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Persons

Katherine Shaw Spaht

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PERSONS

*Katherine Shaw Spaht**

JOINT CUSTODY**

Anticipation of the first appellate court decision interpreting Louisiana's joint-custody statute need no longer occupy the minds of interested members of the profession. In *Plemer v. Plemer*[1] the Louisiana Fourth Circuit Court of Appeal reviewed a court-imposed joint custody plan. The father had filed a rule seeking modification of a prior judgment awarding sole custody of the child to the mother. Requesting joint custody of the child, the father had submitted a proposed plan of implementation.[2]

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* Professor of Law, Louisiana State University.

** A partial list of publications concerning joint custody includes: J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAK-UP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980); Abarbanel, *Shared Parenting After Separation and Divorce: A Study of Joint Custody*, 49 AM. J. ORTHOPSYCHIATRY 320 (1979); Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C.D. L. REV. 523 (1979); Foster & Freed, *Joint Custody: A Viable Alternative?*, 15 TRIAL 26 (May, 1979); *Family Law in the Fifty States: An Overview*, 16 FAM. L.Q. 289 (1983); Gaddis, *Joint Custody of Children: A Divorce Decision-Making Alternative*, 16 CONCILIATION CTS. REV. 17 (1978); Green, *Joint Custody: California's Presumptive Panacea*, 12 U. WEST L.A. REV. 67 (1980); Lemon, *Joint Custody as a Statutory Presumption: California's New Civil Code Sections 4600 and 4600.5*, 11 GOLDEN GATE U.L. REV. 485 (1981); Miller, *Can Joint Custody Serve the Best Interests of the Child?*, 9 BULL. AM. ACAD. PSYCHIATRY & L. 210 (1981); Ramey, Stender & Smaller, *Joint Custody: Are Two Homes Better than One?*, 8 GOLDEN GATE U.L. REV. 559 (1979) (includes discussion of the Joint Custody Study Project, a comprehensive study of joint custody in the initial stages in San Francisco, California); Comment, *The New Joint Custody Statute: Chrysalis of Conflict or Conciliation?*, 21 SANTA CLARA L. REV. 471 (1981); Note, *Joint Custody Awards: Toward the Development of Judicial Standards*, 48 FORDHAM L. REV. 105 (1979).

Two articles that analyze Louisiana's joint custody statutes appear in the previous volume of the *Louisiana Law Review*: Comment, *Joint Custody in Louisiana*, 43 LA. L. REV. 85 (1982); Note, *Louisiana's New Joint Custody Law*, 43 LA. L. REV. 759 (1983).

Two additional articles are recommended because in one, experience as a judge applying California's joint custody statute is related; Mills & Belzer, *Joint Custody As a Parenting Alternative*, 9 PEPPERDINE L. REV. 853 (1982). In the other, a critical evaluation of joint custody statutes is conducted. Schulman & Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U.L. REV. 538 (1982).

Examples of joint custody plans can be found in 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS § 14, forms 14.10-.13 (rev. ed. 1982); M. MORGENBESSER & N. NEHLS, JOINT CUSTODY (1981).

1. 436 So. 2d 1348 (La. App. 4th Cir. 1983).

2. *Id.* "In his proposed plan Mr. Plemer agreed that Mrs. Hughes should retain physical custody of Michele during the school year, but he sought physical custody during three weekends a month, half of the summer vacation, and on alternate holidays." *Id.* at 1349. Under Louisiana Civil Code article 146 which became effective January 1, 1983, a parent acting individually could submit a custody implementation plan to the court prior to issuance of a joint custody decree. Unless otherwise indicated, the Civil Code articles cited refer to the articles in effect prior to September 1, 1983.

In response to the request for joint custody, the mother opposed any custody change "on the grounds that shared custody would be confusing to Michele and disruptive to everyone's lives."[3] Furthermore, she refused to file a joint custody plan.

After a hearing, the trial judge imposed "a comprehensive and totally structured plan."[4] The judge's plan differed in some important respects from that submitted by the father, and on appeal additional modifications of the plan were made. Two aspects of the appellate decision are significant: (1) its interpretation of the joint custody legislation, and (2) its reflection of the extent to which the court will impose and modify a detailed plan of implementation.

In interpreting Louisiana Civil Code article 146, which became effective January 1, 1983, the court opined that joint custody required a physical sharing of the child but not "a fifty-fifty sharing of time."[5] Each case, according to the *Plemer* court, will be decided based upon "the child's age, the parents' availability and desires, and other factors."[6] In *Plemer*, the court noted that "[t]he weekly schedule (over one year) places Michele with her mother approximately two-thirds of the time."[7] Such a physical sharing under the court's plan was reasonable, "[c]onsidering the child's age and the sole custody enjoyed by Mrs. Hughes in the past."[8]

Clarification of the sharing of physical custody was necessary in the *Plemer* case because the language of article 146[9] did not specify what was required to constitute a sharing of physical care and control under a joint custody decree. As has been suggested,[10] the statutory language permitted the possibility of a single residence. The 1983 legislative

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3. *Id.*
4. *Id.* at 1350.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. Article 146(A)(1) & (D) provides in part:

(1) To both parents jointly. The court, shall, unless waived by the court for good cause shown, require the parents to submit a plan for implementation of the custody order, or the parents acting individually or in concert may submit a custody implementation plan to the court prior to issuance of a custody decree. Such plan may include such considerations as the following:

(a) Domiciliary arrangements for the child or children.

