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Cynthia R. Mabry

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Indissoluble Nonresidential Parenthood: Making it More than Semantics when Parents Share Parenting Responsibilities

Cynthia R. Mabry*

I. INTRODUCTION

In his book entitled *Family Law and the Indissolubility of Parenthood*,¹ Professor Patrick Parkinson writes that shared parenting (often referred to as joint custody in the United States), is the preferred placement arrangement for parents upon divorce.² In the United States, both parents have equal rights to the care and custody of their children.³ Joint custody is one of the arrangements that is available for parents who are divorcing. It is “an arrangement by which both parents share the responsibility for and authority over the child at all times, although one parent may exercise primary physical [care].”⁴

One study of California custody orders revealed that seventy-nine percent of the families in the study had joint custody orders.⁵ In California, joint custody means that parents share physical and legal custody, but the two concepts are separate and distinct.⁶ “Joint legal custody” means that both parents “share the right and the responsibility

* Cynthia R. Mabry, JD, 1983, Howard University School of Law; LL.M., 1996, New York University School of Law. I am grateful to Professor Lynn Wardle for the invitation to participate in the Colloquium on the Indissolubility of Parenthood on September 29, 2011 and to the colloquium presenters and attendees for sharing their ideas and comments on this topic.

1. PATRICK PARKINSON, *FAMILY LAW AND THE INDISSOLUBILITY OF PARENTHOOD* (2011). In his book, Professor Parkinson discusses parenthood from a global perspective, examining relevant laws in the United States, France, Sweden and other countries. It is a comprehensive, interdisciplinary book, in that he discusses psychological and legal aspects of parenthood and includes background references to studies and statistics. He includes all perspectives, including the importance of the child’s voice. He uses creative phraseology to explain concepts, such as when he describes decision-making authority in Sweden as authority without an “umpire.” *Id.* at 58.

2. *Id.* at 50.

3. *E.g.* *Kaloupek v. Burfcening*, 440 N.W.2d 496, 497 (N.D. 1989) (giving no preference to mothers or fathers as better able to parent).

4. A HANDBOOK OF FAMILY LAW TERMS 152 (Bryan A. Garner ed., 2001); *see* *Haskell v. Haskell*, 686 S.E.2d 102, 104 (Ga. 2009) (awarding primary physical care to the child’s father because of his close relationship with the child and the stability and continuity that living with him would bring).

5. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 725 n.13 (4th ed. 2010).

6. CAL. FAM. CODE § 3002 (West 2011).

to make the decisions relating to the health, education, and welfare of a child.”⁷ By comparison, when parents share physical custody, it means that each parent “shall have significant periods of physical custody [that is] . . . shared . . . in such a way so as to assure a child of frequent and continuing contact with both parents”⁸ Most states require the parents to agree to share parenting before a court will award it.⁹

As Professor Parkinson notes, however, joint custody does not mean that parents will receive equal parenting time, and the parenting arrangement can take many different shapes.¹⁰ In a majority of states that recognize shared parenting in this context, a court may award joint physical care separate from joint legal care.¹¹ As a result, one parent often is designated as the primary caretaker, and the child’s primary home will be with that parent.¹²

In the United States, courts apply shared parenting principles in one of three ways. Some courts apply a presumption of joint custody.¹³ Others state a preference for shared parenting, which is sometimes referred to as shared parenting.¹⁴ But in a majority of states, shared parenting is one of a few options that are available to parents.¹⁵ Generally, though, in most instances, shared parenting means that both parents will have shared legal custody with one parent taking primary

7. *Id.* § 3003.

8. *Id.* § 3004.

9. WEISBERG & APPLETON, *supra* note 5, at 722 n.6; *see id.* at 724 n.12 (concluding that joint custody is not in a child’s best interests when it is imposed on parents over their objection); *accord* LYNN DENNIS WARDLE & LAURENCE C. NOLAN, FAMILY LAW IN THE USA 191 (2011) [hereinafter FAMILY LAW IN THE USA] (looking for a friendly relationship between parents); *see also* OR. REV. STAT. ANN. § 107.169(3) (West 2011) (requiring agreement by both parents for joint custody); VT. STAT. ANN. tit. 15, § 665(a) (2011) (stating that if both parents cannot agree to share responsibilities, the court is to award them to just one parent). *But see* IOWA CODE ANN. § 598.41(2)(a) (West 2011) (allowing consideration of joint custody if one parent requests it even if the parents have not agreed).

10. PARKINSON, *supra* note 1, at 46; *see also* IND. CODE ANN. § 31-17-2-14 (West 2011) (stating that joint legal custody “does not require an equal division of physical custody”); *Rivero v. Rivero*, 195 P.3d 328 (Nev. 2008) (ordering a joint custody arrangement that was not equal). *But see* *Kaloupek v. Burfening*, 440 N.W.2d 496, 499 (N.D. 1989) (ordering joint physical custody on a six month alternating basis with liberal visitation during non-custodial periods).

11. *See, e.g.*, CAL. FAM. CODE § 3085 (West 2011).

12. *See, e.g., id.* § 3086 (making the designation for public assistance purposes); *see also* D. Marianne Blair & Merle H. Weiner, *Resolving Parental Custody Disputes – A Comparative Exploration*, 39 FAM. L. Q. 247, 262–65 (2005) (describing joint custody arrangements in other countries including Australia, England, France, Germany, and Sweden).

13. CAL. FAM. CODE § 3080 (West 2011).

14. IOWA CODE ANN. § 598.41(2)(d) (West 2011) (stating that the court may require custody mediation before granting joint custody).

