LOOKING AT JOINT CUSTODY THROUGH THE LANGUAGE AND ATTITUDES OF ATTORNEYS

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The workings of the judicial system influence the attitudes and actions of attorneys and, in turn, their attitudes and actions affect the courts. Through their experiences with the courts, lawyers develop perceptions toward policy embedded in law and toward the court system that implements the law. These perceptions may in turn influence the construction of new policies. This article examines the connections between the attitudes of family law attorneys toward the process of divorce and their construction of the “custody problem” in the debate over joint custody. It concludes that, because matrimonial lawyers are less likely to engage in “zealous advocacy” for their clients and more likely to seek “fair solutions” than are other types of attorneys, their framing of the “custody problem” (whether for or against joint custody) focused on the mental health of the parties and the just and fair functioning of the court system.

ATTORNEYS AND JOINT CUSTODY

This article deals with attitudes of family law attorneys toward their work and the influence of these attitudes on the construction of the debate over joint custody. The debate over joint custody of children after divorce is an example of how attorneys’ views are influenced by, and then influence, the legal proceedings surrounding divorce. When joint custody emerged as a new idea in the 1980s, matrimonial lawyers were deeply involved in the debate over whether the new arrangement would be a positive development or a disastrous innovation. There was not a consensus among attorneys—in fact, they lined up on both sides of the issue. But interestingly, both sides focused on the same concerns: First, what custody arrangement is in the best interests of the postdivorce family? Second, what custody arrangement is most likely to contribute to the smooth and efficient functioning of the legal system? The fact that lawyers who supported joint custody and those opposed to the concept framed the issue in similar ways was at least partially due to the professional orientation of matrimonial attorneys. Research indicates that family law attorneys are less likely to engage in zealous advocacy for their clients than to seek “fair” and “emotionally healthy” solutions for custody disputes. As a result, the debate over joint custody was structured around concerns for the emotional health of the individuals involved and the desire to reduce conflict and litigation.

This study is significant because more needs to be known about the role of lawyers in the justice system. Lawyers’ attitudes toward policy embedded in law and toward the court system that implements the law are very important, given the centrality of attorneys to the legal process. Like judges, juries, guardians ad litem, and social workers, lawyers are major actors within the judicial system. It is obvious that
actions they take within the courtroom directly affect other “officers.” What is not as clearly understood is how the actions taken by attorneys outside of court have an impact on court personnel. For example, what lawyers do outside of the courtroom usually affects whether cases even go to court. Through their interpretations of the law and their predictions of the responses of other legal actors, attorneys can discourage potential clients from pursuing cases, encourage clients to settle, encourage clients to reject settlement offers, or encourage them from the outset to pursue litigation actively. All of these actions directly influence the number of cases that are litigated and, thus, affect the workload of other actors within the system. Furthermore, these actions by lawyers with respect to their clients influence the behaviors and attitudes of other court personnel. Attorneys’ perceptions and approach to their work and toward the adversarial system in general will influence the atmosphere within the courts, the environment in which judges and other court personnel work. By the same token, lawyers’ actions and perceptions are influenced by their experiences with judges and legal proceedings. It is an interactive relationship.

Attorneys’ work experiences affect their orientation toward their jobs and their clients, as well as toward proposals to change the law itself. These experiences influence the advice they give their clients, their approach toward opposing counsel, and their attitudes toward litigation and other legal proceedings. Sometimes, as a result of experiences within the court system, lawyers are quite vocal in legislative debates over proposed substantive changes to statutory laws. They may see legislative proposals as worthwhile propositions that will greatly aid them, their clients, and the smooth functioning of the legal system. On the other hand, they may fear that a particular legal change will hurt their clients, bog down the legal process, and make their jobs much more difficult.

During the 1980s, statutes proposing joint custody were considered in virtually all fifty states. As mentioned above, divorce lawyers were deeply involved in the controversy over joint custody, with some attorneys supporting joint custody statutes and some opposing them. (A study of the involvement of individual lawyers and of bar groups in the legislative dispute over adoption of joint custody is beyond the scope of this article.) “Joint custody” can refer to two different aspects of child custody: legal custody and physical custody. Joint legal custody refers to shared decision making between the parents; joint physical custody refers to the child residing with each parent for significant amounts of time. Furthermore, joint custody statutes differ as to the extent they encourage shared custody. Some statutes label joint custody as a presumption or a preference under state law, while others merely list joint custody as one option available to divorcing couples. Presumptive/preference statutes are more controversial, because they mean that joint custody is the default position in a divorce, putting the burden of proof on those who resist it. Presumptive statutes also provide a judge with the authority to impose joint custody on unwilling parents.

Part 2 of this article explains the design of the study. In part 3, the political and legal contexts of the rise of joint custody are examined. Part 4 discusses the profession-
al orientation of divorce attorneys. As mentioned above, studies indicate that they are far more likely than other attorneys to focus on achieving “fair solutions” for both parties to the divorce rather than to seek zealously to advance the immediate desires of their clients. By and large, divorce lawyers seek to minimize litigation, as they see it to be harmful to the long-term well-being of their clients. This orientation encouraged the construction of the joint custody debate along two dimensions: whether joint custody would encourage or discourage quick and fair divorce settlements and whether it would be more or less healthy for the emotional functioning of the postdivorce family. Part 5 of this article explores in detail attorneys’ framing of the custody debate.

**THIS STUDY**

**Sources**

This examination of attitudes of family law attorneys toward their work and the debate over joint custody relies on three sources. The first source is a set of twenty-seven interviews conducted in the 1980s. The respondents were attorneys who practiced family law, although not all of them restricted their practice to that one area. Most had experienced joint custody arrangements in their private practice, and all of them had given serious consideration to the issue and its ramifications. They were from Massachusetts, Missouri, and New Jersey, three states that, during the time the interviews were conducted, were considering various types of joint custody bills, with bills proposing presumptive joint custody being the most controversial.

The individuals to be interviewed were identified through their public involvement with the issue or through a modified “snowballing” technique, in which each respondent was asked for names of other attorneys who were involved in the joint custody debate. Within each state, a relatively limited number of attorneys was actively involved in that debate, so the same names were mentioned repeatedly; this provided assurance that almost all of the relevant actors had been interviewed. Most of the attorneys had been directly involved with the joint custody issue in their state, some in an official capacity of the family law section of their state or metropolitan bar association, and some were well-known advocates or opponents of joint custody. Among those interviewed were attorneys who had testified before legislative committees or who had been involved in drafting proposed statutes.

The author conducted the interviews; most were in person, with a few by telephone. Examination of how attorneys framed the joint custody issue, the purpose of the study, could only be achieved by allowing them to speak freely and at length, constructing their own narratives. As Louis Dexter pointed out in his classic work on *Elite and Specialized Interviewing*, this type of interviewing involves: “1.) stressing the interviewee’s definition of the situation; 2.) encouraging the interviewee to structure the account of the situation; 3.) letting the interviewee introduce to a considerable extent . . . his notions of what he regards as relevant, instead of relying upon the investigator’s notions of relevance” (Dexter, 1970:5). Thus, these interviews were
semistructured around open-ended questions, such as “Why do you favor joint custody?” and “How do you respond to the criticism that it will undermine children’s stability?” To a large extent, respondents went where they wanted to go with the conversation, so they determined what was salient in the debate.

The second source of data are articles dealing with joint custody in law reviews and other law-related publications written in the 1980s by attorneys—some family law practitioners, some law professors. Because at the time there were relatively few articles published on this subject, reading and analyzing almost all of them was relatively easy. The third source was written testimony attorneys had presented before state legislative committees, and letters attorneys had sent to state legislators. This material was found in the offices of state legislators and interest group activists, who allowed me to dig through their files. With all of the data, commonalities of argument, categories of concerns, and repetition of phrases, words, and ideas were sought. From these were generated the “claims” that follow in part 5.

Relevance to Today

It is important here to note the relevance of material from the 1980s to the current realm of divorce attorneys and custody law. First, there is a dearth of relevant studies examining the views of lawyers toward child custody issues or analyzing the emergence of joint custody as a political issue. (For notable exceptions dealing with the political aspects of child custody, none of which focuses on the role of attorneys in the debate, see Coltrane and Hickman, 1992; Smart and Sevenhuijsen, eds., 1989; Drakich, 1988). Given the importance of the “revolution” in family law over the last two decades (Jacob, 1988), it is appropriate to understand the arguments surrounding the changes in custody law and the perceptions of the advocates and opponents of change, even if the focus of this article is not on change itself.

