was better-suited to care for the children. The court, however, was sympathetic to the fact that the father was devoted to the children and had overcome serious physical handicaps. Physical custody was split on a weekday-weekend basis. Schack v. Schack, N.Y.L.J., Aug. 21, 1974, at 15, col. 8.

In yet another case, the mother, who was under the care of a psychiatrist, appeared in court inappropriately dressed and behaving in a bizarre fashion. The court order for joint custody provided that the two children, in accordance with their preference, would live with their father and step-mother during the school year, except when the father was to be away for more than two weeks, during which time they would live with their mother. Odette R. v. Douglas R., 91 Misc. 2d 792, 399 N.Y.S.2d 93 (Fam. Ct. N.Y. County 1977).

45. See notes 47-62 infra and accompanying text.
46. See notes 53-70 infra and accompanying text.
JOINT CUSTODY

ing to this theory, joint custody exacerbates the damage to the child's welfare and sense of security inflicted by separation or divorce.48 It is argued that a divorced couple encounters insurmountable practical difficulties when attempting to exercise joint responsibility.49 Problems related to the couple's divorce will inevitably resurface, resulting in conflicts and inconsistent approaches to childrearing.50 The opponents of joint custody claim that a child's welfare requires that he be under the consistent custody and control of one parent;51 his need for stability requires that he not be shuffled frequently from one home to the other.52

Some courts are more flexible, recognizing that joint custody, albeit imperfect, can be under the proper circumstances “the closest it is possible to come to the shattered ideal” of two loving, married parents.53 This approach, chiefly discerned from the New York cases of Braiman v. Braimnan54 and Dodd v. Dodd,55 is nevertheless characterized by a cautious, pessimistic attitude toward the feasibility of joint custody arrangements in most situations. Moreover, no attempt has been made to establish a workable set of guidelines for determining when joint custody is advisable.

In Braiman, the New York Court of Appeals overturned an award of joint custody to the parents of two sons, aged six and seven. The trial court had awarded sole custody to the father; two years later, the appellate division

each parent custody for part of the year and full authority over the child while he has custody. See notes 14, 44 supra. These cases are nevertheless instructive because the reasoning employed by the Louisiana courts in rejecting divided custody is equally applicable to joint custody.


At least one Missouri court has specifically rejected joint custody. Cradic v. Cradic, 544 S.W.2d 605 (Mo. Ct. App. 1976).


49. Those critical of joint custody emphasize practical difficulties in clothes and books left at the wrong house and friends not knowing where to telephone joint custody children. M. Roman & W. Haddad, supra note 36, at 9-10. Focusing on personal possessions when a child's welfare is at stake seems trivial at best.


51. Cormier v. Cormier, 193 La. 158, 190 So. 365 (1939); Foster & Freed, supra note 4, at 341.


There are other expressions of the flexible approach. Vermont has established a rebuttable presumption that joint custody is not in the best interests of a child, citing the difficulty of parental cooperation as well as the other problems addressed by Louisiana and Florida courts, which are discussed in notes 47-52 supra. Lumbra v. Lumbra, 136 Vt. 529, 394 A.2d 1139 (1978). New Hampshire's position is that joint custody is acceptable in a proper case, but a dissenting judge's proposal that there be a presumption in favor of joint custody was rejected by the majority. Starkeson v. Starkeson, — N.H. —, 397 A.2d 1043 (1979).


55. 93 Misc. 2d 641, 403 N.Y.S.2d 401 (Sup. Ct. N.Y. County 1978).
reversed and awarded joint custody. Under the joint custody award, the two boys were ordered to spend weekdays with the mother and weekends with the father. Relations between the parents were very poor; they accused each other of promiscuity and unethical behavior. The court of appeals concluded that joint custody “is insupportable when parents are severely antagonistic and embattled,” reasoning that such pugnacious parents cannot be expected to exercise their shared duties in a responsible manner.

The importance of the Braiman decision is that the court did not flatly reject joint custody; rather, it emphasized the need for a careful factual review before making a joint custody award. Because an essential element of a successful joint custody arrangement is parental cooperation, joint custody should not be imposed in a situation in which neither parent has requested it, unless the court has the opportunity to observe the parents directly and to discuss with them the possibility of joint custody. Although the animosity between the Braimans supported the conclusion that court-ordered joint custody was untenable in their case, the sole custody award was reinstated on the ground that the trial court was better situated than the appellate division to determine placement of the children.

