PSYCHIATRIC CONSIDERATIONS IN PRESERVING THE BEST INTERESTS OF THE CHILD

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I. INTRODUCTION

The presence of children in divorcing families appears to increase the likelihood of litigation. In a study of 148 consecutive divorces in one jurisdiction, Westman and others found that 53% of the 105 families with children were involved in post-divorce legal action compared with only 2% of the remaining forty-three families without children. The majority of these actions were described as "repeated and intensive".[1] Divorce involving children is often a protracted process rather than a single legal event. It is preceded by marital discord, is often conducted in an atmosphere of acrimony and competition over children and property, and it may be followed by years of further disputes over these same matters in the legal and social arenas. This paper will review that relevant child psychiatry and psychology literature and will focus in particular on the data which are informative about issues crucial to the courts' disposition of custody and access matters.

II. THE EFFECT OF SEPARATION-RELATED AND DIVORCE-RELATED EVENTS ON CHILDREN

There have been numerous reports of the adjustment of children to their parents' separation and divorce. How children cope appears to be dependent

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1 J.C. Westman, D.W. Cline, W.J. Swift and D.A. Krâmer, "Role of the Child Psychiatrist in Divorce" (1970) 23 *Arch Gen Psychiatry* 416.

on factors in the child (age, sex, maturity, disabilities of learning or physical capacity), the circumstances which led up to the separation, the speed with which custody and access has been resolved and the quality of the custodial parenting.[2] The studies confirm that separation and divorce are stressful for children, and imply that the distress may be reduced by the nature of the custody disposition.

The longitudinal study of Wallerstein and Kelly tells us a great deal about the types of distress experienced by children, although the design of the study did not allow the distress attributable solely to separation and divorce to be distinguished from the distress attributed to the many other events which attend separation and divorce.[3] They evaluated 131 children and adolescents from sixty separated couples consecutively registered with the civil authorities, and followed them for up to ten years.

The majority of children of all ages experienced initially a sense of loss and sorrow. Many of the children between 3 and 8 years believed that they had brought about their parents' separation in some way. They were more distressed if the custodial parent was depressed and angry. Pre-school children (3-5 years) showed developmental regressions, separation anxiety and sleep disturbances. They tried to repair the rift between their parents by being 'good' or by doing things for them, and almost half of these children seemed sadder a year after the separation than at the time of the separation. Young school age children (5-8 years) also tried hard to bring their parents together, but did so by acting as messengers between the parents. They showed open grieving, feared being replaced and often showed a precipitous decline in their school work.

Nine to twelve year olds tended to ally themselves with the custodial parent against the non-custodial parent. They showed open resentment, but they could also be more compassionate with a troubled parent. In contrast to the younger children however, they appeared to be able to involve themselves more in activities outside the home (such as games and clubs), and this seemed to allow them to ventilate some of their feelings in a socially acceptable way.

Although the adolescents were best able to understand the circumstances which had led to the separation, they became more interested in, and concerned about, the new relationships their parents developed and they were often caught in loyalty conflicts between the parents. The breakdown of their parents' relationship tended to make them doubt their own sense of sexual identity. They worried about their future sexual competence, their potential as marital partners, and whether or not they should marry at all. About a third of them were more troubled a year after the separation than at

2 G. Brun, "Conflicted Parents: High and Low Vulnerability of Children to Divorce" in E.J. Anthony, C. Koupernik and C. Chiland (eds), *The Child and His Family. Volume IV Vulnerable Children* (1978); M.S. Jellinek and L.S. Slovik, "Divorce: Impact on Children" (1981) 305 *N Eng J Med* 557; J.S. Wallerstein and J.B. Kelly, "The Impact of Divorce on Children" (1980) 3 *Psychiatric Clinics N Am* 455.

3 Wallerstein and Kelly, note 2 *supra*, 455.

the time of the separation.

At follow-up ten years later, the age of the child at the time of the parental separation emerged as an important factor. Children who were under 6 years at the time, and had little recall of the events, had generally attained a good level of adaptation and adjustment. However, those who were adolescent at the time of separation were often very distrustful of heterosexual relationships and still harboured a great deal of bitterness about the separation.[4]

Although the data are far from complete, it is clear that children of all ages are susceptible to emotional distress in the twelve months following their parents' separation. Furthermore, it has been estimated that for 15-25% of children whose parents separate, the immediate emotional turmoil or conflict is serious enough to warrant psychiatric treatment.[5] Kalter and Renbar suggest that the age and maturity of the child determines the form the disorder may take.[6] However, there is also good evidence now that most of this distress subsides within a year, provided the parents' relationship is no longer acrimonious.[7]

