

JOINT CUSTODY: THE PARENTS' BEST INTERESTS ARE IN THE CHILD'S BEST INTERESTS

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Critics of joint custody¹ argue it serves the needs of the parents but not of the child, and so should be disfavored. The concept of "best interests of the child" has become so talismanic that it has occluded the possibility that if the needs of the parents are not reasonably met, the child's best opportunity for healthy growth is diminished. Many children do not make a good choice of their parents. Their parents may simply be inadequate by any standard. Whether the parents separate or stay together, the prognosis for their offspring is guarded. Court ordered custody decisions are unlikely to improve the child's opportunity for growth. But where parents have reasonable skills, court orders which meet *their* needs may be the best thing for their child.

The recent Vermont Supreme Court decision in *Cloutier v. Blowers* raises the question of whether the best interests of the child can ever be severed from the best interests of a loving parent.² In this complex decision, Justice Skoglund, writing for the majority, reversed a sole custody award to the mother in part because the Family Court gave her custody to avoid the "substantial anguish" she would feel because of the loss of her child, which would "further sour her strained relationship with the father."³ Justice Skoglund cited several cases for the proposition that "the focal point of any custody dispute is to reach a . . . disposition that is in the child's, not the parents' best interest."⁴

Justice Dooley, in dissent, would have upheld the award, primarily to put an end to the pernicious effect of litigation on the child by validating the trial judges' "use of common sense and common life experience" in making decisions, and also because he read the Family Court's decision to hold that "making the father the primary custodian would have such an effect on the mother that it would destroy her ability to be an effective parent, adversely affecting the child."⁵

Surely, if one parent is deeply wounded emotionally by a custody decision the child will be affected. This hard case properly raises the question whether the

"best interests" test can ignore the reality that a custody decision that has a substantial negative impact on a parent may also have a substantial adverse impact on the child. A custody decision which leaves one parent deeply dissatisfied will produce conflict and litigation, and may diminish that parent's ability to love the child.

Parental conflict, whether in a nuclear family or a separated one, has long been recognized as detrimental to a child. Anna Freud once told me that a child would be better off if both divorcing parents were dead, rather than live in the middle of a high conflict between the parents.⁶ She meant that the finality of death permits grieving and rebuilding of the child's personality after loss, whereas lengthy parental conflict involving the child is a persistent harmful condition with pernicious results. This reasoning led to the conclusion in *Beyond the Best Interests of the Child* that "the non-custodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits."⁷ This view did not gain wide acceptance, probably for the very reasons the authors chose to propose it. As they wrote, the best interests standard

in context and as construed . . . has come to mean something less than what is in the child's best interests. The child's interests are often balanced against, and frequently made subordinate to adult interests and rights. . . . [m]any decisions . . . are fashioned primarily to meet the needs and wishes of competing adult claimants . . .⁸

In any event, it is the competing adult claimants who will continue to have the most decisive impact on the life of the child, even after the court has rendered a decision. Even death does not end a parent's influence for good or ill.

In recognition of this fact, Vermont law declares as public policy that it is "in the best interests of the minor child to have the opportunity for maximum continuous physical and emotional contact with both

parents, unless direct physical harm or significant emotional harm to the child or a parent is likely to result from such contact."⁹ This provision is found in the preamble to the child support statutes, rather than the "custody" statutes, suggesting perhaps that it primarily constitutes a recognition that fathers who are actively involved with their child will pay support which will benefit the entire former family unit.

It is trite and verging on cliché to observe that children are devastated by parental fights over them.¹⁰ Therefore, when parents agree on a custody arrangement, our law presumes their decision to be in the best interests of the child.¹¹ In short, the public policy expressed in Section 650 encourages "joint custody," and the validation of parental agreements to implement it.

Nevertheless, there is criticism of even agreed-upon joint custody arrangements. Such agreements may come about for parental reasons that appear to be irrelevant to the welfare of the child. For example, the avoidance of a "custody battle," "fairness" to each parent, the resolution (or avoidance) of money issues, imbalance in parental tolerances for negotiations or conflict, or a desire to "get it (the divorce) over with," may all have more to do with the shape of these agreements than direct concern for the child's welfare. In addition, joint custody has its own negative aspects. The shuttlecock kid is cause for pathos. Few adults would want to change homes and pack up every week. Children have trouble trying to remember which friends might be available where. They may find their schedule a bewildering puzzle. They may resent the interruption of peer relationships. They may have difficulty adjusting to different rules at different houses, or forget something and either miss it for a week or involve others in negotiations to retrieve it. The week on/week off arrangement makes it difficult for parent and child to have a coherent relationship. For example, disagreements, anger-producing events, and the fallout from discipline, might not be dealt with

adequately because it is time to move on.

