

January 1981

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Recommended Citation

Nancy K. Lemon, *Joint Custody As a Statutory Presumption: California's New Civil Code Sections 4600 and 4600.5*, 11 Golden Gate U. L. Rev. (1981).
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JOINT CUSTODY AS A STATUTORY PRESUMPTION: CALIFORNIA'S NEW CIVIL CODE SECTIONS 4600 AND 4600.5

Nancy K. Lemon*

INTRODUCTION

On January 1, 1980, California, in enacting Civil Code sections 4600 and 4600.5, became the first state in the nation to operate under statutes not only authorizing joint custody awards upon divorce, but also establishing a presumption that joint custody is in the best interests of the child when both parents request it. This Article will examine the history of joint custody and of the legislative process, present guidelines for judicial interpretation, and undertake an analysis of the implications for women in the new statutes.

I. SHORT HISTORY OF CUSTODY LAW AND PRACTICE

A. SOLE CUSTODY

Under Anglo-American law, the father's right to custody of his children after divorce was absolute.¹ Besides being considered the children's protector and provider, their father was almost considered their owner. This view started to change in the nineteenth century, when the maternal presumption arose.² The new presumption, based on changing attitudes about the roles of men and women, was in part a product of the Industrial Revolution and the consequent changes in the material conditions of

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1. Foster & Freed, *Joint Custody — A Viable Alternative?*, N.Y.L.J., Nov. 9, 1978, at 4, col. 1. Actually, in spite of the father's right, the early cases reveal that joint custody was awarded almost as a matter of course where each parent wanted custody. Not until 1908 was this even questioned. See Annot., 92 A.L.R.2d 695, 698 (1963).

2. See also Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C.D.L. Rev. 523, 530-32 (1979).

life.³ Courts started to apply the tender years doctrine, which held that it was always in the best interests of young children to be in the custody of their mothers.⁴

Though this doctrine is frequently still applied by courts,⁵ almost all states have statutorily abrogated preferences based on the sex of the parent.⁶ On the books, at least, mothers and fathers have an equal right to post-divorce custody.

In spite of the present presumption of equality, mothers are still being awarded sole custody in approximately 90% of the divorces with minor children.⁷ Though part of the explanation for this may be judicial sexism and the continuing viability of the tender years doctrine, a more significant reason is that mothers request custody 80-85% of the time, while fathers petition for it in only about 15-20% of divorces.⁸ Though one would expect this pattern to have changed after the legislative enactment of sex-neutral guidelines, which occurred in California in 1973,⁹ a study published recently indicates that California fathers have not requested custody in any significantly greater numbers four years after this change than they did four years before the change.¹⁰ Thus, the legislative changes do not seem to have encouraged fathers to continue parenting in any greater numbers after divorce.

B. JOINT CUSTODY

The definition of joint custody has not been precise. The term has sometimes been used interchangeably with split custody or divided custody, and the distinction between joint physical and joint legal custody has been blurred. In this Article split custody will be used to mean the initial separation of two or

3. *Id.*

4. See cases collected in Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 432-34 n.38 (1976-77).

5. See Miller, *Joint Custody*, 13 FAM. L.Q. 345, 353-354 (1979).

6. See statutes collected in Foster & Freed, *Life With Father: 1978*, 11 FAM. L.Q. 321, 343-63 (1977).

7. See Roth, *supra* note 4, at 423.

8. Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support, and Visitation After Divorce*, 12 U.C.D.L. REV. 471, 488-89 (1979). The study cited was based on filings in 1968-72.

9. CAL. CIV. CODE § 4600(a) (West Supp. 1980).

10. Weitzman & Dixon, *supra* note 8, at 502-03.

more children between the two parents. Divided custody will be used to denote each parent's having exclusive decision-making power while the child is physically with her or him. Joint legal custody will be defined as shared decision-making by parents no matter where the child is. Joint physical custody will mean alternating physical custody of the child on some regular, usually scheduled basis.¹¹ Thus joint custody differs from the usual sole custody-with-visitation arrangement: [1] both parents have the right and duty to make decisions about the child, [2] the child's time is spent equally, or almost equally, with both parents, and [3] one parent does not decide when the other will be with the child.

Joint custody, whether legal or physical, is statutorily authorized in only a few states,¹² and is presumed to be in the child's best interests only in California, and there, only under certain circumstances.¹³ Statutes mentioning joint custody as an alternative are all quite recent.¹⁴ Nevertheless, judges have a great deal of discretion in determining the best interests of the child, which is virtually the universal custody standard in the United States.¹⁵ Within the discretion, courts have historically awarded forms of joint custody when they found it appropriate.¹⁶ Most recently, in *In re Marriage of Neal*,¹⁷ the California appellate court affirmed the authority of trial courts to award joint custody even in the absence of a specific statute:

[A]ppellant first contends that the trial court was without *jurisdiction* to award "legal custody" of the children to the parties, "jointly," for the

11. Folberg & Graham, *supra* note 2, at 525-30.

12. IOWA CODE ANN. § 598.21 (Supp. 1980-1981); ME. REV. STAT. ANN. tit. 19, § 214 (Supp. 1979-1980); MICH. COMP. LAWS ANN. § 722.25 (Supp. 1980-1981); N.C. GEN. STAT. § 50-13.2(b) (1976); OR. REV. STAT. §§ 107.095(n), 107.105(a) (Chapters replaced 1979-1980); WIS. STAT. ANN. §§ 767.24(1)(b), 50-13.2(a) (Supp. 1979).

13. CAL. CIV. CODE § 4600.5(a) (West Supp. 1980).

14. See note 12 *supra*.

15. Miller, *supra* note 5 at 354.

16. See, e.g., *Holsinger v. Holsinger*, 44 Cal. 2d 132, 279 P.2d 961 (1955); *Gudelj v. Gudelj*, 41 Cal. 2d 202, 259 P.2d 656 (1953); *Burge v. City and County of San Francisco*, 41 Cal. 2d 608, 262 P.2d 6 (1953); *Adoption of Van Anda*, 62 Cal. App. 3d 189, 132 Cal. Rptr. 878 (1976); [hereinafter cited as Ramey]. *Merrill v. Merrill*, 167 Cal. App. 2d 423, 334 P.2d 583 (1959); *Rocha v. Rocha*, 123 Cal. App. 2d 28, 266 P.2d 130 (1954); *Juri v. Juri*, 61 Cal. App. 2d 815, 143 P.2d 708 (1943); and cases cited in Ramey, Stender, & Smaller, *Joint Custody: Are Two Homes Better Than One?*, 8 GOLDEN GATE U. L. REV. 559, 562-63 (1979) [hereinafter cited as Ramey].

17. 92 Cal. App. 3d 834, 155 Cal. Rptr. 157 (1979).

stated reason that section 4600 of the Civil Code authorizes an award of child custody to "either" parent but not to both. The reference to "either" parent, in subdivision (a) of the statute, appears as the first element in the "order of preference" to be followed by the awarding court. . . . Its statement as a factor of "preference" does not diminish the court's *jurisdiction* to exercise the essential discretionary authority with which section 4600 invests it. That authority is conferred by the unqualified language which precedes the "order of preference" in the statute, and which empowers the court to "make such order" for child custody "as may seem necessary and proper" There is no *jurisdictional* defect in the award made here.¹⁸

Nevertheless, other courts have declined to award joint custody, even when requested by both parents, claiming they lack such authority in the absence of approval by statute.¹⁹ Courts have also shown contempt for joint custody orders and excessive eagerness to modify such orders to sole custody.²⁰ They have sometimes disregarded joint legal custody orders when parents disagreed as to decisions affecting the child,²¹ in effect giving the sole physical custodian sole legal custody as well. Furthermore, judicial awards of joint custody have sometimes been unclear in specifying whether the award included only joint legal custody, or also included joint physical custody.²²

Because of this history of judicial reluctance to award, enforce, or clarify joint custody orders, two bills were introduced in the California legislature in 1979 authorizing such awards and establishing a presumption that joint custody is in the best in-

18. *Id.* at 839-40, 155 Cal. Rptr. at 159-60 (citations to statute omitted) (emphasis in original).

19. Ramey, *supra* note 16, at 561.

20. *In re Marriage of Schwartz*, 104 Cal. App. 3d 92, 94, 163 Cal. Rptr. 408, 409 (1980).

21. *Holsinger v. Holsinger*, 44 Cal. 2d 132, 279 P.2d 961 (1955); *Burge v. City and County of San Francisco*, 41 Cal. 2d 608, 262 P.2d 6 (1953); *Adoption of Van Anda*, 62 Cal. App. 3d 189, 132 Cal. Rptr. 878 (1976).

22. *See, e.g., Winn v. Winn*, 143 Cal. App. 2d 184, 299 P.2d 721 (1956), in which the original joint custody decree was so unclear as to legal/physical custody that the parties had to return to court to clarify a parent's right to care for a sick child. The decree was modified to provide for joint custody, with physical custody to the mother.

terests of the child when both parents request it.²³

C. THE STATUS OF JOINT CUSTODY LEGISLATION IN OTHER STATES

At least six other states besides California have now enacted legislation specifically authorizing joint custody awards: Iowa, Maine, Michigan, North Carolina, Oregon, and Wisconsin.²⁴ However, in none of these states is there a presumption that joint custody is in the best interests of the children—in every case, joint custody is listed as merely one alternative open to the court.²⁵ Nor are there guidelines given as to what the court should consider in making its decision, other than the general “best interests of the child” standard.²⁶

The New York Legislature considered a bill based on the California legislation in its 1979-1980 session. The bill, A. 9369/S. 7964,²⁷ went farther than the California legislation in that it

23. Cal. SB 477 and Cal. AB 1480 (1979-1980). See notes 38 and 94 *infra* for text of original bills.

24. See note 12 *supra*.

25. *Id.*

26. *Id.*

27. Section 1. The legislature hereby finds and declares that it is the public policy of this state to assure a child's frequent and continued access to both his parents despite the parents' marital status and that parental rights and responsibilities for a child should be encouraged, within the context of judicial proceedings to determine the custody of a child. The practice of awarding the custody of a child on an exclusive basis to either of the child's parents deprives the child of a meaningful relationship with both parents and promotes unnecessary conflict and confusion in the child's life. It is the intention of the legislature by this act to insure that, to the extent possible, joint custody shall be the preferred means of determining custody of a child and that the best interests of a child require both parents to share the legal control of a child and an equitable sharing of the physical care of such child.

....

Section 3 amends N.Y. DOM. REL. LAW § 240 as follows:

In any action or proceeding where there is at issue the custody of a minor child, the court shall give such direction, between the parties, for the custody, care, education and maintenance of any child of the parties, as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child in the following order of preference: (1) to both parents in joint legal and physical custody. For the purpose of

established a strong first preference for joint custody, sole custody to be awarded only if supported by "clear and convincing evidence . . . that it is in the best interests of the child that custody be awarded to one parent."²⁸ The New York bill also goes farther than the California statutes in defining joint custody to include both legal and physical custody.²⁹ However, it was less far-reaching in that it, unlike the California legislation, did not provide for retroactivity, nor did it state that one of the factors to be considered in determining sole custody was which parent would allow the other the most access to the child.³⁰ Sponsored by Equal Rights for Fathers, opposed by the National Organization for Women, the State Judiciary, and the State Bar Association, A. 9369 was passed by the New York Assembly in April 1980, by a vote of 100 to 39.³¹ However, it did not become law.³²

Bills establishing a presumption favoring joint custody have

this section, "joint legal and physical custody" shall mean an equal sharing of the responsibility and control of such child and an equitable sharing of living experience in time and physical care to assure frequent and continued contact for guidance, love and affection by both parents, (2) to either parent if clear and convincing evidence establishes that it is in the best interests of the child that custody be awarded to one parent. In all such cases there shall be no prima facie right to the custody of the child in either parent and no permanent order granting sole and exclusive custody shall be made which is granted solely on the basis of a prior temporary order of sole and exclusive custody, (3) if to neither parent, to any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child. Where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children or upon the application of either parent, there shall be a presumption affecting the burden of proof that joint custody is in the best interest of the minor child or children and joint custody shall be awarded in the discretion of the court pursuant to the provisions of this section . . . [also mentioned are court-ordered investigations, implementation plans, conciliatory or counseling services, and reasons for denial of or modification/termination of any joint custody award].

