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The New Joint Custody Statute: Chrysalis of Conflict or Conciliation

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THE NEW JOINT CUSTODY STATUTE:
CHRYSAEIS OF CONFLICT OR CONCILIATION?

I. INTRODUCTION

The current interest in joint custody is the result of changes in parental roles and lifestyles in recent years. The growing number of dissolution proceedings and the changing concepts of sex roles have engendered increasing criticism of the judicial handling of child custody disputes. It is estimated that ninety percent of all custody awards are decided in favor of the mother. Criticism has been directed at the results of child custody disputes as well as the means by which the results are reached. As new concepts of femininity and masculinity evolve, the traditional expectations of parenting are changing.

Recent research emphasizes the importance of the father's role in childrearing. Social attitudes and laws have changed to make it easier for fathers to request custody of their children. Although numerous explanations have been offered for the increasing involvement of men in parenting, the major factors appear to be an increasing sensitivity to the importance of the male role in the childrearing process, and an awareness that fathers have a realistic possibility of prevailing in a custody proceeding.

In addition, an increasing number of mothers now recognize that fathers are competent to take care of children after

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3. Id.

4. Id. See Kurtz, The State Equal Rights Amendments and Their Impact on Domestic Relations Law, 11 Fam. L.Q. 101, 103 (1977) ("Of all areas of the law, this field is one which has been the most sexist in its traditional mandates. The laws of alimony, divorce and child custody . . . have been based on gender-based classifications.").


the dissolution of the marriage. 7 Partly because of the equal rights movement and the subsequent increase in the number of women working outside the home, 8 the sharing of child care responsibilities is more prevalent. 9

As a result of the quest for sexual equality, legal presumptions and preferences are being replaced by legislation that more equitably applies to both parents in child custody disputes. 10 Recent legislative efforts in California have resulted in the passage of new joint custody legislation, effective January 1980. With the passage of its new bill, the California Legislature has sanctioned joint custody as an important alternative for restructuring families after dissolution.

This comment considers the evolution of child custody law to the present with a major focus on California's joint custody legislation and the problem areas likely to be encountered as a result of the new law. The comment considers some of the deficiencies in the legislation and examines the feasibility of joint custody arrangements.

II. REVIEW OF CALIFORNIA LAW

At early common law, child custody matters reflected the concepts of the feudal system. 11 Custody disputes were decided on the basis of the father's property rights in the child. 12 As late as 1900, common law was cited as authority for the legal concept of the child as property. 13 In the nineteenth century, statutes were enacted that began to limit the father's absolute right to the children. 14 With the advent of the indus-
trial revolution\textsuperscript{16} and the resulting demarcation between fathers' work at the factory and mothers' work in the home, courts began to favor the mother as the preferred custodian.\textsuperscript{18}

The California courts have traditionally favored the mother in child custody determinations. Sole custody of the children is generally awarded to the mother with visitation rights granted to the noncustodial father.\textsuperscript{17} The visitation rights are usually referred to as "reasonable" and dissolution agreements often specify particular days, weekends, and holidays that the noncustodial parent is to have the companionship of the children.\textsuperscript{18}

A. \textit{The Tender Years Doctrine}

Before amendment in 1972, California's statutory law required that the best interests of the child be considered:

As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, custody should be given to the mother: if the child is of an age to require education and preparation for labor or business, then custody should be given to the father.\textsuperscript{19}

Under this statutory scheme, the custody of a child of tender years was given to the mother unless she was shown to be unfit.\textsuperscript{20} This doctrine operates to favor women solely because

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\textsuperscript{15} Bratt, \textit{supra} note 8, at 280-81.

\textsuperscript{16} Id. at 281. For a general history of custody, see Freed, \textit{supra} note 14. See also Derdeyn, \textit{Child Custody Contests in Historical Perspective}, 12 \textit{AM. J. PSYCH.} 133 (1978).


\textsuperscript{18} Id. \textit{See CAL. CIV. CODE} § 4601 (West 1970) ("Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child.").

\textsuperscript{19} \textit{CAL. CIV. CODE} § 138(2) (West 1954) (repealed 1970). An extensive collection of cases containing a tender years presumption is cited in Roth, \textit{supra} note 2, at 432-33.

\textsuperscript{20} For a discussion of parental unfitness see, e.g., Bronson, \textit{Custody on Appeal}, 10 \textit{LAW & CONTEM.P. PROB.} 737, 740-41 (1944). See also, Note, \textit{The California Custody Decree}, \textit{supra} note 17, at 117 ("The most common situation warranting a change in custody arises when the custodian is found unfit. There is no statutory definition of unfitness, but an important limitation on judicial discretion is found in the rule that the conduct complained of must have a direct bearing on the child's welfare."). For a case discussing which years are "tender" see Russell v. Russell, 20 Cal. App. 457, 129 P. 467 (1913). See also, Annot., 70 A.L.R.3d. 262, 287-93, 301-03
they are women and assumes mothers are by nature better suited to caring for the needs of the children. An idealized stereotype of a loving, affectionate, nurturing mother, rather than any statutory criteria, often served as the basis for the custody award.21

The appellate courts were reluctant to deprive the mother of custody because it was a “well known fact that there is no substitute for a mother’s love.”22 The maternal preference was consistently recognized notwithstanding the fact that the best interests test was to be utilized.23

When facts are established which clearly make applicable the quoted provision of this section [former Civil Code § 138] that custody should be awarded to the mother, it is not within the discretion of the court to ignore it. There is no more sound or universally recognized rule of law to be found in the books. When the court finds that ‘other things’ are equal, young children are invariably given into the custody of their mother.24

The maternal preference was criticized as violative of fathers’ rights.25 The presumption in favor of the mother imposed a difficult burden of proof upon the father.26

The father’s claim to custody under former Civil Code Section 138, that other things being equal, the father should have custody when “the child is of an age to require education and preparation for labor or business,”27 was ignored by the courts.28 Even where the statute explicitly directed equal treatment of the parents, courts avoided the evaluation of the best interests of the child or the relative merits of the par-