15. WEISBERG & APPLETON, *supra* note 5, at 721 n.3. *See generally* 2A MONROE L. INKER, CHARLES P. KINDREGAN, JR. & PATRICIA A. KINDREGAN, MASS. PRACTICE SERIES: FAMILY LAW AND PRACTICE WITH FORMS, § 47.7 (3d ed. 2011) (discussing Massachusetts law where there is no presumption).

residency.¹⁶ A Current Population Survey indicates, for example, that an overwhelming majority of custodial parents are mothers (82.2%) rather than fathers (17.8%).¹⁷

This Article embraces Professor Parkinson's views about the indissolubility of parenthood. It focuses on non-residential parents and sheds more light on why shared parenting may not be the in the best interests of a significant number of children. Part II discusses efforts to change the nomenclature to effect change in how parenting is viewed. Part III discusses the benefits and disadvantages of shared parenting custody as well as challenges that make joint or shared parenting impossible for many parents. Part IV concludes that the nomenclature is less important than concerted efforts to ensure that the parenting arrangement promotes the best interest of the child and both parents' rights and responsibilities toward the child.

II. VISITATION OR CUSTODY BY ANY OTHER NAME: SEMANTICS OR REALITY IN NOMENCLATURE?

Professor Parkinson discusses legislative efforts to identify new names for custodial responsibility.¹⁸ In recent years, legislators in the United States and other countries have grappled with labeling time that children spend with their parents. Over time "visitation" has evolved into "parenting time" and "access." Parenting time, formerly called visitation, is the time awarded the non-residential parent after a divorce when the other parent is awarded custody.¹⁹ In many states, the "visitation schedule" has been replaced by the "parenting plan."²⁰

In many states, the term custody, whether legal or physical,²¹ also has been a product of metamorphosis. Both parents now have parenting responsibility.²² Custodial parents have become domiciliary parents or residential parents.²³ The non-custodial parent has become the non-

16. FAMILY LAW IN THE USA, *supra* note 9, at 129; *see e.g.*, *Gonzalez v. Gonzalez*, 893 N.E.2d 333, 335-36 (Ind. Ct. App. 2008) (awarding joint legal custody on different issues to mother and father despite evidence that they did not communicate well).

17. U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2009: CURRENT POPULATION REPORTS 2 (Issued Dec. 2011).

18. PARKINSON, *supra* note 1, at 49.

19. A HANDBOOK OF FAMILY LAW TERMS, *supra* note 4, at 598.

20. WEISBERG & APPLETON, *supra* note 5, at 722-23 n.8.

21. Legal custody is "decision-making authority" while physical custody is "care-giving authority" and the "right to have the child live with the person awarded custody by the court." A HANDBOOK OF FAMILY LAW TERMS, *supra* note 4, at 151, 153.

22. PARKINSON, *supra* note 1, at 67 (discussing the change in attitudes about parenting).

23. *See e.g.*, *Chastain v. Chastain*, 2012 Ark. 73 (Ark. App. 2012) (finding that "primary residential parent" is synonymous with "custodial parent"); PARKINSON, *supra* note 1, at 67.

residential parent.²⁴ One author calls the terms visitation and custody “demeaning.”²⁵

In an online message about its deliberations, the committee that drafted South Africa’s Children’s Bill of Rights describes the dilemma that law and policy makers faced with proposed changes in nomenclature and why it believed that a change was necessary:

The debate on replacing the terms “access” and “custody” with “care” and “contact” repeatedly dogged the committee. [T]hey finally decided that it was important to shift from the concept of parental power to . . . parental responsibilities and rights and that the *new terminology was essential for this shift* to take place. They therefore decided to use the new terms of “care” and “contact.”²⁶

In an effort to be more inclusive and expansive, some state legislatures have blended traditional nomenclature and definitions with more modern approaches. For example, the Utah statute provides that “any party requesting joint custody, joint legal or physical custody, or any other type of parenting arrangement, shall file and serve a proposed parenting plan.”²⁷

A. Parental and Children’s Rights in Parenting Arrangements

There is a presumption that biological parents are the “best custodians of their child.”²⁸ They also have a fundamental “right to the companionship, care, custody, and management” of the child.²⁹ However, the non-residential parent’s right to parenting time after a divorce is not absolute. The parent must be willing and able to care for the child and contact must be in the child’s best interests. The child’s physical, mental, moral, or emotional health must not be endangered or

24. GERI S.W. FUHRMANN & ROBERT A. ZIBBELL, *EVALUATION FOR CHILD CUSTODY* 18 (2012).

25. *Id.* (offering alternatives of “residential parents,” “parenting time” and “parenting schedules”).

26. Lucy Jamieson, *Vote is a Milestone for Defence of Rights*, INT’L CHILD & YOUTH CARE NETWORK (Aug. 2005), <http://www.cyc-net.org/cyc-online/cycol-0805-jamieson.html> (explaining its reasons for a change in terminology); see also Linda Elrod & Robert G. Spector, *A Review of the Year in Family Law: Redefining Families, Reforming Custody Jurisdiction, and Refining Support Issues*, 34 FAM. L.Q. 607, 608 (2001) (changing the impression of the non-residential parent as a visitor).

27. UTAH CODE ANN. § 30-3-10.8(1) (West 2011); see also *Trubetzky v. Trubetzky*, 205 P.3d 891, 894–95 (Utah 2009) (ruling that shared parenting was not available because neither parent filed a parenting plan).

28. LYNN D. WARDLE & LAURENCE C. NOLAN, *FUNDAMENTAL PRINCIPLES OF FAMILY LAW* 844 (2d ed. 2006) [hereinafter *FUNDAMENTAL PRINCIPLES OF FAMILY LAW*].