N.Y. A. 9369/S. 7964 (1979-1980).

28. *Id.*

29. *Id.*

30. *Id.*

31. See note 34 *infra*.

32. N.Y. DOM. REL. LAW § 240 (McKinney Supp. 1980-1981).

been considered and rejected in at least four states: New York, Massachusetts, Oregon, and Pennsylvania,³³ though proponents of such a presumption are still attempting to get legislation passed in many states.³⁴ Thus, California's legislation is unique.

II. THE CALIFORNIA LEGISLATIVE PROCESS

A. PRE-1979 LEGISLATION

The only prior attempt to pass legislation specifically authorizing joint custody in California occurred in March of 1976, when Assemblyman Ken Maddy introduced AB 3475.³⁵ This bill would have amended Civil Code section 4600 to provide for custody to either parent or "to both parents" according to the best interests of the child.³⁶ AB 3475 was passed overwhelmingly by the Assembly but died when the Senate did not vote on it by the end of the session.³⁷

B. SB 477

Three years after the unsuccessful introduction of AB 3475, Senator Jerry Smith of Santa Clara County, introduced SB 477 on March 1, 1979.³⁸ The press statement he released the same

33. Foster & Freed, *Joint Custody — A Viable Alternative?*, N.Y.L.J., Dec. 22, 1978, at 2, col. 5.

34. Equal Rights for Fathers, Report to Contributors (Feb. 6, 1980) (unpublished paper; c/o James A. Cook, 10606 Wilkins Ave., Los Angeles, Ca. 90024). Equal Rights for Fathers is a national grass-roots lobbying organization.

35. 2 ASSEMBLY FINAL HISTORY 1832 (1975-1976).

36. Cal. AB 3475, (1975-1976).

37. 2 ASSEMBLY FINAL HISTORY 1832 (1975-1976).

38. Section 4600.5 is added to the Civil Code, to read:

4600.5. (a) Joint custody shall be presumed to be in the best interests of the child where all of the following factors are present:

(1) The parties have agreed in writing to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor children of the marriage.

(2) The parties have submitted to the court for its approval, a written plan for the implementation of the joint custody arrangement.

(3) Both parties presently reside in this state and state that they intend to reside in this state in the future.

Such presumption is a presumption affecting the burden of proof.

(b) Joint custody may be awarded in other cases but in the absence of clear and convincing evidence shall not be pre-

day³⁹ quoted Senator Smith as saying the bill "would permit the court to award custody of children jointly to both parents when both have agreed to share custody or where a joint custody agreement appears to be in the best interests of the children." Smith also said his bill "should encourage divorcing couples to remain involved with their children and therefore help children of divorce better adjust to the changes divorce brings into their lives." He went on to note that "[t]he bill could also eliminate reluctance on the part of a parent to pay child support because he is excluded from having any control over his children's upbringing." Smith noted that this bill would be of benefit to both the parents and the children.

It would eliminate the inequity under our divorce law which usually results in custody being awarded to the mother, and at the same time would give each parent an equal chance to participate in raising the children. The children would benefit because they would continue to have equal access to both parents. . . . [T]he bill would create a presumption of joint custody where the parents agree and file a written plan with the court explaining how the arrangement will be carried out. In other cases, the court may order joint custody instead of traditional single parent cus-

sumed to be in the best interests of the child. For the purpose of assisting the court in making a determination as to an award of joint custody, the court may direct that an investigation be conducted pursuant to the provisions of Section 4602.

(c) For the purposes of this section, "joint custody" means an arrangement whereby the minor child or children of the parents shall be in the physical custody of each parent for a period of time with the parents having equal control of the care, upbringing, and education of the child or children.

(d) Any order for joint custody shall be terminated by the court if one parent establishes his or her principal residence in another state. Any such order may be modified or terminated upon the petition of one or both parents or the court's own motion if it is shown that the best interests of the child require modification or termination of the order. The court may consider evidence of any substantial failure of a parent to adhere to the plan for implementation of the joint custody arrangement in determining whether the joint custody order shall be modified or terminated.

Cal. SB 477 (1979-1980) (March 1, 1979 Introduction).

39. Press release from Smith's office, dated March 1, 1979. A great deal of legislative history, including this release, is filed in the California State Archives, 1020 O St., Sacramento, Ca. 95814, under the bill numbers.

tody and visitation arrangements. The child would live part-time with each parent.^{39.1}

The proposed amendment specified three criteria in order to raise a presumption that joint custody was in the child's best interests: first, the parents must agree to joint custody; second, they must make a written plan for implementing it; and third, both parents must reside in California and state their intention to continue to do so.⁴⁰ Joint custody was defined as both joint physical and joint legal custody.⁴¹ The bill authorized courts to award joint custody in other cases, but made it clear that in the absence of the three requirements stated above, joint custody would not be presumed to be in the best interests of the child.⁴² "Clear and convincing evidence" would be required to overcome this presumption.⁴³ Lastly, the bill provided for termination of a joint custody order if either parent moved out of the state, and allowed modification or termination based on the best interests of the child.⁴⁴ The only evidence specifically mentioned as a guide to the court in determining modification or termination was the "substantial failure of a parent to adhere to the plan for implementation of the joint custody arrangement"⁴⁵ The Legislative Counsel's Digest stated merely that the bill "would specify the circumstances in which . . . a presumption [of joint custody] shall operate, and would also specifically authorize such an award in other cases, as designated."⁴⁶

Senator Smith received numerous letters from family law practitioners, concerned voters, and people suggesting proposed amendments to the bill.⁴⁷ On April 16, 1979, SB 477 was amended in the Senate.⁴⁸ The changes were mostly technical,

39.1. *Id.*

40. Cal. SB 477, § 4600.5(a)(3) (1979-1980) (March 1, 1979 Introduction) [Text at note 38 *supra*].

41. *Id.*, § 4600.5(c).

42. *Id.*, § 4600.5(b).

43. *Id.*

44. *Id.*, § 4600.5(d).

45. *Id.*

46. Cal. SB 477, Legislative Counsel's Digest 1979-1980 (March 1, 1979).

47. State Archives, *supra* note 39.

48. 4600. In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of such child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity

such as changing section 4600, the existing custody statute, to

to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof. Custody should be awarded in the following order of preference:

(a) To either parent, or to both parents jointly pursuant to Section 4600.5, according to the best interests of the child. [Additions to the bill are indicated by italic type. This convention will be used throughout. The rest of Section 4600 remains the same.]

4600.5(a) *There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where all of the following factors are present:*

(1) *The parents have agreed in writing to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage.*

(2) *If the wishes of the child have been consulted under the circumstances stated in Section 4600, the child agrees to joint custody.*

(3) *The parents have submitted to the court for its approval, a written plan for the implementation of the joint custody award, including provisions for minimizing substantial disruption of the child's schooling, daily routine, association with friends, and religious training.*

(b) Joint custody may be awarded in the discretion of the court in other cases. For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate under this subdivision, the court may direct that an investigation be conducted pursuant to the provisions of Section 4602.

(c) *For the purposes of this section, "joint custody" means an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of close and continuing contact with both parents.*

(c) Any order for joint custody may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interests of the child require modification or termination of the order. The court may consider, among other factors, evidence of any substantial or repeated failure of a parent to adhere to the plan for implementing the joint custody order or evidence that one parent has established, or is likely to establish his or her principal residence in another state in determining whether the order should be modified or terminated.

(e) Any order for the custody of the minor child or children of a marriage entered by a court in this state or any other state may be modified at any time to an order of joint custody in accordance with the provisions of the section.

(f) *In counties having a conciliation court, the court or the parties may, at any time, consult with the conciliation*

provide that first preference in custody awards would be "to either parent, or to both parents jointly pursuant to section 4600.5, according to the best interests of the child,"⁴⁹ and requiring more detail in the written plan.⁵⁰ Additionally, the new version provided some substantive changes. Before the presumption could operate, the child had to agree to the joint custody plan if s/he had been consulted.⁵¹ The requirement that the parents continue to reside in California was removed, and moving out of state, rather than automatic grounds for termination of joint custody, became merely one factor to be considered on modification or termination.⁵² The standard for awarding joint custody in cases where the presumption did not apply was changed from requiring "clear and convincing evidence" to the vague "discretion of the court."⁵³ The definition of joint physical custody was amended to specify that physical custody meant "assur[ing] the child . . . of close and continuing contact with both parents."⁵⁴ Conciliation court services were suggested as helpful to formulation of plans or resolution of disputes.⁵⁵ Lastly, section 3 was added, declaring it to be "the public policy of the state to assure minor children of close and continuing contact with both parents after the parents have separated or dissolved their marriage."⁵⁶ This policy statement was eventually incorporated, in slightly different form, into the beginning

court for the purpose of assisting the parties to formulate a plan for the implementation of the joint custody order or to resolve any controversy which has arisen in the implementation of a plan for joint custody previously approved by the court.

Section 3. The Legislature finds and declares that it is the public policy of the state to assure minor children of close and continuing contact with both parents after the parents have separated or dissolved their marriage. The Legislature further finds and declares that it is the public policy of this state that there exists no preference in law that the custody of minor children be ordered or awarded to one parent because of that parent's gender.

Cal. SB 477, 1979-1980 (April 16, 1979 amendment).

49. *Id.* § 4600(a).

50. *Id.* § 4600.5(a)(3).

51. *Id.* § 4600.5(a)(2).

52. *Id.* § 4600.5(d).

53. *Id.* § 4600.5(b).

54. *Id.* § 4600.5(c).

55. *Id.* § 4600.5(f).

56. *Id.* Section 3.

of section 4600.⁵⁷

The requirement that parents continue to reside in California was apparently removed either because of a letter from a constituent arguing in favor of parental autonomy,⁵⁸ or because the Advisory Commission on Family Law, part of the Senate Subcommittee on the Administration of Justice, thought the clause might be an unconstitutional restraint on the parents.⁵⁹

Some constituents objected to the bill as being too restrictive—they took the position that joint custody should be the presumption in all cases,⁶⁰ a position with which Senator Smith disagreed.⁶¹ Smith's memo to the Senate Judiciary Committee reads in part:

1. Need for the bill:

Since existing law does not mention joint custody, some courts refuse to make any joint custody awards at all, and others have developed a concept of 'joint legal custody' which is essentially meaningless. Thus, in some courts custody orders under which both parents share physical custody of and legal control over the children are not

57. Compare Cal. SB 477 (1979-1980) (April 16, 1979 amendment) [text at note 48 *supra*] with CAL. CIV. CODE § 4600(a) (West Supp. 1980).

