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JOINT CUSTODY AND SHARED PARENTAL RESPONSIBILITY: AN EXAMINATION OF APPROACHES IN WISCONSIN AND IN FLORIDA

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I. DEFINING CUSTODY ARRANGEMENTS

"Joint custody" is a term that is loosely bandied about in courts around the country. The term has been used interchangeably with "separate" custody, in which custody of one child is granted to one parent and the other child to the other parent,¹ and with "split" or "divided" or "alternating" custody, in which sole custody of the child alternates between the parents.² This usage is unfortunate. Separate custody has nothing to do with joint custody. Divided custody is similar to many joint custody arrangements, but in some respects is the exact opposite. Joint custody encourages sharing responsibility, while divided custody, where each parent has sole control for part of the time, encourages splitting, sometimes competing, responsibilities.

Courts, legislators and social scientists have used at least eighteen terms to describe alternatives to sole custody: joint

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1. See, e.g., *Hagge v. Hagge*, 234 N.W.2d 138 (Iowa 1975) (court said that although there is a preference for not dividing brothers and sisters, it was in the best interests of these children to award the son to the father and the daughter to the mother); *Sandman v. Sandman*, 64 A.D.2d 698, 407 N.Y.S.2d 563 (court awarded youngest child, a son, to the mother, but awarded the oldest child, a daughter, to the father because her mother had alienated her), *appeal denied*, 46 N.Y.2d 705, 413 N.Y.S.2d 1026 (1978); *Kerlee v. Kerlee*, 40 Or. App. 367, 595 P.2d 487 (court awarded younger son to wife and older son to husband), *modified on other grounds*, 41 Or. App. 137, 596 P.2d 1331 (1979).

2. See, e.g., *Martin v. Martin*, 132 S.W.2d 426, 428 (Tex. Civ. App. 1939) (original decree divided the child's time between both parents, but the appellate court awarded full custody to the mother, saying that "[c]ertainly, no child could grow up normally when it is hawked about from one parent to the other with the embarrassing scene of changing homes at least twice a year"). See also Note, *Divided Custody After Their Parents' Divorce*, 8 J. FAM. L. 58 (1968).

legal custody, joint physical custody, divided custody, separate custody, alternating custody, split custody, managing conservatorship, possessory conservatorship, equal custody, shared custody, partial custody, custody given to neither party to the exclusion of the other, temporary custody, shifting custody, concurrent custody,³ dual custody,⁴ cooperative parenting⁵ and shared parenting.⁶ To this list I would add "shared parental responsibility," which is the cachet given the concept in Florida.⁷ "Joint custody" is the most widely used term and is the term established in Wisconsin.⁸ This article will examine the Wisconsin and Florida approaches to the issue of joint custody and will show that although their terminology differs, courts in both states can use their statutes flexibly to achieve the same result — the best interest of the child.

A. *The Wisconsin Approach*

Terms such as "joint custody" should be specifically and carefully defined either by statute or by case law but, unfortunately, the Wisconsin statute⁹ falls a little short in this respect. The current statute, section 767.24,¹⁰ which became a part of the Family Code¹¹ in 1977, provides that:

3. Miller, *Joint Custody*, 13 FAM. L.Q. 345, 360 n.79 (1979) (identifying the first fifteen terms).

4. See, e.g., Patrick v. Patrick, 17 Wis. 2d 434, 436-37, 117 N.W.2d 256, 258 (1962) (wife's attorney argued that arrangement allowing the father a maximum of 84 days visitation, 60 of them to be in Florida, was dual custody, but the court did not agree).

5. Address by Hugh McIsaacs, Florida Supreme Court Commission on Matrimonial Law (Jan. 20, 1983).

6. See, e.g., Banel, *Shared Parenting After Separation and Divorce*, 49 AM. J. OF ORTHOPSYCHIATRY 320 (1979).

7. FLA. STAT. ANN. § 61.13(2)(b)(2) (West Supp. 1983). See also Costa v. Costa, 429 So. 2d 1249 (Fla. Dist. Ct. App. 1983), where the court said:

The declaration of such public policy and the use of the term "responsibility" as opposed to "custody" is aspirational. It would be society's greatest reward — tangibly and otherwise — were the future adult inhabitants of this state able to look back to the 1980's and reflect how their predecessors finally came to recognize the priority to be given the well being of children.

8. WIS. STAT. § 767.24(1)(b) (1981-1982). Prior to 1977, Wisconsin trial courts were statutorily required to grant custody to one parent only. See WIS. STAT. § 247.24 (1975).

9. WIS. STAT. § 767.24 (1981-1982).

10. *Id.*

11. WIS. STAT. chs. 765-68 (1981-1982).

The court may give the care and custody of such children to the parties jointly if the parties so agree and if the court finds that a joint custody arrangement would be in the best interest of the child or children. Joint custody under this paragraph means that both parents have equal rights and responsibilities to the minor child and neither party's rights are superior.¹²

The Wisconsin Legislature emphasized its commitment to the laudable goals of joint custody by enunciating its legislative purpose as follows: "It is the intent of the legislature to recognize children's needs for close contact with both parents, to encourage joint parental responsibility for the welfare of minor children and to promote expanded visitation."¹³ While the legislature's purpose—to recognize children's need for close contact with both parents, to encourage joint parental responsibility and to promote expanded visitation—is clear enough, Wisconsin's specific definition of joint custody fails to distinguish between joint legal custody and joint physical custody. Comparing this legislative intent with the specific definition in the statute, it appears that the legislature is combining the two concepts. However, it is difficult to envision a situation where both parents enjoy *equal* rights and responsibilities to the minor child without the sharing of physical custody as well and, more specifically, the *equal* sharing of that custody. The main problem with Wisconsin's statutory definition is that such a custody arrangement is virtually impossible to attain in most divorce situations.

The reason this definition is not satisfactory is that there are many "sharing" arrangements which are neither "sole custody" nor "equal joint custody" but which *will* accomplish the legislative intent of encouraging close contact with both parents, joint parental responsibility and expanded visitation. In short, despite the apparently clear language of section 767.24, Wisconsin still needs a definition of the kind of "joint" custody envisioned in the legislative intent, as opposed to the statute's specific delineation of "joint custody."