29. *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982) (quoting *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18, 27 (1981)) (internal quotation marks omitted).

impaired by the contact.³⁰

Children also have rights. They have a right to their parents' love, guidance and support and to know both parents.³¹ Children also have a right to parenting time with both parents.³²

B. Policies that Support Shared Parenting Principles

Policies that underlie allowing parents such shared contact are based upon the theory that children benefit from having frequent contact with both parents.³³ For example, when California passed its joint custody legislation, the legislature explained that:

[I]t is the public policy of this state to assure that children have 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 this policy, except where the contact would not be in the best interest of the child³⁴

International laws also promote children's and their parents' rights to care and contact. For example, South Africa's Children's Bill of Rights provides that "[e]very child has the right" to "family care or parental care."³⁵ This principle is also supported by the United Nation's Convention on the Rights of the Child, which provides that children have a right to care by their parents and that States must "ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents."³⁶ At Article 9, the Convention further provides that "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."³⁷ Still further, Article 18 states a principle that appears to support shared parenting. It provides that "both parents have common responsibilities for the upbringing and development of the child."³⁸ The European Convention similarly

30. See, e.g., GA. CODE ANN. § 19-9-3 (2011) (listing criteria for making a determination).

31. See generally Cynthia R. Mabry, *Who is the Baby's Daddy (And Why Is It Important for the Child to Know)?*, 34 U. BALT. L. REV. 211 (2004) (discussing children's rights).

32. FUNDAMENTAL PRINCIPLES OF FAMILY LAW, *supra* note 21, at 886.

33. *Id.*

34. CAL. FAM. CODE § 3020(b) (West 2012); accord PARKINSON, *supra* note 1, at 37 (advocating that both parents should have parenting time and an opportunity to remain involved with the children post-divorce).

35. S. AFR. CONST., § 28(1)(b), 1996.

36. Convention on the Rights of the Child art. 21 (Nov. 20, 1989) 28 I.L.M. 1448.

37. *Id.* art. 9, ¶ 3.

38. *Id.* art. 18, ¶ 1.

provides that “[e]veryone has a right to respect for his private and family life, his home, and his correspondence.”³⁹

C. The Standard for Determining Care and Parenting Time

Universally, decision-makers rely upon the best interest of the child standard to determine whether a parent is entitled to parenting time.⁴⁰ United States courts rely upon statutory lists of criteria to ascertain whether a non-residential parent should have parenting time and an opportunity to care for the child.⁴¹ Common factors that appear in many statutes and that are applicable when two biological parents divorce and shared parenting is considered are:

- (1) the fitness and suitability of each of the persons awarded joint custody;

39. European Convention on Human Rights, (Nov. 4, 1950), 213 U.N.T.S. 222.

40. ANN LAQUER ESTIN & BARBARA STARK, GLOBAL ISSUES IN FAMILY LAW 122 (2007); *Chiappone v. Chiappone*, 984 A.2d 32, 38 (R.I. 2009) (“[T]he paramount consideration in cases involving visitation rights or custody disputes is the best interests of the child.” (quoting *Riedeman v. Petrella*, 828 A.2d 538, 540 (R.I. 2003) (alteration in original) (internal quotation marks omitted))).

41. Each state has enacted parenting time statutes regarding parental rights. See ALA. CODE §§ 30-3-132, -135 (1975); ALASKA STAT. §§ 25.20.060, .20.061, .20.095, .24.150 (2011); ARIZ. REV. STAT. ANN. §§ 25-403, -408 (2011); ARK. CODE ANN. §§ 9-10-114, -13-101, -13-108, -13-110, -15-215 (1987); CAL. FAM. CODE §§ 3011, 3042, 3100 (West 2011); COLO. REV. STAT. § 14-10-124 (2011); CONN. GEN. STAT. §§ 46B-56, -59B (2011); DEL. CODE ANN. tit. 13, §§ 722, 724A, 726A, 728 (2011); D.C. CODE §§ 16-914, -1005 (2011); FLA. STAT. ANN. § 61.13 (West 2011); GA. CODE ANN. §§ 19-9-3, -7 (2011); HAW. REV. STAT. § 571-46 (2011); IDAHO CODE ANN. § 32-717 (2011); 750 ILL. COMP. STAT. ANN. § 5/607 (West 2011); IND. CODE ANN. §§ 31-14-14-1, -17-2-8.3, -17-4-1, -17-5-8 (West 2011); IOWA CODE ANN. §§ 598.41, .41B, .41D, 600B.40 (West 2011); KAN. STAT. ANN. § 60-1630 (2011); KY. REV. STAT. ANN. §§ 403.320, .325 (West 2011); LA. REV. STAT. ANN. §§ 9:341, :364, :392.1 (2011); LA. CHILD. CODE ANN. arts. 136, 136.1, 137 (2011); ME. REV. STAT. ANN. tit. 19, § 1653 (2011); MD. CODE ANN., FAM. LAW §§ 9-101, -107, -108 (West 2011); MASS. GEN. LAWS ANN. ch. 208, §§ 31, 31A, 38 (West 2011); *id.* ch. 209C, § 10; MICH. COMP. LAWS ANN. § 722.27a (West 2011); MINN. STAT. ANN. §§ 257.541, 518.175 (West 2011); MISS. CODE ANN. §§ 93-5-24, -5-34, -16-3 (2011); MO. ANN. STAT. § 452.400 (West 2011); MONT. CODE ANN. § 40-4-218 (2011); NEB. REV. STAT. § 43-1103 (2011); NEV. REV. STAT. ANN. § 125C.020 (West 2011); N.H. REV. STAT. ANN. § 458-C:5 (2011); N.J. STAT. ANN. §§ 9:2-2, -4 (West 2011); N.M. STAT. ANN. §§ 32A-4-22, -3A-10 (2011); N.Y. DOM. REL. LAW § 241 (Consol. 2011); N.Y. FAM. CT. ACT §§ 447, 1081 (Consol. 2011); N.C. GEN. STAT. ANN. § 50-13.2 (West 2011); N.D. CENT. CODE ANN. §§ 14-09-24, -05-22 (West 2011); OHIO REV. CODE ANN. §§ 3109.04, 3109.05, 3111.26 (West 2011); OKLA. STAT. ANN. tit. 10, § 90.5 (West 2011); *id.* tit. 43, §§ 111.1-1A, .3, 112; OR. REV. STAT. ANN. §§ 107.101-102, 107.159, 109.119 (West 2011); 23 PA. CONS. STAT. ANN., §§ 5323, 5328, 5337 (West 2011); R.I. GEN. LAWS ANN. §§ 15-5-16, 19, 24.5 (West 2011); S.C. CODE ANN. § 20-3-160 (2011); S.D. CODIFIED LAWS § 25-4A-12 (2011); *id.* § 25-4A App. A Guidelines 2 to 4; TENN. CODE ANN. §§ 36-6-108, -301 (West 2011); TEX. FAM. CODE ANN. § 153.193 (West 2011); UTAH CODE ANN. §§ 30-3-10, 30-3-32 to 37-35.5 (West 2011); VT. STAT. ANN. tit. 15, §§ 650, 668A (2011); VA. CODE ANN. §§ 20-124.2-3, -108.2 (West 2011); WASH. REV. CODE ANN. §§ 26.09.160, .10.160 (effective until January 1, 2012), .10.170 (West 2011); W. VA. CODE ANN. §§ 48-9-101, 48-9-501, 61-2-14d (West 2011); WIS. STAT. ANN. §§ 767.43, 48.925 (West 2011); WYO. STAT. ANN. §§ 20-2-201 to 204, 20-7-102 (West 2011).