Second, the debate over the wisdom of joint custody arrangements continues today. The institution of joint custody statutes across the United States has not settled the issue of which arrangements are better for postdivorce families or more efficient for the legal system. Writers in legal publications continue to debate joint custody, making the same claims made twenty years ago (see, e.g., Bartlett, 2002; Bozzomo, 2002; Brinig, 2001; Bryan, 2000; Sexton, 1999-2000), and state legislatures have continued to amend their custody statutes in response to continuing complaints from both proponents and opponents of joint custody. The resilience of the debate in the face of statutory change makes an examination of the claims on both sides, even if made twenty years ago, all the more relevant.

The Context of Joint Custody

In recent years, family law has moved away from an adversarial approach toward a more consensual, therapeutic approach. Positive approaches such as mediation, fam-
ily court systems, and “therapeutic jurisprudence” have been offered in attempts to ensure the legal system makes divorce as painless as possible for the spouses and children experiencing the dissolution of their families (see, e.g., Rugby, 1984; McEwen, Rogers, and Maiman, 1995; Kisthardt, 1997; “Symposium,” 1998). No-fault dissolution, mandatory mediation, and collaborative divorce are all legal innovations intended to focus on the psychological component of the divorce process. Postdivorce adults and children will be far less damaged, goes this new conventional wisdom, if the legal context for the divorce is not structured around adversarial, win/lose, good-guy/bad-guy modes of interaction. A “good” divorce involves addressing the emotional needs of the parties and focusing on fair outcomes that help provide solace and closure to the grieving, or aggrieved, litigants. The legal system should not be in the business of proving that one party was wrong, so goes this reasoning; rather, it should help both individuals, and their children, to heal. One element in this new approach was joint custody.

This refocusing of family law, beginning in the 1970s and continuing today, came at least partially in response to the rise in the divorce rate. Attorneys sought to eliminate the hypocrisy and dishonesty prevalent in the attempt to prove “fault” in divorce proceedings and desired to remove as much acrimony as possible from a process already filled with anger and despair (Jacob, 1988). (At this same time, alternative dispute resolution and mediation were also being explored in other areas of the law.) The legal profession was also becoming increasingly aware of the psychological toll divorce took on children (for one example in a sea of literature, see the classic work by Wallerstein and Kelly, 1980). In this context, joint custody emerged as a possible solution for the pain experienced by children and fathers whose relationships often disintegrated after divorce.

Statutes allowing for the joint custody of children after divorce spread rapidly across the United States in the 1980s. In many states, fathers’ rights advocates were key players in putting the issue on the legislative agenda, feminist organizations were active in opposing certain types of joint custody bills, and mental health professionals also weighed in on both sides of the debate. Finally, the legal profession enjoyed a prominent position. State legislators were inclined to listen to the arguments of both family law attorneys and judges who dealt with custody cases and often supported the positions taken by the local or state bar associations. Though attorneys were not always as vocal or as passionate in this debate as either fathers’ rights groups or feminist organizations, matrimonial lawyers steadfastly sought to define the dimensions of the “custody problem,” and frequently shaped the form of custody statutes.

This does not mean that family law practitioners spoke with one voice in regard to joint custody. Attorneys were divided over its desirability, and those on both sides of the debate drew on a variety of arguments: constitutional, therapeutic, and pragmatic. Overwhelmingly, however, both advocates and opponents in the legal community focused on two particular aspects of the issue: the possible consequences of joint custody on the psychological and emotional health of the individuals involved.
in a divorce and possible consequences of joint custody for the legal system. Their experiences with litigation, judges, and divorcing clients led to a desire to minimize rancor between the spouses and to keep their clients out of court.

The Professional Orientation of Divorce Lawyers

This section provides an overview of the research on family law attorneys’ perceptions of their work and their professional role. Research has established that matrimonial attorneys strongly favor both settlements that avoid win/lose interpretations and policies and processes that aim to heal broken individuals and families. This orientation laid the foundation for a debate over joint custody that framed the issues in psychological and emotional terms.

Until the 1990s, little research had been done concerning attorneys’ own attitudes toward their professional roles, either within society at large or within a specific area such as family law. Most of the research regarding lawyers focused upon their role within a particular social and political system, that is, attorneys’ functions in contemporary society. For decades, attorneys were studied as agents of social control (see, e.g., Parsons, 1962; Rueschemeyer, 1973) who mediated between the legal system and the individual client (see, e.g., Sarat and Felstiner, 1986). Studies that concentrated upon lawyers as individuals examined such phenomena as the problems and aspirations of individual practitioners (Carlin, 1962) and the social structure of the bar (Heinz and Laumann, 1982). Only a few studies dealt with family law attorneys and their perceptions of their professional roles.

Hubert J. O’Gorman’s Lawyers and Matrimonial Cases, published in 1963, is a classic study of matrimonial attorneys in New York. O’Gorman was concerned with the informal pressures and attitudes that influence the professional behavior of these lawyers. In addition to studying ethical dilemmas then facing attorneys, he explored the ways in which lawyers perceived both matrimonial cases and their own professional role in such cases. He reported that lawyers’ perceptions of divorce cases consistently emphasized such factors as the clients’ emotionalism and ignorance of the law, the emotional strain these cases impose upon the lawyer, and the “nonlegal,” personal aspect of this type of case. This focus on the psychological, emotional aspect of divorce cases has been found in later studies of family law attorneys, discussed below. O’Gorman also studied the various conceptions lawyers have of their professional role in these cases. He explored different role orientations among matrimonial attorneys and emerged with two basic role definitions: the “Counselor,” who seeks to discover the best solution for his client and to work toward a solution that is fair to both spouses, and the “Advocate,” who seeks simply to achieve whatever result is desired by the client.

Subsequent studies elaborated upon O’Gorman’s basic findings. Kressel et al. (1979) compared the views of lawyers, psychotherapists, and clergy on divorce intervention. Like O’Gorman, they found that an important factor attorneys mentioned in connection with divorce actions was emotional strain, which the authors attributed to
the legal structure of divorce proceedings. Attorneys must function within an adversarial process in which clients are very emotional and the problems are seldom strictly “issues of law.” Instead, they are usually problems that require “psychological judgment and expertise, or personal values” (Kressel et al., 1979:251). Lawyers are unlikely to have the proper training to handle such issues, and this incapacity adds to the strain.

The ways in which matrimonial attorneys attempt to deal with this role strain differ greatly, and the authors developed different “stances,” or role definitions, based upon lawyers’ “attitudes toward the client; the objectives of legal intervention; and the nature and value of collaboration with mental health professionals” (Kressel et al., 1979:252). There were six role definitions that formed a continuum, starting with the “Undertaker,” who is cynical about divorce and not interested in the client, running through such types as the “Mediator” and the “Therapist,” and ending up with the “Moral Agent,” who rejects neutrality and attempts to negotiate a divorce that is good for all concerned. Like O’Gorman’s “Counselor” and “Advocate,” these types ranged from attorneys who are neutral “hired guns,” seeking to do their clients’ bidding, to those who are interested in negotiating a divorce that is fair to both spouses and is in the best interests of the children.

In 1983, Kressel, Hochberg, and Meth examined a larger, more representative sample of divorce lawyers to test the hypothesis that attorneys can in fact be classified into distinctive types. They distributed a questionnaire to a random sample of the members of the Family Law Section of the New Jersey State Bar Association. The questions sought to explore the lawyers’ attitudes toward the goals of the divorce settlements, the obstacles to the settlements, the major satisfaction in divorce work, the usefulness of mental health professionals, and toward divorce and divorce clients in general. A cluster analysis revealed the same basic typology enunciated by O’Gorman fifteen years earlier: family law attorneys tend to be “Counselors” (interested in the psychological adjustment of the family unit and the client) or “Advocates” (interested in “winning” a case for themselves and the client). Kressel, Hochberg, and Meth (1983) also found a subset within each category. Within the “Advocate” group was an identifiable cluster of attitudes that were held by “Gladiators”—lawyers who shared an extremely adversarial stance, a negative view of their clients, and a rejection of psychological goals. The “Counselor” category included a subset of “Journeymen,” who were recognizable by their rejection of both an adversarial stance and a therapist stance (Kressel, Hochberg, and Meth, 1983:40).

These studies of family law attorneys done in the 1960s, 1970s, and early 1980s are significant because they provide a snapshot, albeit a sketchy one, of the attitudes of family law attorneys during the years joint custody arose as a contentious issue in a number of states. The studies depicted most divorce lawyers as particularly concerned with the psychological aspects of their work—a concern for their clients’, and their own, emotional health. These findings might come as some surprise, at least for the lay observer. Certainly the public perception of most lawyers—including divorce attorneys—and the depiction of them by the media is based on the “Gladiator” model
described above. And this perception has been at least partially rooted in reality. Until 1983, lawyers operated under professional ethical guidelines from the American Bar Association that explicitly expected them to be “zealous advocates” for their clients (Mather, McEwen, and Maiman, 2001:111-12).