12. WIS. STAT. § 767.24(1)(b) (1981-1982).

13. Divorce Reform Act, ch. 105, § 1(2), 1977 Wis. Laws 560, 561.

B. *The Florida Approach*

By contrast, Florida's new Shared Parental Responsibility Act¹⁴ more explicitly expresses Florida's requirements:

"Shared parental responsibility" means that both parents retain full parental rights and responsibilities with respect to their child and requires both parents to confer so that major decisions affecting the welfare of the child will be determined jointly. In ordering shared parental responsibility, the court may . . . grant to one party the ultimate responsibility over specific aspects of the child's welfare or may divide those aspects between the parties based on the best interests of the child.¹⁵

It is the public policy of the state to assure each minor child frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights and responsibilities of childrearing.¹⁶

Thus, the legislative goals in both states are the same. The statutes are similar also, but Wisconsin's is too limited; however, if Wisconsin courts ultimately interpret the law to encourage trial courts to exercise flexibility in their joint custody awards, Wisconsin and Florida may end up taking the same approach to this very sensitive issue. They might do this by stressing the legislative purpose rather than the specific definition of "joint custody."¹⁷

C. *Case Law*

So far Wisconsin appellate courts have not specifically addressed the issue of defining joint custody either before or

14. Shared Parental Responsibility Act, ch. 82-96, 1982 Fla. Laws 233 (codified at FLA. STAT. ANN. § 61.13 (West Supp. 1983)).

15. FLA. STAT. ANN. § 61.13(2)(b)(2) (West Supp. 1983).

16. *Id.* § 61.13(2)(b)(1).

17. In fact, one Wisconsin attorney who has practiced extensively at the Milwaukee County Children's Court believes that there does not appear to be any real substantive difference between the two state statutes:

The Wisconsin statute, while vaguely written, certainly can accommodate the Florida situation and any others that are presented by the facts of the specific case. I am not sure, given the legislative history of the Wisconsin law, that judges need the specific statutory direction provided in the Florida statute.

Letter from Paula K. Lorant to the *Marquette Law Review* (Mar. 14, 1983).

after passage of the Divorce Reform Act.¹⁸ In 1963 the supreme court disapproved of a divided responsibility order which authorized a father to make decisions relating to summer camp while the mother had sole custody of the child.¹⁹ The opinion indicated disapproval of the concept of a parent without physical custody making decisions regarding the welfare of the child. On the other hand, in *Patrick v. Patrick*²⁰ the court expressed approval of the concept of expanded visitation, which the wife called "dual custody." In that case the court discussed the limited authority a visiting parent has to care for the child's immediate and emergency needs.²¹ In the recent case of *Sandy v. Sandy*²² the Wisconsin Court of Appeals upheld a trial judge's order which alternated custody of the children and of the home on a bimonthly basis. The court extensively discussed the authority of the family court commissioner and the trial judge to evict a spouse from the homestead when there is no actual or threatened physical violence, but ignored the concept of joint or divided custody. It is tempting to try to definitively assess Wisconsin's attitude toward joint custody by analyzing the underlying philosophy of these few cases, but the scarcity of comment and the dynamic nature of family law make such an effort futile.

Decisions in Florida courts prior to the enactment of the new statute were equally ambiguous. Although appellate decisions affirmed most of the numerous awards of joint or divided custody decrees entered by trial judges, the following statement by the court of appeal is not unusual: "[O]bviously they both cannot have the custody because they stand divorced from each other; and any attempt to divide permanent custody of minor children is emphatically frowned upon by the Courts."²³

18. Divorce Reform Act, ch. 105, 1977 Wis. Laws 560.

19. *Kritzik v. Kritzik*, 21 Wis. 2d 442, 450, 124 N.W.2d 581, 586 (1963) (father claimed right to determine which camp his child would attend since he was to pay the cost, but court said "it is the type of decision that must be left to the person having custody of the children").

20. 17 Wis. 2d 434, 117 N.W.2d 256 (1962).

21. *Id.* at 437, 117 N.W.2d at 258.

22. 106 Wis. 2d 230, 316 N.W.2d 164 (Ct. App. 1982).

23. *Julian v. Julian*, 188 So. 2d 896, 897 (Fla. Dist. Ct. App. 1966) (citations omitted).

In an earlier case, *Phillips v. Phillips*,²⁴ the Florida Supreme Court reversed an order which gave custody of an infant to the mother with directions that the child should be allowed to visit the father for the first week of each month. The court interpreted this to be a "divided custody" order and reversed, saying:

There can be no doubt that experience shows that it is detrimental to the best interests of a young child to have [his/her] custody and control shifted often from one household to another and to be changed often from the discipline and teachings which are attempted to be imparted by one custodian to that other discipline and teachings sought to be imparted by another custodian.²⁵

Five months later in *Watson v. Watson*,²⁶ however, the same court approved a decree mandating placement of the child with one parent for six months and then with the other for six months without even referring to *Phillips*.²⁷

The one appellate decision in Florida interpreting the new Act has warmly embraced its philosophy, particularly with respect to the law's emphasis on parental responsibility rather than control. In that case, *Costa v. Costa*,²⁸ the trial court modified a provision entered prior to passage of the Act restricting the wife's right to move the children, ages seven and nine, from South Florida. The wife was granted custody and the husband was given "generous" and specific visitation. Shortly after the divorce both parties remarried and, six months after the final judgment, the wife sought permission to move with the children to Philadelphia on the ground that her new husband could earn \$4,000 more per year there. The trial court, granted her request but the appellate court, relying on the Shared Parental Responsibility Act, reversed.²⁹ Speaking for the majority, Judge Glickstein observed:

24. 153 Fla. 133, 13 So. 2d 922 (1943).

25. *Id.* at —, 13 So. 2d at 923.

26. 153 Fla. 668, 15 So. 2d 446 (1943).

27. *Id.* at —, 15 So. 2d at 447.

28. 429 So. 2d 1249 (Fla. Dist. Ct. App. 1983).

29. See also *Giachetti v. Giachetti*, 416 So. 2d 27 (Fla. Dist. Ct. App. 1982) (pre-Act case in which the court would allow a custodial mother to move from Florida to Alaska with the children only upon a showing of substantial or material change of circumstances even though the divorce decree contained no residence restriction).

Both of these parents have a fundamental, continual and permanent obligation to these children that can only be satisfied by the love and attention the close proximity of the two of them can provide at this time. The court can best serve the children's interest by making it possible that this occurs.³⁰

The court left little doubt that it would strongly enforce the shared responsibility concept:

[T]o recognize any such opinion which disregards close, continuing contact of minor children with both parents after dissolution would disregard the public policy now expressly recognized by the legislature of this state; namely, "to assure each minor child frequent and continuing contact with both parents after the parents have separated or dissolved their marriage."³¹

II. HISTORY OF PARENTAL PREFERENCE

In order to fully understand the concept of joint custody, it is necessary to consider the history of parental preference rules and of the current gender neutral view of parental custody. At common law, husband and wife were one and the husband, being the one, received custody of the children in the event the marriage broke up.³² This preference for the father continued in the United States into the twentieth century and was perhaps best expressed by Justice Brewer of the Kansas Supreme Court in 1881:

The father is the natural guardian and is *prima facie* entitled to the custody of his minor child. This right springs from two sources: one is, that [it is] he who brings a child, . . . into life . . .; the other reason is, that it is a law of nature that the affection which springs from such a relation

30. *Costa*, 429 So. 2d at 1251. Even Judge Anstead's dissent agreed with the philosophy of the Act: "I find myself in agreement with virtually everything said in the majority opinion, and most especially with the concerns expressed for the children." *Id.* at 1253.