I have reviewed selectively the growing literature concerning the overall extent to which children are affected adversely by parental separation and divorce. There are few definitive data about which children are most vulnerable to such effects, and which custody and access dispositions will lead to the best adjustment of which children. A decade ago Derdeyn noted that there was "an absence of the type of empirical studies that would be most effective in influencing the Courts".[8] Although the picture is more complete now, there still exist gaps which can be only partially filled by reference to data collected in other areas of child psychiatry and psychology

4 J.S. Wallerstein, "Children of Divorce: Preliminary Report of a Ten-Year Follow-Up" in E. Anthony and E. Chiland (eds), *The Child and His Family. Volume III* (1984); J.S. Wallerstein, "Children of Divorce: Preliminary Report of a Ten-Year Follow-Up of Young Children" (1984) 54 *Am J Orthopsychiatry* 444.

5 N. Kalter, "Children of Divorce in an Outpatient Psychiatric Population" (1977) 47 *Am J Orthopsychiatry* 40; J.F. McDermott, W. Tseng, W.F. Char and C.S. Fukunaga, "Child Custody Decision Making; The Search for Improvement" (1978) 17 *J Am Acad Child Psychiatry* 104; J.A. Rohrlich, R. Ravier, L. Berg-Cross and G. Berg-Cross, "Effects of Divorce: A Research Review with a Developmental Perspective" (1977) 6 *J Clin Psych* 16; Jellinek and Slovik, note 2 *supra*; note 1 *supra*.

6 N. Kalter and J. Renbar, "The Significance of a Child's Age at the Time of Parental Divorce" (1981) 51 *Am J Orthopsychiatry* 85.

7 S. Chess, A. Thomas, S. Kora, M. Mittleman and J. Cohen, "Early Parental Attitudes, Divorce and Separation, and Young Adult Outcome: Findings of a Longitudinal Study" (1983) 22 *J Am Acad Child Psychiatry* 47; E.M. Hetherington, M. Cox and R. Cos, "The Development of Children in Mother Headed Families" in H. Hoffman and D. Reiss (eds), *In the American Family: Dying or Developing* (1983); R.A. Kulka and H. Weingarten, "The Long-Term Effects of Parental Divorce in Children on Adult Adjustment" (1979) 35 *J Soc Iss* 50; J. Saucier and A. Ambert, "Adolescents Self-Reported Mental Health and Parents' Mental Status" (1983) 46 *Psychiatry* 363; E.J. Slater, K.J. Stewart and M. Linn, "The Effects of Family Disruption on Adolescent Males and Females" (1983) 18 *Adolescence* 531; J.S. Wallerstein, "Children of Divorce: The Psychological Tasks of the Child" (1983) 53 *Am J Orthopsychiatry* 230.

8 A.P. Derdeyn, "A Consideration of Legal Issues in Child Custody Contests" (1976) 133 *Am J Psychiatry* 165.

research. In drawing these data together, each form of custodial relationship will be considered separately: exclusive custody, joint custody and access.

III. EXCLUSIVE CUSTODY

The research findings which bear directly and indirectly on which parent should be awarded exclusive custody will be related to guidelines which have moulded the practice of the courts in recent years.[9] They do not reflect accurately current Australian law, but the major issues are common to those addressed by our courts as well as those in the United Kingdom, Canada and the United States. So this review will consider the empirical evidence relevant to them. The broad guidelines address the following issues:

1. The continuity of existing satisfactory parenting relationships (the status quo)
2. Current parent-child relationships
3. Stability of the home
4. Prospective parenting capacity
5. Separation of siblings
6. Young children need their mother
7. Sex match parent and child
8. The child's preference
9. Needs and special needs

Before I consider separately the research relevant to each guideline two general points must be made. First, following separation children may show transient psychiatric symptoms for the first time, or pre-existing psychiatric disturbance may be exacerbated briefly, or permanent adverse psychological consequences may accrue. The Court is generally aware of the emotional distress of the child under such circumstances. However, a child who is obviously distressed shortly after the separation is not necessarily so because of the incompetence of the parent with whom the child resides at that time; the distress may well be a response to the process of separation itself and need not dictate a change of custodial parent. The event of separation is not nearly as detrimental to children as is the parental disharmony which precedes and follows the break-up.[10]

Second, the psychiatrist's recommendations may be nullified ultimately by the parents' actions. The children who suffer the most, and who are most frequently adversely affected by the parental divorce, are those whose parents engage in protracted litigation for years following the divorce, particularly if the children are themselves the subject of the litigation.[11] The process of

9 G.A. Awad, "Basic Principles in Custody Assessments" (1978) 23 *Can J Psychiatry* 441; note 8 *supra*; S. Fine, "Children in Divorce, Custody and Access Situations: The Contribution of the Mental Health Professional" (1980) 21 *J Child Psych & Psychiatry* 353; J. Goldstein, A. Freud and A. Solnit, *Beyond the Best Interests of the Child* (1973).