- (2) whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare;
- (3) the wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age;
- (4) whether the child has established a close and beneficial relationship with both of the persons awarded joint custody;
- (5) whether the persons awarded joint custody:
 - (A) live in close proximity to each other; and
 - (B) plan to continue to do so; and
- (6) the nature of the physical and emotional environment in the home of each of the persons awarded joint custody.⁴²

If the stated criteria, such as those listed above, are met, it is a rebuttable presumption that a non-residential parent will have parenting time unless that parent's contact with the child would cause serious physical or emotional harm to the child.⁴³ The terms of parenting time vary. However, the parenting time arrangements typically fall into two categories: (1) reasonable or liberal without specified terms, or (2) a specific, structured parenting time schedule.⁴⁴ When a schedule is established, it must meet the best interests of the child standard.⁴⁵ Common arrangements allow for the non-residential parent to have contact with the child on weekends, overnight, summer vacation, certain holidays, and for special events such as attending the non-custodial parent's annual family reunion.⁴⁶ Parents are encouraged to attempt to agree to the terms, but if they cannot agree, the family court will issue an order.⁴⁷

D. Benefits of Shared Parenting

Both children and their parents benefit from shared parenting.

42. IND. CODE ANN. § 31-17-2-15 (West 2011); *see also* D.C. CODE § 16-914(a)(3) (2011) (listing seventeen criteria in an exhaustive list); IOWA CODE ANN. § 598.41(3) (West 2011) (listing criteria for consideration when parents do not agree to shared parenting); UTAH CODE ANN. § 30-3-10.2(2) (West 2011) (listing criteria for considering shared parenting); VT. STAT. ANN. tit. 15, § 665(b) (2011) (listing criteria to consider when determining parenting rights and responsibilities).

43. *See, e.g.*, IOWA CODE ANN. § 598.41(1)(a) (West 2011) (ordering joint custody unless "direct physical or significant emotional harm" would occur).

44. WHISBERG & APPLETON, *supra* note 5, at 729 n.1, 730 n.5.

45. JOHN F. FADER II AND RICHARD J. GILBERT, MARYLAND FAMILY LAW § 6-6(1) (4th ed. 2006) (calling for a more structured parenting plan).

46. *Id.*

47. INKER, KINDREGAN & KINDREGAN, *supra* note 15 (advocating for more detailed shared custody implementation plans). *But see* *Thronson v. Thronson*, 810 P.2d 428, 433 (Utah Ct. App. 1991) (refusing to award shared parenting without an agreement between the parents).

Children will experience the love of both parents, continued contact with both parents and have both parents' guidance. "Children benefit from maximizing time with each parent." Some studies show that children who have regular contact and positive relationships with both parents have better post-divorce adjustment than children who do not have such contact.⁴⁸

Parents also receive benefits from shared parenting. Both parents are acknowledged as parents because parenting roles are not gender-specific.⁴⁹ Both parents have assurances of maintaining contact and an established bond with the child. Parents who have access are more likely to continue engagement and to pay child support. Those parents who share parenting responsibilities are happier than those who view themselves as just a "visitor" or "Disneyland parent."⁵⁰ Both parents are actively involved in the child's life. "A parent does not become a nonparent just because the other parent has residential custody."⁵¹ Parents with shared parenting arrangements also tend to have "lower levels of acrimony."⁵²

E. Disadvantages of Shared Parenting

Shared parenting can be difficult for children. They have two homes and accompanying confusion such as trying to adhere to two different sets of house rules. They have at least two schedules to manage as they are shuttled back and forth between homes.⁵³ Some children also deal

48. FUHRMANN & ZIBBELL, *supra* note 24, at 68 (noting that divorce and separation have a smaller impact than experiences that the child has after the divorce or separation). *But see* Janet R. Johnston, et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AM. J. ORTHOPSYCHIATRY 576 (1989). *But see* N.J. STAT. ANN. § 9:2-4.1 (2011) (denying access to some persons convicted of sexual assault); Susan Steinman, *The Experience of Children in a Joint Custody Arrangement: A Report of a Study*, 51 AM. J. ORTHOPSYCHIATRY 403 (1981) (finding no difference or very little difference in adjustment as compared with sole custody arrangements).