31. *Id.* at 1252-53 (citation omitted).

32. See, e.g., *Wellesley v. Beauford*, 2 Russ. 1, 21 (Eng. Rep. 1827); *People ex rel. Pruyn v. Walts*, 122 N.Y. 238, 25 N.E. 266 (1890). Cf. *Welch v. Welch*, 33 Wis. 534 (1873) (court transferred custody of young boy to father despite the fact that the father had deserted the mother and child and had not supported them; the father allegedly was a man of means who kept a gambling house in Stevens Point). See also 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS, §§ 14-31 (1978); 59 AM. JUR. 2D *Parent and Child* § 28 (1971).

as that is stronger and more potent than any which springs from any other human relation.³³

In the case of *In re Stillman Goodenough*³⁴ the Wisconsin Supreme Court recognized this rule as being grounded in the common law.³⁵

Forty years later Wisconsin abolished the father preference rule in *Jenkins v. Jenkins*.³⁶ In that case, which reversed a trial court award of the two eldest sons to the father, the court rhapsodized on mother love in much the same language courts had previously bestowed on fathers:

For a boy of such tender years nothing can be an adequate substitute for mother love — for that constant ministration required during the period of nurture that only a mother can give because in her alone is duty swallowed up in desire; in her alone is service expressed in terms of love. She alone has the patience and sympathy required to mold and soothe the infant mind in its adjustment to its environment. The difference between fatherhood and motherhood in this respect is fundamental and the laws should recognize it unless offset by undesirable traits in the mother.³⁷

Wisconsin courts have not been alone in their febrile expressions of mother love. It is hard to top Justice Fulbright of the Missouri Supreme Court when he wrote, in 1938: "There is but a twilight zone between a mother's love and the atmosphere of heaven,"³⁸ but Justice Terrell of the Florida Supreme Court tried in 1941:

[S]he is morally, spiritually, and biologically best suited to care for it [the child] during infancy and adolescence. She is more sensitive to influences that are derogatory to its health and character and has been known to pursue it to the gutter and retrieve it after the father had abandoned it. In deeds springing from innate nobleness, the mother is the

33. *Chapsky v. Wood*, 26 Kan. 650, 652 (1881).

34. 19 Wis. 291 (1865).

35. *Id.* at 296 (court recognized general rule that a father has a right to his child, but in this case the father had been in prison, the mother was in the poorhouse and the daughter was an indentured servant who was deemed better off where she was).

36. 173 Wis. 592, 181 N.W. 826 (1921) (court awarded permanent custody of three sons to mother although both parents were of roughly equal means and the two oldest boys had been in the temporary custody of the father).

37. *Id.* at 595, 181 N.W. at 827.

38. *Tuter v. Tuter*, 120 S.W. 203, 205 (Mo. Ct. App. 1938).

peer of the father and when it comes to instinctive and intuitional powers she is much his superior.

. . . .

In civilized society, no calling rises above that of motherhood and in the care of minor children, she makes her most abiding impression. In this, the father is by nature a poor second

If ever he had the will to wield the rod of authority over his home, the refinements of civilization have drawn his fangs. He is now the world's champion heeler, his wife precedes him through the door and down the aisle; she is waited on before he is and is everywhere preferred to him. He is second at every social function and when he enters his curtillage, the very atmosphere reminds him that he is within the confines of an absolute matriarchy. If it is a benevolent one, he likes it; otherwise he spends his evenings at the club.³⁹

Although judges such as these heaped praises upon the nation's mothers, this praise frequently was reserved only for those who "behaved themselves," that is, ran the household, changed the diapers and kept the children quiet. As Justice Terrell wrote in 1943: "If she goes and returns as a wage earner like the father, she has no more part in [child care] than he and it necessarily follows that all things else being equal, she has no better claim when the matter of custody is at issue."⁴⁰ And in the recent *Pulitzer* case⁴¹ the trial judge concluded that even though neither parent was a candidate for parent of the year, it was the mother and not the father who "abandoned the primary care-taker role to nannies and the father."⁴²

Once Wisconsin abolished the father preference rule in favor of gender neutrality,⁴³ the courts began to prefer mothers.⁴⁴ Consequently, in 1971 the legislature passed a

39. *Randolph v. Randolph*, 146 Fla. 491, __, 1 So. 2d 480, 481-82 (1941).

40. *Watson v. Watson*, 153 Fla. 668, __, 15 So. 2d 446, 447 (1943).

41. *Pulitzer v. Pulitzer*, No. 81-5263 (Cir. Ct. West Palm Beach, Fla. 1982).

42. *Id.* See also J. Sanford, *Contested Custody and the Judicial Decision Making Process* (1977) (doctoral dissertation available at Florida State University library) (observing that Florida circuit judges frequently concluded that mothers, but not fathers, who did not seek custody "abandoned" their children).

43. See *supra* note 36 and accompanying text.

44. See, e.g., *Welker v. Welker*, 24 Wis. 2d 570, 129 N.W.2d 134 (1964) (where the court said it was an abuse of discretion not to award custody of a five-year-old girl

law to explicitly require equality of treatment.⁴⁵ But *Scolman v. Scolman*,⁴⁶ the first appellate case interpreting this statute, created confusion. In reversing a judgment awarding custody to the mother the court said:

We conclude that sec. 247.24(3), Stats., does not strike down the holdings of this court indicating that, other things being equal, there is usually a preference for the mother. The trial court may properly find that young children are better off with their mother. *The statute merely decrees what the law in Wisconsin is already*, that the trial court's decision cannot solely be based on the sex of the parent.⁴⁷

As pointed out by Justice Heffernan in his concurring opinion, the majority clearly misinterpreted the existing strong mother preference rule.⁴⁸

Wisconsin courts are not alone in resisting legislative severance of the umbilical cord. In 1971 the Florida Legislature enacted a sweeping reform of the state's divorce laws,⁴⁹ including provisions directing equal treatment of the sexes.⁵⁰ With respect to custody, the legislature required that "[u]pon considering all relevant factors, the father of the child shall be given the same consideration as the mother in determining custody."⁵¹ But the Florida Supreme Court soon announced that other factors being equal, the mother would

to the mother, who had been adjudged a fit parent). See also *Peterson v. Peterson*, 13 Wis. 2d 26, 108 N.W.2d 126 (1961); *Acheson v. Acheson*, 235 Wis. 610, 294 N.W. 6 (1940).