10 M. Rutter, "Parent-Child Separation: Psychological Effects on the Children" (1971) 12 *J Child Psych & Psychiatry* 233.

11 Jellinek and Slovik, note 2 *supra*; Wallerstein and Kelly, note 2 *supra*.

litigation and endless fighting between the parents appears to be the damaging agent. Under these circumstances the final custody disposition, each parents' psychological adjustment, and their material circumstances, all seem to be immaterial to the children's health. It is critical that the Court identifies this malignant process in its early stages.

The guidelines represent an artificial disentanglement of the issues, and are presented as follows for clarity. Clearly, for example, current parent-child relationships and the stability of the home have an important bearing on the nature of the status quo. I will now consider separately each guideline. Those which are supported and those which are unsupported by research findings will be indicated.

1. The Continuity of Existing Satisfactory Parenting Relationships (the Status Quo)

The presumption that an existing satisfactory parent-child relationship should not be interrupted by the Court in favour of custody by the other parent has neither been adequately researched nor seriously challenged. Goldstein and others asserted the absolute necessity of this type of relationship for the optimal development of children, and argued that the rights of the non-custodial parent should not be allowed to infringe on a good parent-child relationship and produce loyalty conflicts in the child.[12] Although this opinion has been influential, it is based on anecdotal material. Nevertheless, what we know of child development suggests that domicillary changes are likely to have at least a temporary detrimental effect, even if in the long run the benefits to the child outweigh the disadvantages. It is unlikely that this issue will ever be resolved satisfactorily. Changes from one custodial parent to another frequently take place under such acrimonious circumstances that it will be difficult to know if any adverse effects can be attributed to the discontinuity, or to the other circumstances surrounding the change.

2. Current Parent-Child Relationships

Research on access has underlined the importance of a satisfactory relationship with both parents, but the issues before the Court usually require a choice between two parents. The clinical problem is to assess adequately the qualitative nature of the parent-child relationship between the respective parents and children. This has most often been based upon a clinical impression following conjoint interviews with the parent and child.

Psychological instruments which purport to rate objectively the nature and strength of emotional bonds between family members have no place in such appraisals. They were developed for use in intact families, not those which have broken up. Such instruments may make an important positive contribution when their reliability and validity have been demonstrated empirically. Until then, the Courts will be forced to rely on credible clinical assessment.

12 Goldstein, Freud and Solnit, note 9 *supra.*

3. Stability of Home

The crucial element in this guideline is the capacity of the custodial parent to provide consistent, warm parenting in an internally stable domicile. The importance of this has not been tested directly in studies of children of divorce. The available longitudinal studies do not allow a determination of its relative importance over other concurrent factors such as parenting ability and absence of ongoing litigation.[13] Nevertheless, data from other studies on the beneficial effect of a consistent, warm home suggest that the Courts are well advised to consider this factor.[14]

An important issue is what constitutes stability: a family with a well functioning step-parent in addition to the custodial natural parent can provide a very stable family life.[15] Instability is only introduced into such "blended" families when the parental relationship is not harmonious (in which case it exerts no less an adverse effect than living with constantly fighting natural parents) or when the step-parent, for some personal reason, interferes with a satisfactory relationship between the natural parent and child.[16] It is therefore important to determine the role of the step-parent in the "blended" family, and the motivations underlying the nature of the relationship with the step-children. They may have a good or a bad influence on the stability of the home, and they may complement or sabotage the parenting by the natural parent.

The undivided attention of the custodial parent is not necessary for psychologically stable care, and recent research indicates that well-chosen alternate care such as that provided for young children in pre-schools and day care centres, need not compromise child development or behaviour.[17] Such facilities are capable of enhancing the development of children if they offer a warm and consistent nurturing environment in a sufficient material environment. The relationship of young children to the natural parents need not be undermined by alternate care, provided that the natural parent still occupies the central nurturant role in the child's eyes. Children in alternate care continue to prefer parents over care-givers, since good quality alternate care does not disrupt the parent-child bond if the parent makes an effort to spend as much time as possible in productive interaction with the child.[18]

It follows that the parent whose occupation requires that alternate care be provided for the children, particularly young children, need not fear that this reflects an unstable home, and the Court should not be swayed by evidence

13 Hetherington, Cox and Cos, note 7 *supra*; McDermott, Tseng, Char and Fukunaga, note 5 *supra*; Wallerstein and Kelly, note 2 *supra*.