(1976).
23. Roth, supra note 2, at 435.
25. Kurtz, supra note 4, at 139.
26. Roth, supra note 2, at 440. See also Kurtz, supra note 4, at 142 (“It is not sufficient for a state simply to require that a mother need only be fit to gain child custody, while the father with the same general fitness is denied custody.”).
27. CAL. CIV. CODE § 138(2) (West 1954) (repealed 1970). This section imposed a sexual stereotype that a mother was not capable of providing for a child’s education or preparing a child for entry into the job market.
28. But see Disney v. Disney, 121 Cal. App. 2d 602, 263 P.2d 865 (1953). An adolescent boy was placed in his father’s custody because the court found the mother incapable of handling the boy’s problems at his stage of development.
In *Bemis v. Bemis*, the court stated:

[W]e have not found in our reported cases a single instance in which custody of young children has been awarded to their father upon evidence that the mother was a fit and proper person to have their custody and was able to give them advantages equal to those they enjoy in the home of the father.

B. *California's Family Law Act of 1970*

The California Family Law Act of 1970 brought about much needed changes in the area of child custody. Civil Code section 4600 of that Act established an order of preference for courts to follow in making custody awards and gave judges an opportunity to depart from traditional rules that existed under former law. Custody was to be awarded:

(a) To either parent according to the best interests of the child, but, other things being equal, custody shall be given to the mother if the child is of tender years.

(b) To the person or persons in whose home the child has been living in a wholesome and stable environment.

(c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

The 1970 Act no longer required the court to find a parent unfit before awarding custody to a nonparent. Custody awards to a nonparent currently require either consent of the parents or a dual finding that an award of custody to the parent would be detrimental to the child and that the award to the nonparent is in the best interests of the child. Although the enactment of section 4600 departed from the former prin-

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29. Kurtz, * supra note 4, at 141.
31. *Id.* at 90, 200 P.2d at 90.
principle of parental unfitness and focused attention on potential
detriment to the child, the statute made it quite clear that
parental custody of minor children was preferred. The pre-
sumption that an award to a parent is in the best interests of
the child was merely made rebuttable.⁵⁵

C. Elimination of Sex-Bias

The tender years doctrine was conclusively eliminated
from the Civil Code in 1972. This modification allowed the
court to award custody to either parent regardless of the age
of the child. The "best interests of the child" standard facili-
tated the relinquishment of sex-biased presumptions favoring
the mother and replaced them with a neutral standard.⁵⁶ The
amendment of Civil Code section 4600 enhanced a father's
chances of obtaining custody of minor children.

The elimination of sexual bias in the statute reflected the
quest for sexual equality by both men and women. The new
standard, however, was insufficient to satisfy the increasingly
vocal fathers' rights groups who were seeking the custodial
power fathers once had at common law.⁵⁷ Even after the 1972
amendment of section 4600, the statute failed to provide for a
joint custody arrangement and stated that custody could be
awarded only to either parent or to a nonparent. Custody by
both parents seemed to be precluded by the statute's specifi-
cation of exclusive custody of children.

D. The Inadequacies of Prior Joint Custody Cases

In addition to a lack of express statutory basis for shared
custody, the case law did not favor joint custody orders. Judi-
cial interpretation of the legal effects of joint custody orders
made such awards virtually meaningless for the noncustodial
parent.

In Burge v. San Francisco,⁵⁸ an earlier divorce decree had
given both parents joint legal custody of the child with physi-
cal custody resting with the mother. In upholding the
mother's right to settle the minor child's claim in a personal
injury suit, the court stated that because the mother had the

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37. Roth, supra note 2, at 424.
38. 41 Cal. 2d 608, 262 P.2d 6 (1953).
physical custody of the child, she was in effect the true custodian. Thus, the mother was authorized to settle the claim out of court without the father's consultation or permission. This decision prevented the noncustodial parent from using joint custody as a legal basis for participating in important decisions regarding the care of the child.

The inadequacies of the award of joint legal custody were exemplified in another California case, Holsinger v. Holsinger. In this case, the court again gave joint legal custody to both parents; physical custody of the child was given to the mother. The court held that where disagreement developed with respect to the minor children, the wife's instructions and directions were to be followed as though she had sole custody.

The court again limited the usefulness of joint legal custody in Adoption of Van Anda. In an earlier decree, the court had awarded joint legal custody to both parents; physical custody was given to the mother. In a subsequent adoption proceeding, initiated by a stepparent, the issue before the court was whether the children could be adopted if both parents did not agree. The adoption statute allowed one parent to consent to the adoption of a child if that parent had custody. The court upheld the mother's right to consent to the adoption, stating that the physical custody vested in the mother amounted to full custody and authority. "[W]e discern a legislative intent to use the word 'custody' to mean 'physical custody' for the reason that in the usual custody agreement between parents, the physical control of the child is the essential consideration."

The inadequacies of the few decisions which did award some form of joint custody and the reluctance of the courts to

39. Id. at 618-19, 262 P.2d at 13.
41. Id. at 133, 279 P.2d at 961.
43. Id. at 192, 132 Cal. Rptr. at 879 (quoting Cal. Civ. Code § 224 (West 1954) as amended by 1969 Cal. Stats., ch. 1611, at 3376 § 2 (amended 1974 and 1975)). Section 224 still provides for the consent of one parent for the adoption of a child: "[I]f one parent has been awarded custody by judicial decree, or has custody by agreement of the parents, and the other parent for a period of one year willfully fails to communicate with and to pay for the care, support, and education of such child when able to do so, then the parent having custody alone may consent to such adoption..." Cal. Civ. Code § 224 (West Supp. 1980).
44. 62 Cal. App. 3d at 194, 132 Cal. Rptr. at 881.
award joint custody without an explicit statutory basis, added to the growing momentum for a more meaningful form of shared custody, supported by clear legislative sanction. The emergence of women in the labor force, the increased involvement of fathers in child care, and the growing interest in sexual equality heightened the inadequacies of existing joint custody law and contributed to the movement for legislative reform.

