Can Joint Custody Serve the Best Interests of the Child?

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In the 19th Century, the father had almost absolute right to the custody of his children. That right was based, in part, on the notion that the father owned the child. In addition, the child's welfare was presumed to be protected since the father was the more financially secure parent and the child's "natural protector." In the 20th Century, the presumption fell to the mother, who was considered more fit to raise the children ("tender years doctrine"). At present, this presumption has been eliminated from many statutes and is rapidly changing in the public mind, both because of equal rights for fathers as well as the attention to the child's best interests.[9] As a result, joint custody, virtually unknown before the Sixties, is now popular and controversial. Indeed, since January, 1980, California has insisted that courts consider joint custody in contested cases.[5]

The idea of joint custody is attractive: divorced parents, despite their differences, cooperate to assure their child's welfare. It more intimately involves both parents in raising their child and serves to prevent the child's profound sense of loss — and mourning — of the non-custodial parent. The child can look to both parents for support. By having both parents regularly available, it discourages the unrealistic fantasies which the child fashions about the absent parent: the child has an opportunity to compare the real

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parent with the fantasied one,[2,10] promising a less fragmented identity.[3,6,11]

The ideal is far from the reality. Joint custody does not always serve "The best interests of the child," the generally accepted medical and legal criterion for placement of the child. The child's best interests can easily be lost in a joint custody settlement. Shared placement may be a compromise to avoid the risk of loss of the child to the former spouse; it may seem the only solution when nothing else can be agreed upon.

The greatest danger is that the parents cannot cooperate, despite their best intentions. Joint custody is more complicated than sole custody because it requires divorced parents to make mutual decisions. The parents, angry and hurt for many years after the divorce, find that they cannot cooperate easily. Further, situations change to complicate the working arrangement: father remarries, mother gets a job, son needs a special school. The parents try to solve their disagreements by compromising instead of cooperating, and, as a consequence, the child is compromised. Sole custody determines that one parent is the clear decision-maker, preventing the kind of disruption occurring between two equally responsible, but disagreeing, parents.

Continuity for the child is so important that the most influential and well-known book on child placement, *Beyond the Best Interests of the Child,* by Joseph Goldstein, Anna Freud and Albert Solnit[14] opposes joint custody, insists on permanent and unconditional placement with one parent and even argues against court-ordered visitation: "Once it is determined who will be the custodial parent, it is that parent, not the court, who must decide under what conditions he or she wishes to raise the child. Thus, the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits" (p.38); yet, joint custody has many defenders, both medically and legally, not only for the reasons cited above, but also because of the dangers of sole custody: the marked change in the child's relationships to the mother and father, the devalued or idealized absent parent,[2] the burden of care on the custodial parent, the grief over the lost parent[10] and the inaccessibility of the noncustodial parent.[23–26]

Present custody arrangements are unsatisfactory.[8,17] Battles between ex-spouses, challenges to custody and court interventions continue to trouble the life of the child.[14]

In a typical study, the disturbed marital relationships continued long after the divorce, resulting in at least one court intervention in 52% of the cases,[7] so it is not simply for theoretical benefits that courts are willing to experiment with joint custody.

There are not now any comprehensive studies of the effect of joint custody, nor are there studies comparing joint custody to sole custody.[1] (Wallerstein and Kelly have published *Surviving the Breakup*, which describes their five-year study of divorcing families. It is the most comprehensive (but uncontrolled) study available.) There are a few scattered reports

enthusiastically endorsing joint custody,[1,14,19] and others suggesting that joint custody may be advantageous or workable,[4,10] but none of these studies are controlled. Goldstein, Freud and Solnit's opinions are persuasive in part because of their intelligent application of the extensive information about child development derived from psychoanalytic studies.[2] (The psychoanalytic studies, all necessarily incomplete, cannot answer some of the more singular questions of joint custody; for example, psychoanalytic orientation can be used to support[3,8,16] or oppose enforced visitation.[10,11] Goldstein and his collaborators often ignore contrary studies and, at times, quickly dismiss studies with different conclusions than their own. In *Before the Best Interests of the Child*,[11] which is more carefully documented than their first book, they remark about the investigators who maintain that intellectual performance is relatively resistant to childhood deprivation: "However, their reliance on the resilience of cognitive function as evidence of the child's well-being is simplistic." Implicit in much of their criticism is that they believe that behavioral scientists are poor at making long-range predictions; therefore, they value the immediate well-being of the child, but what is in the "best interest of the child" to assure his immediate freedom from anxiety and sadness is not necessarily "best" in his preparation for adulthood; e.g., we know it is frustration that enables the infant to act more realistically in his environment.[12]) However, they do not base their opinions on controlled, longitudinal studies of children in joint custody situations, since none are available, but the most notable aspect of the psychiatric literature on the placement of children is not its quality, which tends to be poor, but its absence: in the psychiatric literature, there are only a handful of investigations dealing specifically with joint custody. It is undeniable that we know little about the effects of custody arrangements.[1,8,17]

