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I. INTRODUCTION

In my practice, I have seen the sad results of a joint custody mania which is sweeping the courts. Joint custody is popularly seen as the solution to the divided family: the parents may divorce, but the children remain legally and emotionally "married" to both.

Unfortunately, joint custody is more often an arrangement designed to protect the divorcing father's rights rather than the best interests of the children. Fathers are often economically motivated, since they are often successful in reducing their child support obligations by seeking joint custody orders. Allegedly since they have joint custody, they are providing half of the cost of caring for that child. However, the tendency of the fathers in joint custody arrangements is to leave the children with their mother during the father's physical custody time. Not only does this cause psychological harm to the children and inconvenience to the mother, it costs the mother money. She must feed and entertain the child for the extra time that the father had agreed to spend with the child. Thus, the fathers retain control and get rights with no responsibility.

The following is a guide to resources about the negative effects of joint custody for practitioners arguing against this arrangement.[1] It discusses the psychological effects on children of joint custody, situations in which the award is inappropriate or dangerous, and the legal status of joint custody. The sources listed below represent some of the strongest arguments made against the casual awarding of joint custody.

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[1] Because this article is essentially a research guide, the citations are in the body of the piece instead of segregated to footnotes.

II. PSYCHOLOGICAL STUDIES

In recent years, several psychological studies have been done which identify specific family situations where joint custody has proven not to be in the child's best interest. These studies indicate that where certain factors are present in the family, the emotional health of children who have been the subject of joint custody arrangements has deteriorated. Influenced by the indications of these studies, numerous courts have held that the presence of these circumstances alone means that joint custody is inappropriate. These decisions are discussed in section IV, below.

In McKinnon and Wallerstein, *Joint Custody and the Preschool Child*, 4 BEHAVIORAL SCIENCES AND THE LAW, 169 (1986), the authors report the findings of a study regarding joint custody arrangements in twenty-five families with children aged fourteen months to five years. The authors first point out that, although all of the families had opted for joint custody voluntarily rather than through a court order, various reasons existed for their choices. Even though courts assume that the parents' desire to nurture the child by continuing contact is the primary reason that divorcing couples seek joint custody, this is true in only one-third of the cases. Parents had practical and economic reasons in addition to emotional ones. Sometimes the parents' practical considerations were more compelling than their emotional ones. Parents selected joint custody for the following reasons:

1. Each parent had only a partial commitment to the child;

2. Each parent's workplace demands rendered joint custody practicable;

3. The parent who opposed the divorce, especially if feeling humiliated or rejected, saw joint custody as a means of holding onto the marital relationship or of denying the divorce;

4. The parent who was seeking the divorce was aware and concerned about the suffering the other spouse was experiencing and thus used joint custody as restitution to "soften the blow."

McKinnon and Wallerstein note the factors which they found affected the emotional health of a child in a joint custody arrangement. The most important factors in creating a positive situation for the child were whether both parents could sustain a strong commitment to the child and whether they could cooperate with each other on childrearing decisions. Unfortunately, the authors found that such cooperation between divorcing parents was rare. (McKinnon at 176-7) Another important factor was the parent's remaining doubts over whether or not joint custody was appropriate. Those parents in the sample who came to joint custody as a result of mediation were resentful that the arrangement was never really their idea and doubted it could work. When time did not dispel their doubts, their children did poorly.

Other important factors influencing the outcome of the joint custody arrangement were whether or not parental disagreement and overt hostility existed; whether or not the couple's parenting style or values were extremely different; whether or not one parent was using the child as a replacement for the marital partner; and whether or not, and how soon, the parents entered into new romantic relationships.