III. Comparison of California's New Joint Custody Statute with Legislation of Other States

In most states the authority to award joint custody rests in the wide discretion given to the courts in custody matters. The various state laws concerning child custody cover the spectrum from the absence of any express provision for joint custody to the more detailed legislation newly enacted in California. In addition to California there are five other states that recognize joint custody by statute. The other five states passed their legislation before the fathers' rights groups grew more specific in their demands. Consequently, those statutes lack the procedural constraints required by California's new statute. Wisconsin, Iowa and Oregon simply grant the court the power to award joint custody, while North Carolina and Maine imply the authorization of shared custody by describing such an arrangement in their statutes.

At the turn of the century, virtually no shared custody awards were made. North Carolina was the first state whose statutes authorized joint custody arrangements, if in "the best interest of the child." Iowa statutes have since provided that a court order may authorize joint custody of the children

47. See Note, Divided Custody of Children After Their Parents' Divorce, 8 J. Fam. L. 58, 62-63 (1968).
48. Id.
49. N.C. Gen. Stat. § 50-13.2(b) (1976) provides:
An order for custody of a minor child may grant exclusive custody of such child to one person, agency, organization or institution or if clearly in the best interest of the child, provide for custody in two or more of the same, at such times and for such periods as will in the opinion of the judge best promote the interest and welfare of the child.
where "justified."\textsuperscript{50} Wisconsin's statute authorizing joint custody defines the concept as an arrangement whereby "both parties have equal rights and responsibilities to the minor child and neither party's rights are superior."\textsuperscript{51} The Oregon statute does not define joint custody but authorizes the court to award custody to "one party or jointly . . . as it may deem just and proper."\textsuperscript{52} Maine's statute also encompasses joint custody without expressly stating such, by declaring that the judge may decree the parent who is to have exclusive custody or "may apportion the exclusive care and custody of the said minor between the parents, as the good of the child may require."\textsuperscript{53}

California's law is much more detailed. It is also a much stronger statute in that, in addition to authorizing joint custody, the legislation mandates a statutory presumption that joint custody is in the best interests of the child where both parents agree to such an award.\textsuperscript{54} The bill also allows the court, at its discretion, to award joint custody to both parents even if one parent does not agree to the arrangement.\textsuperscript{55}

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50. Iowa Code Ann. § 598.21 (West Supp. 1979) provides in part: "When a dissolution of marriage is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be justified. The order may include provision for joint custody of the children by the parties."


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 parties have equal rights and responsibilities to the minor child and neither party's rights are superior.

52. Or. Rev. Stat. § 107.105 (1979) provides in part:

(1) Whenever the court grants a decree of annulment or dissolution of marriage or of separation, it has power further to decree as follows:

(a) For the future care and custody of the minor children of the marriage by one party or jointly and for the visitation rights of the parent or parents not having custody of such children as it may deem just and proper.

53. Me. Rev. Stat. Ann. tit. 19, § 211 (1981) provides: "The father and mother are the joint natural guardians of their minor children and are jointly entitled to the care, custody, control, services and earnings of such children. Neither parent has any rights paramount to the rights of the other with reference to any matter affecting such children."


Joint custody bills were introduced in both houses of the California Legislature in 1979. Former Senator, now Court of Appeal Justice, Jerome Smith authored Senate Bill 477 (S.B. 477), which authorized a court to make a joint custody award and created a presumption of joint custody contingent upon agreement of the parents to such an award. Senate Bill 477 passed the legislature and was signed into law by Governor Brown in July, 1979. The introduction of Assembly Bill 1480 (A.B. 1480), authored by Assemblyman Charles Imbrecht, closely followed passage of S.B. 477. Although there was some basis for joint custody in previous decisional law, this legislation was California’s first statutory recognition of the joint custody arrangement.

Prior to the new legislation there had been considerable doubt about the court’s authority to award joint custody. Because previously existing law made no mention of joint custody, many judges believed they had no legal authority to grant a shared custody award. Parental requests for shared physical and legal custody of the children were denied by some courts based on a lack of jurisdiction, and granted by other courts on the basis of their discretionary authority.

56. Senate Bill 477, Reg. Sess., 1 Cal. J. Senate 700 (1979-80) (introduced by Senator Jerome Smith) and Assembly Bill 1480, Reg. Sess., 1 Cal. J. Assembly 1937 (1979-80) (introduced by Assemblyman Charles Imbrecht). Joint hearings were not possible because neither S.B. 477 nor A.B. 1480 was in the same forum simultaneously. After the passage of S.B. 477, A.B. 1480 was viewed as a corrections bill. Clarifications that were advisable within S.B. 477 could be accomplished through A.B. 1480. Assembly Bill 1480 was also viewed as a vehicle through which the legislature could rectify the discrepancy between S.B. 477 and the decision in In re Marriage of Neal, 92 Cal. App. 3d 834, 155 Cal. Rptr. 157 (1979). See note 108 and accompanying text infra. Assembly Bill 1480 supplemented S.B. 477 in significant areas, and the composite bill which evolved is the most exhaustive joint custody legislation in the nation. See, California Judiciary Committee hearings, A.B. 1480 (Joint Custody), Tuesday, August 21, 1979, 1:30.


58. Senate Committee on Judiciary Digest, concerning S.B. 477, at 1-2 (Oct. 1979). See Bill Digest, May 1979, at 2, prepared by L. Young and presented to the Assembly Committee on Judiciary (“Currently, requests for joint custody in child custody proceedings are not disposed of uniformly. Some courts will routinely deny requests for joint custody; other courts will, in certain instances grant joint legal custody while giving physical custody to only one parent.”).
This ambiguity was clarified by the legislature in its passage of the joint custody legislation.

A. Statutory Joint Custody

With the new statute, Civil Code section 4600, legislative notice is clearly given to attorneys, judges, and parents that it is the express public policy of California that minor children should have continuing access to both parents after the parents have separated or dissolved their marriage. The statute does not mandate joint custody agreements, but its policy statement makes it unmistakably clear that children should continue their relationship with both parents after divorce. Section 4600 of the Civil Code has been modified to express a policy favoring enhanced visitation privileges and joint custody arrangements:

The Legislature finds and declares that it is the public policy of this state to assure minor children of 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 child rearing in order to effect such policy.56

The language of section 4600 expresses the legislature's desire that the parent-child relationship is to be maintained after dissolution. Frequent contact avoids a break in that relationship and continues an alliance that is beneficial to the parents, the children and society.

