THE EVOLUTION OF JOINT CUSTODY IN IOWA: A PREFERENCE EMERGES†

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I. INTRODUCTION

During the past three years, the Iowa Legislature has given new strength to the concept of joint custody by enacting a number of significant changes in the law of custody.[1] These statutory changes have and will dra-

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1. The most significant change in Iowa law is that it now requires consideration of joint custody upon the request of one party and sets forth specific factors to be considered. Iowa Code section 598.41 (1983) reads as follows:

598.41 Custody of Children

1. The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure a minor child frequent and continuing contact with both parents after the

matically alter the traditional approach to child custody matters by Iowa

parents have separated or dissolved the marriage, and which will encourage parents to share the rights and responsibilities of raising the child. Unless otherwise ordered by the court in the custody decree, both parents shall have legal access to information concerning the child, including but not limited to medical, educational and law enforcement records.

2. On the application of either parent, the court shall consider granting joint custody in cases where the parents do not agree to joint custody. If the court does not grant joint custody under this subsection, the court shall state in its decision the reasons for denying joint custody. Before ruling upon the joint custody petition in these cases, the court may require the parties to participate in custody mediation counseling to determine whether joint custody is in the best interest of the child. The court may require the child's participation in the mediation counseling insofar as the court determines the child's participation is advisable.

The cost of custody mediation counseling shall be paid in full or in part by the parties and taxed as court costs.

3. In considering what custody arrangement under either subsection 1 or 2 is in the best interests of the minor child, the court shall consider the following factors:

a. Whether each parent would be a suitable custodian for the child.

b. Whether the psychological and emotional needs and developments of the child will suffer due to lack of active contact with and attention from both parents.

c. Whether the parents can communicate with each other regarding the child's needs.

d. Whether both parents have actively cared for the child before and since the separation.

e. Whether each parent can support the other parent's relationship with the child.

f. Whether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity.

g. Whether one or both the parents agree or are opposed to joint custody.

h. The geographic proximity of the parents.

4. Joint legal custody does not require joint physical care. When the court determines such action would be in the child's best interest, physical care may be given to one joint custodial parent and not to the other. However, physical care given to one parent does not affect the other parent's rights and responsibilities.

5. When the parent awarded custody of physical care of the child cannot act as custodian or caretaker because the parent has died or has been judicially adjudged incompetent, the court shall award custody including physical care of the child to the surviving parent unless the court finds that such an award is not in the child's best interests.

IOWA CODE § 598.41 (1983). Iowa Code sections 598.1 and 592.41 were amended in 1984 as follows (additions are underlined, deletions striken out):

Section 1. Section 598.1, Code 1983, is amended by adding the following new subsection:

NEW SUBSECTION. 6. "Best interest of the child" includes, but is not limited to, the opportunity for maximum continuous physical and emotional contact possible with both parents, unless direct physical or significant emotional harm to the child may result from this contact. Refusal by one parent to provide this opportunity without just cause shall be considered harmful to the best interest of the child.

Sec. 2. Section 598.41, subsections 1 and 2, Code 1983, are amended to read as follows:

judges and attorneys.[2] Despite these sweeping changes, however, legal schol-

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1. The court, insofar as is reasonable and in the best interest interests of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure a minor the child frequent the opportunity for the maximum continuing physical and emotional contact with both parents after the parents have separated or dissolved the marriage, unless direct physical harm or significant emotional harm to the child is likely to result from such contact with one parent, and which will encourage parents to share the rights and responsibilities of raising the child. The court shall consider the denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangement. Unless otherwise ordered by the court in the custody decree, both parents shall have legal access to information concerning the child, including but not limited to medical, educational and law enforcement records.

2. On the application of either parent, the court shall consider granting joint custody in cases where the parents do not agree to joint custody. If the court does not grant joint custody under this subsection, the court shall state in its decision the reasons for denying joint custody cite clear and convincing evidence, pursuant to the factors in subsection 3, that joint custody is unreasonable and not in the best interest of the child to the extent that the legal custodial relationship between the child and a parent should be served. Before ruling upon the joint custody petition in these cases, the court may require the parties to participate in custody mediation counseling to determine whether joint custody is in the best interest of the child. The court may require the child's participation in the mediation counseling insofar as the court determines the child's participation is advisable.

The costs of custody mediation counseling shall be paid in full or in part by the parties and taxed as court costs.

Sec. 3. Section 598.41, subsection 3, unnumbered paragraph 1, Code 1983, is amended to read as follows:

In considering what custody arrangement under either subsection 1 or 2 is in the best interests of the minor child, the court shall consider the following factors:

Sec. 4. Section 598.41, Code 1983, is amended by adding the following new subsection before subsection 4 and renumbering the subsequent subsections:

NEW SUBSECTION. 4. Subsection 3 shall not apply when parents agree to joint custody.

Sec. 5. Section 598.41, subsection 4, Code 1983, is amended to read as follows:

4. Joint legal custody does not require joint physical care. When the court determines such action would be in the child's best interest interests, physical care may be given to one joint custodial parent and not to the other. If one joint custodial parent is awarded physical care, the court shall hold that parent responsible for providing for the best interests of the child. However, physical care given to one parent does not affect the other parent's rights and responsibilities as a legal custodian of the child. Rights and responsibilities as legal custodian of the child include, but are not limited to, equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction.

Sec. 6. The enactment of subsection 1 of section 598.41 constitutes a substantial change in circumstances authorizing a court to modify a child custody order pursuant to section 598.21 and chapter 598A.

1984 Iowa Legis. Serv. No. 3 42-44 (West).

2. Iowa has followed a number of states in enacting statutes that specifically provide for the award of joint custody in dissolution and modification cases. *See* Foster & Freed, *Family Law in the Fifty States—An Overview*, 16 FAM. L.Q. 289 (1983); Steinman, ***Joint Custody:***

ars have virtually ignored these reforms. Therefore, this article will define joint custody, review the Iowa statutes and case law, and analyze the practical ramifications for Iowa practitioners.

Prior to 1977, there was no specific statutory authority in Iowa for granting joint custody. The courts had broad authority to render child custody decisions.[3] Although the courts had the authority to grant joint custody, the Iowa Supreme Court discouraged what was called "divided" custody, except in unusual circumstances.[4]

In 1977, a sentence was added to Iowa Code section 598.21 which specifically stated that joint custody may be awarded in dissolution cases.[5] This statutory change, however, did not increase the court's power in child custody cases. Iowa courts had occasionally granted joint or divided custody.[6] Furthermore, this statutory addition did not significantly increase the number of joint custody awards.

In 1982, the Iowa Legislature enacted section 598.41 of the Iowa Code which stated that the court should make a custody award "which will assure a minor child frequent and continuing contact with both parents . . . and will encourage parents to share the rights and responsibilities of raising the child."[7] The section further provided that upon the application of either party in a dissolution, the court should consider granting joint custody.[8] This section also included a list of factors to be considered by the court in deciding the custody arrangements in a dissolution case.[9] In addition, the section provided that if joint custody is not awarded, the court shall state the reasons for denying such custody.[10]

In 1984, the legislature made further amendments to sections 598.1 and 598.41 of the Iowa Code which strengthened the preference for joint custody. These amendments stated that the best interests of the child "includes but is not limited to the opportunity for maximum physical and emotional contact possible with both parents unless direct physical or emotional harm

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What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications, 16 U.C.D. L. REV. 739, 740 (1983).

3. Prior to 1977, section 598.21 of the Iowa Code stated that "[w]hen a dissolution of marriage is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as may be justified. Subsequent changes may be made by the court in these respects when circumstances render them expedient." IOWA CODE § 598.21 (1975).