Finally, McKinnon and Wallerstein report on the adjustment and experiences of the children of the twenty-five sample families. First, joint custody did not protect any of the children from experiencing the grief and anxiety common to young children when parents divorce: "Joint custody did not sustain the illusion of an intact family." (McKinnon at 180) Second, of the seven very young children between the ages of one and three years, three adjusted well to the divorce, while four did not. For the four unhappy children, continuing parental conflict, inappropriate nurturing and structure, and excessive drinking by one parent were the reasons. Third, of the nineteen children between the ages of three and five years, three coped well with the divorce and sixteen did not. For those who did not, new parental relationships, "disorganized" parents, disinterested parents, violent parents, and substance abusive parents were the reasons. The authors also suggest that the greater difficulty the older children had in adjusting to joint custody may have been due to the greater complexity of their pre-school lives. (McKinnon at 180)

A report by Steinman, Zemmelman and Knoblauch, *A Study of Parents Who Sought Joint Custody Following Divorce: Who Reaches Agreement and Sustains Joint Custody and Who Returns to Court*, 24 JOURNAL OF AMERICAN ACADEMY OF CHILD PSYCHIATRY, 554-62 (1985), contains findings similar to those reported in McKinnon and Wallerstein's study. The Steinman study followed forty-eight joint custody families. One year after joint custody was established, thirteen of the families were placed in an outcome category labeled "Successful," twenty were placed in a category labeled "Stressed," and fifteen were placed in a category labeled "Failed." "Successful" parents who most easily mastered the tasks demanded by the joint custody arrangement displayed the following qualities:

1. Maintained respect and appreciation for the bond between their children and former spouses, despite the anger and disappointment from the failed marriages.

2. Maintained some objectivity through the divorcing process, at least in relation to the children.

3. Empathized with the point of view of the children and of the other parents.

4. Shifted emotional expectations of the spouses from the role of mate to that of co-parent.

5. Established new role boundaries.

6. Generally had high self-esteem, flexibility, and openness to help.
7. Believed that their ex-spouses were good parents.

Additionally, these families resorted to litigation and lawyers far less frequently than the families with less successful results. These families preferred to solve their own problems as a way of protecting their co-parenting relationship from outside stress.

The parental characteristics that led to a failed outcome for the joint custody arrangement included:

1. Intense, continuing hostility and conflict with the spouse that spilled over onto the child.
2. Overwhelming anger and the continuing need to punish the spouse.
3. A history of physical abuse.
4. A history of substance abuse.
5. A fixed belief that the spouse is a bad parent.
6. An inability to separate their own feelings and needs from those of the child.

This study, like that of McKinnon and Wallerstein, concluded that in certain instances, such as where physical, verbal, or substance abuse is present, joint custody fails.

A third study by Irving, Benjamin, & Trocme, *Shared Parenting: An Empirical Analysis Utilizing a Large Canadian Data Base*, in JOINT CUSTODY AND SHARED PARENTING (J. Fulberg ed. 1984) deals with 201 parents (75 couples and 51 individuals) who shared custody. In this study, the vast majority of participants said they were satisfied or extremely satisfied with the arrangement. The parents who were significantly less satisfied with the custody arrangement:

1. Came to shared parenting through court action or involvement;
2. Reported a greater level of guilt over the marital break-up;
3. Had a higher level of pre-separation conflict;
4. Had spent a shorter length of time in the shared parenting arrangement than the more satisfied parents.

Generally, the authors conclude that joint custody does not work for the child where overt parental conflict exists. Although the data supports the viability of joint custody as an option, the authors' data supports the need to differentiate between those families for whom it is appropriate and those for whom it is not.

A fourth study, Steinman, *The Experience of Children in a Joint Custody Arrangement: A Report of a Study*, 51 AMER. J. ORTHOPSYCHIAT. 403 (1981), involved families who arranged joint custody extrajudicially and who maintained it over a number of years. The author found that, while the parents were generally satisfied, the children's experience was more mixed. In this group of highly motivated and satisfied

parents, about one-third of the children were having significant adjustment problems and appeared to feel "overburdened by the demands and requirements" of the arrangement, even after a number of years. (Steinman at 414) The author concluded that:

1. Joint custody arrangements should be made with an emphasis on the child's individual needs and capacities.

2. Further research is necessary to better understand which children and parents will benefit from joint custody.

3. Factors which appeared to make joint parenting work were:

   a. commitment to the arrangement;

   b. parents' mutual support and respect for each other as parents;

   c. flexible and cooperative sharing of responsibility.

In summary, the studies on how children fare in joint custody arrangements indicate that in some instances joint custody is totally inappropriate and will not foster a climate of growth and well being for the child. The most obvious situations in which joint custody will not be in a child's best interest are where domestic violence has occurred, where overt continual conflict exists between the parents, where a parent has substance abuse problems, where the court, rather than the parties, decide that joint custody is the answer, and where a parent is using joint custody as a means of denying the divorce.