. . . .

D. For purposes of this Article, "joint custody" shall mean the parents shall share the physical custody of children of the marriage, subject to any plan of implementation effected pursuant to Paragraph A of this Article, and shall enjoy the natural cotutorship of such children in accordance with Article 250. Physical care and custody shall be shared by the parents in such a way as to assure a child of frequent and continuing contact with both parents.

10. Note, *Louisiana's New Joint Custody Law*, 43 LA. L. REV. 759, 766-67 (1983).

amendments[11] to article 146 further elucidate the meaning of physical sharing in a joint custody decree: (1) the parents shall "to the extent feasible" share the physical custody of children of the marriage; (2) in making an award of physical custody, the court shall consider a list of factors including the "distance between the respective residences of the parties";[12] and (3) a plan of implementation shall allocate time periods during which each parent shall enjoy physical custody of the children.[13]

The court-imposed plan in *Plemer* provided that the mother would have physical custody for approximately nine months during the school year, and the father would have physical custody all weekends but one per month. During vacation periods, the father assumed physical custody but would share all weekends but one per month with the mother. Holidays were alternated each year. However, one modification of the imposed plan by the fourth circuit was the allocation of Christmas vacation:

> However, allocation of the entire Christmas vacation to one parent is unrealistic because it totally deprives one parent of visitation during the two-week Christmas time. Even though we feel the parents would have worked out their own arrangement to share Christmas, out of caution we amend the judgment to provide that the non-custodial parent shall have visitation on December 25 from 2:00 p.m. to 10:00 p.m., subject to any mutually agreeable modifications.[14]

Such a modification of a plan imposed in a joint custody decree reflects the appellate court's willingness to scrutinize and modify a detailed plan.

Another interesting feature of the court-imposed plan relating to physical joint custody was the provision that "[t]he parent with physical custody is liable for the child's conduct."[15] Civil Code article 250[16] ac-

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11. LA. CIV. CODE art. 146, *as amended by* 1983 La. Acts, No. 695, § 1 [hereinafter cited as Act 695]; *see infra* text accompanying notes 59-70.

12. LA. CIV. CODE art. 146(C)(2)(k), *added by* Act 695; *see* Miller, *Joint Custody*, 13 FAM. L.Q. 345, 373-74 (1979).

13. LA. CIV. CODE art. 146(D), *as amended by* Act 695; *see* Miller, *supra* note 12, at 390.

14. 436 So. 2d at 1350; *cf.* Miller, *supra* note 12, at 390-91.

15. 436 So. 2d at 1350.

16. Article 250 provides in part:

> Upon divorce or judicial separation from bed and board of parents, the tutorship of each minor child belongs of right to the parent under whose care he or she has been placed or to whose care he or she has been entrusted; however, if the parents are awarded joint custody of a minor child, then the cotutorship of the minor child shall belong to both parents with equal authority, privileges, and responsibilities, unless modified by order of the court or by an agreement of the parents approved by the court awarding joint custody.

Note that article 146(D) defines joint custody to mean that the parents enjoy the natural cotutorship of such children "in accordance with Article 250." However, there is no occasion for tutorship coincidental with an award of pendente lite custody under article 146.

cords to parents awarded joint custody as in *Plemer* equal authority, privileges, and *responsibilities* "unless modified by order of the court or by an agreement of the parents approved by the court awarding joint custody."[17] In *Plemer*, the specific modification was by order of the court. The modification presumably would not affect the right of the victim damaged by the conduct of the minor to hold each parent responsible[18] for the whole of the claim.[19] Yet the modification is applicable between the parties and should be interpreted as permitting indemnification[20] from the parent who had physical custody when the damage was occasioned.[21] Ultimately, the provision of the decree stipulating that physical custody determines liability alters the contribution rights[22] of two persons vicariously liable to a victim.[23]

In *Audubon Insurance Co. v. Fuller*,[24] plaintiff appealed a summary judgment dismissing his suit against the father of a minor. The trial court had granted summary judgment, assuming that upon the divorce of the parents the mother had been awarded custody of the child and thus was solely responsible to the plaintiff for damage occasioned by the minor while the child was residing with the father. In reversing the trial court

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Civil Code article 246 reads: "The minor not emancipated is placed under the authority of a tutor after the dissolution of the marriage of his father and mother or the separation from bed and board of either one of them from the other."