Still, however suspect the reasons for agreement may be, and whatever the difficulties in joint custody, these voluntary arrangements should be regarded as good policy, and not mere acquiescence in politically correct ideas, or romantic notions of “family values.”¹² Justice Dooley in *Cloutier v. Blowers*, cites several articles to the effect that “custody litigation has a tremendous adverse impact on the children who are the subject of that litigation.”¹³ Presumably, then, in an imperfect world the fact that the parents have reached an agreement, even for “wrong reasons,” and with some negative consequences, can substantially improve the lives of children after divorce. Some parental harmony permits a child to experience the benefit of having two loving, involved parents. “Joint custody kids” who have resented being a shuttlecock, do not resent having a good relationship with two parents, and often the extended families of their mothers and fathers.

Joint custody has other benefits beyond reduction of parental conflict. Eric Mart argues that such social research as exists shows that joint custody is desirable. Recent findings, he contends, indicate that children can adjust well to multiple caretakers, and that even young children tolerate moves. Moreover, even primary caretakers can be replaced. Further, joint custody can be a viable arrangement even if parents have difficulty with communication and moderate conflict.¹⁴ In general, fathers like it and some mothers get used to the idea.¹⁵ Mart concludes that the arrangement is under utilized.¹⁶

It is storming an open door to say parental agreements for joint custody should be recognized. However, the reasons for agreed-upon joint custody also apply in some contested cases where the conflict is not severe and productive parental involvement with children is possible. Should courts order joint custody over the objections of a parent? Vermont law does not prohibit such orders. Section 665 provides that if the parents cannot agree to share parental rights, the court shall award parental rights solely to one parent.¹⁷ This veto right, usually exercised by the parent with the greatest momentum for winning custody – typically the mother – does not necessarily foreclose court-ordered time-sharing of children similar to joint custody. An award of sole physical

responsibility is “subject to the right of the other parent to have contact”¹⁸ Conceptually, then, it is possible for one parent to have the exclusive right to make all major decisions for the child, except how much time the child will spend with the other parent.¹⁹

What criteria should the court use to provide for extensive visitation? The literature and law of custody decisions is both voluminous and inconclusive. Perhaps Wallerstein sums it up best when she concludes that there is “no model of custody, no axiom of time sharing,” and no other overriding principle that governs the outcome for children.²⁰ She writes:

What matters is the mental health of the parents, the quality of the parent-child relationships, the degree of open anger versus cooperation between parents, the age, temperament and flexibility of the child. What also matters is the extent to which parents are able and willing to have the same routines for their child in each house. A child can't go to bed at eight o'clock in one home and ten o'clock in the other, watch unlimited television in one and have severe restrictions in another . . . without serious consequences.²¹

Further, psychologists can identify so many pertinent issues that it is doubtful courts will ever be in the position to obtain enough competent evidence to address them fully.²² What would be of assistance, however, is the proper interpretation of the word “love” in applying the first custody criterion: “the ability and disposition to provide . . . love, affection, and guidance.”²³ “Love” in this sense is not an emotion, it is an act, the essence of which is subordination of a parent's needs to those of the child.²⁴ The meaning is simply and starkly stated in the King Solomon story where the mother gives up the child rather than have it cut in half.

Where a parent is able to govern his or her life in a way that is subordinate to the needs of the child, an extended visitation arrangement may be appropriate. The dissenting opinions of Justices Dooley and Morse in *Cloutier* and *Spaulding* provide no real assistance. They abandon the very notion of law by suggesting custody decisions should be made by trial judges’ “use of common sense and common life experience,”²⁵ rather than close analysis of the statutory criteria as asserted by the majority. Where the weighing of the custodial

factors shows that parental skills are somewhat equal and competent, consideration should be given to balancing their interests.²⁶ Litigants, at least when they have legal counsel, rarely expect to get all they want, so the Court should assume that parental expectations are more flexible than their stated positions. With this in mind the Court may be able to order a visitation plan that does not lead to severe parental resistance and consequent harm to the child.

The fact that either substantial parental conflict already exists or “joint custody” will fan tensions into more virulent conflict provides the most compelling reason to deny joint custody. How much conflict can be tolerated? The authors of *Caught in the Middle*²⁷ identify several levels of conflict: mild, moderate, moderately severe, and severe, relating these conditions to custody decisions in view of the age of the child. “Mild” cases are those in which parents follow traditional rules with slight conflict. In “moderate” cases, the parents function well as parents when separate, but are prone to conflict and argument when they are face-to-face. In “moderately severe” and “severe” cases abuse and fear of physical violence exists. In “moderate” cases it would appear that some form of joint custody would be appropriate, although arrangements to minimize contact between the parents, and minimize transitions of child care would be required.²⁸