III. Legal Precedent

A. California Legislation

In 1980, California became the first state to adopt a statute that was interpreted by courts and practitioners as favoring joint custody. Cal.Civ. § 4600 (West 1983). The statute's stated goal was "to assure minor children of frequent and continuing contact" with both parents. Toward this end, joint custody was listed as the first custody arrangement to be considered by the court. Cal.Civ. § 4600(a). In 1988, after an examination of the results of the joint custody legislation, California became the first state to revoke this presumption. Cal.Civ. § 4600(d) (West 1989). Revocation of the law was based on recent psychological findings, including a study of 100 children from San Francisco Bay Area families in which custody was bitterly contested. Janet R. Johnson, a Stanford University sociologist, suggested that access to both parents increased emotional distress for children. "Children who shared more days each month with both disputing parents were significantly more depressed, withdrawn and uncommunicative, had more somatic symptoms, and tended to be more aggressive, according to the perceptions of their parents." Mathews, *Bill Curbs Court Use of Joint Custody: Califor-*

nia Vote Could Slow Trend of Dual-Parenting After Divorce, Washington Post, Sept. 1, 1988, at A3, col. d.

The FINAL REPORT OF THE CALIFORNIA TASK FORCE IN FAMILY EQUITY (June 1, 1987) commented on the unintended ill results of the original joint custody statute. First, the Task Force noted that the statute was misinterpreted "to create a joint custody preference or presumption." (Task Force at VII-2) Second, the Task Force was concerned about the use of "a misperceived preference for joint custody to lower child support obligations and as a means of extracting financial concessions from a parent opposed to such an arrangement." (Task Force at VII-2) Third, the Task Force recommended that the revised statute require that courts consider the following specific factors before awarding joint custody:

a) The past and present abilities of the parents to cooperate and make decisions jointly.

b) The ability of each parent to permit the sharing of love, affection, and contact between the child and the other parent.

c) The geographic proximity of the parents as this relates to the practical considerations of joint custody.

d) Any history of, or potential for, child abuse, spousal abuse, or parental kidnapping.

e) The age and developmental stage of the child. It shall be presumed that joint physical custody is not in the best interest of infants aged three years and under. In determining whether to award joint physical custody of an infant aged three years or less, the court shall consider, in addition to the other factors specified in this subdivision, all of the following:

(1) The ability of the parents to communicate frequently about the child's daily routine and the willingness of the parents to develop and maintain similar child rearing duties.

(2) The personality characteristics of the child including, but not limited to, the child's flexibility, developmental capacity to adjust to repeated separations from each parent, frequent moves from one house to the other, and different patterns of parenting and caregiving, where those differences exist.

(3) Each parent's child care arrangements and the ability of the parents to communicate about these arrangements on a regular basis. (Task Force at VII-8 - VII-9)

The Task Force's rationale for adding this section was that joint custody is a complicated arrangement which requires special parents and children to make it work. Courts' failure to appropriately evaluate parents and children results in inappropriate awards or mediated agreements of joint custody that are harmful to children. Although joint custody has been understood to promote a child's continued relationship with both parents, the Task Force noted that since a continuing relationship can also occur in sole custody, joint custody should be reserved for the "special cases." Moreover, joint custody should not be used by the court to

avoid the appearance of labeling either parent inadequate. (Task Force at VII-9 -VII-11)

B. Massachusetts Legislation

Problems of misinterpreting an open ended joint custody statute occurred in the state of Massachusetts. According to the REPORT OF THE SUBCOMMITTEE ON DIVORCE AND CHILDREN, MASSACHUSETTS' BAR ASSOCIATION GOVERNOR'S COMMISSION ON THE UNMET LEGAL NEEDS OF CHILDREN (Winter, 1986), courts applied the statute inconsistently and incorrectly. Despite the state supreme court's ruling that the statute did not give a presumption in favor of joint custody, parents and lawyers requested, and courts granted, joint legal and physical custody even where the award was unwarranted. Courts granted joint custody without considering the child's age and developmental stage and the parents' ability to cooperate with each other.