17. LA. CIV. CODE art. 250.

18. LA. CIV. CODE art. 2318: "The father, or after his decease, the mother, are responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons. The same responsibility attaches to the tutors of minors."

19. Under a joint custody award since both parties enjoy the natural cotutorship of the minor, each is responsible to the victim for the damage occasioned under the second paragraph of Civil Code article 2318. Quoted *supra* note 18. The responsibility is solidary, LA. CIV. CODE art. 2091, although not the perfect solidarity provided for in Civil Code article 2093. *See, e.g.*, Foster v. Hampton, 381 So. 2d 789 (1980); Williams v. City of Baton Rouge, 252 La. 770, 214 So. 2d 138 (1968); Kern v. Travelers Ins. Co., 407 So. 2d 2 (La. App. 4th Cir. 1981); *see also* LA. CIV. CODE art. 2092. *But see* LA. CODE CIV. P. 4262; Comment, *Joint Custody in Louisiana*, 43 LA. L. REV. 85, 113 n.164 (1982).

20. LA. CIV. CODE art. 2106: "If the affair for which the debt has been contracted *in solido*, concern only one of the co-obligors *in solido*, that one is liable for the whole debt towards the other codebtors, who, with regard to him, are considered only as his securities." *Cf.* LA. CIV. CODE art. 2103.

21. The responsibility of the father would be analogous in instances where he is permitted indemnification from the person in whose care he entrusted the minor: "The father, or after his decease, the mother, are responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of the other persons, *reserving to them recourse against those persons*." LA. CIV. CODE art. 2318 (emphasis added).

22. LA. CIV. CODE art. 2103.

23. LA. CIV. CODE art. 2318; *see supra* note 19.

24. 430 So. 2d 343 (La. App. 3d Cir. 1983).

and remanding the case, the Louisiana Third Circuit Court of Appeal found that a genuine issue of material fact existed. Under the Oklahoma judgment of *divided custody* the evidence was insufficient to establish who had legal custody at the time of the tortious act. The following language of the divorce judgment supported the conclusion that *divided custody* had been awarded: "That the defendant [father] shall have reasonable rights of visitation and *shall have custody* of the children during the defendant's vacation for a period not to exceed three months."[25] Although the parties stipulated that the child was residing with the father at the time of the act, no evidence established that, under the custody judgment, the act occurred during the father's vacation. If under the decree the father had legal custody, he alone would be liable to the plaintiff for damage occasioned by his child. A divided custody decree is distinguishable from a joint custody decree; under the former only one parent alternately enjoys the rights and *responsibilities* of legal custodian or natural tutor, whereas under the latter both parents simultaneously enjoy the rights and responsibilities of natural cotutors.[26]

Joint custody also was defined in *Plemer* to include both parents "participating in decisions affecting the child's life,"[27] or joint legal custody. Article 146(D) imposes an obligation upon parents awarded joint custody "to exchange information concerning the health, education, and welfare of the minor child; and, unless allocated, apportioned, or decreed, the parents or parties shall confer with one another in the exercise of decision-making rights, responsibilities, and authority." Furthermore, because they enjoy natural cotutorship,[28] the Code of Civil Procedure requires parents awarded joint custody to rear and educate the child in accordance with his station in life[29] and to prudently administer his property and represent him in all civil matters.[30] Under both article 146 relative to joint

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25. *Id.* at 344 (quoting March 15, 1972, judgment of the District Court of Cleveland County, Oklahoma) (emphasis added).

26. Divided custody allows each parent to have the child for a part of the year. This form of custody may also be referred to as alternating custody. Each parent has reciprocal visitation rights under this arrangement, and each exercises control over the child while the child resides in his or her custody.

Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C.D. L. REV. 523, 526 (1979) (footnote omitted). For a recent Louisiana case in which divided custody was rejected, see Colley v. Colley, 435 So. 2d 1141 (La. App. 1st Cir. 1983).

In contrast, articles 146 and 250 impose on parents awarded joint custody the rights and responsibilities of cotutors with the obligations of exchanging vital information concerning the child and of conferring with one another in the exercise of decision-making rights, responsibilities, and authority.

27. 436 So. 2d at 1350.

28. LA. CIV. CODE art. 250.

29. LA. CODE CIV. P. art. 4261.

30. LA. CODE CIV. P. art. 4262.

custody[31] and article 250 relative to cotutorship,[32] this equal and joint responsibility for decision-making may be affected by allocation to one parent in the decree.

