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JOINT CUSTODY: THE BEST INTERESTS OF THE CHILD

In every state, when parents decide to divorce, the court with jurisdiction over the divorce automatically has jurisdiction to determine the custody of the minor children of the marriage.¹ Standards used to determine appropriate post-divorce custody arrangements have evolved over the years, but the customary assumption has been that one parent would be the sole custodian and the other would be a visitor. At present, the preferred custodian is the mother.² Because sole custody gives the custodian all legal rights to determine the child's upbringing, the non-custodial parent no longer functions as a parent, altering his relationship with the child.³ The presumption of sole custody is being reexamined in light of changing family patterns and functions of family members. As more women work outside the home and men become more active in childrearing, "[s]hared parental responsibility—joint

1. See *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1323 (1980). The development of the concept of family rights under the Constitution is reviewed; of particular interest are the sections dealing with family rights in the context of divorce and child custody. See *id.* at 1308-50.

In Oklahoma, during marriage, the "father of a legitimate unmarried minor child is entitled to its custody, services and earnings," OKLA. STAT. tit. 10, § 5 (1981), but at the time of divorce, the court is empowered to "make provision for guardianship, custody, support and education of the minor children," OKLA. STAT. tit. 12, § 1277 (1981). The district court has jurisdiction over the custody of children whose parents are separated, but not divorced. OKLA. STAT. tit. 10, § 21 (1981). Although the term "custody" is not statutorily defined, it appears to be the rough equivalent of "guardianship," with which it is used interchangeably in title 30, *Guardian and Ward*. Guardianship involves the control and care of a person and his property. OKLA. STAT. tit. 30, §§ 1, 14 (1981).

2. A detailed look at the history of custodial preferences is not within the scope of this Recent Development. See M. ROMAN & W. HADDAD, *THE DISPOSABLE PARENT* 22-47 (1978); Miller, *Joint Custody*, 13 FAM. L.Q. 345, 351-52 (1979).

3. See Bratt, *Joint Custody*, 67 KY. L.J. 271, 295 (1978-79). In awarding custody, judges typically apply the "best interests of the child" standard. See *infra* notes 20-21 and accompanying text. See also Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C.D. L. REV. 523, 553 (1979) (the best interest of the child is "interdependent with and to a large measure a by-product of the best interest of all family members."). A recent view of the divorce process proposes that, where children are involved, divorce involves a reorganization of the family rather than its death. The family has an altered physical structure, but also a continuing parent-child relationship which needs attention. See, e.g., Greif, *Joint Custody: A Sociological Study*, 15 TRIAL, May 1979, at 32, 33; Abarbanel, *Shared Parenting After Separation and Divorce: A Study of Joint Custody*, 49(2) AM. J. ORTHOPSYCHIATRY 320, 321 (1979); Bratt, *supra*, at 302-03. Under this view, the court's designation of only one parent as custodian "does not take into account the children's existing attachment to the parent relegated to visitor status." *Id.* at 296. A custodial arrangement which best meets the needs of all parties involved should be the objective of the legal process.

custody—is very much evident in intact families.”⁴

Attorneys and judges involved in custody decisions should not only recognize changing family patterns, but should also encourage and facilitate post-divorce parenting arrangements which accommodate particular family relationships.⁵ Joint custody offers advantages that judges and attorneys should consider when making post-divorce custody decisions. This Recent Development compares joint custody with other post-divorce custodial arrangements, assesses the advantages and disadvantages of joint custody, and provides guidelines for judges and lawyers evaluating the appropriateness of joint custody in particular circumstances.

I. JOINT CUSTODY

Joint custody may be divided into two concepts, joint legal custody and joint physical custody. Joint legal custody has been defined as

4. Greif, *supra* note 3, at 32. See Bratt, *supra* note 3, at 277-80. Bratt indicates that more than fifty percent of the female population is in the work force, a fact which alters assignments in the home, including child care. In addition, there has been a recent increase in the number of single father-headed homes and an increased involvement of fathers in childrearing in two-parent homes. See also Foster & Freed, *Joint Custody: A Viable Alternative?*, 15 TRIAL, May 1979, at 26, 31. The authors point out that while a presumption in favor of the mother “may be warranted in cases where there has been a part-time father and a full-time mother, . . . it breaks down when the stereotype is absent because the parents have a different lifestyle.” *Id.* at 27. In the economic realities of most divorce situations where the single parent must work, the traditional award of sole custody does not necessarily guarantee the child either a full-time parent or economic security. While the percentage of all children living below the poverty line in 1974 was 15.5%, the percentage of such children in families headed by women was 51.5%. Bratt, *supra* note 3, at 274 n.14. For divorced, widowed, or separated women with children, the percentage employed outside the home was significantly greater than in families with the husband present. *Id.* at 274 n.15.