In harmony with the legislative policy thus expressed, the new legislation requires the court to consider a custody award to both parents jointly or to either parent. The joint custody award alternative precedes mention of the alternative of an award to either parent and by this change in language, indicates that the California legislature now favors shared custody arrangements.60 The joint custody alternative may reduce fric-

59. CAL. CIV. CODE § 4600 (West Supp. 1980). Originally, A.B. 1480 included the phrase "equal access to both parents" within its public policy statement. A.B. 1480 (March 29, 1979). This would have been a limiting requirement in the flexibility of joint custody arrangements, implying equally divided time. Assembly Bill 1480, was amended by the Senate on Aug. 29, 1979 to delete this phrase. A.B. 1480, Reg. Sess., 4 CAL. J. SENATE 6875, 6915 (1979-80).

60. CAL. CIV. CODE § 4600 (West Supp. 1980) provides: "Custody should be awarded in the following order of preference, according to the best interests of the child: (a) To both parents jointly pursuant to Section 4600.5 or to either parent."
tion between parents in a child custody proceeding. If parents know that joint custody is an option of the court, perhaps they will be less inclined to litigate their access to the child. The motivation for the provision is clear; recent legislative efforts have endeavored to promote equality between the sexes and the new alternative for shared custody furthers this goal.

The bill also specifies that "in making an award of custody to either parent, the court shall consider . . . which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent . . . ." This section provides significant criteria for evaluating the suitability of a sole custodian. It benefits the more cooperative parent in sole custody decisions by making that parent more likely to be awarded custody. The tolerance requirement prevents a parent from disagreeing to joint custody merely for the purpose of being granted sole custody. Thus if either parent proves to be totally uncooperative, it will only ensure sole custody to the more forebearing parent.

Although the last vestiges of sex-biased language were removed from the child custody statutes in 1972, the new legislation explicitly mandates gender neutrality. "In making an award of custody to either parent, the court shall not prefer a parent as custodian because of the parent's sex." Although this provision is clearly surplusage, those judges who have invariably awarded custody to the mother may be influenced by this explicit declaration that child custody awards are not to be made on the basis of the sex of the parent.

The bill also authorizes the court, in its discretion, to require the submission of an implementation plan for the custody order. This provision allows the court to require a plan for either sole or shared custody prior to its award. Previously, A.B. 1480 was a much stronger bill than that ultimately approved. The proposed legislation stated that custody should be awarded in the following order of preference: "(a) To both parents in joint physical and legal custody. (b) To either parent if a preponderance of the evidence established that it is in the best interests of the child that custody should be awarded to one parent or if the parents agree that one parent shall assume custody." Assembly Bill 1480 (March 29, 1979) was amended by the Assembly on May 14, 1979 to delete subdivision (a). A.B. 1480, Reg. Sess., 3 CAL. J. ASSEMBLY 4731, 4792 (1979-80). It was subsequently amended by the Senate on Aug. 29, 1980 to delete subdivision (b). A.B. 1480, Reg. Sess., 4 CAL. J. SENATE 6875, 6915 (1979-80).

62. Id.
63. Id.
the court allowed testimony about the merits of the parent to be awarded sole custody, but the sole custodian was not required to submit an implementation plan. If a parent is now required to submit a plan to the court, it may inspire the proposed sole custodian to allow more liberal visitation rights. The visitation plan requirement also permits the judge to evaluate how cooperative a parent will be. It is quite possible that a sole custodian may submit such a generous visitation plan that the court may then alter its award to joint custody.

The court may, in its discretion, require a plan subsequent to the custody award. Therefore, the court may award joint custody without an implementation plan. The delayed plan has the benefit of preventing a reluctant joint custodial parent from initially sabotaging the arrangement by refusing to agree on a particular detail. In addition, the conflict inherent in a dissolution proceeding may be ameliorated by deferring the shared custody plan to a later date. However, if parents are not in agreement on essential matters, such as schools, friends, routine, and lines of authority, joint custody would be unsettling to children already disoriented by the divorce of their parents.

It is not made clear within this provision whether the court has jurisdiction to award joint custody without a future requirement for an implementation plan. If such an award is made, it may lead to an increase in modification proceedings as parents encounter areas of conflict that have not been resolved.

B. Presumptive Joint Custody

Section 4600.5(a) of the Civil Code now provides for a presumption that joint custody is in the best interests of the child when both parents seek joint custody. As a practical matter, when parents agree on joint custody, strong evidence should be required to justify setting aside the proposal. If couples have separated amicably and have been able to devise

64. Id.


There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage.
an implementation plan for shared custody, they are prime candidates for a joint custody decree. It is interesting to note that it is not necessary that the parents agree to joint custody prior to their appearance in court. This may further encourage joint custody agreements.

If the court denies a request for joint custody, the court must render a written explanation. This may lead to an increase in the incidence of joint custody decrees because even a judge wary of the new joint custody statute will be hesitant to deny the award to two fit parents. If such an award is requested and denied, it gives the parents a legal basis for appeal.

Significantly, the statute authorizes the court, in its discretion, to award joint custody even where one parent seeks such an arrangement but the other parent does not agree. "Upon the application of either parent, joint custody may be awarded in the discretion of the court in other cases." Thus, an uncooperative parent has no veto power over a joint custody award. This provision is also the greatest source of uncertainty in the legislation. There are serious legal and practical objections to a joint custody order imposed without the agreement of both parents. Arguably, this is not a workable starting point for a shared custody arrangement. Joint custody is a personal arrangement that requires a definite commitment on the part of each party. The conflict that results when one parent is uncooperative in carrying out the terms of a joint custody decree may be contrary to the best interests of the child. An award without agreement may lead to more frequent modification hearings and the subsequent proceedings may well be more acrimonious and adversarial than the initial child custody litigation.

