

1987

Whose Child is it Anyway? Awarding Joint Custody Over the Objection of One Parent

Daniel R. Mummery

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Family Law Commons](#)

Recommended Citation

Daniel R. Mummery, *Whose Child is it Anyway? Awarding Joint Custody Over the Objection of One Parent*, 15 Fordham Urb. L.J. 625 (1987).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol15/iss3/3>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

WHOSE CHILD IS IT ANYWAY? AWARDING JOINT CUSTODY OVER THE OBJECTION OF ONE PARENT

"The only absolute in the law governing custody of children is that there are no absolutes."¹

I. Introduction

Today approximately one of every two marriages ends in divorce,² or results in "some form of marital breakdown."³ The divorce rate has unquestionably been growing at a rapid pace in recent years. In 1960, there were 2.2 divorces for every 1,000 Americans; by 1982 that figure had more than doubled to 5.0.⁴ More than one million divorces now occur in this country every year,⁵ of which a significant number involve children.⁶

More often than not, a court awards custody of the children to one parent, and grants visitation rights to the other.⁷ Since "[t]he

1. *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 93, 432 N.E.2d 765, 767, 447 N.Y.S.2d 893, 895 (1982).

2. See Weber, *Alone Together: The Unromantic Generation*, N.Y. Times, Apr. 5, 1987, § 6 (Magazine), at 25; Otten, *Deceptive Picture: If You See Families Making a Comeback, It's Probably a Mirage*, Wall St. J., Sep. 25, 1986, at 1, col. 1. In the late 1970's, experts estimated that one of every three marriages ended in divorce. See M. ROMAN & W. HADDAD, *THE DISPOSABLE PARENT* 48 (1978) (emphasis added) [hereinafter *DISPOSABLE PARENT*].

3. H. Keshet, *Part-time Fathers: A Study of Separated and Divorced Men Who are Highly Involved with Child Rearing* 4 (1977) (available at *Fordham Urban Law Journal* office) [hereinafter *Part-time Fathers*].

4. See U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 1986, 79. The rate for New York State in 1982 was 3.6 divorces per 1,000 residents. *Id.* at 81.

5. See *id.* at 79. In 1982, the most recent year for which statistics are available, 1,170,000 marriages ended in divorce. *Id.*

6. *Id.* Of the 1,170,000 divorces in 1982, see *supra* note 5, 1,108,000 involved children. See *id.*

7. See Freed & Foster, *Family Law in the Fifty States: An Overview*, 16 FAM. L.Q. 289, 290 (1983); see also R. GARDNER, *FAMILY EVALUATION IN CHILD CUSTODY LITIGATION* 20 (1982); Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C. DAVIS L. REV. 523, 525-26 (1979) [hereinafter *Joint Custody of Children*].

essence of custody is the companionship of the child and the right to make decisions regarding his [or her] care and control, education, health, and religion,"⁸ the custody determination is absolutely crucial to the subsequent lives of parents and children.

In recent years, the practice of routinely awarding custody to one parent with visitation rights to the other "has come under attack."⁹ One proposed alternative is an arrangement known as "joint custody."

Although courts have not yet precisely defined joint custody, the term embodies two separate concepts—physical custody and legal custody.¹⁰ Joint legal custody generally means that all decisions regarding the child's health, education and welfare are made by the parents jointly,¹¹ while joint physical custody usually means that physical care of the child is shared by both parents equitably, though not necessarily equally.¹² Custody arrangements vary, and courts may award joint legal custody without joint physical custody.¹³ Alternatively, joint physical custody may be ordered without joint legal custody.¹⁴ For purposes of this Note, discussion and analysis is limited to joint *legal* custody.

Although joint custody has been criticized on several grounds,¹⁵ the concept is now firmly established in most states.¹⁶ At present,

8. *Lerner v. Superior Court*, 38 Cal. 2d 676, 681, 242 P.2d 321, 323 (1952).

9. Miller, *Joint Custody*, 13 FAM. L.Q. 345, 355 (1979) [hereinafter *Joint Custody*].

10. See *Beck v. Beck*, 86 N.J. 480, 486-87, 432 A.2d 63, 65-66 (1981); 1 J. ATKINSON, MODERN CHILD CUSTODY PRACTICE § 6.02, at 356 (1986) [hereinafter CHILD CUSTODY]. The author stated that "[a]lthough the statutes of most states refer to the custodial arrangement as 'joint custody,' some states refer to the custodial arrangement as 'shared custody.'" *Id.* at 356 n.6 (citations omitted). The *Beck* court cautioned that "[j]oint custody must be distinguished from 'alternating' custody (an arrangement in which parents alternate both physical and legal custody) and 'split' custody (in the case of two or more children, each parent is awarded sole custody of one or more of the children)." 86 N.J. at 486 n.2, 432 A.2d at 66 n.2. (citations omitted).

11. See *Braiman v. Braiman*, 44 N.Y.2d 584, 589, 378 N.E.2d 1019, 1020, 407 N.Y.S.2d 449, 450 (1978); *Odette R. v. Douglas R.*, 91 Misc. 2d 792, 795, 399 N.Y.S.2d 93, 96 (Family Ct. N.Y. County 1977). Decisions are made jointly because parents share the legal "authority for and the responsibilities in raising their children." Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739, 740 (1983).

12. See, e.g., CAL. CIV. CODE § 4600.5(d)(3) (West Supp. 1987); IND. CODE ANN. § 31-1-11.5-21(f) (Burns Supp. 1986).

13. CHILD CUSTODY, *supra* note 10, at 357.

14. *Id.*

15. See *infra* notes 56-63 and accompanying text.

16. See *infra* note 17.

thirty-one states have joint custody statutes.¹⁷ New York statutory law does not expressly provide for an award of joint custody;¹⁸ the courts have, however, inferred the power to make such an award from several sections of the Domestic Relations Law,¹⁹ provided that such an award is in the best interests of the child.²⁰

17. See, e.g., ALASKA STAT. §§ 25.20.060(c), 25.20.090, 25.20.100 (1983); CAL. CIV. CODE §§ 4600(b)(1), 4600.5 (West 1983 & Supp. 1987); COLO. REV. STAT. § 14-10-123.5 (Supp. 1984); CONN. GEN. STAT. ANN. § 46b-56a (West 1986); DEL. CODE ANN. tit. 13, § 701(a) (1981); FLA. STAT. ANN. § 61.13(2)(b)(2) (West 1985 & Supp. 1987); HAW. REV. STAT. § 571-46(1) (1985); IDAHO CODE § 32-717B (1983); ILL. ANN. STAT. ch. 40, paras. 602.1, 610(b) (Smith-Hurd Supp. 1987); IND. CODE ANN. § 31-1-11.5-21(f) (Burns Supp. 1986); IOWA CODE ANN. §§ 598.1(4), 598.41 (West Supp. 1987); KAN. STAT. ANN. § 60-1610(a)(4)(A) (Supp. 1986); KY. REV. STAT. ANN. § 403.270(3) (Michie/Bobbs-Merrill 1984); LA. CIV. CODE ANN. art. 146(A)(1) (West Supp. 1987); ME. REV. STAT. ANN. tit. 19, § 752(2)(C) (Supp. 1986); MASS. ANN. LAWS ch. 208, § 31 (Law. Co-op. Supp. 1987); MICH. COMP. LAWS ANN. § 722.26a (West Supp. 1987); MINN. STAT. ANN. §§ 518.003[3](b), (d), 518.17[2] (West Supp. 1987); MISS. CODE ANN. § 93-5-24(1)(a)-(c) (Supp. 1987); MO. ANN. STAT. § 452.375 (Vernon 1986 & Supp. 1987); MONT. CODE ANN. §§ 40-4-222 to -224 (1985); NEV. REV. STAT. ANN. §§ 125.480(1), 125.480(3)(a), 125.490 (Michie 1986); N.H. REV. STAT. ANN. § 458:17(II), (III) (1983); N.M. STAT. ANN. § 40-4-9.1 (Supp. 1986); N.C. GEN. STAT. § 50-13.2(b) (1984); OHIO REV. CODE ANN. § 3109.04(A), (D) (Anderson 1986); OKLA. STAT. ANN. tit. 12, § 1275.4B (West Supp. 1987); OR. REV. STAT. § 107.105(1)(a) (1985); PA. STAT. ANN. tit. 23, § 5304 (Purdon Supp. 1987); TEX. FAM. CODE ANN. §§ 14.03(a), 14.06(a) (Vernon 1986); WIS. STAT. ANN. § 767.24(1)(b) (West 1981).

18. *Dodd v. Dodd*, 93 Misc. 2d 641, 644, 403 N.Y.S.2d 401, 403 (Sup. Ct. N.Y. County 1978).

19. See N.Y. DOM. REL. LAW §§ 70, 81 (McKinney 1977); *id.* § 240 (McKinney 1986). Section 240 provides:

In any action or proceeding brought . . . to obtain . . . the custody of . . . any child . . . the court must give such direction, . . . for the custody, care, education and maintenance of any child . . . as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child. In all cases there shall be no prima facie right to the custody of the child in either parent.

Id. Section 70 provides that "the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly." *Id.* § 70 (McKinney 1977).

Given this broad statutory mandate, the courts have the authority to fashion custody orders that will best serve the particular circumstances of each case. Because, under section 240 of the Domestic Relations Law, the court may award custody to either parent, by implication the court may award custody to both parents. See *id.* § 240 (McKinney 1986). In addition, because section 81 of the Domestic Relations Law states that each parent is a joint guardian of his or her child, *id.* § 81 (McKinney 1977), and no statute expressly forbids joint custody, the courts have held that they may award joint custody. See, e.g., *Odette R. v. Douglas R.*, 91 Misc. 2d 792, 795, 399 N.Y.S.2d 93, 95 (Family Ct. N.Y. County 1977).

20. See, e.g., *New York ex rel. Wasserburger v. Wasserburger*, 42 A.D.2d 93, 94, 345 N.Y.S.2d 46, 47-48 (1st Dep't 1973), *aff'd*, 34 N.Y.2d 660, 311 N.E.2d

Although the New York courts have acknowledged their implied authority to award joint custody, they remain reluctant to do so.²¹ Not surprisingly, the courts are even more reluctant to order joint custody when one parent objects to such an arrangement.²² This is attributable, at least in part, to the "essentially negative and pessimistic"²³ tenor of the New York Court of Appeals' decision in *Braiman v. Braiman*,²⁴ the court's major pronouncement on the subject of joint custody. Under *Braiman*, joint custody is viewed "primarily as a voluntary alternative"²⁵ for amicable parents, and hence, is feasible only when the parents are in agreement.²⁶

This Note submits that such an approach is unduly restrictive and thus inhibits full consideration of joint custody as an alternative to the traditional award of sole custody. Part II of the Note discusses the historical background of child custody and explains the emergence

651, 355 N.Y.S.2d 580 (1974); *Perotti v. Perotti*, 78 Misc. 2d 131, 132, 355 N.Y.S.2d 68, 70 (Sup. Ct. Queens County 1974); *Odette R. v. Douglas R.*, 91 Misc. 2d 792, 795, 399 N.Y.S.2d 93, 96 (Family Ct. N.Y. County 1977).

21. See *Perotti v. Perotti*, 78 Misc. 2d 131, 132, 355 N.Y.S.2d 68, 70 (Sup. Ct. Queens County 1974); Eisenberg, *New York, New Jersey Rulings Compared in Joint Custody Proceedings*, N.Y.L.J., Aug. 19, 1982, at 3, col. 2 [hereinafter *Rulings Compared*]; see also Meyer & Schlissel, *Difficult Area for Judges—Child Custody in Divorces*, N.Y.L.J., Sept. 17, 1982, at 1, col. 3 [hereinafter *Difficult Area*]. For a discussion of attempts to overcome this judicial reluctance by legislation, see *infra* note 136.