To be pragmatic, the possibility of implementing joint custody in moderate conflict cases is low considering the attitude of sitting Family Court judges. In response to a questionnaire sent to Family Court judges in preparation for this article, all the judges ranked the ability of parents to discuss and agree on the needs of their children, free from conflicts arising out of their own relationship, as essential to the award of joint custody. Virtually all judges believed that if parents had only a limited ability to communicate, and confined their interaction to arranging children's schedules, joint custody should not be awarded. The judges were nearly unanimous in their view that where the parties had limited communication, but one party wanted to limit the other to 25% to 30% custody, they would not order a parenting plan approaching a 50/50 time share. However, most judges did indicate a goal of making orders as consistent as possible

with the desire of both parents if that could be done. These answers suggest that judges do try to accommodate reasonable parental requests in order to remove areas of contention between the parents.

The result of this judicial mindset is of course, that an angry parent – usually the mother – can foreclose substantial visitation by the other parent. This power is not unlimited. If the anger is consuming and rises to the level of actively alienating the children from the other parent, the angry parent could lose custody altogether.²⁹ However, an alienating parent may be so successful that it would cause emotional harm to the child to switch custody – a “Catch 22” for the alienated parent and the court.

Courts can also rely on Criterion 5 – the ability and disposition of each parent to foster a positive relationship with the other parent – to award custodial rights to the non-belligerent parent,³⁰ or leave custody with the belligerent parent and award substantial visitation to the alienated parent as Judge Leavitt did in *Renaud*.³¹ Thus, courts have tools to implement the policy of Section §650 to provide children with maximum contact with both parents, something that is good for the parents, and good for the children.

Joint custody, and the recognition that what is good for the parents is good for the children, are not widely accepted principles. Judge Cashman in *Cloutier* was correct: the effects of the custody decision on the parent may be a substantial factor in the child’s welfare, and should be considered in determining the best interests of the child.

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¹ I use the term to mean a legal relationship in which a child spends approximately equal time (up to 60 percent/40percent) with each of his/her separated parents. The term refers to a status in which each parent has approximately equal rights to be a parent and approximately equal time, as distinguished from the actual legal classifications in the Parental Rights statutes. VT. STAT. ANN. tit. 15, § 664 (1989). Hoover v. Hoover, 11 VT. L. WK. 282 (Oct. 2000) holds that if the parents have joint custody, a *de novo* custody review is required if one parent moves away.

² 12 VT. L. WK. 189 (Aug. 2001).

³ *Id.* at 190.

⁴ *Id.* (quoting *Horutz v. Horutz*, 560 P.2d 397, 401 (Alaska 1977)).

⁵ *Id.* at 192, 193 (Dooley, J., dissenting). See also *deBeaumont v. Goodrich*, 162 Vt. 91, 104 (1994) (psychologist opinion that mother should have custody because awarding custody to father would so devastate mother that child would suffer because mother would seek to undermine father and provoke conflict not credited).

⁶ Personal conversation with Anne Freud, Yale Law School (1964). See Kimberly B. Cheney, *Safeguarding Legal Rights in Providing Protective Services*, 13 CHILDREN 86 (1966).

⁷ JOSEPH GOLDSTEIN, ANNE FREUD, & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD*, 38 (1973). Of course, highly damaging parental conflict can occur regardless of whether there is a divorce and irrespective of any post-separation, court-determined, custodial arrangements.

⁸ *Id.* at 54.

⁹ VT. STAT. ANN. tit. 15, § 650 (1989).

¹⁰ See generally, GOLDSTEIN et al, *supra* note 7. See also articles cited by Dooley, J., in Cloutier v. Blowers, 12 VT. L. WK. 189, 191 (2001); CARLA B. GARRITY & MITCHELL A. BARIS, *CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE* (1994).

¹¹ VT. STAT. ANN. tit. 15, § 666(a) (1989).

¹² See Barbara DafoeWhitehead, *Dan Quayle was Right*, THE ATLANTIC, April 1993, at ____ (commenting on the “Murphy Brown” controversy, in which Quayle was ridiculed for moralizing about out of wedlock children and single parenting, and arguing that children in single-parent homes are more likely than those in intact families to be poor, drop out of school, have trouble with the law, etc.) There is also evidence that involved fathers pay child support and ousted ones frequently do not. If joint custody is as close to an intact family as can be fashioned after a divorce, the Vermont Statute is not mere oratory.

¹³ *Cloutier*, 12 VT. L. WK. at 191.

¹⁴ Eric G. Mart, *Joint Physical Custody - What we Know*, N.H.B.J., Dec. 1999, at 50.

¹⁵ J.A. Arditt, *Examined Differences Between 25 Divorced Fathers with Joint Custody of Children and 145 Noncustodial Fathers*, 62 AM. J. ORTHOPSYCHIATRY 186 (1992).