In Dodd, a lower court case cited approvingly by the Braiman court, the mother sought sole custody when she brought suit for divorce. For fourteen months the family had maintained a voluntary, informal joint custody arrangement, which the father wanted to continue. Under the voluntary plan, the two daughters, aged five and seven, had divided their time equally between the parents. The court granted sole custody to the mother with liberal visitation to the father; the mother was granted “the right to make all decisions affecting the children upon consultation with the [father].” Such

56. 44 N.Y.2d at 587, 378 N.E.2d at 1019, 407 N.Y.S.2d at 449.
57. Id. at 588, 378 N.E.2d at 1020, 407 N.Y.S.2d at 450. The appellate division’s order would have been more accurately characterized as divided custody. See note 44 supra.
58. Id. at 587-88, 378 N.E.2d at 1020, 407 N.Y.S.2d at 450.
59. Id. at 587, 378 N.E.2d at 1019, 407 N.Y.S.2d at 449.
60. Id. at 591, 378 N.E.2d at 1022, 407 N.Y.S.2d at 452.
61. See notes 82-95 infra and accompanying text.
62. As the court of appeals noted, the hearing before the trial court took place in 1976, two years before the appellate courts reviewed the matter. 44 N.Y.2d at 587, 378 N.E.2d at 1019, 407 N.Y.S.2d at 449. Moreover, an appellate court necessarily deals with a cold record.
63. Id. at 589-90, 378 N.E.2d at 1021, 407 N.Y.S.2d at 451.
64. 93 Misc. 2d at 647, 403 N.Y.S.2d at 405.
65. Id. at 650-51, 403 N.Y.S.2d at 407. Although it would appear to be somewhat unusual for a custody order to require that the custodial parent consult the noncustodial parent on all major decisions affecting the children, it was done in at least two other cases. Provin v. Provin, 264 Ark. 551, 572 S.W.2d 853 (1978); Salk v. Salk, 89 Misc. 2d 883, 893-94, 393 N.Y.S.2d 841, 848 (Sup. Ct. N.Y. County 1975), aff’d, 53 A.D.2d 558, 385 N.Y.S.2d 1015 (1st Dep’t 1976).

The father in Provin sought what he called joint custody of the two children, aged seven and six. He did not ask for physical custody; rather, he wanted “a voice in ‘major’ decisions affecting the children,” which the appellate court granted. Id. at 264 Ark., 572 S.W.2d at 855. The Provin court provided several examples of what it considered “major” decisions: “whether a child should have an operation, what doctor should perform the operation, where the child will attend college.” Id. Although the lower court had found each parent fit to act as custodian, sole responsibility for daily decisions remained with the mother; otherwise, the court reasoned, “[t]he
an order differs significantly from a joint custody order, which leaves decision-making authority jointly in both parents. Mrs. Dodd, as sole custodian, was granted the ultimate authority to make all decisions affecting the children. The father's role became purely advisory.

The Dodd court concluded that, in light of Mrs. Dodd's opposition, a court-imposed joint custody arrangement would have little chance of success. The court generally restricted joint custody to those situations in which both parents seek such an arrangement. In addition, the court concluded that joint custody is permissible only where both parents are fit, that is, "free of significant emotional problems and willing and able to function well as parents." The court's analysis is flawed by an apparent unwillingness to order joint custody unless both parents agree to such an arrangement. Only if one parent's opposition were "frivolous" would the court be willing to take such a step; however, no example of the type of opposition which might be characterized as frivolous was given. Notwithstanding Mrs. Dodd's unhappiness with the family's joint custody experiment, there was evidence that such an arrangement, although imperfect, represented the least detrimental alternative for the Dodd children. Furthermore, the possibility that parents would cooperate to the extent necessary for a successful joint custody arrangement, despite the opposition of one or both of them, was not considered.

Although rejected as a viable alternative in Braiman and Dodd, legislatures and courts are beginning to recognize that the disadvantages of a

children would never know whom to look to for guidance, and unreasonableness on the part of either parent could mean nothing except more court visits." Id.

66. 93 Misc. 2d at 647, 403 N.Y.S.2d at 405.
67. Id. at 643, 403 N.Y.S.2d at 402.
68. Id. at 644, 403 N.Y.S.2d at 403.
69. Id. at 643, 403 N.Y.S.2d at 402.
70. The psychiatrist called by Dr. Dodd was the therapist of one of the children and had examined the other child and Dr. Dodd as well. This psychiatrist testified that, although the joint custody arrangement then in effect was not working well, it represented the least detrimental alternative for the children. The court, however, accorded greater weight to the testimony of the psychiatrist called by Mrs. Dodd because he had examined the entire family and because he had had a distinguished career in child psychiatry. It was his opinion that joint custody was not a workable alternative for the Dodds. 93 Misc. 2d at 648, 403 N.Y.S.2d at 405.