22. See *infra* note 98. A parent may object to joint custody because he or she genuinely believes that sole custody is best for the child. As discussed below, depending on the circumstances, joint custody may still be feasible and indeed, in the best interests of the child. This Note does not address, however, the situation in which one party resists joint custody because the parents simply cannot agree on how to raise their child.

23. Eisenberg, *Joint Custody Proceedings, Judicial Rulings Compared*, N.Y.L.J., Aug. 18, 1982, at 1, col. 3 [hereinafter *Proceedings*]. The opinion, authored by Chief Judge Breitel, stated:

There are no painless solutions. In the rare case, joint custody may approximate the former family relationships more closely than other custodial arrangements. It may not, however, be indiscriminately substituted for an award of sole custody to one parent. Divorce dissolves the family as well as the marriage, a reality that may not be ignored.

Braiman v. Braiman, 44 N.Y.2d 584, 591, 378 N.E.2d 1019, 1022, 407 N.Y.S.2d 449, 452 (1978). *Contra Beck v. Beck*, 86 N.J. 480, 488 n.3, 432 A.2d 63, 66 n.3 (1981) ("[w]e reject the notion that divorce dissolves the family as well as the marriage") (citation omitted).

24. 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978).

25. *Id.* at 589, 378 N.E.2d at 1021, 407 N.Y.S.2d at 451 (citation omitted).

26. See Schulman & Pitt, *Second Thoughts on Joint Child Custody: An Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U.L. REV. 539, 548 (1982) [hereinafter *Second Thoughts*].

of joint custody as a result of perceived inadequacies inherent in the sole custody arrangement.²⁷ Part III discusses different approaches taken by various jurisdictions to the controversial issue of awarding joint custody over the objection of one parent,²⁸ and contains an analysis of *Beck v. Beck*,²⁹ the leading case upholding such an order. Part IV takes the position that because under certain circumstances³⁰ joint custody will serve the best interests of the child,³¹ the New York courts must adopt a flexible approach that will ensure full consideration of joint custody, even when one party objects. Finally, this Note recommends that New York join the majority of states that recognize that under proper circumstances, courts may award joint custody over the objection of one parent.³² Such an approach is supported by the following: (1) research indicates that some parents are ultimately able to separate their marital problems from their parental duties;³³ (2) one parent should not have an automatic veto power over joint custody;³⁴ and (3) a joint custody award may help reduce parental conflict in the long run.³⁵

II. The Emergence of Joint Custody

Historically, trends in the law of child custody have reflected existing social and economic conditions.³⁶ Hence, "[c]hanges in societal attitudes toward children's rights and changing economic conditions have resulted in changes in the legal approach to child custody."³⁷

At early common law in England, for example, courts considered the father's right to the custody of his minor children superior to the mother's as a consequence of his obligation to protect, maintain and educate his children.³⁸ The presumption that a father was entitled

27. See *infra* notes 57-74.

28. See *infra* notes 75-161 and accompanying text.

29. 86 N.J. 480, 432 A.2d 63 (1981).

30. See *infra* notes 145-61 and accompanying text.

31. See *infra* note 164 and accompanying text.

32. See *infra* note 83 and accompanying text.

33. See *infra* notes 171-85 and accompanying text.

34. See *infra* notes 196-99 and accompanying text.

35. See *infra* notes 186-95 and accompanying text.

36. See *Joint Custody*, *supra* note 9, at 351-52.

37. Bratt, *Joint Custody*, 67 Ky. L.J. 270, 280 (1978-79) [hereinafter Bratt].

38. See *State v. Richardson*, 40 N.H. 272, 273 (1860); Foster & Freed, *Life With Father*: 1978, 11 FAM. L.Q. 321, 322 (1978). One commentator has pointed out that "[i]n spite of this presumption in favor of the father with respect to child

to custody carried over to the United States, and in the 1800's the rule in many states was that a father had a right to custody unless he was demonstratively unfit.³⁹ As societal roles of men and women changed, however, the courts and state legislatures began to reject this paternal preference.⁴⁰

In the early 1900's, a number of states enacted legislation that modified the old common law rule in favor of fathers,⁴¹ and a new rule, the "tender years doctrine," was born.⁴² This doctrine created a preference for mothers that was equally as strong as the previous preference for fathers.⁴³ Eventually, a presumption arose that a mother was more fit to assume the custody of the child.⁴⁴ The maternal preference persisted as the dominant rule into the 1970's.⁴⁵ Ultimately, however, because the tender years doctrine was premised

custody, . . . until the end of the nineteenth century, joint custody was awarded as a matter of course when both parents desired custody." Note, *A Presumption in Favor of Awarding Joint Custody: A Proposal for Legislative Change in New York*, 48 ALB. L. REV. 1073, 1076 (1984) [hereinafter *Proposal for Change*].

39. See, e.g., *Commonwealth v. Briggs*, 33 Mass. (16 Pick.) 203, 205 (1834); *People ex rel. Rhoades v. Humphreys*, 24 Barb. 521, 523 (N.Y. Sup. Ct. Cayuga County 1857).

40. *Joint Custody*, *supra* note 9, at 351-52. The author has stated:

Numerous factors have been cited to explain these transitions in nineteenth century custody laws. Urbanization and industrialization forced fathers to work away from the home and often left child rearing to the mother. The development of the science of psychology demonstrated that children need psychological as well as financial support, and that good mothering produces emotionally healthy children. Finally, the movement for women's rights coincided with these transitions. It is likely that all of these factors played some role in loosening—and ultimately reversing—the presumption favoring paternal custody.

Id.

41. Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 428-29 (1976-77) [hereinafter *Tender Years*].

42. *Id.* at 425. The tender years doctrine has been defined as a "blanket judicial finding of fact, a statement by a court that, until proven otherwise by the weight of substantial evidence, mothers are always better suited to care for young children than fathers." State *ex rel. Watts v. Watts*, 77 Misc. 2d 178, 180, 350 N.Y.S.2d 285, 287 (Family Ct. N.Y. County 1973).

43. Bratt, *supra* note 37, at 281 n.43.

44. See, e.g., *Cavalleri v. Cavalleri*, 37 Misc. 2d 620, 622, 236 N.Y.S.2d 304, 307 (Sup. Ct. Kings County 1962). This presumption in favor of the mother stemmed from her presumed "love and concern for her offspring [which the courts believed were] the very endowments of her nature." *Id.*; see also *Tender Years*, *supra* note 41, at 425.

45. Note, *Fathers and Families: Expanding the Familial Rights of Men*, 36 SYRACUSE L. REV. 1265, 1273 (1986) [hereinafter *Fathers*]; see also *Joint Custody*, *supra* note 9, at 353.

on the assumption that the mother would remain at home while the father was at work,⁴⁶ courts could not justify it once the traditional roles of husband as provider and wife as homemaker began to change.⁴⁷ Accordingly, by the 1980's, most states had eliminated this maternal preference.⁴⁸

Today, the "best interest of the child" standard is the near-universal legal basis for determining custody.⁴⁹ Under this standard, the court, acting as *parens patriae*,⁵⁰ must render a decision in the best interests of the child.⁵¹

Traditionally, application of the best interest standard has resulted in awards of sole custody.⁵² If both parents are fit and desire custody of the child, the court will determine which parent is better qualified to act as the sole custodian.⁵³ The custodial parent not only retains

46. DISPOSABLE PARENT, *supra* note 2, at 36-37; Scott & Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 460-61 (1984) [hereinafter *Rethinking Joint Custody*].

47. *Fathers*, *supra* note 45, at 1274 n.71. The author has observed that "[c]hanges in sex roles, as well as equal protection claims brought by fathers, have been responsible for the rejection of the tender years doctrine" (citing *State ex rel. Watts v. Watts*, 77 Misc. 2d 178, 180-82, 350 N.Y.S.2d 285, 289-90 (Family Ct. N.Y. County 1973)). The *Watts* court concluded that "[a]part from the question of legality, the 'tender years presumption' should be discarded because it is based on outdated social stereotypes rather than on rational and up-to-date consideration of the welfare of the children involved." *Id.* at 181, 350 N.Y.S.2d at 288.

48. *Fathers*, *supra* note 45, at 1274 n.71 (list of states that have rejected the doctrine); see also Freed & Foster, *Family Law in the Fifty States: An Overview*, 17 FAM. L.Q. 365, 416 (1984).

49. See *Joint Custody*, *supra* note 9, at 354.

50. See *Lincoln v. Lincoln*, 24 N.Y.2d 270, 272, 247 N.E.2d 659, 660, 299 N.Y.S.2d 842, 843-44 (1969). *Parens patriae*, " 'literally parent of the country,' refers traditionally to [the] role of state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). In standing as *parens patriae*, the trial judge "is to put himself in the position of a 'wise, affectionate and careful parent' and make provision for the child accordingly." *Finlay v. Finlay*, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925) (citation omitted).

51. See *Nehra v. Uhlar*, 43 N.Y.2d 242, 246, 372 N.E.2d 4, 5, 401 N.Y.S.2d 168, 169 (1977). Though uniformly adopted, the best interest standard has been criticized as indeterminate and amorphous. See, e.g., Bratt, *supra* note 37, at 270; Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 229 (Summer 1975); see also *Difficult Area*, *supra* note 21, at 4, col. 3 ("present system for determining custody of children of divorce is essentially no system at all").

52. See Note, *Joint Custody Awards: Towards the Development of Judicial Standards*, 48 FORDHAM L. REV. 105, 105 (1979) [hereinafter *Judicial Standards*].

53. See, e.g., *Dodd v. Dodd*, 93 Misc. 2d 641, 648, 403 N.Y.S.2d 401, 406 (Sup. Ct. N.Y. County 1978). Such a determination is, in the words of one commentator, "a perplexing problem that does not lend itself easily to solution by application of law or legal precedent." Bratt, *supra* note 37, at 271.

physical custody of the child, but also the primary decision-making authority.⁵⁴ A sole custody award is almost always accompanied by a grant of visitation rights to the non-custodial parent.⁵⁵

In recent years, the practice of generally awarding sole custody to one parent, with visitation rights to the other, has been sharply criticized.⁵⁶ Critics of sole custody have pointed to several problems inherent in such an arrangement.⁵⁷

First, since sole custody awards place substantial limitations upon the noncustodial parent's physical access to the child, they tend to isolate that parent from the child.⁵⁸ As a result of his or her diminished parental role, the parent may experience a great sense of loss,⁵⁹ and withdraw "from the child as a barrier against further pain."⁶⁰ Second, sole custody awards place significant emotional and financial burdens on the custodial parent.⁶¹ In short, the custodial parent must single-handedly do the work normally done by two parents.⁶² Moreover, the child suffers "[b]ecause the custodial parent may have great difficulty providing the emotional support required

54. Bratt, *supra* note 37, at 295. One commentator argues that "[t]he parent awarded sole custody of the child gains an advantage over the non-custodial parent. The custodial parent has complete control over the child and his or her decision has 'priority over the other parent's with regard to the day-to-day upbringing of the children.' " *Proposal for Change*, *supra* note 38, at 1074 n.8 (citation omitted); accord Bratt, *supra* note 37, at 295.

55. See CHILD CUSTODY, *supra* note 10, at 319. One commentator has stated: Visitation is usually regarded as a joint right of the noncustodial parent and the child. It is often referred to as a "natural right" of the non-custodial parent that may not be taken away absent extraordinary circumstances showing that it is in the best interests of the child not to see the parent.

