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# SECOND THOUGHTS ON JOINT CHILD CUSTODY: ANALYSIS OF LEGISLATION AND ITS IMPLICATIONS FOR WOMEN AND CHILDREN\*

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Joanne Schulman\*\*  
Valerie Pitt\*\*\*

There is currently a growing and disturbing national trend away from the traditional sole custody resolution toward awarding custody of children to both parents jointly.<sup>1</sup> This trend is most visible in state legislatures where, in less than three years, almost every state has considered joint custody legislation.<sup>2</sup>

The trend toward joint custody represents a significant change in legal and mental health professional theories regarding child custody. Heretofore, stability and continuity in the child's family environment were the primary factors governing custody determinations.<sup>3</sup> However, under joint custody the continued relationship between the child and the noncustodial parent becomes paramount.<sup>4</sup> This shift in emphasis is remarkable

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1. Freed & Foster, *Divorce in the Fifty States: An Overview as of August 1, 1980*, 6 *FAM. L. REF.* (BNA) 4043, 4047 (1980); see also, Foster & Freed, *Joint Custody: A Viable Alternative*, 15 *TRIAL MAGAZINE*, May 1981, at 26, 27 [hereinafter cited as *Viable Alternative*].

2. See *infra* Section II. This article was originally prepared in July 1981. The status of legislation and statutes has been updated as of March 1982.

3. Annot., 92 *A.L.R.2d* 699 (1950); *Moninger v. Moninger*, 202 *Neb.* 494, 499, 276 *N.W.2d* 100, 104 (1979) (one of the primary objectives after the dissolution of a marriage is to create a stable atmosphere for the children). See also *In re Lang*, 9 *A.D.2d* 401, 193 *N.Y.S.2d* 763, *aff'd*, 7 *N.Y.2d* 1029, 200 *N.Y.S.2d* 71, 166 *N.E.2d* 861 (1960) (upholding traditional regard for stability).

4. Memorandum in support of S. 7964/A. 9369, 203th *Legis.*, 1980 *Sess.* (New York's first joint custody bill) (failed). See also *CAL. CIV. CODE* § 4600(a) (West Supp. 1982) (legislative finding and declaration that it is the public policy of the State to assure

in light of the fact that there have been no reliable studies and little is known of the effects of joint custody on children.<sup>5</sup>

Joint custody is not a new concept. In the past it was viewed with caution and as an exception to the traditional sole custody resolution. Today, legal experts still acknowledge that, because joint custody requires divorced spouses to cooperate and interact on an ongoing basis, only a small percentage of families qualify for it.<sup>6</sup> By contrast, the current joint custody trend seeks legislatively to mandate joint custody as the "norm," if not preferred, resolution. This shift in policy absent studies on the effects of joint custody on children is ill-advised and suspect.

The purpose of this article is to review and analyze joint custody legislation and its implications for future custody litigation. However, discussion of joint custody must include an awareness of who its proponents are and their motivations, as well as the effect it will have on the lives of women who remain the primary caretakers of children, for "[i]n the background of the arguments over joint custody lies the age old 'battle of the sexes' and the current change in lifestyles." That the current joint custody trend is a backlash to the feminist movement and women's struggle for an identity *in addition* to that of mother and homemaker becomes apparent from an analysis of the legislation being introduced and enacted in the name of joint custody.

## I. THE LEGAL MEANINGS OF "JOINT CUSTODY"

The legal term "custody" generally denotes both legal and physical custody. "Legal" custody is the right or authority of a parent, or parents, to make decisions concerning the child's up-

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children "frequent and continuing contact with both parents after the parents have separated or dissolved their marriage"), and CAL. CIV. CODE § 4600(b) (West Supp. 1982) (parent which is more likely to allow "frequent and continuing contact" with noncustodial parent is a factor to be considered in determining which parent is to be awarded sole custody).

5. Foster & Freed, *Joint Custody: Legislative Reform*, 16 TRIAL MAGAZINE, June 1980, at 22, 27 [hereinafter cited as *Legislative Reform*]; J.B. v. A.B., 242 S.E.2d 248, 255 (W. Va. S. Ct. 1978); Williams v. Williams, N.Y.L.J., Feb. 28, 1981, at 10, col. 4 ("[T]here is no definitive evidence to demonstrate that such concepts are generally viable in that it provides the best basis for the health development of the child.").

6. *Viable Alternative*, *supra* note 1, at 31.

7. *Legislative Reform*, *supra* note 5, at 27.

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bringing.<sup>8</sup> Legal custody includes the right to make decisions regarding the child's residency, education, religious training, medical care, discipline, etc.<sup>9</sup> The legal custodian has the right to institute legal action on behalf of the child and to enter into settlements or contracts on behalf of the child.<sup>10</sup> Physical custody is the right to physical possession of the child, i.e., to have the child live with the physical custodial parent. The physical custodian is charged with carrying out the day-to-day responsibilities of childrearing.<sup>11</sup> A legal custodian does not, by definition, have to be the physical custodian in order to retain and exercise decision-making authority or rights.<sup>12</sup>

During the ongoing marriage and prior to a court order, both parents have equal legal and physical custody rights; they stand as co-custodians. Upon divorce or separation, the traditional resolution of child custody matters by courts has been the "sole custody-visitation" order, wherein one parent (the custodial parent) is vested with the legal and physical custody of the child. This parent, while given the exclusive decision-making authority or rights, is concurrently charged with the full responsibilities for the day-to-day care of the child (i.e., physical custody). The other (non-custodial) parent's rights with respect to the child are generally limited to "visitation."<sup>13</sup> That parent's responsibility is basically financial support of the child in the

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8. *Id.* at 24; Nielson, *Joint Custody: An Alternative for Divorced Parents*, 26 U.C.L.A. L. REV. 1084, 1087 (1979).

9. *Burge v. City and County of San Francisco*, 41 Cal. 2d 608, 617, 262 P.2d 6, 16 (1953); *Dodd v. Dodd*, 93 Misc. 2d 641, 647, 403 N.Y.S.2d 401, 408 (1978); See also Abar-ganel, *Shared Parenting After Separation and Divorce: A Study of Joint Custody*, 49(2) AM. J. ORTHOPSYCH. 320 (1979).

10. *Burge v. City and County of San Francisco*, 41 Cal. 2d 608, 262 P.2d 6 (1953).

11. Bruch, *Making Visitation Work: Dual Parenting Orders*, FAM. L. ADVOC., Summer 1978, at 22; Nielson, *supra* note 8.

12. *Trompeter v. Trompeter*, 218 Kan. 535, 545 P.2d 297 (1976). See *infra* note 31 and accompanying text.

13. See, e.g., CAL. CIV. CODE § 4601 (West 1970) and HAWAII REV. STAT. § 571-46 (Supp. 1981) which provide the noncustodial parent with "reasonable visitation rights." See also Rabbino, *Joint Custody Awards: Toward the Development of Judicial Standards*, 48 FORDHAM L. REV. 105, 110 (1979). That this "right of visitation" is solely a "right" and not a "responsibility" was made clear in *Louden v. Olpin*, 118 Cal. App. 3d 565, 173 Cal. Rptr. 447 (1981), *cert. denied*, 102 S. Ct. 601 (1982). The *Louden* court held that a child could not compel her non-custodial father to visit her. Some experts have questioned visitation law that provides for the right to visit without a reciprocal responsibility to visit. See Benedeck & Benedeck, *Post-Divorce Visitation: A Child's Right*, 16 AM. ACAD. CHILD PSYCH. J. 256 (1977); Bruch, *supra* note 11, at 24.

form of court-ordered child support payments.<sup>14</sup> Traditionally, the actual day-to-day care of the child satisfied the mother's responsibility to the child, with fathers alone held legally responsible for their financial support. However, most states now hold both parents equally responsible for the financial support of the child,<sup>15</sup> without ascribing value to the custodial parent's non-monetary contributions.

The rights and responsibilities of parents under a joint custody order are not clearly delineated, as are those under sole custody. The term "joint custody" has been used to describe everything from "joint legal custody" to "joint physical," "shared," "dual," "divided," "alternating" and "split" custody.<sup>16</sup>

#### A. LEGAL AND PHYSICAL JOINT CUSTODY

Although terminology varies, there are basic attributes commonly ascribed to "joint custody." Generally, joint custody is broken down into "legal" and "physical" custody. Joint "legal" custody connotes parents' equal legal rights, or authority, to make the vital decisions affecting the child's life.<sup>17</sup> Joint "physical" custody indicates parents' alternating "physical care and living time with the child,"<sup>18</sup> that is, equal responsibilities.

Since joint custody legislation usually does not distinguish between "joint legal" and "joint physical" custody, one would assume that the term "joint custody" implies equal responsibil-

14. *But see* CHILD SUPPORT—WHERE IS IT?, 7 SEARCH, A REPORT FOR THE URBAN INSTITUTE (1977) which reports that more than two-fifths of the divorced, separated and single women entitled to receive child support have never received any payments. Interestingly, "fathers' rights" groups have publicly acknowledged the withholding of support as an appropriate reaction to an "improper visitation schedule." Russell, *Fathers Have Feelings*, Rochester Time-Union, June 15, 1978, reprinted in *Equal Rights for Fathers of New York State, Inc., Newsletter*, Dec. 1978, at 3.

15. "Today in the majority of states, statutes impose the obligation of child support on both parents, rather than considering it to be the primary obligation of the father." Freed & Foster, *supra* note 1, at 4054.

16. Bruch, *supra* note 11; Ramey, Stender & Smaller, *Joint Custody: Are Two Homes Better Than One?*, 8 GOLDEN GATE UNIV. L. REV. 559, 560 (1979) [hereinafter cited as Ramey]; Woolley, *Shared Custody*, 1 FAM. ADV., Summer 1978, at 6; Annot., 92 A.L.R.2d §§ 1-14 (1950).

