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JOINT CUSTODY

WHERE HAS IT BEEN, WHERE IS IT NOW, AND WHERE IS IT GOING?

The Honourable Mr. Justice John H. Gomery

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BY: The Honourable Mr. Justice John H. Gomery,
Superior Court of Quebec,
1 Notre Dame St. E.,
Montreal, Que.
H2Y 1B6.

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The concept of joint custody is of recent origin. With only a few exceptions it was virtually unheard of in Canada before 1975.

Traditionally the courts have awarded custody of a child to one or other of its parents once it has been determined that they are incapable of continuing to live together or choose to live apart. Many parents in these circumstances are able to agree upon who is to care for the child, the access to be accorded to the other parent and related matters; such agreements are almost invariably ratified by the court. So it is only exceptionally that a judge is called upon to award custody following trial of the issue. The award of custody confers upon the custodial parent the rights and obligations formerly exercised together by the parents while they were married or cohabited. The non-custodial parent's role is limited to more or less generous rights of access coupled with some degree of supervision over the child's upbringing, which may or may not be defined by the Judgment or Order.

With the increasing incidence of marriage breakdown and divorce, the public, the legal profession

and the Judiciary have gradually become more aware than they were formerly of the traumatic effect upon a child of the dissolution of the family unit into which it was born. The situation is aggravated when the inter-spousal conflict extends to disagreements concerning custody and access. Parents frequently fight over custody and visiting even after the legal termination of their marital or other relationship has put an end to all possibility of fighting on other subjects. The child is distressed by this conflict, of which it is invariably aware and suffers feelings of guilt for being the occasion for continuing hostility between the parents he still loves. It is often confused about its future relationships with them and to whom it owes loyalty. These feelings of guilt and confusion are added to its existing feelings of insecurity at being abandoned by the non-custodial parent, even where such abandonment did not in fact or in law occur.

Confronted by the apparent misery of many of the children of divorce, the courts have sought new and innovative legal remedies with a view to cushioning the impact upon a child of a custody order which seems, to the child, to deprive him of the care, comfort and presence of one of his parents. Joint custody seemed, for a time at least, to be one such solution. In Baker v. Baker (1978), 3 R.F.L. (2d) 193, Madam Justice Boland of the Ontario Supreme Court was one of the first to advocate the concept of joint custody. Her Judgment imposed joint custody upon two parents found to be equally

qualified to give affection and guidance to their eight -year old son, although care and control of the child was granted to the mother. She defined joint custody as follows:

> « Joint custody is shared parental responsibility. A joint custody award gives legal custody to both parents, with care and control to one and liberal access to the other. Although a joint custody order, as opposed to the more common custody and access order, has been infrequently used by Canadian courts, in my respectful view, there is nothing unusual or startling about such an order, as it merely continues the status enjoyed by the spouses during their marriage.
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> .....
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> It would seem logical to begin with a presumption in favour of joint custody, as children who fare best after a divorce are those who are free to develop full and loving relationships with both parents. Surely, whenever possible, a child is entitled to the advice, training and love of both parents, as well as the benefit of two separate but interdependent homes. »

The Ontario Court of Appeal ordered a new trial of the Baker case and criticized Madam Justice Boland rather harshly for her espousal of the concept of joint custody: its decision is reported at (1979) 8 R.F.L. (2d) 236. At page 246 Mr. Justice Lacourcière states:

> « We believe that judges engaged in the resolution of child custody litigation must take a realistic and practical approach to joint custody, and limit that form of order to the exceptional circumstances which are rarely, if ever, present in cases of disputed custody. This kind of healthy cynicism is perhaps best reflected in the words used by my brother Weatherston when he was sitting in the trial division. He said in a brief oral judgment in McCahill v. Robertson (1974), 17 R.F.L. 23 at 23-24 (Ont. H.C.):
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> " Much has been said during the argument about the divided custody, about the desirability of the child keeping a close relationship with his father and how desirable that is. My judgment here is based on the very strong feeling

> that divided custody is inherently a bad thing. A child must know where its home is and to whom it must look for guidance and admonition and the person having custody and having that responsibility must have the opportunity to exercise it without any feeling by the infant that it can look elsewhere. It may be an unfortunate thing for the spouse who does not have custody that he or she does lose a great deal of the authority and indeed to some extent the love and affection of the child that might otherwise be gained, but this is one of the things which is inherent in separation and divorce. The parents cannot have it both ways. As I say, in my view, it is vitally necessary that the child know where its home is, to whom it is responsible and that there be no doubt in the mind of the child as to that. Within those limits, the parent who does not have custody should, of course, have access to the child under terms which are as reasonably generous as possible, but without interfering with that basic responsibility on the parent having custody. " »