The court may initiate an investigation to determine the suitability of a joint award. "For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate under this subdivision, the court may direct that an investigation be conducted pursuant to the provisions of Section 4602." The parent who has retained the

66. Id.
67. Id.
68. Id. § 4600.5(b).
69. Id. Section 4602 provides in part:

In any proceeding under this part, when so directed by the court, the
former family home or the parent with sufficient funds to establish living arrangements conducive to childrearing may well have the advantage in such an investigation. In a modification proceeding, the investigation may be more advantageous for the former husband or wife who has remarried and whose spouse prefers to remain at home and care for the children.

Joint legal custody is sanctioned by statute if parents wish such an arrangement. "[S]uch [an] order may award joint legal custody without awarding joint physical custody." A decree of joint legal custody without concurrent joint physical custody gives both parents joint authority in major decisional areas. The scope of this authority encompasses such matters as education, medical care, and religion. This provision is most troublesome, for it appears to be in conflict with the intent of the statute as expressed throughout A.B. 1480. The clause may allow the court to avoid the award of joint physical custody in appropriate circumstances, thereby circumventing the intent of the legislation that parenting be shared.

Joint custody orders may be modified or terminated if it is in the child's best interest, and prior sole custody awards may be modified at any time to permit joint custody. The bill requires a statement of reasons for the modification or termination order. In some cases, joint custody will be a continuing source of dissension between parents. If substantial disagreement does follow the decree, the most likely recourse will be through the courts. An increase in modification hearings may result.

probation officer or domestic relations investigator shall conduct a custody investigation and file a written confidential report thereon. The report may be considered by the court and shall be made available only to the parties or their attorneys . . . .

70. Id. § 4600.5(c).
71. See notes 37-43 supra and notes 103-07 infra for discussion of cases negating the significance of joint legal custody. The legal effect of a decree of joint legal custody has been increasingly limited by case law.
72. A.B. 2197 § 1 (Jan. 29, 1980), proposes to change the wording of the above quoted portion of the statute. The proposed change is as follows: "Except where the parents have agreed to both joint legal and physical custody, the order may award joint legal custody without awarding joint physical custody." Id Hearings on this amendment, however, were postponed. Assembly Weekly History 535 (Aug. 31, 1980).
A noteworthy provision encourages the use of conciliation courts to assist the parents in formulating or carrying out an implementation plan.

In counties having a conciliation court, the court or the parties may, at any time, pursuant to local rules of court, consult with the conciliation court for the purpose of assisting the parties to formulate a plan for implementation of the custody order or to resolve any controversy which has arisen in the implementation of a plan for custody.7

This provision is significant because it represents a shift from an adversarial to a mediation process. It is becoming more evident that child custody determination is in many respects extrajudicial and should not be part of the adversary system. When couples reach their own decisions through counseling, they are far less likely to continue using the legal process to harass each other.76 This provision should lighten the court's burden in those metropolitan areas that maintain conciliation courts; it will, however, have the opposite effect in jurisdictions without such facilities. The court's time will be better utilized if conciliation court personnel assist in mediating conflicting demands before their submission to the judge. Inasmuch as the success of a joint custody arrangement depends on the negotiation process, conciliation courts will play an active role in the encouragement of joint custody arrangements.

The statute's concluding provision mandates that the noncustodial parent be allowed access to the "records and information pertaining to a minor child, including but not limited to medical, dental, and school records."77 The access to information is not confined to the categories specifically mentioned in the statute.78

The foregoing statutory framework secures joint custody as an important alternative in child custody proceedings. The concept of joint custody is woven throughout the fabric of the statute. The statute begins with a public policy statement encouraging frequent and continuing contact with both parents,

75. Id. § 4600.5(f).
76. See Ramey, Stender & Smaller, supra note 45 at 576 ("A joint custody agreement usually arises out of a mutually acceptable plan in which the parents negotiate their own working relationships and resolve their own differences. Therefore, it is far less likely that they will repeatedly return to court.").
78. Id.
proceeds to list joint custody as the preferred alternative along with sole custody, and further establishes the concept by a presumption of joint custody in section 4600.5. The new law sanctions an alternative way of restructuring families and reflects the current movement toward full sexual equality. The statute's many provisions may, however, open up the possibility of increased child custody litigation and custody modification hearings.

IV. AREAS THE STATUTE DOES NOT ADDRESS

Although the new statute clearly sanctions the joint custody concept, it ignores some potential problem areas. The transition into the new law would be facilitated by clarification of several important issues. The statute's lack of a clear definition of joint custody and its failure to provide judicial standards places heavy demands on attorneys and judges. Similarly, uncertainty surrounds the issue of interstate child custody jurisdiction. The issues not addressed by the legislation may lead to confusion and variance in the application of its provisions.

A. Vagueness of Definition

The legislation lacks a definite explanation of the joint custody concept, defining it as "[a]n order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with both parents . . . ."79 This definition fails to alleviate the inconsistency and uncertainty prevalent in current child custody literature.80 The courts have had very lim-

79. Id. at § 4600.5(c).
80. See, e.g., Nielson, Joint Custody: An Alternative for Divorced Parents, 26 U.C.L.A. L. REV. 1084, 1088 (1979) ("[J]oint custody has come to denote a division of physical custody as well as shared legal custody."). M. Roman & W. Haddad, supra note 9, at 173, state:

[J]oint custody is that postdivorce custodial arrangement in which parents agree to equally share the authority for making all decisions that significantly affect the lives of their children. It is also that postdivorce arrangement in which child care is split equally or, at the most discrepant, child care resolves itself into a two-to-one split.