4. *See* McCrery v. McCrery, 258 Iowa 354, 358, 138 N.W.2d 876, 878 (1965) (and cases cited therein). See *infra* note 17 for a definition of divided custody.

5. IOWA CODE § 598.21 (1977).

6. *See* Mason v. Zolnosky, 251 Iowa 983, 103 N.W.2d 752 (1960); Stillmunkes v. Stillmunkes, 245 Iowa 1082, 65 N.W.2d 366 (1954).

7. IOWA CODE § 598.41(1) (1983).

8. *Id.* § 598.41(2).

9. *Id.* § 598.41(3).

10. *Id.* § 598.41(2).

to the child may result from this contact."[11] These recent amendments also strengthened the requirement that the court fully consider the option of joint custody by requiring that it "cite clear and convincing evidence" that joint custody is not in the best interests of the child in those cases where such custody is denied.[12] Additionally, the 1984 amendments specifically set forth various rights of a parent who has joint custody.[13]

The 1982 and 1984 amendments have made it abundantly clear that joint custody is to be seriously considered by the court in every dissolution decree involving child custody issues.[14] The Iowa Supreme Court has interpreted the above statutory amendments as creating a preference for joint custody over sole custody.[15] For Iowa attorneys, this means that joint custody must now be considered as an alternative in each case involving child custody.[16]

II. Background

A. *Definition of Joint Custody*

In any legal analysis, definitions are extremely important. As social and legal developments have pushed toward the increased recognition of joint custody as a feasible alternative in custody cases, much of the difficulty faced by attorneys and judges has occurred in defining what is meant by joint custody. In Iowa, over the years, there has been a developing distinction between legal and actual custody, which now has been codified. This section will briefly review the definitions of joint custody under Iowa law in order to provide a framework for the analysis of the development of joint custody in Iowa.

The term joint custody did not appear in Iowa cases or statutes before 1977. The cases before 1977 referred to "divided" custody which was defined as a situation in which the child lived part of the time in one household and part of the time in another.[17] Divided custody was opposed by the Iowa Su-

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11. *See supra* note 1, § 598.41(1) (as amended).
12. *Id.* § 598.41(2) (as amended).
13. *Id.* § 598.41(4) (as amended).
14. The statute also applies to actions involving modifications of dissolution decrees. *See* In re Marriage of Bolin, 336 N.W.2d 441 (Iowa 1983). Therefore, the material presented in this article also applies to modification cases. Consequently, many of the cases cited and discussed herein are cases involving dissolution decrees.
15. *See* In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983); In re Marriage of Fish, 350 N.W.2d 226, 229 (Iowa Ct. App. 1984).
16. The number of children affected by divorce each year has increased steadily over the past thirty years. The number of divorces has risen from an annual rate of 385,000 in 1950 to 1,181,000 in 1979. The number of children affected by divorce each year has also risen steadily from 347,000 in 1955 to 1,181,000 in 1979. Iowa has followed this trend; the number of divorces in this state has increased from 5,300 in 1965 to 11,400 in 1979. Bureau of the Census, United States Dep't of Commerce, Statistical Abstract of the United States, 80, 82 (1981).
17. Maron v. Maron, 238 Iowa 587, 590-91, 28 N.W.2d 17, 19 (1947). The Iowa Supreme

preme Court, except in the most unusual circumstances.[18]

The court discussed its opposition to divided custody in cases where custody was in one parent and in cases where custody was divided between the parents by the terms of the decree.[19] This made it difficult to distinguish cases in which sole custody was actually divided between the parents from cases in which sole custody was awarded with extensive visitation rights. Divided custody, therefore, appeared to refer to actual, rather than legal, custody, but the language in the cases was not clear on this point.

In 1977, the Iowa Code was amended to expressly permit the courts to award joint custody.[20] This amendment was the first reference made to joint custody in Iowa law, but it did not contain a definition of joint custody. There were, however, a number of law legal periodicals, written during this period, which frequently proposed definitions.[21]

The Iowa Supreme Court was faced with these definitional problems in the case of *In re Marriage of Burham*.[22] The *Burham* court defined joint custody as an arrangement in which each parent had legal responsibility for the child with alternating physical custody.[23] The court compared the terms divided custody, which the court had previously used, and joint custody and found them to be synonymous:

> We will treat the terms joint custody and divided custody as synonymous because in each such custody arrangement, regardless of the label it is given, both parents share in the legal responsibility for care and alternate in custodial companionship. And each such custody arrangement when

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Court has consistently distinguished divided custody from split custody. Divided custody refers to a situation where custody is divided between the parents. Split custody refers to a situation in which there are two or more children and each parent is given custody of one or more of the children. *See* In re Marriage of Grandinetti, 342 N.W.2d 876, 878-79 (Iowa Ct. App. 1983); Annot., 92 A.L.R.2d 695 (1961). For the purposes of this article, general references to children will be expressed in the singular even though more than one child may be affected by the decree.

18. *See* McCrery v. McCrery, 258 Iowa at 358, 138 N.W.2d at 878; Huston v. Huston, 255 Iowa 543, 553, 122 N.W.2d 892, 898 (1963); Mason v. Zolnosky, 251 Iowa at 988, 103 N.W.2d at 755; York v. York, 246 Iowa 132, 138-39, 67 N.W.2d 28, 32 (1954); Stillmunkes v. Stillmunkes, 245 Iowa at 1088, 65 N.W.2d at 370; Maron v. Maron, 238 Iowa at 590, 28 N.W.2d at 19; Bennett v. Bennett, 200 Iowa 415, 418, 203 N.W. 26, 27 (1925).

19. McCrery v. McCrery, 258 Iowa at 357-58, 138 N.W.2d at 878 (custody in one parent); Huston v. Huston, 255 Iowa at 555-56, 122 N.W.2d at 900 (custody between the parents).

20. IOWA CODE § 598.21 (1977).

21. *See* Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems*, 65 CALIF. L. REV. 978, 1009-10 (1977); Nielson, *Joint Custody: An Alternative for Divorced Parents*, 26 U.C.L.A. L. REV. 1084, 1088 (1979); Note, *A Case for Joint Custody After the Parents Divorce*, 17 J. FAM. L. 741, 742 (1979); Note, *Joint Custody: The Best Interests of the Child*, 18 TULSA L.J. 159, 159-60 (1982); Comment, *The New Joint Custody Statute: Chrysalis of Conflict or Conciliation*, 21 SANTA CLARA L. REV. 471, 487-88 (1981); Annot. 17 A.L.R. 2d 1013, 1015-16 (1981).

22. 283 N.W.2d 269 (Iowa 1979).

23. *Id.* at 271-72.

> contested, whether described as joint or divided, must withstand scrutiny on its terms and conditions.[24]

The court, however, later reversed these statements, following the 1982 statutory changes.[25]

In 1982, the dissolution statute was amended to essentially create a preference for joint custody. The amendment included definitions of joint custody and physical care and made distinctions between those two terms.[26] Joint custody, under the statutory definitions, gave each parent equal rights and responsibilities toward the child.[27] Physical care gave the parent the right to maintain the home for the child and provide for routine care.[28] The amendment clearly distinguished between the two terms and indicated physical care may alternate between the parents or be awarded to only one parent.[29]

After the enactment of Iowa Code section 598.41 creating the statutory preference for joint custody, the Iowa Supreme Court was faced with reconciling its previous opposition to divided custody and its statement in *Burham* that divided custody and joint custody were synonymous with the new statutory preference for joint custody.[30] In the case of *In re Marriage of Bolin*,[31] the Iowa Supreme Court stated that "[j]oint custody is not synonymous with what this court previously labeled 'divided custody.' "[32] The court explained that since joint custody does not require that a child spend part of the time with one parent and part with the other, it was not the same as divided custody, as previously defined by the court.[33]

The court correctly asserted that in its earlier opinions discouraging divided custody, the issue debated was whether a child's physical care should alternate between the parents.[34] As indicated above, in some of those cases one parent actually had sole legal custody and the issue was the amount of

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24. *Id.* at 272.
25. *See* In re Marriage of Bolin, 336 N.W.2d at 444.
26. Iowa Code sections 598.1(4) and (5) (1983) read as follows:
> 4. "Joint custody" or "joint legal custody" means an award of custody of a minor child to both parents under which both parents have rights and responsibilities toward the child and under which neither parent has rights superior to those of the other parent. The Court may award physical care to one parent only.
> 5. "Physical care" means the right and responsibility to maintain the principal home of the minor child and provide for the routine care of the child.