45. Act of Dec. 23, 1971, ch. 157, § 2, 1971 Wis. Laws 415, 416 (currently codified at WIS. STAT. § 767.24 (1981-1982) ("In making a custody determination, the court shall consider all facts in the best interest of the child and shall not prefer one potential custodian over the other on the basis of the sex of the custodian.")). See also Podell, Peck & First, *Custody—To Which Parent?*, 56 MARQ. L. REV. 51 (1972) (advocating equal footing for each parent with past presumptions replaced by greater reliance on social scientists and expert testimony of psychologists and psychiatrists).

46. 66 Wis. 2d 761, 226 N.W.2d 388 (1975).

47. *Id.* at 766, 226 N.W.2d at 390 (emphasis added).

48. *Id.* at 768-72, 226 N.W.2d at 392-94 (Heffernan, J., concurring).

49. Act of June 22, 1971, ch. 71-241, 1971 Fla. Laws 1319.

50. *E.g., id.* § 10, 1971 Fla. Laws 1319, 1323 (currently codified at FLA. STAT. ANN. § 61.08(1) (West Supp. 1983) (alimony may be granted to either party)); Act of June 22, 1971, ch. 71-241, § 15, 1971 Fla. Laws 1319, 1325 (currently codified at FLA. STAT. ANN. § 61.13(1) (West Supp. 1983) (either spouse may be required to pay child support)).

51. Act of June 22, 1971, ch. 71-241, § 15, 1971 Fla. Laws 1319, 1325 (currently codified at FLA. STAT. ANN. § 61.13(2)(b)(1) (West Supp. 1983)).

still receive prime consideration in custody disputes when the children were of tender years.⁵²

Despite pronouncements such as these, the nation's courts began to establish a more truly neutral view of the sexes in the 1970's. In a line of cases beginning with *Reed v. Reed*⁵³ the United States Supreme Court developed the doctrine that laws classifying individuals on the basis of sex must be carefully scrutinized and be substantially related to an important governmental purpose if they are to be upheld.⁵⁴ This developing judicial view toward equality of treatment of the sexes was also reflected in the changing attitudes of state trial judges.⁵⁵

III. CONSIDERATIONS IN AWARDING JOINT CUSTODY

The ultimate test for whether joint custody or shared parental responsibility should be attempted is whether the arrangement would be in the best interest of the child.⁵⁶ This

52. See, e.g., *Dinkel v. Dinkel*, 322 So. 2d 22 (Fla. 1975) (custody of three-year-old child given to adulterous mother); *Anderson v. Anderson*, 309 So. 2d 1 (Fla. 1975) (two-and-one-half year old twin girls awarded to father, although both parents fit).

In 1982 the Florida Legislature finally announced that it meant what it said in 1971 by adding the phrase "without regard to the age of the child" to section 61.13(2)(b). Shared Parental Responsibility Act, ch. 82-96, 1982 Fla. Laws 233.

Even before passage of this Act, a shift toward gender neutrality was occurring. See *Wiggins v. Wiggins*, 411 So. 2d 263 (Fla. Dist. Ct. App.), *petition for review denied*, 418 So. 2d 1281 (Fla. 1982) (court held that it was an abuse of discretion to award custody of a six-year old child to the mother solely on the basis of the age of the child). See also *infra* note 55.

53. 404 U.S. 71 (1971).

54. *Id.* at 75-76. See also *Orr v. Orr*, 440 U.S. 268 (1979) (Alabama law which permitted wives but not husbands to receive alimony held violative of the equal protection clause, U.S. CONST. amend. XIV, § 1); *Craig v. Boren*, 429 U.S. 190 (1976) (equal protection clause violated by law prohibiting beer sales to males under 21 and females under 18); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (law requiring female members of the armed forces to establish that husbands were actually dependent before being entitled to benefits violated equal protection).

55. See *Kapner & Frumkes, The Trial of a Custody Conflict*, FLA. B.J., Mar. 1978, at 174, 176-77; J. Sanford, *supra* note 42, at ____ The *Florida Bar Journal* article describes surveys of Florida judges taken in 1977 which revealed that 82% would favor the mother where both parents were fit, even (impliedly) where the father was more fit. By contrast, in a 1982 survey of judges attending the Family Court Seminar at the National Judicial College in Reno, Nevada, two-thirds favored mothers in custody cases involving children of tender years, while one-third favored mothers in all cases. Twenty percent defined "tender years" as under two years of age; 55% as zero to six years; 20% as zero to 12 years; and 5% as zero to 16 years of age.

56. See generally Comment, *The Best Interest of the Child Doctrine in Wisconsin Custody Cases*, 64 MARQ. L. REV. 343 (1980) and the cases discussed therein.

test, although generally attributed to Justice Cardozo in the case of *Finlay v. Finlay*,⁵⁷ was mentioned in Wisconsin as early as 1865 in the case of *In re Stillman Goodenough*:⁵⁸ "[I]f [the child] was of such tender years that he could not form a proper judgment, the court would exercise its judgment for his benefit, and do what it thought most for his interest and welfare."⁵⁹ In 1873 the Wisconsin Supreme Court affirmed this laudatory goal more explicitly, saying that: "The welfare of the children, and how their interests will be best subserved are the matters of primary consideration with the court."⁶⁰

A. Benefits

Potentially, many benefits can accrue to a child in a joint custody arrangement, but because all benefits will be realized only in the ideal case, it is not necessary to predict attainment of every benefit before ordering joint custody. If, however, it is clear that few benefits will be realized, the risks involved in such an arrangement might dictate that sole and not joint custody is preferable.

Wisconsin law requires that courts "recognize children's need for close contact with both parents, . . . encourage joint parental responsibility . . . and expanded visitation."⁶¹ This law dictates, then, that some sort of "joint" custody arrangement be preferred over one calling for custody to the mother or the father, even though the decree might be called "sole" custody. Consequently, it should be the burden of the proponent of a *true* sole custody award to demonstrate that the risks outweigh the benefits rather than the other way around.

Benefits to the child include the greater stability of parental relationships and the continuation of full parental responsibility. This is consistent with a common clause in separation agreements which provides that: "The parties shall use all reasonable efforts to maintain free access and to

57. 240 N.Y. 429, 433, 148 N.E. 624, 626 (1925).

58. 19 Wis. 291 (1865).

59. *Id.* at 296.

60. *Welch v. Welch*, 33 Wis. 534, 542 (1873). The best interest of the child test was adopted by Florida in 1882. *McGill v. McGill*, 19 Fla. 341, 349 (1882).

61. See *supra* note 13 and accompanying text.

create a feeling of affection between themselves and the minor child. Neither should do anything to hamper the natural development of the child's love and respect for the other party." Thus, joint custody attempts to continue, as much as possible, the custodial arrangement that most clearly approximates that of the marital home to which the child is accustomed. Even if the arrangement must later be modified, at least it would have provided a smoother transition than the traditional severance process.