In *Plemer*, the general decision-making authority was to be shared by the parents;[33] however, the trial judge had allocated to the mother the authority concerning the child's education during the elementary school years "but during high school the judgment shifts this authority to the father."[34] Accepting the wisdom of the allocation to the mother of the initial responsibility for educational decisions,[35] the fourth circuit observed, "we feel strongly that the trial judge erred by suddenly interrupting this scheme at the high school level."[36] The court then proceeded to modify the judgment by maintaining ultimate authority in the mother for educational decisions throughout the child's high school years "with Mr. Plemer participating as set forth in the court's plan."[37] The court advanced the following reasons for the modification: "It seems illogical to shift educational responsibilities after one parent (Mrs. Hughes) would have guided this aspect of Michele's life for so long. There is no advantage to this change; in fact, continuity in such a critical area as education is in Michele's best interest."[38]

In addition to responsibility for education, the trial court decree stipulated that "each parent . . . provide whatever medical treatment is necessary while the child is in his (her) physical custody."[39] Another provision of the decree provided that all medical information should be available to both parents,[40] and all major medical decisions should be

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31. LA. CIV. CODE art. 146(D), *as amended by* Act 695;

> Joint custody shall also mean that the parents shall enjoy the natural cotutorship of such children in accordance with Article 250, subject to the plan of implementation effected pursuant to Paragraph A of this Article. . . . An award of joint custody obligates the parties to exchange information concerning the health, education, and welfare of the minor child; and, unless allocated, apportioned, or decreed, the parents or parties shall confer with one another in the exercise of decision-making rights, responsibilities, and authority.

32. LA. CIV. CODE art. 250, quoted in part *supra* note 16.

33. "These parents are to share equally their child, and wherever possible share equally in the decision-making process regarding this child." *Plemer*, 436 So. 2d at 1351 (quoting Plemer v. Plemer, No. 77-03348, Judgment 4 (La. Orl. Civ. Dist. Ct. Mar. 23, 1983)).

34. *Id.* at 1350.

35. "Vesting responsibility in Mrs. Hughes during grade school years is plausible because she has raised the child since birth, arranged her schooling, and shared these experiences with Michele." *Id.*

36. *Id.*

37. *Id.* at 1351.

38. *Id.* at 1350-51.

39. *Id.* at 1351 (quoting Plemer v. Plemer, No. 77-03348, Judgment 4 (La. Orl. Civ. Dist. Ct. Mar. 23, 1983)).

40. *See* LA. CIV. CODE art. 146(D), (H). Section H reads: "Notwithstanding any other provision of law, access to records and information pertaining to a minor child, including

made by both parents. Thus, the decree did not allocate to one parent the decision-making authority concerning medical problems of the child, but it allocated to the parent with physical custody the financial responsibility for the joint decision. The fourth circuit modified the decree relative to medical treatment and expenses. The provision allocating financial responsibility to one parent for a jointly-made decision was modified "to have both parents pay equally all major medical expenses (not covered by insurance) regardless of who has custody if treatment becomes necessary."[41] As to responsibility for medical decisions involving the child, ultimate authority was allocated to the mother, if the parents disagreed as to major medical treatment, because "the majority of Michele's custody has been and will be with her mother."[42]

The modifications concerning both educational and medical decisions illustrate the detail incorporated into the court-imposed plan and the extent to which the reviewing court examined individual provisions. In *Plemer*, the appellate court was willing to substitute its judgment for that of the trial judge in an area of the law in which there is ordinarily considerable deference to the decision of the trial judge.

A plan of implementation under article 146 before the 1983 amendments could include child support, if appropriate. In *Plemer*, the court-imposed plan provided for child support of $300 a month for the nine-month school term. The child support provision represented a $2100 reduction in the amount awarded the mother in conjunction with the prior sole custody award. The fourth circuit found no manifest error in the reduction because the mother's income and the father's custody time had increased. The fact that the award of child support did not include an amount for the period of time when the child was residing with the father raises the question of whether it would ever be appropriate for an award to include such an amount. The 1983 legislative amendments to article 146 contemplate the possibility of such an award:

> If a parent would otherwise be unable to maintain adequate housing for the child and the other parent has sufficient resources, the court may order modified support payments for a portion of housing expenses even during a period when the child is not residing in the home of the parent receiving support.[43]

In addition, the amendments to article 146 provide that the court awarding child support in a joint custody decree "shall consider the impact of any dependency exemption granted to a parent by provisions of

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but not limited to medical, dental, and school records, shall not be denied to a parent because the parent is not the child's custodial parent."

41. 436 So. 2d at 1351.