Id. (citations omitted); accord Weiss v. Weiss, 52 N.Y.2d 170, 175, 418 N.E.2d 377, 380, 436 N.Y.S.2d 862, 865 (1981).

56. See *supra* note 9.

57. See *Difficult Area*, *supra* note 21, at 4, col. 2. The authors succinctly stated that "[t]he problem with a sole-custody award is that it puts heavy logistical, financial and emotional burdens on the custodial parent, truncates the relationship of the noncustodial parent with the child and often creates emotional problems for the child." *Id.*

58. See CHILD CUSTODY, *supra* note 10, at 371-72; *Joint Custody*, *supra* note 9, at 355-56.

59. See *Rethinking Joint Custody*, *supra* note 46, at 459-60; see also Greif, *Fathers, Children and Joint Custody*, 49 AM. J. ORTHOPSYCHIATRY 311, 316 (1979) [hereinafter *Fathers, Children*].

60. See *Fathers, Children*, *supra* note 59, at 316-17; *Rethinking Joint Custody*, *supra* note 46, at 459.

61. See Bratt, *supra* note 37, at 274-75.

62. See *id.*

by a child experiencing the trauma of divorce.”⁶³ The ultimate criticism of sole custody, however, is that, while the award may have a detrimental effect on the custodial or noncustodial parent, the person most harmed is the *child*, in whose best interests the award was presumably made.

As a result of the perceived inadequacies of sole custody arrangements,⁶⁴ joint custody has emerged as a potential alternative. Simply stated, joint custody “attempts to solve some of the problems of sole custody by providing the children with access to both parents and granting parents equal rights and responsibilities regarding their children.”⁶⁵

According to its proponents, joint custody is designed to promote shared parenting for the benefit of both the children and the parents.⁶⁶ In giving parents equal rights and responsibilities, joint custody can allow the child to feel “rooted in relation to both parents and to continue to value each relationship.”⁶⁷ The child thus has a better chance to “feel secure in the love and involvement of both parents as the parents share in the day-to-day upbringing of the child and in making major decisions affecting the child.”⁶⁸ Because both parents can remain actively involved with the child, joint custody avoids the “absolute nature of sole custody determinations, in which one parent ‘wins’ and the other ‘loses.’”⁶⁹ Legal recognition of the right of both parents to participate in their child’s life, it is argued, lessens the sense of loss that usually accompanies a divorce, and makes it less likely that one parent will have excessive power.⁷⁰ The involvement of both parents with their child “adds to the parents’ sense

63. *Judicial Standards*, *supra* note 52, at 113.

64. See *Beck v. Beck*, 86 N.J. 480, 486, 432 A.2d 63, 65 (1981); *Joint Custody*, *supra* note 9, at 359; *Rethinking Joint Custody*, *supra* note 46, at 460; *Judicial Standards*, *supra* note 52, at 113. The *Beck* court observed that “[t]he use by the courts of custodial arrangements other than sole custody is not new. In the early cases of many jurisdictions custody was routinely divided when both parents sought it.” 86 N.J. at 486, 432 A.2d at 65; see also *Bratt*, *supra* note 37, at 282 n.45 (list of illustrative cases). Nevertheless, while such arrangements have been permitted from time to time, “the drive for joint custody” did not begin until the 1970’s. Foster & Freed, *Joint-Custody Legislation Finds Firm Support in Majority of States*, Nat’l L.J., Apr. 28, 1986, at 25, col. 1 [hereinafter *Legislation*].

65. *Beck v. Beck*, 86 N.J. 480, 486, 432 A.2d 63, 65 (1981).

66. See *CHILD CUSTODY*, *supra* note 10, at 372.

67. *DISPOSABLE PARENT*, *supra* note 2, at 120.

68. *CHILD CUSTODY*, *supra* note 10, at 372.

69. *Beck*, 86 N.J. at 486, 432 A.2d at 65 (citation omitted).

70. See *Joint Custody of Children*, *supra* note 7, at 569-70.

of self worth and dignity,"⁷¹ and the result is a more "natural sharing of childrearing burdens" with an opportunity for the parents to "positively balance child care with other essential activities."⁷²

Thus, according to one commentator, joint custody "presents itself as a . . . natural alternative" which "satisfies the normal parental desire to have [something] more than momentary contact with one's children"⁷³ and in facilitating greater contact between parent and child, "helps to ensure that each parent fulfills his or her responsibility to the child."⁷⁴

III. Differing Approaches to Joint Custody

A. The Majority Approach

The concept of joint custody is now firmly established in most jurisdictions.⁷⁵ At present, thirty-one states have adopted statutes that expressly authorize joint custody.⁷⁶ Of these statutes, ten express a preference for joint custody,⁷⁷ while four favor the arrangement when both parents agree.⁷⁸ Three states require the consent of both

71. CHILD CUSTODY, *supra* note 10, at 372.

72. Abraham, A Short Brief for a Rebuttable Presumption in Favor of Joint Custody 1 (undated) (available at *Fordham Urban Law Journal* office). The remarks of one mother with joint physical custody of her daughter are illustrative:

I find I can be lovingly responsive, patient, and tactful because I know I have only 3 1/2 days of explaining how cars work, "how come" banks don't give free money, why shoes fit left or right, and so on. Haika and I have few arguments now, and I find I can easily endure them knowing I'll be relieved by her father on Sunday.

CHILD CUSTODY, *supra* note 10, at 372 n.73 (citing Holly, *Joint Custody: The New Haven Plan*, Ms. MAGAZINE 70, 79 (Sept. 1976)).

73. *Joint Custody*, *supra* note 9, at 363.

74. *Id.* at 364.

75. *See supra* note 17.

76. *See supra* note 17.

77. *See* CHILD CUSTODY, *supra* note 10, at 356; *see also* CAL. CIV. CODE §§ 4600(b)(1), 4600.5 (West 1983 & Supp. 1987); DEL. CODE ANN. tit. 13, § 701(a) (1981); FLA. STAT. ANN. § 61.13(2)(b)(2) (West Supp. 1987); IOWA CODE ANN. §§ 598.1(6), 598.41(1) (West Supp. 1987); KAN. STAT. ANN. § 60-1610(a)(4)(A) (Supp. 1986); LA. CIV. CODE ANN. art. 146(A)(1) (West Supp. 1987); MASS. ANN. LAWS ch. 208, § 31 (Law. Co-op. 1981 & Supp. 1987); NEV. REV. STAT. ANN. §§ 125.480(1), (3)(a), 125.490 (Michie 1986); N.H. REV. STAT. ANN. §§ 458:17(II), 458:17(III) (1983); N.M. STAT. ANN. § 40-4-9.1 (Supp. 1986).

78. *See* CHILD CUSTODY, *supra* note 10, at 356; *see also* CONN. GEN. STAT. ANN. § 46b-56a(b) (West 1986); ME. REV. STAT. ANN. tit. 19, § 752(6) (Supp. 1986); MICH. COMP. LAWS ANN. § 722.26a(2) (West Supp. 1987); MISS. CODE ANN. § 93-5-24 (Supp. 1987).

parents before joint custody may be awarded,⁷⁹ and the remaining states simply allow joint custody as an option.⁸⁰ In the absence of such statutes, "courts may enter orders of joint custody under implied powers of a general custody statute or under the inherent equitable powers of the court."⁸¹

While it is clear that jurisdictions differ on the issue of whether a court may order joint custody over the opposition of a parent,⁸²

79. See, e.g., OHIO REV. CODE ANN. § 3109.04(A) (Anderson 1986); TEX. FAM. CODE ANN. § 14.06(a) (Vernon 1986); WIS. STAT. ANN. § 767.24(1)(b) (West 1981); cf. IND. CODE ANN. § 31-1-11.5-21(g) (Burns Supp. 1986). The Indiana statute states that in determining whether to award joint custody, "the court shall consider it a matter of *primary*, but not determinative importance that the persons awarded joint custody have agreed to an award of joint legal custody." *Id.* (emphasis added); see also *In re Marriage of Lampton*, 677 P.2d 352, 353 (Colo. Ct. App. 1983) (abuse of discretion to award joint custody absent parental agreement), *modified*, 704 P.2d 847, 850 (Colo. 1985) ("[o]nly in the most exceptional cases could an award of joint custody be warranted . . . in the absence of mutual consent and agreement by the parties"). Until 1985, Illinois also had a statute which required the consent of both parents before joint custody could be awarded. See ILL. ANN. STAT. ch. 40, para. 603.1 (Smith-Hurd 1983). In 1985, however, the Illinois legislature repealed the provision of the statute which required dual consent. ILL. ANN. STAT. ch. 40, para. 602.1 (Smith-Hurd Supp. 1986).

80. See CHILD CUSTODY, *supra* note 10, at 356; see also ALASKA STAT. §§ 25.20.060 (c), 25.20.090, 25.20.100 (1983); COLO. REV. STAT. § 14-10-1235 (Supp. 1984); DEL. CODE ANN. tit. 13, § 701(a) (1981); HAW. REV. STAT. § 571-46(1) (Supp. 1985); ILL. ANN. STAT. ch. 40, paras. 602.1, 610(b) (Smith-Hurd Supp. 1987); IND. CODE ANN. § 31-1-11.5-21(f) (Burns Supp. 1986); KY. REV. STAT. ANN. § 403.270(3) (Michie/Bobbs-Merrill 1984); MINN. STAT. ANN. §§ 518.003[3](b), (d), 518.17[2] (West Supp. 1987); MO. ANN. STAT. § 452.375 (Vernon 1986 & Supp. 1987); MONT. CODE ANN. §§ 40-4-222 to -224 (1985); N.C. GEN. STAT. § 50-13.2(b) (1984); OKLA. STAT. ANN. tit. 12, § 1275.4B (West Supp. 1987); OR. REV. STAT. § 107.105(1)(a) (1985); PA. STAT. ANN. tit. 23, § 5304 (Purdon Supp. 1987).

81. See CHILD CUSTODY, *supra* note 10, at 356 (citing *Kerns v. Kerns*, 59 Md. App. 87, 90-94, 474 A.2d 925, 927-29 (Md. Ct. Spec. App. 1984) ("implied authority from general custody statute"); *Beck v. Beck*, 86 N.J. 480, 488, 432 A.2d 63, 65 (1981) (general custody statute "evinces a legislative intent to grant courts wide latitude to fashion creative remedies in matrimonial custody cases"); *Dodd v. Dodd*, 93 Misc. 2d 641, 644, 403 N.Y.S.2d 401, 403 (Sup. Ct. N.Y. County 1978) ("implied authority from general custody statute"); *Lembach v. Cox*, 639 P.2d 197, 200 (Utah 1981) ("equitable powers could serve as basis for joint custody").