5. See Bratt, *supra* note 3, at 281. Although a variety of custodial arrangements are being tried, only recently has any serious research focused on the problem. See Trombetta, *Joint Custody: Recent Research and Overloaded Courtrooms Inspire New Solutions to Custody Disputes*, 19 J. FAM. L. 213, 215-24 (1980-81); Ramey, Stender & Smaller, *Joint Custody: Are Two Homes Better Than One?*, 8 GOLDEN GATE U.L. REV. 559, 569-74 (1979) (This article was heavily relied on in a recent Oklahoma case. See *infra* notes 22-25 and accompanying text.). The existing commentary on custodial arrangements uses such a variety of terms to designate the alternatives and defines them in so many ways that it is difficult to sort out the advantages or disadvantages of any particular alternative. Court decisions using a variety of terms make it difficult to identify specific types of arrangements receiving general judicial support. Because less than ten percent of divorce cases are contested and, of those, very few are appealed, appellate judicial determination of custody issues constitutes only a small portion of the actual custody decisions being made. Interview with Daniel Boudreau, Deborah Shallcross, and Alan Klein, Tulsa District Court Judges (Oct. 1981).

Available literature and court decisions indicate that alternatives to sole custody are expressly permitted in nineteen states. Some form of joint custody may be considered a viable alternative in most jurisdictions. See 7 FAM. L. REP. (BNA) 1151 (Aug. 4, 1981); Foster & Freed, *supra* note 4, at 31.

“each parent shar[ing] in the function of making parental decisions. The essence of this arrangement is that they continue to share equal responsibility and authority with respect to their children.”⁶ Joint physical custody means the child spends “more or less equal” time with each parent.⁷

The significant difference between joint custody and other custody alternatives is that both parents continue at all times to have legal rights and responsibilities with regard to the children.⁸ In a sole custody arrangement, one parent has the entire legal responsibility for the upbringing of the child.⁹ The other parent may have to pay a sum of money periodically to support the child, but all major decisions regarding the health, education, moral, and religious upbringing of the child are the legal responsibility and right of the custodial parent.

Joint custody also differs from “divided custody,” which is properly a distinct concept.¹⁰ The distinguishing characteristic of divided custody is that only one parent at a time exercises legal custody, combined with physical custody. “[E]ach parent lives with the child for a part of the year with reciprocal visitation privileges. But the parent with whom the child is living has complete control over the child during that period; divided custody involves none of the joint decision making of [joint] custody.”¹¹ Custody may alternate weekly, monthly, yearly, or on some complicated schedule of days, weeks, months, or years.¹² The other parent usually will be allowed visitation privileges, especially if the custodial periods are in the range of months or years.

“Split custody,” yet another distinct concept, involves the splitting of siblings by awarding sole custody of one or more children to one parent and the rest to the other parent.¹³ Usually the non-custodial parent of a particular child has visitation privileges.

Understanding the characteristics of each of these forms of cus-

6. W. WISHARD & L. WISHARD, *MEN'S RIGHTS* 206 (1980).

7. *Id.* at 207. Both concepts may be included in one definition. See, e.g., Bratt, *supra* note 3, at 282-83; Ramey, Stender & Smaller, *supra* note 5, at 560-61.

8. Roman & Haddad, *The Case for Joint Custody*, *PSYCHOLOGY TODAY*, Sept. 1978, at 96, 100.

9. See Folberg & Graham, *supra* note 3, at 525-26.

10. See W. WISHARD & L. WISHARD, *supra* note 6, at 205-06; Folberg & Graham, *supra* note 3, at 526-30; Bratt, *supra* note 3, at 282-83 & n.45. But see *In re Marriage of Burham*, 283 N.W.2d 269, 272 (Iowa 1979) (treating divided and joint custody as synonymous since both parents have some legal responsibility in either arrangement).