14 Note 10 *supra*; M. Rutter, "Stress, Coping and Development: Some Issues and Some Questions" (1981) 22 *J Child Psych & Psychiatry* 323.

15 W.G. Clingempeel and N.D. Repucci, "Joint Custody After Divorce: Major Issues and Goals for Research" (1982) 91 *Psych Bull* 102.

16 A.E. Atwell, U.S. Moore and C.S. Nowell, "The Role of Step-Parents in Child Custody Disputes" (1982) 10 *Bull Am Acad Psychiatry & L* 211.

17 M. Rutter, "Social-Emotional Consequences of Day Care for Pre-School Children" (1981) 51 *Am J Orthopsychiatry* 4.

18 *Ibid.*

to this effect. Of course, the adequacy of the alternate care and the capacity of the child to function without adverse consequences within the alternate care setting should be demonstrated to the Court wherever possible.

4. Prospective Parenting Capacity

The capacity of the parent to provide a developmentally facilitating environment for the child may be impaired by the parent's reaction to the separation-divorce process.[19] It is important to distinguish this temporary incapacity from an enduring parenting incapacity which had preceded the break-up and which is likely to persist in the ensuing years (and so be an important consideration in disposition).

Of particular concern to the Court is whether a parent who has a manifest psychiatric illness, or who demonstrates an apparent defect in parenting, by virtue of this, should be denied custody. The Court has difficulty weighing evidence presented concerning the mental health of the various parties. The children of personality disordered parents (hysterical, alcoholic or antisocial) and neurotic parents are as likely to be disturbed as the children of psychotic parents.[20] Perhaps more important than the nature of the parental psychiatric illness to the consideration of custody is whether the illness remits for lengthy periods (as in psychosis, but not in personality disorder) and whether the spouse has a psychiatric illness as well.[21] Most psychiatrists experienced in custody work stipulate that parental mental illness is only relevant to the extent that it affects directly the parenting capacity.[22]

There is no evidence that homosexuality per se is a psychiatric illness. Moreover, homosexual custodial parents do not exhibit any intrinsic lack of parenting ability. Available research data concern only the children of homosexual mothers. Children in the custody of lesbian mothers seem as well adjusted as children in the custody of heterosexual mothers. They show no evidence of confused gender identity or other psychiatric disorders, and they appear to do as well at school.[23] There are no well controlled studies of homosexual custodial fathers.

19 D.G. Ollendick and B.J. Otto, "MMPI Characteristics of Parents Referred for Child-Custody Studies" (1984) 117 *J Psych* 227.

20 M. Rutter, *Child of Sick Parents. An Environmental and Psychiatric Study.* Institute of Psychiatry, Maudsley Monographs No. 16, 1966; J. Worland, H. Lauder and V. Hesselbrock, "Psychological Evaluation of Clinical Disturbance in Children at Risk for Psychopathology" (1979) 88 *J Ab Psych* 13.

21 B. Waters, "Psychiatric Disorders in the Offspring of Patients with Affective Disorders" (1985) *J Preventive Psychiatry* (In Press).

22 G.A. Awad and R. Parry, "Access Following Marital Separation" (1980) 25 *Can J Psychiatry* 357; Jellinek and Slovik, note 2 *supra.*

23 S. Golombock, A. Spencer and M. Rutter, "Children in Lesbian and Single Parent Households: Psychosocial and Psychiatric Appraisal" (1983) 24 *J Child Psych & Psychiatry* 551; B. Hoeffer, "Children's Acquisition of Sex-Role Behaviour in Lesbian Mother Families" (1981) 51 *Am J Orthopsychiatry* 536; M. Kirkpatrick, C. Smith and R. Roy, "Lesbian Mothers and their Children: A Comprehensive Survey" (1981) 51 *Am J Orthopsychiatry* 545.

5. Separation of Siblings

There are no good studies of children from broken families which are informative on this guideline. When sibling separation occurs, there are generally so many other disruptions and sources of distress in the children's lives that it is unlikely that a definite answer will emerge. However, Wallerstein[24] reported that older children recalled as very important and sustaining the support which they received from their siblings. In the presence of parental divisions, a strong sibling bond may fulfil much of a child's need for relationship.[25] Informed clinical opinion abhors further disruption of an already divided family, and most psychiatrists working with custody and access disputes can recall cases where, in the face of ongoing post-separation parental fighting, the children banded together to provide each other with emotional and material support.