The therapeutic model of divorce, which produced such innovations as no-fault divorce and mediation, was just beginning to take hold in the 1970s, so its emphasis on the psychological and emotional health of the parties would not have been common parlance among O’Gorman’s subjects in the early 1960s. The attorneys studied in Kressel’s projects (from the middle to late 1970s) would not necessarily have been formally exposed to the therapeutic model, either through their law school experiences or their own professional development. Therefore, one might have assumed most matrimonial attorneys in these earlier studies would see themselves as uncompromising partisans for their clients, defining success as winning a huge property settlement or full custody of a child in a divorce settlement. This notion, however, is at odds with the reality of how many attorneys perceived their obligations or their goals. Although some of the attorneys in these studies rejected psychological goals and tried to “win” every case, one is struck by the consistent finding that many divorce lawyers saw their work in terms of finding the best emotional outcome for all parties involved. “Zealous advocacy” was not perceived as the highest value, or even a value at all, by many matrimonial attorneys. It seems reasonable to conclude that the actual work experiences of divorce lawyers led them to adopt different professional goals. Continually observing the pain caused by divorce appeared to have encouraged these attorneys to abandon the mandate for unconditional advocacy.

Later studies of divorce attorneys have reiterated the finding that most matrimonial attorneys pursue fair settlement, rather than vigorous advocacy, for their clients. Gilson and Mnookin (1994), analyzing different types of litigation, found that divorce lawyers they interviewed were more likely to see themselves as “problem solvers” who embraced cooperation with opposing attorneys, in contrast to the few “gladiators” who sought to win at all costs. In their observations of the power dynamics between divorce lawyers and their clients, Austin Sarat and William Felstiner (1995:108-09) also pointed out that compromise and “reasonable” settlements are the informal norm among matrimonial attorneys. And in their very recent and comprehensive study, Lynn Mather, Craig McEwen, and Richard Maiman continually emphasized the importance of “fair settlement” to the majority of family law attorneys, saying, “Most divorce lawyers we interviewed rejected overzealous advocacy. Instead, they drew on their experience with divorce cases and family law to define advocacy in ways that incorporated fairness to both parties” (2001:114) These attorneys maintained that it was ultimately in everyone’s long-term psychological interest that no one leave a divorce settlement feeling particularly aggrieved (Mather, McEwen, and Maiman, 2001:116).

If one were assessing the results of these recent studies in isolation, it would be difficult to know whether individual family law attorneys have rejected partisan advo-
cacy due to the increasing criticisms of this approach voiced in the 1970s and 1980s, or whether the inherent structure of divorce cases encourages a “fair settlement” approach, which was itself the impetus for the move away from the adversarial process—a true chicken-or-egg dilemma of causality. Presumably, there has been an interactive relationship over the past few decades: many divorce attorneys rejected zealous advocacy, which led to the embrace of no-fault divorce, mediation, and the like, which in turn encouraged new attorneys to adopt more therapeutic approaches. By including the studies from the era predating the revolution in family law, however, one is led to the conclusion that an orientation toward fairness to all and a concern for the emotional welfare of the postdivorce family has, for some time, been embedded in the experience of divorce cases themselves.

Whatever the exact sequence of causality, this research literature demonstrates that family law attorneys have long favored “win/win” settlements, and supported practices and policies that seek to mend the psychological wounds of divorce. It is thus no surprise that in the debate over joint custody, divorce lawyers often framed their arguments in psychological and emotional terms.

Attorneys Frame the Joint Custody Debate

Family law attorneys have lined up on both sides of the joint custody debate, but the claims of both proponents and skeptics have clustered into two basic categories: the effects of joint custody on the family law system in general and the effects of joint custody upon the family during and after a divorce. The first category included concerns as to how joint custody would alter, for better or worse, the then-current operation of the legal system as it handled divorce proceedings. The latter category included perceptions of the influence of joint custody upon relationships between divorcing spouses and between parent and child.

These two dimensions of the debate are interrelated, of course, and dominate the day-to-day work experience of a matrimonial attorney. Because most divorce lawyers favor settling cases and avoiding protracted litigation or actual trials, they favor policies that they believe discourage litigation and courtroom appearances. This is partially due to the particular emotional stress they experience when divorce cases become hate filled and prolonged. But they also recognize that litigation is hard on the parties involved, especially children. Given the primacy they place on finding solutions that aid the emotional healing of the postdivorce family, the desire for smooth and predictable legal processes is intertwined with the desire for custody solutions that best serve the interests of the children involved. Despite connections between these two dimensions of the debate, I will discuss them separately, starting first with arguments made by attorneys concerning the effects of joint custody on the legal system. After examining the particular pro and con arguments, I will then explore how these claims relate to attorneys’ views concerning the relationship between law and behavior.
Joint Custody and the Legal System

Claims Concerning Relitigation. A concern attorneys frequently voiced was whether joint custody promotes relitigation of custody decrees. Many divorce lawyers were convinced that joint custody (either legal or physical) only works in a rare number of cases where the ex-spouses are exceptionally mature and greatly motivated to make the arrangement work. Most couples remain sufficiently hostile toward one another that they cannot share decision-making authority without constant bickering, they maintained. When disagreements become too frequent, the couple ends up back in court, with one or both parties seeking sole custody:

Joint custody gives sanction to parents who file application after application with the court because they cannot agree about the littlest aspect affecting the lives of their children. Joint custody, unlike sole custody, legitimizes those applications and then expects our judiciary to take on the role of parents. . . .

. . . There is nothing judges dislike more than post-judgment applications by parties who are still squabbling. In the wrong hands, joint custody can be the beginning of protracted litigation (Skoloff, 1984: 53-54).

This scenario is particularly likely if joint custody has been imposed on unwilling parties:

I think the problem is that in any joint custody arrangement you need a presumption of cooperation and there are many people who feel that if one spouse is against joint custody, it can’t work. A judge should not impose this arrangement on people when one of the parties [doesn’t want it]. You’re just asking for postjudgment litigation.*

Or, as another lawyer wrote:

When parents cannot agree on joint custody, to allow the courts to force it down their throats will only create untold litigation and exacerbate an already emotional situation (Wallman, 1983:14).

Not all divorce lawyers agreed with this assessment, however. In fact, some maintained that postjudgment litigation would decrease if joint custody became more prevalent. Relitigation, they said, results from one parent feeling deprived of participation in the child’s life, and joint custody alleviates that feeling.

People will fight over their right to be recognized as parents. . . . One way or the other what it [joint custody] says to people is: “You can’t wipe out the other party as parent.” . . . [Parents] are fighting over the fact that they feel they no longer have the right to participate in the raising of their children.

* All unattributed quotations are drawn from the set of interviews with attorneys.
Once there’s a recognition that they have a right to do that, that their children will not be raised without them, without their participation, there isn’t the emotional fuel to fight over [whether the kids go to] camp. . . . People relitigate out of their sense of being deprived.

If the feelings of alienation and deprivation that result from being a noncustodial parent could be decreased through joint custody arrangements, then relitigation would decrease as well:

Mitigating the parental sense of loss has legal and practical ramifications as well. In reaction to the depression caused by the “loss” of a child, a parent may resort to renewal of litigation, a potentially devastating course for both child and parents (Nielson, 1979:1114).

Thus, whether attorneys supported or opposed joint custody, one reason they often gave for their stance is that they wanted to discourage relitigation. This is in keeping with the numerous findings that most matrimonial lawyers want to close cases fairly quickly and stay out of court.

[I]f you talk to lawyers, one thing they don’t enjoy is having to litigate custody. It’s certainly not a very fulfilling role that we play with clients. . . . I don’t know of many lawyers who like to litigate custody, and there’s not enough money in the world to compensate a lawyer for the time, effort, and anxiety that he goes through litigating custody.

Of course, a cynic might argue that attorneys may dislike protracted litigation not so much because of the emotional toll on them and their clients but because they perceive that it does not serve their long-range economic interests. Courts are notoriously overburdened and slow moving, and lawyers are accustomed to dealing with continuances and delays. Certainly, part of their function is to guide their clients through the maze of court proceedings. But if laws are perceived to threaten the minimum level of efficiency they expect from the legal system, the lawyers may feel it is necessary to preserve the system’s viability and thus their professional success. Therefore, promoting the relatively smooth functioning of the system may be seen as advancing the economic interests of attorneys in the long run. Thus, one could argue that lawyers tended to oppose joint custody if they saw it as a vehicle for relitigation and to support it if they believed it would enhance the chances of keeping divorced couples out of court.