Although it is often said that responsibility decisions should be based on the best interest of the child and not on the desires of the parents, the reality is that most responsibility problems involve difficulties with parents, not children. Practically speaking, arrangements which establish only an idealized concept of the "best interest of the child" but ignore the needs and wishes of parents are the kind which are continuously litigated and, consequently, work against the best interest of the child. If parents cooperate with each other because their wishes are fulfilled, children will enjoy more stability than if the custody order, while theoretically perfect, in practice exacerbates hostility between the parents.

Under joint custody the nonresidential parent can continue to enjoy full parental rights and responsibilities, thereby diminishing the terrible sense of loss and the feeling of being extraneous, expendable or outcast.⁶² Although the noncustodian is usually the father, it is generally the mother, when cast in that role, who receives the greatest psychological benefit of joint custody because of the stigma often placed upon a mother who does not have custody of the child.⁶³ The primary residential parent also gets some relief from the stresses of fulltime parenting which might otherwise engender resentment toward the child.

If negative feelings are instilled in a parent, he or she is less likely to continue a proper parental role and the child will be the ultimate loser. Also, a nonresidential parent who continues to enjoy full rights and responsibilities will have greater motivation to contribute his or her fair share of sup-

62. See generally M. ROMAN & W. HADDAD, *THE DISPOSABLE PARENT* (1978).

63. See Brooks, *Mothers Defending Rights of Custody*, N.Y. Times, Feb. 26, 1983, at 48, col. 5.

port—a consideration of great importance in light of the dismal state of financial support by noncustodians in this country.⁶⁴

Joint custody is more likely to offer the child a greater opportunity to be with and to continue a close relationship with each parent. Even where one parent has a substantially greater physical involvement, the child is more likely to view each parent as a “full” parent, rather than one parent as a disciplinarian and the other as a Disney World companion. As the court in *Gerscovich v. Gerscovich*⁶⁵ put it:

There can be no question that a child benefits from the influence of *both* a father *and* a mother in making the varied and, at times, stressful adjustments imposed by adolescence and its transformation to adulthood. Where circumstances warrant, as here, the best interest of minor children may well be served by alternating [physical] custody between parents.⁶⁶

B. Risks

Most of the risks occur when joint custody is awarded automatically or to avoid a difficult decision or to avoid being thought of as “old fashioned.” The Wisconsin Legislature, along with legislatures across the country,⁶⁷ addressed the concept of joint custody, not because courts were making such awards in inappropriate cases, but because some courts refused to do so even when clearly warranted.⁶⁸ If courts now order joint custody without weighing the potential risks against the benefits, parent-child relationships will not be served.

Joint custody should be ordered in every case where it is not detrimental, but courts should be alert to the risks. For

64. See *Divorce American Style*, NEWSWEEK, Jan. 10, 1983, at 42, 47; Brooks, *Child Support: A Growing Problem of Nonpayment*, N.Y. Times, June 14, 1982, at B10, col. 2 (stating that today a divorced woman has only a 10% chance of being paid on time and in full).

65. 406 So. 2d 1150 (Fla. Dist. Ct. App. 1981).

66. *Id.* at 1153 (emphasis added).

67. WIS. STAT. § 767.24(1)(b) (1981-1982). As of September 1982, 27 states have adopted statutes allowing joint custody in some cases. Freed & Foster, *Family Law in the Fifty States: An Overview as of September 1982*, 8 FAM. L. REP. 4065 (1982).

68. See, e.g., *Ponder v. Rice*, 479 S.W.2d 90 (Tex. Civ. App. 1972) (divided custody should be ordered only when there is no reasonable alternative); *Rickard v. Rickard*, 7 Wash. App. 907, 503 P.2d 763 (1972) (divided custody should be avoided).

example, if factors such as parental maturity or fitness are negative, joint custody, because of its greater reliance on cooperation and flexibility, could result in manipulation and arguments by both the child and the parents.⁶⁹ A child who is shuttled back and forth between hostile parents of sharply different lifestyles and disciplinary attitudes can only experience more difficult adjustment problems than otherwise. Some critics contend that this results in "lack of stability in the home environment" and can cause children to "become prey to severe and crippling loyalty conflicts."⁷⁰

Despite these risks, everything should be done to foster the continuation of the full parent-child relationship with each parent by granting joint custody because if it works, it will result in the child continuing to enjoy the benefits of both parents. Sole custody implies an acknowledgment that the relationship with one parent will, and should, be limited.

C. Factors

It is impossible to make a definitive list of all factors which the court should consider in making a decision on joint custody, depending as it does on the interrelationship of many diverse considerations. It is also difficult to rank the

69. See, e.g., *Braiman v. Braiman*, 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978). In *Braiman* the court stated:

It is understandable, therefore, that joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion. . . . 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.

More than four years since their separation, the parents are evidently still unable to manage their common problems with their children, let alone trust each other. Instead, they continue to find fault and accuse. They have failed to work out between themselves even a limited visitation with the children. To expect them to exercise the responsibility entailed in sharing their children's physical custody at this time seems beyond rational hope. It would, moreover, take more than reasonable self-restraint to shield the children, as they go from house to house, from the ill feelings, hatred, and disrespect each parent harbors towards the other.

Id. at 589-90, 378 N.E.2d at 1021, 407 N.Y.S.2d at 451.

70. *In re Marriage of Burham*, 383 N.W.2d 269, 273 (Iowa 1979) (court reversed joint custody order because atmosphere between parties had the flavor of an "armed camp").

factors in order of importance, since in some circumstances one usually "unimportant" factor might outweigh the others.

If any factor can be considered the *sine qua non* of joint custody, it would be that both parents should be fit.⁷¹ Just as an unfit parent should not be given sole responsibility, he or she should not be given the right to share equally in child rearing responsibilities.⁷² Preferably the parties should be comparable in their fitness,⁷³ and if neither party is fit, joint custody should not be ordered for that reason alone.⁷⁴

What Wisconsin trial judges should do when neither party is fit in light of a legislative mandate to encourage joint parental responsibility, close contact and expanded visitation is not clear. The Group for Advancement of Psychiatry points out that: "The very possessive parent, the parent who is going to discourage the child from visitation, is likely to deprive the child of important input from the estranged spouse when given sole custody."⁷⁵ Thus, simply because conditions for joint custody are not ideal, sole custody should not necessarily be ordered, since this might result in a worse situation. If parents are not willing to cooperate under joint custody, they may be equally unwilling to cooperate under sole custody. Nevertheless, the court must order

71. See *Farwell v. Farwell*, 33 Wis. 2d 324, 147 N.W.2d 289 (1967) (words "fit" and "proper" on issue of custody in divorce cases are usually interpreted as meaning moral fitness); *Larson v. Larson*, 30 Wis. 2d 291, 140 N.W.2d 230 (1966) (evidence of past conduct, prior physical and emotional conditions and other previous circumstances is relevant and material as a reasonable guide in considering question of fitness). But see *Snedaker v. Snedaker*, 327 So. 2d 72 (Fla. Dist. Ct. App. 1976) ("There is a clear distinction between fitness of parents and the best interests of the child.").