11. Miller, *supra* note 2, at 361. See also W. WISHARD & L. WISHARD, *supra* note 6, at 205.

12. See Bratt, *supra* note 3, at 282 n.45 (citing several arrangements). Divided custody has also been called “alternating” custody. See W. WISHARD & L. WISHARD, *supra* note 6, at 205.

13. See Miller, *supra* note 2, at 361.

tody is important in evaluating the comparative advantages and disadvantages of joint custody in particular circumstances.

II. JOINT CUSTODY IN OKLAHOMA

Although joint custody is not specifically authorized by statute in Oklahoma, there is no prohibition against it. The Oklahoma statutes embody two standards, found in most jurisdictions, for determining child custody. The first is called the "tender years doctrine," from a statutory provision that "if the child be of tender years, it should be given to the mother."¹⁴ This doctrine and other gender-based criteria for determining custody of children have been rejected in several other jurisdictions, either by statutory revision or by court decision.¹⁵ However, the tender years presumption was upheld by the Oklahoma Supreme Court in *Gordon v. Gordon*¹⁶ in 1978. *Gordon* was subsequently cited with approval in *Boyle v. Boyle*,¹⁷ which held that section 11 of title 30 was not "a gender-based discrimination statute."¹⁸ The

14. OKLA. STAT. tit. 30, § 11 (1981).

In awarding the custody of a minor, . . . the court or judge is to be guided by the following considerations:

1. By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare; and if the child be of sufficient age to form an intelligent preference, the court or judge may consider that preference in determining the question.
2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor or business, then to the father.

Id. For a history and analysis of the tender years doctrine, see Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. LAW 423 (1976-77).

15. See Ramey, Stender & Smaller, *supra* note 5, at 564 & n.26 (listing eighteen jurisdictions which have recently rejected the tender years doctrine by statute); *Developments in the Law—The Constitution and the Family*, *supra* note 1, at 1334 (at least twenty-eight jurisdictions have rejected the doctrine by court decision and twelve more have enacted legislation barring the use of gender as a factor in determining child custody); Foster & Freed, *Divorce in the 50 States—An Overview as of 1978*, 13 FAM. L.Q. 105, 123-25 (1979) (listing twenty-seven jurisdictions that have rejected the tender years doctrine and ten that have "de-sexed" custody decisions); Roth, *supra* note 14, at 442-48.

16. 577 P.2d 1271, 1277 (Okla. 1978).

17. 615 P.2d 301 (Okla. 1980).

18. *Id.* at 303. The statute was called a guideline and "tie-breaker." Although the court unanimously modified the decree, Justice Hodges, joined by two other justices, found the tender years presumption blatantly discriminatory on its face and as applied.

I cannot concur with that part of the opinion which states "30 O.S. 1971 § 11 is not a gender-based discrimination statute."

. . . . The trend in legislation [The Uniform Child Custody Jurisdiction Act, OKLA. STAT. tit. 10, § 1605(D) (1981)], legal commentary, and judicial decisions is to abandon fixed rigidity [sic] of the tender years presumption in favor of a flexible and unbiased consideration based solely on the best interest of the children

The gender preference rule is sexually discriminatory on its face and discriminatory

tender years presumption, by its own provisions, guides the court only and is not mandatory in the face of better alternatives for the child.¹⁹

The other, probably controlling, custodial standard is the "best interests of the child."²⁰ Seemingly, if joint custody meets the statutory standard of the best interests of the child, it would be a legitimate alternative.²¹

The Oklahoma Supreme Court recently recognized the possible appropriateness of joint custody arrangements in *Rice v. Rice*.²² While modifying a joint custody arrangement by awarding sole custody to the father, the court nevertheless acknowledged that joint custody would be preferable in some circumstances.²³ The custody arrangement in *Rice* may actually have been a divided custody arrangement, although the trial court termed it joint custody; the trial court awarded "reasonable visitation rights and joint custody of the child to both parties on a two-week rotating schedule."²⁴ In modifying the custody arrangement, the supreme court spoke only to the problems created by the physical rotation of the children on a two-week basis, finding that it created instability and prevented adequate medical care for a chronically ill child.²⁵ It can be inferred from the court's opinion that, had it viewed "joint custody" as continuing legal responsibility and rights in both

as applied by the courts. It is unconstitutional as a denial of equal protection to both sexes.