In relying on the opinion of Mrs. Dodd's expert, the court did not address two significant questions. First, no explanation was given as to why Dr. Dodd's expert failed to examine Mrs. Dodd; it was unclear whether she refused to meet with him. Second, Dr. Dodd's expert, as the regular therapist of one of the children, presumably had greater familiarity with the situation than a psychiatrist consulted only in the context of a child custody battle.

71. Some commentators claim that joint custody cannot work where the parents themselves say it would not work. M. Roman & W. Haddad, supra note 36, at 178. For a contrary view, see notes 82-94 infra.

72. See note 74 infra. The California legislature has declared it to be "the public policy of this state to assure minor children of close and continuing contact with both parents after the parents have separated or dissolved their marriage." Child Custody—Preferences—Joint Custody, Ch. 204, § 3, 1979 Cal. Legis. Serv. 683, 684 (West). Hence, the legislature has created a statutory presumption, to operate when both parents seek joint custody, that joint custody is in the best interests of children. Furthermore, the statute expressly authorizes awards of joint custody when only one parent seeks such an arrangement. Id. at § 2, adding § 4600.5 to the Civil Code.

73. E.g., Adler v. Adler, 5 Fam. L. Rep. 2613 (N.Y. Sup. Ct. N.Y. County May 4, 1979);
Joint custody arrangement are outweighed by its capacity to maintain the child's relationship with both parents. Concededly, it is difficult to make joint custody work. It requires parents who can set aside their personal marital disputes to arrive at mutual decisions concerning the child. It requires courts willing and able to analyze the facts in each case to determine whether a joint custody arrangement is feasible. The focus of this inquiry must be the best interests of the child. Nothing better serves the welfare of a child of divorced parents than a workable joint custody plan, an arrangement designed to reduce, insofar as possible, the suffering experienced by the child as a result of his parents' divorce.

II. PROPOSED JUDICIAL STANDARDS FOR JOINT CUSTODY AWARDS

The best interests standard requires that the consideration of joint custody extend beyond approval of voluntary plans to court-ordered joint custody in appropriate instances. Realistic application of joint custody, however, is necessarily limited to those families able to overcome the difficulties inherent in such an arrangement. For example, parental difficulty in reaching agreement on post-divorce custodial arrangements may in fact be insurmountable, precluding anything but sole custody.

Because courts have had limited experience in applying the best interests standard to joint custody, guidelines are suggested. Like the best interests standard itself, which leaves a large amount of discretion in the court, these

DeForest v. DeForest, 228 N.W.2d 919 (N.D. 1975). In the Adler decision, written by the author of the Dodd opinion, joint custody was imposed on the parents of an 11 year old child whose guardian ad litem had recommended that the court order such an arrangement. Although the mother had been the sole legal custodian for four years, the court found that the child herself had extracted a de facto joint custody arrangement from her parents by means of her visitation with her father, who lived eight blocks from her mother's home. The court ordered the child to continue to live primarily with her mother with extensive time spent at her father's home. Both parents were found to require periodic respite from the demanding task of caring for their disturbed child in order to function as loving parents within the limitations of their own emotional problems. An important factor in the court's decision was the civility and restraint with which the parents treated each other as well as their basic agreement on schools, camp, medical care, and religion.

The authority for a court to impose joint custody must necessarily be based on each state's relevant statutes and case law. In Mayer v. Mayer, 150 N.J. Super. 556, 561, 376 A.2d 214, 217 (Ch. 1977), the court relied on N.J. Stat. Ann. § 2A:34-23 (West 1952), which authorizes orders "as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just." Dodd v. Dodd, 93 Misc. 2d 641, 644, 403 N.Y.S.2d 401, 403 (Sup. Ct. N.Y. County 1978), cited N.Y. Dom. Rel. Law § 240 (McKinney 1976), which requires the court to provide "for the custody . . . of [the] child . . . as . . . justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child. In all cases there shall be no prima facie right to the custody of the child in either parent."


See notes 81-86 infra and accompanying text.

H. Clark, supra note 6, at 584.
guidelines must remain flexible. They serve, however, to highlight the areas which must be considered in evaluating whether joint custody should be ordered in a particular case.  

Whether joint custody is voluntary or court-imposed, the court must 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. If either of these requirements is not satisfied, joint custody is inappropriate. Finally, if these personal criteria are met, the court, to protect the child's interests, must be satisfied that the proposed custodial arrangement is reasonable and, on its face, workable.

Analysis of each parent's fitness to serve as custodian should follow that used in the evaluation of the potential custodian in the sole custody case. A fit parent need not be a perfect parent, nor does a finding of fitness require that the parent have led an exemplary life in all respects; only behavior which bears directly on the parent's ability to care for the child should be considered. Thus, the fact of an extramarital relationship should not be determinative of whether a parent is a fit custodian; rather, the circumstances of the relationship, and their effect on the child, should control.