6. Young Children Need their Mother

This guideline presumes that only the mother can provide the nurturing environment required by an infant to permit optimal emotional, intellectual and physical development. There are no studies examining whether infants or toddlers (children up to 2 years) are better adjusted psychologically when they are reared by a custodial mother than when they are reared by a custodial father, but the results of maternal deprivation research are inferentially informative.

Many of the concerns regarding the purported adverse effects of maternal deprivation are unfounded. First, the major adverse childhood and adult adjustments (depression, delinquency, mental retardation) are now attributed to other important components of the events which led to or followed the loss of the mother, rather than to the loss itself. For example, mental retardation found in institutionalised orphans was found to be due more to lack of educational materials and opportunities in the institutions than to the orphaning itself.[26] Secondly, adverse consequence can be avoided even though the mother does not return: for example, distress in young children separated from their mothers can be alleviated by the attention of a substitute warm and nurturing adult.[27] Thirdly, in follow-up studies of infants and children who lost their mothers by death, and where it was evident that this was the sole loss, long term adverse psychological consequences have not been convincingly demonstrated. This area has been extensively reviewed by Rutter and he has concluded that it is clearly the quality of alternative care which is the crucial factor in the child's

24 Wallerstein, in Anthony and Chiland (eds), note 4 *supra*.
25 S. Bank and M.D. Kahn, "Sisterhood-Brotherhood is Powerful: Sibling Sub-Systems and Family Therapy" (1975) 14 *Family Process* 311; G. Tsukada, "Sibling Interaction: A Review of the Literature" (1979) 49 *Smith Coll Studies Soc Wk* 229.
26 M. Rutter, "The Long-term Effects of Early Experience" (1980) 22 *Dev Med Child Neur* 800.
27 Note 10 *supra*.

adjustment.[28] That is, other adults can satisfactorily fulfil a parenting role, and the absence of one parent need not have adverse consequences.

Furthermore, in the case of separated parents there is no evidence that awarding custody of children under 2 years to fathers has a detrimental effect. Thus, the Court should be open to either parent, irrespective of sex, gaining custody of young children. The responsibility is on each parent to provide evidence to the Court that he or she can rear the child in a nurturant and developmentally facilitating environment.

7. Sex Match Parent and Child

The guideline assumes particular importance when there is only one child of the union, or all the children are of the same sex, or where there is a question of breaking up a sibship and awarding split custody, or when the needs of one particular child in a sibship are likely to dictate the disposition of the whole sibship. Single fathers appear to be satisfactory custodial parents.[29] Moreover, there are data on children of separated parents whose adjustment has been correlated with the sex match. Few of the studies are well designed, but three are scientifically sufficiently sound to allow a more objective appraisal of this guideline.

Hetherington and others have reported on a careful assessment of forty-eight pre-school boys and girls (mean age 4 years) who were in the sole custody of their mothers, and forty-eight carefully matched control children from intact families.[30] Although they found that both boys and girls in the mother custody families were less well-adjusted than their respective controls at one year, they found that among girls the adverse effects had almost disappeared by two years, whereas among boys, the effects were more intense and enduring. Furthermore, the less adequate the mothers' parenting skills, the more troublesome was the boys' behaviour. This study did not address the issue of boys and girls living with their fathers.

Santrock and Warshak evaluated the adjustment of pre-adolescent (6-11 year olds) boys and girls in twenty father-led and twenty mother-led homes three years after separation and compared them with children in twenty intact homes.[31] They found that children living with the opposite-sexed parent were less well-adjusted than children living with the same-sexed parent, but they also found that competent parenting was associated with competent social behaviour in the child irrespective of sex. Furthermore, they were unable to demonstrate that the children from intact families were significantly better adjusted socially than the group of children from divorced families. They speculated that the absence of a difference indicated

28 Note 17 *supra*; note 26 *supra.*

29 P. Chang and A.S. Deinard, "Single-Father Caretakers: Demographic Characteristics and Adjustment Process" (1982) 52 *Am J Orthopsychiatry* 236; R. Turner, "Divorced Fathers who Win Contested Custody of their Children" (1984) 54 *Am J Orthopsychiatry* 498.

30 Hetherington, note 7 *supra.*

31 W.J. Santrock and R.A. Warshak, "Father Custody and Social Development in Boys and Girls" (1979) 35 *J Soc Iss* 112.

that by the time three years had passed, the children in their study had adjusted to the separation.

Rosen also looked at father-led and mother-led families. In a study of ninety-two children of parents divorced over a ten year period, she was unable to demonstrate that sex mis-match had an adverse effect on the adjustment of the children.[32] She also found that free access to the non-custodial parent appeared to ameliorate the more traumatic aspects of divorce. Her results may be questioned on the basis of small sample size, given the wide age range of children under study (pre-schoolers to late adolescents).