Id. at 304 (footnote omitted) (Hodges, J., concurring in result).

19. OKLA. STAT. tit. 30, § 11 (1981).

20. *Id.*; OKLA. STAT. tit. 10, §§ 1601-1627 (1981) (Uniform Child Custody Jurisdiction Act). The UCCJA provides that "[t]he controlling criteria for awarding custody by a court of this state shall always be what is in the best interest of the child, other statutory provisions merely being factors which may be considered." *Id.* at § 1605(D). Not a part of the uniform act, this provision was added by the Oklahoma legislature in adopting the UCCJA. At least one justice has interpreted this as a possible legislative disavowal of the tender years presumption. See *Boyle v. Boyle*, 615 P.2d 301, 304 (Okla. 1980) (Hodges, J., concurring in result).

21. In fact, the door is left open specifically by a provision anticipating the appointment by the court of joint guardians. See OKLA. STAT. tit. 30, § 17 (1981) (which anticipates that there may be two or more joint guardians).

22. 603 P.2d 1125 (Okla. 1979). In dicta, the *Rice* court took a rather broad view of the possibility of joint custody, stating that

[t]he question of custody, joint or otherwise, must be decided by reference to the consequences for the particular child in each case. The primary contemplation must always be the welfare and best interests of the child. An award of joint child custody is a viable alternative for courts to consider when favorable circumstances are present so that it probably will work.

Id. at 1129 (footnote omitted).

23. *Id.*

24. *Id.* at 1128 (footnote omitted).

25. *Id.* at 1128-29. Citing recent commentary and specifically concurring with a previous appellate decision, the court's opinion embodied elements of both joint custody and divided custody in its standards. *Id.* at 1129. Because of the court's choice of criteria, some lawyers view *Rice*

parents, it might have upheld joint *legal* custody, while modifying the physical custody aspect of the trial judge's order.

Rice is an example of the confusion of custodial terms and of the need for delineating the advantages and disadvantages of the various alternatives so that courts making custodial determinations may do so with a clearer understanding of the likely effects of their decisions.

III. ADVANTAGES AND DISADVANTAGES OF JOINT CUSTODY

To determine whether joint custody is a reasonable alternative in given circumstances, it should be viewed "not in comparison to an idealized intact family, but rather relative to the less than ideal alternatives."²⁶ Studies have identified the many adverse effects on children caused by a parent's absence,²⁷ whatever the cause. It has also been shown that "children who fared best after divorce were those who were free to develop loving and full relationships with *both* parents."²⁸

The single distinguishing characteristic of joint custody is that both parents continue, whether physically with the child or not, to have legal rights and responsibilities with regard to the child. This factor gives rise to most of the advantages of joint custody.

One major advantage of joint custody is that both parents can feel satisfied with their roles as parents, since the arrangement neither banishes one parent nor overburdens the other.²⁹ Joint custody provides "recognition of each parent's equal need and ability to parent children, and the importance of both the father and the mother"³⁰ and allows the child to feel "rooted in relation to both parents and to continue to value

as a decided constraint on the use of joint custody in Oklahoma. Interview with William Hood, practicing divorce lawyer (Jan. 1982).

The appellate case the supreme court relied upon, *Spencer v. Spencer*, 567 P.2d 112 (Okla. Ct. App. 1977), used the term "split custody" but actually dealt with divided custody. The appellate court stated, in dicta only, that a division of legal custody on a daily, weekly, or weekend basis was "impractical, if not impossible." *Id.* at 113-14.

26. Folberg & Graham, *supra* note 3, at 581.

27. See Miller, *supra* note 2, at 358 (citing various studies on parental absence); see also Kelly & Wallerstein, *The Effects of Parental Divorce: Experiences of the Child in Early Latency*, 46(1) AM. J. ORTHOPSYCHIATRY 20 (1976). This study found that the central event of the divorce process for most children was the separation of their parents, which a child often perceives as one parent departing from him personally. *Id.* at 21-22. In addition, the children experienced a great sense of loss, expressing themselves in a manner similar to grief for a dead parent. This reaction was found regardless of the quality of the pre-divorce parent-child relationship. *Id.* at 26.