1979]

JOINT CUSTODY

119

77. Wallerstein and Kelly, in the articles discussed at notes 33-34 supra, examine the varying effects of divorce on children in different developmental stages. As experience with joint custody and its effects is gained, it may be possible to develop workable standards for structuring joint custody orders to meet specific requirements of each stage of development. At this time, however, such an effort is premature.

78. Among the factors traditionally considered by courts in determining the question of parental fitness for custody are alcohol abuse, adultery, cruelty, neglect, desertion, failure to support, and conviction of a crime. Evidence that a parent's behavior in any of these areas has been less than ideal will not necessarily render that parent "unfit"; rather, the behavior will be evaluated in light of all the circumstances.

79. In Batt, Child Custody Disputes: A Developmental-Psychological Approach to Proof and Decisionmaking, 12 Willamette L.J. 491, 502-507 (1976), the author provides an excellent example of how analysis of the child's developmental needs, which vary depending on his age and maturity, determine the type of parental behavior which might be helpful or harmful. Batt points out that a child four or five years old is curious about the world outside his immediate family and is establishing his gender identity. That his father occasionally smokes marijuana and lives with a woman to whom he is not married is less important than the father's initiative, receptiveness to new ideas and people, and suitability as a gender-identity model. The hypothetical boy's maternal grandparents might be less able than the father to tolerate the "earthiness" which is normal at his stage of development. Furthermore, their lifestyle would expose him to a narrower, more confined world. Id.

80. In New York, the private sexual activities of a divorced woman which do not affect her minor child will not render her unfit to act as the custodial parent. Feldman v. Feldman, 45 A.D.2d 320, 323, 385 N.Y.S.2d 507, 511 (2d Dep't 1974). In reaching its determination that a divorced woman is entitled to a private sexual life, the Feldman court relied on Griswold v. Connecticut, 381 U.S. 479, 484 (1965), wherein the Supreme Court recognized that certain fundamental rights emanate from the specific guarantees of the Bill of Rights. The right of an unmarried man to engage in private sexual activities has long been recognized. As Judge Learned Hand wrote in Schmidt v. United States, 177 F.2d 450, 452 (2d Cir. 1949): "We have answered in the negative the question whether an unmarried man must live completely celibate, or forfeit his claim to a 'good moral character'. . . ."
the court should rightfully consider the number, duration, and level of commitment of such relationships as well as the sensitivity shown by the parent toward the child's needs.\textsuperscript{81}

Moreover, "fitness" is a relative term; as such, certain practical considerations precluding an otherwise fit parent from acting as sole custodian might not be a bar to his suitability as joint custodian. For example, the parent of a young child who must travel extensively but on a regular schedule would not be able to act as a sole custodian. He could act as joint custodian, however, if the joint custody arrangement were tailored to fit the requirements of his employment.

Of equal importance in evaluating the merits of a voluntary or mandatory joint custody arrangement is the determination as to whether the parents are capable of mutual cooperation regarding the child.\textsuperscript{82} Because of the bitterness and hostility which frequently accompany separation or divorce,\textsuperscript{83} courts

\textsuperscript{81} One factor considered by the court in Dodd v. Dodd, 93 Misc. 2d 641, 403 N.Y.S.2d 401 (Sup. Ct. N.Y. County 1978), in its award of sole custody to the mother, was the "credible evidence" that the father, immediately after the separation from his wife, entered into an intimate relationship with a former family friend who slept overnight at the father's home when the children were present. A psychiatrist called by the wife testified that the amount of stress experienced by the children as a result of the separation was intensified by seeing another woman with their father at that time. The court "express[ed] no moral judgment on Dr. Dodd's extramarital relationship. However, choosing to have his paramour stay overnight when his children were with him demonstrated a disregard for his daughters' need for time to adjust to the transfer in their father's affection away from their mother to another woman. Mrs. Dodd, on the other hand, has shown maturity in coping with her own problems and an ability to put her children's welfare ahead of her own." Id. at 649, 403 N.Y.S.2d at 406.