Claims Concerning Presettlement Negotiations. Understandably, one of divorce lawyers’ first concerns about any statutory change is, “What effect will this have on negotiations?” The vast majority of divorce cases—90 percent by most estimates—are settled out of court. Thus, most custody arrangements are the result of two parents, and their attorneys, each bargaining for the most satisfactory outcome, however defined. The lawyers negotiate these arrangements with full knowledge of the existing law and the probable outcome should the case end up in court. Therefore,
to some extent presettlement bargaining is done “in the shadow of the law” (Mnookin and Kornhauser, 1979). The law at least partially dictates the type of strategy a lawyer will employ to settle the case in a way most advantageous to his or her client—or, as seems to be the case with most divorce attorneys, in a way that appears the least damaging to all concerned. When the substance of statutes changes, the strategies of negotiation will probably change as well. So it is understandable that attorneys approved or disapproved of changes in custody law based at least partly upon their perceptions of how they thought the changes would affect predecree negotiations.

Those who opposed presumptions of joint custody feared that greater hostility would be expressed between parents during the bargaining process. This hostility could make it more difficult to settle a case and increase the chances of the dispute being adjudicated. A Boston attorney who opposed a presumptive statute explained:

I was concerned that it [the statute] emphasized the negative. It forced you, if you didn’t want joint custody, to really put the other parent down. And that’s not something I like to see at the outset of a case. . . . If you really felt the parent wasn’t being cooperative or wasn’t a good influence or wasn’t in the best interests of the child, you had to make a big case out of that.

A divorce lawyer from the Midwest agreed with this assessment as he discussed the problems resulting from a statutory preference for joint custody:

More cases are being filed in an attempt to avoid joint custody, and they’ve got a lot more cases they’re trying. . . . People are now bringing in more and more concept of fault in an effort to avoid joint custody. Where before the two people might say, “All right, I’ll give it a try to see if it will work,” now what’s happening is that they’re being forced to do something they don’t want to do. So they go into their lawyers and bring a whole list of all the things that are terrible about the other parent.

Attorneys opposing joint custody believed that presumptions and preferences for it forced parties who would otherwise peacefully settle their differences to try to prove the other spouse unfit in order to avoid court-imposed joint custody. Rather than encouraging parents to negotiate toward an arrangement that suits them both, legal presumptions would instead increase the bitterness and the chances of litigation.

If the parties want to do joint custody, we let them do it. But if the statute presumes it, you’ll be in a position where every custody will have to be litigated when one of the parties doesn’t want to have joint custody because of that presumption. If I have a client who says, “I don’t want to have joint custody,” and there is a presumption, I have to litigate it.

When a parent who wants sole custody rather than joint custody knows that the law presumes the former, he or she would have to assume an aggressive posture toward the
spouse from the outset to convince a judge that joint custody is not in the child’s best interests.

Again, however, not all divorce lawyers agreed with this perception of presumptions. In fact, some believed just the opposite—that presumptions and preferences encourage cooperation and keep parents out of court.

I mean, presumptions tend to minimize litigation. That is their intent: to create a barrier over which someone has to jump to do it, and if you don’t have the evidence to jump that barrier, then you have a problem.

An attorney from New Jersey gave a more detailed explanation of how presumptions deter litigation:

Where you have a presumption of joint custody, where people walk into the lawyer’s office and are told right off the bat—“In this state, everybody assumes that joint custody is the answer, and unless you, sir or madam, can give me good reasons why it won’t work in this case (like your spouse is a whore-monger or drunkard or beats the child) I’m telling you: no settlement panel, judge, or expert is going to be sympathetic with a win/lose situation”—many people who would otherwise run headlong into litigation are going to go home and say: “Well, I’m not really going to go anywhere to try and win all the marbles. I may as well make the best of it and settle it on a joint custody basis.” When you don’t have a presumption, you have lawyers saying to a client: “Here’s how you’re going to win. You’re going to do this and that and the courts and the experts don’t like joint custody.” It’s like refueling the fire.

From this point of view, a presumption was seen as a hurdle that few couples would choose to jump, couples who otherwise would have ended up in court. Rather than encouraging hostility, such laws presume cooperation, and most people would find it easier to defer to the presumption than to fight.

Again, just as is the case with the issue of postjudgment litigation, attorneys supported or opposed presumptive joint custody at least partially on the basis of whether or not they thought it would encourage clients to settle out of court. Most divorce lawyers have long been as reluctant to enter the courtroom for the first time as to enter it for a postdivorce modification. It is reasonable to assume that the reasons for wishing to avoid litigation from the outset were similar to those for avoiding it after the divorce: litigation puts emotional strain on both lawyer and client, and inhibits the efficient functioning of judicial machinery.

Claims Concerning Judicial Discretion. Attorneys’ attitudes toward judges and their role in custody adjudication also influenced their position on joint custody. The extent of a trial court’s discretion in awarding custody is a matter of statutory law (Jarboe, 1979:747), and traditionally state legislatures allowed trial judges great latitude in exercising this discretion. Similarly, appellate courts have been quite reluc-
tant to “second-guess” the decisions of the lower courts, since the trial judges actually observe the parents and, on occasion, talk directly with the children. So judges hearing custody disputes have historically enjoyed a great deal of power and responsibility. Attorneys’ perceptions of how well judges carry out this responsibility often influenced their attitudes toward presumptive joint custody.

Those who opposed a legal presumption for joint custody favored the idea of allowing judges as much discretion as possible in custody proceedings. They believed judges need latitude in fashioning custody decrees; because each family is different, no mechanical formulas should be applied. A presumption in favor of joint custody would make it difficult for judges to find creative solutions to custody disputes:

[W]hen you’re dealing with the equities, if a [joint custody] bill is too strict, it ties a judge’s hands and doesn’t allow him to be creative, and doesn’t allow him to bring other factors into consideration—then we become more of a computer-type justice. . . . [U]niformity isn’t always the answer. No two cases are alike. . . . When you make it so easy for a judge to render a decision by putting Fact A and Fact B equals Fact C, then we don’t need judges up there, we just need a computer. Push the button and you get your answer.

Another attorney agreed:

You need the ability to be creative, and the more you put a structure of inflexible law onto domestic cases, then you take [away] the judicial ability to do what makes sense under the circumstances.

These lawyers found it inappropriate to presume that one particular custody arrangement is in the best interests of all children. Most of them were somewhat skeptical about the psychological benefits of joint custody and did not want to see judges forced into imposing it onto most divorcing couples. They favored a case-by-case approach in which judges would have little to restrict their decisions other than a statutory directive to act in “the best interests of the child.” In this way, a judge could carefully evaluate the circumstances surrounding a particular divorce and mold a decree that best suited the needs of that individual family.

Other attorneys were less impressed with the ability of judges to dispense such wisdom. They believed that judges, when left completely to their own devices, would base their decisions primarily on their own personal prejudices and views (perhaps outdated) of childrearing:

One of the problems is that judges have such incredible discretion that if you brought every matrimonial judge before this Commission and asked them to define fitness, you would get a different definition from every single judge that sat here, and to me, that presents a terrible problem because you’re giving the power to decide the lives of their children to 21 different judges with an incredible discretionary power, most of which, because we’re
dealing with childrearing, has to do with the way they were reared (Danzig, 1980).

Because most judges have no professional background in mental health to aid them in their deliberations, even the most conscientious would have to rely on their biases:

[M]ost judges have had little or no training in psychiatry, psychology, social work, child development, or other disciplines which would assist them in their decision-making (Blond, 1984:569).

Such a lack necessarily forces judges to apply their own conceptions of “proper” child-rearing to custody cases:

Judges decide custody cases by making extralegal judgments which may involve personal value judgments having little to do with the needs of a particular child. The material presented to them is often out of date, incomplete, or conflicting (Schwartz, 1984:242).

These attorneys pointed to the fact that most judges were middle-aged, middle-class males who might not be sympathetic to the notion that men could be nurturing parents or that a divorced couple could share caretaking responsibilities. Virtually any decision they made could be justified as being “in the child’s best interests.” Therefore, the judges are relatively free to impose their own personal prejudices upon dissolving families, prejudices that may reflect a previous era of family law.

This led to another perception that influenced lawyers’ positions, but it was one vocalized rather reluctantly: “judicial laziness.” Some attorneys believed that judges might secretly feel unqualified to determine what is truly in the “best interests of the child.” Rather than agonizing over each case brought before them, for judges are not unmoved by the emotional turmoil surrounding the litigants, trial judges tended to look at their crowded dockets and dispense with each case as quickly as possible. This means “following the path of least resistance,” with the path varying according to statutory law. If there were a statutory presumption or preference for joint custody, judges would frequently look no further when issuing a decree. Particularly if a statute required that reasons be stated in writing for denying joint custody, a judge would be loath to award sole custody. Divorce lawyers who felt that joint custody is workable only in a limited number of situations thought that presumptions and preferences would encourage judges to award shared custody against their better judgment simply because it would be the easier thing to do.