28. M. ROMAN & W. HADDAD, *supra* note 2, at 18 (emphasis in original).

29. See *id.* at 104; Ramey, Stender & Smaller, *supra* note 5, at 575; Miller, *supra* note 2, at 356.

30. W. WISHARD & L. WISHARD, *supra* note 6, at 202.

each relationship."³¹ Although some of these benefits are available through liberal visitation privileges, continued joint legal responsibility adds a dimension of "legal recognition of [the] right [of both parents] to participate in their child's life and assurance that the other parent does not have unequal power."³²

Furthermore, joint custody lessens the possibility of hostility over visitation rights. Visitation rights afforded under the typical sole custody arrangement may be used by the custodial parent as a weapon.³³

Sole custody

stacks the deck against mutual cooperation The decree then serves as a disincentive for continuing accord and mutual accommodation. Fair negotiation during the dynamics of family reorganization requires equal legal power and sanctions. Neither parent should have the right, when both are capable, to "give" or "take" custody at their whim.³⁴

Because it recognizes the "equal-status of the parents, but also provides a standard of expected behavior to guide the parents following divorce,"³⁵ a joint custody arrangement is less likely to contribute to any potential hostility between the parents.

Joint custody is more flexible than sole custody since it allows parents to jointly decide what is best for their children as changes may warrant. Joint custody may thus eliminate some reasons for returning to court.³⁶ For instance, variances in children's ages and activity schedules as they get older may dictate changes in physical custody schedules, as may changes in a parent's schedule. A joint custody arrangement gives parents the flexibility to handle these changes without either "giving up" custody of the children.

As well as flexibility in physical custody, the joint custody arrange-

31. M. ROMAN & W. HADDAD, *supra* note 2, at 120. *See also* Abarbanel, *supra* note 3, at 323 (study of joint custody families indicated that "[n]one of the children seemed to experience the severe loss of one parent reported in traditional custodial arrangements, yet all missed 'the other parent' (i.e., the one they were not with at the moment).").

32. Folberg & Graham, *supra* note 3, at 569. *See* Wilcox v. Wilcox, 7 FAM. L. REP. (BNA) 2193, 2198 (Feb. 3, 1981) (Mich. Ct. App. Sept. 15, 1980). *But see* Foster & Freed, *supra* note 4, at 31 (characterizing the desire for joint legal custody as "oneupmanship" or "status-seeking").

33. *See* Ramey, Stender & Smaller, *supra* note 5, at 570. The visitation rights of the non-custodial parent are often subject to the benevolence and caprice of the other. Furthermore, sole custody, in those cases where both parents are equally fit, gives one of two persons all the legal authority and, according to at least one commentator, provides a clear signal to the children that one parent is right and one is wrong. Miller, *supra* note 2, at 355-56.

34. Folberg & Graham, *supra* note 3, at 569-70.

35. *Id.* at 570.

36. *See id.* at 572.

ment may be advantageous in terms of quality of time. If a parent feels better about his continuing parental role and has not been proclaimed a "visitor," the time spent with the children may be more comfortable and meaningful.³⁷ The atmosphere in both homes should increase the child's sense of security and stability.³⁸ Another purported advantage of joint custody is that it may reduce the default rate on child support payments³⁹ since the parents' regular contact with the children⁴⁰ and continuation of the legal role as parents⁴¹ create the incentive to provide for the children's needs and allow a realistic appraisal of the costs of childrearing.⁴²

One practical advantage of a joint custody arrangement is that either parent can authorize medical care for the child. In the typical sole custody arrangement, the non-custodial parent has no legal rights with regard to the child's care and cannot authorize emergency medical care without a consent form signed by the custodial parent.

A commonly stated disadvantage of joint custody is that it is disruptive to the child, in terms of time, inconsistency of discipline, and conflicts in loyalty.⁴³ However, physical custody is also disrupted in sole custody arrangements by the absent parent's visitation rights. Rigid rotation schedules are the source of most of the criticism of divided custody as well as joint custody arrangements.⁴⁴ The argument against disruption is not an argument against joint legal custody, but an argument for reasonable physical custody schedules geared to the child's needs. Generally, any disruptive effects must be weighed against the advantages of enhancing the parent-child relationship.