42. *Id.*

43. LA. CIV. CODE art. 146(A)(1)(c), *as amended by* Act 695.

any revenue law and shall allocate such exemption to either parent."[44] The statutory requirement of allocation of the dependency exemption[45] is presumably a response to a journal article discussing the effect of the joint custody statute on the exemption.[46] Under the Internal Revenue Code, the general rule is that the cutodial parent is entitled to the exemption unless the non-custodial parent provides support of $600 during the year and the *decree* or written agreement of the parents specifies that he is entitled to it.[47] The joint custody statute complicates the issue of who is the custodial parent, but under Treasury Regulation section 1.152-4(b) "custody will be deemed 'with the parent who, as between both parents, has the physical custody of the child for the greater portion of the calendar year."[48] As the judge is now mandated to consider the impact of the exemption and allocate it in the decree to one parent, the exception to the general rule ought to be easily established. However, another exception[49] to the general rule in the Internal Revenue Code *supersedes* the exception allowing allocation of the exemption to a parent in the decree. A non-custodial parent is entitled to the exemption if he provides more than $1200 a year child support and the custodial parent does not establish that he has provided a greater amount of support.[50] Anticipating that an allocation of the exemption to a parent in a court decree might not be maintained by the Internal Revenue Service, the 1983 amendment to article 146(A)(1)(c) continues:

> In the event that for any tax year such allocation is not maintained by the taxing authorities, then the parent who receives the benefit of the exemption for such tax year shall not be considered as having received payment of a thing not due as defined in Chapter I of Title V of Book III of this Code.[51]

Finally, the *Plemer* decision is significant because it in rather perfunctory fashion discusses the presumption contained in article 146 that joint custody is in the best interest of the child.[52] At the time of the deci-

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44. LA. CIV. CODE art. 146(A)(1)(c), *as amended by* Act 695; see *infra* text accompanying note 51 for more of the amendment to article 146(A)(1)(c).

45. I.R.C. § 151(e) (1976).

46. Lehmann, *Joint Custody and the Dependancy Exemption*, 30 LA. B.J. 346 (1983).

47. I.R.C. § 152(e) (1976).

48. Lehmann, *supra* note 46, at 349 (quoting Treas. Reg. § 1.152-4(b) (1979)).

49. Treas. Reg. § 1.152-4(d)(3) (1979).

50. I.R.C. § 152(e)(2) (1976).

51. LA. CIV. CODE art. 146(A)(1)(c), *as amended by* Act 695; *see also* LA. CIV. CODE arts. 2301-2313. Article 2301 provides: "He who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it."

52. "LSA-C.C. Art. 146, which is made applicable to changes in permanent custody

sion, the two statutory exceptions to the presumption were situations in which the parents agreed to an award of sole custody or the court found that joint custody would not be in the best interest of the child.[53] In considering the second exception to the presumption, which reaffirms its rebuttable nature, the fourth circuit required "[t]he opposing parent . . . to show that joint custody is not feasible."[54] The court found that the trial judge's plan was "*reasonable, feasible* and in the best interests of Michele."[55] Thus, feasibility alone was not the critical factor in determining that the mother had failed in her burden of rebutting the presumption that joint custody was in Michele's best interest. In fact, the detailed reasons for judgment contained in the trial judge's opinion specified "the need for Michele to avoid her mother's dominance and for the child to 'mingle . . . with other people.'"[56] Furthermore, the fact that no plan "could possibly resolve the infinite number of conflicts which can and will arise between divorced parents in their quest to share their child's life"[57] did not affect the "feasibility" of joint custody.[58]

The awkward phraseology of the second exception to the presumption was amended in 1983 to read: "The presumption in favor of joint

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under Art. 157, now creates a rebuttable presumption in favor of joint custody. The opposing parent has the burden to show that joint custody is not feasible." 436 So. 2d at 1350.

53. LA. CIV. CODE art. 146(C):

> There shall be a rebuttable presumption that joint custody is in the best interest of a minor child unless:
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> (1) The parents have agreed to an award of custody to one parent or so agree in open court at a hearing for the purpose of determining the custody of a minor child of the marriage; or
>
> (2) The court finds that joint custody would not be in the best interest of the child.

54. 436 So. 2d at 1350.

55. *Id.* (emphasis added).

56. *Id.* (quoting Plemer v. Plemer, No. 77-03348, Facts and Reasons for Judgment 3 (La. Orl. Civ. Dist. Ct. Mar. 23, 1983)). The trial judge in giving advice to the parents stated:

> Both parents are to try to see things from the child's point of view, not their own, and at all times both parents are to act primarily in the child's best interest. The general attitude of each parent and their communication with their child shall be: Your parents have their differences, both have gone separate ways, and each has remarried, each has established a new and different life for themselves. However, both of your parents love their child, both are interested in her welfare, and well being; both parents love and want to share their child; both parents want to be with the child as much as is possible.

Id. at 1351 (quoting *Plemer*, No. 77-03348, Judgment 4).

57. *Id.* at 1350.

58. *See* Note, *supra* note 10, at 769. "Finally, it will be important to consider the chance of a dispute arising which could not be settled without an adverse effect on the child." *Id.*

custody may be rebutted by a showing that it is not in the best interest of the child, after consideration of evidence introduced with respect to all of the following factors . . . ."[59] The specific factors to use in evaluating whether joint custody is in the best interest of the child, as the statute initially presumes,[60] include: emotional ties between the parents and the child;[61] the capacity of the parents to give the child love and guidance and continuation of education and raising of the child in its religion;[62] the capacity of parents to provide the child with basic needs;[63] the length of time the child has lived in a stable environment and the desirability of maintaining continuity;[64] the permanence, as a family unit, of the existing or proposed custodial home;[65] the moral fitness of the parents;[66]

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59. LA. CIV. CODE art. 146(C)(2), *as amended by* Act 695.