\textsuperscript{82} A variety of different types of voluntary arrangements have been chronicled. M. Roman & W. Haddad, supra note 36. Most centered around the child's ability to alternate between the parents' closely located homes. For example, it was reported that one six year old girl had been alternating two or three times a week between her parents' separate apartments in the same neighborhood for over two years. She had a bedroom in each apartment. Id. at 123-26. Similarly, two girls, aged eleven and seven, had been alternating twice weekly for four years between their parents' homes in the same neighborhood. Id. at 126-27. Two boys, seven and four, whose parents lived a few blocks apart, had been alternating weekly. The father, however, wanted to move to the country and have the children alternate annually, a proposal which was unacceptable to the mother. The final resolution of this conflict was not reported. Id. at 127-28. A four year old boy was reportedly on a four-day/three-day split. His parents, whose relationship was amicable, were living in the same neighborhood. Id. at 123-33.

The physical arrangements under a joint custody agreement are sometimes made in response to the child's needs. For example, a thirteen year old boy who originally alternated weekly with his siblings, aged three and four, elected to live with his mother on a full-time basis in order to escape from the younger siblings at least some of the time. Id. at 133-38. In another family, the parents' original agreement, entered into when their daughter was three years old, provided for an equal division of physical custody; a nine-day/five-day split had developed by the time the child was five years old. Id. at 138-42. After a year of splitting the week, an eight year old girl requested one shift per week, an arrangement agreed upon by her parents. Although the parents disagreed sharply about child raising practices, they reported that their daughter understood and adjusted to their differing styles. Id. at 142-44.

\textsuperscript{83} For a discussion of the role of professional psychological intervention in dealing with post-separation and divorce hostility, see Suarez, Weston & Hartstein, Mental Health Interventions in Divorce Proceedings, 48(2) Am. J. Orthopsych. 273 (1978) [hereinafter cited as Interven-
have been and should continue to be skeptical about the parents' ability to cooperate. Different parents, however, will exhibit varying degrees of cooperativeness, and it should not be presumed that no formerly married couple is capable of setting aside past interspousal difficulties for the purpose of raising the child. Similarly, court-imposed joint custody arrangements should not be viewed as untenable solely because one or both parents is opposed to such an arrangement. The "frivolous objections of one party" do not necessarily indicate that the parents will be unable to cooperate once the arrangement is imposed. The court must examine the degree and scope of the parents' hostility and determine that cooperation is possible in several key areas. Joint custody may then be approved or imposed.

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. Among the practical considerations, the parents must live in the same general vicinity if the child is to alternate living arrangements with any degree of frequency. Initially, remaining in the city of the marital home would not ordinarily place an undue burden on either parent since both have previously been living and working there. In order that the joint custody arrangement continue throughout childhood, there must be willingness on the part of both parents to maintain their proximity. This restricted mobility will undoubtedly create a hardship. Because the alternative, however, is a complete loss of custody for at least one parent, each would presumably be willing to make such a commitment to ensure that he would not be the loser. Moreover, courts should not hesitate to make such a

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85. Interventions, supra note 83, at 278. Of the 200 families studied in evaluation and treatment programs, 90% were referred by the courts and therefore presumably among the more hostile divorcing couples. Nevertheless, fewer then five percent were unable, with professional counseling, to resolve their continuing hostilities. Although professional counseling was necessary, almost all of the divorcing couples succeeded in overcoming what would have initially appeared to be insurmountable obstacles to an arrangement such as joint custody.
86. Dodd v. Dodd, 93 Misc. 2d 641, 643, 403 N.Y.S.2d 401, 402 (Sup. Ct. N.Y. County 1978). Imposition of joint custody notwithstanding the opposition of one parent, is analogous to the imposition of visiting rights notwithstanding the opposition of the parent with sole custody, such opposition being clearly an insufficient reason to deny visitation rights. Professor Lindey states that “[t]he non-custodial parent will not be denied such rights unless the evidence conclusively shows that he has forfeited them by his conduct, or that the visitation would be detrimental to the child.” Lindey, supra note 21, at 14-70 (footnote omitted); accord, H. Clark, supra note 6, at 590.
87. Abarbanel, supra note 1, at 326.
88. Id. at 327. Dr. Abarbanel reports that all eight parents in her study were committed to continuing to live in close geographical proximity. See note 82 supra.
89. One commentator has contended that “punishment [by denial or change of custody] of a parent who exercises the right to a change of residence raises a serious question of violating the constitutional right to travel.” Bodenheimer, Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications, 65 Calif. L. Rev. 978, 1004 (1977). It could be argued, however, that the child's welfare constitutes a compelling state interest which justifies an intrusion on the parents' right to
commitment a condition of a custody award. At least one court has denied the mother's request to relocate out-of-state; the implication was that she could move only if she forfeited her custody rights.  