¹⁶ Mart, *supra* note 14.

¹⁷ VT. STAT. ANN. tit. 15, § 665 (1989).

¹⁸ VT. STAT. ANN. tit. 15, § 664 (1)(B) (1989).

¹⁹ In Maine, judges routinely exercise discretion to prevent a veto. The veto provision was added in 1986 to give statutory support to *Lumbra v. Lumbra* 136 Vt. 529 (1978) (joint custody should only be decreed in extraordinary circumstances and is rarely best for the child’s point of view). See also *Cabot v. Cabot* 166 Vt. 485, 493 (1997) (holding court cannot impose shared rights on parents absent agreement, but under *Gazo v. Gazo* 166 Vt. 434 (1997) it may divide aspects of legal rights between the parties). In preparation for this article I submitted a questionnaire to Family Court judges asking, among other things, whether they favored repeal of the veto and permitting the court to award shared rights. The judges were about evenly split on the issue. The argument for repeal is that even when there is a divorce, parents have a continuing responsibility to work together for their child, and society should not tolerate, without good cause, a destruction of that obligation. Moreover, it is almost always the woman who exercises the veto, and having it demeans the importance of fathers in the child’s life, and may

force them into litigation to get “custody.”

²⁰ JUDITH S. WALLERSTEIN, SANDRA BLAKESLEE & JULIA M. LEWIS, *THE UNEXPECTED LEGACY OF DIVORCE* 215-216 (2000) 215-216. (25 year longitudinal study of children of divorced parents, concluding there are no good outcomes in divorce). *But see* KATHA POLLITT, *Social Pseudoscience* THE NATION, Oct. 23, 2000, at 10 (scholars critical, no control group, generalizes too quickly, etc.).

²¹ *Id.*

²² See, e.g., Bray *Psychosocial Factors Affecting Custodial and Visitation Arrangements* 9 BEHAV. SCI. & L., 419 (1991) (asserting that the following factors should be considered: developmental status of child, bonding and attachment, age, sex, intelligence of child, temperament, psychological adjustment of the child, psychological adjustment of the parents, parenting skills, parent child relationships, similarity or dissimilarity of home environments, and inter-parental relationships).

²³ VT. STAT. ANN. tit. 15, § 665(b)(1) (1989).

²⁴ See Kimberly B. Cheney & Trine C. Bech, *The 1986 Divorce Revolution*. VT. B.J. & L. DIG., Aug. 1986, at 4-6. The authors were co-chairs of the Vermont Family Proceedings Advisory Committee which proposed the “custody” criteria that were enacted into present law. The article summarizes the views of the Committee and reasons for the criteria. The authors prepared a detailed review of the custody criteria in their article *Vermont’s 1986 Divorce Act - A Health Value System* which can be obtained at www.cbs-law.com.

²⁵ I have argued in another context that such unlimited discretion enables judges “to hide behind pious intonations of justice and equity while escaping hard intellectual analysis of the values structuring an outcome.” Kimberly B. Cheney, *Family Law: Curtailing Judicial Discretion*, VT. B. J. & L. DIG., Aug. 1990, at 10-11.

²⁶ Judge Matthew Katz has decided that joint custody is not favored and that the allocation of parental responsibility should be determined by the pre-divorce share of responsibility that each parent assumed, citing American Law Institute tentative draft. *Rouleau v. Rouleau*, 5 VT. TRIAL CT. RPTR. 160 (Oct. 2000)

²⁷ GARRITY & BARIS, *supra* note 10.

²⁸ *Id.* at 60.

²⁹ See *Renaud v. Renaud*, 168 Vt. 306 (1998) (parent guilty of parental alienation syndrome may lose custody, but not if conduct is transitory and subject to change); *Spaulding v. Butler*, 11 VT. L. WK. 195 (Sept. 2001) (father who was a batterer and liar, who had consciously and deliberately alienated child from mother, should not have custody). In addition to the literature cited in *Renaud*, a good summary of PAS is found in *FAMILY WARS - the Alienation of Children*, 9 CUSTODY NEWS LETTER (1993) available at <http://peiro.warplink.ch/VeV/en/index.htm>. See also Cartwright, *Expanding the Parameters of Parental Alienation Syndrome*, (1993); Richard A. Gardner, *FAMILY EVALUATION IN CHILD CUSTODY, MEDIATION, ARBITRATION, AND LITIGATION* (1989); Richard A. Gardner, *THE PARENTAL ALIENATION SYNDROME; A GUIDE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS* (1998, addenda 1999, 2000) (suggesting PAS satisfies the tort of intentional infliction of emotional distress).

³⁰ VT. STAT. ANN. tit. 5 §665(b)(5) (1989).

³¹ 168 Vt. 306 (1998).