Lawyers who championed joint custody also subscribed to the theory of judicial laziness, but that is precisely why they believed presumptions were necessary. They, too, felt judges frequently took the easy way out in custody decisions, and if joint custody was merely an option, judges usually would not employ it simply because it was a new idea. Instead they would continue to award custody as they had always done—to one parent, usually the mother. In general, fewer people in the 1980s would have
been surprised or upset by a decree giving the mother sole custody and the father visiting rights than would be disturbed by joint custody. And if joint custody were merely one option among several available to the trial judge, an appellate court would be unlikely to overturn a decree for sole custody. Judges are seldom accused of “abusing discretion” when they follow a path well marked by case law. So, attorneys who favored joint custody frequently believed judges would begin to award it in great numbers only when statutes made joint custody the easiest choice to make.

Thus lawyers on both sides of the joint custody issue tended to believe that judges shrink from agonizing over custody cases and having to fashion individualized solutions. Full dockets and lack of expertise encourage trial judges to make the decision least likely to create additional work or be challenged by the parents and their attorneys. Therefore, proponents of joint custody often wanted statutory presumptions that would discourage a judge from rejecting the new arrangement. Skeptics of shared custody disliked presumptions for that very same reason, saying it would be too easy to impose joint custody inappropriately.

It is interesting that some opponents of joint custody held two rather conflicting perceptions of judges. On one hand, they argued that presumptions were bad because judges must be free to develop creative custody solutions that are tailor-made for individual families. On the other hand, they reluctantly admitted that judges tended to duck such difficult projects and were apt to fall back on the traditional solution of sole custody—a solution that these lawyers favor. How could these attorneys simultaneously champion the creativity that results from great discretion and admit that it is seldom used? Part of this may be an acknowledgment of the variation between judges. As one attorney told me:

We have a variable bench; I’m sure all states have variable benches. There are some judges who are particularly sensitive to psychodynamics of divorce and custody and child development issues, and they’re enlightened and bright. If I’m trying a case in front of them, God knows I want them to have all the discretion in the world, especially if I’m on the right side of the case [Laughter]. Likewise, you might have a judge who is not sensitized to mental health issues, to child development issues, and I suppose in that case you wouldn’t want quite so much discretion.

Such lawyers had tried cases in front of judges who truly were concerned and creative and in front of judges who hated custody disputes and were apt to hand down the easiest solution possible. These conflicting perceptions may reflect conflicting experiences.

These perceptions also may have reflected an acknowledgment of both the “is” and the “ought.” Many lawyers may have been sincerely dedicated to the ideal of a judge creating individualized custody arrangements out of his or her great wisdom, and they did not want that possibility destroyed through legal presumptions. But at the same time, they were quite aware many judges did not live up to this ideal, and
they took reality into account when they formed their positions on joint custody. At any rate both perceptions—that of the wise judge and that of the lazy one—supported an argument against presumptive joint custody, so skeptics of the arrangement could comfortably hold both at once.

**Joint Custody and the Postdivorce Family**

Of course, attorneys’ positions on joint custody did not stem solely from their perceptions of the legal system. In fact, when explaining their positions, most lawyers discussed the psychological effects of joint custody upon the postdivorce family. They seemed sincere in their desire to promote arrangements that would best serve both the needs of the children and the needs of the parents. To support their positions, either pro or con, lawyers relied on both social science literature and their own observations and experiences.

**Claims Concerning Children’s Best Interests.** Most lawyers appeared concerned with the effects of joint custody upon the children of divorcing couples. Though a few “gladiators” might have worried about nothing but winning the battle for their clients (see Kressel, Hochberg, and Meth, 1983), those involved in the joint custody debate considered its possible impact upon the children. Differing claims about how children should best be raised accounted for quite a bit of the division between pro- and anti-joint-custody positions.

Opinion was sharply divided over the notion of joint physical custody. A child who spends a significant amount of time with each parent is forced to move from one domicile to another. Arrangements can vary greatly: sometimes the shift can occur only twice a year (school year spent with one parent, summer vacation with the other); sometimes it can be as often as twice a week (four days with one parent, three with the other). Many divorce lawyers questioned the benefits of frequent shifts. They worried that it creates instability for the child during a time when she or he most needs to feel secure—right after his or her parents’ divorce.

Joint physical custody requires the sharing by both parents of the child on an equal basis and compels the child to shift from residence to residence on a periodic basis. My feeling, bolstered by a review of the psychological literature, is that such shifting of residences prevents the child from developing roots in a community and a sense of psychological stability (Morris, 1983).

Attorneys particularly disapproved if the parents did not live close to one another:

Normally [I support joint physical custody] only in relatively rare situations where not only the parents but the kids themselves seem able to make it work. I think one of the things it requires is not only a strong commitment, but very close geographic proximity—literally within the same town and maybe even within the same neighborhood. Because in order to keep a support system stable, constant, and working for a kid, I think a kid certainly
has to have the same school, and probably ought to have the same network
of friends and fairly close physical contact with friends.

Or as one pragmatic attorney said:

If you and I are a divorced couple and you live in Plainfield and I live in
Willingboro, we can’t have joint custody. Bounce the kid around from one
school to the other every week? It just won’t work.

For these lawyers, stability and continuity of care are always in the child’s best inter-
ests, and usually override other important considerations such as preserving close ties
to both parents. One attorney, considering the conflict between a child’s need for
continuity and the need for two parents, resolved it this way:

For each case, the courts must weigh the priorities; the court can only try to
provide for both needs where they are compatible. . . . [W]here incompati-
ble, continuity appears the more conservative and safer option. Opting for
continuity may be the only way to provide a basis for a reorganized family
that can adequately protect a young child from insecurity (Moller,
1982:42).

These lawyers worried about an arrangement that differs so markedly from tradition-
al ways of rearing children. Single-parent families are indeed on the increase, but
they have never been unusual. Widows and widowers with children have always
existed, particularly during times of war. And for decades, postdivorce families fol-
lowed that same model—one parent (usually the mother) was the primary physical
caretaker. To embark on a radically different arrangement in which children are shut-
tled back and forth between caretakers seemed foolhardy to many lawyers. As one of
the eminent legal scholars in the area of divorce law commented:

Caution in endorsing joint custody seems justified. Throughout human his-
tory, families in many societies have been nomads, but in few have the chil-
dren alone been the travellers moving between sets of principal caretakers
and in even fewer, if any, have children moved between caretakers who
were apart because they had proven unable to live together (Chambers,
1984:551).

Attorneys who were skeptical about joint physical custody particularly opposed
legal presumptions for it. They frequently said such decrees should only be made
when both parents truly want to share caretaking responsibilities. In their view, joint
physical custody had absolutely no chance of succeeding if a judge imposed it on an
unwilling couple. When parents enter the arrangement with hostile and uncooper-
ative attitudes, the children suffer:

It really comes down to the degree of animosity and the way it’s manifested
itself. . . . If every day of the week they’re going to have a debate over what
the kid wears to school and what the kid’s diet is and whether the kid’s going to come home after school or go into school activities, it would be extremely disruptive to the child. Because then the child would be in a position of having to make a decision which would be reflected as a choice of loyalty for one parent over the other.

These lawyers worked from an assumption that had a commonsensical appeal: joint physical custody requires an exceptional amount of cooperation on the part of both parents; if the couple could cooperate that well, they wouldn’t be getting a divorce in the first place.

In 1979, we started discussing it [joint custody]. At that time, there was a lot of animosity from the lawyers who do family law full-time. They were against joint custody. They felt you couldn’t force two people to do something that they didn’t want to do. They also felt that if the people could get along well discussing their problems with their children, they ought to be able to get along with their marriage and resolve their differences rather than going through a divorce.

Attorneys usually see people at the stage of the divorce process when the two people are at their worst. Feelings of anger, betrayal, and rejection are often the most intense during the time of legal dissolution. Divorcing spouses frequently haggle over petty details of property division, and regale their lawyers with story after story of their spouses’ wrongdoings. As studies of matrimonial attorneys indicate, divorce lawyers have trouble keeping their clients focused upon the legal issues at hand (Sarat and Felstiner, 1995:26-31). Often the client will prefer to dwell upon ways to gain a small advantage over his or her spouse rather than bring the situation to a speedy resolution.