The parents must also be able to reach basic agreement concerning the child's upbringing. As with the place of residence, the pre-separation arrangements for school, medical care, and religion will presumably continue in effect. Changes will necessarily occur over time, however, and each parent may be required to compromise. Careful analysis of the parents' potential for compromise is necessary to avoid excessive court supervision subsequent to the custody hearing. It is not necessary that the parents get along well or that they agree on all child raising matters in order to have a successful joint custody arrangement; it is only necessary that they be capable of setting aside their personal differences to reach mutual decisions affecting their child. Each parent must be able to acknowledge the value of the other as a parent to the child. Each must be willing to listen to the other's position when they disagree and, ultimately, there must be a fundamental agreement to agree.

Even if the parents are severely embattled, the court should remain flexible and receptive to joint custody if other factors in the balancing process outweigh the hostility. One such factor is the decision-making ability of the parents. See generally Shapiro v. Thompson, 394 U.S. 613 (1969) (right to travel is a fundamental right which may only be abridged by a compelling state interest). In re Osborn, 5 Fam. L. Rep. 2790 (Wash. Ct. App. July 23, 1979). The parents had been awarded joint custody of their two young children with the mother having primary physical custody. The mother's motion to modify the joint custody decree to permit her to move from Seattle to Iowa, where she wanted to accept a position as housekeeper to a parish priest, was denied. The court found that the move would deprive the children of their relationship with their father and other members of their extended family, as well as of the cultural benefits of life in Seattle. Furthermore, the mother failed to demonstrate sufficient economic benefit to justify the move.

91. Equity has traditionally been reluctant to issue decrees which might require excessive court supervision. For example, one of the reasons for denying the employer specific performance of an employment contract is the level of court supervision necessary to enforce such a decree. D. Dobbs, Handbook on the Law of Remedies 933 (1973). See generally, Van Hecke, Changing Emphases in Specific Performance, 40 N.C. L. Rev. 1 (1961).

92. “A childless marriage that ends in divorce involves only the two people who made the commitment to each other in the first place. When there are children, however, the divorce is qualitatively different. The parents must always keep the concerns of their children paramount.” L. Salk, supra note 9, at 6.

93. For a description of intensive case studies of four families living under joint custody agreements, see Abarbanel, supra note 1. Dr. Abarbanel concluded that the success of these joint custody arrangements was attributable to four major factors: the parents' commitment to making their joint custody arrangement succeed; each parent's support for the other's relationship with the child; flexibility in sharing child-care responsibilities such as obtaining routine medical and dental care and buying clothes; and basic agreement on such issues as the amount of contact and type of relationship the parents would have with each other. Id. at 325-26. Although some of the eight parents studied were not in complete agreement with the other parent's approach to child rearing, none believed that the child's relationship with the other parent was harmful. Despite the times of anger and disappointment, each parent trusted that, at a minimum, the other would listen to his position. Id. at 326. Dr. Abarbanel concluded that this tolerance, rather than complete agreement, was the essential ingredient in the success of the joint custody arrangements studied. Id.
child. A court's evaluation that the parents' bitterness might preclude reasonable discussion between them would not necessarily make a joint custody arrangement unworkable if the child were an adolescent, as it would if the child were a toddler. On the one hand, if one parent wants his adolescent child to become an engineer while the other parent wants the child to become a photographer, the child's own wishes, talents, and achievements will play a larger role than either parent's vicarious career goals. On the other hand, if one parent of a hearing-impaired three year old is unwavering in his belief that the child should be taught sign language while the other parent is equally committed to teaching the child lip-reading only, joint custody is simply unworkable.

Another circumstance to be considered is whether the area of parental conflict is isolated and whether it is suitable to judicial determination as part of the custody award. If the parents of a three year old disagree vehemently about whether the child should attend public or parochial school, the court could structure its order to give one parent complete authority over educational decisions affecting the child while allowing both to share decision-making in other areas. The court must exercise patience and care in evaluating the needs of the individuals before it, and it must have the will to persuade the parents to work together in order to protect the child's welfare.

Once the initial determination is made that each parent is fit to act as a custodian and that the parents are able to cooperate vis-a-vis the child, the court must ensure that the details of the proposed custody arrangement are reasonable, taking into account the peculiar needs of the individuals involved. To ensure that joint custody continues as long as the child remains a child, the plan must be workable on a daily basis.

When presented with a voluntary joint custody plan, the court should only scrutinize the agreement for practicality. For example, an obstetrical nurse who remains with laboring patients until delivery and hence cannot work a regular schedule, must provide for that circumstance in the joint custody proposal. The other parent might take over when the nurse cannot leave work at the expected hour; alternatively, reliable babysitting help would be necessary. If, for some reason, the only feasible solution is to have the other parent take over, the court should satisfy itself that the other parent would, in fact, be available. The proposed arrangement might be unworkable if, for example, the former spouse blames the failure of the marriage on the nurse's career and steadfastly refuses to adjust his own plans to take physical charge of the child at an unscheduled time. In such an instance, it would be a mistake to allow joint custody because the practical problems are insurmountable.