17. Fain, *Custody of Children*, 1 CAL. FAM. LAWYER 539, 564 (1962) (Continuing Education of the Bar).

18. Levy & Chambers, *The Folly of Joint Custody*, 3 FAM. ADV., Spring 1981, at 6, 9.

ity for the day-to-day care of the children. In fact, most joint custody court orders and legislation expressly provide the opposite.<sup>19</sup> Legislation in Massachusetts, for example, provided for a presumption "that legal custody . . . shall remain equally with and be equally shared by both parents . . . *independent* of the residential and the shared living arrangements of the minor children."<sup>20</sup> Joint custody "presumption" legislation in Pennsylvania stated that "while actual [joint] physical custody may not be practical or appropriate in all cases, it is intended that both parents have an opportunity to guide and nurture their children, and to meet the child's needs on an equal footing, *beyond the considerations of support or actual physical custody.*"<sup>21</sup>

The equal sharing of responsibility by parents fares no better when joint custody is by court order. While "fathers' rights" groups and other joint custody proponents tout the success of the California joint custody "experience,"<sup>22</sup> Judge Billy Mills of the Los Angeles Superior Court points out that "[t]he bulk of these [joint custody] awards—perhaps 95 percent—specify joint legal custody rather than joint physical custody."<sup>23</sup>

Many supporters of the joint custody concept only define it as joint *legal* custody; joint physical custody is not even envisioned as part of the concept: "Some judges and attorneys are supportive of the concept of joint custody. On closer examination, however, they are still operating under the assumption that there would be a primary home and a primary parent, with liberal visitation rights for the other parent. *This is not joint custody.*"<sup>24</sup>

Joint legal custody is particularly common when courts

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19. See, e.g., N.M. STAT. ANN. § 40-4-9.1(c) (Supp. 1981).

20. H. 1877, S. 2077, 1982 Reg. Sess. (Mass. 1982) (emphasis added). See Appendix B.

21. S. 141, 166th Reg. Sess. (Pa. 1982), (emphasis added). See Appendix B.

22. See Cook, *Joint Custody, Sole Custody: A New Statute Reflects A New Perspective*, 18 COUNCIL. CTS. REV., June 1980, at 31, 33-34; Cook, *California Retires a Formula for Injustice in Child Custody Fights*, L.A. Times, Jan. 6, 1980, pt. v. at 3, col. 1, reprinted in *Equal Rights for Fathers of New York State, Inc., Newsletter*, March 1980, at 12.

23. Dullea, *Weighing the Importance of a Joint Custody Law*, N.Y. Times, April 27, 1981, at C-19, col. 2.

24. Levy & Chambers, *supra* note 18, at 10.

want to avoid labelling the noncustodial parent unfit.<sup>25</sup> While this may be "joint custody in name only,"<sup>26</sup> the legal rights and responsibilities of the parents are affected. Further, confusion surrounding terminology and parents' rights works to the detriment of the child. Children suffer as they become pawns in the hands of parents vying for control over the child.<sup>27</sup> As Levy and Chambers point out, "ultimately, when the first crisis arises, the duplicity of terminology will result in exactly what the courts do not want—a return by the parents for enforcement, interpretation or reversal as a post-decree or appellate matter."<sup>28</sup>

Unfortunately, court resolution of terminology has not been forthcoming. Despite the apparent decision-making authority vested in legal custodians, a California court held that an award of joint custody to both parents with physical custody in the mother constituted an abuse of discretion, since these terms overlapped and became "ephemeral and essentially meaningless."<sup>29</sup> The court found that remand for redetermination of "joint custody" was unnecessary since the "physical custody" award in fact gave the mother "custody."<sup>30</sup> Thus, the effect of the trial court's award was to vest all legal custodial rights in the physical custodian. On the other hand, in acknowledging the significance of a *legal* custody award, courts have also found physical custody not to be determinative. In *Trompeter v. Trompeter*,<sup>31</sup> the court concluded that the legal custodian (the father) exerted adequate decision-making authority over the child to constitute "custody," despite actual physical custody in a non-related third party.

## B. FREQUENTLY USED JOINT CUSTODY TERMS

Once beyond the "legal" and "physical" qualifications of joint custody, ambiguity and confusion again abound. "Alternating,"<sup>32</sup> "shared,"<sup>33</sup> and "dual,"<sup>34</sup> custody are only a few of the

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25. *Dodd v. Dodd*, 93 Misc. 2d 641, 645, 403 N.Y.S.2d 401, 406 (1978); Levy & Chambers, *supra* note 18, at 8-9.

26. *Dodd v. Dodd*, 93 Misc. 2d 641, 645, 403 N.Y.S.2d 401, 406 (1978).

27. Levy & Chambers, *supra* note 18, at 10.

28. *Id.*

29. *Neal v. Neal*, 92 Cal. App. 3d 834, 841, 155 Cal. Rptr. 157, 163 (1979).

30. *Id.*

31. 218 Kan. 535, 545 P.2d 297 (1976).

32. *Bratt, Joint Custody*, 67 Ky. L.J. 271, 282 (1978-1979).

terms used interchangeably with "joint" custody. "Divided" custody often signifies the alternating of sole custody between the parents, where each parent has physical and legal custody of the child for a designated time period.<sup>35</sup> Some of the most common arrangements are a nine and three month division based on the school calendar, or a six month division.<sup>36</sup>

The term "divided" custody has also been applied to a "split" custody arrangement.<sup>37</sup> However, a "split" arrangement generally means that siblings are divided up between the parents and each parent maintains sole custody of the child or children awarded to him or her.<sup>38</sup> Once the "split" has been made, the principles of sole custody govern.

Although some authorities claim that the differences in terminology are basically semantic,<sup>39</sup> these variances produce confusion and obscure the legal rights and responsibilities of parents, to the possible detriment of the child.

## II. SURVEY AND ANALYSIS OF JOINT CUSTODY LEGISLATION

### A. TYPES OF JOINT CUSTODY LEGISLATION

As of March 1982, 24 states have joint custody statutes.<sup>40</sup> Over the past two years, joint custody legislation has been introduced in almost every other jurisdiction,<sup>41</sup> and amendments to strengthen existing joint custody statutes have been introduced in California, Connecticut, Kansas, Kentucky, Massachusetts,

33. Woolley, *supra* note 16.

34. Bruch, *supra* note 11.

35. Cox & Cease, *Joint Custody: What Does It Mean? How Does It Work?* 1, *FAM. ADV.*, Summer 1978, at 10, 11.

36. *Id.*

37. *Id.*

38. A. LINDNEY, *SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS* 14-60 (rev. ed. 1977).

39. Ramey, *supra* note 16. *But see Legislative Reform, supra* note 5, at 23-24 ("The terms 'joint' or 'shared' custody have taken on different meanings from state to state and even in the courts of the same state.").

40. Arizona, California, Connecticut, Florida, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Texas and Wisconsin. See *Joint Custody Statutes*, Appendix A for citations.

41. See *Joint Custody Legislation*, Appendix B for a list of states and full citations.



Minnesota, Nevada, Ohio, Oregon, and Texas.<sup>43</sup> This spate of joint custody legislation in less than three years is surprising when compared with the fact that it has taken more than twenty years for thirty-seven states to move from the "tender years" (or "maternal presumption") doctrine to a gender-neutral "best interests of the child" doctrine.<sup>43</sup>

Most of the current joint custody legislation does not appear problematic at first glance. Proponents usually claim that the legislation merely provides the court with the option of awarding joint custody.<sup>44</sup> However, an examination of the enumerated and implied provisions, and the impact of these provisions on custody disputes, reveals that most of the legislation is at best unnecessary, and at worst inimical to the best interests of children and the parent charged with the day-to-day responsibilities of childraising.

There are four types of joint custody bills: (1) joint custody as an option; (2) joint custody as an option only when parties are in agreement; (3) joint custody upon the request of one party; (4) joint custody "preference" and "presumption."

### 1. *Joint Custody as an Option*

The simplest form of joint custody statute provides that "the order *may* include provision for joint custody of the children by the parties."<sup>45</sup> Under this type of statute, the court is

42. See Appendices A & B for citations.

43. *E.g.*, While the "best interests" standard first appeared in California's custody statute in 1931 (1931 Cal. Stat. ch. 930, § 1), it was not until 1972 that all presumptions were deleted and the "best interests" standard was stated in gender-neutral terms. See CAL. CIV. CODE § 4600 (West Supp. 1982). As of September 1980, all but four states had incorporated the "best interests" standard into their custody laws. 6 FAM. L. REP. (BNA) 4057 (1980).

44. *See, e.g.*, Dullea, *Weighing the Impact of a Joint Custody Law*, N.Y. Times, April 27, 1981, at C-19, col. 2, interpreting the New York joint custody bill as simply providing courts with the "right to award joint custody if both parents agree." However, the bill in fact included a joint custody presumption, court authorization to make awards on either party's request, and consideration of "frequent and continuing contact" with the noncustodial parent as a primary factor in a sole custody determination. In rebuttal, see Cohen, *Mischievous Bill on Joint Custody*, N.Y. Times, May 19, 1981, at A-14, col. 5 (Letters to the Editor).

45. IOWA CODE ANN. § 598.21 (1981) (emphasis added). States with "option" statutes are Connecticut, Hawaii, Kentucky, Maine, Michigan, Minnesota, Montana, North Carolina, Oregon and Pennsylvania. See Appendix A, col. A.1 for citations.

expressly granted the power or authority to award joint custody. Although a few statutes do not include reference to the "best interests" standard, most provide for joint custody as an option "if it appears to the court that joint custody would be in the best interests of the child . . . ."46

The major drawback of the "option" statute is its failure to set adequate limits or standards on the court's power to order joint custody. It permits the court to opt for joint custody as an easy out, as a means of "escap[ing] an agonizing choice, to keep from wounding the self-esteem of either parent . . . to avoid the appearance of discrimination between the sexes."<sup>47</sup>

Under this type of statute, it is possible for a court to force joint custody on parties who are not in agreement or who have not considered the consequences of a joint custody award and arrangement.<sup>48</sup> As most experts agree, opposition by one parent to joint custody is antithetical to the concept itself, if not to the best interests of the child.<sup>49</sup> Joint custody forced upon two hostile parents can create a dangerous environment for a child, such as conflicting directives to physicians with respect to medical care, or to educational institutions regarding education.<sup>50</sup> The child's immediate needs will be prevented from having prompt resolution while emergency decisions await court resolution of the dispute between the joint custodians.

The "option" statute may create more problems than it solves. The lack of directives or guidelines to the court increases the likelihood that joint custody will be ordered in inappropriate cases.

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46. NEV. REV. STAT. § 125.140(1) (1981). See also Hawaii, Iowa, Kentucky, Montana and North Carolina statutes. (citations in Appendix A).

47. *Dodd v. Dodd*, 93 Misc. 2d 641, 403 N.Y.S.2d 401, 402 (1978).