Another criticism of joint custody is that inconsistency in discipline may confuse the child. Yet, inconsistency of discipline is not a greater problem in a joint custody arrangement than in any other custody arrangement where the child spends some time with each parent. Because it anticipates some degree of communication between the parents, joint custody may actually reduce potential inconsistencies. One commentator has pointed out that different standards in each home

37. Abarbanel reports that the children in her study of joint custody arrangements "reported that they lived in two homes and that they felt 'at home' in both." Abarbanel, *supra* note 3, at 323.

38. Bratt, *supra* note 3, at 298.

39. Miller, *supra* note 2, at 365.

40. Folberg & Graham, *supra* note 3, at 564.

41. Miller, *supra* note 2, at 365.

42. Folberg & Graham, *supra* note 3, at 564.

43. See Roman & Haddad, *supra* note 8, at 99.

44. See Bratt, *supra* note 3, at 300.

may not be overly burdensome to children since different standards of behavior are expected in different locations and times in a child's life, and parents in an intact family are not always consistent in disciplinary matters.⁴⁵ Further, since parental responsibilities continue for both parents, each parent may be more willing to exercise discipline, and the children may be more likely to respond.

Conflicts in loyalty may be fewer in joint custody arrangements than in other types of arrangements. Again, the fact that both parents continue as the child's legal custodian may reduce the child's loyalty conflicts by assuring him of continuing contact with both parents. Joint custody may also decrease the possibility of either parent fostering a loyalty conflict.

The second cited disadvantage of joint custody is that parents who could not agree during their marriage are unlikely to cooperate in raising the children. Parental conflict is a major concern of domestic relations judges. Even judges sympathetic to the concept of joint custody foresee serious problems arising from both non-consensual and consensual joint custody arrangements when the parents later disagree on a particular issue.⁴⁶ Repeated returns to court are seen as the likely way to resolve such disputes.

Although such concerns are not without merit, the concept of joint custody does not require that both parents agree on everything. Nothing in the concept of joint custody requires both parents to sign each report card or consent form for medical care. It merely authorizes that either may do so. Arguably, joint custody and its necessity for cooperation may increase communication about important decisions between the parents. Unlike a sole custody arrangement, joint custody may enhance the amount of communication. It may also be that parents can put aside their own differences for a child's wellbeing.⁴⁷ Further, where both parents have legally recognized rights, they may be less likely to try to take advantage of one another.⁴⁸

45. See *id.* at 305; Abarbanel, *supra* note 3, at 325 (discrepancies do not become overly burdensome as long as "each household has a consistency and continuity of its own and each welcomes the child to his or her place in that household.").

46. One judge described the not unrealistic scenario in which one parent insists that the child needs braces and the other absolutely forbids it. Interviews with Daniel Boudreau, Deborah Shallcross, and Alan Klein, Tulsa District Court Judges (Oct. 1981).

47. See Greif, *supra* note 3, at 33.

48. See Folberg & Graham, *supra* note 3, at 580. Even cooperative parents may disagree and find it helpful to have "legal definition[s] of their rights, responsibilities, and the parameters of their parenting relationship." *Id.* at 569. Several commentators and at least two courts have even taken the position that the parents need not both seek joint custody in order for it to work. See *id.*;

Arguably, an additional disadvantage is that joint custody calls into question the time-honored practice of awarding child support to the sole custodian. The fear of losing child support may be a barrier to a joint custody agreement.⁴⁹ Joint custody does not necessarily eliminate the need for child support, but probably necessitates its reevaluation based on individual circumstances.

IV. FACTORS IN RECOMMENDING JOINT CUSTODY

Since joint custody is a preferable arrangement in certain circumstances, why is its use not more prevalent? One answer is that the concept has only recently been publicized and "popularized."⁵⁰ While Oklahoma statutes do not contain a presumption against joint custody, there is no doubt that a practical presumption exists against it.⁵¹ The presumption favors one parent being designated as the legal custodian and the other as a visitor. Overcoming this presumption is a formidable task. It is suggested that the only way to accomplish this task is to create the opposite presumption—one in favor of joint custody.⁵²