Abarbanel, Shared Parenting After Separation and Divorce: A Study of Joint Custody, 49 AM. J. ORTHOPSYCH. 320, 320 (1979) states that joint custody families are ones "in which children live in two homes, in which neither parent is considered the
ited experience in joint custody awards and need to have joint custody distinguished from other types of custody arrangements. Although the provision explicitly mentions the physical aspect of joint custody, the statute does not clarify the difference between sole custody with extensive visitation and joint custody. The statute may be purposely vague in order not to restrain the development of shared custody arrangements. Nevertheless, ambiguity in the definition may lead to confusion within the legal system as judges attempt to determine which type of child custody award they are granting. Under the present definition, a mere altering of terms could continue the previous pattern of child custody decrees made under the former law. This was clearly not the intent of the legislation.

To be effective, the statutory definition of joint custody must be interpreted to permit an order in which both parents continue to share responsibility for the care, custody and control of their children. Both parents should have equal authority as to a child's upbringing, education and general welfare, shared legal responsibility for major decisions affecting the child, and shared physical custody of the child for significant periods on an alternating basis.

The courts will also need further guidance in determining whether a joint custody award is appropriate in a particular situation. The legislation sets forth no guidelines to aid the court. Whether an award is agreed upon or court imposed, there are areas of agreement that should be worked out beforehand. Judges should inquire into these arrangements and establish criteria for the evaluation of an implementation plan. Some essential factors that courts may wish to consider in determining whether a joint custody order is a workable

'visitor', and in which both parents actively continue to share parenting responsibilities after they have separated." Woolley, Shared Custody, 1 Fam. Advocate 6, 6 (1978) states:

I have defined shared custody as any method that permits the children to grow up knowing and interacting with each parent in an every-day situation, whether that comes by splitting the time on a fifty-fifty basis each week or by having the children go live with the other parent for several years or more.


82. Id. at 11.

83. See Abarbanel, supra note 80, at 325-27.

84. Nielson, supra note 80, at 1121.
and realistic resolution for a particular family include the following:

1. Whether the parents have demonstrated agreement and cooperation with regard to the child.85
2. Whether the parents have demonstrated an ability to communicate regarding the needs of the child.86
3. Whether both parents have been actively involved in the care and upbringing of their children prior to the divorce.87
4. Whether the parents are committed to their children and to the joint custody arrangement.88
5. Whether both parents evidence an ability to support each other as parents even though there may be disagreement as to childrearing practices.89
6. Whether the parents are able to detach their relationship *qua* parents from their former marital relationship.90

If the above criteria are met, courts should judicially impose joint custody and require the parents to consider the mechanics of the arrangement.91 The lack of cooperation in the submission of an implementation plan may jeopardize the joint custody arrangement and could potentially determine which parent is to be awarded sole custody. The court should evaluate the plan on the basis of the needs of the individual family.92

B. Interstate Joint Custody

The jurisdictional problems involved in interstate enforcement of joint custody decrees are not considered in the statute. No provision is made for joint custody under the Uniform Child Custody Jurisdiction Act; therefore, a joint custody order entered under the new law could be subverted in

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86. See Foster, *supra* note 11, at 31.
87. See Gaddis, *supra* note 6, at 18; Folberg & Graham, *supra* note 12, at 579.
88. See Abarbanel, *supra* note 80, at 326.
89. Id.
90. Id.
91. See Rabbino, *supra* note 85, at 121. Subjects that must be considered include the following: education, medical care, religious training, geographic proximity, financial responsibility, the child's routine, parental responsibility areas, lines of authority, division of time, and a conflict resolution plan. It is imperative that the parents agree to an extrajudicial procedure to resolve disputes.
92. Id. at 126.
the courts of another state. Joint custody is considered undetermined custody in the interstate context. If a joint custody arrangement is imposed upon an unwilling parent who desires sole custody, there is a very real possibility that the parent may leave the state with the child. The legislature was wise, however, in not placing a restriction on moving from the jurisdiction after a joint custody award. Such a restriction might encourage a parent to leave clandestinely with the child. In addition, a restraint on the right to move is a constitutional issue yet to be resolved in the child custody context.

VI. WAS THE JOINT CUSTODY STATUTE NECESSARY?

The need for joint custody legislation has been questioned; the legal structure which existed prior to the new law permitted regular and generous visitation to the noncustodial parent. The "best interests of the child" standard dictated the nature of the visitation rights and within that structure parents had great latitude in dividing a child's time. In effect, many parents have been working out "joint custody arrangements, probably for as long as the concept of post divorce custody awards has existed . . . ." A typical visitation plan might provide for alternating weekends, holidays, or a period of time during the summer. A provision in the plan could provide for automatic increases in the length of visitation if desired.

Moreover, it has been noted that California decisions have long permitted the award of joint legal custody to both parents and physical custody to one of them. California courts have experimented with the sharing of legal and physical custody under the statutory mandate that the court may make such award as "is necessary and proper." The court's wide

95. Id. at 1008-09, 1012. See also Bodenheimer, Equal Rights, Visitation and the Right to Move, Fam. Advocate, Summer 1978, at 18.
96. Folberg & Graham, supra note 46, at 569.
discretion in the determination of custody and visitation rights has been consistently acknowledged.\textsuperscript{99}

That the court had the power to award joint custody under the old legislation is implicit in a number of California cases. The holding in \textit{Priest v. Priest},\textsuperscript{100} sustained the entry of a decree dividing the custody of a child under seven years of age. Both parents had been found fit and proper persons to have the custody of the child. The mother contended upon appeal that she should have been awarded the custody of the children, in accordance with section 138 of the Civil Code which provided that "other things being equal, if the child is of tender years, custody should be given to the mother."\textsuperscript{101} The court held that the paramount principle was the welfare and best interests of the child and found that the trial court had not abused its discretion in awarding custody to each parent for alternating three-month periods.

In a more recent case, \textit{Klemm v. Superior Court},\textsuperscript{102} the parents agreed to an arrangement "whereby custody of the children would be joint, that is, each [parent] would have the children for a period of two weeks out of each month. . . ."\textsuperscript{103} There were no contested issues before the court; the parental cooperation essential for shared custody was evident and the trial judge awarded joint custody in accord with their requests.\textsuperscript{104}

\textit{In re Marriage of Neal},\textsuperscript{105} decided in May 1979 just before the enactment of the joint custody legislation, gave judges clear authority to award joint custody. The court stated that the order of preference established in Civil Code section 4600 "does not diminish the court's jurisdiction to ex-

\textsuperscript{99} See, e.g., Bratt, supra note 8, at 286; Annot., 92 A.L.R. 2d 695, 697 (1963) ("A court which is charged with the duty of awarding the custody of a minor child clearly has the power to divide or alternate the custody of the child between its parents.").