82. Compare OHIO REV. CODE ANN. § 3109.04(A) (Anderson 1986) (requiring parental consent) and TEX. FAM. CODE ANN. § 14.06(a) (Vernon 1986) (same) and WIS. STAT. ANN. § 767.24(1)(b) (West 1981) (same) with CAL. CIV. CODE § 4600.5 (West Supp. 1987) (expressly authorizing court-ordered joint custody) and HAW. REV. STAT. § 571-46 (1985) (same) and MICH. COMP. LAWS ANN. § 722.26a(2) (West Supp. 1987) (same) and PA. STAT. ANN. tit. 23, § 5304 (Purdon Supp. 1987) (same).

the majority of states that have addressed the issue allow a court to order joint custody even if one parent is opposed.⁸³

The decisions upholding joint custody awards over parental opposition have been justified primarily on the following grounds: (1) granting one parent a veto power over joint custody is undesirable;⁸⁴ (2) agreement of the parties is merely one factor to be considered in determining whether a court should order joint custody;⁸⁵ and (3) allowing joint custody, even over the opposition of a parent, preserves the discretionary powers courts have traditionally enjoyed in custody cases.⁸⁶

83. See, e.g., *In re Marriage of Bolin*, 336 N.W.2d 441, 446 (Iowa 1983) ("[a]greement is merely one factor to be considered when joint custody is ordered, and a change of heart by one or even both parties is not by itself sufficient to establish a change of circumstances requiring joint custody to be terminated"); *Kerns v. Kerns*, 59 Md. App. 87, 95, 474 A.2d 925, 929 (Md. Ct. Spec. App. 1984) (affirming joint custody over mother's opposition); *Kline v. Kline*, 686 S.W.2d 13, 17 (Mo. Ct. App. 1984) (stating that a parent should not have veto power over joint custody, but affirming sole custody for mother because of hostility of father); *Stanley D. v. Deborah D.*, 124 N.H. 138, 143, 467 A.2d 249, 251 (1983) (affirming joint legal custody for mother and step-father and sole physical custody for step-father despite mother's desire for sole custody); *Beck v. Beck*, 86 N.J. 480, 498, 432 A.2d 63, 71 (1981) (parent's "opposition to joint custody does not preclude the court from ordering that arrangement") (emphasis in original); see also *Bratt*, *supra* note 37, at 273; *Rethinking Joint Custody*, *supra* note 46, at 457. But see *In re Marriage of Lampton*, 677 P.2d 352 (Colo. Ct. App. 1983) (award of joint custody absent parental consent is abuse of discretion), *modified*, 704 P.2d 847, 850 (Colo. 1985) ("[o]nly in the most exceptional cases could an award of joint custody be warranted . . . in the absence of mutual consent and agreement by the parties").

84. See, e.g., *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983) ("our statutes now express a preference for joint custody over other custodial arrangements and do not allow one-party vetoes"); *Taylor v. Taylor*, 306 Md. 290, 308, 508 A.2d 964, 973 (1986) ("unwilling to fashion a hard and fast rule that would have the effect of granting to either parent veto power over the possibility of a joint custody award"); *Kline v. Kline*, 686 S.W.2d 13, 17 (Mo. Ct. App. 1984) ("one of the parents should not be able to veto such a court decision by failure to agree or failure to cooperate with the joint custody determination"). For a discussion of why the courts should not grant such a veto power, see *infra* notes 197-99 and accompanying text.

85. See *In re Marriage of Bolin*, 336 N.W.2d 441, 446 (Iowa 1983) (agreement of parties merely one factor to consider).

86. See, e.g., *Kline v. Kline*, 686 S.W.2d 13, 16 (Mo. Ct. App. 1984) ("[a]bsent legislative mandate to the contrary, . . . judges should be given as much latitude and discretion as possible"); *Stanley D. v. Deborah D.*, 124 N.H. 138, 143, 467 A.2d 249, 251 (1983) (court has discretion to award joint custody when it "would be in the best interests of the child"). For a discussion of how allowing joint custody over the objection of one parent preserves the discretionary powers of courts, see *infra* notes 200-06 and accompanying text.

B. The New York Approach

In sharp contrast to the majority approach, the New York Court of Appeals has indicated that joint custody should be encouraged only "as part of a *voluntary* agreement" between the parties.⁸⁷

New York law requires that courts determine child custody solely in the best interests of the child,⁸⁸ and neither parent has a prima facie right to custody.⁸⁹ No statute expressly provides for an award of joint custody.⁹⁰ The New York courts have, however, recognized their implied power to make such an award under several sections of the Domestic Relations Law, provided that the award is in the best interests of the child.⁹¹ Since "[t]here are no absolutes in making these determinations,"⁹² the "existence or absence of any one factor [is] not determinative,"⁹³ and the court must therefore consider the "totality of the circumstances."⁹⁴ The court may consider any child custody agreements that the parents themselves have executed.⁹⁵ While a judge may give weight to such an agreement, prior agreements

87. *Braiman v. Braiman*, 44 N.Y.2d 584, 589-90, 378 N.E.2d 1019, 1019, 407 N.Y.S.2d 449, 449 (1978) (emphasis added) (citation omitted).

88. *See, e.g., McIntosh v. McIntosh*, 87 A.D.2d 968, 968, 451 N.Y.S.2d 200, 201 (3d Dep't 1982); *Gloria S. v. Richard B.*, 80 A.D.2d 72, 76, 437 N.Y.S.2d 411, 414 (2d Dep't 1981); *Braiman v. Braiman*, 61 A.D.2d 995, 1000, 402 N.Y.S.2d 643, 649 (2d Dep't), *rev'd on other grounds*, 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978); *Dodd v. Dodd*, 93 Misc. 2d 641, 644, 403 N.Y.S.2d 401, 403 (Sup. Ct. N.Y. County 1978); *see also* N.Y. DOM. REL. LAW §§ 70, 240 (McKinney 1977 & 1986). The New York Domestic Relations Law requires that the court "give such direction, between the parties, for the custody . . . of any child of the parties, as . . . justice requires, having regard to the circumstances of the case and . . . to the best interests of the child." N.Y. DOM. REL. LAW § 240 (McKinney 1986).

89. N.Y. DOM. REL. LAW §§ 70, 240 (McKinney 1977 & 1986).

90. *See supra* note 18.

91. *See supra* notes 19-20.

92. *Eschbach v. Eschbach*, 56 N.Y.2d 167, 171, 436 N.E.2d 1260, 1262, 451 N.Y.S.2d 658, 660 (1982) (citing *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 93-95, 432 N.E.2d 765, 767-68, 447 N.Y.S.2d 893, 895-96 (1982)).

93. *Id.* at 174, 436 N.E.2d at 1264, 451 N.Y.S.2d at 662.

94. *Id.*

95. *See* N.Y. DOM. REL. LAW § 236B[3](4) (McKinney 1986). The statute provides:

An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action. . . . Such an agreement may include . . . provision for the custody, care, education and maintenance of any child of the parties, *subject to the provisions of section two hundred forty of this chapter.*

Id. (emphasis added).

between the parties are not binding on the court.⁹⁶ Thus, although the parents may have agreed to joint custody, the court is not bound to adopt it.⁹⁷

While the parents may agree to joint custody, the courts have been reluctant to impose it when either parent objects.⁹⁸ This re-

96. See *Eschbach*, 56 N.Y.2d at 171, 436 N.E.2d at 1262, 451 N.Y.S.2d at 660-61.

97. See *Robinson v. Robinson*, 111 A.D.2d 316, 318, 489 N.Y.S.2d 301, 303 (2d Dep't 1985); see also *Calder v. Woolverton*, 50 A.D.2d 587, 375 N.Y.S.2d 150 (2d Dep't), *aff'd*, 39 N.Y.2d 1042, 355 N.E.2d 306, 387 N.Y.S.2d 252 (1976). *Contra* MICH. COMP. LAWS ANN. § 722.26a(2) (West Supp. 1987) (court must award joint custody if parents agree to it, unless court determines by clear and convincing evidence that such award is not in best interests of child).

98. See, e.g., *Braiman v. Braiman*, 44 N.Y.2d 584, 590, 378 N.E.2d 1019, 1021, 407 N.Y.S.2d 449, 451 (1978) ("[a]s a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, it can only enhance familial chaos"); *Stanat v. Stanat*, 93 A.D.2d 114, 461 N.Y.S.2d 32 (1st Dep't), *appeal denied*, 59 N.Y.2d 605, 451 N.E.2d 504, 464 N.Y.S.2d 1025 (1983).

In *Stanat*, the trial court awarded sole custody to the mother despite its determination that both parties were fit parents who were "concerned for [their] child's best interests." 93 A.D.2d at 115, 461 N.Y.S.2d at 33. On appeal, the father sought modification of the order to obtain joint custody. The court sustained the award of sole custody to the mother after commenting that "[j]oint-custody" seems to be one of those ideas which are often quite attractive at a distance, but not quite so, when viewed close up." *Id.* at 116, 461 N.Y.S.2d at 33.

In a separate opinion, Justice Carro concluded that "joint custody would benefit the child as well as 'the defeated parent.'" *Id.* at 120, 461 N.Y.S.2d at 36 (Carro, J., *dubitante*). Justice Carro observed that since "[b]oth parents yearn to give their love and support to th[e] child . . . [j]oint custody might well dispel the competition between the parties and, by declaring 'no contest' at all, encourage each to love and nurture the one good thing remaining from their union." *Id.* at 120-21, 461 N.Y.S.2d at 36. Nonetheless, Justice Carro joined the majority because, as he stated, "there should be an end to [this] litigation." *Id.* at 121, 461 N.Y.S.2d at 36; see also *Dodd v. Dodd*, 93 Misc. 2d 641, 643-44, 403 N.Y.S.2d 401, 402-03 (Sup. Ct. N.Y. County 1978) (despite fact that "both parents have a loving and close relationship with the children and that both . . . are willing and able to function well as parents," court "must give thought to whether joint custody is feasible when one party is opposed and court intervention is needed to effectuate it"). *But see* *Martin v. Martin*, 113 A.D.2d 943, 943, 493 N.Y.S.2d 840, 841 (2d Dep't 1985) (affirming order of joint custody absent parental agreement where parties relationship "is not so severely antagonistic or embattled as to make [such] an award . . . improper") (citation omitted).

In a recent survey of attorneys' perceptions and experiences of gender bias in state courts in New York, respondents reported that joint custody is imposed by courts over the objections of one or both parents in the following percentages:

ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO ANSWER
*	6	25	27	35	7

See R.L. ASSOCIATES, ATTORNEYS' PERCEPTIONS OF GENDER BIAS WITHIN THE NEW YORK STATE JUDICIAL SYSTEM, app. A, at 54 (Dec. 1985) (available at *Fordham*

luctance is not surprising given the language of *Braiman v. Braiman*,⁹⁹ the New York Court of Appeals' major pronouncement on the subject of joint custody. In *Braiman*, the custody of two minor children was in dispute.¹⁰⁰ The mother was initially granted custody by a divorce judgment which incorporated the terms of the parties' separation agreement.¹⁰¹ Upon learning of the mother's plan to leave the state, however, the father moved to obtain custody of the children.¹⁰² The trial court granted his application, but the appellate division reversed, awarding custody to the parents jointly.¹⁰³ On appeal, the court of appeals reversed and ordered a new hearing.¹⁰⁴ The court noted that "[o]n the wisdom of joint custody the authorities are divided."¹⁰⁵ Joint custody is desirable, observed the court, because "children are entitled to the love, companionship and concern of both parents"¹⁰⁶ and such an arrangement "affords the otherwise noncustodial parent psychological support which can be translated into a healthy environment for the child[ren]."¹⁰⁷ The court was persuaded, however, that "[c]hildren need a home base,"¹⁰⁸ and "[p]articularly where alternating physical custody is directed,"¹⁰⁹ joint custody may be disruptive, and further the pain of divorce.¹¹⁰

Urban Law Journal office). The asterisk means less than half of one percent. The survey, which was commissioned by the New York Task Force on Women in the Courts, was designed to "collect systematic data" in order to assist the Task Force in determining the extent to which gender bias may exist in the New York courts. See *Report of the New York Task Force on Women in the Courts*, reprinted in 15 *FORDHAM URB. L.J.* 15, 23-25 & n.23 (1986). One thousand seven hundred and fifty-nine attorneys responded to the survey which was comprised of questions relating to such topics as equitable distribution, custody, domestic violence and juvenile justice. See *id.* at 23 n.23.