IOWA CODE §§ 598.1(4), (5) (1983). These definitions were not changed by the 1984 amendments.
27. *Id.* § 598.1(4).
28. *Id.* § 598.1(5).
29. *See id.* § 598.41(4).
30. In re Marriage of Burham, 283 N.W.2d at 271-72.
31. 336 N.W.2d 441 (Iowa 1983).
32. *Id.* at 444.
33. *Id.*
34. *Id.* at 443-44.

time the child should spend with the other parent.[35] Under the new amendments, it is clearly possible to have joint custody with the physical care of the child in only one parent.[36] Physical care of the child, however, may also alternate between the parents. Where the physical care does alternate between the parents, it is in effect that divided custody which the court previously discouraged, since the child will spend time in two households. Thus, the court has not been entirely successful in distinguishing its previous negative statements about alternating physical custody.[37]

B. *Reasons for Change Towards Joint Custody*

Between 1965 and the present, the law on divided, joint and sole custody has changed from a strong preference for sole custody in one parent to a preference for joint custody. This change in Iowa has been part of a national trend.[38] The reasons for and against joint custody and the proposals for change have been the subject of an extensive debate in legal and psychology journals.[39] At the root of the changing views on joint custody are the changes in our society that took place in the 1960's and 1970's. Some of the changes which have had an impact on child custody cases are the increasing number of mothers who work, the changing social norms which have allowed fathers to become more active parents, and the changing belief among social scientists, psychologists and psychiatrists about the impact of shared custody on children.[40]

First, for numerous reasons, the number of women with children who are working has increased dramatically.[41] Thus, the family structure in

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35. *See* McCrery v. McCrery, 258 Iowa at 355-56, 138 N.W.2d at 877; Huston v. Huston, 255 Iowa at 545, 122 N.W.2d at 894.

36. *See* IOWA CODE § 598.41(4) (1983).

37. The Iowa Supreme Court has stated that it would approve joint custody awards provided that the "tests" that the court set forth in the *Burham* decision were satisfied. In re Marriage of Burham, 283 N.W.2d at 275.

38. *See* Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 CALIF. L. REV. 978, 1009-10 (1977); Foster & Freed, *supra* note 2, at 290-91, 352; Steinman, *supra* note 9, at 739-40; Comment, *supra* note 21, at 478-79.

39. *See* H. ROMAN & W. HADDAD, THE DISPOSABLE PARENT (1978); J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973); J. WALLERSTEIN & J. KELLEY, SURVIVING THE BREAKUP: HOW PARENTS AND CHILDREN COPE WITH DIVORCE, (1980); Foster & Freed, *Joint Custody: A Viable Alternative?*, 15 TRIAL 26 (May 1979); Miller, *Joint Custody*, 13 FAM. L.Q. 345, 355-69 (1979); Nielson, *supra* note 19, at 1106-19; Robbins, *Joint Custody Awards: Toward the Development of Judicial Standards*, 48 FORDHAM L. REV. 105 (1979); Comment, *supra* note 21, at 493-97.

40. *See infra* notes 41-49 and accompanying text.

41. In March of 1980, 53% of all children under the age of 18 had mothers who were working or looking for work. More than 17 million mothers with children under the age of 18 were in the workforce, an increase of 44% from 1970. Grossman, *Working Mothers and Their Children*, 104 MONTHLY LAB. REV. 49, 49 (May 1981). During this period, marriage and birthrates declined. Women increasingly sought employment due to inflation and financial pressures,

which the mother stays home and raises the children while the father works to support the family is an increasingly rare family situation. When a divorce takes place in a family in which both parents work, it is possible that neither parent may be considered the primary caretaker of the children during the marriage. Furthermore, because of their work, neither parent is automatically able to spend more time with the children. Therefore, the previous model of sole custody in the mother with weekend and vacation visitation by the father no longer makes as much sense.

Second, fathers are now taking a more active role in parenting than in the past.[42] As more women are working, fathers are more frequently required to care for the children. The reduction of masculine and feminine role models and stereotypes has permitted men to express more emotion and experience closer relationships with their children without being thought of as less masculine. As a result, fathers have become more active parents. Thus, when a divorce occurs, fathers are no longer viewed as being incapable of caring for the children on a day-to-day basis.[43] Further, because of the stronger relationships with the children, fathers are more likely to seek custody of their children when a divorce occurs.[44]

Finally, the results of social science and psychological research have refuted the theory that the shifting of children between two parents is harmful to the children.[45] This theory was the basis for many decisions refusing to divide custody between the parents.[46] It was argued that divided custody caused problems with discipline, with the children being adversely harmed by the shift in their environment and exposure to different values, with split loyalties, and with disputes between the parents.[47] Although more recent research indicates that these effects may occur in some cases, in the majority of cases, shared custody can be beneficial to the children.[48] Shared custody prevents the sense of loss experienced by both the noncustodial parent and the child when the family relationship is terminated; it exposes the child to the knowledge, skills, experiences and affection of both parents and relieves

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smaller families, the increasing costs of having children, and for reasons of personal satisfaction. *Id.*

42. M. Roman & W. Haddad, *supra* note 39, at 90; Comment, *supra* note 21, at 471-72.

43. Gaddis, *Joint Custody of Children: A Divorce Decision-Making Alternative*, 16 Conciliation Ct. Rev. 17 (1978).

44. *Id.*

45. *See* Kelley, *Further Observations on Joint Custody*, 16 U.C.D. L. Rev. 762, 764-65 (1983); Robbins, *supra* note 39, at 117; Schwartz, *Toward a Presumption of Joint Custody*, Schwab Memorial Award Essay, ABA Secton on Family Law (1983); Trombetta, *Joint Custody: Recent Research and Overloaded Courtrooms Inspire New Solutions to Custody Disputes*, 19 J. Fam. L. 213, 215-22 (1980).

46. *See, e.g.*, Huston v. Huston, 255 Iowa at 552-53, 122 N.W.2d at 898; Bennett v. Bennett, 200 Iowa at 418, 203 N.W. at 27.

47. *See generally supra* note 21.

48. *See* Miller, *supra* note 39 at 361-66; Mills & Belzer, *Joint Custody as a Parenting Alternative*, 9 Pepperdine L. Rev. 853, 854 (1982).

the custodial parent of the stress of full-time parenting that may have a negative impact on the children.[49]

There are undoubtedly many more reasons for the shift away from sole custody to joint custody. In sum, the shift in societal values and norms has resulted in a corresponding shift in the law on joint custody.