60. LA. CIV. CODE art. 146(C), *as amended by* Act 695: "There shall be a rebuttable presumption that joint custody is in the best interest of a minor child."

61. LA. CIV. CODE art. 146(C)(2)(a), *added by* Act 695: "The love, affection, and other emotional ties existing between the parties involved and the child." *See* ALASKA STAT. § 09.55.205(4) (Supp. 1982); FLA. STAT. ANN. § 61.13(3)(b) (West Supp. 1983); IDAHO CODE § 32-717(3) (Supp. 1983); ILL. ANN. STAT. ch. 40, ¶ 602(3) (Smith-Hurd 1980); KAN. STAT. ANN. § 60-1610(3)(D) (Supp. 1982); KY. REV. STAT. ANN. ch. 403, § 270(1)(c) (Baldwin 1981); MONT. CODE ANN. § 40-4-212(3) (1983); OHIO REV. CODE ANN. § 3109.04 (Page Supp. 1982); OR. REV. STAT. § 107.137(1)(a) (1981); WIS. STAT. ANN. § 767.24(2)(b) (West 1981). See also discussion of factors in awarding visitation rights to a parent of an illegitimate child in Maxwell v. LeBlanc, 434 So. 2d 375 (La. 1983), and authorities cited therein; *cf.* LA. CIV. CODE art. 256, *as amended by* 1983 La. Acts, No. 215, § 1.

62. LA. CIV. CODE art. 146 (C)(2)(b), *added by* Act 695: "The capacity and disposition of the parties involved to give the child love, affection, and guidance and continuation of the education and raising of the child in its religion or creed, if any." *See* Maxwell v. LeBlanc, 434 So. 2d 375 (La. 1983), and authorities cited therein. In the article *Family Law in the Fifty States: An Overview*, 16 FAM. L.Q. 290, 291-92 (1983) [hereinafter cited as *Family Law*] the guidelines for shared custody promulgated by the Maricopa County Superior Court of Arizona were reproduced and one factor the parents were to consider in deciding on a shared custody award was arrangements for the children's religious training, if any. *See also In re* Burham, 283 N.W.2d 269 (Iowa 1979); *News Notes*, 6 FAM. L. REP. 2383 (1980).

63. LA. CIV. CODE art. 146(C)(3)(c), *added by* Act 695: "The capacity and disposition of the parties involved to provide the child with food, clothing, medical care, and other material needs." *See* ALASKA STAT. § 09.55.205(2) (Supp. 1982); FLA. STAT. ANN. § 61.13(3)(c) (West Supp. 1983); *see also* Maxwell v. LeBlanc, 434 So. 2d 375 (La. 1983).

64. LA. CIV. CODE art. 146(C)(2)(d), *added by* Act 695: "The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." *See* ALASKA STAT. § 09.55.205(5) (Supp. 1982); FLA. STAT. ANN. § 61.13(3)(d) (West Supp. 1983); IDAHO CODE § 32-717(6) (Supp. 1983) (similar); MONT. CODE ANN. § 40-4-212 (1983) (similar); OHIO REV. CODE ANN. § 3109.04(C)(4) (Page Supp. 1982) (similar); WIS. STAT. ANN. § 767.24(2)(c) (West 1981) (similar); *see also* Maxwell v. LeBlanc, 434 So. 2d 375 (La. 1983).

65. *See* FLA. STAT. ANN. § 61.13(3)(e) (West Supp. 1983); IDAHO CODE § 32-717(6) (Supp. 1983) (similar).

66. LA. CIV. CODE art. 146(C)(2)(f), *added by* Act 695: "The moral fitness of the parties involved." *See* FLA. STAT. ANN. § 61.13(3)(f) (West Supp. 1983); IDAHO CODE § 32-717(5)

the mental and physical health of the parties involved;[67] the home, school and community record of the child;[68] the reasonable preference of the child, if the court deems the child to be of sufficient maturity to express a preference;[69] the willingness of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent;[70] and the distance between the respective residences of the parents.[71] Although it has been suggested that the factors considered in determining the best interest of the child would probably change because of the presumption in favor of joint custody,[72] the list of factors added to article 146 by the 1983 amendments include, with some necessary additions,[73] those traditionally applied.

After an examination of the list of factors in article 146, it is at least arguable that the court in a case like *Plemer* might conclude that joint

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(Supp. 1983); *see also* Maxwell v. LeBlanc, 434 So. 2d 375 (La. 1983), and authorities cited therein.