49. FUHRMANN & ZIBBELL, *supra* note 24, at 17; WEISBERG & APPLETON, *supra* note 5, at 721 n.1 (noting the importance of fathers' and mothers' role in childrearing that developed after the fathers' rights movement of the 1970s); VT. STAT. ANN. tit. 15, § 665(c) (2011) (ordering parental rights without favoring gender). *But see* PARKINSON, *supra* note 1, at 3 (reporting about gender wars in Australia).

50. Elrod & Spector, *supra* note 26, at 608.

51. Linda D. Elrod & James P. Buchele, *Parenting Time, Visitation and Enforcement*, in 2 KANSAS LAW AND PRACTICE, KANSAS FAMILY LAW § 13:2 (4th ed. 2011).

52. FUHRMANN & ZIBBELL, *supra* note 24, at 89.

53. *See* JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* (1989), *reprinted in* READINGS IN FAMILY LAW: DIVORCE AND ITS CONSEQUENCES 157, 158 (Frederica K. Lombard ed., 1990) [hereinafter READINGS IN FAMILY LAW]; *see also* Susan Steinman, *The Experience of Children in a Joint-Custody Arrangement*, 51 AM. J. ORTHOPSYCHIATRY 403, 404–14 (1981), *reprinted in* READINGS IN FAMILY LAW, *supra*, at 148–56 (concluding that some children adjusted well while others were anxious and confused with going back and forth between homes).

with the stress of shouldering the burden of one or both parents' happiness. In general, there are concerns about the lack of "stability, consistency, and predictability in a child's life" without an "established home base."⁵⁴

In *Kaloupek v. Burfening*,⁵⁵ when the majority affirmed the trial court's shared parenting decision that would cause young Robert to alternate between his parents' homes every six months, the dissenting judge wrote:

Poor Robert! In order to "assure" that his relationship with his father "survive[s] and grow[s]," he has been placed in a state of custodial schizophrenia—six months with one parent and six months with the other. [The court's unwillingness to choose between parents] and award custody to one parent or the other has placed a two-year-old child in a state of animated suspension, a custodial limbo."⁵⁶

Still, forty-two states and the District of Columbia recognize joint custody.⁵⁷

Shared parenting also may be difficult for one or both parents. This method of parenting may require continued contact with a non-residential parent that is harmful to the parent, especially when there is evidence of domestic violence. It enables an abusive parent to continue power and control over the other parent through sustained contact with the other parent. It is a tool for some parents to use to bargain for property.⁵⁸ Often, one or both parents' inability to cope with the marital breakdown is transferred to the child. Others believe that shared parenting arrangements result in increased litigation.⁵⁹

III. PRACTICALITY AND FEASIBILITY: DERAILING THE SHARED PARENTING PRESUMPTION

In some states, there is a presumption of joint custody.⁶⁰ In other states, there is only a preference for joint custody, so that a parenting

54. FUHRMANN & ZIBBELL, *supra* note 24, at 17.

55. *Kaloupek v. Burfening*, 440 N.W.2d 496 (N.D. 1989).

56. *Id.* at 499 (Levine, J., dissenting).

57. *See, e.g.*, IOWA CODE ANN. § 598.41(5)(a) (West 2011); OR. REV. STAT. § 107.169(3) (2011); UTAH CODE ANN. 30-3-10.2 (West 2011); VT. STAT. ANN. tit. 15, § 665(a) (2011).

58. Lila Shapero, Esq., *The Case Against A Joint Custody Presumption*, 27 VT. B. J. 37, 37–38 (2001) (demonstrating why Vermont should not pass a joint custody presumption).

59. *See generally* Margaret F. Brinig, *Does Parental Autonomy Require Equal Custody at Divorce?*, 65 LA. L. REV. 1345 (2005). *See also* Shapero, *supra* note 58, at 37 (noting that conflict can cause continued litigation between parents).

60. CAL. FAM. CODE § 3080 (2011) (providing that "[1]here is a presumption, . . . that joint custody is in the best interests of a minor child . . . where the parents have agreed to joint custody or so agree in open court" at a custody hearing); *accord* FLA. STAT. ANN. 61.13.2(c)(2) (West 2011); LA. CIV. CODE ANN. art. 131 (2011).

arrangement may not be imposed upon parents.⁶¹ Shared parenting is a minority view that is unrealistic for most families. In some situations, shared parenting is not ideal. Usually, joint custody will not be awarded, for example, when the parents “cannot agree on basic child-rearing issues.”⁶² Consequently, one parent will be awarded primary physical care while the other will receive parenting time. Although the right to parent is so indissoluble, if the parents’ “inability to cooperate is not extensive enough” to prevent shared parenting, the court may issue a joint custody order.⁶³