III. Summary Of Joint Custody In Iowa

A. *Pre-1977 Developments*

As indicated above, prior to 1977, neither Iowa case law nor statutory law referred to joint custody.[50] The cases referred to "divided" custody, which was a custody arrangement in which the child spent part of the time in one parent's household and part in the other.[51] The distinction between divided custody and sole custody with visitation was not clearly delineated by the courts prior to 1977. Most of the cases dealing with the issue of divided custody, however, involved fact situations where the child's time was divided between the parents more equally than was customary in sole custody with weekend, holiday, and summer visitation.[52]

Although divided custody was occassionally granted, the Iowa Supreme Court strongly stated that it should be resorted to only in exceptional circumstances.[53] This doctrine was first expressed in the 1925 case of *Bennett v. Bennett*.[54] In *Bennett*, the initial dissolution decree had granted custody to the father with visitation to the mother four times each year.[55] The mother applied to have custody changed, and the trial court modified the decree to give the mother custody from June 15th to August 15th.[56] The Supreme Court reversed, stating that there was not a sufficient change in circumstances to justify the modification.[57] In a frequently repeated quote, the court stated that "[e]xperience has shown that allowing the child to live a part of the time in one household and a part of the time in another, is not only not to the best interest and welfare of the child, but in many instances it is wholly destructive of discipline."[58] The court further stated that divided custody induced feelings of dissatisfaction and rebellion in the child

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49. *See generally supra* notes 21 and 48.
50. *See supra* notes 3-4 and accompanying text.
51. *See supra* note 17 and accompanying text.
52. *See supra* notes 18-19 and accompanying text.
53. *See generally id.*
54. 200 Iowa 415, 203 N.W. 26 (1925). Two earlier Iowa Supreme Court decisions upheld divided custody awards without making any general statements regarding divided custody. *See* Ladd v. Ladd, 188 Iowa 351, 176 N.W. 211 (1920); Leupold v. Leupold, 164 Iowa 595, 146 N.W. 55 (1914).
55. Bennett v. Bennett, 200 Iowa at 417, 203 N.W. at 27.
56. *Id.* at 418, 203 N.W. at 27.
57. *Id.* at 419, 203 N.W. at 27.
58. *Id.* at 418, 203 N.W. at 27.

and allowed the parents the opportunity to turn the child away from the other parent.[59] The supreme court did agree that the mother had the right to visit the child and left visitation rights to be decided by the trial court.[60]

Another case in which the custody of the child was divided between the parents, this time in the original dissolution decree, was *Maron v. Maron*.[61] The dissolution decree in *Maron* provided for each parent to have custody of the children for alternating six month periods.[62] After the father had the children for the initial six month period, he applied to modify the decree to obtain sole custody.[63] The mother resisted the application and also asked for sole custody.[64] The trial court modified the decree giving custody to the father,[65] and the Iowa Supreme Court affirmed this decision.[66] The parents had agreed that the divided custody arrangement should cease and that the main issue to be decided by the court was which parent should be granted sole custody.[67] The court once again stated that divided custody was generally not in a child's best interests.[68]

There were a few cases prior to 1977, however, in which divided custody was upheld. Two of these cases involving similar facts were *Stillmunkes v. Stillmunkes*[69] and *Mason v. Zolnosky*,[70] in which the mothers were given custody of the children and then they subsequently moved out of state. In both cases, the Iowa Supreme Court granted the fathers custody for the summer months so the children could spend summers in Iowa.[71] In *Mason*, the court recognized that the previous case law disapproved of divided custody, but stated that the alternative was to prevent the child from seeing the other parent; an alternative that was not in the child's best interests.[72]

In *Huston v. Huston*,[73] the court again disapproved of a divided custody

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59. *Id.*
60. *Id.* at 418-19, 203 N.W. at 27.
61. 238 Iowa 587, 28 N.W.2d 17 (1947).
62. *Id.* at 588, 28 N.W.2d at 18.
63. *Id.* at 589, 28 N.W.2d at 18.
64. *Id.*
65. *Id.* at 594, 28 N.W.2d at 20.
66. *Id.*
67. *Id.* at 590, 28 N.W.2d at 19.
68. *Id.* at 590-91, 28 N.W.2d at 19.
69. 245 Iowa 1082, 65 N.W.2d 366 (1954).
70. 251 Iowa 983, 103 N.W.2d 752 (1960).
71. Stillmunkes v. Stillmunkes, 245 Iowa at 1084, 65 N.W.2d at 368; Mason v. Zolnesky, 251 Iowa at 990, 103 N.W.2d at 756.
72. Mason v. Zolnosky, 251 Iowa at 988, 103 N.W.2d at 755. The *Mason* court stated that "no citation of authority [is needed] for the proposition that a divided custody is to be avoided if reasonably possible. But often there is no alternative unless the child is to be cut off entirely from one parent; and this, also is not usually for his best interest." *Id. But see* York v. York, 246 Iowa 132, 67 N.W.2d 28 (1954) (divided custody denied where noncustodial mother sought custody for summer following her move to Ohio); *see also* Smith v. Smith, 257 Iowa 584, 133 N.W.2d 677 (1965).
73. 255 Iowa 543, 122 N.W.2d 892 (1963).

arrangement and granted sole custody to the father.[74] Although the mother had sole legal custody, the parties had agreed that the father would have primary responsibility for the physical care of their son with the exception that the mother would have him on weekends and for two weeks in the summer.[75] This agreement was embodied in a court decree.[76] After the mother was refused visitation on a weekend, she filed a petition for contempt of court and an application for modification of the earlier custody decree.[77] The trial court modified the decree to provide for sole custody in the father and gave the mother visitation on the first and third Sunday of each month.[78] The supreme court upheld the trial court's decree as to the modified custody order.[79] The court stated that "[t]he situation is added proof divided custody of a child is usually unwise."[80]

The court in *Huston*, having found that the child had emotional problems, stated that "[t]he underlying cause of this appears to be the divided custody . . . [and that the custody arrangement] tends to induce a feeling in [the child that] he does not belong to either family."[81] It should be noted, however, that both parents agreed that the divided custody arrangement should end; it was recommended by the child guidance center that there be less division of parental responsibility and custody so that the child could feel that he belonged to a family.[82]

In *Huston*, the court looked beyond the labels to the actual custody arrangement. The mother had been granted sole custody of the child.[83] The child lived with the father, however, during the week and with the mother on the weekends.[84] The court, therefore, considered this a case involving divided custody.[85]

Another example demonstrating the Iowa Supreme Court's reluctance to approve divided custody arrangements, regardless of the terminology used, is *McCrery v. McCrery*.[86] In *McCrery*, custody was originally granted to the father with reasonable rights of visitation in the mother.[87] Following the father's remarriage, the mother petitioned for modification seeking custody or, in the alternative, increased and definite rights of visitation.[88] The

74. *Id.* at 546, 122 N.W.2d at 895.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 557, 122 N.W.2d at 901.
79. *Id.* at 556-57, 122 N.W.2d at 900-01.
80. *Id.* at 553, 122 N.W.2d at 898.
81. *Id.*
82. *Id.* at 555, 122 N.W.2d at 899.
83. *Id.* at 546, 122 N.W.2d at 894.
84. *Id.* at 550, 122 N.W.2d at 897.
85. *Id.* at 556, 122 N.W.2d at 900.
86. 258 Iowa 354, 138 N.W.2d 876 (1965).
87. *Id.* at 355, 138 N.W.2d at 877.
88. *Id.*

trial court refused to change custody but granted the mother visitation every weekend, during her school vacations (she was a college student), on Christmas Eve and on alternate birthdays.[89] The father was allowed weekend visitation when the child was with his mother for extended periods.[90]

The supreme court affirmed the continued custody in the father but stated that it could not approve "the extensive rights awarded to the mother in the modification."[91] The end result was that the court reduced the visitation to every other weekend, a specified portion of the Christmas vacation, fewer weeks in the summer (two-week periods), and alternate birthdays.[92] The court's reasoning for reducing the visitation was based upon the previous cases that opposed divided custody.[93]

B. *1977-1981 Developments*

In 1977, the Iowa Legislature added a sentence to section 598.21 of the Iowa Code which read: "The order [for child custody] may include a provision for joint custody of the children by the parties."[94] The first case dealing with the joint custody issue by the Iowa Supreme Court after the enactment of the statute was *In re Marriage of Burham*.[95] In this case the court was faced with reconciling its previous statement against divided custody with the new statutory language expressly permitting joint custody.