These data suggest that while an opposite-sexed custodial parent may initially have more problems being an effective parent, such effects may wane with time, particularly as the parent adjusts to the separation and regains confidence as a parent. This is in agreement with the findings of Wallerstein and Kelly[33] at the five year follow-up in their longitudinal study of children of divorce, and with Rutter[34] who demonstrated that in boys, a resumption of family harmony after the separation of constantly fighting parents was associated with a reduction in conduct problems. Both studies found this effect irrespective of the sex of the custodial parent. Rutter has also suggested that boys may be more vulnerable than girls to the adverse effects of stress such as separation and divorce.[35] Thus, a further question is whether sex of parent may be a more important consideration for boys than for girls.

Henderson recently reviewed studies indicating that there was a detrimental effect of father-absence of gender role and socialisation in boys.[36] He was unable to determine whether the father's absence was itself deleterious or whether it was the circumstances which brought about the absence.

The data concerning this guideline are incomplete. It is uncertain first, whether sex matching itself is detrimental or whether sex mis-matching exposes impaired parenting skills; second, whether boys are more vulnerable to stress in general and whether for them, parental sex mis-match may be a consideration; and third, whether any of these effects apply only to certain age groups of children.

8. The Child's Preference

This guideline allows a child to participate in the disposition process. The child must be sufficiently mature cognitively and emotionally to appreciate the factors which enter into such a major decision, and to appreciate the long-term implications of their preference. In many jurisdictions the preference of adolescents is sought routinely. However, this practice is not

32 R. Rosen, "Some Crucial Issues Concerning Children of Divorce" (1979) 3 *J Div* 19.
33 Note 2 *supra*.
34 Note 10 *supra*.
35 *Ibid*.
36 J. Henderson, "On Fathering (The Nature and Functions of the Father Role). Part 1" (1980) 24 *Can J Psychiatry* 403.

universally accepted. For example, Miller, a child psychiatrist, believes that the child's preference should not be a decisive factor, and that the wishes of the parents should be favoured over those of the child.[37] He feels that the current emphasis on a child's legal rights often obscures the importance of treating the child as a child, rather than as a mature adult.

The psychiatrist is often asked in court whether the child has made their preference in a mature way, in which they allowed for future as well as immediate considerations. Unfortunately there are no scientific data which enable the psychiatrist to be confident that such preferences by children reflect a course which is in their best interests.

9. Needs and Special Needs

The general need of children for a developmentally facilitating home is widely recognised in custody cases, and the Courts' assessment of parenting capacity generally addresses this issue. In some cases however, the special needs of individual children may dictate custody dispositions which are apparently contrary to these general goals. For example, the capacity of one parent to provide for the material needs of a physically handicapped child may compensate for over-indulgent parenting attitudes, or the special training of a speech therapist-parent may carry particular weight when one child has a major speech impairment.

Generally though, unless there is a particularly close fit between a parent's special capacities or training and a child's special needs, children with any sort of handicap are going to find growth and development a more difficult process, and are especially in need of an understanding and warm parent. There are no direct studies of this, but the importance of a good fit between parental characteristics and children's temperament is well known. Rutter and others have described the consequences of a poor fit, which frequently leads to scapegoating and to emotional maladjustment in the child.[38]

IV. JOINT CUSTODY

Generally the Court seeks guidance on which parent should have exclusive custody and which parent should have how much access, but the Family Law Act 1975 (Cth) does allow joint custody to be awarded to both parents. I will focus on real or implemented joint custody rather than notional joint custody. The possible benefits of such an arrangement include the child's active involvement in the lives of both parents, the active participation of both parents in the life of the child, elimination of a custody dispute, less opportunity for the child to hold divided loyalties, and a greater

37 G.H. Miller, "The Child's Preference for Placement in the Divorced Family" (1981). Presented at the Annual Meeting of the American Academy of Psychiatry and the Law – San Diego.

38 M. Rutter, H.G. Birch, A. Thomas and S. Chess, "Temperamental Characteristics in Infancy and the Later Development of Behavioural Disorders" (1963) 110 *Brit J Psychiatry* 657.

likelihood that the parents' relationship will be relatively harmonious. The risks include instability associated with constant shuffling between homes, the possibility that parental circumstances may change and a custody battle will ensue, and immense practical problems if the respective homes are far apart geographically.[39]

Joint custody agreements may be quite complex, and varieties include long-term block time (alternate years/seasons/terms with each parent), alternating short-term block times (alternate months or weeks, split weeks, alternate days or even split days), birdsnest (parents move in and out of the 'children's' home), and free access (children move back and forth at will).[40] These arrangements are complex, and their complexity is often devised to serve the parents' needs (for symmetry and an equal share) rather than the children's. Not surprisingly, excessively complex and inflexible arrangements often appear to be detrimental to the children.[41] The complex psychological issues involved have been reviewed in depth elsewhere.[42] Important considerations yet to be studied include inter-parental relationships, mechanics of alterations, similarity-dissimilarity of home environments, and the impact of the remarriage of one or both parents.