72. But see *Lindgren v. Lindgren*, 220 So. 2d 440 (Fla. Dist. Ct. App. 1969) (where court approved a custody arrangement whereby the young twins were to be with the father four days and the mother three days a week even though the mother had, prior to the custody proceeding, carried on a liaison with a married man and lived in a home rented by him).

73. See, e.g., *Gerscovich v. Gerscovich*, 406 So. 2d 1150, 1153 (Fla. Dist. Ct. App. 1981) (alternating custody ordered when both parents found fit).

74. See, e.g., *Scott v. Scott*, 401 So. 2d 879, 880 (Fla. Dist. Ct. App. 1981) (reversing the trial court's award of joint custody based on a finding that "both parents were found to be, euphemistically, less than ideal"; court found that such a rationale "hardly justifies plaguing the child with both their houses" and remanded the case for a determination of custody in accordance with the child's best interests).

75. Gardner, *Family Evaluations in Child Custody Litigation*, CREATIVE THERAPEUTICS, 1980, at ____.

one or the other, and the chief consideration is which arrangement offers the best opportunity to endow the child with the full benefit of both parents, keeping in mind Wisconsin's public policy mandating "close contact with both parents, . . . joint parental responsibility . . . and expanded visitation."⁷⁶ These are not empty words. They are the heart of Wisconsin's approach to parent-child relationships following divorce.

Agreement of the parents is another strong factor in awarding joint custody.⁷⁷ Even the parties' failure to agree

76. Divorce Reform Act, ch. 105, § 1(2), 1977 Wis. Laws 560, 561.

77. See, e.g., *Lindgren v. Lindgren*, 220 So. 2d 441 (Fla. Dist. Ct. App. 1969) (alternating custody order agreed to by parties termed "unusual" but upheld by court).

This author knows of no appellate decision reversing a joint custody order where the parents have agreed to it, nor does he know of any appellate court decision dealing with a trial court's refusal to grant joint custody in the face of a positive agreement. On the other hand, FLA. STAT. ANN. § 61.13 (West Supp. 1983) provides that the court *may* consider the agreement of the parties, but Florida courts have never been bound by an agreement of the parties as to custody or child support.

WIS. STAT. § 767.24(b) (1981-1982) requires joint custody when the parties have made such an agreement unless otherwise dictated by the best interest of the child. One Wisconsin practitioner predicts possible problems arising from this issue of consent or agreement of the parties:

[A]lthough the Wisconsin statute requires a joint custody arrangement to be in the best interest of the child, there is no independent evaluation of what those best interests are. If the parties agree and there are no apparent problems with either party's "fitness," joint custody will be granted. The judge does not have the benefit of either a guardian ad litem's recommendation or a social worker's custody evaluation, and must take the word of the parents. I suppose the assumption is made that parents will always act in the best interest of their children and that the involvement of both parents in custody decisions after a divorce is the "best" for the children. I do not know that this assumption is valid in every application for joint custody. Neither the Florida nor the Wisconsin statutes address this point. [But see *Koslowsky v. Koslowsky*, 41 Wis. 2d 275, 163 N.W.2d 632 (1969) (stipulation of parties not determinative in custody matters; requirement that court decide on the basis of best interest of the child transcended any agreement of the parties)]. [A]s to the issue of consent, the Wisconsin statutes are somewhat contradictory. WIS. STAT. § 767.23(1)(a) (1981-1982) allows the Family Court Commissioner to make a temporary award of joint custody with or without the parties' consent. By contrast, WIS. STAT. § 767.24(1)(b) (1981-1982) requires the parties' consent before the trial judge can make a permanent joint custody order. I am not sure if this was an oversight in drafting or a way of allowing the parties to see if joint custody works before a final order is rendered. I think it can be interpreted either way, and some family court commissioners are, in fact, ordering joint custody without both parties' consent.

Letter from Paula K. Lorant to the *Marquette Law Review* (Mar. 14, 1983).

to joint custody should not necessarily require sole custody.⁷⁸ If the parties are able to cooperate on child rearing, that should override their failure to reach a comprehensive separation agreement or their respective desires for sole responsibility.

Other considerations include the preference of the child,⁷⁹ the attitude of the child toward the nonresidential parent⁸⁰ and the ability and willingness of the parents to cooperate with each other for the best interest of the child⁸¹ —

78. See, e.g., *Levy v. Levy*, 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13 (1976). In that case the court ordered joint custody even though the parents not only disagreed as to joint custody but were antagonistic toward each other. The court reasoned that the parents had reached agreements in the past which were fair and would probably be able to do so in the future. Cf. *Beck v. Beck*, 173 N.J. Super. 33, 413 A.2d 350 (1980) (the court reversed a joint custody order because it was against the wishes of both the children and the parents).

79. WIS. STAT. § 767.24(2)(am) (1981-1982). A child's preference, assuming sufficient intelligence, understanding and experience, is entitled to great weight, but is not controlling. See *Haugen v. Haugen*, 82 Wis. 2d 411, 262 N.W.2d 769 (1978). "[T]he personal preference of a child is not a controlling consideration on the issue of custody unless the child gives substantial reasons why it would be against his or her best interests to award custody contrary to such expressed preference" *Id.* at 417, 262 N.W.2d at 772. "[W]hen a trial court confers with the minor children in chambers, a record of the event should be made as a matter of course." *Id.* See *Seelandt v. Seelandt*, 24 Wis. 2d 73, 128 N.W.2d 66 (1964) (14-year-old girl preferred to live with grandparents and was so placed); *Graichen v. Graichen*, 20 Wis. 2d 200, 121 N.W.2d 737 (1963) (girl, almost 14, preferred to live with father; preference given weight when it was backed up by statements of other witnesses); *Edwards v. Edwards*, 270 Wis. 48, 70 N.W.2d 22 (1955) (11-year-old boy "sick at heart" when custody changed from foster parents to father); *Jones v. State ex rel. Falligant*, 211 Wis. 9, 247 N.W. 445 (1933) (14-year-old girl allowed to decide she would remain with grandparents).

See also *Gerscovich v. Gerscovich*, 406 So. 2d 1150 (Fla. Dist. Ct. App. 1981) (upheld a rotating custody order partly because the children preferred it); *Garvey v. Garvey*, 383 So. 2d 1172 (Fla. Dist. Ct. App. 1980) (preference of seven-year-old girl held not to be sufficient in the face of a strong recommendation by a psychologist against joint custody); *Gall v. Gall*, 336 So. 2d 10 (Fla. Dist. Ct. App. 1976) (specific residential decision should not be left to the "unbridled discretion" of a 14-year-old girl). See generally *Siegel & Hurley, The Role of Child's Preference in Custody Proceedings*, 2 FAM. L.Q. 1 (1977).