Discussing the impact of the legislative change, the supreme court stated that "[p]rior to the recent amendment to section 598.21, joint, or divided, custody was never forbidden by statute. Thus, the legislature has now simply placed its imprimatur upon joint custody."[96] The court also stated that joint and divided custody were essentially synonymous.[97]

The court then reviewed its historical opposition to divided custody citing its earlier cases.[98] The arguments for and against joint custody were also set out and discussed.[99] The court listed a set of eight "tests" to be considered by judges in determining the appropriateness of joint custody in each

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89. *Id.* at 356, 138 N.W.2d at 877.

90. *Id.*

91. Id. at 358, 138 N.W.2d at 878.

92. *Id.* at 358, 138 N.W.2d 878-79.

93. *Id.; see* Huston v. Huston, 255 Iowa at 553, 122 N.W.2d at 898; Maron v. Maron, 238 Iowa at 590, 28 N.W.2d at 19.

94. IOWA CODE § 598.21 (1977).

95. 283 N.W.2d 269 (Iowa 1979).

96. *Id.* at 272.

97. *Id.*

98. *Id. See* McCrery v. McCrery, 258 Iowa 354, 138 N.W.2d 876 (1965); Huston v. Huston, 255 Iowa 543, 122 N.W.2d 892 (1963); Mason v. Zolnosky, 251 Iowa 983, 103 N.W.2d 752 (1960); Maron v. Maron, 238 Iowa 587, 28 N.W.2d 17 (1947); Bennett v. Bennett, 200 Iowa 415, 203 N.W. 26 (1925).

99. In re Marriage of Burham, 283 N.W.2d at 272-74.

case.[100] Finally, the court stated that in the future, it would have "no opposition to joint custody arrangements, either by stipulation or decree, which meet substantially those tests" that it had set forth.[101]

Thus, the Iowa Supreme Court, recognizing changes in legal precedent, philosophy, psychology, and society in general, accepted the concept of joint custody and reversed its previous opposition to divided custody. Nevertheless, the court in *Burham*, reversed the trial court's award of joint custody.[102] Each parent had requested sole custody of the two minor girls at the trial court level, and both appealed from the trial court's joint custody decree.[103] The initial decree placed the girls in the temporary custody of the Polk County Department of Social Services and ordered each parent to assume parental responsibilities and to live with the girls in the marital home for alternating 2 ½ month periods.[104] The final decree provided for joint custody with each parent living with the girls in the marital home for alternating six month periods.[105]

The supreme court reversed the trial court and gave sole custody to the father, reserving the visitation rights of the mother to be decided by the trial court.[106] The reason for rejecting joint custody was essentially the inability of the parents to get along and the chronic fighting which made the home an "armed camp."[107] The court stated:

> A mutual acceptance of joint custody and the ability to reach shared decisions in the children's best interests, the second and third tests for joint custody suggested above are imperative . . . Because this case

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100. The eight "tests" listed in *Burham* are:
(1) Is each parent fit and suitable as a custodial parent?
(2) Do the parents agree to joint custody, or is one or both opposed?
(3) Have the parents demonstrated that they are able to communicate and give priority to the child's welfare such that they are capable of reaching shared decisions in the child's best interests?
(4) Is there geographical proximity such that there will be no substantial disruption of the child's schooling, association with friends, religious training, or other routines?
(5) Is there similarity in the environment of each parent's home, or will the child be confronted with vastly different or potentially disruptive environmental changes?
(6) Is there any indication that the psychological and emotional needs and developments of the child will suffer due to a particular joint custodial arrangement?
(7) Are the work hours and routines of both parents such that child care will be suitable with either parent?
(8) Is joint custody in accord with the child's wishes and does he or she not have strong opposition to such an arrangement?
Id. at 274.

101. *Id.* at 275.
102. *Id.*
103. *Id.* at 270.
104. *Id.* at 270-71.
105. *Id.* at 271.
106. *Id.* at 276.
107. *Id.* at 275.

> plainly fails the second and third tests, it also fails the sixth, which requires that the children not suffer emotionally or psychologically from joint custody. . . . Consequently, we believe that joint custody is, as both parties have asserted, untenable in this situation.[108]

Burham was followed in result, at least, by *In re Marriage of Castle*.[109] In *Castle*, the Iowa Court of Appeals denied the father's request for sole or joint custody and affirmed the trial court's decree granting sole custody to the mother.[110] The trial court found that joint custody was not appropriate because the parties could not trust or communicate with each other.[111]

The *Castle* case is significant, however, because of a special concurrence in which two members of the court challenged the concept that one parent could veto a joint custody award.[112] This special concurrence further stated that there should be a presumption that joint custody is in the child's best interests.[113] The majority responded by stating:

> If both parties to a joint custody arrangement agree, there will be few problems, but where one or both disagree, no amount of court ordered or voluntary counseling will satisfactorily resolve the problems which will inevitably arise.
>
> To presume that joint custody is in the child's best interest overlooks the basic fact that joint custody *may not* be in the child's best interest. To force continued association between the parties by marriage counseling or other means under the threat and penalty of loss of custody, or loss of "ability to minister effectively to the child's welfare" as suggested by the special concurrence only prolongs and perpetuates the unpleasantness and litigation that no-fault dissolution was at least partially designed to avoid.[114]

C. *Post-1981 Developments*

1. *Statutory Changes in 1982*

In 1982 the Iowa Legislature enacted a new joint custody statute which remains substantially intact, even after further amendment in 1984. The statute defined joint custody and the factors to be used in determining whether to award joint custody.[115] The bill, which passed both the Iowa Senate and House by large margins,[116] was introduced, debated and passed

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108. *Id.*
109. 312 N.W.2d 147 (Iowa Ct. App. 1981).
110. *Id.* at 149.
111. *Id.* at 148.
112. *Id.* at 150-51 (Johnson, J., Oxberger, C.J., specially concurring).
113. *Id.*
114. *Id.* at 150.
115. IOWA CODE § 598.41 (1983).
116. The final votes on House File 2442 clearly indicate strong support for the bill. The House approved the measure 97-0 and the Senate passed it 47-0. *See* House Journal, 69th Gen.

without much consideration, support or opposition by the legal community. The new law defined joint custody and its application,[117] as well as enumerated concrete guidelines for the judiciary and attorneys.[118]

As previously discussed, the prior statute gave no explicit guidelines for the use of joint custody.[119] This lack of clear legislative guidance was evident in the cases decided by the Iowa Supreme Court dealing with joint custody.[120] The previous statute clearly put the burden upon the courts to choose the "after-thought" option of joint custody instead of the more accepted and traditional alternatives for custody of children.

These changes can possibly be attributed to the difficulty that the courts and the public had experienced with the prior statute. Joint custody had not been widely used or accepted prior to the 1982 legislative changes in Iowa. Due to the apparent non-availability or non-implementation of joint custody in most situations, the demand for a meaningful method of "shared" custodial responsibility increased steadily.