Most often, parents do not share parenting responsibility because of their inability to agree or to cooperate on major issues concerning the child.⁶⁴ A New York supreme court held that shared parenting is “an aspirational goal.”⁶⁵ However, it is inappropriate when parents cannot communicate and cooperate effectively to raise the child together. In that 2011 case, the mother would not allow the father to spend time with the child if he appeared just five minutes late for scheduled visitation. In addition, she constantly threatened to use child protective services to deny visitation altogether.⁶⁶ Because the mother remained hostile toward the father and was unwilling to foster a relationship between the non-residential father and the child, joint custody was not an appropriate custodial arrangement.⁶⁷ Similarly, in *Kamal v. Imroz*, the court ruled that the Nebraska statute did not require the court to grant equal parenting time or joint custody when it was not in the child’s best interests.⁶⁸ In *Kamal*, the court found that the parents could not communicate in person (the mother would only communicate through e-mails), and that there was such a high level of distrust between the parents that ordering “joint decision-making by the parents was not in the

61. IOWA CODE ANN. § 598.41(2)(b) (West 2011) (requiring a court to explain in writing why joint custody was not awarded).

62. *Lombardo v. Lombardo*, 507 N.W.2d 788 (Mich. Ct. App. 1993) (citing *Fisher v. Fisher*, 324 N.W.2d 582 (Mich. App. 1982)).

63. *Gerencser v. Mills*, 4 So. 3d 22, 24 (Fla. Dist. Ct. App. 2009); *Yates v. Yates*, 963 A.2d 535, 542-43 (Pa. Super. Ct. 2008) (finding that a minimal degree of cooperation existed even though the parents still had a tumultuous relationship that was “replete with conflict”).

64. *Kaloupek v. Burfening*, 440 N.W.2d 496, 499 (N.D. 1989) (concluding that “[t]he success of any custody resolution must ultimately rest with the parents” to “set aside their differences and conflict when dealing with their roles as parents”).

65. *Melissa WW. v. Conley XX.*, 88 A.D.3d 1199, 1200-01 (N.Y. App. Div. 2011).

66. *Id.*

67. *Id.* (N.Y. App. Div. 2011) (finding that joint custody was inappropriate when the mother repeatedly threatened father and interfered with his parenting time); accord *Clupper v. Clupper*, 869 N.Y.S.2d 253 (N.Y. App. Div. 2008); see also IOWA CODE ANN. § 598.41 (1)(a) (2011) (considering whether one parent has denied “continuing contact with the other parent, without just cause” in making the custody determination).

68. 759 N.W.2d 914 (Neb. 2009).

child's best interests."⁶⁹

Also, in high conflict cases, shared parenting is not recommended. The California statute provides, for example, that "any court's order regarding physical or legal custody or visitation shall be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members."⁷⁰ One writer concludes that "[w]hen parents engage in high conflict . . . court-ordered shared physical custody . . . may be the worst of all possible psychological worlds for the child."⁷¹ In *In re Marriage of Hansen*,⁷² an Iowa court heard evidence that revealed "serious marital stress," domestic violence allegations, communication challenges, mutual distrust, and high conflict.⁷³ The mother, who had been the primary caregiver during the marriage, always acquiesced to the father's wishes to avoid an argument with him.⁷⁴ They disagreed on essential parenting styles on issues such as discipline.⁷⁵ Under the circumstances, the court ruled that joint physical care was not in the children's best interests.⁷⁶ Accordingly, the court awarded physical care to the mother but recognized the important role that the father played in the children's life and awarded him liberal parenting time.⁷⁷

When one parent has engaged in domestic violence against the other parent or the child, joint custody raises grave safety concerns for the survivor parent and the child. However, states treat evidence of domestic violence differently when evaluating custody. Some will apply a presumption against shared parenting while others forbid joint custody awards when there is evidence of intrafamily violence.⁷⁸ In many states in the United States and some countries, visitation centers have sprouted up to provide a place for such visits. For other parents, such as those embroiled in violence, these centers also act as a transfer point so that the residential parent drops off the child and the non-residential parent picks

69. *Id.* at 918 (granting custody to the mother).

70. CAL. FAM. CODE § 3020(c) (2011); *see also* WEISBERG & APPLETON, *supra* note 5, at 723-24 n.12 (finding that many states are withdrawing the presumption because it is not in the child's best interests when parents are in high conflict).

71. FUHRMANN & ZIBBELL, *supra* note 24, at 89 (citing J. Johnston et al., *Ongoing Post-Divorce Conflict in Families Contesting Custody: Do Joint Custody and Frequent Access Help?*, in JOINT CUSTODY AND SHARED PARENTING 177-84 (J. Folberg, ed., 2d ed. 1991)).

72. 733 N.W.2d 683 (Iowa 2007).

73. *Id.* at 686.

74. *Id.* at 700.

75. *Id.* at 700-01.

76. *Id.*

77. *Id.* at 701-02 (describing the father as a "responsible, committed, nonresident parent, with good parenting skills").