When attorneys constantly see spouses so embittered and hateful toward one another, they have difficulty envisioning a time in the future when these same spouses can cooperate in rearing their children. Many lawyers assumed that the acrimony present at the time of the divorce would continue indefinitely, and they were well acquainted with many situations in which the hostility had not abated:

The problem with a lawyer who has a large family practice is that he is constantly seeing motions to modify, constantly seeing all these contempt charges, and he says, “My God, all we’ve got to do is give them another reason to fight.” . . . You work from your perception of: “What do I see heartache over? I see it over people battling.” And a lawyer’s perception, because he doesn’t know much about it, is: “If they could work together they wouldn’t be getting a divorce in the first place.”

Attorneys do not see the divorces that work out well. When postdivorce parents are happy with their situations, they do not return to their lawyers’ offices. So lawyers tended to focus upon the more extreme situations, the ones in which the
divorced couple seemingly could not agree on anything. And these attorneys felt it was ridiculous to expect such angry people to share in the rearing of their children. If the courts placed children in such situations, the lack of stability and unending hostility would be traumatic for them. Thus, many lawyers believed it was in the best interests of most children to have a more traditional custody arrangement, because joint physical custody was only feasible in the rarest of circumstances.

There was no unanimity on what constitutes the “best interests” of children. Lawyers who questioned joint physical custody stressed the importance of continuity of care, stability of environment, and parental cooperation. A growing number of attorneys, however, rejected these considerations as the sine qua non of healthy custodial arrangements. Instead, they pointed to the growing amount of psychological data that cataloged the trauma experienced by children of divorced parents. Almost all of these studies concerned children in sole custodial situations, as they represented the vast majority of custody decrees. Much of the trauma felt by children appeared to be a consequence not of the divorce itself, but of the disruption of the existing parent/child relationships (Blond, 1984:590). Children have strong attachments to both parents, even if only one has been the primary caregiver. When one of the parents, usually the father, no longer resides with them, they grieve:

If either of these attachments is severed, children suffer greatly. . . . The children often feel abandoned and rejected. It shakes their basic sense of security to see someone they have loved and trusted gone from their lives (Bratt, 1978-79: 296-97).

The fact that children may continue to see the noncustodial parent every other weekend did not appreciably lessen the trauma, according to these lawyers. The parent with visiting rights inevitably becomes a “visitor” into his child’s life:

There is evidence that continuous, meaningful contact with a non-custodial parent is a critical factor in a child’s post-divorce adjustment. “A ‘visiting’ or ‘visited’ parent has little chance to serve as a true object for love, trust and identification; the parent role is based on availability on an uninterrupted day-to-day basis” (Moller, 1982:44, quoting Goldstein, Freud, and Solnit).

Even when visitation occurs, it is frequently strained and superficial. The father is seen only as a person who brings gifts or conducts outings. The amount of father-child contact in a non-holiday, day-to-day setting is minimal. The child is denied exposure to the father’s lifestyle and view of the world, and there is no opportunity for father and child to develop a deeply personal relationship (Miller, 1979:356).

Children understand that the noncustodial parent’s position has changed from the predivorce status. This further disrupts the relationship:
When placed in sole custody, children often see the absent or “visiting” parent as a second-class person; if the children have identified with this parent, they may feel inferior also (Bratt, 1978-79: 296-97).

Attorneys with this viewpoint went on to cite many other psychological effects resulting from “losing” a parent. These include children blaming themselves for the departure of the noncustodial parent (see also Robinson, 1983:647), feeling loyalty conflicts (Ducie, 1984:1079; Robinson, 1983:647; Blond, 1984:597; Nielson, 1979:1116), expressing great anger toward one or both parents (Ducie, 1984:1079), and being deprived of role models of both sexes for proper gender identification (Hawkins, 1982:96-97). This psychological damage did not simply affect the child at the time of the divorce: rather, the trauma extended into adolescence and adulthood. Lawyers pointed to studies that indicated higher rates of antisocial behavior among children of divorce (Miller, 1979:358), higher rates of expulsion and dropping out in high school (Seton Hall Law School, 1981:15), and reduced I.Q. scores (Blond, 1984:597; Trombetta, 1980:219).

In short, a number of attorneys looked at the available psychological literature and came to the conclusion that children of divorced parents suffer greatly. The root of much of this suffering appears to be the parental deprivation a child feels when one parent no longer has day-to-day contact. Sole custody usually limits the amount of time a noncustodial parent can spend with the child. Therefore, these attorneys maintained it was time for something new:

We know that sole custody and visitation doesn’t work because the statistics that have been gathered over the years in court, and by mental health professionals, and by schools have demonstrated that the largest group of problem children, of school dropouts, of kids who need psychotherapy are ones who come from broken homes. Well, joint custody didn’t exist when these studies were made, so therefore those children were suffering under a sole custodial situation. So, from my point of view, when you have a system that doesn’t work in every case—which it clearly didn’t—you look for something else.

If loss of day-to-day contact with one parent was the cause of such psychological trauma, then the solution was to keep both parents involved in the caretaking of their children. Preserving a child’s emotional ties to both parents should be the most important consideration when determining custody arrangements. It is the preeminent value, the very definition of “the child’s best interests.”

The child’s right to parental association should be considered as a primary object in furthering the best interests of the child (Jarboe, 1979:745).

Attorneys supporting this viewpoint believed joint physical custody was the obvious solution to many of the problems attendant to divorce. Divorce changes the legal relationship between the two adults involved—they are no longer husband and wife—
but it does not change the biological relationships between parent and child. Several of the lawyers I interviewed stated, “Adults divorce each other, they don’t divorce their kids.” In their view, joint physical custody was the most natural arrangement for a post-divorce family. It resembled the intact family as closely as possible, because both parents had the opportunity to live with their children, feed them, supervise their homework, and take them to the doctor. Neither was relegated to the artificial role of “circus parent,” one who appears every other weekend for a day of entertainment.

Preserving this continuing contact with both parents is more important than any other consideration, said these attorneys. They rejected the argument given by more traditional lawyers and judges that environmental stability should always be maintained. A child would not be as bothered by moving from place to place as by losing close contact with a parent.

What kids need is stability in relationships much more than stability in houses. If we are going to impair their relationships so that we can ensure the amount of time that they have in houses, we’re teaching the children to bond to houses and not to people. That’s nuts.

Attorneys expressing this viewpoint also noted there was little, if any, evidence that children are harmed by moving between two residences, whereas reams of evidence explored the damage caused by parental deprivation. In fact, several legal commentators said there was not necessarily much more shuttling in joint custody than there is in many sole custody arrangements:

I submit that all children of divorce “bounce around” to some degree: they “bounce” over to the visiting parents some nights during the week; “bounce” back again on weekends, holidays, and summer vacations; “bounce” back again when they effect adolescent self-help custody changes; and “bounce” back again when they spend any time with the visiting parent. The real difference is that for the joint custody child it is a regular occurrence, agreed to by the parents, and unalterable by the whim of either parent, and accepted and encouraged by both parents. Thus, the “bouncing around” of the child of joint custody is probably no worse, than that which other children of divorce experience (Parley, 1979:316).

Other pro-joint-custody attorneys added that the concern over environmental instability was primarily a parental concern, not a concern of the children involved. Children adapt very easily to these types of changes, they said; it was their parents who dislike the moving around.

Adults have much more trouble with kids going back and forth than kids have. You will never hear a kid complaining about going back and forth between two houses unless one of the parents is disruptive. Kids go back and forth every day to school, they go to all sorts of places—there’s nothing
particularly disruptive about going to his mother's or father's house also. Kids don't have trouble with that—adults do. We're much more regimented in our lives and expectations of kids.

Attorneys who advocated joint custody also discussed the issue of hostility between parents and its relationship to custodial arrangements. They denied that joint custody encourages bickering and endless fights over minutiae. On the contrary, they said, joint custody tends to reduce the acrimony between ex-spouses.

Providing both parents equal authority over the child reduces the need to hear the litany of one spouse's faults as the other attempts to gain single custody. Legal procedure is minimized, unnecessary confrontation is eliminated, and a basis for cooperation rather than controversy is established (Nielson, 1979:1117).

A joint custody decree would eliminate the need for a courtroom battle with a win/lose resolution. Therefore, ex-spouses would not have to listen to one another tear apart each other's character. Afterward, because couples must deal with the logistics of time-sharing, they would find it to their mutual advantage to cooperate:

The need to reach an agreement on all major child rearing decisions, combined with equalized parental power, fosters an atmosphere of détente rather than hostility (Miller, 1979:364).

Needless to say, cooperation between parents virtually always benefits the children involved. “Détente” reduces the chances of children being used as weapons in a battle of revenge between ex-spouses, said these lawyers.