Criteria for Consideration of Joint Custody

In favorable cases, where the child's interests will be better served, joint custody should be chosen. This section describes those criteria which the psychiatric expert should consider before recommending joint custody. Joint custody is defined by the law and decreed by the court; it is not the same as "shared parenting," which refers to a non-legal arrangement between parents. Shared parenting means that mother and father share in the responsibilities of raising the child, (e.g., in deciding residence arrangements or in choosing a school). It does not imply a "50-50" division of care, but it does mean that both parents will be substantially involved in rearing the child. It may be implemented under conditions of sole custody, joint custody or without any court order (since divorced parents may make their own placement decisions). Mental health workers should not assign themselves the **task** of defining joint custody,[1,4] but it is reasonable for mental health workers to **assist** the law in its task of defining joint custody. As in all areas of the law, the court should not be relieved of its responsibility to decide conventions; the psychiatrist should not be lured into making such determinations.[18]

The guiding principle should be that the child's best interest will be better served by joint custody than by sole custody. Joint custody should not be awarded simply because of the parents' good character or because of some claimed legal right. Ellen Goodman has argued that the Kramers (in the movie *Kramer vs. Kramer*) would have been "perfect candidates for joint custody" because both parents were decent and loving.[16] That is an error because parental qualities, in themselves, cannot determine what is in the best interest of the child. Placement between decent and loving parents who are perpetually in conflict is detrimental to a child. What is at issue is not the actual virtues or vices of the parents, but the child's response to the actions of the parents. Joint custody — or any kind of custody — should be decided on what is least damaging to the child.

From this point of view, Joseph Sobran's argument that fathers deserve some redress because of the injustices they have suffered is irrelevant.[22] It is not a question of Mr. Kramer's getting his fair share of his son Billy, or of Mr. Kramer's having equal protection under law. The question is whether **Billy** is protected; the presumption should be in his favor.[15]

If the parents cannot cooperate, there is little reason to consider joint custody, since it would be disruptive to the child's development even if both parents are fit, and if a parent is not fit (e.g., by being physically abusive or sexually assaultive to the child), joint custody should not be considered; however, since past relationships with parents are not good predictors of future ones (e.g., some fathers become much better fathers after the divorce[27]), joint custody should not be ruled out automatically because of a previously imperfect relation.

1. Physical factors should allow the possibility of joint custody. The parents should live close enough to each other that no hardship is forced on the child in traveling between homes. This may result in the parents not being more than "biking distance" from one another, or even, as has been ordered, that the parents alternate living in the child's permanent residence. Other physical factors include the amount of time a child can spend with each parent, the health of the parents, the location of the child's friends, the financial means of the parents, schooling, etc.

2. Responsibilities of child care can be shared. The parents must be willing to work out an arrangement where both make decisions concerning the child's activity. Joint custody implies that each will take responsibility for aspects of routine care, not, as happens in sole custody, that one parent plans for the child and the other "visits" the child.

3. The parents can cooperate. Ex-spouses who hate each other and, consciously or unconsciously, sacrifice their child's welfare for their own ends, are unsuitable for joint custody. Abarbanel[1] has suggested four major factors that contribute to success: "commitment to the arrangement, the parents' mutual support, flexible sharing of responsibility, and agreement on the implicit rules of the system." Cooperation can mean agreeing to pick up the child from a less troublesome spot than the ex-spouse's home. It may

entail substantial sacrifice for the child's best interest, e.g., the parent's willingness not to move out of the area or even agreement not to remarry. Cooperation is the most difficult area for divorced parents; it is the single biggest obstacle that a joint custody program must remove.

This is not to say that joint custody should be ruled out if parents argue. If the child can still form an attachment to each, despite parental conflicts, then joint custody is possible. Indeed, some have argued that conflict is necessary between parents so that the child understand the necessity of the divorce and be able to work through the reality of the separation.[13] Wallerstein and Kelly have found that parents can still raise their children adequately in a conflicted home environment (p. 15). More important, they found (p. 215) that, after the divorce, "Successful outcome at all ages... reflected a stable, close relationship with the custodial and non-custodial parent".[27]

4. Parents are accountable to the court. In effect, parents have asked the court to impose joint custody because they cannot themselves agree. Therefore, they are accountable to the court in order for the court to fulfull its function. They must agree to be evaluated, both at the time of the determination and subsequently; they must agree that the child be allowed representation if it is appropriate[3] (Sheffner and Suarez[20] argue that a child should not be represented: "We would view such a step as reinforcing the idea that legal solutions alone are sufficient" (p. 443) and they must agree to specific conditions related to joint custody which the court imposes in order to assure its success. Though the court should interfere minimally in the custody arrangement, it may encourage family members to be counseled or enter psychotherapy.