67. *See* FLA. STAT. ANN. § 61.13(3)(g) (West Supp. 1983); IDAHO CODE § 32-717(5) (Supp. 1983); ILL. ANN. STAT. ch. 40, ¶ 602(4) (Smith-Hurd 1980); KY. REV. STAT. ANN. ch. 403, § 270(1)(e) (Baldwin 1981); MONT. CODE ANN. § 40-4-212(5) (1983); OHIO REV. CODE ANN. § 3109.04(C)(5) (Page Supp. 1982); WIS. STAT. ANN. § 767.24(2)(c) (West 1981); *see also* Maxwell v. LeBlanc, 434 So. 2d 375 (La. 1983) (court listed as a factor to consider in awarding visitation privileges, the effect of visitation on the physical condition of the *child*).

68. *See* FLA. STAT. ANN. § 61.13(3)(h) (West Supp. 1983); IDAHO CODE § 32-717(4) (Supp. 1983); ILL. ANN. STAT. ch. 40, ¶ 602(4) (Smith-Hurd 1980); KAN. STAT. ANN. § 60-1610(3)(E) (Supp. 1982); KY. REV. STAT. ANN. ch. 403, § 270(1)(d) (Baldwin 1981); MONT. CODE ANN. § 40-4-212(4) (1983); OHIO REV. CODE ANN. § 3109.04(C)(4) (Page Supp. 1982); WIS. STAT. ANN. § 767.24(2)(c) (West 1981).

69. *See* ALASKA STAT. § 09.55.205(3) (Supp. 1982) (does not stipulate sufficient intelligence); CAL. CIV. CODE § 4600(a) (West 1983); CONN. GEN. STAT. ANN. § 46b-56(b) (West 1983); FLA. STAT. ANN. § 61.13(3)(i) (West Supp. 1983); HAWAII REV. STAT. § 571-46(3) (1976); IDAHO CODE § 32-717(2) (Supp. 1983); Ill. ANN. STAT. ch. 40, ¶ 602(2) (Smith-Hurd 1980); IOWA CODE ANN. § 598.41(3)(f) (West Supp. 1983); KAN. STAT. ANN. § 60-1610(3)(C) (Supp. 1982); KY. REV. STAT. ANN. ch. 403, § 270(1)(b) (Baldwin 1981); MONT. CODE ANN. § 40-4-212(2) (1983); NEV. REV. STAT. § 125.134(4)(a) (1979); OHIO REV. CODE ANN. § 3109.04 (Page Supp. 1982) (eleven years or older gets choice unless it is unreasonable); WIS. STAT. ANN. § 767.24(2)(a) (West 1981); *see also* Maxwell v. LeBlanc, 434 So. 2d 375 (La. 1983), and authorities cited therein.

70. *See* ALASKA STAT. § 09.55.205(6) (Supp. 1982); CAL. CIV. CODE § 4600(b)(1) (West 1983); FLA. STAT. ANN. § 61.13 (West Supp. 1983); IDAHO CODE § 32-717B(2) (Supp. 1983) (similar); IOWA CODE ANN. § 598.41(3)(a)-(h) (West Supp. 1983); LA. CIV. CODE art. 146(A)(2); MONT. CODE ANN. § 40-4-224(2) (1983) (similar); NEV. REV. STAT. § 125.134(3)(a)(2) (1979); *see also* Maxwell v. LeBlanc, 434 So. 2d 375 (La. 1983).

71. *See* Note, *supra* note 10, at 768-69; *see also In re* Burham, 283 N.W.2d 269 (Iowa 1979).

72. Note, *supra* note 10, at 766.

73. For example, the distance between respective residences and the willingness of a parent to encourage and facilitate a close parent-child relationship between the child and the other parent were added by the 1983 amendments. *See* authorities cited *supra* notes 70-71; Beck v. Beck, 86 N.J. 480, 432 A.2d 63 (1981).

custody is not in the best interests of the child. The outcome will depend upon the relative weight accorded to such factors as the emotional ties between the child and her mother,[74] the permanence as a family unit of the existing or proposed custodial home[75] and the willingness of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.[76]

However, the more fundamental legal question is whether the statute should contain any presumption as to what is in the best interest of the child. Absent studies on the long-term effects of joint custody which empirically establish that joint custody is in the best interest of all children, nothing would appear to justify such a presumption.[77] Surely, the argument that the presumption reduces the imbalance between mothers and fathers in custody suits is not sufficient justification. The alleged justification, which elevates parental rights over those of the children, is antithetical

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74. "Detailed reasons for judgment emphatically specify the need for Michele to avoid her mother's dominance and for the child to 'mingle . . . with other people.'" *Plemer*, 436 So. 2d at 1350 (quoting Plemer v. Plemer, No. 77-03348, Facts and Reasons for Judgment 3 (La. Orl. Civ. Dist. Ct. Mar. 23, 1983)).