“Winner take all” custody decisions, such as sole custody, encourage further disputes and bitterness, with one parent using the child to retaliate against the other parent (Gouge, 1981:332).

The battle for revenge hurts not only the parents, but the children as well, it could not help but encourage conflicts of loyalty and anger. According to some attorneys, joint custody would greatly reduce the opportunities for such destructive behavior. For example, because the father has full parental rights, he will not feel deprived or angry and, therefore, will be less likely to undermine his ex-wife's parenting, and because the mother knows she must share authority over the children, she would not be able to flaunt exclusive power in an effort to redress old wrongs from the marriage.

Another reason for arguing that joint custody is in the best interests of children was that it promotes proper gender identification. Psychologists have long maintained that children need role models of both sexes to establish their own sexual identity. Lawyers who supported joint custody often pointed to this benefit (see, e.g., Seton Hall Law School, 1981:18). Along those same lines, joint custody was said to break down sex stereotypes. When the mother rears the child alone, and the father's
responsibility is limited to financial support, the child receives the message that women are nurturers and men are breadwinners. For “liberal” attorneys who were at least somewhat sympathetic to feminism, it is wrong to reinforce such a sexist message with custody arrangements. Joint custody encourages children to perceive both parents as nurturers and both as wage earners. Children of both sexes would be exposed to a broader range of gender behavior than might be the case in traditional custodial arrangements.

Thus, a number of attorneys believed joint physical custody was in the best interests of children, primarily because it would help preserve the emotional ties between the child and both parents. Many other divorce lawyers did not put such emphasis on continuing contact. They were wary of shared custody because they believed it would disrupt the continuity of care and stability of environment vital to children of divorce. Furthermore, they saw the situation as unworkable in most instances, given the hostility that is usually present.

To a certain extent, these conflicting perceptions of joint custody reflected conflicting visions of how to best preserve the predivorce status quo. Both sides agreed divorce greatly disrupts the family unit and that children are traumatized by the disruption. What eases this trauma is to change the child’s life as little as possible. Where the pro- and anti-joint-custody lawyers parted company was over what part of the child’s life was most important to preserve. Skeptics of joint custody believed continuing to reside with the primary caretaker offered the least amount of disruption to a child’s routine and sense of security. Advocates of joint custody felt an arrangement that allows both parents to nurture their child on a day-to-day basis would best preserve the relationships that existed before the divorce. Opponents viewed the concept of stability in differing ways and held different perceptions as to the type of arrangements most likely to approximate an intact, healthy family.

Claims Concerning Parents’ Best Interests. Though lawyers claimed to be most concerned with the best interests of the child, they did not ignore the interests of parents in evaluating joint custody. To a certain extent, the interests of parents and children often overlap: it would be unusual for a child to be happy in a home if the parents were miserable. When a parent is fiercely angry and resentful about the custody arrangements imposed, the child will also be upset. When both parents are accepting of the situation, their equanimity will rub off on the child. Nonetheless, parents do have particular interests in custodial arrangements that are distinct from the child’s, and attorneys recognized this when evaluating joint custody.

Pro-joint-custody lawyers mentioned the benefits to the parents more often than do those who were wary of shared caretaking. First, those who support joint custody believed it was in the long-term interests of the mother. She was given sole custody in the vast majority of divorces; joint custody offered a way to reduce the heavy burdens that weigh down single parents. It is difficult to be the sole person responsible for a child, particularly when divorce usually necessitates full-time employment:
In sole custody, the custodial parent bears alone the burden of decision-making, emotional support, and physical care of the child. Also, the sole custodian usually has to work to support the children adequately. The imposition on the custodial parent's time and energy often leaves little opportunity to develop new relationships with other adults. Joint custody offers some relief from this problem (Hawkins, 1982:98).

With joint custody, the mother (custodial parent) gains some time off. She is not forced to spend every day of every week trying to be both parents to her child, because her ex-spouse will sometimes be providing care. This not only reduces the psychological stress on her, but also gives her the time to develop her own interests (Gouge, 1981:333). She would be less likely to become socially isolated and more likely to meet new people and learn how to be “single” again. She would gain an identity apart from her role as mother.

In addition, pro-joint-custody lawyers said shared parenting was a way for many women who either did not want to be the sole custodians or were not able to do so to “save face.” Virtually everyone agreed there are intense societal pressures on women to fight for custody of their children.

[M]others may be opposed to joint custody, in favor of their own sole custody, because they’re afraid of what it says to the community if they were to say, “My husband can take the kids.” What does that say about their femininity, their roles as mother, woman, etc.?

Joint custody provides a way out of this dilemma, said some attorneys. It would allow women to share the burden of child care without being accused of being bad mothers. This helps their self-esteem and may provide for better care for the children than if they attempted to do it all themselves.

Furthermore, for the woman who may not want to assume the stereotypic role of woman as full-time mother, joint custody provides a means of acknowledging what is best for the child without “losing face.” Joint custody provides an acceptable compromise for the mother who is unable or unwilling to assume the burdens of single custody, but does not desire to relinquish, for personal reasons or societal pressures, the privilege of sharing the decisions in her child’s life (Nielson, 1979:1115).

Joint custody could thus reduce the stigma attached to women who cannot or do not wish to be sole custodians, some attorneys asserted. Rather than forcing these women to choose between “losing face” and taking on too great a burden, joint custody offered a reasonable alternative that would benefit both them and their children.

Obviously, fathers also would benefit greatly from joint custody since typically they have been noncustodial parents. (In fact, many anti-joint-custody attorneys maintain joint custody benefits only the fathers, not the children.) Attorneys advo-
cating joint custody pointed to the psychological damage done to men when they are noncustodians:

The noncustodian loses contact with the child as a parent and instead becomes a holiday parent or a “Disneyland daddy.” Visitation becomes a frantic effort to entertain the child, to court him in order to retain his affection. This pseudo-relationship is not an adequate substitute for a meaningful, non-holiday parental interaction with the child. The noncustodian subsequently withdraws from the child in order to deal alone with the loss, rejection, and depression (Nielson, 1979:1113-14).

These feelings of grief—of being strangers in their own children’s lives—subside when they can share in rearing the children. Lawyers who advocated joint custody pointed out this would benefit the child as well as the father, for children suffer when the noncustodian withdraws from contact.

Attorneys who doubted the benefits of joint physical custody for the child did not generally question the notion that it might benefit the father, but some did question whether shared custody would necessarily benefit the mother. One attorney mentioned some fathers use joint custody as a vehicle to try to remain “married” to their ex-wives. The frequent interaction necessary to make joint custody work would indeed allow someone to stay much more emotionally involved with his ex-wife than she might find comfortable. Another complaint lawyers made was that men sometimes use joint custody as a way to punish their ex-wives:

[T]he concept of legal joint custody is being used today as a club more than as a device in maintaining a relationship with the children. . . . Fathers sometimes use joint custody to prevent things from happening or from having control post-judgment over the other side by saying “I have custodial input into this decision.”

Thus, joint custody becomes a tool of harassment instead of a means to better parental cooperation.

In addition, joint custody is sometimes used as a bargaining chip, said some lawyers. A husband may ask for joint custody as a financial ploy. He does not really desire joint decision-making or caretaking responsibilities, and withdraws his request for joint custody as soon as his wife agrees to accept less in support payments. It should be noted that there was disagreement among lawyers over how often this type of ploy is used, with some saying they saw it frequently and others maintaining they had never personally experienced it. Those who mentioned the use of joint custody as a tool of negotiation or harassment said it happens most often when joint legal custody, as opposed to joint physical custody, is employed. But interestingly enough, joint legal custody was accepted by many attorneys who rejected joint physical custody. They did so primarily because they believed it does bestow psychological benefits on both parents and has fewer drawbacks for children.
Joint legal custody means that both parents have a right to share in major decisions concerning their child. This includes decisions involving what religion the child will follow, what schools she will attend, and which doctor will tend her. Physical residence usually remains with one parent. This type of arrangement—joint legal custody with physical custody with one parent—is by far the most common variation of joint custody. And many lawyers—both those who supported and those who opposed joint physical custody—believed this variation was of psychological value to the postdivorce family.

Both parents want the dignity of joint [legal] custody, and no one loses on a psychological level. It doesn't give you anything. In a psychological sense, it keeps you from feeling that something's been taken. And that's not unimportant.