One would have thought that this unanimous Judgment would have settled the issue, in Ontario at least, but only some six months later in Kruger v. Kruger (1979), 11 R.F.L. (2d), page 52, two Judges of the Ontario Court of Appeal dismissed an appeal from a trial court Judgment which had refused to order joint custody, but Madam Justice Wilson, since elevated to the Supreme Court of Canada, wrote a long and powerful dissenting opinion, indicating that, in her mind at least, joint custody orders deserve consideration even when the parents are unable to agree upon them. At page 69 she states:

> « It is perhaps timely for courts in Canada to shed their "healthy cynicism" and reflect in their orders a greater appreciation of the hurt inflicted upon a child by the severance of its relationship with one of its parents. While purporting to award custody on the basis of the child's best interests, our courts have tended to overlook that in some circumstances it may be in the child's best interests not to choose between the parents but to do everything

possible to maintain the child's relationship with both parents. We accept now, I believe, that men and women who fall short as spouses may nevertheless excel as parents. We have also become increasingly aware over the last number of years that the context of a divorce action is the worst possible context in which to form an assessment of the spouses as people let alone as parents. The adversarial process by its nature requires each spouse to attack the other in order to protect his or her economic interests. This has caused an undue emphasis to be placed at trial on the deterioration of the husband and wife relationship and not enough on the parent and child relationship. Indeed, as the Law Reform Commission of Canada points out in its Report on Family Law (1976), c.4,p.48, para.4.12:

> " Custody considerations sometimes over-emphasize interspousal matters to the exclusion of the all-important parent-child relationship. The traditional legal concepts of proper conduct as a spouse should not be allowed to intervene where the court must determine the strengths and weaknesses of the parties as parents rather than as husbands and wives. The parent who should raise a child is not necessarily the legally 'innocent' spouse. The law should be made more flexible, making custody less an all-or-nothing proposition; a judicial determination that one parent will assume primary responsibility for raising and caring for a child should not necessarily exclude the other from the legal right to participate as a parent in many other significant areas of the child's life." »

(The emphasis is added by Madam Justice Wilson)

Meanwhile courts in other provinces do not always consider themselves to be bound to follow the reasoning of the Kruger and Baker Judgments, and tend to decide litigation upon the particular circumstances of each case.

In Zwicker v. Morine (1980), 16 R.F.L. (2d) 293, the Nova Scotia Court of Appeal cancelled an order for joint custody granted by the trial division on the ground that it had not been asked for by either party. It indicated that such orders should only be granted where the parents agree to them. At page 302 Mr. Chief Justice MacKeigan says:

> « A joint order may be helpful, and not harmful, only where the parents agree to co-operate and are capable of co-operating. Paradoxically, such an order would thus be unobjectionable only when the parents are the kind for whom no controlling order is necessary at all! For such parents, an order would merely affirm or approve their agreement as to how they propose to bring up their children. Such parents, and their children, do not need to care whether any order is issued or whether a formal order purports to give legal right of custody to the father, to the mother or to both.
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> The concept of joint custody of a child by separated parents seems to me to overlook the traditional role of custody as a matter of physical possession and control, a question of which parent shall have the child. If the parents are living apart, I have difficulty in seeing how they both can have custody at the same time. If "care and control" is given to one parent by a joint custody order, what practical right is left with the non-controlling parent?
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> (Underlining added)

But in British Columbia joint custody orders seem to be granted frequently, even in circumstances where the parents may be living far apart: See

Charlton v. Charlton (1980) 15 R.F.L. (2d), 220,

Berard v. Berard (1979) 10 R.F.L. (2d), 371.

In Manitoba joint custody awards have been maintained by the Manitoba Court of Appeal on at least three occasions, with very little discussion as to the validity of the concept: See

Miller v. Miller (1974) 17 R.F.L., 92,

Parker v. Parker (1975) 20 R.F.L., 232,

Fontaine v. Fontaine (1980) 18 R.F.L. (2d) 235.

It should be noted however that in the latter case Mr. Justice Huband commences his reasons for Judgment with the statement that

« In custody disputes, an order awarding legal custody to both parents is usually to be avoided. »

In Prince Edward Island joint custody awards were made in the trial division, in the following reported cases:

McCabe v. McCabe (1979) 11 R.F.L. (2d) 260,

Groom v. Groom (1979) 10 R.F.L. (2d) 257.

The most recently reported case on the subject is from Saskatchewan, Stewart v. Green (1983) 26 Sask. R.80, where the Unified Family Court of Saskatchewan refused to grant joint custody to parents who were unable to agree on some aspects only of the child's upbringing: however the court indicated that it was influenced by the child's age and sex (a five and a half year old girl) and that when she becomes nine or ten it might very well give favourable attention to a new demand for joint custody.

In the writer's home province of Quebec, joint custody orders are rarely, if ever, imposed upon parents competing for the custody of a child or children, and Judges will sometimes closely question counsel proposing that such orders be granted on the agreement of the parties.

Where does this mixed jurisprudence leave today's trial judge who is faced with (a) parents who ask the court to confirm their agreement that they should have joint custody, and (b) parents who are contesting custody, one of whom asks that a joint custody order be granted?