58. State Archives, *supra* note 39 (letter from Diane Trombetta to Senator Smith, (March 25, 1979)).

59. State Archives, *supra* note 39.

60. See documents from the organization, Equal Rights for Fathers, in State Archives, *supra* note 39.

61. Steven Belzer, legislative counsel to the Senate Subcommittee on the Administration of Justice, of which Senator Smith was the chair, wrote several letters to constituents further clarifying the Senator's position on joint custody. In a letter to a professor at the University of California, he stated that "the legislature was not ready," in the Senator's opinion, "to make joint custody a first priority," but rather that the Senator saw the legislation as an "important first step toward changing the attitudes of judges and lawyers, that joint custody ought to be a viable alternative to single-parent custody." Another letter states that Senator Smith advocates neither the extreme position that joint custody should always be awarded, nor the other extreme, that it never should be. Instead, he states that "SB 477 attempts to take a moderate approach so that joint custody can be tried in more cases. When some experience with it has been gained; then the Legislature will be in a better, more informed position to take the next step." He goes on to explain that court-ordered joint custody is not a prerequisite for informal co-parenting: "Co-parenting, which I believe is the goal that we are seeking, can be accomplished with or without joint custody. Those who want to continue active involvement with their children after dissolution of marriage can do so under Senator Smith's bill. [On the other hand,] [t]hose who cannot agree to joint custody would still have the option to co-parent." These and similar letters are in the State Archives, *supra* note 39.

readily available.

This, combined with the practice of some judges of always awarding custody to the mother, means that in these courts the father has no possibility of obtaining full or partial custody of his children.⁶²

The memo went on to define joint custody as both physical and legal, as in 4600.5(c) of SB 477.⁶³ It also specified that in order to invoke the presumption, the parents and children would have had to agree to joint custody and to have submitted a detailed written plan for implementation, as provided in 4600.5(a)(3).⁶⁴ It authorized courts to award joint custody in cases where the parties had not fulfilled these three criteria, but specified that no presumption in favor of joint custody would apply in such cases. The memo went on, virtually quoting the bill in its April 16 form, and noting in addition that parents who rejected joint custody "in the heat of divorce" could return later to request it, and the specified equality between father and mother "is intended to influence those judges who invariably award custody to the mother."

A hearing was held by the Senate Judiciary Committee on April 17, 1979, the day after the first amendments.⁶⁵ Some of the testimony presented stated that the basis for this bill and similar legislation in other states was "fathers' groups pressing for equality, mothers seeking to share the burden of child care, and children's rights advocates pressing for the right of children to continued association with both parents after divorce."⁶⁶ The same speaker stressed that the presumption in favor of joint custody should apply only "where the spouses are willing and able to relate to each other as parents concerned with the best interests of the child," as shown by their ability and willingness to formulate a plan implementing such an agreement. She also mentioned her opposition and that of the Advisory Committee

62. Memo from Senator Smith to the Senate Judiciary Committee. State Archives, *supra* note 39.

63. Cal. SB 477, § 4600.5(c) (1979-1980) (April 16, 1979 amendment) [text at note 48 *supra*].

64. *Id.* § 4600.5(a)(3).

65. State Archives, *supra* note 39.

66. Testimony before the Senate Judiciary Committee given by Herma Hill Kay, Professor of Law, University of California, Berkeley (Boalt Hall). The Professor's notes were made available to the author.

on Family Law to AB 1480, the other joint custody bill, because it "eliminates consideration of children's best interests in favor of giving priority to joint physical and legal custody."

The bill was again amended on April 24, 1979.⁶⁷ Other than

67. Section 1. Section 4600 of the Civil Code is amended to read:

4600. In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of such child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof. Custody should be awarded in the following order of preference:

(a) To either parent, or to both parents jointly pursuant to section 4600.5, according to the best interests of the child, *provided, however, that in making such an award to either parent, the court shall not prefer a parent as custodian because of that parent's sex.*

[The rest of 4600 remains the same.]

Section 2. Section 4600.5 is added to the Civil Code, to read:

4600.5(a) There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where all of the following factors are present:

(1) The parents have agreed in writing to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage.

(2) *The wishes of the child have been considered under the circumstances set forth in Section 4600.*

(3) The parents have submitted to the court for its approval, a written plan for the implementation of the *joint custody order. Such plan may contain provisions sufficient to enable the parents to determine the manner in which the child's education, daily routine, association with friends, religious training, and other activities shall be carried out. If the court declines to enter an order awarding joint custody pursuant to subdivision (a), the court shall state in its order the reasons for denial of an award of joint custody.*

(b) *Upon the application of either parent, joint custody may be awarded in the discretion of the court in other cases. For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate under this subdivision, the court shall, upon the request of either party, direct that an investigation be conducted pursuant to the provisions of Section 4602.*

(c) For the purposes of this section, "joint custody" means an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or

technical changes, details in the written plan were made discretionary rather than mandatory,⁶⁸ and language was added requiring the court to state its reasons for denial of an award of joint custody, where the parties had fulfilled the requirements of the presumption.⁶⁹ Also significant were new provisions for discretion to award joint custody "upon the application of either parent,"⁷⁰ and for mandatory court-ordered investigations "upon the request of either party,"⁷¹ rather than investigations only in the discretion of the court. The Senate Judiciary Committee then passed the bill as amended, six to zero, and the bill went to the Senate floor.⁷²

Senator Smith's Floor Statement, besides restating the text of the bill, mentioned that

[t]he bill makes conciliation court counseling services available to help the parties work out satisfactory arrangements, and provides that a child

children of close and continuing contact with both parents.

(d) Any order for joint custody may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interests of the child require modification or termination of the order. The court may consider, among other factors, evidence of any substantial or repeated failure of a parent to adhere to the plan for implementing the joint custody order or evidence that one parent has established, or is likely to establish, his or her principal residence in another state, in determining whether the order should be modified or terminated.

(e) Any order for the custody of the minor child or children of a marriage entered by a court in this state or any other state may, *subject to the jurisdictional requirements set forth in Section 5152*, be modified at any time to an order of joint custody in accordance with the provisions of this section.

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

[Section 3 remains the same, except "gender" changed to "sex."]

Cal. SB 477 (1979-1980) (April 24, 1979 amendment).

68. *Id.* § 4600.5(a)(3).

69. *Id.*

70. *Id.* § 4600.5(b).

71. *Id.*

72. Cal. SB 477, SENATE SEMIFINAL HISTORY 198 (1979-1980).

custody evaluation could be ordered if joint custody is sought by one parent but the other parent does not agree, or where the parties are unable to produce a plan.⁷³

This is the first mention of conciliation court services where one parent does not agree to joint custody, a situation discussed further under Parts III and IV.

The Senate passed SB 477 as amended by the Judiciary Committee, thirty-one to zero, on May 3, 1979.⁷⁴ Senator Smith's press release of that date⁷⁵ stressed the rights of parents to make their own arrangements as to custody of their children upon divorce, and the role of the courts as approving such private decisions "unless the circumstances indicate that it would be against the child's best interests." In this way, the Senator admitted that the court's determination of the best interests of the child remain paramount, overcoming, in appropriate situations, the presumption favoring joint custody when requested by both parents. The press release also stated that "[t]he bill would also allow the court to order joint custody without a parental agreement and provides for the assistance of the conciliation court to work out the details in those cases. 'In this way, the bill hopes to give children the opportunity to continue to have access to their parents and to have a close relationship with both parents after they have separated,' stated the author."

SB 477 then went to the Assembly Committee on the Judiciary, where it was amended on June 4, 1979.⁷⁶ The presumption

73. State Archives, *supra* note 39 (Floor Statement to Senate regarding SB 477 as amended April 24, 1979).

74. Cal. SB 477, SENATE SEMIFINAL HISTORY 198 (1979-1980).

75. State Archives, *supra* note 39.

76. Sections one and three were not amended. Section two provided for the addition of section 4600.5 to the Civil Code as follows:

4600.5(a) There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage.

The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the joint custody order. If the court declines to enter an order awarding joint custody pursuant to subdivision (a), the court shall state in its order the reasons for denial of an award of joint custody.

favoring joint custody now arose only upon agreement of the parties, either before or during a court hearing; the former requirement of a written plan was left up to the court's discretion; and the child's agreement no longer had to be obtained.⁷⁷ Additionally, for the first time, joint custody was redefined to mean joint *legal* custody, and courts were specifically authorized to award joint legal custody without awarding joint physical custody.⁷⁸ Furthermore, in describing the physical relationship between children and parents, the Committee amended the section so that children were assured only of continuing contact, rather than "close and continuing contact,"⁷⁹ thereby clearly separating

(b) Upon the application of either parent, joint custody may be awarded in the discretion of the court in other cases. For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate under this subdivision, the court shall, upon the request of either party, direct that an investigation be conducted pursuant to the provisions of Section 4602.

(c) For the purposes of this section, "joint custody," means an order awarding *legal* custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of continuing contact with both parents, provided, however, that such order may award joint legal custody without awarding joint physical custody.

(d) Any order for joint custody may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interests of the child require modification or termination of the order.

(e) Any order for the custody of the minor child or children of a marriage entered by a court in this state or any other state may, subject to the jurisdictional requirements set forth in Sections 5152 and 5163, be modified at any time to an order of joint custody in accordance with the provisions of this section.

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

Cal. SB 477, § 4600.5 (1979-1980) (June 4, 1979 amendment).

77. *Id.* § 4600.5(a).

78. *Id.* § 4600.5(c).

79. State Archives, *supra* note 39. Assembly Committee Statement on SB 477 as amended, dated the date of amendment, June 4, 1979, discussed 1) when the presumption arose, and 2) the scope of the judicial authority to award joint custody in the non-presumption cases. The Committee continued by stating that the bill "encourages courts to assure that children have close contact with both parents after dissolution of marriage." This last statement is ambiguous in light of the amendment's having just re-

the concepts of joint legal and joint physical custody. Lastly, the Committee removed both suggested grounds for modification or termination, (substantial or repeated failure to adhere to the joint custody plan, or moving out of the state), thereby leaving the court only with the broad "best interests" standard.⁸⁰

The Committee Statement⁸¹ mentioned the judicial discretion to require parents to submit a plan, and the suggestion that conciliation court services help parents plan these details. It goes on to state that the bill is "a modest proposal to move courts toward the application of joint custody in more cases," that it "encourages parents to maintain close contact with their children regardless of their personal differences," and that it "encourages parents to agree for the benefit of their children." The list of supporters, surprisingly enough, included Equal Rights for Fathers, which had previously opposed SB 477 as not going far enough.

A hearing was held June 6, 1979.⁸² Witnesses in support of SB 477 included a family law judge, practitioners, a clinical psychologist, a director of conciliation court services, and a professor of family law; at least two of the witnesses, though generally supporting joint custody, voiced opposition to 4600.5(b), arguing that joint custody should not be authorized where only one parent requested it.⁸³ However, the Committee voted thirteen to zero to pass SB 477 as it had already been amended.⁸⁴ The only opposing witness was William Green, from Equal Rights for Fathers. He stated that legal custody without physical custody subjects fathers to liability for children without giving fathers the rights accompanying physical custody.⁸⁵ Senator Smith's response to the Committee members was that Green was seeking mandatory joint (physical) custody in all cases, and that because the bill dealt with human beings and not property, it was vital for courts to retain some discretion in ordering joint legal and

moved the word "close" in the bill.