80. See, e.g., *Jacobs v. Ross*, 304 So. 2d 542 (Fla. Dist. Ct. App. 1974) (reversing split custody order wherein the child would be with the father one weekend a month, one week in the summer and one week during the school year on the ground that the father upset the child; court-ordered psychologist recommended a more gradual resumption of the father-child relationship). Just as the forcing of even limited visitation might exacerbate a bad parent-child relationship, imposing joint custody in such circumstances could be even worse.

81. See, e.g., *Brown v. Brown*, 409 So. 2d 1133 (Fla. Dist. Ct. App. 1982) ("[W]here, as here, both parents are mature and responsible individuals, there is a great deal to be said for a custody arrangement which preserves the parental role of

a factor which behooves the court to examine the maturity and compatibility of child rearing views of the parties.⁸² The court should also look into the particular psychological and emotional needs of the child,⁸³ the degree to which split residential care would disrupt the child's normal school schedule⁸⁴ and the age and maturity of the child.⁸⁵

both parties and encourages shared responsibility and joint decision-making for the benefit of the child.").

This does not mean that parents must love each other or that they must get along well in all respects, only that they can put their differences aside when it comes to the welfare and rearing of the child and that they recognize the importance of both parents to the process. All other factors are related to this factor. If, despite everything else, the parties still are unable to cooperate with each other, joint custody will be a concept in name only and the reality will be either a sole custody type arrangement or a never ending source of family stress. *See, e.g.,* *Bienvu v. Bienvu*, 380 So. 2d 1164 (Fla. Dist. Ct. App. 1980) (reversing joint custody award because parents were mutually antagonistic and it might be perceived by, and thus influence, the children); *Braiman v. Braiman*, 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978) (reversing joint custody order because of mutual hostility of parents). *But see, e.g.,* *Levy v. Levy*, 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13 (1976) (joint custody awarded because it would tend to ameliorate the ill will between the parents and psychologically uplift each parent, all of which would be communicated to the child in the way of mutual love, attention and training).

82. *See, e.g.,* *Rickard v. Rickard*, 7 Wash. App. 907, 503 P.2d 763 (1972) (reversing an alternating custody award because, among other things, there were widely divergent viewpoints of the parents on child rearing which would leave the children in a state of confusion and also the lack of any consistent parental counsel, direction and control).

83. *See, e.g.,* *Jacobs v. Ross*, 304 So. 2d 542 (Fla. Dist. Ct. App. 1974) (reversing split custody order because the psychologist said this arrangement threatened the child's great need for a stable environment). In these situations, expert testimony is helpful and when such testimony clearly recommends against joint custody, courts have properly paid heed to it. *See, e.g.,* *Garvey v. Garvey*, 383 So. 2d 1172 (Fla. Dist. Ct. App. 1980) (reversing a divided custody order in the face of a seven-year-old girl's preference because the "only evidence" was the psychologist's strong recommendation against joint custody).

84. *See, e.g.,* *Gerscovich v. Gerscovich*, 406 So. 2d 1150 (Fla. Dist. Ct. App. 1981) (children kept in same home while parents rotated until father remarried and plan modified to allow father to keep children in his new home which was only three miles from marital home).

85. *See, e.g.,* *Wonsetler v. Wonsetler*, 240 So. 2d 870 (Fla. Dist. Ct. App. 1970) (reversing joint custody award and requiring sole custody to the mother because of the young ages of the children). This preference for the mother when the children are very young is called the "tender years doctrine." *See* *Stewart v. Stewart*, 156 Fla. 815, 24 So. 2d 529 (1946). *See also* *Gerscovich v. Gerscovich*, 406 So. 2d 1150 (Fla. Dist. Ct. App. 1981) (saying that the older and more mature the children the more appropriate a joint custody arrangement); *Chapman v. Chapman*, 3 Wis. 2d 559, 89 N.W.2d 207 (1958) (two-year-old daughter should be awarded to good and affectionate mother).

These cases should not be interpreted to mean that joint custody of young children

IV. IN CONCLUSION: THE NEED FOR A BROAD DEFINITION

Once the court and the parties have evaluated these benefits, risks and factors as applied to their particular case, a decision can be made as to whether some form of joint custody or shared parental responsibility should be attempted. But what form? This again raises the question of what exactly is joint custody today. Black letter statutory definitions go only so far. Is it daytime with one parent and nighttime with the other? Joint legal custody with both parents, but actual physical contact and control essentially with only one? The truth is that custody arrangements are as varied as are the situations and personalities of divorced families and more than one arrangement can fairly be described as a true joint custody arrangement. No single arrangement will be suitable for everyone. One situation in California, for example, has involved a father who moved to the downstairs apartment after the divorce.⁸⁶ The child primarily lives with her mother but frequently spends the night with her father. She usually eats breakfast with him and dinner with her mother. So far it is working, but if the parents remarry, move or develop serious conflicts with one another over child rearing, a modification may become necessary.

A working definition of joint custody should be broader than that specifically described in Wisconsin's section

is prohibited. The tender years rule, like the mother preference rule, has been statutorily abolished in Florida, FLA. STAT. ANN. § 61.13(2)(b)(1) (West Supp. 1983), and at least diminished by case law and by statute in Wisconsin, *Scolman v. Scolman*, 66 Wis. 2d 761, 226 N.W.2d 388 (1975); WIS. STAT. § 767.24(2) (1981-1982). See Podell, Peck & First, *supra* note 45, at 57 (calling the tender years doctrine "archaic").

Joint custody may be even more important where the child is very young and, therefore, unable to express or enforce his or her desire to form a close relationship with the nonresidential parent. It is at this point that the development of a parent-child relationship is essential and flexibility of schedules and parental cooperation is most important. The child's later lack of cooperation or fondness for the absent parent is frequently attributable to poor parental cooperation and limited parent-child contact when the child was an infant.

Pronouncements about the tender years doctrine are usually based on socio-psychological studies rather than explicit law. Their value will depend upon the weight accorded judges' opinions on socio-psychological matters.

86. Stein, *Joint Custody: How Three Families Cope*, San Francisco Examiner, July 20, 1982, at 1 (People Section), col. 1.

