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Joint Custody: An Exploration of the Issues*

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Joint custody, an increasingly popular custody decision, allows both divorced parents to share equally the rights and responsibilities of child-rearing following their divorce. The authors discuss the potential positive and negative effects of this new and highly controversial custody decision by reviewing relevant research and theoretical concepts. Suggestions for further research are offered.

THE UNITED STATES is experiencing a dramatic increase in both the number of divorces and the number of children involved in divorce. In 1976, the 1,077,000 divorces (30) directly affected over one million children.¹ These children, like all children involved in divorce share one thing in common—their lives are profoundly affected by custody decisions.

Custody decision-making is significantly influenced by legal trends and social mores. In this century, the mother has typically been considered the more appropriate custodial parent. As a result, over 90 percent of all custody decisions are in her favor (27). Today, society is experiencing changes that significantly challenge this phenomenon. First, more men are considering and seeking custody of their children (17, 21). Sec-

ond, more women are considering the option of not demanding custody as a realistic and perhaps preferred alternative (25). Third, individuals are more assertive in demanding that the legal system be responsive to their particular needs. Last, individuals are considering and adopting non-traditional child-rearing roles (6, 18). These changes have already affected the legal and social ramifications of custody decisions. One variation resulting from these societal changes is the growing number of divorced parents who design joint custody agreements. Joint custody, as discussed in this paper, refers to a legal agreement between divorced parents to share equally the rights and responsibilities of child-rearing following their divorce.

In joint custody arrangements the crucial issue is that both divorced parents have an equal responsibility for making decisions that affect the child. In some cases, the joint custody agreement means that although the parents are divorced the child will alternately live with each parent.

A growing number of states have enacted joint custody legislation. The statutes in California, Iowa, Kansas, Maine, Nevada, North Carolina, Oregon, Texas, and Wis-

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¹ This number is probably low. The last year such data were available was 1965 at which time the mean number of children per divorce decree was 1.32 (31).

other Missouri case,⁵ a California case,⁶ and a New York case⁷ have all used parental fitness coupled with the child's best interests criteria to support joint custody decisions. Although joint custody is only beginning to receive major attention today, a 1948 case in Virginia awarded joint custody and stated: "It gives the child the experience of two separate homes. The child is entitled to the love, advice, and training of both her father and her mother. Frequent associations, contact, and friendly relations with both of her parents will protect her future welfare if one of her parents should die. It gives recognition to the rights of parents who have performed their obligations as parents."⁸

Courts have not always agreed that joint custody is the preferred custody alternative. Some state courts have refused to award joint custody, believing that it is, in general, not in the child's best interests. A 1977 Oregon case, *Matter of the Marriage of Pergament* stated: "When a family is split by dissolution of the marriage the child of necessity can be in custody of only one parent and the custodial parent is given the primary responsibility for rearing the child. Equity does not require that the custody of the child be equally divided; the welfare of the child mitigates [sic] against such approach."⁹ A 1976 Washington, D.C. case used a similar argument in reversing a trial court's decision to award joint custody: "Divided custody of a child of tender years is not favored. . . . The court holds that without a showing of any exceptional circumstances or a compelling reason why such a custody arrangement would promote the best interest of the child such an ar-

angement is error."¹⁰ Cases in Florida¹¹ and Missouri¹² have used similar arguments to deny joint custody type arrangements.

Two recent New York cases, *Dodd v. Dodd*,¹³ and *Braiman v. Braiman*,¹⁴ overturned previous joint custody awards because the parents' constant conflict was seen as making the arrangement unworkable. The court in *Dodd v. Dodd* explained their reasoning for changing joint custody to sole custody: "The parties herein have made child rearing a battleground. . . . During [a 14-month trial period] they have shared in all decisions, and for most of the time they have divided physical custody equally. In all areas, in matters both major and minor there has been conflict."

In addition to the cases already cited, several other recent joint custody cases deserve attention. A 1977 Michigan case, *Stamper v. Stamper*, awarded joint custody to a couple because "there was little to recommend granting of custody to either parent."¹⁵ The court did not feel that either parent alone could provide a stable emotional or physical environment for their children. A 1978 Illinois case granted joint custody to a natural mother and stepmother. The court concluded that the children's emotional health would be damaged if physical custody were with the natural mother.¹⁶ A 1977 New York court changed a sole custody award to joint custody when the mother, who had sole custody, suffered a "mental breakdown." The court concluded that although "joint custody is usually fashioned by agreement in New York, where, as here, circumstances materially

¹⁰ *Utley v. Utley* 3 Fam. L. Rep. 2047 (D.C. Ct. App. 1976).