From this point of view, joint legal custody is prized more for its symbolic value than for any way in which it changes legal rights. Most lawyers agreed that if there were a serious disagreement between parents who shared legal custody, the courts would usually side with the parent who had primary physical custody. So the parent without physical custody, usually the father, may not be in an appreciably better position should a dispute actually be taken to court. However, the term joint legal custody would allow parents without physical custody to feel they retained some rights in regard to their children. The physical custodian could not automatically dismiss the other's wishes when important decisions were to be made. School records and medical records would be accessible, and the right to give permission for the child to receive medical care or to go on a school field trip would be retained by the parent without physical custody. All of this could be tremendously important to a parent psychologically.

The “good feelings” produced by joint legal custody might reduce anger toward the ex-spouse and encourage cooperation. The benefits of cooperation—less relitigation, fewer loyalty conflicts for the child, etc.—have been discussed above. These positive feelings also could help keep the parent without physical custody involved with the children. That parent would not feel like a “visitor” in their lives and respond by withdrawing. Instead, legal rights and responsibilities would be realized and exercised. This is especially important, said lawyers, when it comes to paying child support:

[T]he record shows that if fathers aren’t given the opportunity and a fair amount of responsibility, then they aren’t going to exercise it. . . . Many, many times, if you talk to lawyers representing husbands and wives, they’ll tell you that the frustration and utter feeling of powerlessness leads many folks to just bow out of the system. And bow out of their responsibilities. And then what does this do? It just leaves the mother with total responsibility for financial support and ultimately, I suppose, the state has to take responsibility. And that’s in nobody’s interest.
Indeed, many attorneys maintained joint custody would be an important mechanism for ensuring child support payments. When a father perceives he still has equal rights and decision-making authority, he is more willing to assume responsibilities, they claimed.

What I have found is that a joint legal custody framework causes people to treat one another differently, causes them to work things out between themselves in a mutually satisfactory way. It tends to keep fathers who have joint legal custody meeting their obligations, especially those of support, more so than the old “sole custody to the mother/visitation to the father” framework.

It is certainly in everyone’s interest for the father to make regular support payments when the mother receives physical custody. It relieves the mother of some of the financial burden, helps ensure that the children will be adequately cared for, and reduces the likelihood that the state will have to support the family.

Finally, many attorneys cited joint legal custody as a handy mechanism for settling divorces out of court. The term joint custody would satisfy the person who will not have physical custody; if no one has given up custody, it keeps cases from being tried on that issue. Keeping cases out of court benefits both parents and children and is among the primary goals of many divorce attorneys.

Therefore, there was less disagreement among attorneys concerning the benefits of joint custody for the parents as opposed to its benefits for children. Although some argued that mothers may sometimes be harassed through its use, they generally agreed that it would be much better for fathers than the traditional noncustodial visitation arrangement, and sometimes might relieve burdens on mothers. More lawyers were willing to endorse joint legal custody than joint physical custody because they perceived shared decision making would produce many psychological benefits for the whole family, without the potential for disruption that might result from shared caretaking.

**The Relationship of Law and Behavior**

When one steps back from the specific arguments for and against joint custody, it becomes clear that much of the conflict between attorneys on the issue of joint custody stemmed from differing views on the relationship of law and behavior. Though these views were usually not articulated, they indirectly emerged in conversations and writings dealing with the “workability” of joint custodial relationships.

There is no question that law influences human behavior. Divorce lawyers on both sides of the joint custody issue tacitly acknowledged that changes in statutes would produce changes in the behavior of parents, children, judges, and attorneys, although they disagreed as to the nature of these changes. But lawyers who championed joint custody perceived the law as having a much greater force in altering behavior than did those opposing shared parenting.

Attorneys who questioned whether joint custody arrangements could work were in fact questioning the ability of law to encourage cooperation between adversaries.
They doubted the wisdom of having statutory presumptions for joint custody, or of the court imposing joint custody upon parents, because they did not believe the coercive power of the state could significantly alter people's intimate relationships. These lawyers insisted a battling couple cannot possibly share decision-making authority unless those two individuals decide to do so. Court orders and state laws cannot erase hostility and ensure cooperation.

A lot of it, in family law, is difficult to legislate. We're trying to forge and determine relationships that may or may not be susceptible to law making.

Forcing people into a familial arrangement they do not desire merely encourages acrimony, which breeds litigation and psychological damage to all involved. Attorneys of this viewpoint questioned presumptive joint custody for some of the same reasons many divorce lawyers supported no-fault divorce laws in the 1970s. When people do not want to be in an intimate relationship, being forced by law to stay there does not promote harmony. Though joint custodians need not harmonize to the extent they did before the divorce, they must exhibit a modicum of civility and respect toward one another. This civility and respect cannot be promoted by an outside force, according to many attorneys. Like love, it must come from within. If there is only hate between the divorcing couple, a legal presumption cannot force them to interact with maturity and integrity. Familial relationships are much more resistant to legal influence than are relationships between businesses or government and citizen.

Attorneys who supported presumptive joint custody believed that law can shape behavior to a very great extent, even the behavior of divorcing couples. If a couple knew from the moment they contemplated a divorce that the law presumed they would share custody, they would incorporate that presumption into their personal and legal negotiations. If the state assumed divorced parents could get along well enough to rear their children jointly, a number of lawyers believed that the parents would assume so as well:

If the legal standard encourages responsible supportive behavior, more of that behavior will follow (Schwartz, 1984:242).

The current reality is that most separated parents do cooperate with each other. . . . That they do so, is reflected in and affected by, the expectation that they will do so (Parley, 1979:314).

This faith in the ability of divorced parents to conform to legal expectations was reflected in the arguments that presumptive joint custody would lead to less litigation, less hostility between divorced spouses, and less conflict over how to rear the children. Divorce lawyers who embraced this view pointed out that presumptions for joint custody would encourage attorneys to counsel their clients to cooperate, encourage judges to perceive joint custody as the preferable decree, and encourage society to accept joint
custody as the normal postdivorce arrangement. As time passes, all of these changes would have an enormous influence on the attitudes of divorcing parents.

To some extent, one can view many of the varied claims over the desirability of presumptive joint custody as reflective of a basic disagreement over the degree to which laws can shape the behavior of family members toward one another. Many attorneys were skeptical of the susceptibility of intimate relationships to legal change and of the notion of imposing joint custody upon unwilling parties. Other lawyers believed that presumptive laws would gradually change both societal attitudes and the attitudes of individual parents. Cooperation will become the norm when the state assumes it to be the norm.

CONCLUSION

In the case of joint custody, matrimonial lawyers framed the controversy in terms of both its potential psychological effects and its effects on the efficient functioning of the legal system. For both opponents and proponents of the new arrangement, the most important questions were whether it would result in less litigation and happier postdivorce families. These two factors were inextricably linked, for virtually all divorce lawyers believed families do best when exposed to a minimum of legal proceedings. Furthermore, the assessment of whether joint custody would help or hinder postdivorce families was often based on the individual attorney’s view of the relationship of law and behavior. Those who believed legal change could engender good behavior between former spouses tended to favor presumptive joint custody, while those more skeptical of the power of law to influence intimate relationships usually opposed it.

What attorneys on both sides of the debate shared was an orientation toward achieving fair settlements and minimizing emotional damage for the individuals involved. This rejection of “zealous advocacy” as the ultimate value for a divorce lawyer appeared to be rooted partially in the actual work experience of family law attorneys, and partially in the emerging therapeutic model of divorce. Whether they championed joint custody or eyed it with suspicion, these lawyers agreed that a “good” divorce involved as little involvement with the judicial system as possible. Thus, one can see that family law attorneys’ experiences with divorce litigation, custody trials, judges, and one another significantly shaped their assessments of joint custody.

In the same way that lawyers’ experiences influenced their attitudes toward custody, litigation, and the judicial system, their perceptions influenced their actions. Experiences with court personnel and procedure affected lawyers’ attitudes, and these attitudes shaped lawyers’ actions. For example, a belief that divorces are best settled out of court and that joint custody can enhance prospects for settlement might have led lawyers to encourage clients to seek joint custody, or to accept the arrangement if the other party proposed it. Judges would then see an increase in joint custody arrangements and, perhaps, a decrease in custody litigation. Thus, it is important to study the attitudes of attorneys, because their perceptions of issues influence their
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actions, and their actions have great impact on the work of the courts and on other actors within the judicial system.

Furthermore, the attitudes of attorneys toward joint custody shaped the debate within the political arena. This article does not answer all the questions one might have relating to the influence of attorneys over the creation of joint custody statutes. It does not explore why a state or local bar chose a particular position on joint custody when the issue was being hotly debated within the ranks of divorce practitioners. Nor does it demonstrate that the claims made by divorce attorneys had particular resonance with state legislators. But it does allow us to understand more fully the ways in which attorneys’ work experiences, orientation toward their professional role, experiences with the court system, and underlying perceptions of law and behavior inform their perceptions of legal innovations. jsj

REFERENCES