In the former case the benefit of any doubt should be given to the parents, at least in the absence of indications that the agreement will not work. It is difficult to conceive of other circumstances in which the court would not encourage them to agree on all matters having to do with the care and upbringing of their child, notwithstanding their separate residences.

In the latter case, unless the Judge in question is prepared to risk the kind of thunderbolts that descended upon the unfortunate head of Madam Justice Boland, he should order joint custody only in the extremely rare case where he finds as a fact that the parents are capable of reaching agreement on all matters having to do with the care and upbringing of their child, even though they are before the court contesting that child's custody. Even then such an order is a calculated risk and, depending upon the composition of the Court of Appeal of his province, might be struck down.

The writer suggests that the devolution of the jurisprudence as outlined above is unfortunate, not because the reasoning of the courts which have disapproved of joint custody orders is faulty, but because there is a dichotomy between joint custody as seen by legal institutions and joint custody as seen by the public at large including many persons expert in the field of child psychology. For these persons joint custody is a beguiling concept and they are genuinely puzzled about the reluctance of the legal system to embrace it with enthusiasm. Divorced parents are seen, perhaps too

optimistically, to be capable of reaching agreement on all matters concerning their children. They believe and hope that all disagreements and misunderstandings will be negotiated away by discussion and mediation. The child will surely benefit from an atmosphere of compromise and from the knowledge that he still belongs to both of his parents who are no longer in conflict concerning him.

As noted in Baker in Appeal the judicial approach is:

> « .... that judges engaged in the resolution of child custody litigation must take a realistic and practical approach to joint custody, and limit that form of order to the exceptional circumstances which are rarely, if ever, present in cases of disputed custody. »

This is tantamount to saying that in a contested matter a joint custody order is never appropriate.

Is this dichotomy merely one opposing idealism and cynicism, or is it not rather a question of semantics?

The word 'custody', with its connotation to the layman of possession and ownership is at the root of the problem. To the ordinary person having an imperfect understanding of difficult legal concepts, if he or she 'loses' the custody of a child a negative judgment has been made by authority as to that person's qualities as parent and person. For many this is difficult to bear. Rather than assume the thankless role of visiting parent or what has been referred to in some cases as 'chequebook daddy', the unsuccessful litigant will all too often abandon his interest in the child for whose custody

he was ferociously contesting only a short time previously. I suggest that this aspect of the traditional custody order has not always been sufficiently appreciated in the past.

The emotional trauma for the losing parent of his or her unsuccessful custody case may be overcome by awarding joint custody, and for all practical purposes, the result will be the same. After all, what is the real difference between an order for joint custody which gives the physical care and control of the child to the mother but permits the father to take the child out on alternate weekends and during certain specified holiday periods, and the traditional award of custody to the mother which grants to the father access to the child alternate weekends and on the same specified holidays? Is the father more likely or able to interfere in the mother's upbringing of the child in the former case than in the latter? Is there not an advantage <u>for the child</u> in permitting the unsuccessful litigant to save face?

Where is the concept of joint custody going in the future.

It is safe to assume that the idea will not go away by itself. The writings of experts in child care continue to advocate joint custody (for a list of some of these authorities see <u>Stewart v. Green</u> cited above), experts to whom the courts turn for guidance persist in recommending it,

and it is safe to predict that at least some trial judges will continue to be so attracted by the concept that they will order joint custody on the grounds that in the particular case before them there are the exceptional and rare circumstances of which the appeal court judgments speak. Some day perhaps the Supreme Court of Canada will give us all clear guidelines as to when a joint custody order is justified.

In the meantime it is worth noting that Bill C47 «an Act respecting divorce and corollary relief» deposited for first reading on May 1, 1985 proposes in section 16(3) that the law will be that a court making an order respecting the custody of or the access to the children of the marriage «may make an order ..... granting custody of any or all children of the marriage to any one or more persons.» This indicates that the legislator is for the first time requiring the court to consider the possibility of an order for joint custody. This proposed legislation will make it more difficult to resist the arguments of counsel that a joint custody order should in appropriate cases be made, even when they have not been consented to.

QUESTIONS FOR DISCUSSION:

1. Is there any real difference between a joint custody order with care of the child granted to one parent and visiting rights granted to the other, and the traditional custody order granting custody of the child to one parent with visiting rights to the other?

2. Is it a sufficient justification to award joint custody on the grounds that it will give both parents a sense of participation in a child's life which they would not have otherwise?

3. Does section 16(3) of Bill C47 officially endorse the concept of joint custody in divorce matters?

4. If joint custody is not ordered, how can a custody order be formulated so as to avoid the danger that the losing party will los interest in the child?

5. If joint custody is ordered, how should the court provide for the resolution of disagreements between the parents on ongoing concerns such as higher education, summer camp, orthodontistry, ballet lessons, etc.? Is it safe to assume that the parents will be able to agree upon these matters, or should the order contain some mechanism for settling disputes?