¹¹ *Gall v. Gall* 336 So. 2d 10 (Fla. App. 1976).

¹² *Wood v. Wood* 400 S.W. 2d 431 (St. Louis Ct. App. 1966).

¹³ 4 Fam. L. Rep. 2302 (N.Y. Cty Sup. Ct. 1978).

¹⁴ 4 Fam. L. Rep. 2522 (N.Y.C. Ct. App. 1978).

¹⁵ 3 Fam. L. Rep. 2541 (Mich. Cir. Ct. Wayne Cty, 1977).

¹⁶ *Cebryznaki v. Cebryznaki* 4 Fam. L. Rep. 2676 (Ill. App. Ct. 1st Dist. 1978).

⁵ *Davis v. Davis* 354 S.W. 2d 526 (Springfield Ct. App. 1962).

⁶ *Winn v. Winn* 299 P. 2d 721 (Dist. Ct. App. 1st Dist. Div. 2 1966).

⁷ *Krois v. Krois* 4 Fam. L. Rep. 2017 (N.Y. Sup. Ct. Queens Div. 1977).

⁸ *Mullen v. Mullen* 49 S.E. 2d 349 (App. Div. 1948).

⁹ 559 P. 2d 942 (Ore. Ct. App. 1977).

change, courts are authorized to fashion such a remedy in a contested case."¹⁷

The above review of case law points to the controversial nature of joint custody. Although courts in some states have tended to rule in favor of parents seeking joint custody, courts in other states have refused. Though controversial, the concept of divorced parents possessing equal rights and responsibilities for the minor child is increasingly being demanded by parents and considered by courts. For this reason, it is imperative that the issues and potential effects of joint custody be carefully examined. This paper will review relevant literature on joint custody, as well as research that may bear on the potential positive and negative consequences of this custody decision. The authors personally believe that joint custody is an appropriate alternative in some divorces. It is not our intent, however, to present an argument for or against joint custody but rather to present information from which the reader may formulate opinions and conclusions. Recommendations for further research in this area are also proposed.

Background

According to Roman Law, the father possessed control over his children (23); control included the right to maintain sole custody. This philosophy was perpetuated under the English Common Law, which assumed that the natural guardian of the child was the father (23). In 1839, the United States abandoned the idea of "father's dictatorial control" (4, p. 377). Since that time, both parents have been considered equal in terms of the right to be awarded custody. Although both parents were considered equal in a legal sense, custody was usually awarded to the mother (4). It is important to note that at this time the primary issue considered in court decisions regarding custody was the right of the parents (4). In

1889, the emphasis changed from parental rights to the rights of the child. Chief Justice Brewer of the Supreme Court of Kansas in a landmark decision stated: "Above all things, . . . the paramount consideration is what will promote the welfare of the child" (21, p. 40). This decision was reaffirmed in 1925 (4). Today, "the best interests of the child" remains the principle guideline by which custody decisions are made.

Derdeyn (11) contends that there are common presumptions guiding the court in making a custody decision in cases in which both parents are "fit" and desire custody. In such instances the court typically acts on the belief that (a) "a young child should be placed in the custody of his mother," (b) "a girl should be placed in her mother's custody, while a boy should be in his father's custody, if he no longer requires his mother's constant care" (p. 792). Sharon J. Alexander wrote: "Even after the 'best interest' of the child became the guideline, rarely was the choice given scrutiny. The mother was given custody because it was assumed that she was the person who could take care of the child" (4, p. 378). These assumptions have been challenged by a growing number of individuals who have expressed and acted upon the belief that when both parents are "fit," joint custody is "in the best interest of the child" (4, 6, 11, 12).

The most pervasive argument for joint custody can be found in Roman and Haddad's recent book *The Disposable Parent: The Case for Joint Custody* (26). The authors argue that joint custody "unlike sole (generally maternal) custody . . . does not banish the father or overburden the mother and, just as important, it does not sever ties between one parent and the children" (p. 104). They contend that joint custody should be the assumed custody decision rather than the exception. An article by Truesdell Cox and Cease, "Joint Custody What Does It Mean? How Does It Work," (29) lends support to this position, conclud-

¹⁷ *Odette, R. v. Doublas R. 4 Fam. L. Rep. 2043 (N.Y. Cty. Fam. Ct. 1977).*

ing: "Conceivably the burden of proof on the parent seeking sole custody should be to show why joint custody will not work rather than why he or she is the most fit parent" (p. 44).