78. *See* WEISBERG & APPLETON, *supra* note 5, at 724 n.12b; *see, e.g.*, IOWA CODE ANN. § 598.41(1)(b) (West 2011) (applying a rebuttable presumption against joint custody if there is domestic violence).

up the child without any interaction between the parents.⁷⁹

As Professor Parkinson observed, parenthood is indissoluble and it should be indissoluble.⁸⁰ The right to parent and spend time with one's biological children is so indissoluble that even when a parent has not seen or communicated with his children for years, he will be allowed access to the children.⁸¹ It is so indissoluble that a parent will have contact even when the children do not want to have contact because of the parent's misconduct or unacceptable behavior.⁸² The non-custodial parent's parental rights are so indissoluble that rarely is access totally denied.⁸³

Parenthood is so indissoluble that even when there is a risk of harm to the child, parenting time will be allowed if the risk of harm can be abated.⁸⁴ When there is evidence that a parent's contact may be harmful to a child, a court is more likely to award supervised parenting time rather than deny it altogether.⁸⁵ The court may also place restrictions or conditions on activities that the child may engage in during contact if there is a concern that the child may suffer harm.⁸⁶ Supervised or restricted parenting time has been ordered when there has been evidence of child abuse, child endangerment, or threats of child abduction.⁸⁷

The right to access to one's child is so indissoluble that when one parent threatens to place physical or geographical distance between the non-residential parent and a child, such as when the residential parent relocates, the parenting times and terms may change to ensure that the non-residential parent's relationship with the child continues.⁸⁸ When the residential parent seeks to relocate, one of the inquiries that a court may make is whether that residential parent is attempting to thwart or frustrate the non-residential parent's right to contact with the child and whether the residential parent is likely to honor "substitute visitation orders" if he

79. FUNDAMENTAL PRINCIPLES OF FAMILY LAW, *supra* note 28, at 887.

80. PARKINSON, *supra* note 1 at 277.

81. *Chiappone v. Chiappone*, 984 A.2d 32, 38 (R.I. 2009) (ordering supervised visitation for father who had not seen his children for three years).

82. *Id.* at 39 (ordering father to attempt reconciliation with his children through a psychologist).

83. FUNDAMENTAL PRINCIPLES OF FAMILY LAW, *supra* note 28, at 886.

84. D.C. CODE § 16-914(a-1) (2011); N.J. STAT. ANN. § 9:2-4.1(a) (West 2011).

85. WEISBERG & APPLETON, *supra* note 5, at 729-30.

86. *Id.* at 730; *see also* FADER AND GILBERT, *supra* note 45, at § 6-6(i) (restricting a father's alcohol and prescription drug use).

87. *See, e.g., Wilkins v. Ferguson*, 928 A.2d 655, 672 (D.C. 2007) (ordering supervised visitation when father had been accused of sexually abusing his young daughter); *Kamal v. Imroz*, 759 N.W.2d 914, 919 (Neb. 2009) (forbidding travel with the child to Bangladesh until the child was older without the mother's written permission because of the fear of abduction); *Elrod & Spector*, *supra* note 26 at 608 (describing supervised exchanges).

88. *See, e.g., In re Huff*, 969 A.2d 428 (N.H. 2009); *Cannon v. Cannon*, 280 S.W.3d 79 (Mo. 2009).

or she is allowed to relocate.⁸⁹

Technological advances have made it easier for both parents to have contact between in-person visits. Virtual parenting time is available when a non-residential parent is unable to meet the child in-person, such as when the non-residential parent lives in another state or has a work schedule that does not allow for in-person contact. Virtual parenting time allows the parent and child to maintain contact through videoconferencing, Skype, webcams, cellular telephones or other internet tools.⁹⁰

Parenthood is so indissoluble that when a non-residential parent's contact with a child is thwarted or threatened, a parenting order may be modified. The standard for determining whether a modification should occur in most states is that a material or substantial change in circumstances has occurred and a change in the parenting arrangement is in the child's best interests.⁹¹ "An order for joint custody may be modified or terminated upon the petition of one or both parents, or on the court's own motion, if it is shown that the best interest of the child requires modification or termination of the order."⁹² A change in a parenting time agreement or order may be caused by the residential parent's interference with the non-residential parent's contact with the children, failure to cooperate, failure to provide information about the child, failure to accommodate the child's need for a schedule change as the child ages, or one parent wishing to relocate to another state.⁹³ Parenting time is so indissoluble because courts are reluctant to disrupt the relationship between the child and the non-residential parent.⁹⁴

Even though a modification may be ordered because a parent has acted badly, parenthood is so indissoluble that the non-residential parent still will have parenting time.⁹⁵ In *Jefferson v. Jefferson*,⁹⁶ the court modified a joint custody order. Initially, the mother and father had agreed to joint custody with primary placement with the mother.⁹⁷ After

89. *Henry v. Henry*, 326 N.W.2d 497, 499 (Mich. Ct. App. 1982) (quoting *Watters v. Watters*, 314 N.W.2d 778 (Mich. App. 1981)); *F.T. v. L.J.*, 123 Cal. Rptr. 3d 120, 137 (Cal. Ct. App. 2011).

90. Elrod & Spector, *supra* note 26, at 608 (describing different methods of parenting).

91. OR. REV. STAT. ANN. § 107.169(5) (West 2011); *Jefferson v. Jefferson*, 980 A.2d 410, 419 (Del. Fam. Ct. 2008); *Mathie v. Mathie*, 884 N.Y.S.2d 433, 435 (N.Y. App. Div. 2009).

92. CAL. FAM. CODE § 3087 (West 2011).

93. *See, e.g., In re Garrett*, 152 P.3d 993, 995-96 (Ore. Ct. App. 2007) (modifying joint custody agreement to sole physical custody because of father's anger and hostility toward mother); *Mathie*, 884 N.Y.S.2d at 434-35, 436-37 (balancing the interests of the residential and non-residential parents when the residential parent sought a modification because the mother had remarried and wanted to relocate to another state and revising the visitation schedule).

94. FUNDAMENTAL PRINCIPLES OF FAMILY LAW, *supra* note 28, at 886.

95. *Garrett*, 152 P.3d at 997.

96. 980 A.2d at 419.