The REPORT further found that a presumption for joint custody gives parents who might be unsuitable custodians of their children a bargaining advantage in settling the rest of the divorce issues. This advantage causes the more suitable parent to make financial concessions, often to the detriment of the child, in order to assure sole custody.

C. Other State Legislation

Several other states have embraced the position that joint custody is only beneficial to children in certain cases. For instance, at least three states only permit courts to award joint custody where both parties agree to the arrangement. Neb. Rev. Stat. § 42-363(3) (1988); Ohio Rev. Code Ann. § 3109.04 (Page 1989); Wis. Stat. § 767.24 (1981). In Indiana, the parties' agreement to joint custody is not a prerequisite to such an award but is a matter of primary importance. Ind. Code Ann. § 31-1-11.5-21(g) (West 1979). In Iowa, this is a factor for the court to consider. Iowa Code § 598.41 (1981). Even in states where joint custody is presumed to be in a child's best interest, the presumption only exists where both parents agree to the award. Nev. Rev. Stat. Ann. § 125.490(1) (Michie 1986) or where the parents have shown a willingness or ability to communicate, cooperate, or agree on issues regarding the child's needs. N.M. Stat. Ann. § 40-4-9.1 (1989). Most importantly, Iowa's statute implies that joint custody is inappropriate where physical violence has occurred by requiring the court to consider whether the safety of the other parent will be jeopardized by an award of joint custody. Iowa Code § 598.41 (1981).

Colorado's legislature has passed amendments that will preclude the use of joint custody in domestic violence cases based on findings that it is

not in the best interest of children to be exposed to violence at home. Colo. Rev. Stat. § 14-10-124 (Supp. 1988-9). The New Hampshire legislature has passed an amendment requiring that the court presume that abuse is harmful to the children. If the court grants joint custody despite the evidence of abuse, then the court must supply written findings to support the order. N.H. Rev. Stat. § 458.17 (Supp. 1988-9).

Arizona House Bill 2418 passed during the 1989 legislative session and will be codified at Ariz. Rev. Stat. Ann. § 25-332 (F-I). It states that joint custody is not the preferred arrangement and will only be awarded where both parents seek the arrangement and the court has found it is in the best interest of the child. Subsections A and B.

The court must make specific inquiry into the motivations and influences on the parents, including whether the parents were subject to "duress or coercion." Subsection F. Practical considerations and evidence of the parents' commitment to the child are also taken into account.

Joint custody agreements are reviewable by the court after a one year trial period. Either parent can request review and will be granted sole custody if the other parent has demonstrated insufficient involvement with the child.

While both battered women's advocates and fathers' rights groups lobbied against the Arizona bill, it attempts to embody all of the psychological teachings and legal precedent from other states. It does not grant a preference but requires an agreement that is not the result of coercion. Additionally, the parent seeking joint custody must have been able to sustain an ongoing commitment to the child and must continue to do so after the divorce, and the arrangement must be logistically reasonable. Child support orders shall be determined strictly by the existing child support statute and guidelines not dependent on the existence of a joint custody order.

IV. Case Law

Generally, courts have broken down the analysis of joint custody decisions into three categories: Agreement between the parties to joint custody, ability of the parties to cooperate, and practical logistics.

A. Agreement

In *In Re Marriage of Neal*, 92 Cal. App. 3d 834, 155 Cal. Rptr. 157 (1979), the appeals court held it was an abuse of discretion to order joint custody if the parties had not agreed to it. Without an agreement, the court said that the children are subject to conflicting demands, and frequent disputes would arise resulting in more court actions.

In Arizona, in an unpublished but frequently used opinion, *Pitts v. Pitts*, 2 CA-CV88-0125 (April 28, 1988), the court held that since there is no statutory authority for joint custody, a trial court cannot order it over one party's objection. This rationale has been used in Illinois, *Re Marriage of Hanson*, 112 Ill. App. 3d 564, 445 N.E.2d 912 (1983), Iowa, *Re Marriage of Weidner*, 338 N.W.2d 351 (1983), Connecticut, *Faria v. Faria*, 38 Conn. Supp. 37, 456 A.2d 1205 (1982), Indiana, *Lord v. Lord*, 443 N.E.2d 847, (1982), Oregon, *Re Marriage of Handy*, 44 Or. App. 225, 605 P.2d 738 (1980), Kansas, *Larsen v. Larsen*, 5 Kan. App. 2d 284, 615 P.2d 806 (1980), and Vermont, *Berlin v. Berlin*, 139 Vt. 339, 428 A.2d 1113 (1981).