80. Cal. SB 477, § 4600.5(d), (1979-1980) (June 4, 1979 amendment) [text at note 76 *supra*].

81. See note 79 *supra*.

82. See note 39 *supra*.

83. State Archives, *supra* note 39.

84. Cal. SB 477, SENATE SEMIFINAL HISTORY 198 (1979-1980).

85. Los Angeles Daily Journal, June 8, 1979, at 1, col. 4.

physical custody.⁸⁶

A June 6, 1979 press release from Smith's office⁸⁷ noted that the bill "encourages both parents to maintain a close relationship with their children after dissolution of their marriage by permitting judges to order that the parents share responsibility for the care of their children and for decisions which affect the children."⁸⁸ The release then quoted Smith as to parental rights to make their own arrangements, with court sanction, and mentioned that "the bill would allow joint custody when the parents do not agree, but one states an interest in it and the circumstances favor the arrangement. In such cases, the parents can be referred to conciliation court to help out with the details."

The Assembly passed SB 477 on June 14, 1979.⁸⁹ The bill was then sent to Governor Brown,⁹⁰ who signed it July 3, 1979.⁹¹

86. *Id.*

87. State Archives, *supra* note 39.

88. Note that the press release fails to distinguish between joint legal and joint physical custody, the newest amendment.

89. Cal. SB 477, SENATE SEMIFINAL HISTORY 198 (1970-1980).

90. State Archives, *supra* note 39. A letter from Senator Smith to the Governor dated June 22, 1979, urging the Governor to sign the bill into law, contains the following:

The bill would create a presumption that joint custody is in the best interests of a child where the parents have agreed to a joint custody order. The court may enter an order for both joint legal custody and joint physical custody or for joint legal custody with physical custody to one parent. Where the parents do not agree, the court may order joint custody in appropriate cases, but the presumption would not apply.

The bill would empower the court to require that the parties submit a plan for implementation of the joint custody order and, in counties with a conciliation court, the parties can consult with the counseling staff in order to assist in working out the details of the joint custody arrangement.

The bill has two significant benefits — first it will introduce the concept of joint custody into the Family Law Act and thereby encourage divorcing parents, their attorneys, and the courts to use it as an alternative of equal dignity with single parent custody; and second, it will encourage parents to maintain continuing relationships with their children after dissolution of their marriage . . .

[After stating that opposition to the bill is based on the belief that it does not go far enough, Smith concludes:]

"SB 477 is an appropriate first step toward more universal use of joint child custody which, I believe, should be tried and tested."

91. Cal. SB 477, SENATE SEMIFINAL HISTORY 198 (1979-1980).

It was chaptered as Chapter 204,⁹² to become effective January 1, 1980, unless superseded by later legislation. A press release the date of the signing states:

SB 477 gives the court equal authority to order either traditional single-parent custody or joint custody. When the parents agree to share custody the bill presumes that joint custody is in the best interests of the child. It also permits joint custody orders in cases where the parents do not agree but the court finds that circumstances warrant a joint custody arrangement Some courts have been reluctant to comply with the parents' wishes when they express their agreement to share child custody. This bill gives joint custody equal dignity in the law. "Once the parents decide how they wish to arrange custody of their children, the court should approve that decision," Smith noted. "The bill encourages both parents to maintain their relationship with their children, and has the potential to give the child more access to both parents after divorce." "This bill is an important step toward easing the adverse effects of divorce on children," Smith said, "by encouraging parents to make co-operative decisions based on the benefits to the children."⁹³

C. AB 1480

Shortly after SB 477 was introduced, and while it was being debated, amended, and considered, a similar bill, AB 1480, was introduced by Assembly members Imbrecht and Torres.⁹⁴ The

92. *Id.*

93. State Archives, *supra* note 39.

94. Cal. AB 1480 (1979-1980) (March 29, 1979 introduction) provides:

[Section 1] It is the intention of the Legislature by this act to insure that, to the extent possible, despite dissolution of the marriage of a child's parents, the child shall have equal access to both parents.

[Section 2. Section 4600 of the Civil Code is amended to read] In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of such child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court

bill was introduced on March 29, 1979, just four weeks after SB 477. AB 1480 was originally authored by James Cook, of Equal Rights for Fathers.⁹⁵ AB 1480 went much further than SB 477: AB 1480 amended section 4600 to establish a presumption that joint legal and physical custody was *always* in the best interests of children.⁹⁶ The only ways sole custody could result were either an agreement between the parents that one parent would assume custody, or else a rebuttal of the presumption by a preponderance of the evidence that sole custody was in the best interests of the child.⁹⁷ Steven Belzer, the legislative counsel who drafted SB 477, felt that such a presumption would have led to joint custody in every case.⁹⁸

Proponents of AB 1480 seized on language in *In re Marriage of Neal*,⁹⁹ (decided while both bills were under consideration) to argue that, even though the *Neal* court held that courts had jurisdiction under the "necessary and proper" language of section 4600 to enter orders for joint legal custody with physical custody to one parent, the *Neal* court "had further held that *unless the parties agree*, an overlapping award of joint legal custody with physical custody to one parent constitutes an abuse of discretion".¹⁰⁰ Whether *Neal* so held is debatable.¹⁰¹ However, this distinction was apparently the impetus behind the May 14, 1979, amendment which changed the first preference in section

shall consider and give due weight to his wishes in making an award of custody or modification thereof. Custody should be awarded in the following order of preference:

- (a) *To both parents in joint physical and legal custody.*
- (b) *To either parent if a preponderance of the evidence establishes that it is in the best interest of the child that custody should be awarded to one parent or if the parents agree that one parent shall assume custody.*

[The rest of 4600 remains the same.]

95. Noted in James Cook, *Joint Custody, Sole Custody: A New Statute Reflects a New Perspective* (unpublished paper; c/o James A. Cook, 10606 Wilkins Ave., Los Angeles, Ca. 90024).

96. Cal. AB 1480, § 4600(a) (1979-1980) (March 29, 1979 introduction) [text at note 94 *supra*].

97. *Id.* § 4600(b).

98. Author's phone conversation with Steven Belzer, April 7, 1980.

99. 92 Cal. App. 3d 834, 155 Cal. Rptr. 157 (1979).

100. Cal. AB 1480, Draft One, Comment One, (emphasis in original) State Archives, *supra* note 39.

101. Letter from the late Brigitte Bodenheimer, Professor of Law, University of California, Davis (King Hall) to judge Donald King, San Francisco Superior Court (June 2, 1979).

4600 "[t]o both parents in joint physical and legal custody or to both parents in joint legal custody with physical custody awarded to one parent."¹⁰²

The Comment on AB 1480¹⁰³ stated that proponents of 1480 argued that joint custody would promote the best interests of children because "such awards would give children equal access to both parents," and that "where one parent does not agree to an award of joint custody, the child would be able to maintain contact with both parents and would be exposed to the influence of both parents."¹⁰⁴ Apparently the wishes of the anti-joint custody parent would be overcome by the presumption favoring joint custody.

The Comment also stated that proponents argued the bill would promote cooperation between parents by "placing [them] on notice that joint custody is in the first order of preference," but also noted that opponents of AB 1480 argued that "unless the parents agree to joint custody, the bill would encourage more litigation by non-agreeing parents to establish that single-parent custody is in the best interests of the child."¹⁰⁵

The final form of the Comment¹⁰⁶ notes that proponents of AB 1480 "also argue that existing law 'has implemented a potential for extortion by capturing single-parent custody as a source of support income,' and that joint custody as proposed in this bill would 'serve notice that the advantages of leverage that could otherwise accrue through single-parent custody are unlikely to be available.'" It thus appears that a major, if not the primary, reason for introduction of AB 1480 was the desire of presently non-custodial fathers to "get even" with the presently custodial mothers. This motivation is also apparent in the next part of the same Comment: "If agreement of the parties were required in order to obtain a joint custody order, one parent

102. The only amendment reads: "Custody should be awarded in the following order of preference, according to the best interests of the child: (a) To both parents in joint physical and legal custody or to both parents in joint legal custody with physical custody awarded to one parent." [The rest of 4600 remains the same.] Cal. AB 1480, § 4600 (1979-1980) (May 14, 1979 amendment).

103. Cal. AB 1480, Draft One, Comment Two. State Archives, *supra* note 39.

104. *Id.*

105. *Id.*, Comment Three.

106. Cal. AB 1480, Draft Three, Comment Three, State Archives, *supra* note 39.

would have an absolute power of veto over the wishes of the other 'more cooperative' parent to have joint custody."¹⁰⁷ The Comment noted further that

[o]pponents argue that joint custody is a workable alternative only where the parents can communicate and cooperate in the implementation of the joint custody arrangement. They argue that joint custody appears to work only for dedicated parents whose anger and hostility toward each other has passed or is at least under control, and who can handle the frequent contact with each other that shared custody requires. One parent can frustrate joint custody by being uncooperative in carrying out the terms of an imposed joint custody order. Such conflict, they argue, is contrary to the best interests of the child.¹⁰⁸

The Comment also noted problems under the Uniform Child Custody Jurisdiction Act, which has no provisions for joint custody. A parent pushed into joint custody against her or his will might be able to undo the joint custody order merely by moving to another state.¹⁰⁹ Problems in qualifying for Aid to Families with Dependent Children (AFDC) were also noted.¹¹⁰ The Second Draft of the Comment also stated,

In its recent report on Family and Child, the State Bar Committee on Law and Mental Health Problems noted that there is "evidence that custody disputes are too often not undertaken out of genuine concern for the child's best interests, but more often reflect unresolved angers between the parents which find expression in the legally sanctioned custody-visitation dispute."¹¹¹

The Bill Digest of AB 1480 as amended to May 14, 1979, stated the objective as "intend[ing] to provide both parents with equal access to the child upon dissolution of the marriage."¹¹² After describing the bill, the Digest went on:

107. This motivation is discussed further in Part IV, *infra*.

108. Cal. AB 1480, Draft One, Comment Four. State Archives, *supra* note 39.

109. *Id.*, Comment six.

110. *Id.*, Comment seven.

111. Cal. AB 1480, Draft Two, Comment Three. State Archives, *supra* note 39.

112. Written by L. Young. State Archives, *supra* note 39.

Comment

1. Currently requests for joint custody in child custody proceedings are not disposed of uniformly. Some courts will routinely deny requests for joint custody; other courts will in certain instances grant joint legal custody while giving physical custody to only one parent.

Supporters of this bill will claim that statutory law should provide the court with not only a clear but a first option for joint legal and physical custody. They argue that existing law does not ensure parents equal access to a child nor does it ensure the child access to both parents after the marriage is dissolved.

Moreover, supporters suggest that this measure will reduce the rancor often encountered between parents in a child custody proceeding. According to supporters, if parents know that joint custody will be given first consideration by the court, they would be less inclined to engage in a custody battle to protect their access to the children. They also argue that an award of joint custody would preclude one parent from using single parent custody as a vehicle for obtaining support income or as leverage against the other parent during and after the marriage dissolution.

The Digest noted that joint custody is feasible in a few cases, where the parties "separate amicably, have an adequate agreement as to implementing joint custody, and participate in any necessary counseling. However," it cautioned, "in the majority of cases, joint custody only creates more instability so that the child in fact continues to be a pawn long after the dissolution. If joint custody were granted in these cases, would not more modifications of child custody awards be likely?" It then asked the key question; "[w]ould sound social policy be based on creating equality between parents or on achieving and maintaining stability for the child?"

The Digest then inquired as to how a court would determine whether joint or sole custody was in the best interests of the child, including both psychological and practical factors. It suggested that "an adequate, workable agreement between the parents as to implementation" be made a precondition of joint custody. It mentioned that perhaps joint custody should be merely

one alternative, rather than first preference, noted that a distinction between legal and physical custody may be useful, and questioned whether reference to the preponderance of the evidence standard is necessary, or would only engender more confusion and bitterness.

The Digest then commented on SB 477, which on May 3, 1979, had been passed by the Senate and referred to the Assembly,¹¹³ noting the difference between the two bills as to when the presumption favoring joint custody applies.