Nevertheless, there is evidence emerging that when such arrangements are possible, there may be definite benefits for the children. Ilfield and others found that the relitigation rate (a measure of post-divorce parental conflict) in joint custody families was one half of that in exclusive custody familes.[43] Furthermore, in an uncontrolled study, Steinman concluded that joint custody children felt that both parents loved and wanted them, although the children found that the demands of having two homes could be burdensome.[44] In a controlled study of the emotional adjustment of four groups of boys living in different types of families (joint custody families, exclusive custody families, happy intact families, unhappy intact families), Pojman found that the joint custody boys were significantly better adjusted emotionally than were boys from exclusive custody or unhappy intact families.[45] Of course these results may simply indicate that a prerequisite for joint custody is a relative lack of parental antipathy, in which case the good outcome could be expected.

These data indicate that, for whatever reason, joint custody can be a satisfactory disposition for children. There is no evidence that it may be more harmful than exclusive custody, but there is also no support for

39 Note 15 *supra.*

40 A.E. Atwell, U.S. Moore, E.J. Neilson and S. Levite, "Effects of Joint Custody on Children" (1984) 12 *Bull Am Acad Psychiatry & L* 149.

41 *Ibid*; G.A. Awad, "Joint Custody: Preliminary Impressions" (1983) 28 *Can J Psychiatry* 41; A.P. Derdeyn and E. Scott, "Joint Custody: A Critical Analysis and Appraisal" (1984) 54 *Am J Orthopsychiatry* 199.

42 Note 15 *supra.*

43 F.W. Ilfield, H.Z. Ilfield and J.R. Alexander, "Does Joint Custody Really Work? A First Look at Outcome Data of Relitigation" (1982) 139 *Am J Psychiatry* 62.

44 S. Steinman, "The Experience of Children on a Joint Custody Arrangement: A Report of a Study" (1981) 51 *Am J Orthopsychiatry* 403.

45 E. Pojman quoted in Ilfield, note 43 *supra*, 63.

decreeing joint custody without the consent of both parties. However, because it can lead to a complicated lifestyle for parents and children alike, the capacity of both parents to set aside personal differences in the service of the child's best interests is an important consideration in a recommendation of joint custody.[46]

V. ACCESS

Courts have generally upheld the right of non-custodial parents to liberal access to their children, and the view of Goldstein and others that enforceable access engenders dangerous loyalty conflicts in children has received no empirical support.[47] Rather, longitudinal and follow-up studies have repeatedly supported the important positive role that the non-custodial parent can have in the development and adjustment of children, particularly when the access does not give rise to continuing conflicts.[48] Children recalled with pleasure the quality of these interactions, and conversely they regretted deeply the non-custodial parent not taking up access rights. Children who had adjustment problems were more likely to have had little or no access to the non-custodial parent, whereas liberal availability of a non-custodial parent with whom the child had a good relationship was associated with better adjustment in the short and the long term.[49] When the non-custodial parents did not avail themselves of access it was usually for some personal reason, rather than the court having denied or restricted access. Grief and demoralisation resulting from the separation may lead them to avoid access and unwittingly to deprive their children of a needed relationship. Thus, every effort should be made to maintain their motivation for access.

On the other hand, the exercising of access rights may provide the opportunity for continued fighting between the parents. The adverse consequences of this for the children appear to be due principally to the ongoing discord rather than the access itself.[50] It is in these extreme cases that the views of Goldstein and others on the inadvisability of enforceable access are most persuasive.[51]

The Court usually seeks guidance in those cases in which the evidence points to denial or restriction of access being in the child's best interests. There are no rigorous research studies of this issue, however, it has been suggested that children are not likely to be damaged by access to a psychotic parent unless they are intimately involved in the parent's psychotic thinking, whereas access to a physically or sexually abusive parent usually engenders

46 E.P. Benedek and R.S. Benedek, "Joint Custody: Solution or Illusion?" (1979) 136 *Am J Psychiatry* 1540.
47 Goldstein, note 9 *supra*.
48 Note 32 *supra*; note 31 *supra*; Wallerstein and Kelly, note 2 *supra*.
49 Note 1 *supra*; Wallerstein and Kelly, note 2 *supra*; Chess, note 7 *supra*; note 32 *supra*.
50 R.E. Emery, "Interparental Conflict and the Children of Discord and Divorce" (1982) 92 *Psych Bull* 310; note 10 *supra*; Wallerstein and Kelly, note 2 *supra*.
51 Goldstein, note 9 *supra*.

