

# AlterNet

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## Solomon's Solution

By Trish Wilson, AlterNet

*Presumptive joint custody has become the norm in many states, as judges attempt to force cooperation in contentious divorces. But instead of bringing families closer together, mandated joint custody can tear them further apart.*

Angela is a divorced single mother whose ex-husband was abusive, often in front of the children. Her ex-husband had told her if she tried to divorce him, "I will say or do anything to prove you are an unfit mother. And if I can't, I will take the kids and you will never see them again."

Angela trusted that the court system would see his abusive behavior and protect her and her children, so she filed for divorce. Unfortunately, her husband's predictions came true. "I was pressured to accept an unstable and unsafe 50/50 custody schedule, even for my nursing infant," she said. "I was blamed for the violence in the house; for mine and my children's reasonable fears about their father's abuse. [The court] implied that if I didn't agree to shared physical custody, I would be punished by having sole custody awarded to the children's father. His verbal abuse of me and the children were deemed 'communication problems.' Incidents of child abuse and physical domestic violence were minimized and called a 'difference in parenting styles'."

When Angela finally agreed to joint custody, the results were a disaster. "The toll on our eldest child of unsupervised and increasing visitation was enormous," Angela said. "She would kick, struggle, scream and cry as he carried her bodily from my home for visitation. She chewed her hair and pulled it out. She picked at her skin so often it bled. She had stomach aches prior to visits with her father, crying jags, and although tested as a gifted child, she almost failed fourth grade. One of her teachers reported she would sit at her desk crying after being dropped off by her father."

Joint custody is all the rage in courts across the United States, but it doesn't always look as good in practice as it does on paper. Fathers' rights groups lobby for presumptive joint physical custody, which would make joint physical custody the starting point in all divorces, regardless of whether or not joint custody would be appropriate for the families. The Indiana chapter of the Children's Rights Council (a fathers' rights group) has urged the filing of class action suits nationwide calling for a presumption for joint physical custody. While presumptive joint custody looks fair on paper, it should not be applied to families in a cookie-cutter fashion. Custody decisions should be taken into consideration based on an individual families needs on a case-by-case basis.

In theory, it's a good idea. Children are thought to thrive best when there is "frequent and continuing contact" with both parents. Judges often proscribe joint custody in the hope that parents will work together for the sake of their children. Eleanor Maccoby and Robert Mnookin, authors of *Dividing the Child*, argue that "We are deeply concerned about the use of joint physical custody in cases where there is substantial parental conflict. Such conflict can create grave risks for children." They described a California study in which joint custody was sometimes awarded to resolve familial conflicts. The more legal conflict that occurred between the couples, the more likely the court was to order joint custody. They wrote that "three and one-half years after separation, these couples were experiencing considerably more conflict and less co-operative parenting than were couples for whom joint custody was the first choice of each parent."

Judith Wallerstein, in her book *Second Chances* writes that "[s]adly, when joint custody is imposed by the court on families fighting over custody of children the major consequences of the fighting are shifted onto the least able members of the family – the hapless and helpless children. The children can suffer serious psychological injury when this happens."

When both parents freely choose joint custody, it can be a great idea. Early studies of joint custody show the following characteristics commonly held by parents who chose it: they had cooperative relationships, there was less conflict at the time of divorce, they were financially well-off, the mothers had not remarried, they chose to live near each other, and they usually had only one child.

When these qualities are lacking, families are thrown into turmoil. Forcing joint custody leaves the child's primary parent without an ability to function properly. Beverly, a woman whose divorce was very divisive, still sees the negative effects of joint custody on her son. "My ex does give my son his asthma medications," she says. "Then, he tells the judge that my son is always sick when with me." The experience has changed her feelings about joint custody. When couples get a divorce no matter how civil it is," she says, "The first thing that goes out of the window is trust, communication and cooperation. These are the main ingredients in order for joint custody to work. Otherwise it becomes an arsenal to continue to control."

Joint custody became the most politically attractive concept of the 90's. Mary Ann Mason, in her book *The Custody Wars*, wrote that "joint or shared custody ... has been propelled by the rhetoric of fairness to parents, mainly fathers, who believe they have been discriminated against by the courts and excluded from their children's lives." And the idea has grown popular among judges. As New York Judge Felicia K. Shea observed, "Joint custody is an appealing concept. It permits the court to escape an agonizing choice, to keep from wounding the self-esteem of either parent and to avoid the appearance of discrimination between the sexes." No wonder Iowa Gov. Tom Vilsack signed a presumptive joint custody law in May 2004.