Finally, the Digest noted the *Neal* case just handed down. Though the factor of parental preference established in section 4600 was considered not to diminish the discretionary authority of the trial court to award joint custody "as may seem necessary and proper," the trial court in *Neal* was held to have "abused its discretion by awarding joint custody, since the record reflected ongoing parental discord which would not serve the best interests of the children involved." The Digest concluded: "Would this judicial interpretation of existing law be preferable to proposed legislation as a basis for awarding joint custody?"

The Assembly Committee on the Judiciary voted unanimously to pass AB 1480 as amended;¹¹⁴ so did the Assembly (seventy-six to zero).¹¹⁵ The bill then went to the Senate and was assigned to the Senate Committee on the Judiciary, Subcommittee on the Administration of Justice, the same Subcommittee that had been midwife to SB 477.¹¹⁶ Hearings were held

113. Cal. SB 477, SENATE SEMIFINAL HISTORY 198 (1979-1980).

114. Cal. AB 1480, ASSEMBLY SEMIFINAL HISTORY 644 (1979-1980).

115. *Id.*

116. A memo from Steven Belzer, legislative counsel to the Subcommittee, to Senator Smith, dated June 26, 1979, raises several significant questions regarding Cal. AB 1480:

1. If the preference for joint custody operates to impose a joint custody order against the wishes of one parent, or against the wishes of two competing parents, neither of whom want joint custody, would this not result in a great deal of post-judgment litigation to attempt to modify the order? Isn't it better for the child to have the matter of custody firmly settled at the earliest possible time even if it means single parent custody?

2. Would any services be available to nonagreeing parents to help them reach agreement or work out problems which may arise in the operation of the joint custody order when

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by the Senate Committee on August 21, 1979;¹¹⁷ opposing testimony was given by a family court judge, representatives from the State Bar Family Law Section and the Academy of Matrimonial Lawyers, family law practitioners, and a noted scholar in the field of family law.¹¹⁸ Equal Rights for Fathers testified in support of the bill.¹¹⁹

Proponents of AB 1480 submitted many suggestions for amending it,¹²⁰ most of which were efforts to create as strong a presumption favoring joint custody as possible, a position which the Assembly Committee on the Judiciary had already rejected in its May amendment. These included establishing the presumption in all cases, even in the absence of parental agreement, requiring parents to make efforts to establish joint custody agreements, and redefining joint custody to eliminate the distinction between legal and physical, but permitting courts to order joint legal/sole physical custody *if* the parents requested it.¹²¹ The Senate Judiciary Committee did not choose to adopt

they reside in counties without a conciliation court? If not, wouldn't they constantly be back in court trying to have the court work out conflicts by court order?

3. In the forty-two counties without conciliation courts, could the court compel the parties to see a counselor to help work out problems in a case which returns for post-judgment relief repeatedly?

4. Would you consider extended disagreement over the operation of joint custody to be in the best interests of the child?

5. Would a California joint custody order be enforceable in another state without provisions in its law for joint custody? Should this bill include provisions which make the California joint custody order valid in other states?

6. Do you have any information regarding how many parents would seek joint custody under this bill, whether by agreement or not? If not, should we adopt a policy which favors joint custody in all cases when it is unclear whether this form is desired by a significantly large segment of divorcing couples to warrant such a change in the law?

State Archives, *supra* note 39. Most of these questions were not answered in the amendments made to Cal. AB 1480, and still remain unresolved.

117. *Id.*

118. Names of witnesses, and letters opposing Cal. AB 1480 from county bar associations, family law judges, and others can be found in the State Archives, *supra* note 39.

119. State Archives, *supra* note 39.

120. *Id.*

121. These amendments were not endorsed by legislative counsel Steven Belzer, who wrote,

these amendments. Instead, it amended AB 1480 on August 29, 1979, to conform more closely to the language of SB 477.¹²² The

The suggestion of permitting joint legal/sole physical custody only upon parent request is in accord with the *Neal* case but is more restrictive than SB 477, which permits the court to make such orders without a request.

The problem remains that first preference for joint legal and physical custody goes too far in the view of the bill [AB 1480]'s opponents. SB 477 is a bill they can live with.

State Archives, *supra* note 39.

122. Section 1 of the Aug. 29, 1979 version of AB 1480 was not enacted. Almost the same as Section 3, *infra*, it was an alternative version, to be effective only if AB 167, a marginally-related bill, was not enacted or was chaptered later than AB 1480. This was explained in Section 4 of AB 1480. Both section 1 and Section 4 of the Aug. 29, 1979 version of AB 1480 are deleted here.

Section 2. Section 4600.5 is added to the Civil Code, to read:

4600.5(a) There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage.

If the court declines to enter an order awarding joint custody pursuant to this subdivision, the court shall state in its order the reasons for denial of an award of joint custody.

(b) Upon the application of either parent, joint custody may be awarded in the discretion of the court in other cases. For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate under this subdivision, the court may direct that an investigation be conducted pursuant to the provisions in Section 4602. If the court declines to enter an order awarding joint custody pursuant to this subdivision, the court shall state in its order the reasons for denial of an award of joint custody.

(c) For purposes of this section, "joint custody" means an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with both parents; provided, however, that such order may award joint legal custody without awarding joint physical custody.

(d) Any order for joint custody may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interests of the child require modification or termination of the order. The court shall state in its order the reasons for modification or termination of the joint custody order if either parent opposes the modification or termination order.

(e) Any order for the custody of the minor child or children of a marriage entered by a court in this state or any other state may, subject to the jurisdictional requirements

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one amendment suggested by a constituent, recommended by

set forth in Sections 5152 and 5163, be modified at any time to an order of joint custody in accordance with the provisions of this section.

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

(g) Notwithstanding any other provision of law, access to records and information pertaining to a minor child, including but not limited to medical, dental, and school records, shall not be denied to a parent because such parent is not the child's custodial parent.

Section 3. Section 4600 of the Civil Code is amended to read:

4600. (a) The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of the child during minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an award of custody or modification thereof. In determining the person or persons to whom custody should be awarded under paragraph (2) or (3) of subdivision (b), the court shall consider and give due weight to the nomination of a guardian of the person of the child by a parent under Article 1 (commencing with Section 1500) of Chapter 1 of Part 2 of Division 4 of the Probate Code.

(b) Custody should be awarded in the following order of preference according to the best interests of the child:

(1) To both parents jointly pursuant to Section 4600.5 or to either parent. In making an order for custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of this parent's sex.

The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

(2) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.

(3) To any other person or persons deemed by the court

the legislative counsel as a compromise and ultimately adopted, was from Dr. Diane Trombetta, a "cultural anthropologist" and strong supporter of joint custody.¹²³ She suggested that where the court has determined that sole custody is in the best interests of the child and the issue is which parent will get custody, "the court shall consider . . . which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent . . ."¹²⁴ thereby incorporating the legislative policy favoring frequent and continuing contact with both parents into sole custody awards as well.

Another recommendation by Dr. Trombetta¹²⁵ which was incorporated into AB 1480¹²⁶ was to remove SB 477's language requiring the court to order an investigation upon the request of either party, the power of a parent to demand such an investigation being deemed dangerous. However, ordering an investigation remained within the discretion of the court.

The Committee also considered and rejected James Cook's suggestion that modification or termination be made on the basis of "the preponderance of the evidence."¹²⁷ Dr. Trombetta argued that this would make custody orders "more difficult to modify than they already are."¹²⁸ The Committee left the "best interests of the child" standard from SB 477 intact in incorporating it into AB 1480.¹²⁹

to be suitable and able to provide adequate and proper care and guidance for the child.

(c) Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

Cal. AB 1480 (1979-1980) (Aug. 29, 1979 amendment).

123. State Archives, *supra* note 39.

124. This language was eventually incorporated into CAL. CIV. CODE § 4600(b)(1) (West Supp. 1980).

125. State Archives, *supra* note 39.

126. Cal. AB 1480, § 4600.5(b) (1979-1980) (August 29, 1979 amendment) [text at note 122 *supra*].

127. State Archives, *supra* note 39.

128. *Id.*

129. Cal. AB 1480, § 4600.5(d) (1979-1980) (August 29, 1979 amendment) [text at

There was one major difference between AB 1480 and SB 477: AB 1480 seems to make joint custody and sole custody equal in preference. However, proposed section 4600.5 of AB 1480 makes it clear that the presumption in favor of joint custody operates only where the parents agree, and not otherwise.

A new section was added in these amendments, providing that "access to records and information pertaining to a minor child, including but not limited to medical, dental, and school records, shall not be denied to a parent because such parent is not the child's custodial parent."¹³⁰

After these major amendments, Senator Smith, who had introduced SB 477, became the principal co-author of AB 1480.¹³¹ His Floor Statement to the Senate in support of AB 1480¹³² stressed that 1480 "supplement[ed]" SB 477, in that it

A. Incorporates into the statutory language of the Civil Code a legislative policy encouraging parents to share the rights and responsibilities of childrearing.

B. Permits the court to award joint custody and applies a presumption that joint custody is in the best interests of the child when the parents have agreed.

C. Permits joint custody in other cases, but the presumption does not apply.

D. Authorizes the court to require parents to submit a plan for implementation of the custody order when the court feels it is appropriate.

E. Provides for conciliation court services to help parents plan the details.

The Floor Statement also stated that "AB 1480 amends SB 477 in some technical aspects to clarify the application of joint custody":

note 122 *supra*].

130. *Id.*, § 4600.5(g). According to Steven Belzer, this section, though added at the last minute, was not a compromise, but rather had been discussed by proponents of Cal. AB 1480 in connection with 1480 and other legislation for a long time. Letter from Mr. Belzer to the author (April 21, 1980).

131. Cal. AB 1480, (1979-1980) (August 29, 1979 amendment).

132. State Archives, *supra* note 39.

A. Retains the equal status of joint custody and single parent custody as a first preference in child custody awards.

B. Clarifies the definition of joint custody as used in the bill.

C. Permits the court to consider, among other factors, which parent is more willing to share access to the child when awarding custody to one parent.

The Statement also mentioned that the bill was double-joined with AB 167, which made some technical changes in guardianship provisions, and that there was no substantial conflict between the two bills.¹³³

In a letter from Steven Belzer to a practitioner dated August 31, 1979,¹³⁴ Belzer analyzed the changes made in AB 1480 on August 21, 1979, by the Senate Judiciary Committee. He stated that though most of the changes were technical, at least three substantive changes were made: first, for the first time, courts are authorized to require parents to submit a plan for implementation of custody, whether joint or sole.¹³⁵ Of course, there are major questions as to right to privacy presented by applying this power to a sole custody situation. This amendment seems to have originated with Dr. Trombetta in a proposed amended draft of AB 1480.¹³⁶ Second, the word "legal" was removed from the first clause of section 4600.5(c); the new language implying that joint custody is presumed to mean physical

133. The Senate Democratic Caucus' summary of AB 1480 (as amended August 29, 1979), states the arguments in support as: "Proponents argue that this bill promotes the best interests of the children by making awards of joint custody. Since such awards give children equal access to both parents, the child will be able to maintain contact with both parents and be raised by both parents."

The arguments in opposition are listed:

Opponents argue that the courts must award custody on the basis of serving the best interests of the child; consequently, this bill might subject a minor to an unstable, inconsistent environment. Opponents fear that joint custody might become a fallback, in the hopes that conditions will improve; however, joint custody actually works in very few cases. This measure also ignores the constitutional rights of the child.

The Caucus Summary is in the State Archives, *supra* note 39.