\textsuperscript{100} 90 Cal. App. 2d 185, 202 P.2d 561 (1949).


\textsuperscript{102} 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977). This is the first published appellate case to discuss a court order awarding joint legal and joint physical custody of the children.

\textsuperscript{103} Id. at 896, 142 Cal. Rptr. at 511.

\textsuperscript{104} Id.

\textsuperscript{105} 92 Cal. App. 3d 834, 155 Cal. Rptr. 157 (1979).
exercise the essential discretionary authority with which [that statute] invests it." 106 Because a court may make any orders for child custody "as may seem necessary and proper," 107 the trial court did not exceed its jurisdictional bounds in making an order awarding joint custody.

The Neal case is also significant in its departure from past decisions that interpreted joint custody. Earlier decisions had awarded physical custody to one parent and joint legal custody to both parents. Ostensibly, this meant that the non-custodial parent, usually the father, would participate in the major decisional areas, such as non-emergency medical care, schooling and religious training. The Neal case concluded, however, that exclusive physical custody to one parent was tantamount to sole custody for that parent. The court found joint legal custody to be an "ephemeral and essentially meaningless" term, 108 because the custodial parent in effect had complete control of all aspects of the child's life. This appears to be at odds with the new statute, which defines joint custody as an order which "may award joint legal custody without awarding joint physical custody." 109

The decision in Neal supplied the specific judicial sanction for joint custody needed by the courts; however, S.B. 477 and A.B. 1480 were already proceeding through the legislature. The new joint custody legislation adds weight to the Neal decision as well as other California decisions that have permitted some form of shared custody. The combined authority of judicial interpretation and an actual statute now enhance the jurisdiction of the court.

106. Id. at 839, 155 Cal. Rptr. at 160. It is interesting to note that the new legislation tends to limit judicial discretion. It places restraints on the judiciary by requiring a consideration of joint custody if one parent requests such an award and by mandating a presumption of joint custody if both parents agree to joint custody. Moreover, the statute requires a judge to render a decision justifying the denial of an award of joint custody.

107. Id. The court further stated that since the record showed no agreement by the parents and no indication that such an agreement might be reached, joint custody was not in the best interests of the children.

108. Id. at 844, 155 Cal. Rptr. at 163. Assembly Bill 1480 was chaptered on September 21, 1979, and supersedes Neal as to the viability and significance of joint legal custody. See note 56 supra.

109. CAL. CIV. CODE § 4600.5(c) (West Supp. 1980).
VII. Evaluation of Joint Custody

Joint custody is a viable alternative for the courts to consider. As additional data on the effects of shared custody become available, the advantages and disadvantages of the arrangement will become more apparent. Along with a recognition of the benefits of joint custody, there should be an awareness of the substantial problems that may be encountered.

A. Disadvantages of Joint Custody

Most critics of joint custody question its practicability. By definition, a shared custody arrangement requires two people who can work together, and the failure of the marriage is perceived as evidence of a couple’s inability to cooperate. In this regard, some of the opposition to the joint custody statute has focused on the difficulty of formulating an implementation plan. Potential future problem areas include the reconciliation of differing childrearing philosophies, scheduling problems, division of time, financial arrangements, choice of schools and the parameters of each parent’s authority.

The logistics of a joint custody arrangement also present difficulties. There is a general aversion to children being shuttled back and forth between parents. Children may be placed under a great deal of stress by the lack of continuity and stability inherent in having two homes. Geographical proximity is another important criterion for joint custody.

110. Commissioner John R. Alexander of the West District of the Los Angeles Superior Court has summarized the rates of controversy in joint and sole parent custody cases from the fall of 1978 through September 30, 1980. Statistics were compiled from case files and index cards in the Santa Monica family law court. During that period, 414 custody cases were heard. Sole custody awards were granted in 277 cases (67%) while joint custody awards were granted in 137 cases (33%). Only 16% of the joint custody awards resulted in repeat courtroom appearances (22 of the 137 cases), whereas, 31% of the sole custody awards resulted in further courtroom appearances (86 of the 277 cases). Commissioner Alexander also compiled statistics on joint custody orders where one parent did not agree to the arrangement. Seventeen joint custody decrees were awarded over parental objection during this period. Of those cases 12 (71%) were not followed by relitigation despite the initial opposition of one parent. J. Cook, Evaluating the ‘Success’ of Joint Custody Decrees (Nov. 14, 1980) (leaflet on file at offices of Santa Clara Law Review).

111. Nielson, supra note 80, at 1007.


113. Freed, supra note 14, at 340.

114. See Bodenheimer, supra note 94, at 1011.
however, this requirement can be very restrictive on parents and may constitute an interference with their right to travel.\textsuperscript{115}

Some authorities view joint custody arrangements as a continuing power struggle between parents with the child caught in the middle.\textsuperscript{116} Joint custody "provides an equal opportunity for the parents to compete for the child's loyalty, or to use him as an instrument of revenge upon the other spouse."\textsuperscript{117} It forces interaction between parents who may remain antagonistic toward each other. As one commentator has stated, "[i]f the focus is on the child's welfare, rather than on a battle of the sexes, an award of joint custody will rarely seem justified."\textsuperscript{118}

Joint custody presumptions may provide too simple a mechanism for determining custody. The option of presumptive joint custody may encourage the court to automatically grant joint custody decrees without determining whether the parents are prepared to make the arrangement work.\textsuperscript{119} It may be hazardous for the court to resolve delicate and important issues with the expedient of unfounded presumptions.\textsuperscript{120}