48. See *Adler v. Adler*, 51 A.D.2d 694, 379 N.Y.S.2d 408 (1976) (ordering joint custody although neither party sought it). As two commentators note, "legal edicts cannot force parents to agree on child rearing questions." Levy & Chambers, *supra* note 18, at 8.

49. "Joint custody . . . cannot succeed . . . when imposed upon parents who are irrevocably opposed to it and who refuse to give the cooperation joint custody requires." *Legislative Reform*, *supra* note 5, at 24; see also Miller, *Joint Custody*, 13 FAM. L.Q. 345, 369 (1979).

50. See, e.g., Levy & Chambers, *supra* note 18, at 8.

## 2. *Joint Custody as an Option Only when Parties Are In Agreement*

A few states permit a court to order joint custody only when the parties are in agreement.<sup>51</sup> The Texas statute expressly allows parties to enter into a written agreement providing for joint custody.<sup>52</sup> The court still retains ultimate authority since it must approve the parties' agreement and find that it is in the best interests of the child. However, because parents can agree to joint custody and make such an arrangement for the child without a court order, the court's role as final arbiter becomes meaningless; these parents will have joint custody regardless of a court order. "Many share equal rights and responsibilities in decision-making and care-taking of their offspring, even though legal custody has been granted to one or the other parent. In these instances, the parents have made an emotional and moral commitment to their children . . . ." <sup>53</sup>

Although New York does not have a joint custody statute, case law permits joint custody awards only when the parties are in agreement.<sup>54</sup> In *Braiman v. Braiman*,<sup>55</sup> the New York Court of Appeals reversed the trial court's forced joint custody order. The court noted that, despite a four-year separation, the parties remained unable to contain their "ill-feelings, hatred and disrespect" for each other and had been unable to work out even a limited visitation schedule.<sup>56</sup> Ordering a new hearing, the court held that joint custody is "insupportable when parents are severely antagonistic and embattled."<sup>57</sup>

This "option only when parties agree" statute is the best of the joint custody legislation. It comports with the findings of

51. KANSAS STAT. ANN. § 60-1610(b) (1976); LA. CIV. CODE ANN. art. 146-147 (West Supp. 1982); Mass. Gen. Laws ch. 299, § 31 (1981); OHIO REV. CODE ANN. § 3109.04 (Page 1980); TEX. FAM. CODE ANN. § 14.06(a) (Vernon Supp. 1982); WIS. STAT. ANN. § 247.24(1)(b) (1981). Connecticut's newly amended statute only permits awards of "joint legal custody without awarding joint physical custody where the parents have agreed merely to joint legal custody." 1981 Conn. Pub. Acts 81-407, § 2(b) (to be codified at CONN. GEN. STAT. ANN. § 466-56 (Supp. 1982 & 1982 app. supp.)).

52. TEX. FAM. CODE ANN. § 14.06(a) (Vernon Supp. 1982).

53. Levy and Chambers, *supra* note 18, at 9. See also, Arbarbanel, *supra* note 9.

54. *Braiman v. Braiman*, 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978).

55. 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978).

56. *Id.* at 590, 378 N.E.2d at 1026, 407 N.Y.S.2d at 451.

57. *Id.* at 587, 378 N.E.2d at 1023, 407 N.Y.S.2d at 449.

most experts that these are the only appropriate cases for joint custody.

However, problems can arise even under this type of legislation. A parent who does not believe joint custody is in the child's best interests may be forced into accepting such an "agreement" out of fear that she or he will stand at a disadvantage and lose sole custody in a contested trial. This is particularly a problem when the custody statute requires that the court consider, as a factor in determining sole custody, which parent would provide greater access of the child to the other parent.<sup>58</sup> The parent seeking joint custody appears "friendlier" and would therefore receive preference in the sole custody award.<sup>59</sup>

To date, these statutes and legislation do not require courts to make an inquest into whether the parental joint custody agreement was made knowingly and voluntarily. Because of the potential for court approval of agreements made under duress or coercion, some bar associations have actively opposed this type of legislation:

Moreover, the bill would give a preference to joint custody if the parties so agree, but it does not provide a mandatory inquest into whether the agreement was knowing and voluntary. It is widely reported among the defense bar that husbands are applying, or threatening to apply, for joint or sole custody in order to bargain for a reduction in alimony and/or child support. This bill's preference without mandatory inquest would encourage the use of joint custody applications purely as a tactical weapon.<sup>60</sup>

Another family lawyer noted: "[T]his bill does not provide a mandatory inquest into any agreement wherein the parties had agreed to preference of joint custody and thus, many wives might be forced into giving up sole custody as a result of coer-

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58. *E.g.*, CAL. CIV. CODE § 4600 (West Supp. 1982); MONT. REV. CODE ANN. § 40-4-223(2) (1981). See Appendices A & B, col. B-1.

59. For a discussion of this "catch-22," see "Friendly Parent Provisions," *infra* notes 75-92 and accompanying text.

60. COMMITTEE ON THE FAMILY COURT, NEW YORK COUNTY LAWYERS' ASS'N, REPORT No. 81-A (June 1981) (submitted in opposition to and recommending disapproval of, S. 3255A, A. 4166A, 204th Legis. 1981 Sess. (New York) (available at 14 Vesey St., New York, N.Y. 10007).

cion and/or duress, without the court having knowledge of the same."<sup>61</sup>

### 3. *Joint Custody Upon Request of One Party*

This type of statute allows the court to award joint custody "on either parent's application" or request.<sup>62</sup> Most authorities agree that joint custody is only appropriate and in a child's best interests when both parents agree to such a plan and are capable of joint decision-making regarding the child's welfare.<sup>63</sup> This type of joint custody legislation is antithetical to the above criteria since the court can force joint custody on those parents who are not in agreement or who have not shown themselves capable of co-parenting. Legal edicts cannot force parents to agree on childrearing questions. Nor can the fate of children rest on the possibility of success:

Legal orders cannot be predicated on good intentions, but must take into account existing facts and behaviors. A joint custody award should not rest on the ultimate hope that successful co-parenting may result. When all available evidence indicates that the parents cannot agree that the sun will come up in the morning, much less on the handling of their children, a joint custody order will not change anything.<sup>64</sup>

This type of statute is extremely dangerous when it is coupled with a "friendly parent" provision.<sup>65</sup> The parent requesting joint custody over the opposition of the other parent is given an unconscionable bargaining lever. A parent who does not believe

61. Letter from Lester Wallman, Chair of Committee on Legislation, New York Chapter of the American Academy of Matrimonial Lawyers, to Robert L. Schack, Esq. (May 28, 1981) (regarding New York S. 3255A, A. 4166A) (on file at National Center on Women and Family Law, 799 Broadway, Room 402, New York, N.Y., 10003).

62. See, e.g., CAL. CIV. CODE § 4600.5 (West Supp. 1982); HAWAII REV. STAT. §§ 571.46-.46.1 (Supp. 1982); MICH. COMP. LAWS ANN. § 722.23(5)(a) (Supp. 1982); MONT. CODE ANN. § 40-4-224 (1981); N.H. REV. STAT. ANN. § 458.17 (Supp. 1981); 1981 Pa. Laws, No. 115 (to be codified at PA. CON. STAT. ANN. § 23.1001-.10015). See also legislation introduced in New York and South Carolina, Appendix B, col. A.3.

63. Gaddis, *Joint Custody of Children: A Divorce Decision-making Alternative*, WASH. ST. BAR NEWS, March 1978, at 10, 12-13; O'Neil & Leonoff, *Joint Custody: An Option Worth Examining*, PERCEPTION, Nov.-Dec. 1977, at 28.

64. Levy & Chambers, *supra* note 18, at 8.

65. See *infra* notes 75-92 and accompanying text. See also statutes cited, Appendix A, col. B-1.

joint custody would be in her or his child's best interests is put into a negotiating position of either "accepting" joint custody or risking the loss of custody altogether in a contested trial.

Ironically, a parent who is least fit for the custody and care of a child benefits the most from this type of statute. A parent opposed to joint custody might be more willing to risk loss of sole custody if she or he feels that the other parent is capable of providing sufficient care for the child. However, the parent opposed to joint custody cannot, and probably will not, take that risk when an award of custody to the other parent would not provide minimally sufficient care for the child. Thus, the more "unfit" the parent requesting joint custody, the more bargaining leverage that parent gains under this type of statute.

#### 4. *Joint Custody Preference/Presumption*

Joint custody "preference" statutes<sup>66</sup> prioritize available custody resolutions and mandate that joint custody must be given first consideration by the courts. Under a presumption statute,<sup>67</sup> joint custody is presumed by law to be in the best interests of the child. Thus, sole custody can be ordered only when the "presumption" is rebutted by evidence proving that joint custody is detrimental to the child's best interests. Many of these bills declare joint custody to be the norm, and that it is to be encouraged as an express public policy of the state.<sup>68</sup>

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66. See, e.g., Connecticut, Florida, Idaho, Michigan, Nevada, New Hampshire, and New Mexico statutes (citations at Appendix A). While CAL. CIV. CODE § 4600 (West Supp. 1982) appears on its face to give equal weight to joint custody and sole custody ("to both parents jointly or to either parent"), it has been interpreted and touted as a joint custody "preference." See Cook, *Joint Custody, Sole Custody: A New Statute Reflects a New Perspective*, 18 CONCL. CRS. REV., June 1980, at 32.

67. California was the first state to incorporate a joint custody presumption. See CAL. CIV. CODE § 4600.5 (West Supp. 1982). See also 1981 Conn. Pub. Acts No. 81-402; FLA. STAT. § 61.13(2)(b) (West Supp. 1981); IDAHO CODE ANN. § 32-717B (Supp. 1982); MICH. COMP. LAWS ANN. § 722.23(6a)(2) (Supp. 1981); NEV. REV. STAT. § 125.240 (1981); N.H. REV. STAT. ANN. § 458.16 (Supp. 1981); N.M. STAT. ANN. § 40-4-9.1(A) (Supp. 1981). "Presumption" legislation has been introduced in Alaska, Illinois, Kansas, Maryland, Massachusetts, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina and the District of Columbia. See Appendix B for citations.