134. State Archives, *supra* note 39.

135. Compare Cal. AB 1480, § 4600(a) (1979-1980) (August 29, 1979 amendment) [text at note 122 *supra*] with Cal. SB 477, § 4600.5 (1979-1980) (June 4, 1979 amendment) [text at note 76 *supra*].

136. State Archives, *supra* note 39.

custody, though judicial discretion to award joint legal custody without joint physical custody is still specifically authorized. The origin of this change appears to be James Cook's proposed draft;¹³⁷ however, his comments on this section do not include any discussion of the reasons for omitting the word "legal." Nor is it known whether the Senate Judiciary Committee discussed this change. Third, Belzer wrote that the Committee "added as a compromise concession to proponents of 1480" a provision that "[t]he court shall state in its order the reasons for modification or termination of the joint custody order if either parent opposes the modification or termination order."¹³⁸

After amending AB 1480 one more time on September 4, 1979, to change court "order" to court "decision" wherever it appeared,¹³⁹ the Senate voted to pass the bill.¹⁴⁰ It was approved September 21, 1979, and filed September 22, 1979.¹⁴¹ Because it was chaptered as Chapter 915,¹⁴² after SB 477, it superseded the earlier-enacted legislation, and became effective January 1, 1980.

D. AB 2197

On January 29, 1980, Assemblyman Imbrecht, who had introduced AB 1480, introduced AB 2197. The new bill was to take effect immediately,¹⁴³ amending section 4600.5(c) in part to read: "Except where the parents have agreed to both joint legal and physical custody, the order may award joint legal custody without awarding joint physical custody."¹⁴⁴ Imbrecht explained that this change had been made by the Senate Judiciary Committee prior to chaptering AB 1480, but that the printers had erred in not including it in AB 1480's final form.¹⁴⁵ Thus, Imbrecht felt an obligation to give section 4600.5 the form it was meant to

137. *Id.*

138. Cal. AB 1480 § 4600.5(d) (1979-1980) (August 29, 1979 amendment) [text at note 122 *supra*].

139. *Id.* (September 4, 1979 amendment). Compare Cal. AB 1480 (1979-1980) (August 29, 1979 amendment) [text at note 122 *supra*] with CAL. CIV. CODE §§ 4600, 4600.5 (West Supp. 1980).

140. Cal. AB 1480, ASSEMBLY SEMIFINAL HISTORY 644 (1979-1980).

141. *Id.*

142. *Id.*

143. 2 Assembly Weekly History 535 (August 31, 1980).

144. Cal. AB 2197, § 4600.5(c), (1979-1980) (January 29, 1980 introduction).

145. Form Letter from James Cook, Mar. 11, 1980, to his supporters. For Cook's address, see note 34 *supra*.

have.¹⁴⁶

James Cook alerted the original proponents of AB 1480 in a three-page memo¹⁴⁷ alleging that the amendment was a

subterfuge that a cooperative parent and child could be denied joint *physical* custody and be stuck with merely joint *legal* custody by a covetous alternate parent, by a vicious attorney, or by a judge who doesn't realize that genuine joint custody reduces tension, while restriction of joint custody increases tension permanently, to the disadvantage of children, of parents, and of society.

However, AB 2197 died in Committee in the summer of 1980.¹⁴⁸

III. JUDICIAL INTERPRETATION OF SECTIONS 4600 AND 4600.5

A. SECTION 4600

Subdivision (a): Section 4600 of the Civil Code now begins with a statement of legislative policy.¹⁴⁹ It declares the state policy to include assuring minor children of "frequent and continuing" contact with both parents after dissolution, which would support an ambiguous definition of joint custody as including joint physical custody. The policy statement also "encourage[s] parents to share the rights and responsibilities of child rearing," which still falls short of presuming that parents actually will decide to share these responsibilities.

The *Neal* court emphasized the broad judicial discretion inherent in the "necessary or proper" language in 4600,¹⁵⁰ language unchanged by the bills. Also left intact is the direction to the court to consider the wishes of the child, if s/he is old enough to form an intelligent preference. The child's preference is even more important in cases where the court is considering a joint custody award, since the likelihood that the child will be

146. *Id.*

147. *Id.* (emphasis in original).

148. Compare 2 ASSEMBLY WEEKLY HISTORY 535 (Aug. 31, 1980) (hearing postponed in committee July 1, 1980) with ASSEMBLY RECESS HISTORY 100 (Oct. 1, 1980) (no reference to bill).

149. See Cal. AB 1480, § 4600(a) (1979-1980) (August 29, 1979 amendment) [text at note 122 *supra*].

150. 92 Cal. App. 3d at 839-40, 155 Cal. Rptr. at 160 (1979).

used as a pawn is much greater in joint custody than in sole custody situations. Even though language in SB 477 requiring the child's agreement before joint custody could be awarded was deleted,¹⁵¹ it seems likely that the reason for the deletion was not that the child's opinion was considered unimportant, but that the child's wishes were already mentioned in the existing section, and the legislators did not want to limit judicial discretion any further.

Subdivision (b): The most important change in this subdivision is the clarification that joint custody and sole custody are equal in first preference. However, it must be noted that the criteria in section 4600.5(a) must be met before the joint custody choice becomes a presumption. Additionally, in establishing any order of preference in custody matters, it must be remembered that the best interests of the child are always primary.¹⁵² Thus, even if the parents agree to joint custody, the trial court may still find that joint custody is not in the child's best interests in a given case.

The California Legislature also inserted language at this point regarding cases where the court found sole custody to be in the child's best interests, from which it can be inferred that sole custody awards would still frequently be made.¹⁵³ The new consideration, preferring the parent who is more likely to allow the child frequent and continuing contact with the noncustodial parent, is still just one factor among other factors in making this determination. Of course, such a consideration can also be overcome by a finding that, after balancing all the factors, awarding that parent custody would not be in the child's best interests. The same subdivision authorizes the court to order the parents to submit a plan as to how each would allow the child access to the other parent. The court also has authority to order an investigation under section 4602 for this purpose. The language removing preference based on the parent's sex has been law in

151. See Cal. SB 477, § 4600.5(a)(2) (1979-1980) (April 24, 1979 amendment) [text at note 67 *supra*], and Cal. SB 477, § 4600.5(a) (1979-1980) (June 4, 1979 amendment) [text at note 76 *supra*].

152. CAL. CIV. CODE § 4600(b) (West Supp. 1980) (emphasis added) states: "Custody shall be awarded in the following order of preference *according to the best interests of the child.*"

153. *Id.* (emphasis added): "Custody should be awarded . . . [t]o both parents jointly pursuant to Section 4600.5 *or to either parent.*"

California since 1973,¹⁵⁴ seven years before these other amendments were made.

It is interesting to note that the provision for an implementation plan applies equally to sole custody and to joint custody determinations.¹⁵⁵ Courts have previously not had explicit authority to order such plans,¹⁵⁶ though this may have been included within their broad discretionary powers. It would almost certainly be an abuse of discretion for a court to withhold approval of an implementation plan in the usual sole custody situation—such an act would infringe on the right to privacy.

B. SECTION 4600.5

Subdivision (a): This subdivision is the heart of the new code sections. It established for the first time a presumption that joint custody is in the best interests of a minor, where the parents have agreed to such an arrangement or do so in open court. It is important to note that an automatic presumption favoring joint custody in all cases was unequivocally rejected by the legislature.¹⁵⁷ Additionally, Senator Smith, who coauthored both bills, frequently stated that the purpose of the legislation was to encourage awards of joint custody in *appropriate* cases.¹⁵⁸ Thus, when a court is presented with non-agreeing parties, it would not be carrying out the intent of the legislature to urge strongly, or even to force, such an "agreement" in court. Nor should a parent who opposes joint custody be threatened with loss of all custody for being "uncooperative."¹⁵⁹ The role of the court is not to reward or punish parents, but to truly determine the best interests of the child. Because this standard is always primary, in appropriate situations, it can and must overcome a presumption favoring joint custody.

It is the role of courts to make detailed, careful investiga-

154. CAL. CIV. CODE § 4600(a) (West Supp. 1980).

155. Suggested amendment by Diane Trombetta. See notes 121-122 *supra* and accompanying text.

156. See CAL. CIV. CODE § 4600(b)(1) (West Supp. 1980).

157. See notes 60 and 61 *supra*, and accompanying text.

158. See text accompanying notes 39, 75 and 90 *supra*.

159. Letter from Carol Bruch, Professor of Law, University of California, Davis (King Hall) to a practitioner (January 2, 1980) indicates California courts are already pushing reluctant parents into joint custody agreements.

tions before coming to any decisions regarding custody.¹⁶⁰ Good judges have always made such careful custody decisions. The temptation to seize upon the language of this subdivision in order to justify automatic custody awards must be resisted, whether the rationale is saving time, energy, or money of the parties or of the court. Any such "savings" will operate to the detriment of the child, and will probably also lead to greater costs in the long run, when the parties return to court to try to resolve their differences. Thus, it is short-sighted for proponents of joint custody to assert that it will cut down necessary litigation¹⁶¹—courts, counselors, attorneys, and families may need to spend *more* time deciding whether or not to attempt joint custody and working out details than they would have spent determining which parent would get sole custody.

Subdivision (a) also requires courts to state the reasons for denial of joint custody where both parents have agreed to it. If the necessary detailed investigation has been done in making the decision, it should not be difficult to articulate why such an award might not be in the best interests of a child in a particular case. Since such findings would be stated as findings of fact, based on in-depth investigations, the likelihood of an appellate court overturning a well-reasoned denial seems minimal.

Subdivision (b): This subdivision authorizes the court to award joint custody even if the parties do not agree to it, if the court finds such an award to be in the child's best interests. First, it should be noted that the statute specifically authorizes a joint custody award only if one or both parents request it.¹⁶² Though the court could conceivably justify any award under the "necessary and proper" language of 4600(a), if it somehow found the arrangement to be in the child's best interests, the language of 4600.5(a) and (b) implies that a joint custody award unsought

160. Foster & Freed, *Joint Custody — A Viable Alternative?*, N.Y.L.J., Nov. 9, 1978, at 1, col. 1; Nov. 24, 1978, at 1, col. 1; Dec. 22, 1978, at 1, col. 1, make a strong argument for such meticulous fact-finding and judicial flexibility in custody cases. See especially Dec. 22, 1978 at 3, col. 1-2.

161. See Diana Trombetta, *Co-Parenting After Divorce: Recent Research and Overloaded Courtrooms Inspire New Solutions to Custody Disputes*, 4 (unpublished paper, available from Dr. Trombetta at 504 University Ave., Los Gatos, CA 95030).

162. "Upon the application of either parent, joint custody may be awarded in the discretion of the court in other cases" CAL. CIV. CODE § 4600.5(b) (West Supp. 1980) (emphasis added).

by either party would be an abuse of discretion.¹⁶³

The more usual situation will be a request for joint custody by one parent, which is opposed by the other. Though courts do have authority under 4600.5(b) to award joint custody in such cases, they should do so only in rare situations, where it is clear that the parents are able to cooperate in making decisions concerning the child, and will not merely use the child as a pawn in an ongoing power-play.¹⁶⁴ So far, it seems that joint custody works in only a few special cases,¹⁶⁵ because in most divorces, the parties' inability to make satisfactory decisions together is inextricably bound up in the divorce.