767.24(1)(b),⁸⁷ which is limited to situations in which both parents agree to joint custody and have equal rights and responsibilities. I would define it more broadly to include the kind of arrangement required by the Wisconsin legislative intent,⁸⁸ that is, an arrangement that encourages close contact with both parents and joint parental responsibility whether or not the residential and responsibility division is equal. As so defined, the decree might be expressed as "sole custody, but joint responsibility and liberal visitation," but the reality would be joint custody.⁸⁹

I believe that the application of the limited kind of joint custody called for in section 767.24(1)(b) will pose some difficulty. That kind of joint custody is to be awarded only when the parties agree to it and when it serves the best interest of the child. If strictly interpreted, there will be few instances when parties will be able to agree to it; if interpreted liberally, there will be few instances when courts could, in light of the legislative intent, conclude that the child's best interest would not be served by awarding joint custody. The real challenge to Wisconsin judges is to determine which kinds of cases justify this broader form of "joint custody"; therefore, I believe that this approach—putting form over substance—is justified.⁹⁰

87. WIS. STAT. § 767.24(1)(b) (1981-1982).

88. See *supra* text accompanying note 13.

89. Scott v. Scott, 401 So. 2d 879 (Fla. Dist. Ct. App. 1981) ("The [trial court's] judgment, perhaps to avoid the impact of the rule disfavoring split-custody provisions . . . calls for [sic] the four separate months to be spent with the father 'visitation.' We call it custody, and counsel for the father concedes it is."); Forman v. Forman, 315 So. 2d 9 (Fla. Dist. Ct. App. 1975) ("The mere fact that the court feels that the grandparents might play a significant role in assisting to bring about a better domestic environment for the child does not deprive the father of a 'natural right,' nor should labels such as 'joint' or 'conditional' custody . . . govern our determination of this appeal.").

90. In further comment on the Wisconsin approach, one of that state's practitioners states:

The major problem with any joint custody statute is that it requires very careful and precise drafting by the attorney involved. It seems to me that in order to avoid tremendous postjudgment litigation, there should be specific orders as to support and placement. It would be unrealistic to expect a statute to encompass all the variables that could arise. The benefit of the Florida statute is that it provides some guidance for the drafting attorney and judge as to what a custody stipulation and order can contain. Although the Wisconsin statute is not as specific, the actual orders made pursuant to our statute often look like the Florida statute. The very vagueness of the Wisconsin statute may

Accordingly, I would define "joint custody" as an arrangement whereby each party retains full and joint parental responsibilities and rights with respect to their child; where the residential plan is flexible and designed so that each parent has frequent, continuing and close contact with the child; and where both parents jointly make major decisions affecting the child to the extent practicable, even though, because of the practicalities involved, the child may live with one parent more than the other or one parent may be given authority to make child care decisions when the two parents are unable to agree. Moreover, physical contact should be comparable, not necessarily equal, and may even be substantially unbalanced because of particular circumstances.

At one extreme might be the California arrangement described above.⁹¹ At the other extreme, where, for example, one parent lives far from the child, frequent contact may involve heavy use of mail and telephone and "major" decisions may be very few or may require joint consultation with ultimate authority in the residential parent. More commonly, it probably would involve primary residential care with one parent and the other parent having as much physical contact as is feasible and consistent with the parties' and the child's needs, schedules and desires.

A typical physical arrangement might be the school year with one parent and some of the summer, frequent weekends and holidays with the other. In other cases, the child might alternate school semesters and holidays with the parents or Monday through Thursday with one parent and Friday

permit more innovative orders than the more specific Florida statute. In addition, I believe that unless specific placement of the child is stated, as well as the times when the child will be with one parent or another it would be very difficult to initiate prosecution under Wis. STAT. § 946.71 (1981-1982), interference with child custody. As a matter of fact, it is my understanding that the Milwaukee County District Attorney's office is reluctant to start an action under that statute, unless the placement is specified in the family court's order.

Letter from Paula K. Lorant to the *Marquette Law Review* (Mar. 14, 1983). See also Letter from Paula K. Lorant to the *Marquette Law Review* (Mar. 17, 1983) (quoting Milwaukee County Assistant District Attorney (now Milwaukee Municipal Court Judge) Christopher Foley as saying that since Wis. STAT. § 946.71(2) (1981-1982) requires that the child be taken out of state "for the purpose of depriving the parent . . . of the custody of the child . . .," it would be very difficult to successfully prosecute unless the placement of the child was specified in the joint custody order).

91. See *supra* note 86 and accompanying text.

through Monday with the other. Occasionally judges have left the child in the family home but provided for the parents to rotate on a periodic basis.⁹² The important philosophical point is that even though the physical care might essentially be in one home, the important philosophical point is that the child lives in both homes, rather than lives with one parent and visits with the other, and that contact and involvement with both parents is maximized.

Another quality which distinguishes this broad definition of joint custody from its more traditional forms is its flexibility. A plan may set forth a definite schedule, but unless the parents are able to cooperate and be flexible, all members of the family could find themselves locked into an onerous regime and the laudable purposes of section 767.24(1)(b) would be defeated. Joint custody also differs from other forms of custody, specifically split, divided, rotated or alternate responsibility wherein physical care is shifted from one parent to the other with the parent having physical care also having sole parental responsibility.

Under this broad definition the parties and the court can again consider the above-mentioned factors⁹³ which should influence the specific responsibility agreement or order. This is an analytical rather than mathematical process and each case must turn on its own merit. It should not be determined by adding up a set of cliches.

Although joint custody is currently in vogue, it is by no means a recent invention.⁹⁴ Yet court pronouncements throughout the country have produced an inconsistency of approach typical of matrimonial decisions generally.⁹⁵ Now, however, the legislatures of both states have spoken. Custody arrangements which recognize the need for close con-

92. See, e.g., *Gerscovich v. Gerscovich*, 406 So. 2d 1150 (Fla. Dist. Ct. App. 1981); *Sandy v. Sandy*, 106 Wis. 2d 230, 316 N.W.2d 164 (Ct. App. 1982).

93. See *supra* text accompanying notes 71-85.

94. Judging from the many appellate decisions in Florida in the 1930's and 1940's on this issue, Florida judges did not hesitate to enter such orders at that time. See, e.g., *Dobbs v. Kelly*, 39 So. 2d 479 (Fla. 1949); *Stewart v. Stewart*, 156 Fla. 815, 24 So. 2d 529 (1945); *Jones v. Jones*, 156 Fla. 524, 23 So. 2d 623 (1945).

95. See generally *Loeb & McCann, Dilemma v. Paradox: Valuation of an Advanced Degree upon Dissolution of a Marriage*, 66 MARQ. L. REV. 495 (1983) (describing conflicting court pronouncements from throughout the United States on the issue of whether a professional degree is a divisible asset of a marital estate).

tact with both parents and encourage joint parental responsibility will be the norm and such orders should be encouraged. Still, it would be a mistake to award joint custody in every case. Joint custody is the presumption, but each case must be considered on its own facts. Ultimately, the factors discussed above⁹⁶ should be utilized not to determine whether joint custody should be ordered but rather to determine the specific details of the arrangement or whether such an arrangement would be detrimental to the child, thus requiring sole custody.

96. *See supra* text accompanying notes 71-85.