68. E.g., CAL. CIV. CODE § 4600(a) (West Supp. 1982) states that it is the state's public policy to assure "frequent and continuing contact with both parents . . . to encourage parents to share the rights and responsibilities of child rearing." See also S. 3255B, A. 4155B, 204th Legis., 1981 Sess. (New York, introduced Feb. 23, 1981) (vetoed by the Governor).

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While the degree of weight accorded joint custody differs under "presumption" and "preference" statutes, the effect of these statutes is basically the same: Joint custody becomes the norm and is assumed to be appropriate for all or most cases. Sole custody is relegated to an exception that is appropriate and to be considered only after the court has decided against joint custody.

To date, most *express* joint custody presumptions are limited to those cases where parents have agreed to joint custody.<sup>69</sup> However, these statutes also include provisions that (1) permit joint custody upon the request of one party and (2) give preference in sole custody to that party requesting joint custody.<sup>70</sup> The practical and combined effect of these two additional provisions is an *implied* joint custody presumption in all cases. Should a parent opposed to joint custody "agree" out of fear of losing custody altogether at trial, this "agreement" then becomes entitled to the *express* presumption.

[A] parent involved in a custody dispute might pressure the other parent to agree to an award of joint custody, not because it is in the child's best interests, but rather to avoid a contest for custody . . . . In such a case, the presumption of joint custody when parents agree might be an undesirable obstacle to the court's determination of what is truly in the child's best interests.<sup>71</sup>

Joint custody presumptions, express and implied, contradict and abrogate the "best interests of the child" standard. The basis of the "best interests" standard is a case-by-case determination where the court's decision is based on the *facts* of the particular case rather than an assumption or "presumption" of what is in the best interests of all children.<sup>72</sup>

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69. See statutes cited *supra* note 67.

70. See "Friendly Parent Provisions," *infra* notes 75-92 and accompanying text.

71. STANDING COMM. REP. NO. 705.8, COMM. ON THE JUDICIARY, 1979-1980 Sess. (Hawaii) (March 10, 1980) (statement of Hon. Betty M. Vitousek, Senior Judge, Hawaii Family Court) (opposing the portion of S. 2419 which would create a joint custody presumption when both parents agree).

72. "In the end, as in every child custody decision, it is the welfare of the children which governs and each case will turn on its individual facts and circumstances." *Dodd v. Dodd*, 93 Misc. 2d 641, 403 N.Y.S.2d 401, 402 (1978).

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The use of "best interests" language in "presumption" statutes is a play on words which avoids confronting the fact that the "best interests" test has in fact been supplanted. As most experts agree, "ideally there should be no presumption for or against joint custody, and each case should be decided on the basis of its . . . facts."<sup>73</sup>

The assumption that joint custody is appropriate or workable in all or most cases is unrealistic. Joint custody, at a minimum, requires that parents are able to communicate and willing to put aside their personal differences. This cannot be *assumed* of most parties who are in the middle or aftermath of divorce.<sup>74</sup>

#### B. ADDITIONAL PROVISIONS: JOINT CUSTODY-RELATED

Most joint custody legislation does not simply grant courts the authority or power to award joint custody. Instead, the legislation usually contains various additional provisions, both related and unrelated to the joint custody issue. Those provisions that are directly related to joint custody serve to increase the pressure on courts to award joint custody. Four of these provisions, that were identified by a survey of all joint custody legislation, will be discussed: "friendly parent" provisions, provisions setting higher evidentiary standards in custody proceedings, requirements that courts must state in writing their reasons for *denying* joint custody, and "modification at any time" provisions.

Many provisions included in joint custody legislation have little or nothing to do with the joint custody issue. These provisions, to a large extent, serve to confuse the pertinent joint custody provisions at issue. In addition, these "unrelated" provisions seem to promote erosion of the custodial parent's rights vis-a-vis the rights of the noncustodial parent. Consequently, four "unrelated" provisions will also be discussed: accountings by the custodial parent, "no removal of child from family home" provisions, "access to records" provisions, and "minimum visitation" requirements.

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73. *Legislative Reform, supra* note 5, at 27.

74. "The experience of most lawyers is that the typical client is embittered during and after divorce and is not prepared to accept the continuing contact with the other parent that joint custody requires." *Legislative Reform, supra* note 5, at 27.



### 1. "Friendly Parent"<sup>76</sup> Provisions

Some joint custody statutes and much of the recent legislation includes a "friendly parent" provision.<sup>76</sup> This provision directs the courts to consider which parent would be more likely to allow "frequent and continuing contact" with the other parent in determining who should be awarded sole custody as an alternative to joint custody.<sup>77</sup> Some statutes and bills include an express legislative declaration or finding that "the public policy of the state is to assure minor children of frequent and continuing contact with both parents" after separation or divorce.<sup>78</sup>

While the concept expressed by the "friendly parent" provision may be important and long-overdue, the practical effect of the provision is to promote the use of the custody issue—and thus, the children—as bargaining tools in divorce. This was, according to James Cook, who drafted the California joint custody statute, the purpose of the "friendly parent" provision: "It's a new twist on an old game called keepaway . . . We've tried to put a new handicap on the game by requiring the court to favor the most cooperative parent."<sup>79</sup>

When only one parent seeks joint custody, the court, pursuant to the "friendly parent" provision, may favor or give preference to that parent in a sole custody award. The potential for abuse is clear: "Joint custody will become an issue for barter, a bargaining lever to be used to compel financial and other capitulation by the parent who believes that the child's best interests will be served by stability and continuity and not by shuttling back and forth."<sup>80</sup> The provision encourages and promotes bad faith requests for joint custody, made solely for the purpose of bartering on other issues.

75. This is the author's term.

76. See statutes in California, Florida, Idaho, Michigan, Montana, Nevada, New Hampshire and Pennsylvania (citations in Appendix A); and legislation in Alaska, District of Columbia, Illinois, Maryland, Missouri, New York, New Jersey, and South Carolina (citations in Appendix B).

77. CAL. CIV. CODE § 4600(a) (West Supp. 1982); see also MONT. CODE ANN. § 40-4-223(2) (1981); and legislation in New Jersey, New York, and South Carolina (citations in Appendix B).

78. CAL. CIV. CODE § 4600(a) (West Supp. 1982); see also, MONT. CODE ANN. § 40-4-223(2) (1981). See generally Appendix B, col. B-1.

79. Dullea, *supra* note 44.

80. Cohen, *supra* note 44. See also Levy & Chambers, *supra* note 18, at 8-9.

Parents who believe joint custody is not in their child's best interests will either "agree" to joint custody or "bargain." Few will risk going into court against a parent seeking joint custody. Children suffer either way—by an unworkable joint custody arrangement or by the custodial parent's "bartering away" of financial resources necessary for the child's support.

Finally, the court's power to determine custody based on the child's "best interests" is circumvented. Instead, the court will be faced with a *fait accompli*: a joint custody "agreement" that it must accept<sup>81</sup> or a property settlement agreement that does not adequately provide for the child's financial well-being.<sup>82</sup>

Battered women's advocates have strongly opposed "friendly parent" provisions because of the dangers they present to clients and their children. The impact of this provision on battered women cannot be discounted when one realizes how serious and widespread wife abuse is in our society: "[H]alf of all wives will experience some form of spouse-inflicted violence during their marriage, regardless of race or socioeconomic status."<sup>83</sup>

Advocates point out that "[T]he presumption that continuing contact with the [abusive] father is in the best interests of the child . . . is to discount the harmful effects such a role model may have on both the individual and on the perpetuation of violence in our system."<sup>84</sup>

The "friendly parent" provision also guarantees the batterer continuing contact with his victim. As advocates point out, divorce and separation do not end battering. Studies reveal that violence often increases when the abusive spouse realizes he is

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81. See *supra* text accompanying notes 66-74.

82. Courts are generally bound by the parties' written property settlement agreements. See, e.g., CAL. CIV. CODE § 4800(a) (West Supp. 1982).

83. REPORT OF NATIONAL LEAGUE OF CITIES AND THE UNITED STATES CONFERENCE OF MAYORS, cited in LANGLEY & LEVY, WIFE BEATING — THE SILENT CRISES 4 (1977). See generally, MARTIN, BATTERED WIVES 10-22 (1976); Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RIGHTS L. REP. 8, 11-13 (1978).

84. *Hearings on A. 1471, Comm. on the Judiciary, Law, Public Safety and Defense*, 1980 Sess. (New Jersey, 1980) (testimony of Diane Palladino, Director, Women Helping Women, Abused Women's Services, Middlesex County, N.J.) (July 24, 1980) [hereinafter cited as *N.J. Hearings*]. The testimony is available from the National Center on Women and Family Law, 799 Broadway, Room 402, New York, N.Y. 10003.

losing control over his victim.<sup>85</sup> Thus, “[w]omen in this situation may not be cooperative in ‘assuring frequent and continuing contact’ . . . . [T]he abusive parent may use this [provision] to provide the court with evidence as to why he or she should be granted sole custody, thus placing the children in the care of an abusive parent.”<sup>86</sup>

Absent child or wife abuse, legal and mental health professionals are beginning to recognize that children need meaningful and continuing relationships with both parents after divorce or separation.<sup>87</sup> “Friendly parent” provisions may reflect these concerns. While fathers’ rights groups insist that this need can only be fulfilled by a joint custody order,<sup>88</sup> legal and mental health professionals point out that “meaningful association with both parents is common under the traditional sole custody-subject to visitation formula”<sup>89</sup> where courts award substantial visitation rights to the noncustodial parent.<sup>90</sup> Parents who are committed to sharing the raising of their children and are emotionally able to co-parent, do not require a joint custody order to do so. In fact, in two studies of children in joint custody arrangements,<sup>91</sup> none of the families studied had or were operating under joint custody court orders; all orders were for sole custody-visitiation. As two legal experts have noted: “In a sense, therefore, some of the agitation for joint custody really involves status-seeking as legal custodian (or co-custodian); or ‘one-upmanship’ . . . .”<sup>92</sup>

## 2. *Evidentiary Standards*

Custody determinations in most states are based upon a

85. UNIV. OF NEW HAMPSHIRE, FAMILY VIOLENCE RESEARCH PROGRAM, FORCED SEX IN MARRIAGE: A PRELIMINARY REPORT 1 (1980) (D. Finkelor & K. Yllo).

86. *N.J. Hearings*, *supra* note 84 (testimony of Ellen Koteen, Vice President, New Jersey Coalition for Battered Women).