99. 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978); see also *Dodd v. Dodd*, 93 Misc. 2d 641, 646, 403 N.Y.S.2d 401, 405 (Sup. Ct. N.Y. County 1978) ("when one parent resists joint custody and refuses to be persuaded that it is workable, what will be the result for the children when it is ordered by the Court? There appear to be no social science studies that will answer this question").

100. See 44 N.Y.2d at 587, 378 N.E.2d at 1019, 407 N.Y.S.2d at 449.

101. See *id.*

102. See *id.*

103. See *id.*

104. See *id.*

105. *Id.* at 589, 378 N.E.2d at 1021, 407 N.Y.S.2d at 451 (quoting *Dodd v. Dodd*, 93 Misc. 2d 641, 645-47, 403 N.Y.S.2d 401, 405 (Sup. Ct. N.Y. County 1978)).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. See *id.*

Regarding the Braimans themselves, the court found that, after more than four years of separation, they were still "unable to manage their common problems with their children, let alone trust [one another]." ¹¹¹ The parents had continued to find fault with one another and had failed to work out even a limited visitation arrangement. ¹¹² It was "beyond rational hope," said the court, "[t]o expect them to exercise the responsibility entailed in sharing" physical custody of the children. ¹¹³ Similarly, "[i]t would . . . take more than reasonable self-restraint to shield the children, as they [went] from house to house, from the ill feelings, hatred, and disrespect each parent harbor[ed] towards the other." ¹¹⁴ Furthermore, since the mother's whereabouts were undisclosed and she was openly intent on leaving the jurisdiction, the joint custody arrangement imposed by the appellate division was unfeasible "as a matter of logistics alone." ¹¹⁵ Because two full years had elapsed since the hearing at special term and the conflicts and contradictions in the record were "so severe" and so material, ¹¹⁶ the court found it impossible to resolve the matter without further assessments of credibility. ¹¹⁷ Accordingly, the court reversed the appellate division's award of joint custody, and directed that a new hearing be held. ¹¹⁸ In dicta, the court stated: "As a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, [joint custody] can only enhance familial chaos." ¹¹⁹

The court of appeals' decision in *Braiman* was perhaps foreshadowed by *Dodd v. Dodd*, ¹²⁰ decided by the Supreme Court of New York County in 1978. In *Dodd*, which *Braiman* cited with approval, ¹²¹ the father had resisted the mother's claim for sole custody by seeking a joint custody arrangement. ¹²² At the outset, the court observed that joint custody was an "appealing" option ¹²³ because

111. *Id.* at 590, 378 N.E.2d at 1021, 407 N.Y.S.2d at 451.

112. *See id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *See id.*

118. *Id.* at 591, 378 N.E.2d at 1022, 407 N.Y.S.2d at 452.

119. *Id.* at 590, 378 N.E.2d at 1021, 407 N.Y.S.2d at 451.

120. 93 Misc. 2d 641, 403 N.Y.S.2d 401 (Sup. Ct. N.Y. County 1978).

121. *See* 44 N.Y.2d at 589-90, 378 N.E.2d at 1021, 407 N.Y.S.2d at 451.

122. *See* 93 Misc. 2d at 642-43, 403 N.Y.S.2d at 402.

123. *Id.* at 643, 403 N.Y.S.2d at 402.

it would allow the court to avoid an "agonizing choice"¹²⁴ and to avoid the appearance of engaging in gender discrimination.¹²⁵ In addition, such an arrangement would protect the self-esteem of both parents by allowing each "an equal voice in making [child care] decisions."¹²⁶ In view of the mother's opposition to joint custody, however, the court paused to observe that "[w]hile [a court] should not yield to the frivolous objections of one party, it must give thought to whether joint custody is feasible when one party is opposed and court intervention is needed to effectuate it."¹²⁷

After a brief examination of prior joint custody cases in New York, and a cursory review of the major arguments for and against it,¹²⁸ the court turned to the parties' actual experience with joint custody.¹²⁹ The parents had in fact tried such an arrangement—for fourteen months they lived apart "without either a separation agreement" or "court order of custody."¹³⁰ During that period, the parents shared all decisions and, for most of that time, split physical custody of the children equally.¹³¹ Conflicts arose, however, over "medical care and psychotherapy, over the children's clothing, over discipline, over money [and] over the children's attendance at family functions."¹³² Moreover, the children were repeatedly exposed to "angry words and obscenities" as a result of the overt hostility the parents displayed towards one another.¹³³ Psychiatrists called by each of the parties testified that the joint custody arrangement was not working well, and the father's own expert stated that the arrangement was not only stressful for the children, but was in fact "unworkable."¹³⁴ Accordingly, the court awarded sole custody to the mother, with liberal visitation rights to the father.¹³⁵

124. *Id.*

125. *Id.* One commentator has argued that since the mother is awarded sole custody in a high percentage of cases brought before the trial courts in New York, and such decisions are rarely reversed on appeal, "legislation creating an express presumption in favor of awarding joint custody is necessary . . . to eliminate the tendency to award custody on the basis of . . . gender." *Proposal for Change*, *supra* note 38, at 1073-74.

126. 93 Misc. 2d at 643, 403 N.Y.S.2d at 402.

127. *Id.*

128. *See id.* at 644-46, 403 N.Y.S.2d at 403-04.

129. *See id.* at 647, 403 N.Y.S.2d at 405.

130. *Id.*

131. *See id.*

132. *Id.*

133. *See id.*

134. *Id.* at 648, 403 N.Y.S.2d at 405.

135. *See id.* at 650-51, 403 N.Y.S.2d at 407. On its facts, the result in *Dodd*

Taken together, *Braiman* and *Dodd* signify that while the New York courts recognize an implied statutory right to order joint custody if it is in the best interests of the child, the courts remain reluctant to do so.¹³⁶ The courts will not award joint custody if the

appears to be legally sound. It is difficult to quarrel with the court's conclusion that joint custody is ill-advised when "one parent resists joint custody and *refuses* to be persuaded that it is workable." *Id.* at 646, 403 N.Y.S.2d at 405 (emphasis added); cf. Foster & Freed, *Joint Custody—A Viable Alternative?*, N.Y.L.J., Dec. 22, 1978, at 3, col. 1 (joint custody should not be awarded where "each party is unalterably opposed") [hereinafter *Viable Alternative*].

The problem, however, is that *Dodd* has been interpreted broadly as in effect holding that joint custody will not work unless both parents have agreed to it. See *supra* note 26 and accompanying text. The court's statement that "[i]t is hardly surprising that joint custody is generally arrived at by consent," 93 Misc. 2d at 647, 403 N.Y.S.2d at 405, is central to the New York Court of Appeals' reasoning in *Braiman*, that "joint custody is encouraged primarily as a voluntary alternative." 44 N.Y.2d 584, 589-90, 378 N.E.2d 1019, 1021, 407 N.Y.S.2d 449, 451 (1978) (citation omitted). For a contrasting approach, see *Beck v. Beck*, 86 N.J. 480, 498, 432 A.2d 63, 71 (1981) (parental "opposition to *joint custody* does not preclude the court from ordering that arrangement) (emphasis in original). See *supra* notes 83-86 and accompanying text. See generally *infra* notes 166-206 and accompanying text.

As a result of the *Braiman* and *Dodd* decisions, the New York courts have been reluctant to impose joint custody as a court-ordered arrangement upon litigants. See *supra* note 98.

136. See *supra* note 21. In response, recent efforts have been made to encourage joint custody awards by legislation. One commentator notes that while "the legislature has yet to enact any statute expressly mandating or even suggesting that the courts consider such an award, [p]roposals creating a presumption in favor of joint custody have . . . been introduced on many occasions over the past four years." *Proposal for Change*, *supra* note 38, at 1093; see *id.* at 1093 n.134 (citing N.Y.A. 4166-C, 204th Sess. (1981); N.Y.A. 10721, 205th Sess. (1982); N.Y.A. 9369, 203rd Sess. (1980)).

Notably, as a corollary to the latter bill, "the legislature proposed amending section 240 of New York's Domestic Relations Law to allow the courts to award joint custody even if one parent opposed such an arrangement." *Proposal for Change*, *supra* note 38, at 1098. To effectuate such an award, "[t]he court would issue a decree directing the parents to act in accordance with the court's order with respect to the custody, care, education and maintenance of the child." *Id.* (footnote omitted). In fact, none of the joint custody bills proposed by the legislature between 1980 and 1982 conditioned such an award on parental agreement. See *Second Thoughts*, *supra* note 21, at 576-77.

Though N.Y.A. 9369 was passed by the New York Assembly in April, 1980, the bill ultimately "died in [the Senate Judiciary] Committee." *Proposal for Change*, *supra* note 38, at 1097-98 n.150; see *Second Thoughts*, *supra* note 26, at 576-77. The bills proposed in 1981 and 1982, though similar, were "much more conservative" than N.Y.A. 9369. See *Proposal for Change*, *supra* note 38, at 1096 n.149. In that Note the author stated:

In the 1980-1981 session of the New York Legislature, a bill was proposed which would have prohibited any *prima facie* right to sole

parties are hostile towards one another, even though "both parents

custody and would have allowed for a presumption in favor of joint custody. A later bill was proposed in the 1981-1982 session. Under this bill the courts would have been prevented from denying an award of joint custody if both parents agreed to it in writing or before the court of record unless the court did so with just and reasonable cause. If the court did reject such an agreement, the court would have had to specifically cite the facts that would require a denial. Both of these bills were vetoed by Governor Carey.

Governor Carey vetoed N.Y.A. 4166-C, 204th Sess. (1981), for two reasons. First, the bill would have created a legal presumption that joint custody is in the best interests of the child. Governor Carey felt that such a presumption should not be enacted into law merely because joint custody is not expressly precluded by § 240 of the Domestic Relations Law. Second, Governor Carey was of the opinion that joint custody, if awarded, would never be in the child's best interests if the parents were hostile or antagonistic. The bill, however, would have provided that joint custody . . . be awarded where either party had applied for such an award at any stage of the proceedings.

The Governor vetoed N.Y.A. 10721, 205th Sess. (1982), because the bill would have required the courts to give joint custody first consideration As a result of the introduction of the bill and the extensive opposition to its proposal the Governor requested the [New York] Law Revision Commission to study New York common law and statutes to assess the needs for reform and to make recommendations with respect to proposed changes in the law. The Law Revision Commission's [interim] report, [which] was submitted to Governor Carey on December 23, 1982 . . . made two recommendations: (1) present law on joint custody should not be codified or changed by legislation at this time; any future legislation should be considered only in the context of a study of the entire custody decision-making process; and (2) the laws concerning the custody decision-making process should be studied to determine whether the best interests of the child are now being satisfactorily met; . . . the role of an award of joint custody would be an important part of such a broad-based study.

While the Commission did acknowledge that problems do arise under a sole custody award, it would not encourage the statutory enactment of a presumption in favor of joint custody for several reasons. First, it noted that problems might also arise in a joint custody arrangement: parents might not be able to cooperate in the decision-making process, the award might be disruptive to the child in terms of inconsistency of discipline and conflicts of loyalty, and such an award might be used by a judge to avoid a complex and difficult fact-finding task. Second, the Commission . . . pointed out that the courts are free to award joint custody if such an award would be in the best interests of the child despite the absence of an express provision providing for such an award. . . .

Id. at 1096-97 n.149 (citations omitted).