fear in the child which has a detrimental effect.[52] It is possible, however, that a good relationship between the custodial parents and the child may buffer somewhat the adverse effects of some types of unpleasant access visits. For example, in intact families where one parent is seriously disturbed, or even when there is serious parental turmoil, a good relationship with the other parent has a relatively protective effect.[53]

Restriction or denial of access should only be considered if the harm to the child outweighs the benefits, and this may be an extremely difficult determination. When the child wishes to continue access visits to which the custodial parent objects, compelling evidence needs to be introduced as to the noxious effect of such access. Unsupported statements by the custodial parent should be treated with caution. There should be a definite behavioural change by the child which is corroborated by a relatively independent witness such as a teacher. But objective evidence of this nature may not be too difficult to find, as there is now substantial research documenting the poor psychological adjustment of children whose parents are in constant conflict, and conversely the good adjustment of children of parents who maintain relatively harmonious relationships in matters concerning the children.[54]

The Court may order access when a child adamantly refuses to visit, even if this appears to be based on a desire to wreak revenge on the non-custodial parent. There is no research on the permanence of such unyielding attitudes, nor whether acquiescence by the Court is in the child's best interests.

VI. DISCUSSION

The circumstances which lead to an adjudicated decision in custody and access cases do not allow for rigorous scientific research into the relative merits of alternate dispositions. Moreover, the effects on different children's development of different judicial dispositions cannot easily be compared as the determining circumstances vary from case to case. Finally, most clinical reports of adverse effects of parental separation and divorce describe biased samples. The majority of separating couples reach agreement between themselves about disposition of custody without recourse to formal litigation.[55] Expert psychiatric and psychological opinion is sought most often in the minority of cases which are contested. The better designed longitudinal studies such as those of Hetherington and others and of

52 Awad, note 9 *supra.*

53 Rutter, note 14 *supra.*

54 C.R. Ahrons, "The Continuing Co-parental Relationship Between Divorced Spouses" (1981) 51 *Am J Orthopsychiatry* 415; A.P. Derdeyn, "The Family in Divorce: Issues of Parental Anger" (1983) 22 *J Am Acad Child Psychiatry* 385; Chess, note 7 *supra* ; E.S. Ellison, "Issues Concerning Parental Harmony and Children's Psychosocial Adjustment" (1983) 53 *Am J Orthopsychiatry* 73; Emery, note 50 *supra.*

55 P.M. Guest and M. Gurvick, *Divorce in Australia: A Guide to the Family Law Act, 1975* (1979); *Family Law in Australia: Report of the Joint Select Committee on the Family Law Act* (Vol.1, AGPS 1980).

Wallerstein and Kelly, examined samples of children which were representative of those from broken families in general, rather than those from families in which custody was contested.[56] The poor prognosis in this latter subgroup of children bears out the experience of legal practitioners that irrespective of disposition, these children fare worse than children whose custody is not contested.[57]

The evidence of unprejudiced mental health professionals can make an important contribution to disposition, but it is critical that a credible balance be struck between generalisations derived from an appreciation of the data reviewed above, and a careful, comprehensive assessment of the child and family. The natural desire to make clear and unequivocal recommendations to the Court regarding custody and access should not lead to unequivocally pessimistic prognostication. It is important to remember that some children under even the most adverse circumstances, can develop satisfactorily, free of major distress, and apparently lead a relatively well-adjusted adulthood.[58] Unfortunately we cannot identify precisely these more competent children. Thus, mental health professionals should restrain themselves from making dire predictions about any particular disposition by the Court, either for custody or access, unless behavioural deterioration can be already definitely attributed to the proposed disposition or can be confidently expected to result from it. However, children who have responded adversely and with lasting sequelae to stresses prior to the marriage break-up, have already demonstrated their vulnerability and should be so identified in evidence.

Caution should be exercised when the particular vulnerabilities of the child have not been exposed by previous events. It is here that the inferential studies (not directly considering custody matters) reviewed above can be helpful in identifying the components of alternate dispositions which may interact with the strengths and vulnerabilities of any particular child.

56 Hetherington, note 7 *supra*; Wallerstein and Kelly, note 2 *supra*.
57 Guest and Gurvick, note 55 *supra*.
58 P. Eisen, "Children under Stress" (1979) 12 *ANZJ Psychiatry* 193.