If the personal criteria have been met, notwithstanding the opposition of one or both parties, joint custody should be judicially imposed with the instruction that the parents work out the mechanics of such an arrangement. In effect, the parents are compelled to sublimate their own interests to the

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94. Disputes of this nature can, and doubtless will, arise subsequent to the initial joint custody order. The scope of this Note, however, is restricted to the factors to be considered at the initial custody hearing.
95. Cf. Provin v. Provin, 264 Ark. 551, 572 S.W.2d 853 (1978) (mother to retain sole authority over daily matters, father to share in making "major" decisions).
best interests of the child. Faced with the possibility that failure to agree on a workable plan may result in a complete loss of custody to one parent, many may be induced to cooperate to the extent necessary to preserve their chance as custodian. Failure to develop a workable plan despite direction from the court is persuasive evidence that the judge erred in his original determination that the parents could overcome their personal hostilities and cooperate as parents. In such a case, it might be necessary to reconsider the joint custody award and, instead, to award sole custody to the more cooperative parent with extensive visitation rights to the other.

The court's proper concern for ensuring that the proposed custody plan is workable and reasonable, whether scrutinizing a voluntary or a court-ordered plan, must be distinguished from irrelevant value judgments about the wisdom of a particular arrangement. A proposal by two working parents that they share the cost of a single housekeeper who would care for the child in their two different homes on alternate days should be accepted as a feasible, consistent method of care, notwithstanding a judge's personal misgivings as to the wisdom of entrusting the care of a child to nonfamily members. Although courts are properly concerned with a broader range of issues in a divorcing family than in a family which does not enter the judicial process, the parents' inherent right to raise their child must be respected and should not be unduly supervised by the court.

The mechanics of the reasonableness test can best be seen by an analysis of physical custody arrangements. Because the physical arrangements can be structured in a variety of ways, the focus of the court should be whether the plan before it accommodates the requirements of the individual post-divorce family. The best interests of the child are dependent on the continuity and duration of the joint custody arrangement, which in turn is partially dependent on the continued satisfaction of the parents. Hence, living arrangements which may be ideal for the child may be required to yield to those

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96. In appropriate cases the court should consider conditioning a resistant parent's custodial rights upon his cooperation on certain issues. See note 90 supra.

97. The days when only one method of providing daily care for a child was considered valid are apparently gone. See B. Spock, supra note 8, at 43-46. Dr. Spock discusses a variety of methods for the care of children, including housekeepers, cooperative child care arrangements, and day care centers, as well as the traditional method of fulltime attention by the parents, without suggesting that any specific arrangement is always preferable.

98. The Supreme Court has stated that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . [But] rights of parenthood are [not] beyond limitations. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways." Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (citation & footnotes omitted). Cf. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (state statute requiring children between the ages of eight and sixteen to attend public schools overturned as an unreasonable interference "with the liberty of parents and guardians to direct the upbringing and education of [their] children"). For a discussion of constitutional decisions effecting family relationships, see Bratt, supra note 8, at 288-297.

which are more realistic for the parents. For example, the expense of maintaining two homes, each large enough to accommodate one parent and several children, is beyond the financial reach of many families, especially if the number of children and their respective genders or ages make two or more children's bedrooms a necessity. The best solution for the children may be for the parents to alternate living with the children in one house; each parent might maintain a separate apartment where he lives while not with the children. Such an arrangement, however, may be too difficult for the parents and hence might properly be rejected by the court as perilous to the continued success of the joint custody award. It requires more contact between the parents than would otherwise be necessary, and future spouses or paramours may be a serious problem. One practical solution for the financially strapped family would be for the children to live primarily with one parent and to spend evenings and weekends with the other. On the other hand, if a child has special needs resulting from mental or physical handicaps, it may not be in his best interest to alternate his living quarters. The child's handicap would justify allowing him to remain in one parent's home, where the other would supervise the child.

The effect of changes in one parent's work schedule must also be considered in determining the structure of the physical custody arrangements, as must the age of the child. The younger the child, the greater is the need for stability. In the case of very young children, frequent but regular changes in physical custody—two or three times weekly—might offer the requisite stability, particularly if a housekeeper, day care center, or school remains a constant in the child's life. A child of school age must obviously attend the same school every day. He need not, however, leave from the same place every day; the distance he can travel varies with the age of the child and the availability of school buses or other transportation. Very young children in rural sections must of necessity travel extensively by bus to school, although public transportation in a large city would not be acceptable for young children. Conversely, it would be reasonable for a high school student to commute by public transportation to a city school an hour from the home of each parent.