Greif, *supra* note 3, at 33; *Wilcox v. Wilcox*, 7 FAM. L. REP. (BNA) 2197, 2198 (Feb. 3, 1981) (Mich. Ct. App. Sept. 15, 1980); *Beck v. Beck*, 7 FAM. L. REP. (BNA) 1151, 1151 (Aug. 4, 1981) (N.J. Sup. Ct. July 2, 1981) ("The parents' opposition to such an arrangement does not necessarily preclude a court from ordering it . . ."). While this may seem to be a revolutionary viewpoint, it may be fairer than allowing one uncooperative parent to deprive the other parent of parental status or to force the court to relieve him of parental status as punishment for not cooperating. Although a court-ordered joint custody arrangement may be more prone to failure than one agreed to by the parents, it is not more prone to failure, in terms of benefits to the child, than a sole custody award following a custody battle. *Folberg & Graham, supra* note 3, at 579. One study has shown that even where parties did not seek joint custody, and in some cases bitterly opposed it, the longer they continued the arrangement, the better they liked it. *Greif, supra* note 3, at 33.

49. Interview with Arthur Rubin, practicing divorce lawyer (Jan. 1982). See *Ramey, Stender & Smaller, supra* note 5, at 568.

50. The recent popular movie, *Kramer v. Kramer*, in which a father assumes responsibility for his son when the mother leaves and later battles her for continued custody, is seen as a factor in the increase in the number of fathers looking at custodial alternatives. Interview with William Hood, practicing divorce lawyer (Jan. 1982).

51. *Bratt, supra* note 3, at 294, states, "The effect of the court's operational assumption in a divorce proceeding is to create a presumption against joint custody." *Bratt* points out that even in dependent/neglect proceedings, where the outcome is a termination of the legal rights of the parent, the parent receives the benefit of a presumption in his favor. *Id.*

52. See *M. ROMAN & W. HADDAD, supra* note 2, at 173. Currently, only two states provide for a statutory presumption in favor of joint custody. See CAL. CIV. CODE §§ 4600, 4600.5 (West Supp. 1982); MICH. COMP. LAWS § 722.23 (Supp. 1982-83). For an analysis of the California statute, see Comment, *California's Presumption Favoring Joint Child Custody: California Civil Code Sections 4600 and 4600.5*, 17 CAL. W.L. REV. 286 (1981). At least five other states expressly permit joint custody by statute. *Id.* at 310-12 n.175 (listing those states as Wisconsin, Iowa, Maine, North Carolina, and Oregon). In other states, like Oklahoma, joint custody is probably permissible under statutes and case law, thus opening the door to a judicial presumption in favor of the arrangement. See *supra* notes 14-25 and accompanying text.

By instituting a judicial presumption in favor of joint custody, trial judges would be using their authority to "discourage parents from competing for sole custody and instead to encourage them to negotiate cooperative arrangements."⁵³ Although a presumption in favor of joint custody might be seen as coercive, it is no more so than the current bias in favor of sole custody.⁵⁴ There are those who argue, however, that presumptions of any kind should be avoided⁵⁵ and, instead, that judges making custody decisions should decide "on the basis of detached, rational analysis that conforms to the best available understanding of the behavioral sciences—not on the basis of outmoded preconceptions and prejudices."⁵⁶

Before judges can have a reasonable opportunity to make informed and rational decisions, the issue must be put before them. This means that one or both of the parties to a divorce should consider joint custody as an alternative and lawyers should recognize its advantages sufficiently to present them, both to clients and judges. Lawyers unfamiliar with alternative custody arrangements and zealous in their adversarial role are seen as stumbling blocks to change by perpetuating "either/or" thinking.⁵⁷ A preferable approach is for lawyers to inform the parties that there are alternatives to the "isolation of sole custody and the bitterness of custody litigation."⁵⁸

From the scant appellate guidance in this new area and sparse scientific research to support the choice of one form of custody over another, lawyers, judges, and even the parties themselves may be reluctant to strike out in search of alternative custody arrangements. Removing this impediment will be a slow process, requiring continuing efforts by lawyers and trial judges to present related issues to appellate courts and achieve some definitions of terms and clarification of custody alternatives for Oklahoma.

As a starting point, it is helpful to identify those factors lawyers

53. Trombetta, *supra* note 5, at 229.

Instead of a win or lose, all or nothing presumption, there must be a presumption of consensus, equality and the protection of parent-child bonding. The courts in effect must say to parents, "We don't care how you feel about each other. As long as there is no clear, convincing evidence that either of you is abusive and unfit to be a parent, our assumption is that you are both qualified to continue as parents, albeit under different circumstances."