Discussion

Joint custody attempts to assist divorced parents in their wish to be actively involved in the routine and special needs of their child. It tries to avoid the lopsided sole custody arrangement in which the child is "divorced" from the noncustodial parent. The central issue is whether a framework can be established within which parents will cooperate for the child's benefit.

One clearly superior form of custody has not been demonstrated. There are suggestions that joint custody provides greater satisfaction than sole custody[17] and that children can function well in two discrete home environments;[1] that children benefit from contact with both parents even when there is conflict between them.[4,10] (This is in contradiction to the Yale Group's beliefs. Goldstein et al state that "Children have difficulty in relating positively to, profiting from and maintaining the contact with two psychological parents who are not in positive contact with each other... A 'visiting' or visited parent has little chance to serve as a true object for love, trust and identification, since this role is based on his being available on an uninterrupted day-to-day basis" (14, p. 38). These reasons weigh heavily in

their opposition to joint custody. Most others believe that satisfactory identification with the non-custodial parent does not depend on day-to-day contact and that children benefit from a continuous relationship with both parents even when they are in conflict. Children rarely favor divorce, except in the most tumultuous marriages. They are much less satisfied with the results of the divorce than their parents. It is probable that adults have less tolerance for conflict than their children.) It does not seem that sole custody is necessarily the solution to conflict between divorced parents.[3] As we learn more about joint custody, we will learn which variables are essential for its success and failure and under what conditions, if any, it ought to be ordered. We need to know the importance of demographic factors, personalities of the parents, effect of ages of the children, conditions of the agreement, etc. Joint custody has to be compared in longitudinal studies against other forms of custody and, where it is unsuccessful, has to be reviewed to determine what factors led to its failure. It does not seem unreasonable to think that joint custody will be the least detrimental alternative for the child under certain conditions. For the present, we cannot specify those conditions.

This is not to suggest a presumption in favor of joint custody. Neither research on joint custody nor our knowledge about the child's psychological development offer any compelling reasons to prefer joint custody; however, if statutes were written forbidding joint custody, there would never be the possibility of testing out its feasibility. In this respect, California's new law should have important findings in the future. Joint custody may be a useful alternative to the present traditional custody arrangements. For example, joint custody is to be preferred to sole custody if it can be shown, as some contend, that the presence of both parents is beneficial,[27] that protracted custody disputes are prevented and that loyalty conflicts are avoided.[1,17]

Perhaps the process of divorce can be changed so that joint custody is a viable alternative. Many authors recommend some kind of counseling or psychiatric assistance for divorced families.[11,23,27] They believe that a counseling program for divorced parents may enhance the chances of a more satisfactory divorce outcome. It is conceivable that the institution of divorce can change (just as the institution of marriage has changed), even though parents and children cannot be changed.

After the divorce, an ongoing evaluation is useful to see what measures are most appropriate for the developing child in different phases of the divorce. Some flexibility is necessary to take into account the changes in the parents. Neither parents, court nor psychiatrist can make a final determination of the child's best interests at the time of the divorce itself. For example, after the divorce, the father may radically change his attitude toward the children or the mother may no longer be bitter toward the father. If so, joint custody may be preferred to sole custody. This is not to say (e.g.) that the child should swing from household to household with every change in the parents, but it is to say that the court may reexamine the custody

situation after the divorce.

The benefits and hazards of joint custody, understood now more on the basis of conjecture than of fact,[4] will become clearer as more studies are begun. Moreover, custody arrangements have an inherent advantage for study by virtue of their court-ordered nature: the family is not free to drop out of the custody arrangement, whereas in ordinary research programs, the family could terminate its involvement at will.

It is, of course, not simply the separation of the parents which produces all the stress in a custody arrangement; it is also the legal process itself which contributes to the difficulties in the child's life.[19] Divorced parties often remark about how things deteriorated when their attorney entered the process. Though such a remark is largely a projection of the parent, it has enough merit to direct our attention to detrimental aspects of the court procedure. Since joint custody is a relatively new legal arrangement, it may suggest we need to know how much of the child's discomfort after the divorce is a result of the legal process itself rather than the break-up of the family.

Finally, research on joint custody helps to focus our attention on not only the best interests of the child, but also the rights of parents.[9] Presently, it is the "best interest of the child" which guides decisions in child placement. Though this value seems most important to us now, we cannot forget that this is a value judgment, just as the father's having the superior right to custody because of notions about the child's being his property was a value judgment.[5] (What constitutes the "best interest of the child? Is it the immediate well-being of the child? Is that the same as appropriate preparation for adulthood? If not, which is more important? These types of questions lie beyond the scope of this paper; the psychiatric literature has been relatively inattentive to these central questions.) Parents may make claim only if they can serve the best interest of the child, but there is some value in considering the needs of the parents even if their needs are not paramount in custody cases. "Best interests of the child" should not become a shibboleth to avoid considering the complexities of a broken family.

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