The Commission's concern that a statutory presumption might inhibit meticulous fact-finding by judges has been echoed by other commentators. *See, e.g., Difficult Area*, *supra* note 21, at 4, col. 2. The authors argue that legislation must "spell out the factors to be considered by the court with respect to joint custody and

have a loving and close relationship with the children and . . . are willing and able to function well as parents."¹³⁷ The courts appear to assume that hostile parents are unable to agree about even minor issues, and thus should be deemed incapable of working together to make major decisions affecting the child.¹³⁸ Implicitly, "the courts have determined that the overriding factor in awarding joint custody is the amicability of the parents rather than [the quality of] the relationship between parent and child."¹³⁹

require the trial judge to articulate his [or her] reasoning with respect to each in reaching his [or her] ultimate conclusion." *Id.* The authors endorse such an approach because:

Specifying the factors to be considered and requiring the trial judge to make specific findings as to each, [thus "abjuring any presumptions"], . . . gives the greatest assurance that the decision for or against joint custody will stem from reason rather than predilection, from learning rather than leaning, in short, . . . the best interest of the child.

Id. at 4, cols. 2-3; *see also* Beck v. Beck, 86 N.J. 480, 488, 432 A.2d 63, 66 (1981) ("despite our belief that joint custody will be the preferred disposition in some matrimonial actions, we decline to establish a presumption in its favor or in favor of any particular custody determination"); MICH. COMP. LAWS ANN. § 722.26a (West Supp. 1987) (listing factors that court must consider in determining "whether joint custody is in the best interests of the child"); MINN. STAT. ANN. § 518.17[2] (West Supp. 1987) (also specifying factors that court must consider); *Joint Custody of Children*, *supra* note 7, at 577.

The Commission completed its study of child custody in 1984, and recommended legislation aimed at creating "a uniform statewide child custody dispute resolution system which encouraged the settlement of custody disputes rapidly, voluntarily, and without adversary litigation, and which fosters the involvement of both parents in the post-divorce emotional and financial support of the child." STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1985, 174. Among other things, the Commission hoped "that its recommended changes in the procedure for resolving custody disputes . . . [would] lead to an increasing number of voluntary joint custody arrangements." *Id.* at 177. Bills were introduced upon the recommendation of the Commission in 1985 in both the Senate and the Assembly. Neither bill, however, was reported out of committee. STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1986, 37.

137. *See* Dodd v. Dodd, 93 Misc. 2d 641, 644, 403 N.Y.S.2d 401, 403 (Sup. Ct. N.Y. County 1978); *see also* Seago v. Arnold, 91 A.D.2d 835, 836, 458 N.Y.S.2d 427, 428 (4th Dep't 1982).

138. *See Proposal for Change*, *supra* note 38, at 1082 n.64 (citations omitted). Concededly, there are circumstances in which the level of hostility and lack of ability to cooperate between the parties is so intense that joint custody is inappropriate. *See infra* note 184. Unfortunately, however, the New York courts have yet to even attempt to provide a framework of analysis for determining those circumstances. For an example of such a framework, *see* Beck v. Beck, 86 N.J. 480, 498, 432 A.2d 63, 72 (1981) ("potential for cooperation should not be assessed in the 'emotional heat' of the divorce"). For an analysis of this approach, *see supra* notes 135-37 and accompanying text and *infra* notes 139-61 and accompanying text.

139. *Proposal for Change*, *supra* note 38, at 1081 (citing Braiman v. Braiman,

C. The New Jersey Approach: The Innovations of *Beck*

Beck v. Beck,¹⁴⁰ decided by the New Jersey Supreme Court in 1981, is the leading case upholding an order of joint custody over the objection of one parent.¹⁴¹ The opinion has been described as a "landmark custody decision" which may be "a harbinger of things to come in other jurisdictions."¹⁴²

In *Beck*, the court ruled that although New Jersey's general custody statute does not specifically authorize an award of joint custody, the court possesses "wide latitude to fashion creative remedies in matrimonial custody cases,"¹⁴³ including joint custody decrees.¹⁴⁴ The decision is significant because it sets forth explicit guidelines for courts to use in determining whether to award joint custody.¹⁴⁵ The factors a court should consider prior to entering an order of joint custody are: (1) both parents must be fit;¹⁴⁶ (2) both parents must desire continuing involvement with their child;¹⁴⁷ (3) the child should view both parents as a source of security and love;¹⁴⁸ and (4) both parents must exhibit potential for cooperation in raising the child.¹⁴⁹

44 N.Y.2d 584, 589-90, 378 N.E.2d 1019, 1019, 407 N.Y.S.2d 449, 450-51 (1978); Cmaylo v. Cmaylo, 76 A.D.2d 898, 899, 429 N.Y.S.2d 44, 46 (2d Dep't 1980); Bergson v. Bergson, 68 A.D.2d 931, 932, 414 N.Y.S.2d 593, 594 (2d Dep't 1979)). The New Jersey Supreme Court expressly rejected such an approach in *Beck*, 86 N.J. at 498, 432 A.2d at 71-72. The *Beck* court stated that the requirement that parents "exhibit a potential for cooperation in matters of child rearing . . . does not translate into a requirement that the parents have an amicable relationship." *Id.* Rather, "a successful joint custody arrangement requires only that the parents be able to isolate their personal conflicts from their roles as parents and that the children be spared whatever resentments and rancor the parents may harbor." *Id.* (citation omitted); accord *Joint Custody of Children*, *supra* note 7, at 550 ("[a]lthough there has been a frequent suggestion that joint custody can work only for couples with an amicable relationship, the pertinent inquiry should be whether the parents are able to isolate their marital conflicts from their role as parents") (footnote omitted).

140. 86 N.J. 480, 432 A.2d 63 (1981).

141. *See id.* at 488, 432 A.2d at 66.

142. *Proceedings*, *supra* note 23, at 1, col. 3.

143. *Beck v. Beck*, 86 N.J. 480, 485, 432 A.2d 63, 65 (1981).

144. *Id.*

145. *See infra* notes 146-49 and accompanying text.

146. 86 N.J. at 498, 432 A.2d at 71 (citation omitted). According to the court, fit means "physically and psychologically capable of fulfilling the role of [a] parent." *Id.*

147. *Id.*

148. *Id.*

149. *Id.* According to one commentator, "[t]he factors discussed in *Beck* have been adopted by courts in several other jurisdictions." CHILD CUSTODY, *supra* note

With regard to the fourth requirement, the opinion represents a clear departure from the joint custody decisions of other jurisdictions.¹⁵⁰ *Beck* expressly holds that parents need not have an amicable relationship in order for joint custody to work, rather, the parties need only "be able to isolate their personal conflicts from their roles as parents."¹⁵¹ If the potential for cooperation does exist, the court should "encourage its activation by instructing the parents on what is expected of them."¹⁵² Moreover, "the potential for cooperation should *not* be assessed in the 'emotional heat' of the divorce."¹⁵³ Rather, the critical determination is whether the parents, outside the context of the litigation, "have each demonstrated that they are reasonable and are willing to give priority to the best interest of their child."¹⁵⁴

In concluding that the relevant inquiry is simply whether the parents can put aside their personal conflicts to cooperate for the benefit of their children, the *Beck* court directly challenges one of the major arguments raised against joint custody—parents who were unable to maintain their marriage cannot achieve the high degree of coop-

10, at 366 n.5 (citing *Strosnider v. Strosnider*, 101 N.M. 639, 645, 686 P.2d 981, 987 (Ct. App. 1984); *In re Wesley J.K.*, 299 Pa. Super. 504, 506, 445 A.2d 1243, 1249 (1982)).

The second factor enumerated in *Beck*—that each parent be willing to accept custody—is a threshold requirement for joint custody, because "[i]f one parent, though fit, does not wish to be actively involved in raising the child following divorce, there is little reason to go further." *Joint Custody of Children*, *supra* note 7, at 580.

The *Beck* court conceded that "the necessary elements [for an award of joint custody] will coalesce only infrequently." 86 N.J. at 497, 432 A.2d at 71. Yet, despite this caveat, the opinion presents a positive view of joint custody, which demands that judges take an active role in facilitating its application. *See id.* at 498-99, 432 A.2d at 72.

150. *See, e.g.*, *Moninger v. Moninger*, 202 Neb. 494, 499, 276 N.W.2d 100, 103 (1979) (both parents fit, but "alternating" custody not in child's best interest given "strenuous tug of war for custody"); *Fuhrman v. Fuhrman*, 254 N.W.2d 97, 100 (N.D. 1977) (joint custody "unworkable" because parents "unable to cooperate with each other well enough to make it work"); *Lumbra v. Lumbra*, 136 Vt. 529, 531-32, 394 A.2d 1139, 1141-42 (1978) (expressing doubt that parents who litigate custody can "collaborate in the interest of their [children]" and concluding that "joint custody should only be decreed in cases where there is a finding of extraordinary circumstances").

151. 86 N.J. 480, 498, 432 A.2d 63, 71 (1981); *see infra* notes 179-84 and accompanying text.

152. *Beck*, 86 N.J. at 499, 432 A.2d at 72 (quoting *Joint Custody of Children*, *supra* note 7, at 580).

153. *Id.* at 498, 432 A.2d at 72 (emphasis added).

154. *Id.* (quoting *Joint Custody of Children*, *supra* note 7, at 580).

eration demanded by joint custody.¹⁵⁵ The essence of the criticism is that "the requirements of joint custody are inherently contrary to the fact of divorce, in that even the most mature and sophisticated divorcees harbor substantial resentment against one another."¹⁵⁶ Since joint custody requires a high-degree of interaction in making child-care decisions, it is argued that parental conflict would be heightened in such an arrangement.¹⁵⁷ The *Beck* court conceded that the requirement that parents be able to cooperate in matters of childrearing is "the most troublesome aspect of a joint custody decree."¹⁵⁸ The essence of the decision, however, is that many parents are quite able to isolate their marital problems from their parental responsibilities,¹⁵⁹ and when the parents exhibit a spirit of cooperation towards childrearing, an award of joint custody will foster the child's relationship with both parents despite the parents' personal antagonism towards one another.¹⁶⁰ Implicitly, a "spirit of cooperation is evident where parents wish to promote their child's best interests."¹⁶¹

IV. Recommendation For New York Courts

This Note maintains that the current New York approach to joint custody is unduly restrictive, and thus inhibits full consideration of

155. *Joint Custody*, *supra* note 9, at 367. One commentator has stated:

Opponents of joint custody advance two primary arguments: (1) joint custody is contrary to a child's need for stability and continuity—conditions that opponents say can be offered by a single custodial environment, but not by a joint custody arrangement and (2) parents who could not cooperate to save their marriage are not likely to be able to cooperate in a joint custody arrangement.

CHILD CUSTODY, *supra* note 10, at 373. The latter argument is articulated in a recent opinion of the Vermont Supreme Court which observed:

Joint custody, more often than not, creates more problems than it resolves regardless of the initial good intentions of the parties. It should be decreed only where there is a finding of extraordinary circumstances; rarely is it in the best interests of the innocent victims of divorce, the children. The same inability of the parties to resolve their own domestic difficulties between themselves "also indicates that the possibility of a cooperative custody solution is usually remote."

Korshak v. Korshak, 140 Vt. 547, 550, 442 A.2d 464, 466 (1982) (citations omitted) (quoted in CHILD CUSTODY, *supra* note 10, at 374).

156. *Joint Custody*, *supra* note 9, at 367.

157. See CHILD CUSTODY, *supra* note 10, at 365. For a differing view, see *infra* notes 186-95 and accompanying text.

158. 86 N.J. at 498, 432 A.2d at 71.

159. See *id.* at 492, 432 A.2d at 68; see also *infra* note 171.

160. *Beck*, 86 N.J. at 498-99, 432 A.2d at 66, 71-72.