87. *Viable Alternative*, *supra* note 1, at 24. *But see*, GOLDSTEIN, FREUD & SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

88. *A Voice for Divorced Fathers*, Equal Rights for Fathers of New York State, Inc., Newsletter, May-June, 1980.

89. *Viable Alternative*, *supra* note 1, at 27.

90. This is, in fact, what some supporters of the joint custody concept envision as a joint custody arrangement! *See supra* note 24 and accompanying text.

91. Arbarbanel, *Shared Parenting After Separation or Divorce: A Study of Joint Custody*, 49(2) *AM. J. ORTHOPSYCH.* 320 (1979); Steinman, *The Experience of Children in a Joint Custody Arrangement: A Report of a Study*, 51(3) *AM. J. ORTHOPSYCH.* 403 (1981).

92. *Viable Alternative*, *supra* note 1, at 31.

"best interests" standard.<sup>93</sup> The court does not have to go to the extreme of finding one parent unfit in order to award custody to the other parent. This standard permits the parents and court to concentrate on the child's needs rather than the parents' faults.<sup>94</sup>

However, some joint custody legislation includes provisions that mandate standards of proof beyond "best interests."<sup>95</sup> A party opposing joint custody, under this legislation, must meet the higher standard of proof in order to prevail. That joint custody may simply not be the best arrangement for the child is insufficient to avoid the joint custody order.

Presumption and preference statutes are the typical example of these new and higher proof standards. However, legislation in Michigan and Massachusetts contemplated even heavier proof standards to avoid a joint custody order. The recently enacted Michigan statute<sup>96</sup> provides for mandatory joint custody when the parents have agreed to this arrangement. The court can only avoid a joint custody order if "clear and convincing evidence" establishes that joint custody is not in the child's best

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93. "A divorce court . . . should . . . take into consideration all the circumstances of each particular case and dispose of the children in such manner as may appear best calculated to secure for them proper care and attention as well as education. In other words, the welfare of the child[ren] is the chief consideration.

Annot., 24 AM. JUR. 2D 783 (1966). Many states, by statute, delineate the factors to be considered under the "best interest" standard. *E.g.*, MICH. COMP. LAWS ANN. § 722.23(6) (Supp. 1981).

94. Court opinions make it clear that interests of the child is a separate issue from parental fitness. An award of custody to one parent does not legally imply that the other is unfit. Both attorneys and psychotherapists need to help parents understand that custodial awards are for the benefit of the child and not the parents, and that no stigma attaches to being noncustodial. The order is rather a demonstration of concern of the needs of the children.

Levy & Chambers, *supra* note 18, at 8-9.

95. *E.g.*, CAL. CIV. CODE § 4600.5 (West Supp. 1982) (presumption); MICH. COMP. LAWS ANN. § 722.23(6a) (Supp. 1981) (presumption *and* "clear and convincing evidence"). See also legislation in Massachusetts (H. 2631, S. 6172 (gross unfitness); H. 420, S. 2059 ("unfit parent"); H. 1877, S. 2077 (presumption)); New Jersey (A. 407 (gross unfitness of parent)); New York (A. 2385 (presumption)); Oregon (H. 2538 (presumption)); South Carolina (H. 3248 (presumption)). For citations, see Appendices A and B, col. B-1.

96. MICH. COMP. LAWS ANN. § 722.23(6) (Supp. 1981).

interests. The use of "best interests" language is misleading. Proof that a sole custody order would be the best or even a better arrangement for the child may be inadequate to overcome the "clear and convincing evidence" standard. The difficulty of overcoming this standard of proof was illustrated in *In re Abdullah*<sup>97</sup> where an Illinois appellate court found that a man's conviction for murdering his wife (the child's mother) was not "clear and convincing evidence" of depravity or unfitness so as to deny him custody of his child.<sup>97.1</sup>

In Massachusetts, three joint custody bills were introduced in the 1980 session, each enunciating a different burden of proof. H. 2631/S. 6172 mandated joint custody where both parties consented unless there was proof that one parent was "so grossly unfit as to cause danger to the child." H. 420/S. 2059 provided for mandatory joint custody (regardless of parties' agreement) unless the party opposing the arrangement could show the other parent to be "unfit." S. 1962, sponsored by the Boston Bar Association, proposed that joint custody be ordered so long as there was no finding or showing that the order went *against* the child's best interests. The heavy burden of proving "gross unfitness," or even the lesser "unfitness," places the parent opposing joint custody at a severe disadvantage in the courtroom. Courts are reluctant to label a parent unfit, especially since most cases involve disputes between two legally "fit" parents.<sup>98</sup>

Most of these heavier proof standards have been restricted (at least until now) to those cases where parents have agreed to joint custody. The underlying purpose of these provisions is probably to restrict courts from interfering with parents' wishes. However, there are no express provisions included in these bills which allow—or force—courts to examine agreements to see if one of the parties agreed under duress or fear of losing cus-

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97. 80 Ill. App. 3d 1144, 400 N.E.2d 1063 (1980), *rev'd* 85 Ill. 2d 300, 423 N.E.2d 915 (1981).

97.1 Ed. note: *In re Abdullah* was reversed on appeal, the Illinois Supreme Court finding that the husband's conviction for murder was ample evidence of depravity, and that placing the child in his custody was against the child's best interest. 85 Ill. 2d 300, 423 N.E.2d 915 (1981).

98. Bratt, *supra* note 32; Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 127 (1978).

tody.<sup>99</sup> The likelihood that such duress or coercion will occur increases where the statute includes a "friendly parent" provision.<sup>100</sup>

Additionally, it is unclear what factors will permit the court to disregard parents' joint custody agreements. What weight will the child's wishes have?<sup>101</sup> What weight will be given to psychiatric, probation, medical or school reports that disapprove of the joint custody arrangement? Under most of these higher proof standards, such factors may not be sufficient to upset the joint custody agreement.

Finally, these higher proof standards may foretell a trend away from the "best interests" doctrine and case-by-case determination in custody disputes. The high degree of weight courts are forced to give parental agreements under this type of legislation constitutes a radical change in custody law. Heretofore, parental contracts regarding their children have been unenforceable *per se*, although, of course, subject to consideration by courts. Under these new and higher proof standards, parental contracts, regardless of the circumstances under which they are entered or their impact on the children involved, will be entitled to extraordinary weight and preference. The court's traditional position as *parens patriae*,<sup>102</sup> is, in effect, undermined.

Some legal and mental health professionals and parents may view this trend as a positive step toward removing custody from the adversarial system. However, such a view fails to acknowledge that "bargaining" over custody will remain, regardless of whether a court is involved. And, women and children, who do not yet have equal bargaining power with men in this society, will suffer. This was well-illustrated in a 1978 New York joint custody case<sup>103</sup> where the court pointed out:

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99. See *supra* notes 58-61 and accompanying text.

100. See *supra* note 75 and accompanying text.

101. See, e.g., *Beck v. Beck*, 86 N.J. 480, 432 A.2d 63 (1981) (upholding a trial court's sua sponte forced joint custody order not requested by either parent and opposed by the children).

102. The role of the court (or state) as *parens patriae* stems from early English Common Law and is based on the state's paramount interest in protecting children within its jurisdiction and acting for their welfare. H. CLARK, *LAW OF DOMESTIC RELATIONS* §§ 17.1, 17-7 (1968).

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

Dr. Dodd has been uncompromising and Mrs. Dodd, while a participant in the frequent acrimonious quarrels, has acquiesced to her husband's demands in large measure out of fear that her husband's threats to remove the children, to prove her an abusive mother and to withhold support, could be carried out with impunity . . . . In the Dodd family, the father has dominated the mother, has forced his views on her, threatened her and belittled her.<sup>104</sup>

### 3. *Mandatory Writing Required for Denial of Joint Custody*

Joint custody "presumption legislation"<sup>105</sup> usually includes the additional mandate that "[i]f the court declines to enter an order awarding joint custody pursuant to this subdivision, the court shall state in its decision the reasons for denial of an award of joint custody."<sup>106</sup> This provision further encourages courts to prefer joint custody over sole custody, and establishes a record for appeal which, in effect, limits the court's discretion in custody decisions. This provision underscores an assumption that joint custody is appropriate in all or most cases and therefore the court does not need to explain its decision when joint custody is ordered.

Courts do not generally have to explain their reasons for custody decisions. All that is required, or stated in most cases, is that the court has found the custodial parent "fit" and that the particular award is in the child's best interests.

Requiring courts to explain their reasons and the factors they considered in making *all* custody decisions has several benefits. Custody law will become clearer and more uniform as "factors" become better articulated. When lawyers and parents are aware of the factors the court will consider, settlement is encouraged and extensive and frivolous litigation avoided.

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104. *Id.* at 647-48, 650, 403 N.Y.S.2d at 408, 501.

105. See Joint Custody Preference/Presumption, *supra* notes 66-74 and accompanying text.

106. CAL. CIV. CODE § 4600.5(a) (West Supp. 1982) (emphasis added). See statutes in Connecticut, Idaho, Montana, Nevada, New Hampshire; and legislation in Alaska, District of Columbia, Maryland, Missouri, New Jersey, New York, Pennsylvania and South Carolina (citations at Appendices A and B). *But see* MICH. COMP. LAWS ANN. § 722.23(6a) (Supp. 1981).

However, mandatory written explanation only when joint custody is denied, rather than in all custody decisions, merely pressures the court to opt for joint custody as the easy solution, rather than the best solution, to a difficult problem. Given the backlog of cases in court, judges may choose the easy way out: Joint custody avoids another written statement. Judges may opt for joint custody, even when they believe it is not in a child's best interest, in order to avoid further disruption to the child by continued litigation and appeals. While joint custody is an appealing concept, it should not, as Judge Shea in *Dodd v. Dodd*<sup>107</sup> pointed out, be used to escape an agonizing choice or decision. This writing requirement, by applying only when the court denies joint custody, encourages "escape" rather than careful deliberation and decision.

Finally, it would be more realistic to require courts to explain in writing why they order joint custody, rather than why they deny it.<sup>108</sup> Joint custody requires, at the very least, two parents who are not hostile to each other and who are able to communicate and make joint decisions. Since it can hardly be assumed that this describes most spouses at the time of divorce, it should not be assumed when children are involved.<sup>109</sup>

#### 4. *Modification "At Any Time" Provisions*

Several joint custody statutes and bills include a provision that "any order for the custody of the minor child or children . . . may . . . be modified at any time to an order of joint custody."<sup>110</sup> As with most of the additional provisions contained in joint custody legislation, the "modification at any time" encourages and promotes the joint custody resolution over that of sole custody. Specifically, parents with sole custody orders are en-

107. 93 Misc. 2d 641, 643, 403 N.Y.S.2d 401, 404 (1978).