Some opposition to joint custody is based on a fear that the granting of such an award at the present time may be precipitous. Women have not yet achieved equality in the marketplace, and their inferior earning capacity may place them at a disadvantage in custody disputes.\textsuperscript{121} Fathers may threaten joint custody strictly for better bargaining power. Joint custody plans reached through negotiation may be one-sided because mothers may accept less in order to avoid the

\begin{quote}
\textsuperscript{115} Id. at 1008-09.
\textsuperscript{116} See Freed, supra note 14, at 341.
\textsuperscript{117} Note, The California Custody Decree, supra note 17, at 112. See, e.g., Plant, The Psychiatrist Views Children of Divorced Parents, 10 LAW & CONTEMP. PROB. 807, 812 (1944) ("It remained to modern Solomons to be the ones to really cut the child in two.").
\textsuperscript{118} Freed, supra note 14, at 341.
\textsuperscript{119} Nielson, supra note 80, at 1121.
\textsuperscript{120} Note, Maternal Preference and the Double Burden: Best Interests of Whom? 38 LA. L. REV. 1096, 1107 (1978). See also Freed, supra note 14, at 331, stating:
\begin{quote}
The law's use of fictions and substantive rules of law disguised as presumptions is probably as old as our art and craft. These fictions and rules have been useful devices to avoid difficult fact-finding and provide a means of adapting the law to a myriad of unforeseeable circumstances so the law may appear to be what it is not: secure and certain.
\end{quote}
\textsuperscript{121} Ramey, Stender & Smaller, supra note 45, at 577.
\end{quote}
gamble inherent in litigation.\textsuperscript{122}

Concern has also been expressed that courts, attorneys, and parents may agree to a joint custody arrangement to expedite the dissolution process. The requirement that judges render a written explanation of their decision to deny joint custody may encourage overworked judges to grant requests. The outcome of a custody award is not easily predictable; however, the difficulty should not be avoided by automatically granting joint custody requests. The court has an obligation to develop all relevant facts before making its custody determination.\textsuperscript{123}

Critics emphasize the fact that sole custody with liberal visitation is a more efficient means of achieving, in effect, joint custody. Court awards of "reasonable visitation" to parents allow them to work out their arrangement as to the logistics, including time, place, duration, and frequency of visitation. Some of the agitation for joint custody may involve "status-seeking as legal custodian . . . or 'one-upmanship,'" since meaningful association with both parents is common under the traditional sole custody, subject to visitation formula."\textsuperscript{124}

B. Advantages of Joint Custody

Notwithstanding the weaknesses of the statute, the advantages of joint custody are compelling. Shared custody agreements allow both parents a greater opportunity to continue providing emotional support and guidance to their children. The legislature and the courts are beginning to recognize that when both parents are permitted to maintain their relationship with the child, there is less emotional trauma for all family members.\textsuperscript{125} The psychological boost to all involved adds to the incentive to work together for mutual solutions to problems. Unlike sole custody, a joint custody arrangement meets the psychological needs of both the child and the parents.\textsuperscript{126}

A joint custody decree underlines the fact that one parent

\textsuperscript{123} See Note, The California Custody Decree, supra note 17, at 116.
\textsuperscript{124} Foster, supra note 11, at 31.
\textsuperscript{125} Rabbino, supra note 85, at 117.
\textsuperscript{126} Nielson, supra note 84, at 1113.
is not more powerful than the other. It provides judicial recognition that both parents have an equally important role to play in their child's life. The removal of a custodial preference for either sex and the alternative of joint custody make it unnecessary to depend on sexual stereotypes, and more accurately reflects the trend in our society toward shared responsibility for the rearing of children.

Joint custody arrangements diminish the role of fault and unwarranted competition in custody hearings. The belief that only one parent should be awarded custody has encouraged competition between parents for the exclusive custody of their children. Adversary litigation is not the ideal method to settle custody problems, and lessening the court's involvement in custody proceedings is a laudable objective.

Shared custody is an important alternative for the court to use in its determination of the best interests of the child. The legislative sanction and encouragement of joint custody provide the needed nudge for reluctant judges to make such an award. Although some judges have yet to overcome their resistance to the shared custody concept, the best interests of the child may dictate a flexible joint custody arrangement.

Past custody decisions have required judges to act in an extrajudicial capacity and have necessitated the application of psychological principles rather than the application of law. This problem is alleviated by the new legislation because it enhances the parents' incentive to resolve their disputes out of the courtroom. Everyone involved benefits by the avoidance of a "bruising custody battle with its attendant bitterness and emotional damages." Joint custody encourages the parents to cooperate and, if necessary, to negotiate their areas of conflict. The importance of private decision making in joint custody is emphasized in the new legislation by its

127. Folberg & Graham, supra note 46, at 551.
128. Nielson, supra note 80, at 1012.
129. See, e.g., Grote & Weinstein, supra note 1, at 51; Folberg & Graham, supra note 46, at 549.
130. Bratt, supra note 8, at 281.
131. Id. at 296.
132. See notes 75-76 and accompanying text supra for a discussion of the role of the conciliation court under the new law.
133. Bratt, supra note 8, at 273.
134. Gaddis, supra note 6, at 17.
135. Id. at 20.
specific encouragement of the use of conciliation courts. 136

VIII. CONCLUSION

Joint custody is another step toward equity in child custody awards. It is responsive to current parental roles and lifestyles and removes sexual stereotyping from the child custody statutes. As evidenced by the new legislation and the Neal decision, joint custody is an important alternative which should be considered in any custody determination. It is certain that the legislation will have an impact on child custody awards and that joint custody will be more common than in the past. The introduction of presumptive joint custody legislation is certain to follow.

Courts should be cautious in awarding joint custody, however, until more long term custody studies are conducted. Behavioral experts differ in their assessment of which custody arrangement is best for children. Therefore, there is currently little basis for presumptions in custody awards. Judges should continue to make a case by case determination in a custody proceeding. The child's best interest should remain the objective of every child custody award.

Sandra Blair Kloster

136. See notes 75-76 and accompanying text supra. See also Kay, A Family Court: The California Proposal, 56 CALIF. L. REV. 1205 (1968) advocating a nonadversarial family court system.