Researchers have only recently begun to study joint custody. Consequently, in addition to reviewing these studies, it is also necessary to extrapolate from related investigations and theoretical frameworks in order to explore the possible positive and negative consequences of joint custody.

Positive Aspects for Children

Some of the deleterious effects of divorce may be circumvented by joint custody. Perhaps the most obvious and well-researched negative effect is the absence of one parent. "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. . . . In this respect, the central event of divorce for children is psychologically comparable to the event of death, and frequently evokes similar responses of disbelief, shock, and denial" (19, pp. 21-22). A longitudinal study begun in 1970 supports the importance of maintaining significant contact with both parents (19). Joan B. Kelly and Judith S. Wallerstein studied 131 children and adolescents from 60 divorcing families. They explored the effects of divorce on 26 children of early latency years. Kelly and Wallerstein concluded that the impact of divorce resulted in a " . . . very strong sense of loss with regard to the departed father" (19, p. 26). In another paper the same authors discussed the effects of divorce on 31 children of later latency years (32). Wallerstein and Kelly found that the child of this age group also experienced a great sense of loss and loneliness. The loneliness was characterized by the child's feeling of having to side with one parent or the other in what the child perceived as a battle: "Thus, paralyzed by their own conflicting loyalties and the severe psychic or real penalties which attach to choice, many

children refrained from choice and felt alone and desolate, with no place to turn for comfort or parenting" (32, p. 264).

Other research has examined the effects of parental absence. A number of studies have shown that a relationship exists between antisocial behavior or delinquency in boys and parental absence (5, 10). Caplan and Douglas (9) provided data to support the theory that a relationship exists between parental deprivation or "early object loss" and childhood depression. A study conducted by E. M. Heatherington demonstrated that adolescent girls raised in homes that were fatherless either through death or divorce manifested dysfunctional behavior in heterosexual relationships (14). Kelly and Wallerstein (19) concluded that children did not feel the visiting situation adequately compensated for the loss of the noncustodial parent.

Joint custody arrangements may have the potential to prevent the above-mentioned problems and psychological conflicts. The perceived loss or actual physical absence of one parent through divorce may be abated by a joint custody arrangement that permits both parents to remain active participants in their child's life. This is confirmed by the findings of current joint custody research. Nehls notes that "in a majority of cases both mothers and fathers considered the most important advantage of joint custody was that both parents maintained an active and/or meaningful role in the child's life" (22). Abarbanel lends further support to this finding. In reference to her study of four joint custody families she states: "There is no doubt that joint custody yields two psychological parents, and that the children do not suffer the profound sense of loss characteristic of so many children of divorce" (1, p. 328).

The stigma attached to the "single-parent" family is well known (7). Joint custody may be capable of decreasing this stigma by creating a family system that most closely resembles a nuclear family. In addition, the increased exposure to different

role models and philosophies gained from contact with both parents may enhance the child's growth and development (28).

Positive Aspects for Parents

Perhaps the most positive aspect of joint custody for parents is the alleviation of the great sense of loss experienced by the non-custodial parent. Under the traditional system of custody, one parent's gain is often the other's loss. Joint custody allows both parents to have equal rights in raising their child. A joint custody arrangement may give both parents the opportunity to remain involved in the everyday life of their child, and it allows them to control and be responsible for the major decisions that influence the child's welfare. In a study of 40 divorced fathers, Grief suggests that "fathers with joint custody are more likely to involve themselves in all aspects of their child's growth and development. The maintenance of such ties can be critical for both father and child" (15, p. 319).

In some cases, a joint custody arrangement may enhance the relationship between divorced parents. A custody fight, potentially the most traumatic aspect of a divorce, is avoided. Furthermore, there is a mutual task, child-rearing, that necessitates cooperation and respect. Parental conflict may be reduced because neither individual is threatened by the loss of his or her child (24). Ahrons studied coparenting relationships following divorce and found that "divorced parents can continue to share a parenting relationship while terminating, both legally and emotionally, a marital relationship" (3). Another recent study based on interviews with 127 divorced Boston fathers compared the satisfaction derived from various types of custody situations (13). The half-time or joint custody father had "the lowest level of conflict with his former mate as well as the most positive attitude about becoming a father again" (13, p. 6).