Mason described her first experience with joint custody, which was in 1978. Carole and George had divorced, and Carole insisted upon Mason representing both her and George. Mason balked because she was not convinced that one lawyer could fairly represent both party's interests. Carole and George were certain they both wanted "a cooperative rather than adversarial property

arrangement, and they also wanted to extend this cooperation to custody arrangements for their two sons, Jacob, six, and Josh, eight.”

To achieve this end, “they sold the family house, and each rented an apartment near the school that both boys attended. [Mason] helped them draft an elaborate custody plan. The children were to stay at Carole’s apartment Wednesday night through Saturday night, and at George’s Sunday night through Tuesday night. George picked up an extra Saturday every month to even out the schedule. Holidays were similarly divided.” They had two rules – keep the boys together and try to attend all their functions. At this time judges were skeptical of joint custody. To avoid seeing it rejected, Mason presented “a standard custody plan to the court that listed Carole as the custodial parent.” This meant that if something went wrong with the joint custody arrangement, a court would not enforce it.

After this, Mason did not hear from Carole until two years later, when she called Mason and asked her to stop by her apartment for a drink. When Mason arrived, Carole was smiling. She reported the good news that the custody arrangement was going well. There were some minor problems, but overall she seemed pleased with the arrangement. While joint custody seemed to work well for Carole, Jacob described a slightly different scenario. Each boy had a watch and was responsible for following “the schedule” without any reminders from their parents. Each boy had to keep track of his belongings as they moved from one house to the other. Neither boy could complain about things at the other house, nor could they discuss other people, such as, as Jacob put it, “like if Dad’s got a girlfriend or something.” That was a lot of time-keeping and list-making for two young children to do.

Over the next several years Mason saw Carole occasionally, and Carole remained positive about the joint custody arrangement. In the end, it lasted seven years. The boys at that point lived with her permanently and saw their father about once a week because George’s long-time girlfriend moved in with him. The arrangement did not end badly. Everyone remained on good terms and the boys still loved their father.

Whether or not joint custody will work depends on the children and the parents. Judith Wallerstein says, “Joint physical custody depends a great deal of the child’s capacity to move back and forth. If the child is a school age child, the child must be able to make friends and maintain them in two neighborhoods. Kids complain all the time that they miss birthday parties and sleep-overs, and that their playmates forget when they are coming. They must be able to maintain their activities like team sports, music, etc. They must feel wanted in both homes by step-parents or lovers and not playing second fiddle to child who is always there and says, ‘This is my house’.” She points out that “joint custody also depends on the flexibility of parents; their willingness to believe the other parent who says Jimmy is ill, or Jimmy does not want to come and their willingness to modify their schedules for the changing needs and wishes of the growing child. And it depends on the jobs that parents have, their other commitments, whether they travel a lot, and their partners too.”

Barbara Hauser, director of the Family Services Clinic, Middlesex Probate Court, in Cambridge, Mass., says that a small percentage of people getting divorced actually have joint custody in their legal documents. She sees an advantage in joint custody in that “children feel they have all the

advantages of both households. Having a more shared relationship mutes the feeling of distance from one parent, usually the father.” However, an atmosphere of conflict or tension takes away from the joint relationship.

The Family Services Clinic seeks to help couples that are having difficulty managing joint custody. It was “set up specifically to help people having disputes.” The Center offers parenting classes and help for parents regarding how to discipline children. Workers meet with parents and children to help them come to agreement about how their children are coping with separation and to help their children cope with disagreements. Sometimes there are disagreements over a parent having a new partner, or a parent who takes the children to relative’s homes. The child wants to visit more with the parents. The child needs to be with the parents. It is sometimes too hard for children to integrate new people into their lives.

Joint physical custody is not easy to maintain. The schedule is daunting. The parents must put aside their own issues and work together in caring for their children, and many parents are unable to do that. Joint custody does not inspire parents to cooperate with each other. It exacerbates conflict.

Children’s needs are often lost in custody cases because the parents are too concerned with their own desires, whether that desire is to keep up the facade of a harmonious relationship or the desire to keep a child completely to oneself. Parents should not risk turning themselves into stopwatches, overly concerned with the amount of time the child spends in each parental household. When joint custody works well, a child has a sense of balance and unity. When it’s forced on couples, joint custody has the opposite effect, tearing children apart.

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