108. See, e.g., MICH. COMP. LAWS ANN. § 722.23(6a)(1) (Supp. 1981) (requiring the court to "state on the record the reasons for granting or denying a request" of joint custody by either parent).

109. "The belief that parents who are otherwise unwilling to cooperate will somehow be inspired to do so because of joint custody reflects magical thinking." Benedek & Benedek, *Post-Divorce Visitation, A Child's Right*, 16 AM. ACAD. CHILD PSYCH. J. 256, 257 (1977).

110. HAWAII REV. STAT. § 571.45.1(d) (Supp. 1981); see also statutes in California, Connecticut, Nevada, New Hampshire, New Mexico, Pennsylvania, and legislation in District of Columbia, Maryland, Missouri, New Jersey, New York and South Carolina (see Appendices A and B, Col. B-4, for citations).



couraged to return to court for a modification to joint custody. The provision constitutes a radical change in custody law because it abrogates the "change of circumstances" standard traditionally required for custody modification.

The "change of circumstances" doctrine, with its attendant proof burdens, seeks to protect and promote the child's welfare by preserving the stable home environment created since the original decree. The doctrine seeks to minimize continued and frivolous custody litigation by requiring the party seeking modification to prove both that a change has occurred since the original decree, and that the change renders the original arrangement and order no longer in the child's best interests.<sup>111</sup> Thus, "changes" which do not operate to the detriment of the child do not theoretically constitute a "change in circumstances" sufficient to justify a custody modification. Factors constituting a change in circumstances include, but are not limited to, changes in the custodial parent's mental and moral fitness,<sup>112</sup> religious factors,<sup>113</sup> the child's physical environment,<sup>114</sup> the child's preference,<sup>115</sup> one party's residence (e.g., a move out of state),<sup>116</sup> remarriage by one of the parties,<sup>117</sup> and alienation of the child's affection from the noncustodian by the custodial parent.<sup>118</sup>

The unfettered power to challenge custody orders is in direct conflict with the deference courts give to original custody decrees.<sup>119</sup> By removing the burden of proving the existence of any "change" factors, the "modification at any time" provision

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111. *Gilmore v. Gilmore*, 530 P.2d 480 (Mont. S. Ct. 1975).

112. *Goto v. Goto*, 52 Cal. 2d 118, 338 P.2d 450 (1959); *Ashwell v. Ashwell*, 135 Cal. App. 3d 211, 286 P.2d 983 (1955).

113. *Sullivan v. Sullivan*, 141 Conn. 235, 104 A.2d 898 (1954).

114. *Phillips v. Phillips*, 48 Cal. App. 2d 404, 119 P.2d 736 (1940). *But see*, *Anderson v. Wilcox*, 163 Neb. 883, 81 N.W.2d 314 (1957).

115. *Allen v. Allen*, 200 Or. 678, 268 P.2d 358 (1954). *But see*, *Strickler v. Strickler*, 57 Ill. App. 2d 286, 206 N.E.2d 720 (1965).

116. *Duncan v. Duncan*, 293 Ky. 762, 170 S.W.2d 22 (1943); *Freed v. Freed*, 309 N.Y. 668, 128 N.E.2d 319 (1955).

117. *Stewart v. Stewart*, 41 Cal. 2d 447, 260 P.2d 44 (1953); *McGuire v. McGuire*, 190 Kan. 524, 376 P.2d 908 (1962).

118. *Rutstein v. Rutstein*, 324 S.W.2d 760 (Mo. Ct. App. 1959); *Reynolds v. Reynolds*, 45 Wash. 2d 394, 275 P.2d 421 (1954).

119. *Bistany v. Bistany*, 66 A.D.2d 1026, 411 N.Y.S.2d 728 (1978); *Underwood v. Underwood*, 38 Or. App. 213, 589 P.2d 1172 (1979); *Doane v. Doane*, 330 So. 2d 753 (Fla. Dist. Ct. App. 1976).

enables the noncustodian to subject both the custodian and child to endless and potentially frivolous litigation.

Significantly, the "modification at any time" provision may only apply to modifications which seek joint custody.<sup>120</sup> Where joint custody is originally ordered and one parent seeks a modification to sole custody, the traditional "change of circumstances" standard may still apply. It may therefore be extremely difficult to modify a joint custody order if, for example, one of the joint custodians is not carrying out his or her responsibilities or the parents are unable to agree. Additionally, if the original joint custody order was forced<sup>121</sup> or made at a time when the parents were hostile, continued hostility and disagreement may not constitute a "change in circumstances" sufficient to terminate an unworkable joint custody arrangement.

### C. ADDITIONAL PROVISIONS: NON-RELATED TO JOINT CUSTODY

#### 1. *Accounting by Custodial Parent*

Joint custody legislation in two states expands the rights of the noncustodial parent under a *sole custody* order. The noncustodial parent is given the unfettered power to challenge the custodial parent's use of support payments and, in effect, her or his care of the child. Oregon's joint custody statute permits the court "at any time" to "require an accounting from the custodian with reference to the use of the money awarded" for child support.<sup>122</sup> New York's 1981 joint custody legislation included a similar "accounting at any time" provision.<sup>123</sup> Neither provision requires that there be evidence of misuse of funds or neglect of the child. The accounting may be requested for a good reason, a bad reason or no reason at all. Furthermore, there is no provision regarding payment of attorneys' fees to defend such actions.

This type of accounting provision creates the potential for abuse and harassment of the custodial parent. It invites viola-

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120. *E.g.*, HAWAII REV. STAT. § 571.46.1(d) (Supp. 1981). See *supra* note 110 and accompanying text. *But see* N.M. STAT. ANN. § 40-4-9.1(B) (Supp. 1981) (permitting modification of a joint custody order upon the motion of one parent).

121. See "Joint Custody Upon Request of One Party," *supra* notes 62-65 and accompanying text.

122. OR. REV. STAT. § 107.105 (1981).

123. H. 2385, 204th Legis., 1981 Sess. (New York) (died); A. 4166, S. 3255, 204th Legis., 1981 Sess. (New York) (vetoed). See Appendix B.

tion of court orders of support and will produce litigation over small sums of money withheld and then disputed. Few custodial parents have the time or expertise to become "accountants" able to document each expenditure for the child. A noncustodial parent seeking to minimize or evade a support order can repeatedly petition the court for an accounting. The custodial parent, faced with incurring attorneys' fees to defend the action, or worse, losing custody because she cannot document or "justify" expenditures, may agree to waive support rights (or arrearages) to end the harassment and legal proceedings.

Moreover, this type of provision contradicts the court's underlying assumption that the parent who has been awarded custody of the child is "fit" and will therefore adequately and properly provide for the child's needs. Accounting provisions presume the opposite.

Accounting "at any time" provisions do not serve children's best interests. Seventy-five percent of child support orders and obligations are never met.<sup>124</sup> Five out of six AFDC families have an absent father, two-thirds of whom are categorized as separated or divorced.<sup>125</sup> The increasing poverty of women and their children has been attributed to the failure of fathers to meet their support obligations: "Researchers have cited the growth in poverty rates for families headed by females and the shrinkage in poverty rates for those headed by males, mainly because women have been forced to support children alone and men have been relieved of this duty."<sup>126</sup> Accounting provisions only add to the ease with which child support obligations are already avoided, and further relegate children of divorce to poverty lifestyles.

## 2. "No Removal of Child From Family Home" Provision

A joint custody bill introduced in New Jersey included a provision that:

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124. *Women and Poverty, Women's Issues in Legal Services Practice*, 14 CLEARINGHOUSE REV. 1035, 1069-70 (1980-1981).

125. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1978, at 361.

126. Seal, *A Decade of No-Fault Divorce: What it Has Meant Financially for Women in California*, 1 FAM. ADV., Spring 1979, at 10, 15.

Unless the parents agree upon arrangements for physical custody of the child, the child may not be removed from the dwelling place which is the family home at the time one of the parents moves to another dwelling place to live separately, until the issue of custody of the child is determined as provided by law.<sup>127</sup>

Under this provision, pre-decree removal of the child could jeopardize the right to custody by the removing parent. Additionally, the provision could be used by a parent to gain an advantage in a custody dispute by, for example, filing for custody while the child and other parent are away on vacation or following a weekend or overnight trip.

While the "no removal" provision has little nexus to joint custody issues, it has serious ramifications for battered women. As battered women's advocates in New Jersey testified:

Our experience has been that many women have remained in the home to continue to be subjected to beatings because they have been misinformed by police that they cannot take their children with them.<sup>128</sup>

.....  
The vast majority of battered women will simply not leave home—or even consider leaving their home—if they cannot take their children with them. Equally frightening is the prospect of a parent not being permitted to remove his or her children from the home when the other parent is physically, psychologically, or sexually abusing one or more of the children. To enact this section [A. 1471] as law will cause the deaths of battered women and children.<sup>129</sup>

The battered woman is placed in a "catch 22" by this type of provision: To leave could jeopardize her custody case since she would be violating the provision; to stay in a dangerous and

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127. A. 1471, A. 407, 198th Legis., 1980-1981 Sess. (N.J.). See also Bill No. 4-424, § 2(b), 1981 Sess. (District of Columbia) (1982) (prohibiting removal "unless an immediate threat to the children exists, as evidenced by a past record of child abuse"). See *infra* note 142 and accompanying text.

128. See *N.J. Hearings, supra* note 84.

129. See *N.J. Hearings, supra* note 84 (testimony of Ellen Koteen, Vice President, New Jersey Coalition for Battered Women).

violent home may imply that she is unable to care for and protect herself and her children.<sup>130</sup>

The purpose of this "no removal" provision is unclear. It may represent an attempt to prevent child-snatching. If so, it is overbroad. A provision prohibiting removal from the jurisdiction, rather than the family home, would address the child-snatching problem without also endangering the safety and well-being of abused wives and children.

The provision may instead be an attempt to minimize the disruption of children's lives (school, neighborhood, friends) caused by the splitting of their parents and family. It is questionable, however, whether keeping children in a home with two hostile and "warring" parents is any less disruptive than a move to another residence.