B. Cooperation

In *Blake v. Blake*, 106 A.D.2d 916, 917, 483 N.Y.S.2d 879, 880 (1984), the court stated that "[t]he parties have demonstrated great antagonism toward each other. For that reason alone joint custody. . . is inappropriate."

In *Braiman v. Braiman*, 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978), the court noted that the ability of the natural parents to behave in a civilized fashion is crucial before a court can award the parents joint custody. Joint custody is "insupportable when the parents are severely antagonistic and embattled." *Id.* at 584, 378 N.E.2d at 1019, 407 N.Y.S.2d at 449.

In *Creusere v. Creusere*, 98 N.M. 788, 653 P.2d 164 (1982), the appeals court found no abuse of discretion in the trial court's denial of joint custody when the level of incompatibility between the husband and wife indicated that joint custody was not in the child's best interest.

In *Hardin v. Hardin*, 711 S.W.2d 863 (Ky. Ct. App. 1986), the court stated that, although both parents were proven fit, where the parents were not mature enough to cooperate, joint custody was not in the child's best interest.

In *Salamone v. Salamone*, 83 A.D.2d 778, 443 N.Y.S.2d 464, (1981), the court reversed an award of joint custody, holding that joint custody was inappropriate where the parents did not exhibit an ability to cooperate in matters of childrearing. Because of the parents' "almost total lack of communication" with each other, they used a psychologist as a problem solver and a go-between for complaints. *Id.* at 780, 443 N.Y.S.2d at 466. Other states which have adopted this argument include New Hampshire, New Jersey, New York, and Oregon.

Several courts have ruled that joint custody is not proper where there has been physical violence by one parent against the other parent. *Slaughter v. Slaughter*, 466 So. 2d 1370 (La. Ct. App. 1985); *Kline v. Kline*, 686 S.W.2d 13 (Mo. Ct. App. 1984); *Blake v. Blake*, 106 A.D.2d

916, 483 N.Y.S.2d 879 (1984); and *Re Matter of Hanson*, 112 Ill. App. 3d 564, 445 N.E.2d 912 (1983).

Some courts have gone further by requiring, in addition to a finding of no overt hostility between the parents, "a showing of involvement and commitment to the child sufficient to provide at least the promise that the parent seeking joint custody will follow through with the obligations that it entails over the long haul." *In the Matter of Cheryl v. Jeffrey*, 133 Misc. 2d 663, 665, 507 N.Y.S.2d 593, 595 (Family Ct. 1986). The *Jeffrey* court refused to grant joint custody to a father who had shown no interest in the child prior to the judicial proceedings.

C. Practical Considerations

The New York court has held that both shifting the child's residence two times a week, *Lyritzis v. Lyritzis*, 55 A.D.2d 946, 391 N.Y.S.2d 133 (1977), and a six months with mother/six months with father arrangement are not in the child's best interest. *Belandres v. Belandres*, 58 A.D.2d 63, 395 N.Y.S.2d 458 (1977). A Montana court found excessive distance between the parents' households made joint custody impractical. *Quinn v. Quinn* 622 P.2d 230 (Mont. 1981).

Another specific reason given for denying joint custody is the parents' differing religious beliefs. In *Fisher v. Fisher*, 118 Mich. App. 227, 324 N.W.2d 582 (1982) the court stated that where the parties' religious views conflicted and they could not agree on this basic child rearing issue, joint custody was properly refused. See also *Andros v. Andros*, 396 N.W.2d 917 (Minn. Ct. App. 1986).

V. Conclusion

The inequities in joint custody, like those in divorce, hurt women and children. Parents in conflict will carry their conflicts into the custody arrangements. Parents who abuse their co-parent or child will continue this abuse in the joint custody situation. Joint custody demands ideal circumstances and exceptional parents to succeed at all. Even with highly committed and motivated parents, joint custody is not for all children. Until these facts are common knowledge and acknowledged, family law practitioners will have to take the arguments presented here into the courts and convince the judicial system one family at a time.