100. See notes 107-108 infra and accompanying text.


102. This consideration equally applies to satisfaction of the personal criteria of parental fitness and ability to cooperate.

103. For a discussion of the amount of disruption a child can tolerate at different stages of his development, see Best Interests, supra note 26, at 31-34.

104. The youngest group of preschool children studied by Wallerstein and Kelly, aged 30 to 40 months apparently tolerated well-chosen substitute caretakers rather well. Conversely, the older preschool children, aged five and six years, did not fare well with substitute caretakers. Preschool Child, supra note 33, at 603.

105. "Bus transportation has been an integral part of the public education system for years. . . ." Swann v. Board of Educ., 402 U.S. 1, 29 (1971). At least for the purpose of desegregating public schools, busing has the imprimatur of the Supreme Court. Id. at 29-31.

106. In 1976, approximately 22,800,000, or 55.1%, of the average number of students attending public schools were transported to school at public expense. Statistical Abstract, supra note 7, at 155.
The joint custody arrangement must remain flexible, adaptable, and, like any custody arrangement, subject to major revision or termination by the court if changing circumstances so warrant. The child and both parents must appreciate the right of each parent to establish new personal relationships.\textsuperscript{107} If the father remarries a much younger woman to the bitter resentment of the mother, this resentment is insufficient reason to limit the joint custody arrangement. If, however, the stepmother abuses the child, or attempts to persuade the child to espouse a religion different from the one agreed upon by the parents, the father's right to physical custody might properly be limited to exclude the stepmother.\textsuperscript{108}

The examples given above are intended merely to illustrate the wide variety of factual situations which occur in child custody cases and to set forth the kind of practical analysis necessary to determine whether joint custody is feasible in a given situation. In choosing the most appropriate custody arrangement, the court must evaluate the needs and capabilities of the individuals before it. The framework of the three criteria—fitness of each parent to serve as custodian, parental ability to cooperate, and reasonableness of the plan—is necessarily broad in deference to the discretion inherent in the best interests standard.

CONCLUSION

Sole custody arrangements developed when divorce was very unusual.\textsuperscript{109} The major shortcoming of sole custody—that it frequently deprives the child of divorced parents of a close relationship with each parent—was seen as inevitable and, perhaps, as not altogether undesirable when divorce was viewed as a sign of the moral weakness of at least one spouse.\textsuperscript{110} Today, as the soaring divorce rate indicates,\textsuperscript{111} parents are increasingly unwilling to remain in unsuccessful marriages for the sake of their children. It is, therefore, necessary to develop new custodial arrangements to deal with the needs of children whose parents no longer live together. Because joint custody is uniquely suited for minimizing the loss which inevitably accompanies divorce, it is essential that standards be developed which will assist courts in fashioning successful joint custody orders. The guidelines proposed in this Note focus on parental fitness and cooperation as well as the practicality of custodial

\textsuperscript{107} A child "need[s] to know that the non-custodial parent . . . may need to [run errands] or . . . go out with a friend at the cost of a babysitter. . . . [A parent should not be] an idealized playmate who suddenly appears when it is convenient only for entertainment purposes." Bruch, \textit{Making Visitation Work: Dual Parenting Orders}, Fam. Advocate 22, 26 (Summer 1978). Although articulated in the context of a traditional sole custody-visitation arrangement, the principle is equally applicable to a joint custody situation.

\textsuperscript{108} In DiStefano v. DiStefano, 60 A.D. 2d 976, 977, 401 N.Y.S. 2d 636, 638 (4th Dep't 1978), a joint custody arrangement originally agreed to by the parents failed at least partially because the mother's lesbian roommate "made repeated efforts to alienate the children from their father."

\textsuperscript{109} The average annual rate of divorce per 1,000 population was .3 during the period 1867-1871. Davis, \textit{Sociological and Statistical Analysis}, 10 L. & Contemp. Prob. 700, 710 (1944).

\textsuperscript{110} See id. at 707.

\textsuperscript{111} The divorce rate per 1,000 population was 5.1 in 1978, up from 2.0 in 1940. Custody Census, \textit{supra} note 2, at 7. It has been estimated that if the rate of divorce continues at the current level, almost 40\% of all marriages would end in divorce. \textit{Id.} at 1.
plans. As more empirical data on the effects of varying joint custody arrangements become available, it may be necessary to consider additional criteria in determining whether joint custody will serve the best interests of a particular child. In the meantime, however, courts must be receptive and flexible in their examination of every custody question, so that joint custody becomes the rule rather than the exception.

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