Interestingly, the "no removal" provision seems to contradict one of the basic tenets of joint custody. Joint custody emphasizes and, in fact, depends upon "flexibility" and the constant moving of children between two homes.<sup>131</sup> However, the "no removal" provision reverts to the traditional emphasis on the child's need for stability and continuity of a one home environment.<sup>132</sup>

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130. The California Supreme Court recently upheld the permanent removal of a child from both parents where the father had been convicted of abusing the child. Despite evidence in the record that the mother and daughter maintained an intimate and caring relationship, the court found the mother passive and dominated by her husband, thus unable to protect the child from the father's continuing abuse. As the dissent pointed out:

A finding that the mother was "too passive" in her relationship with her husband and the use of the finding to justify severance of the parent-child relationship raises some serious questions in a pluralistic society where the relationship between husband and wife may vary according to cultural background.

*In re Angelia P.*, 28 Cal. 3d 908, 927, 623 P.2d 198, 209, 171 Cal. Rptr. 637, 648 (1981).

131. Proponents claim that joint custody offers "flexibility" to parents by, for example, relieving the sole custodian of the full-time job of childrearing. Advocates further contend that this "flexibility" factor more than compensates for the disruption and confusion joint custody causes in the child's environment and should be exploited to the fullest. See, e.g., Roman, *The Disposable Parent*, CONCL. CRTS. REV., Dec. 1977, at 1.

132. These factors have always been paramount under the "best interests" test. "Stability in the human factors affecting a child's emotional life and development is essential." Annot., 92 A.L.R.2d 699 (1950).

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### 3. *Access to Records Provision*

Several joint custody statutes and bills provide noncustodial parents with unrestricted access to all "records and information" pertaining to their children.<sup>133</sup> This may include medical, dental, school and psychiatric records. This provision is, in part, unnecessary since, under federal law,<sup>134</sup> noncustodial parents are already guaranteed access to their children's school records.

This provision is extremely dangerous to battered women, children, and those persons and agencies who assist them such as families and shelters. There are no standards for limiting an abusive parent's right of access to these records. By exercising this right, an abusive noncustodial parent will be able to locate the child's residence and school, as well as the custodial parent's address of employment. Because the "right to access" is usually mandatory, it is unclear if the court may, in its discretion, limit access where there is evidence or a history of battering or child abuse.<sup>135</sup> The "record access" provision in New York's 1981 joint custody bill<sup>136</sup> was strongly opposed by battered women's advocates.<sup>137</sup> As a result, the bill was amended to deny access to noncustodial parents where protection orders were in effect, or to parents whose rights had been terminated or who had been adjudicated abusive or neglectful.<sup>138</sup> However, as advocates pointed out, these amendments were not only insufficient to protect victims, but exhibited the Legislature's lack of understanding and consideration of the problems faced by battered women and

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133. "[A]ccess to records and information pertaining to a minor child, including but not limited to medical, dental and school records, shall not be denied to a parent because such parent is not the child's custodial parent." CAL. CIV. CODE § 4600.5(g) (West Supp. 1982) (emphasis added). See statutes in Florida, Idaho, Massachusetts, Montana, Nevada, New Hampshire; and legislation in Alaska, Connecticut, Illinois, Missouri, New Jersey and New York. (citations in Appendices A and B, col. C-4).

134. The Family Education Rights and Privacy Act of 1974, Pub. L. No. 93-380, tit. V, § 513(a), 88 Stat. 571 (codified at 20 U.S.C. § 1232g (1976)).

135. See Pennsylvania's new statute, 1981 Pa. Laws No. 115 § 10(b), which expressly grants the court discretionary power to deny access, and § 10(c) which forbids the court from ordering "that the address of a shelter for battered spouses and their dependent children or otherwise confidential records of a domestic violence counselor be disclosed to the defendant or his counsel or any party to the proceeding."

136. S. 3255, A. 4166, 204th Legis., 1981 Sess. (New York) (vetoed).

137. NEW YORK STATE GOVERNOR'S TASK FORCE ON DOMESTIC VIOLENCE, COALITION FOR ABUSED WOMEN, INC., LEGAL ACTION ON DOMESTIC VIOLENCE (1980).

138. S. 3255B, A. 4166B, 204th Legis. 1981 Sess. (New York) (introduced Feb. 23, 1981) (amending N.Y. DOM. REL. LAW § 240).

children.

Although the [amendments] represent an attempt to cure an obvious defect allowing access to a shelter or safe home, it requires an adjudication and does not contemplate the myriad of cases where no formal abuse, neglect or parental termination or protective order proceeding has occurred. Specifically it ignores the many child abuse and neglect cases opened by child protective agencies and not brought to court because of inartful collection of necessary evidence, or a lack of staff and services. Further, it does not include the many abuse cases where children recant their initial testimony on the discovery that their removal from the home will be the outcome and therefore the abuse petitions are dismissed. Moreover, the new protective orders amendment fails to consider violent families where orders have lapsed, been dismissed on consent, were never requested . . . . Thus access to the shelter location is still permitted in all of the above instances.<sup>139</sup>

The practical effect of record-access provisions is confused by the extremely broad scope of information available under them. The provision makes accessible not only "records," but any "information pertaining to the child."<sup>140</sup> However, the language of the provision makes clear that a noncustodial parent's right to access applies only if the denial of access is based *solely* on status, i.e., that he or she is a noncustodial parent. Thus, the right of access guaranteed by this provision does not, and should not, apply when denial is based on other recognized reasons or rights of custodial parents and children, such as constitutional rights of privacy or statutory rights (e.g., physician-patient privilege).

#### 4. "Minimum Visitation" Requirement

South Carolina's 1980 joint custody legislation included the provision that "[i]n no case may the courts grant any less access to the child to the noncustodial parent than forty-eight hours

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139. Letter from Meg O'Regan-Cronin, Esq., Executive Director, Coalition for Abused Women, Inc. to Governor's Counsel's Office (June 10, 1981) (recommending veto of joint custody bill).

140. See *supra* note 133.

per week, one-half of all school holidays and forty-five days during the summer unless there is a *proven threat of physical harm* to the child."<sup>141</sup>

This provision constitutes a complete abandonment of the "best interest" standard. It cannot be presumed that such a rigid formula is in most or every child's best interests. Because the provision only permits limitation of visitation when there is a threat of *physical* harm to the child, those children who are psychologically and emotionally abused by the noncustodial parent will be subject to the visitation prescribed by the provision.<sup>142</sup> Further, the requirement that threats of physical harm be "proven" does not take into account the difficulty of proving child abuse.<sup>143</sup> The only "proof" in many cases will be the custodial parent's allegations of abuse or *threats* of abuse. Since this parent is the moving party seeking limitations on visitations these allegations may be viewed by the court as suspect.<sup>144</sup>

The provision, by permitting deviation only when there is a threat of physical abuse to the child, fails to recognize that it is not in a child's best interests to have frequent and continuing contact with a parent who abuses the other parent.<sup>145</sup> Husbands who batter their wives are, under the provision, *guaranteed* frequent and continuing access to their victims. The statute expressly forbids courts from exercising their discretion so as to protect battered wives and their children.

Under this legislation, the custodial parent's needs and schedule become subservient to the dominant visitation rights of

141. H. 3248, 1979-1980 Sess. (South Carolina) (emphasis added). See Appendix B.

142. Generally, courts have the power to limit or suspend visitation when it endangers the child's physical, mental or emotional health. See e.g., WIS. STAT. § 247.245 (1981).

143. See *supra* note 139 and accompanying text.

144. In a 1977 Louisville, Kentucky case, Mimi Jolicour lost custody of her five-year-old daughter to her ex-husband when she sought to terminate his visitation rights because of evidence he was sexually molesting the child. Besides Ms. Jolicour's testimony, there was supporting testimony by two doctors who treated the child. Not only did the judge not believe Ms. Jolicour, but he transferred sole custody to the father and forbade Ms. Jolicour from visiting or communicating with the child. Henry, *Father Molests Child; Gets Custody*, *OFF OUR BACKS*, March 1980; *Who's Minding Father?*, PLEXUS, Dec. 1980 at 9, col. 1.

145. See *supra* text accompanying note 84. Battered women's advocates describe children of violent homes as having "the feelings of instability and insecurity of children who have sustained trauma." *N.J. Hearings*, *supra* note 84.



the noncustodial parent. No provision is included whereby the custodial parent can force the noncustodial parent to exercise these "rights," yet interference with this rigid schedule by the custodial parent may result in a loss of custody. Nor is the economic impact of this provision addressed in the legislation. If the noncustodial parent lives or moves out of state, the custodial parent may have to share the costs of this "right."

This provision is an extreme example of legislators' unprecedented concern for, and protection of, the rights of the noncustodial parents—over and above the needs and best interests of either the child or the parent responsible for the day-to-day care of the child.

### III. CONCLUSION

Legal and mental health authorities generally concur that joint custody is only appropriate when both parents want the arrangement and are able to cooperate in joint decisionmaking. Such cases are in the minority, and those parents will have an informal joint custody arrangement regardless of court order. Thus, the current legislation is directed at, and would largely affect, those parents who are not in agreement. These are the very cases which experts agree are unsuitable for joint custody and where, in fact, it would be detrimental to the child's best interests.

Ostensibly, joint custody equalizes the rights and responsibilities of childraising between parents. This is not, however, the intent or effect of the legislation now being introduced across the country. Instead, this legislation serves to expand the rights of the parent who is not responsible for the day-to-day job of raising children. The non-caretaking parent is given "equal" rights or control when he/she does not contribute equally to the day-to-day care and support of the child, either pre-divorce or post-divorce. Further, forced *legal* joint custody only serves to interfere with the primary caretaker's ability to make the decisions needed to carry out her responsibilities to the child.

The current joint custody trend is, in effect, an attack on women who have been, and wish to continue to be, the primary caretakers of their children. Their past assumption of the daily

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care and responsibility for children is denied any value or credit.

The current joint custody trend will not lead to equality between the sexes. Sexism does not end when women lose rights or lose custody of their children. Forced joint custody, like forced sterilization and forced pregnancy, is a denial of women's right to control their lives.