97. *Id.* at 412.

the mother changed residences several times, invited a few men – whom she had met on the internet – into her home within a short span of time, and did not ensure that the youngest child attended school, the father sought a change in the shared parenting arrangement.⁹⁸ The court concluded that the father had established that a change was “necessary and appropriate in [the child’s] best interest.”⁹⁹ It ordered a change in the parenting plan that required the parents to share placement, which meant that they would exchange the child every Sunday throughout the year.¹⁰⁰

Parenthood is so indissoluble that when a residential parent interferes with the non-residential parent’s rights, the non-residential parent may seek to enforce the parenting time order.¹⁰¹ Contact may be sought through a petition or writ of habeas corpus to the court that entered the initial order.¹⁰² The right to contact is so indissoluble that potential penalties for interference with parenting time include payment of a fine or bond, makeup parenting time, change of custody, and incarceration for contempt of court.¹⁰³ It is so indissoluble that withholding child support is not a remedy for violation of a parenting time agreement or order.¹⁰⁴

IV. CONCLUSION AND ANALYSIS

Changes in nomenclature may help to make some parents feel better about the role that they play in a child’s life and keep them engaged longer. But, different nomenclature still presents the same challenges. Obstacles to shared parenting make implementation of such a parenting plan difficult for most parents and their children. Regardless of whether the court requires it, both parents’ agreement to cooperate/coordinate parenting is needed for a successful implementation of a shared parenting plan. To that end, states should make educational programs mandatory and more readily accessible for all parents and on an ongoing basis rather than just during the pendency of the divorce.¹⁰⁵

Alienation of the non-resident parent by the residential parent and

98. *Id.* at 414–17 (chronicling the mother’s different placements, visits with men and inability to get the child to school on time if at all for several days).

99. *Id.* at 420.

100. *Id.* (designating 6:00 p.m. as the time for exchanging the child); *see also* Siewert v. Siewert, 758 N.W.2d 691, 697 (N.D. 2008) (modifying a joint custody order to sole custody because of harm that stepmother’s hostility toward the mother caused during children’s residency with father).

101. MD. CODE ANN., FAM. LAW § 9-105 (West 2011).

102. FUNDAMENTAL PRINCIPLES OF FAMILY LAW, *supra* note 28, at 888.

103. *Id.*; *see also* Carlson v. Carlson, 661 P.2d 833, 837 (Kan. Ct. App. 1983) (distinguishing punishments for civil and criminal contempt).

104. FUNDAMENTAL PRINCIPLES OF FAMILY LAW, *supra* note 28, at 892.

105. *See* WEISBERG & APPLETON, *supra* note 5, at 723 n.9 (reporting that many states require parent education but some do not require it).

the child and disengagement of the non-residential parent, usually the father, also happen.¹⁰⁶ Non-resident parents grow weary of the relentless battle with the residential parent. Sometimes, they remarry and accept new responsibilities so that children of the first marriage become secondary priorities.¹⁰⁷ Counseling would help parents to release anger about the marital breakdown and post-divorce challenges. Mediation would help resolve disputes that hinder a parent's contact or effective communication.¹⁰⁸ For some parents, such as fathers who have spent most of their time providing for the child outside of the home, a plan for gradual or phased-in implementation of parenting may be more appropriate as they learn how to parent. Since fathers often disengage from the children following a divorce, more programs should be established to help them to maintain contact and relationships with their children.¹⁰⁹

More courts should utilize parenting coordinators for detailed planning rather than ordering liberal and unstructured parenting time. These coordinators should help parents to establish parenting plans that are realistic for the parents and age-appropriate for the children with reasonable ground rules.¹¹⁰ The plan must be flexible so that it will meet the child's needs as he or she grows and the parents' needs as their lives change. Designated third party neutrals should be used as impasse breakers.

States must address legislative concerns raised about when shared parenting is appropriate for families on a case-by-case basis. A fairness standard is more appropriate than a status quo standard. The same parent who had primary care while the divorce is pending or during the marriage fairly may not be the parent who ultimately receives primary care.

In sum, for fit parents, parenthood should be indissoluble regardless of what the parenting arrangement is called. Indissoluble parenthood can be more than semantics. However, as Professor Parkinson observed, "statements of policy or principle to the effect that both parents should

106. PARKINSON, *supra* note 1, at 6 (finding a level of disengagement post-separation). *But see* WALLERSTEIN & BLAKESLEE, *supra* note 53, at 161 (finding that fathers in joint custody arrangements were more engaged).

107. W. Glenn Clingempeel and N. Dickon Reucci, *Joint Custody After Divorce: Major Issue and Goals for Research*, 91 PSYCHOL. BULLETIN 102 27 (1982), *reprinted in*, READINGS IN FAMILY LAW, *supra* note 53, at 163, 166 (1990).

108. *See, e.g.*, UTAH CODE ANN. § 30-3-10.2(5) (West 2011) (urging parents to seek mediation or court intervention).

109. *See* Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 984 (2005) (advocating for changes so that fathers have more than an economic role in their children's lives).

110. *See* WEISBERG & APPLETON, *supra* note 5, at 722-23 n.8 (explaining the coordinator's role).

remain actively involved in the care of children and cooperate in the work of parenting may be unrealistic for many families. They express a hope about what might be, or a statement about what should be, rather than necessarily what is possible or desirable in the actual circumstances of many individual families.”¹¹¹ Shared parenting must be applied appropriately for protection of children and their parents. For most parents and their children, traditional shared parenting without significant support for parents will not work. Legislators must look at whether the current shared parenting model in each state promotes indissolubility.

111. PARKINSON, *supra* note 1, at 64; *see also* WALLERSTEIN & BLAKESLEE, *supra* note 53, at 162 (finding that there was no evidence that joint custody was best for all families).