It is hard to imagine a situation in which it would be appropriate to order joint physical custody where one party opposed it. Even where one party opposes it, however, an award of joint legal and sole physical custody may occasionally be appropriate, when the parents can agree on overall child-rearing policies, but either disagree on day-to-day decisions, or live too far apart for joint physical custody. But even where parties can agree as to overall decisions in raising a child, joint custody should be awarded cautiously where one parent opposes it. Such an award may lead to years of fighting in and out of court, especially where there are no conciliation court services available, as is the case in forty-two California counties.¹⁶⁶ Protracted fighting could only be contrary to the best interests of the child.

It should also be noted that the legislature deleted the proposal that either party could initiate an investigation under section 4602,¹⁶⁷ presumably because power to do this was consid-

163. This was also the opinion of the late Brigitte Bodenheimer, Professor of Law, University of California, Davis (King Hall), who was closely involved in the passage of the legislation. Letter to author (April 19, 1980).

164. See, e.g., Blair, *A mother's nightmare of 'Joint Custody,'* Washington Post, Feb. 3, 1980, at C1, C2. Even though Ms. Blair initially "agreed" to a joint custody award under encouragement from her attorney, the court made the award without a careful investigation, resulting in serious problems and finally resolution by self-help.

165. Foster & Freed, *supra* note 6, at 340-41.

166. SECOND REPORT OF ADVISORY COMMISSION ON FAMILY LAW TO THE SENATE SUBCOMMITTEE ON ADMINISTRATION OF JUSTICE, May 4, 1979, at 1. This document can be obtained from the Senate Subcommittee on Administration of Justice of the Senate Judiciary Committee, California State Senate, Sacramento, Ca. See also note 180 *infra* for later legislative provisions providing conciliation court services state-wide.

167. See Cal. AB 1480, § 4600.5(b) (1979-1980) (August 29, 1979 amendment) [text

ered too apt to result in a power play. Such an investigation can now be authorized only by the court itself.¹⁶⁸

Again, under this subsection, the court is required to state its reasons for a denial of a joint custody award. The inability of the parties to cooperate in major decision-making would seem to be an appropriate reason for denial of joint legal custody, and the inability to cooperate in making daily decisions affecting the child, or the lack of a workable plan, or the geographic distance between the parents would seem to be appropriate reasons for denial of joint physical custody.

Subdivision (c): This subdivision attempts to define joint custody, but the definition remains ambiguous.¹⁶⁹ It is unclear whether the presumption favoring joint custody applies to joint physical custody as well as to joint legal custody even though the definition of joint custody includes "frequent and continuing contact with both parents," implying joint physical custody. Such contact could also easily occur under joint legal/sole physical custody, with liberal visitation. Indeed, many sole-custody families have arranged visitation informally so that the child has "frequent and continuing contact with both parents."¹⁷⁰

The second clause of the subdivision¹⁷¹ is helpful in distinguishing between legal and physical custody, a distinction too often overlooked by courts in the past.¹⁷² A court can award joint legal custody without awarding joint physical custody. This clause also implies that the presumption favoring joint custody

at note 122 *supra*]; see also text accompanying notes 125 and 126 *supra*.

168. "For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate under this subdivision, the court may direct that an investigation be conducted pursuant to the provisions of Section 4602." CAL. CIV. CODE § 4600.5(b) (West Supp. 1980) (emphasis added).

169. For purposes of this section, joint custody means an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with both parents; provided, however, that such order may award joint legal custody without awarding joint physical custody. CAL. CIV. CODE § 4600.5(c) (West Supp. 1980).

170. California Women Lawyers and Jewish Family and Children's Services, Joint Custody Study Project (a study of families who have made joint custody arrangements out of court, available at 1600 Scott St., San Francisco, Ca. 94115).

171. See note 169 *supra*.

172. See, e.g., *Burge v. City and County of San Francisco*, 41 Cal. 2d 608, 262 P.2d 6 (1953), and *Adoption of Van Anda*, 62 Cal. App. 3d 189, 132 Cal. Rptr. 878 (1976).

may apply to joint legal custody alone. Thus, the definition is still unclear. Courts should carefully delineate whether they are awarding joint legal custody, or joint physical custody, or both.

Subdivision (d): Modification and termination are always governed by the best interests standard.¹⁷³ Changed circumstances are required,¹⁷⁴ because the original award presumably was based on the child's best interests. The court's reasons for the change are now required whenever one parent opposes it. The fact that one of the parents is not "cooperating" adequately in implementation of a joint custody award would not in itself seem to constitute the change of circumstances necessary for modification or termination. Non-cooperation may in some instances be in the child's best interests.¹⁷⁵ But perhaps if such non-cooperation greatly harmed the child, the necessary change of circumstances could be shown. Rewarding or punishing the parents is not the issue — the issue is the effect of parental behavior on the child.

Subdivision (e): This subdivision allows modification from sole custody to joint custody, whether sole custody was awarded before or after 4600.5 became effective. Of course, courts have continuing jurisdiction in custody cases,¹⁷⁶ and the modification standard is always "change of circumstances,"¹⁷⁷ so this subdivision is essentially redundant. Since courts already had authority to award joint custody prior to enactment of this new legislation, courts would not regard mere enactment of 4600 and 4600.5 as a

173. 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW 4607 (8th ed. 1974).

174. *Id.* at 4606.

175. See text accompanying note 164 *supra*. This issue was also raised in a letter from the late Professor Brigitte Bodenheimer to Judge Donald King, June 2, 1979:

Section 4600.5(d) . . . has a distinctly punitive flavor. It would cause many judges to award custody to the parent who is not 'guilty' of substantial or repeated failure to adhere to the joint custody plan. But in fact the 'guilty' parent may often be the one who realized that joint custody is not working or is hurting the children and who is therefore assuming primary child care. This is the parent who should then have custody . . . [J]udges [should] be able to concentrate their attention on the future of the children rather than on the deeds or misdeeds of one or both parents.

176. B. WITKIN, *supra* note 173, at 4547. See also *Gudelj v. Gudelj*, 41 Cal. 2d 202, 209, 259 P.2d 656, 660 (1953).

177. See text accompanying note 174 *supra*.

change of circumstances.¹⁷⁸

Subdivision (e) also mentions Civil Code Sections 5152 and 5163, part of the Uniform Child Custody Jurisdiction Act (UCCJA), to reiterate what should already be clear under the UCCJA, namely that a parent cannot child-snatch into California in order to obtain joint custody, or out of California to get out of a joint custody award. Unless the jurisdictional limits of the UCCJA are followed strictly, and custody determinations made very carefully, the likelihood of child-snatching under joint custody will rise greatly.¹⁷⁹

Subdivision (f): This subdivision provides for conciliation court assistance in formulating and implementing the custody plan. It is not restricted to joint custody plans. It is too soon to tell whether the mediation services provided for by California statutes will be effective in helping parents formulate and implement workable custody plans.¹⁸⁰

Subdivision (g): Access to the child's medical, school, and other records is guaranteed by this subdivision. The access is not made dependent on any particular custody award, so it should not create problems in terms of ascertaining whether the parents

178. The one exception may be where both parents had requested joint custody and the only reason the court denied it was because the court thought it did not have authority to award joint custody under the pre-1980 statute. In such circumstances, the parties should be able to go back to court now that there is explicit statutory authority for joint custody, and to get a joint custody award if the court finds such an arrangement to be in the child's best interests. The change of circumstances required would be merely the amendment of Civil Code § 4600 and the enactment of Civil Code § 4600.5.

179. Professors Bruch and Bodenheimer predicted an increase in child-snatching under joint custody. See note 159 *supra*, and testimony by Bodenheimer before the Senate Committee on the Judiciary's August 21, 1979 hearing on AB 1480, available among the late Professor Bodenheimer's papers, now with Professor Bruch. See also Bodenheimer, *Progress Under the UCCJA and Remaining Problems: Punitive Decrees, Joint Custody and Excessive Modifications*, 65 CALIF. L. REV. 978, 1009-12 (1977).

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

CAL. CIV. CODE § 4600.5(f) (West Supp. 1980) (emphasis added). See also CAL. CIV. CODE § 4607 (West Supp. 1981), CAL. CIV. PROC. CODE §§ 1731-1772 (West Supp. 1981), and CAL. GOV'T CODE §§ 26840.3, 26862 (West Supp. 1981), providing for state-wide conciliation services.

have joint legal custody. However, such access would be particularly important in joint legal custody cases, where each parent must have the information necessary for informed decision-making about the child's schooling and health. A potential problem with this section may be proving parenthood to the custodian of records — the custodian may be put in the position of having to balance the parent's right to confidentiality from strangers. It is notable that there was no legislative discussion of this provision.¹⁸¹ It will be interesting to see how the provision will be implemented, and whether a case will ever be presented where it might reasonably be argued that the right to confidentiality outweighs the parental right to access to information. In spite of the absolute language in 4600.5(g),¹⁸² one can imagine a situation where hostility between the parents is great, or where one parent has had little to do with the child's rearing over many years, so that such access may be sought more as a power play than as a genuine expression of responsibility and concern.

C. OTHER POTENTIAL PROBLEMS PRESENTED BY 4600 & 4600.5

There are at least four other problems presented by joint custody orders, arising independently from the statutes. First, child-snatching into or out of California to obtain or avoid joint custody awards may increase.¹⁸³ Courts can help solve the problem of parents removing children from this state by making sure the joint custody award is the right award for the particular family—that is, that joint custody is very likely to work in the particular circumstances. Courts of other states need to refrain from exercising jurisdiction over children recently brought into their territory; they must strictly adhere to the jurisdictional requirements of the UCCJA,¹⁸⁴ which many courts are presently failing to adhere to.¹⁸⁵ When presented with children snatched into the state in hopes of obtaining joint custody, California courts should likewise refrain. Additionally, once jurisdiction has

181. See note 130 *supra*.

182. "Notwithstanding any other provisions of law, access to records and information pertaining to a minor child, including but not limited to medical, dental, and school records, shall not be denied to a parent because such parent is not the child's custodial parent." CAL. CIV. CODE § 4600.5(g) (West Supp. 1980).

183. See text accompanying notes 109 and 179 *supra*.

184. CAL. CIV. CODE §§ 5152, 5163 (West Supp. 1980); see Uniform Child Custody Jurisdiction Act, 9 UNIFORM LAWS ANNOTATED 8 (Supp. 1981).

185. See, e.g., *Nelson v. District Court*, 186 Colo. 381, 527 P.2d 811 (1974); *Giddings v. Giddings*, 228 N.W.2d 915, 918 (N.D. 1975).

been obtained, courts should consider the child-snatching act in determining whether the parents are good candidates for joint custody. At first glance, such behavior would indicate the parties' inability to make joint decisions about the child.

Second, there is some indication that the Department of Social Services may interpret joint custody orders as disqualifying divorced parents from eligibility for AFDC.¹⁸⁶ Since AFDC is a crucial source of support for many single parents with young children,¹⁸⁷ this disqualification could have serious consequences. Courts can help avoid this problem by making very specific support orders when they award any form of joint custody. Of course, collection of child support has been¹⁸⁸ and will continue to be a problem.¹⁸⁹ Administrative regulations clarifying eligibility for AFDC are necessary; further legislation may also be required.

Third, prior to the enactment of these Civil Code sections, a problem was presented concerning the right of one parent to compromise a minor's personal injury claim where the joint legal custodian opposed the compromise.¹⁹⁰ The court's resolution of the matter was basically to ignore the legal custody issue, and to allow the parent who was the sole physical custodian to make the decision to compromise the minor's claim.¹⁹¹ A fourth, similar problem was presented in another joint legal custody case, where the sole physical custodian and her new spouse were allowed to perform a step-parent adoption against the wishes of

186. See text accompanying note 110 *supra*. The Sacramento County District Attorney, responsible for collecting child support which is overdue, voiced this concern to Senator Smith as well. Letter in State Archives, *supra* note 39.