Id. at 231.

54. See M. ROMAN & W. HADDAD, *supra* note 2, at 177.

55. See 5 FAM. L. REP. (BNA) 2144 (Dec. 19, 1978).

56. Roth, *supra* note 14, at 462.

57. See M. ROMAN & W. HADDAD, *supra* note 2, at 164-65; Greif, *supra* note 3, at 32.

58. Folberg & Graham, *supra* note 3, at 581.

and judges may use in determining whether divorcing parents are candidates for joint custody. Recalling that the major distinguishing characteristic of joint custody is continued parental rights and responsibilities, it is possible to isolate a list of factors which must be present for joint custody to be a preferable alternative to sole custody.⁵⁹ Conspicuously absent from this list are factors associated with the physical custody aspect of joint custody, including geographic proximity, similarity of environment, number and ages of the children, and the location preference of the child. These factors should be considered when designing a physical custody arrangement, but they do not bear on the feasibility of joint legal custody.

Factors necessary to successful joint custody include:

1. Both parents must be fit; that is, both must be sane and capable of making rational decisions about the child.
2. Both parents must wish to continue in their parental roles and be willing to provide love and care to the child.⁶⁰
3. Both parents must be able to communicate and cooperate sufficiently to reach reasonable decisions about the child.
4. Each parent must trust the other to love and care for the child.⁶¹
5. The parents must share values and child-rearing philosophies, at least to some degree.
6. Both parents must understand and agree with the rules of the arrangement, whether by agreement or by court order.⁶²

If these six factors are substantially present, joint custody may be a better alternative, for all concerned, than sole custody.

V. GUIDELINES FOR THE ARRANGEMENT

Although an advantage of joint custody is its flexibility, the arrangement should begin with a fairly detailed agreement or court order to set the tone for the arrangement and guide the parents as to their

59. See Miller, *supra* note 2, at 369-74; Folberg & Graham, *supra* note 3, at 579; Abarbanel, *supra* note 3, at 325-26.

60. See Trombetta, *supra* note 5, at 232 (noting that joint custody would not be appropriate where "one parent relinquishes custody voluntarily or both parents agree that sole custody is preferable"); Foster & Freed, *supra* note 4, at 31.

61. See Miller, *supra* note 2, at 370 ("[A]ll that is necessary is the ability to accept the ex-spouse's capacity for positively influencing the children.")

62. See Abarbanel, *supra* note 3, at 325-26 (finding this the most critical factor).

respective rights and responsibilities.⁶³

At a minimum, the relationship between the parties should be defined. It should be clear that each parent continues to have legal parental rights and responsibilities. From that point, the degree of specificity will vary, but the agreement or court order also should contain the following:⁶⁴

1. A delineation of which decisions will be made jointly and which can be made by either parent.
2. An initial physical custody schedule which meets the current needs of the parents and the child and a provision for how that schedule may be changed.
3. Specific financial arrangements, including child support, if any, and how expenses generally will be borne.
4. An agreement as to what type of feedback is expected between the parents.
5. The means to be used to resolve disputes, should any arise.⁶⁵

A carefully considered agreement will not necessarily keep the parents in a joint custody arrangement out of court, but it may help. Ultimately, issues may arise which are amenable only to judicial resolution.

VI. CONCLUSION

Much of the available information on the subject of joint custody is based largely upon opinion or speculation. However, it seems clear that joint custody may be appropriate in many cases. New research will help resolve many of the questions surrounding the issue, but such research will be possible only if more families select joint custody. Fully understood, joint custody is a reasonable alternative for Oklahoma judges to order and for Oklahoma lawyers to seek for their clients.

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63. See Folberg & Graham, *supra* note 3, at 574-76.

64. See W. WISHARD & L. WISHARD, *supra* note 6, at 210-12; Miller, *supra* note 2, at 390-93; Folberg & Graham, *supra* note 3, at 574.

65. Several commentators suggest a mediation clause. See, e.g., W. WISHARD & L. WISHARD, *supra* note 6, at 212; Folberg & Graham, *supra* note 3, at 572-74; Miller, *supra* note 2, at 401; Trombetta, *supra* note 5, at 227-29.