Attitudes toward sexual equality in the workplace and in the home were drastically changing. The growing number of divorced parents who both worked outside the home greatly increased the pressure on the bar and the judiciary to facilitate meaningful relationships between *both* divorced parents and their children by the use of joint custody. In Iowa, increasing strides toward sexual equality were realized as early as 1974 when the supreme court abrogated the tender years doctrine or presumption.[121] In so doing, the court reaffirmed a basic tenet of child custody law; each case must and will be decided on a case-by-case basis and it is unfair to give one party an advantage based on sex in a child custody contest.[122] In abandoning the tender years doctrine, the court held that a custody decision should be based on what is in the best interest of the child and which parent will do a better job of raising the child.[123]

Possibly the most important force behind the new joint custody legislation was the increasing number and power of single parent organizations. In Iowa, Parents Without Partners was one of the most influential backers of the new statute. Representative Douglas Smalley of Des Moines sponsored the Iowa bill on joint custody at their urging.[124] The original draft of the bill

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Assembly, 1471 (1982); Senate Journal, 69th Gen. Assembly, 1265 (1982).

117. IOWA CODE §598.1 (1983).

118. *Id.* § 598.41.

119. The 1981 version of section 598.21 stated that "[t]he court may provide for joint custody of the children by the parties." IOWA CODE § 598.21(6) (1981).

120. *See supra* notes 51-108 and accompanying text.

121. *See* In re Marriage of Bowen, 219 N.W.2d 683, 688 (Iowa 1974).

122. *Id.*

123. *Id.* The court stated that "[i]t is not necessary nor useful to infer in advance that the best interests of young children will be better served if their custody is awarded to their mothers instead of their fathers." *Id.*

124. Interview with Douglas Smalley, former Iowa State Representative (February 28,

promoted joint custody to the extent that it included a rebuttable presumption that joint custody would be in the best interests of the child if both parties agreed to such custody.[125] This draft was apparently patterned after a California joint custody law that contains this presumption.[126] The California statute also specifically permits the court to make an award of joint custody to both parties even if one parent does not agree.[127] Although the statutory presumption was deleted from the final Iowa bill, the bill did not preclude the award of joint custody when one party does not agree.[128] Rather, the Court is *required* to consider granting joint custody in a dissolution proceeding if requested by a party.[129] In the past, the Iowa Supreme Court was not predisposed to joint custody unless both parties agreed.[130] Of course, one of the determinations that the court must make is whether the parents agree or oppose an award of joint custody, but this determination does not appear to be dispositive.[131]

The legislature clearly expressed a preference for joint custody by requiring that the custody award shall "assure minor child frequent and continuing contact with both parents . . . and . . . encourage parents to share the rights and responsibilities of raising the child."[132] The 1982 amendment also required that if joint custody is requested by one parent and denied, the trial court must delineate the reasons for such denial in its ruling.[133] This is a radical change from the previous statute which did not require such delineations.[134]

The 1982 statute dictates that eight factors be considered in the decision to award joint custody.[135] As previously noted, prior to the enactment of the statute, the Iowa Supreme Court had also set out eight factors to be considered in an award of joint custody.[136] It is interesting to note the differences between the lists of factors of the legislature and the supreme court. Perhaps the biggest difference is one of definition. The Iowa Supreme Court in *In re Marriage of Burham* stated that joint custody also included joint physical care.[137] The 1982 statute rejected this concept and explicitly stated

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1984).

125. *See* House File 2442 (1982) (original draft).

126. *See* CAL. CIV. CODE § 4600.5(a) (West 1983).

127. *Id.* § 4600.5(b).

128. IOWA CODE § 598.41(2) (1983).

129. *Id.*

130. *See* In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981) (the court interpreted such agreement as a requirement for joint custody award).

131. *See* IOWA CODE § 598.41(3)(g) (1983).

132. *Id.* § 598.41(1).

133. *Id.* § 598.41(2).

134. *See* IOWA CODE § 598.41 (1979); IOWA CODE § 598.21 (1981).

135. IOWA CODE § 598.41(3) (1983).

136. *See* In re Marriage of Burham, 283 N.W.2d at 274; *see supra* note 100.

137. In re Marriage of Burham, 283 N.W.2d at 274.

that joint physical care is not required.[138] This explains the omission of the *Burham* court's requirements of coordinated work schedules, non-disruptive environmental changes and certain considerations of geographical proximity.[139] Although proximity of location is still a consideration, it is worded in a substantially more neutral manner.[140]

The allowance of joint custody without joint physical care greatly increases the number of divorced families that could benefit from joint custody. The 1982 statute, however, does consider whether both parents have actively cared for the child before and after the separation.[141] This consideration would not only be appropriate in making a decision as to which party should have physical care, but would also have some importance in joint decision-making (that is, educational and medical needs).

Another difference is the attitude of the legislature and the court toward joint custody. This difference is apparent by looking at how the consideration of the appropriateness of joint custody is phrased. The legislature requires the court to consider whether the denial of joint custody would make the child suffer due to a "lack of contact and affection from both parents."[142] This section transposes the supreme court's factor which requires consideration of whether a joint custody arrangement would cause the child to suffer emotionally.[143] This difference reflects a diametric change in attitude from the negative (that is, will joint custody hurt the child) to the positive (that is, will the denial of joint custody be harmful). These changes better demonstrate the preference that the legislature created for the implementation of joint custody after 1982.

2. *Cases Following the 1982 Statutory Changes*

Following the enactment of Iowa Code section 598.41 in 1982, the supreme court was again faced with the joint custody issue in the case of *In re Marriage of Bolin*,[144] an action for the modification of a child custody decree. The Iowa Supreme Court stated that applications to modify decrees would be governed by the new statute.[145] The original decree, which was a

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138. Iowa Code § 598.41(4) (1983).

139. *See* In re Marriage of Burham, 283 N.W.2d at 274.

140. The *Burham* court stated that the issue was whether or not the "geographical proximity [was] such that there [would] be no substantial disruption of the child's schooling, association with friends, religious training, or other routines?" *Id.* The statute, on the other hand, merely considers "the geographic proximity of the parents". Iowa Code § 598.41(3)(g) (1983).

141. *Id.* § 598.41(3)(d).

142. *Id.* § 598.41(3)(b).

143. In re Marriage of Burham, 283 N.W.2d at 274.

144. 336 N.W.2d 441 (Iowa 1983).

145. *Id.* at 443. Other modification cases have discussed joint custody and have applied dissolution principles. *See* McCrery v. McCrery, 258 Iowa 354, 138 N.W.2d 876 (1965); Huston v. Huston, 255 Iowa 543, 122 N.W.2d 892 (1963); Maron v. Maron, 238 Iowa 587, 28 N.W.2d 17 (1947); Bennett v. Bennett, 200 Iowa 415, 203 N.W. 26 (1925).

result of an agreement between the parties, provided for joint custody of the parties' son, but did not specify who was responsible for his physical care.[146] Subsequent disputes arose over the physical care of the child and the father filed an application requesting sole custody, which was granted by the trial court.[147] The supreme court held that the original joint custody award should remain in effect and specified the arrangement for physical care of the child.[148] Interestingly, the court determined that the mother, who lived in California, was to have physical care during the school year and that the father, who lived in Iowa, was to have physical care during the summers.[149] This was very similar to the divided custody that the court had previously discouraged.[150]

In *Bolin*, the court once again discussed divided custody versus joint custody language. The court rejected its previous statement that the terms are synonymous.[151] The *Bolin* court further distinguished joint custody and physical care by stating that it is possible to have joint custody and still have the physical care of the child in only one parent.[152] Under the statute, however, physical care of the child may also alternate between the parents and in effect become the divided custody that the court previously discouraged.[153] In *Bolin*, the responsibility for the physical care of the child was to alternate between the parents so that the child would spend significant amounts of time in both parents' households.[154]

The *Bolin* court also dealt with the issue of whether or not joint custody could be defeated by the veto of one parent. The court indicated that the agreement of both parties was not required before joint custody would be awarded:

> Agreement is merely one factor to be considered when joint custody is ordered, and a change of heart by one or even both parties is not by itself sufficient to establish a change of circumstances requiring joint custody to be terminated.
>
> Although cooperation and communication are essential in joint custody, tension between the parents is not alone sufficient to demonstrate it will not work.[155]

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146. In re Marriage of Bolin, 336 N.W.2d at 442.
147. *Id.*
148. *Id.* at 447.
149. *Id.*
150. *Id.* This is very similar to the decisions reached in *Stillmunkes v. Stillmunkes* and *Mason v. Zolnosky* where divided custody was approved, allowing fathers to have custody during the summer months following the move of the mother and child out of state. *See* Stillmunkes v. Stillmunkes, 245 Iowa at 1087, 65 N.W.2d at 370; Mason v. Zolnosky, 251 Iowa at 990, 103 N.W.2d at 755-56 (1960).
151. In re Marriage of Bolin, 336 N.W.2d at 444.
152. *Id.* at 447; *See* IOWA CODE § 598.41(4) (1983).
153. *See* IOWA CODE § 598.41(4) (1983).
154. In re Marriage of Bolin, 336 N.W.2d at 447.
155. *Id.* at 446.