187. See text and sources cited in Ulliver, *Father's Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 120 (1978).

188. Nagel & Weitzman, *Women as Litigants*, 23 HASTINGS L.J. 171, 190 (1971). The authors cite a study showing that about 50% of court-ordered child support goes unpaid.

189. Contrary to statements of joint custody proponents that joint custody may increase the likelihood that court-ordered child support will actually be paid, child support collection may be an even greater problem under joint custody. There is evidence that some fathers are seeking joint custody in order to lower their child support, thus they seem to be even less interested in paying what little child support is ordered. Blair, *supra* note 164; see also Equal Rights for Fathers, Important Alert (January 9, 1980) (unpublished paper; c/o James A. Cook, 10606 Wilkins Ave., Los Angeles, Ca. 90024).

190. *Burge v. City and County of San Francisco*, 41 Cal. 2d 608, 262 P.2d 6 (1953).

191. *Id.* at 618-19, 262 P.2d at 13.

the natural father, the joint legal custodian.¹⁹² The problem of defining just what joint legal custody means when the parents disagree is bound to arise frequently under joint custody awards. Courts can help prevent such problems from arising by making awards of joint custody, whether legal or physical, very specific as to each parent's rights and responsibilities.

IV. IMPLICATIONS FOR WOMEN

The rising interest in joint custody demonstrated by these statutes is apparently a product of changing social attitudes about parenting.¹⁹³ On the one hand, greater acceptance and use of joint custody would seem to benefit mothers, fathers, and children. Fathers may have increased contact with their children, keeping them in touch with a part of life which they often miss. Mothers may have more freedom to work and to pursue their own lives, while still being able to parent on a part-time basis. Mothers who previously felt stigmatized if they gave up their children in order to pursue other activities, and therefore grudgingly agreed to custody, may not have to make such an extreme choice in order to retain social approval.¹⁹⁴ And children may benefit from having two adults rather than one giving them attention and making decisions about their well-being. Joint custody could be a further step towards sexual equality. On the other hand, joint custody may not be such a step.

California legislators who voted for SB 477 and AB 1480, and New York legislators who voted for A. 9369, may have done so for admirable, humanitarian reasons. There is no reason to suspect their motivation, which may have been totally different from the motivation of some of their more vocal constituents. However, no matter how much or how little weight the legislators may have given to the arguments of these constituents, these arguments deserve some commentary. The same arguments are being presented to legislatures across the country.

The people pushing hardest for the legislative change in California were not feminists and were not advocating joint cus-

192. Adoption of Van Anda, 62 Cal. App. 3d 189, 132 Cal. Rptr. 878 (1976).

193. See, e.g., *Joint Custody: One Way to End the War*, NEW WEST (S. Cal. ed.), Feb. 26, 1979, at 42; Dullea, *Is Joint Custody Good for Children?*, N.Y. Times, Feb. 3, 1980, Style Section, at 32.

194. Weitzman & Dixon, *supra* note 8, at 502.

tody as a move toward sexual equality.¹⁹⁵ In fact, much of the literature they sent to legislators, the press, and the public in support of the legislation characterized mothers as opting for sole custody in order to get excessive support income from fathers.¹⁹⁶ A typical leaflet from this group describes the "motivation" of those who opposed a presumption of joint custody in every case as "money and greed, guilt, self-justification, rage and sadism, power play opportunism, punitive superiority, foreign cultural bias, and cockfight preoccupation."¹⁹⁷ Over and over, parents who ask for sole custody, who are almost always mothers, are described as "manipulative and thwarting," "vindictive," "recalcitrant," "unilaterally vetoing in advance any consideration of joint custody," while advocates of an automatic presumption of joint custody, such as members of fathers' rights groups, are called "innocent but cooperative, forgiving and sharing," and "peaceful."¹⁹⁸ Though their literature is careful to use the sex-neutral terms "custodial parent" and "non-custodial parent," or "parent who opposes joint custody" and "parent seeking joint custody," the innuendo is clear.

Additionally, literature from this source focuses much more on the father's "right" to parent after divorce than on the need to consider joint custody a viable alternative in determining each child's best interests.¹⁹⁹ Some of these proponents seemed to forget that neither parent has a "right" to custody,²⁰⁰ and that the child's interests are always paramount.

Questions as to these proponents' motivation are also raised by statistics reported in a recent study of divorces in two California counties.²⁰¹ The study's conclusion is that fathers were

195. See Report to Contributors, *supra* note 34.

196. "Sole custody is useful as a guarantee of tax-free, unreportable, [sic] income and sustenance from the non-custodial parent's after-tax residue." Leaflet from Equal Rights for Fathers (for the address of Equal Rights for Fathers, see note 34 *supra*).

However, the truth is that even when non-custodial fathers pay court-ordered child support, custodial mothers almost always bear the major responsibility for child support, due to the inadequacy of court-ordered child support. Weitzman & Dixon, *supra* note 8, at 500-01.

197. Leaflet from Equal Rights for Fathers. See note 196 *supra*.

198. Leaflet from Equal Rights for Fathers, Immediate—Absolutely Urgent 4 (May 18, 1980) (for the address of Equal Rights for Fathers, see note 34 *supra*).

199. *Id.*

200. *Holsinger v. Holsinger*, 44 Cal. 2d at 135, 279 P.2d at 962.

201. Weitzman & Dixon, *supra* note 8.

not seeking custody, either joint or sole, in any statistically significant greater proportion in 1977 than they did in 1968.²⁰² Though the researchers note that the total number of such requests from fathers has increased due to the increasing divorce rate,²⁰³ the percentage of fathers seeking custody remains very small.²⁰⁴ Thus, one wonders whether the joint custody proponents overstated their case to the legislature and media. One also wonders what the real impetus behind an automatic presumption of joint custody was, if so few fathers are even interested in sharing custody. Given these facts, such a presumption appears premature, if not totally out of touch with the wishes of most divorcing parents in California.

A further question is raised by a comment made by a supporter of AB 1480's original automatic presumption. He wrote that such a presumption was superior to a mere alternative of joint custody with a prerequisite of a written plan, because couples who can agree to a joint custody plan in writing usually share parenting informally anyway.²⁰⁵ Practitioners and scholars have noted that awards of sole custody with visitation can turn out to be joint custody arrangements in practice, where both parents so desire.²⁰⁶ Thus, it appears that a primary rationale for the legislation, clarifying judicial authority to award joint custody where both parents request it and it seems to be in the child's best interest, may have been superfluous.²⁰⁷ In effect, the statutes will have a greater impact where the parents are divided on the issue, a point hardly mentioned in the legislative process. Time after time Senator Smith and his staff stressed the right of parents to receive judicial approval of their own joint custody arrangement,²⁰⁸ while almost ignoring the much more problematic question of what to do when the parents do not have any agreement.

202. *Id.* at 502-03.

203. *Id.* at 519.

204. *Id.* at 502-03.

205. Letter from Gerald Silver, United Fathers Organization, to the editor of the Los Angeles Times (June 1, 1979). State Archives, *supra* note 39.

206. See Joint Custody Study Project, note 170 *supra*; *Joint Custody: One Way to End the War*, *supra* note 193, and Dullea, *supra* note 193.

207. Of course, the *Burge* and *Van Anda* problems remain, if sole custody is the legal status. See text accompanying notes 190-192 *supra*.

208. See text accompanying notes 39 and 75 *supra*.

At a recent discussion of the joint custody issue at a national conference, it was noted that sexual equality is occurring more quickly and easily in the area of family law than in other legal spheres.²⁰⁹ The speaker interpreted this trend as due to the fact that women have traditionally had more power than men under family law, at least in the last few decades; and, conversely, women have had less power than men in other fields. Thus women have more to lose from sexual equality in family law, and more to gain from equality in other areas. This viewpoint sees the move towards joint custody as a backlash by some men, who, under the guise of "equality," are attempting to take away women's power in the one area where it has traditionally been the strongest. The fact that fathers do not seem to be sharing parenting during marriage in any significantly greater numbers²¹⁰ would support the position that the issue of joint custody is being raised more out of a desire to fight than out of a genuine desire to share child care.²¹¹

Another study has noted at least one case in which a judge awarded sole custody to the father, based on the father's greater ability to provide for the child financially.²¹² This sounds like a clear abuse of discretion, because child support awards should be used to solve this problem. Awards which more accurately reflected the high cost of raising a child, along with better enforcement of such awards, are necessary to prevent this sort of backwards custody award. However, given the ever-widening gap between women's and men's incomes,²¹³ the economic rationale may be used more frequently in choosing between the father and the mother. One can imagine a court concerned with this factor "encouraging" a lower-income mother to settle for joint custody, rather than lose custody altogether to a higher-income father.

209. Comment made by an anonymous participant, Eleventh National Conference on Women and the Law (March 1, 1980) (Workshop on Child Custody Overview coordinated by Kathleen Herron and sponsored by Golden Gate University School of Law, San Francisco).

210. Ulliver, *supra* note 187, at 121.

211. The viewpoint voiced at the Conference, *supra* note 209, belies the stereotype that supporters of women's rights oppose motherhood. Rather, they support women's rights to choose among all the potential alternatives: motherhood, paid work, or a combination of both.

212. Ulliver, *supra* note 187, at 122.

213. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, THE EARNINGS GAP BETWEEN WOMEN AND MEN (available from the Dep't of Labor, Washington, D.C. 20210).

Similarly, one wonders whether other women who have traditionally been denied custody, such as lesbians and disabled women, will be likewise "encouraged" to "try" joint custody, or lose custody altogether due to their non-traditional lifestyles.²¹⁴

And when joint custody is strongly encouraged by courts, one wonders whether a parent who wanted sole custody, but was pressured into joint custody, and thus did not "cooperate" very well under the joint custody plan, might be deprived of custody altogether on a motion for termination brought by the other parent. The moving party would allege the other party's non-cooperation, and move for sole custody on the basis of the language in 4600(b); preferring as sole custodian "the parent most likely to allow the child or children frequent and continuing contact with the noncustodial parent." Thus, parents could ultimately be denied custody, either joint or sole, because they did not cooperate well with their ex-spouses.²¹⁵ One wonders whether expecting the cooperation necessary to implement joint custody from divorcing parties is rather unrealistic. Of course, this whole situation could be avoided by judges awarding joint custody only where it is clear that the parents can make joint decisions concerning the child.

Thus joint custody may be a step towards greater sexual equality, increased participation of fathers in child-rearing, and better parental relationships for children of divorce. However, it also presents serious questions regarding the motivation of some of its more vocal supporters, the effect it may have on women's roles in and out of the family, and the potential it presents for abuse of children's best interests, which was, after all, the reason for its introduction. When a request for joint custody is made, courts need to examine the situation very carefully, awarding joint custody whenever it is truly in the child's best interests, and refraining from such an award when it is not.

214. See *In re Marriage of Levin*, 102 Cal. App. 3d 981, 162 Cal. Rptr. 757 (1980), in which sole custody was originally awarded to the father solely because of the mother's physical disability. The appellate court was compelled to reverse by the authority of *In re Marriage of Carney*, 24 Cal.3d 725, 598 P.2d 36, 157 Cal. Rptr. 383 (1979), which forbids custody awards against a disabled parent solely on that basis. On remand the *Levin* court suggested that "joint custody . . . might be particularly appropriate in this case." 102 Cal. App. 3d at 983, 162 Cal. Rptr. at 758.

215. See Letter of the late Professor Brigitte Bodenheimer at note 175 *supra*, and accompanying text.