75. In February, 1981 the former Mrs. Plemer was married to Marshall Hughes, with whom she and Michele now live. In September of 1981 Mr. Plemer married Kathleen Pierson, an attorney, who has two daughters, Shannon, age 16 and Elise, age 10, from her first marriage. Mr. Plemer and his wife reside in her house with the children.

Id. at 1349.

76. Mrs. Hughes testified that, in early 1983, Michele refused to go to her father's house unless she would be guaranteed substantial, person-to-person interaction with her father undiluted by his new family.

. . . . .

. . . Mrs. Hughes contacted Mr. Plemer, told him of Michele's complaints, and, since he would not agree to spend each visit alone with Michele, she allowed Michele to forego the weekly visitations. . . . .

. . . Mrs. Hughes refused to file a [joint custody] plan and opposed any change on the grounds that shared custody would be confusing to Michele and disruptive to everyone's lives. At trial, she suggested that Mr. Plemer's visits be curtailed, i.e., Michele be restricted to daytime visits twice a month and occasional extra dinner or short outings.

Id. at 1349-50.

77. "Courts should be cautious in awarding joint custody, however, until more long term custody studies are conducted. Behavioral experts differ in their assessment of which custody arrangement is best for children. *Therefore, there is currently little basis for presumptions in custody awards.*" Comment, *The New Joint Custody Statute: Chrysalis of Conflict or Conciliation?*, 21 SANTA CLARA L. REV. 471, 497 (1981) (emphasis added); *see also* Schulman & Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U.L. REV. 538, 552-53 (1982); Miller, *supra* note 12, at 403, 408, 411. For a contrary opinion, see Parley, *Joint Custody: A Lawyer's Perspective*, 53 CONN. B.J. 310, 313 (1979). Compare California's joint custody statute which applies the presumption. CAL. CIV. CODE § 4600.5 (West 1983). Most experts agree that joint custody is a desirable arrangement when both parents agree to it and demonstrate their ability to cooperate in parenting.

to the purpose of legislation,[78] which is to determine custody in the best interest of the *child*.

The joint custody presumption, just as its predecessor "the maternal preference" presumption,[79] contradicts and abrogates the "best interest of the child" standard. The basis of the best interest standard was a case by case determination, the court's decision being based on the particular *facts* of the case rather than a presumption of what is in the best interest of all children. A case by case approach is particularly appropriate for child custody disputes since the relationship of a child to each of its parents and the relationship of the parents will differ in *every* case. The statutory presumption may foretell a trend which departs from a case by case determination of custody.[80] By relying upon the presumption, a court may be encouraged to award joint custody automatically without determining whether the parents are prepared to make the arrangement work, and without inquiring into the objectives of the parties to determine whether these objectives might be accomplished by alternative arrangements. Furthermore, the presumption may encourage the court to suggest that the parents negotiate a custody arrangement on the strength of the statutory presumption and preference, which under certain circumstances may be ill-advised[81] and may jeopardize the best interest of the child.[82]

In the final analysis child custody is not simply a legal problem; it is a human problem and a child development problem that is both interpersonal and psychological. The role the court plays in the custody issue has a nonlegal effect—it lays the foundation for a post-divorce

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78. For example, consider the veto message of Governor Hugh Carey of New York when for the second consecutive year he vetoed a joint custody statute passed by the legislature:

> Under current New York law, while parents may contract with respect to the custody of their children they may not bind the court by their agreement where the best interests of the child requires the court's intervention. I do not believe we should by statute change this law—to do so could, in my judgment, put the interests of the separating spouses above the best interests of the child.
>
> Although the bill which is before me this year does not contain an express presumption in favor of joint custody, its provisions would require that joint custody be given first consideration.

Family Law, *supra* note 62, at 294.

79. *See, e.g.* Estes v. Estes, 261 La. 20, 258 So. 2d 857 (1972); Fulco v. Fulco, 259 La. 1122, 254 So. 2d 603 (1971); Estopinal v. Estopinal, 223 La. 485, 66 So. 2d 311 (1953). At the meeting of the Family Law Section of the American Bar Association in 1983, Pittsburgh practitioner Harry Gusener described the problem as follows: "The greatest evil of the pro-mother 'tender years presumption,'" he suggested, was that it provided judges with a way to avoid the agony of decision in a hard case. Now, that is being done with joint custody as a presumption, he suggested." Ass'n of Trial Lawyers of Am. Conv., 52 U.S.L.W. 2062, 2065 (Aug. 2, 1983); *see also* Comment, *supra* note 77, at 494 n.120.

80. *See* Schulman & Pitt, *supra* note 77, at 558.

81. *Id.* at 549-51.

82. *Id.* at 554-57.

family.[83] The success of the post-divorce family depends upon the ability of the members of the family to reorder their lives in such a way that the welfare of the children is protected. Such enormous power must be exercised judiciously.

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83. Mills & Bezler, *Joint Custody as a Parenting Alternative*, 9 PEPPERDINE L. REV. 853, 870 (1982).