## APPENDIX A: JOINT CUSTODY STATUTES (as of March 1982)

STATE/CITE	Date Enacted	A. Type of Joint Custody Statute				B. Additional Provisions: Joint Custody-Related				C. Additional Provisions: Non-Related to Joint Cust.				Other	
		1.	2.	3.	4.	1.	2.	3.	4.	1.	2.	3.	4.		
ARIZ. REV. STAT. ANN. § 25-332 (1981)	1981					x*									
Superior Ct. of Maricopa has adopted guidelines permitting joint custody (6 FLR 2383).															
CAL. CIV. CODE §§ 4600, 4600.5 (West Supp. 1982)	1980			x	x	x	x	x	x				x		mod/term of joint custody order upon request of one or both parents
CONN. GEN. STAT. ANN. § 46b-56(a) (Supp. 1982 & 1982 app. Supp.)	1981	x	x*		x		x	x							*court may order joint legal only per parties agreement
FLA. STAT. ANN. § 61.13(2)(b) (West Supp. 1982)	eff. 7/1/82				x	x	x*						x		*shared custody unless finding of detriment
HAWAII REV. STAT. § 571-46, to 46.1 (Supp. 1981)	1980	x		x										x	mod/term of joint custody order upon request of one parent or court's own motion
IDAHO CODE ANN. § 32-717 (Supp. 1982)	1982				x	x	x*	x						x	*preponderance of evidence standard
IOWA CODE ANN. § 598.21.6 (West 1981)	1977	x													
KAN. STAT. ANN. § 60-1610(b) (Supp. 1981)	1979		x												"both parties have equal rights and responsibilities"
KY. REV. STAT. ANN. § 403.270(3) (Supp. 1980)	1980	x													
LA. CIV. CODE ANN. art. 146-147 (West Supp. 1982)	1982		x*												*parties must both be domiciled in state
ME. REV. STAT. ANN. tit. 19, §§ 214, 752 (West Supp. 1981)	1981	x													
Mass. Gen. Laws ch. 299, § 31 (to be codified at MASS. GEN. LAWS ANN. § ch. 206, § 31)	1981		x*					x*					x		*awards permitted in accordance with parents' agreement unless finding of not in best interests.
MICH. COMP. LAWS ANN. § 722.23(6a) (Supp. 1981)	1980	x		x	x	x	x	x							child support provisions
MINN. STAT. ANN. §§ 518.003, 518.17 (West Supp. 1982)	1981	x													"ability of parents to cooperate" factor
MONT. CODE ANN. § 40-4-222 to -225 (1981)	1981	x		x		x		x						x	

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NEV. REV. STAT. § 125.140 (1981)	1981				x	x	x	x	x			x	
N.H. REV. STAT. ANN. § 458.17 (Supp. 1981)	1981			x	x	x	x	x	x			x	
N.M. STAT. ANN. § 40-4.9.1 (Supp. 1981)	1981				x		x	x	x				joint legal without joint physical
N.C. GEN. STAT. § 50-13.2(b) (Supp. 1981)	1967	x											
OHIO REV. CODE ANN. § 3109.04 (Page Supp. 1981)	1981		x*										*10 months trial period required
OR. REV. STAT. § 107.105(1) (1981)	1977	x								x			
1981 Pa. Laws No. 115 (to be codified at PA. CON. STAT. ANN. § 23.1001-.10015 (Purdon)	1982	x		x		x		x	x			x*	*prohibits disclosure of battered women's shelter addresses and counselors
TEX. FAM. CODE ANN. § 14.06 (Vernon 1974 & Supp. 1982)	1979		x										
WIS. STAT. § 247.24(1)(b) (1981)	1978		x										joint custody "means equal rights and responsibilities"

KEY:

- A. TYPE OF JOINT CUSTODY STATUTE (See text pp. 545 to 553).
  - 1. Option
  - 2. Option Only When Parties in Agreement
  - 3. Upon Request of One Party
  - 4. Preference/Presumption
- B. ADDITIONAL PROVISIONS: JOINT CUSTODY-RELATED (See text pp. 553 to 563).
  - 1. "Friendly Parent" Provision
  - 2. Evidentiary Standards
  - 3. Mandatory Writing for Denial of Joint Custody
  - 4. Modification "At Any Time" Provision
- C. ADDITIONAL PROVISIONS: NON-RELATED TO JOINT CUSTODY (See text pp. 563 to 570).
  - 1. Accounting Provisions
  - 2. "No Removal" of Child From Home
  - 3. Access to Records Provisions
  - 4. "Minimum Visitation" Requirement

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## APPENDIX B: JOINT CUSTODY LEGISLATION (Status as of March 1982)

STATE	BILL #	SESSION	STATUS	A. Type of Joint Custody Statute				B. Additional Provisions: Joint Custody-Related				C. Additional Provisions: Non-Related to Joint Cust.				OTHER (explain)
				1.	2.	3.	4.	1.	2.	3.	4.	1.	2.	3.	4.	
AK	HB 210, Rogers-Hess	1981- 1982	P			x	x	x	x	x				x		
ARK	HB 52, Sherman	1981	D			x									Tax exemption provision	
CA	AB 1706, Kapilof	1982	P			x	x*	x	x	x				x	*Joint legal and joint physical only	
CA	AB 2202, Imbrecht	1982	P			x	x	x	x	x	x				Joint legal/physical defined	
CA	AB 2197, Imbrecht	1980 1981	D	x			x	x	x	x						
CA	AB 3480, Egeland	1980 1981	D												Legal residence designation	
CT	SB 123, O'Leary	1981	F			x	x		x	x						
CT	HB 6464, Moaley	1981	F			x	x		x							
CT	SB 963, Smith	1981	F			x	x		x							
Dist. Col.	AB 4-424 Ray	1982	P				x	x	x*	x	x		x	x	x	*detriment finding; no child support when joint custody ordered
FLA	HB 1440, Gordon	1980	D	x												
FLA	HB 1543*	1981	D	x											*Reported at 7 FLR 2074	
IDAHO	SB 1262, Judic. Com.	1982	D			x	x		x	x				x	Joint legal without joint physical	
IL	HB 0665, Catania	1981 1982	P		x											
IL	HB 3405, Young	1980	F				x	x						x		
KAN	HB 2706 (Am.) Judic. Com.	1982	P				x		x							

APPENDIX B (Continued)

STATE	BILL #	SESSION	STATUS	A. Type of Joint Custody Statute				B. Additional Provisions: Joint Custody-Related				C. Additional Provisions: Non-Related to Joint Cust.				OTHER (explain)	
				1.	2.	3.	4.	1.	2.	3.	4.	1.	2.	3.	4.		
KY	HB 448, Guenther	1982	P	x*													***Joint custody shall be liberally granted**
LA	HB 1691, Byrnes	1980 1981	F	x	x												
MD	SB 388, Boozer	1982	P			x	x	x	x	x	x						
MD	HB 1296, Hughes	1982	F				x	x	x								Joint legal without joint physical
MD	HB 1418	1982	F	x			x										
MD	SB 177/950, Welsh	1982	F				x	x	x								
MD	SB 755, Curran	1982	F	x			x										*Joint legal only
MD	HB 352, Shapiro	1980 1981	D	x													
MA	H 3013, Hicks	1982	P			x*											*Joint legal only
MA	H 2631/S6172 Denucci	1980	F				x		x								
MA	H 1877/S2077 Vigneau	1980	F				x		x								
MA	H4201/S2059, LeClair	1980	F				x		x								
MN	SB 1569, Johnson	1982	P				x*										*Reported at 8 FLR 2278
MO	HB 44, Christian	1981	D	x				x									Joint legal without joint physical
MO	HB 1132, Christian	1982	P	x		x	x	x	x*	x	x						*Detriment finding
MO	SB 683, Wiggins	1982	P				x	x	x*	x					x		*Detriment finding

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## APPENDIX B (Continued)

STATE	BILL #	SESSION	STATUS	A. Type of Joint Custody Statute				B. Additional Provisions: Joint Custody-Related				C. Additional Provisions: Non-Related to Joint Cust.				OTHER (explain)
				1.	2.	3.	4.	1.	2.	3.	4.	1.	2.	3.	4.	
NJ	A 122, Visotchky	1982	P				x	x	x	x	x		x	x		
NJ	A 407, Paolella	1980 - 1981	F				x	x	x				x			
NJ	A 1471, Visotchky	1980 - 1981	F				x		x	x	x		x	x		
NY	S 8464/A 10721, Lasher	1982	Vetoed			x	x	x	x*	x				x		**"Reasonable and just" standard
NY	A 4166/S 3255, Lasher	1981	Vetoed	x		x	x	x	x	x	x	x		x		
NY	A 9369/S 7964, Lasher	1980	D	x		x	x	x	x			x		x		
NY	H 2385, Behan	1981	D			x	x	x	x	x	x			x		
OH	HB 1076, Boyle	1979 - 1980	F				x		x							
OR	HB 2538, Richards	1979 - 1980	D				x		x							
PA	S 141, Fumo	1980 - 1981	D				x	x	x	x				x		
PA	HB 2394, McKelley	1980	D				x		x	x	x			x		Joint legal without joint physical
PA	S 1282, Gekas	1980	D			x	x	x	x	x	x					
RI	SB 1023, Costello	1979	D				x		x							
SC	H 3248, Bradley	1979 - 1980	D				x	x	x	x	x					x
TX	HB 1508, Gilley	1981	D	x												Child support provisions
WA	SB 3246, Haley	1981 - amend 1982	P		x											Court must specify residence of child

**KEY:**

- A. TYPE OF JOINT CUSTODY STATUTE (See text pp. 545 to 553).**
  - 1. Option
  - 2. Option Only When Parties in Agreement
  - 3. Upon Request of One Party
  - 4. Preference/Presumption
- B. ADDITIONAL PROVISIONS: JOINT CUSTODY-RELATED (See text pp. 553 to 563).**
  - 1. "Friendly Parent" Provision
  - 2. Evidentiary Standards
  - 3. Mandatory Writing for Denial of Joint Custody
  - 4. Modification "At Any Time" Provision
- C. ADDITIONAL PROVISIONS: NON-RELATED TO JOINT CUSTODY (See text pp. 563 to 570).**
  - 1. Accounting Provisions
  - 2. "No Removal" of Child From Home
  - 3. Access to Records Provisions
  - 4. "Minimum Visitation" Requirement

**"STATUS KEY:"**

- P—pending
- D—died in committee
- F—failed

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