161. *Proposal for Change*, *supra* note 38, at 1090; see also DISPOSABLE PARENT, *supra* note 2, at 116; *Joint Custody of Children*, *supra* note 7, at 580.

joint custody as a viable alternative to sole custody arrangements. This restrictive approach is attributable, in large part, to the "essentially negative and pessimistic" tenor of *Braiman*, which has had a "chilling effect on lower courts."¹⁶²

Concededly, joint custody is not a cure-all. The feasibility of joint custody turns on the presence of factors that, as the *Beck* court has observed, will "coalesce only infrequently."¹⁶³ When these factors do coalesce, however, joint custody is likely to foster "the best interest of the child," because "it achieves for the [child] a close [ap]proximation of the life [he or she] enjoyed before the parental breakup."¹⁶⁴ Thus, in order to fulfill the intent of the Domestic Relations Law that child custody be determined solely in the best interests of the *child*,¹⁶⁵ the New York courts must adopt a flexible approach that will ensure that courts fully consider joint custody

162. *Rulings Compared*, *supra* note 21, at 3, col. 2. The author has stated:

There is no question but that the essentially negative tenor of the *Braiman* case has had a very definite chilling effect on lower courts prompting them, with a few notable exceptions, to reject or reverse awards of joint custody for the flimsiest of reasons.

In this regard, more than any other single statement in the *Braiman* case, the contention that joint custody "is insupportable when parents are severely antagonistic and embattled" has encouraged lower courts to dismiss joint custody applications generally with nothing more than terse references to "hostility" "acrimony" or "sharp differences" between the parties.

Id. (citing *Bliss v. Ach*, 86 A.D.2d 575, 575, 446 N.Y.S.2d 305, 305 (1st Dep't 1982); *Munford v. Shaw*, 84 A.D.2d 810, 811, 444 N.Y.S.2d 137, 139 (2d Dep't 1981); *Salamone v. Salamone*, 83 A.D.2d 778, 779, 443 N.Y.S.2d 464, 465-66 (4th Dep't 1981); *Cmaylo v. Cmaylo*, 76 A.D.2d 898, 899, 429 N.Y.S.2d 44, 46 (2d Dep't 1980); *Bergson v. Bergson*, 68 A.D.2d 931, 932, 414 N.Y.S.2d 593, 594 (2d Dep't 1979); *Ackerman v. Ackerman*, N.Y.L.J., May 3, 1982, at 43, col. 6 (Sup. Ct. Queens County)); see *Difficult Area*, *supra* note 21, at 1, col. 3. The authors of this article have observed:

Prior to *Braiman*, joint custody had been considered and awarded in a number of trial-term decisions. Since the *Braiman* decision, joint custody has been approved at the appellate level in two cases but rejected in eight. The two acceptances cannot be characterized as ringing endorsements, however, for in one, . . . the appellate division noted that "except for shared legal responsibility, the award of joint custody was, in effect, a grant of sole custody to plaintiff with liberal visitation rights to the defendant," and in the other, . . . the award was of custody to the mother during the school year and the father during the summer recess.

Id. (footnotes omitted).

163. 86 N.J. 480, 497, 432 A.2d 63, 71 (1981). See *supra* notes 146-49 and accompanying text.

164. *Legislation*, *supra* note 64, at 27, col. 4.

165. See *supra* note 88.

as an option to the traditional award of sole custody. One way to accomplish this goal is to follow the lead of *Beck* and the majority of states that have addressed the issue, and recognize that under certain circumstances, a court may award joint custody over the objection of one parent.¹⁶⁶

Courts should award joint custody even over the objection of one parent because: (1) studies indicate that a parent's initial anger and lack of cooperation at the beginning of a divorce will often dissipate with the passage of time;¹⁶⁷ (2) one parent should not have an automatic veto power over joint custody;¹⁶⁸ (3) allowing joint custody, even over the opposition of a parent, preserves the discretionary powers courts have traditionally had in custody cases;¹⁶⁹ and (4) a joint custody order may help reduce parental conflict in the long run.¹⁷⁰

A. Anger Dissipates Over Time

Studies conducted by social scientists indicate that the initial anger and refusal to cooperate during the divorce process that parents may experience is often transitory and will subside over time.¹⁷¹ This is even more likely to occur when parents share common values regarding childrearing,¹⁷² or when they have had a history of cooperation.¹⁷³ Such was the case in *In re Wesley J.K.*,¹⁷⁴ in which

166. See *supra* notes 75-86 and accompanying text.

167. See *infra* notes 171-85 and accompanying text.

168. See *infra* notes 196-99 and accompanying text.

169. See *infra* notes 200-06 and accompanying text.

170. See *infra* notes 186-95 and accompanying text.

171. Atkinson, Commentary Regarding the Revised Draft of the Model Joint Custody Statute 5 (Aug. 21, 1986) (ABA Revised Draft of Model Joint Custody Statute and Commentary thereto, available at *Fordham Urban Law Journal* office) [hereinafter Commentary]; see, e.g., *Joint Custody of Children*, *supra* note 7, at 552 & n.179 ("in studying the relationship that exists between divorced parents who are participating jointly in raising their children, one researcher concluded that the parents studied had the ability 'to continue a co-parenting relationship while terminating, both legally and emotionally, a spousal relationship' ") (quoting Ahrons, 'The Coparental Divorce: Preliminary Research Findings and Policy Implications' 13) (unpublished paper presented at the annual meeting of National Council on Family Relations, Philadelphia, Pa., Oct. 19-22, 1978); Part-time Fathers, *supra* note 3, at 64-76 (study based on extensive interviews with eight separated or divorced men who have physical custody of children) ("it is difficult to point precisely to the combination of factors that helped fathers and their ex-wives separate their relationship as spouses from their relationship as parents").

172. See Part-time Fathers, *supra* note 3, at 75.

173. See *Beck v. Beck*, 86 N.J. 480, 493 n.6, 432 A.2d 63, 69 n.6 (1981).

174. 299 Pa. Super. 504, 445 A.2d 1243 (1982).

the Superior Court of Pennsylvania took issue with the trial court's decision to award sole custody.¹⁷⁵ In remanding the case for further consideration, the court indicated its approval of awarding joint custody over the objection of the mother because the parents had cooperated well during periods of separation.¹⁷⁶ The court, which adopted the *Beck* standards for determining when joint custody is appropriate,¹⁷⁷ concluded that while a voluntary agreement is preferable, joint custody may be awarded over the objection of one parent when "the record indicates an ability [of the parties] to place the interests of the child before their own."¹⁷⁸

Similarly, in *Beck*,¹⁷⁹ the court's affirmance of the trial court's decision to award joint custody was influenced by its observation that "the problem of noncooperation arose only in the wake of the initial joint custody decree,"¹⁸⁰ and that "[t]he parties cooperated satisfactorily in the pre-divorce visitation routine."¹⁸¹ This observation provides the basis for what is perhaps the major innovation of *Beck*: the idea that the "potential for [parental] cooperation should not be assessed in the 'emotional heat' of divorce."¹⁸² Analytically, this is the key to the court's reasoning that parents need not have an amicable relationship to qualify for joint custody, but must only "be able to isolate their personal conflicts from their roles as parents."¹⁸³ In assessing the parents' potential for cooperation outside of the divorce setting, as opposed to the "emotional heat" of the divorce, a court can make a more objective determination of whether

175. See *id.* at 510-11, 445 A.2d at 1246.

176. See *id.* at 516-17, 445 A.2d at 1249 (court noted that since "both parents are fit, . . . desire continuing involvement with their child, . . . are seen by the child as sources of love, and . . . are able to communicate and cooperate in promoting the child's best interests, . . . [the] situation [is] a particularly strong one for . . . a [joint] custody arrangement").

177. See *supra* notes 145-49 and accompanying text.

178. 299 Pa. Super. at 515, 445 A.2d at 1248.

179. 86 N.J. 480, 432 A.2d 63 (1981).

180. *Id.* at 493 n.6, 432 A.2d at 69 n.6.

181. *Id.*

182. *Id.* at 498, 432 A.2d at 72 (emphasis added).

183. *Id.* at 498, 432 A.2d at 71; see also *In re Marriage of Bolin*, 336 N.W.2d 441, 446 (Iowa 1983) ("[a]lthough cooperation and communication are essential in joint custody, tension between the parents is not alone sufficient to demonstrate it will not work"); *Doe v. Doe*, 16 Mass. App. Ct. 499, 502, 452 N.E.2d 293, 295 (1983) ("[w]hile conflict between the parties does in fact exist, the record before us identifies that conflict as concerning the relationship of the husband and the wife with each other and their inability to communicate. It does not involve specific areas of disagreement regarding [the child's] care, custody and upbringing").

joint custody would be in the best interests of the child. Moreover, such an approach ensures that a court will give joint custody full consideration as an alternative to sole custody, because *Beck* requires that the judge "look for the parents' ability to cooperate and, if the potential exists, encourage its activation by instructing the parents on what is expected of them."¹⁸⁴

Given the recognition that, for some parents, the anger they may feel during the initial stages of a divorce litigation will dissipate over time, it is particularly undesirable to effectively preclude joint custody at the beginning of a case by giving one parent an automatic veto power.¹⁸⁵

184. 86 N.J. at 498-99, 432 A.2d at 72 (citation omitted). Clearly, however, if parents lack the ability to cooperate or if the level of hostility is extreme, and likely to remain that way, joint custody will not be feasible. See, e.g., *Rolde v. Rolde*, 12 Mass. App. Ct. 398, 399, 405, 425 N.E.2d 388, 389, 392 (1981) ("joint custody or shared responsibility is an invitation to continued warfare and conflict" where the parties are severely antagonistic and embittered toward each other") (citation omitted); *Heard v. Heard*, 353 N.W.2d 157, 161-62 (Minn. Ct. App. 1984) (error to award joint custody where parties "were unable to communicate and . . . negotiations even on such matters as telephone calls by the children sometimes resulted in abusive behavior"); *Braiman v. Braiman*, 44 N.Y.2d 584, 590, 378 N.E.2d 1019, 1021, 407 N.Y.S.2d 449, 451 (1978) ("[a]s a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, it can only enhance familial chaos"); *Worowski v. Worowski*, 95 A.D.2d 687, 687, 463 N.Y.S.2d 798, 798 (1st Dep't 1983) (abuse of discretion to award joint custody given "background of continuing marital turmoil"); *Dodd v. Dodd*, 93 Misc. 2d 641, 647, 403 N.Y.S.2d 401, 405 (Sup. Ct. N.Y. County 1978) (request for joint custody denied where "parties . . . made child rearing a battleground").

Similarly, some courts have refused to award joint custody when the parents lacked shared values regarding childrearing. See *Kincaide v. Kincaide*, 444 So. 2d 651, 652 (La. Ct. App. 1983) ("irreconcilable differences . . . concerning the child's attending private religious school and other matters"); see also Steinman, Zemelmann & Knoblauch, *A Study of Parents Who Sought Joint Custody Following Divorce: Who Reaches Agreement and Sustains Joint Custody and Who Returns to Court*, 24 J. AM. ACAD. CHILD PSYCHIATRY 554, 561-62 (1985). The authors, who studied 51 families with joint custody, observed the following characteristics of families for whom joint custody was successful:

- (1) relatively low degrees of anger; (2) the ability to control aggression;
- (3) high self-esteem; (4) only mild depression about the break-up; and
- (5) respect for the ex-spouses' role as a parent. By contrast, the typical parent in the failed group possessed: (1) intense anger; (2) a strong tendency to blame the ex-spouse for the break-up; (3) a low sense of self-worth; (4) a rigid personality; and (5) deep mistrust of the other parent.

Id.