The court made it clear that it would not tolerate a lack of cooperation by one parent in a joint custody arrangement.[156] "When one parent's obduracy makes joint custody unworkable, the trial court in a modification proceeding may find the child's best interests require sole custody in the other parent."[157]

The decision in *Bolin*, however, did not rule out a refusal to grant joint custody on the grounds that the parents are antagonistic and unable to communicate to promote the child's best interests. In the case of *In re Marriage of Weidner*,[158] the supreme court affirmed the trial court's decree giving the mother sole custody and the father visitation every other weekend, four weeks in the summer, and on specified holidays.[159] The court stated that "[I]n enacting section 591.41 the legislature did not use the word presumption and we find no such presumption [for joint custody] in Iowa law. Clearly, however, our statutes now express a preference for joint custody over other custodial arrangements and do not allow one-party vetoes."[160]

The *Weidner* court recognized a preference in the law for joint custody and rejected one-party vetoes. Nevertheless, the court refused to grant joint custody. The court found that both parents were suitable custodians,[161] but that the antagonism between the parents was so great that joint custody would not work.[162] The court further determined that post-dissolution counseling would not likely change the situation so that joint custody could work in this particular case.[163] Disagreements between parents, however, will not necessarily preclude an award of joint custody if the court finds that the parents will still be able to communicate in matters regarding the children.[164]

3. *1984 Amendments*

In 1984 the Iowa Legislature again amended sections 598.1 and 598.41.[165] The amendment to section 598.1 provides that the best interests of the child include frequent and continuing physical and emotional contact with both parents.[166] The exception to this rule, however, is where such contact will cause physical or "significant emotional" harm to the child.[167] If one parent refuses to provide the opportunity for contact between the child

156. *Id.*
157. *Id.*
158. 338 N.W.2d 351 (Iowa 1983).
159. *Id.* at 359.
160. *Id.* at 356.
161. *Id.* at 359.
162. *Id.* at 357.
163. *Id.* at 357-58.
164. *See* In re Marriage of Fish, 350 N.W.2d at 229.
165. *See supra* note 1.
166. *See supra* note 1, § 598.1 (as amended).
167. *Id.*

and the other parent, the court, in rendering its decision as to custody, may view this as harmful to the child.[168]

In the 1984 amendments, the legislature again strengthened the preference for joint custody without creating a presumption that joint custody is in the best interests of the child. The amendments emphasize that the best interests of the child are served by continuing contact with both parents.[169] As mentioned, the exception is the rather stringent requirement that such contact will be physically or emotionally harmful to the child.[170]

The legislature further amended the statute as to the findings that a judge must make if joint custody is denied. After 1982, the judge was only required to state the reasons for denying joint custody.[171] The 1984 amendments provide that if joint custody is denied, the judge must "cite clear and convincing evidence" that joint custody is *not* in the best interests of the child.[172] Thus, the Iowa Legislature has placed a burden on the court to either award joint custody or to state clear and convincing evidence as to why joint custody is being denied.

The other 1984 statutory change relating to joint custody made the rights of a parent with joint custody more explicit. The statute now provides that joint custody includes equal participation in the child's medical care, education, activities or religious instruction.[173] These rights apply whether the joint custodial parent has physical care or merely visitation rights.

IV. Impact on Iowa Practitioners

A. *Current Legislation and Cases*

The current statute and recent Iowa Supreme Court cases clearly indicate that joint custody is preferred over sole custody in dissolution and modification cases where it is requested by at least one of the parties. The factors that a court is to consider in deciding whether to award joint custody are set forth in the statute[174] and have been discussed in the two Iowa Supreme Court decisions reached after the 1982 amendments.[175] The only instance where the supreme court rejected the award of joint custody subsequent to the amendments was in the case of *In re Marriage of Weidner*.[176] The court in *Weidner* rejected joint custody because the hostilities between

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168. This is a codification of the Iowa Supreme Court's holding in In re Marriage of Bolin, 336 N.W.2d at 446.

169. *See supra* note 1, § 598.1(6) (as amended).

170. *Id.*

171. Iowa Code § 598.41 (1983).

172. *See supra* note 1, § 598.41(2) (as amended).

173. *Id.* § 598.41(4) (as amended).

174. Iowa Code § 598.41(3) (1983).

175. *See* In re Marriage of Weidner, 338 N.W.2d 351 (Iowa 1983); In re Marriage of Bolin, 336 N.W.2d 441 (Iowa 1983).

176. 338 N.W.2d 351 (Iowa 1983).

the parents was so extreme. The trial court in the case stated that "they [the parents] have not demonstrated that they are able to communicate and give priority to the welfare of the children by reaching shared decisions that are in the best interests of the children."[177]

One major change that the 1982 statutory revision effected was the language used in child custody cases. The statute defined and distinguished joint custody and physical care.[178] Joint custody essentially refers to the legal rights and responsibilities of the parents toward the child. Both parents have equal rights and responsibilities toward the child.[179] This differs from sole custody where only one parent has legal rights and responsibilities and non-custodial parent's rights and responsibilities are defined by the dissolution decree as to visitation, support, and other issues.

Physical care is defined as the right and responsibility to maintain the principal home of the child and to provide for the routine day-to-day care.[180] This distinction between joint custody and physical care means that joint custody may be awarded in a situation where only one of the parents has physical care.[181] While this arrangement would not appear to differ substantially from sole custody with visitation, the parent without physical care has equal legal rights in relation to the child in a joint custody case, but not in a sole custody case.

As to joint physical care, section 598.1(4) states that "[t]he court may award physical care to one parent only."[182] This statement may be interpreted in two ways: only one parent has physical care at all times; or only one parent has physical care during a specific time period. It would appear that the latter interpretation is the one that was intended by the legislature.

Section 598.41(4) provides that "[j]oint legal custody does not *require* joint physical care."[183] This provision, however, does not seem to indicate that joint physical care cannot be awarded. The Iowa Supreme Court awarded joint physical care in the *Bolin* case.[184] In *Bolin*, the court gave the mother physical care of the parties' son during the school year and the father physical care of the boy from the third week in June to the third week in August.[185] The court further gave the father *visitation* rights on alternating Christmas and spring vacations and "at reasonable times and places in California and during other visits by [the child] to Iowa."[186] Although the supreme court did not discuss the point, the result in *Bolin* would lead one

177. *Id.* at 357; *but see* In re Marriage of Fish, 350 N.W.2d at 229.
178. IOWA CODE § 598.1(4)-(5) (1983).
179. *Id.* § 598.1(4).
180. *Id.* § 598.1(5).
181. *See* IOWA CODE § 598.41(4) (1983); In re Marriage of Bolin, 336 N.W.2d at 444.
182. IOWA CODE § 598.1(4) (1983).
183. *Id.* § 598.41(4) (emphasis added).
184. In re Marriage of Bolin, 336 N.W.2d at 447.
185. *Id.*
186. *Id.*

to conclude that physical care can be awarded to both parents, but only one parent shall have the physical care at any given time. The parent without physical care may have visitation rights during the times when the other parent has the physical care of the child.