Parents involved in joint custody arrangements also have the benefit of shared responsibility. In a study by Brown, Feld-

berg, Fox, and Kohen (8) the authors found that two-thirds of the 30 Boston-area women interviewed expressed concern about the increased responsibility of parenthood following divorce. In joint custody, there may be psychological comfort in knowing that important decisions will not be made alone. Joint custody may also provide a parent with "coverage" should a crisis occur.

Negative Aspects for Children

The preceding discussion points to the potential benefits to be derived from joint custody. However, arguments against this custody decision can be extrapolated from other research and theoretical concepts. Perhaps the strongest objections to joint custody stem from the conclusions presented by Goldstein, Freud, and Solnit in their book *Beyond the Best Interests of the Child* (14). The authors strongly emphasize the importance of maintaining continuity in a child's relationships and surroundings. Goldstein, Freud, and Solnit believe that the child's relationship with one parent, the custodial parent, should not be disturbed. They even recommend that the noncustodial parent not possess the legally enforceable right to visit the child: "Children have difficulty in relating positively to, profiting from, and maintaining contact with two psychological parents who are not in positive contact with each other" (14, p. 38). Although the authors do not discuss the issue of joint custody specifically, it appears that they would be in strong opposition to such an arrangement.

The "double-bind" theory has been used in a broad sense as an argument against joint custody. The "double bind" refers to the child's or children's difficulty in relating to two authority figures (12). Goldstein, Freud, and Solnit (14) contend that loyalty conflicts are common when the child maintains substantial contact with divorced parents. The authors (14) believe that such conflicts have the capacity to destroy positive relationships with both parents.

Another major criticism of joint custody is embedded in the philosophy that the preferred parent is the mother. The courts still tend strongly to favor the mother in custody decisions, in spite of the fact that under the law both parents, if "fit," are to have equal rights to custody. This is especially true in some states when the child is of "tender years" (4).

Pragmatic problems may be inherent in some joint custody arrangements. When joint custody includes the child alternately living at the home of each parent, problems can arise (1, 22). The child may have difficulty maintaining peer contact and school continuity unless the parents live close to each other. The actual moving between homes may be unsettling; furthermore, it is unlikely that many parents can afford to purchase duplicate sets of favorite toys, clothes, and other cherished personal belongings important to the child's sense of well-being. These problems, however, need not be overwhelming. Abarbanel "found that the discrepancy between environments (if it is significant at all) can be managed well if the parents cooperate and share important information about their children's welfare" (1, p. 328).

Negative Aspects for Parents

Joint custody has potential negative effects for parents as well as children. It may be unrealistic, for example, to expect former married individuals to make decisions together regarding their children. Authority might best be delegated to one individual (12). Though by no means the norm, Ahrons did find that in several of the joint custody families she studied the parents were "bitter enemies" whose interactions tended to be "competitive and hostile" (2, p. 511).

Joint custody may make it psychologically impossible for formerly married individuals adequately to resolve their marital relationship. This potential problem may result from the ongoing parental relationship inherent in joint custody.

Finally, parents who decided on joint custody may, because of its controversial nature, face criticism from family, friends, and the professional community. Parents may find themselves constantly justifying their decision as being "in the best interests of the child."

Conclusion

A review of the research and theoretical concepts related to the concept of joint custody demonstrates that arguments do exist regarding this issue's potential positive and negative consequences. This fact, coupled with a realization that joint custody is currently being awarded and a belief that it will be considered by more divorcing parents, points to the glaring need for further investigation.

Little research has been done concerning the specific variables used to predict which custody decisions will be truly "in the best interests of the child." Traditional custody decisions have been examined only cursorily, and little data exist regarding joint custody. Many issues need further inquiry. Obviously, the effects of raising a child under a joint custody arrangement must be carefully examined. A description of the number and characteristics of the families who have already implemented joint custody would be extremely useful. Data also need to be gathered and analyzed regarding the arrangement itself. What kinds of joint custody arrangements have worked best for what types of families? Similarly, what kind of joint custody arrangements have not worked with what types of families? In addition, we must begin to identify the specific variables that have contributed to successful joint custody arrangements for some families and unsuccessful ones for other families. These questions must be addressed in order to determine which custody decision best meets the particular needs of the child. The effects of joint custody on both the relationship between divorced parents as well as either parent's remarriage also merit consideration.