185. See *infra* notes 196-99 and accompanying text.

B. Joint Custody May Ultimately Reduce Parental Conflict

For some parties, "the existence of a joint custody order may help reduce conflict since a parent who might otherwise have been the non-custodial parent will not feel like [a] visitor with second-class rights."¹⁸⁶ To the extent a party feels that he or she is being treated as an equal, the party may "have less desire for a power struggle."¹⁸⁷

For example, in a recent California study of 414 custody cases, researchers concluded that "the custody arrangement most beneficial in terms of lack of subsequent parental conflict is joint custody."¹⁸⁸ Of the 414 cases the authors studied, 276 involved sole custody, and 138 involved joint custody.¹⁸⁹

The authors evaluated the success of the two types of arrangements by comparing respective rates of relitigation following the initial

186. Commentary, *supra* note 171, at 6; see also DISPOSABLE PARENT, *supra* note 2, at 116-17; *Proposal for Change*, *supra* note 38, at 1087. The author has stated:

There have been relatively few studies concerning the effects of divorce on children. Roman and Haddad, however, discussed the results of a California and Virginia study in depth. These studies evaluated the effects of the sole custody awards on children over a period of years following divorce. The California study attempted to show the effects of sole custody on the children involved. All of these children were negatively effected by living in a single-parent home. This was especially evident where there was conflict between the parents. The study concluded that this conflict could only be alleviated through an award of joint custody. In fact, this same study asserted that sole custody has a more harmful effect upon the child than does joint custody because children who are part of a sole custody [arrangement] . . . fear that the non-custodial parent will [ultimately] abandon them.

[The study found] several reasons for the increased conflict between parents where sole custody has been awarded. Often, . . . the relationship between the child and the custodial parent becomes tenuous within one year of the divorce. [Hence], [t]he child generally develops a closer relationship with the non-custodial parent. Apparently, the custodial parent is over burdened with the responsibility for the child and is filled with anxiety. The non-custodial parent, however, is able to "woo" the child with trips and other outings. Later, the non-custodial parent tends to withdraw [feeling that] he or she has lost meaningful contact with the child. [Thus] one parent feels overly burdened and anxious, [and] the other is left with a sense of loss.

Id. at 1087 n.94 (citations omitted).

187. Commentary, *supra* note 171, at 6; see also *Joint Custody of Children*, *supra* note 7, at 551.

188. *Rulings Compared*, *supra* note 21, at 4, col. 3 (citing Ilfeld, Ilfeld & Alexander, *Does Joint Custody Work? A First Look at Outcome Data of Relitigation*, 139 AM. J. PSYCHIATRY 63 (1982)).

189. See *id.*

custody determinations.¹⁹⁰ "Agreement between the parents accounted for ninety-one percent of the sole custody awards and eighty-six percent of the joint custody awards."¹⁹¹

The study revealed significantly less relitigation in the joint custody cases—sixteen percent—than in the sole custody cases—thirty-two percent.¹⁹² " 'These proportions,' " observe the authors, " 'are significantly different . . . and suggest that joint custody results in less parental conflict and implicitly, in lower child distress than in [sole] custody.' "¹⁹³

Significantly, "as for the group in which joint custody was awarded over the objection of one of the parents, the rate of relitigation was no greater than that for the sole custody group."¹⁹⁴ Consequently, the authors suggest that "unconsented joint custody is no more disruptive in terms of parental conflict than [sole] custody."¹⁹⁵

C. One Parent Should Not Have an Automatic Veto Power

Although a parent's opposition to joint custody is a factor a court should seriously consider before entering such an order,¹⁹⁶ one parent

190. *See id.*

191. *Id.*

192. *See id.*; *see also Joint Custody of Children*, *supra* note 7, at 572 ("some evidence based on judicial experience that [fewer], not more modification battles result from decrees of joint custody").

193. *Id.*

194. *Id.*

195. *Id.*; *see also Beck*, 86 N.J. at 498 n.9, 432 A.2d at 71 n.9 ("[a]lthough joint custody may be less likely to succeed if ordered by the court than if achieved by the parents' agreement, court-ordered joint custody is likely to be no more prone to failure than court-ordered sole custody following a divorce custody proceeding") (citation omitted).

196. The majority of states that have addressed the issue allow a court to award joint custody, even over the objection of one parent. *See supra* notes 75-86 and accompanying text. By legislation, however, Ohio, Texas and Wisconsin expressly require the consent of both parents. *See supra* note 79; *see also Dodd v. Dodd*, 93 Misc. 2d 641, 643, 646-47, 403 N.Y.S.2d 401, 402 (Sup. Ct. N.Y. County 1978) (observing that "[w]hile the court should not yield to the frivolous objections of one party, it must give thought to whether joint custody is feasible when one party is opposed and court intervention is necessary to effectuate it" and expressing doubt where "one parent resists joint custody and refuses to be persuaded that it is workable"); *cf. Viable Alternative*, *supra* note 135, at 3, col. 1 ("joint custody should be rejected . . . where [e]ach party is unalterably opposed").

In an attempt to develop more consistency in the area of joint custody, the American Bar Association's Family Law Section is in the process of drafting a model joint custody statute. According to the Commentary to the latest draft, the question of "whether joint custody should ever be ordered if one parent opposes

should not have an automatic veto power over joint custody. Allowing one parent the unilateral power to avoid an order of joint custody by withholding consent can unfairly affect the rights of the parties.¹⁹⁷ For example, a parent might withhold consent to joint custody as leverage to gain advantage on other issues, such as support and property settlements.¹⁹⁸ Allowing joint custody over parental opposition will thus discourage parents from using lack of consent to such an arrangement as a "bargaining chip" in divorce negotiations. Moreover, by refusing to allow an automatic parental veto, the court will properly focus the determination of the best interests of the child on the *child*, and not on issues primarily related to the parents' personal interests.¹⁹⁹

[it]" is "[o]ne of the most controversial issues which developed in drafting [the] statute." Commentary, *supra* note 171, at 5. The drafters were "sharply divided":

[T]he issue of parental consent was vigorously debated. Those who would require consent of both parents advance several arguments. First, they argue that if parents are antagonistic enough to litigate the issue of joint custody, they probably are too antagonistic for joint custody to work. They point to studies which indicate a relatively high rate of relitigation of joint custody cases (although other studies report lower rates of relitigation of joint custody compared [with] sole custody).

Second, those who believe joint custody should only be allowed if both parents agree to it [also] claim that some parents will use a request for joint custody as [an] improper bargaining chip on property and support issues. . . . [T]he argument . . . is that a parent who should not receive joint custody will nonetheless seek it as a way to pressure the other parent to give in on property and support issues. Under this line of reasoning, a parent who should have sole custody might consent to a less than fair share of property and support in exchange for the other parent dropping a request for joint custody.

Id. at 5, 6-7. For a discussion of the rationale for allowing courts to order joint custody over the objection of one parent, see *supra* notes 171-95 and accompanying text; *infra* notes 197-206 and accompanying text.

197. See Commentary, *supra* note 171, at 5.

198. See *id.* According to the Commentary the counter-argument is "that a parent who should not receive joint custody will nonetheless seek it as a way to pressure the other parent to give in on property and support issues." *Id.* at 6. That is, "a parent who should have sole custody might consent to less than a fair share of property and support in exchange for the other parent dropping a request for joint custody." However:

[T]here is a significant difference. If the joint custody statute allows parental veto over joint custody, a judge has no discretion to correct the use of a denial of permission for joint custody as an improper bargaining chip. On the other hand, if the statute allows a judge discretion to order joint custody and a parent improperly seeks joint custody, the judge has discretion to deny joint custody and still award an appropriate amount of property and support.

Id. at 6-7.

199. New York law requires that child custody be determined solely in the best interests of the child. See *supra* note 88 and accompanying text.

D. Preserving the Court's Discretionary Powers

Allowing joint custody over the objection of one parent "preserves the discretionary powers which courts have traditionally had in custody cases."²⁰⁰ As noted above, the feasibility of joint custody will depend on an individualized determination of such factors as whether both parents are fit, the ability of the parents to cooperate, and the quality of the parent-child relationships involved.²⁰¹ Because of the need for individualized determinations, courts should not arrive at custody arrangements by applying "rigid rules, such as [an automatic] parental veto over joint custody."²⁰² Instead, courts should "exercise sound discretion after [careful] consideration of appropriate factors."²⁰³ Moreover, in order to ensure full consideration of joint custody as an option, courts should be required to make findings of fact in support of their ultimate custody decisions.²⁰⁴

In short, allowing a parent to veto joint custody by withholding consent would limit the court's discretionary powers because "a judge would be powerless to order joint custody even if [it] appeared to be in the best interest of the child."²⁰⁵ Such a result would not only be unfortunate, but would contravene the express command of the Domestic Relations Law that the court "give such direction, between the parties, for the custody . . . of any child of the parties,

200. Commentary, *supra* note 171, at 6.

201. See *supra* notes 146-49 and accompanying text.

202. Commentary, *supra* note 171, at 6; cf. *Kerns v. Kerns*, 59 Md. App. 87, 95-96, 474 A.2d 925, 930 (1984) ("very existence of conflicting views on the subject [of joint custody] illustrates the necessity for leaving the resolution of such disputes in each case to the sound judicial discretion of the [court]"); see *supra* notes 196-99 and accompanying text.

203. Commentary, *supra* note 171, at 6. Such factors include the following: (1) both parents must be fit; (2) both parents must desire continuing involvement with their child; (3) the child should view both parents as a source of security and love and; (4) both parents must exhibit potential for cooperation in raising the child. For a discussion of these factors, see *supra* notes 146-61 and accompanying text. *Accord* Bratt, *supra* note 37, at 303; see also *Joint Custody*, *supra* note 9, at 369.

204. See Commentary, *supra* note 171, at 6. Currently, many states require judges to make specific findings in the event they modify or deny joint custody. See, e.g., ALASKA STAT. §§ 25.20.100, 25.21.110 (1983); CAL. CIV. CODE §§ 4600.5(c) (West Supp. 1987); CONN. GEN. STAT. ANN. § 46b-56a(b) (West 1986); FLA. STAT. ANN. § 61.13(2)(b)(2) (West 1985 & Supp. 1987); IDAHO CODE § 32-717B (1983); IOWA CODE ANN. § 598.41(2) (West Supp. 1987); KAN. STAT. ANN. § 60-1610(a)(4)(A) (Supp. 1986); ME. REV. STAT. ANN. tit. 19, § 752(6) (Supp. 1986); MASS. ANN. LAWS ch. 208 § 31 (Law Co-op. 1981 & Supp. 1986); MICH. COMP. LAWS ANN. § 722.26a(1) (West Supp. 1987); MONT. CODE ANN. § 40-4-224(1) (1985); NEV. REV. STAT. ANN. § 125.480(3)(a) (Michie 1986); N.H. REV. STAT. ANN. § 458:17(II)(a) (1983); PA. STAT. ANN. tit. 23, § 5307 (Purdon Supp. 1987).

205. Commentary, *supra* note 171, at 6.

as . . . justice requires, having regard to the circumstances of the case and . . . to the best interests of the child.''²⁰⁶

V. Conclusion

When joint custody works it is likely to be in the best interests of the child, because unlike sole custody it preserves the child's family status as it existed before the parental breakup. Given the mandate of the Domestic Relations Law that child custody is to be determined solely in the best interests of the child, the New York courts must adopt an approach to joint custody that will ensure that it is given full consideration, even when one party objects to such an arrangement. One way to accomplish this goal is to join with the majority of states that have addressed the issue, and recognize that under proper—albeit limited circumstances²⁰⁷—courts may award joint custody over the opposition of one parent.

Daniel R. Mummery

206. N.Y. DOM. REL. LAW § 240 (McKinney 1986).

207. See *supra* note 163 and accompanying text.