B. *Handling Child Custody Cases Under the New Statute*

The first responsibility of an attorney handling a child custody case is to explain to the client the distinctions between joint and sole custody and the rights and responsibilities in each situation. As the supreme court stated:

> Now that the statute has been clarified, no excuse exists for misunderstanding of the meaning and consequences of an award of joint custody. Lawyers must carefully explain the concept to their clients and attempt, insofar as feasible, to anticipate and guard against the kind of problem that arose in this case. Trial courts similarly have a duty to satisfy themselves that the parties, even in a default proceeding to the extent possible, have a clear understanding of their custodial rights and responsibilities.[187]

If both parents agree to either a sole custody-visitation or joint custody arrangement the court will most likely grant the request of the parties. If one party requests joint custody and the other party does not agree, the court must consider joint custody in light of the factors set out in the statute. If the court decides against an award of joint custody, it must cite clear and convincing evidence as to why joint custody is unreasonable and not in the best interests of the child.[188] Regardless of whether a decree granting joint custody is entered as a result of an agreement between the parties or by the court after a trial, the court should clearly specify the physical care arrangements for the child or children and limit physical care to one parent at a time. When physical care is in one parent permanently, or for an extended period of time, visitation for the parent without physical care may be appropriate.

Once a client has been informed of the distinctions between joint and sole custody, the attorney should review the statutory factors with the client.[189] Reviewing the statutory factors may help the client determine whether or not an award of joint custody is appropriate. In any event, it will inform the client of the basis on which the court will determine joint custody decisions. For the attorney, the review of the statutory criteria as applied to a specific fact pattern will help in making recommendations to the client and in preparing the case.

One party may not veto either directly or indirectly an award of joint

187. *Id.*
188. *See supra* note 1, § 598.41(2) (as amended).
189. *See id.* § 598.41(3) (as amended).

custody. Initially, based on commentaries by legal scholars and psychologists, it was believed that joint custody would only work, and therefore, should only be awarded, where there was cooperation between the parents.[190] This led the courts to generally award joint custody only where the parties were in agreement. The Iowa Supreme Court, in the *Bolin* decision, clearly rejected this approach.[191]

Thus, the court will look at the degree of hostility between the parents and the impact that this hostility has on the child. In *Bolin*, the hostility was not enough to preclude an award of joint custody.[192] The hostility in *Weidner*, however, was held to be significant enough to prevent a joint custody award.[193]

A client should also be advised of the possible consequences of creating or contributing to hostility in order to avoid a joint custody award. The supreme court has stated that if a parent makes joint custody unworkable due to unreasonable resistance and obduracy, the court may consider such unreasonableness as a factor and award sole custody to the other parent.[194] In situations where parental hostility has led the court to deny joint custody and award sole custody, one of the factors the court has considered is the cooperation of each of the parents in visitation and in promoting the other parent's relationship with the child.[195] These factors have been codified in the 1984 amendments which provide that one parent's denial of contact can be a factor in an award or denial of joint custody.[196]

In considering child custody cases, both clients and attorneys must keep in mind the Iowa Supreme Court's attitude toward the behavior and responsibilities of the parents:

> Even though the parents are not required to be friends, they owe it to the child to maintain an attitude of civility, act decently toward one another, and communicate openly with each other. One might well question the suitability as custodian of any parent unable to meet these minimum requirements. Problems are likely to develop under any custodial arrangement. The adults must have the maturity to put their personal antagonisms aside and attempt to resolve the problems.[197]

Clearly the court will not countenance using custody of the children as an issue in a way that causes emotional harm to the children. Any parent who

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190. *See supra* notes 16-21 and accompanying text.

191. *See* In re Marriage of Bolin, 336 N.W.2d at 446.

192. *Id.*

193. In re Marriage of Weidner, 338 N.W.2d at 359; *see also* In re Marriage of Fish, 350 N.W.2d at 229.

194. In re Marriage of Bolin, 336 N.W.2d at 446. This has also been codified in the 1984 amendments. *See supra* note 1, § 598.41(1) (as amended).

195. In re Marriage of Bolin, 336 N.W.2d at 445; In re Marriage of Weidner, 338 N.W.2d at 359 (Iowa 1983).

196. *See supra* note 1, § 598.41(1) (as amended).

197. In re Marriage of Bolin, 336 N.W.2d at 447.

unreasonably fails to cooperate in the custody arrangements may face the award of sole custody to the other parent.

V. Conclusion

Since 1965, the law in Iowa dealing with the award of joint custody has undergone a fairly radical change. In the mid-1960's, the courts in Iowa had the authority to make whatever custody awards were justified in each case.[198] With limited statutory guidance, the Iowa Supreme Court developed and followed a doctrine which provided that the custody of a child was generally not to be divided between the parents, except in the most exceptional circumstances.[199] Generally, approval of such divided custody was limited to situations where both parents offered a good environment for the child and one of the parents had moved from the state, limiting the availability of more frequent, shorter visitation periods.

In 1977, the statute was modified to provide specific authority for the award of joint custody. This was followed by an Iowa Supreme Court decision which stated that the court would approve joint custody awards in appropriate circumstances.[200] Nevertheless, the court remained cautious and refused to approve joint custody awards where there was animosity between the parties and where the parties did not agree to joint custody. The legislature again amended the statute to require the courts to consider joint custody in cases where one of the parties requested it.[201] Following this statutory change, the Iowa Supreme Court indicated that joint custody may be appropriate even where one of the parties does not agree and where there is some hostility between the parties.[202]

The once discouraged approach to divided custody has evolved over the last twenty years to an approved joint custody approach. Attorneys handling dissolution and modification cases involving child custody must first consider the appropriateness of joint custody in each case. If joint custody is to be resisted in a disputed case, clear and convincing evidence must be presented to support the finding that joint custody is not in the child's interest.[203]

In cases where the parties both agree to sole custody, the court is not required to consider joint custody, but may inquire as to the parties' reasons for wanting sole custody.[204] In disputed cases, the statutory factors will need to be considered by the parties and the court in determining if joint custody

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198. *See supra* notes 17-19 and accompanying text.
199. *Id.*
200. In re Marriage of Burham, 383 N.W.2d at 274.
201. Iowa Code § 598.41 (1983).
202. In re Marriage of Bolin 336 N.W.2d at 446-47.
203. *See supra* note 1, § 598.41(2) (as amended).
204. In re Marriage of Weidner, 338 N.W.2d at 356. This statement is based on the court's paramount responsibility to insure that the best interests of the child are considered.

is appropriate. Even where joint custody is agreed upon, the issue of physical care must be decided.

It is possible that as the acceptance of joint custody grows, the dispute between the parties in custody cases will shift from the issue of which parent should have custody of the child to the issue of physical care. At least where joint custody is awarded, one parent will not be in the position of having "lost" the custody battle, and therefore, implicitly considered to be the inferior parent. This change may reduce some of the animosity in child custody cases. The Iowa Supreme Court has indicated that this is one of the goals of joint custody awards.[205]

Attorneys now have a responsibility to advise their clients as to the options of sole and joint custody and to make satisfactory arrangements for physical care in joint custody cases. Attorneys must promote the best interests of the child but also encourage a continuing relationship between the child and *both* parents and a sharing of the rights and responsibilities of raising the child.

205. *Id.* at 358.