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Casenotes: Family Law — Joint Custody — a Trial Court Has the Authority to Award Joint Custody under Its Equity Powers, but Should Consider a Variety of Factors before Determining That a Joint Custody Award Is Appropriate. *Taylor v. Taylor*, 306 Md. 290, 508 A.2d 964 (1986)

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FAMILY LAW — JOINT CUSTODY — A TRIAL COURT HAS THE AUTHORITY TO AWARD JOINT CUSTODY UNDER ITS EQUITY POWERS, BUT SHOULD CONSIDER A VARIETY OF FACTORS BEFORE DETERMINING THAT A JOINT CUSTODY AWARD IS APPROPRIATE. *Taylor v. Taylor*, 306 Md. 290, 508 A.2d 964 (1986).

A husband sued his wife for divorce *a vinculo matrimonii*¹ and for custody of the couple's two children.² The wife also sought custody of both children.³ The trial judge granted the husband a divorce *a vinculo matrimonii* and ordered that the parents have joint custody of the children.⁴ The court of special appeals affirmed the trial court's decree.⁵ The court of appeals vacated and remanded the judgment because the court could not determine the exact nature of the trial court's custody order.⁶ The court held, however, that a trial judge, in his exercise of equity power, may order joint custody of children after considering those factors identified by the court as relevant to joint custody awards.⁷

A court's jurisdiction in child custody stems from a state's general power of *parens patriae*.⁸ This power, which is quite broad, is delegated

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1. *Taylor v. Taylor*, 60 Md. App. 268, 482 A.2d 164 (1984), *vacated*, 306 Md. 290, 508 A.2d 964 (1986). A divorce *a vinculo matrimonii* dissolves the marriage contract completely. BLACK'S LAW DICTIONARY 70 (Abridged 5th ed. 1983).
 2. *Taylor*, 306 Md. at 293-94, 508 A.2d at 965-66. The children were two and three years old and were living in the marital home with their father at the time the husband filed for divorce.
 3. *Id.*
 4. *Taylor*, 60 Md. App. at 272, 482 A.2d at 165. Joint custody includes the concepts of joint legal custody and joint physical custody. Joint legal custody means that the parents share decisions concerning the child and neither parent has a superior right over the other. Joint physical custody means that the parents share the obligation to shelter the child and make day-to-day decisions. This obligation may be divided in numerous ways such as one parent having the child during the school year and the other during vacation, or divided between weeks. *Taylor*, 306 Md. at 296-97, 508 A.2d at 967.
 5. *Taylor*, 60 Md. App. at 277, 482 A.2d at 168. The wife appealed the decision on three grounds: (1) the trial court did not have the authority to grant joint custody; (2) if the trial judge did have such authority, the trial judge abused his discretion in awarding joint custody where neither party requested or agreed to joint custody; and (3) if the trial judge did have the authority to award joint custody *sua sponte*, the judge abused his discretion under the facts. Brief for Appellant at i, *Taylor v. Taylor*, 306 Md. 290, 508 A.2d 964 (1986) (No. 85-23).
 6. The order appeared to provide for joint physical custody, but was silent with respect to legal custody. The court of appeals also mandated full consideration of the child custody issue in light of the joint custody criteria identified. *Taylor*, 306 Md. at 311-13, 508 A.2d at 975.
 7. *Id.* at 301-11, 508 A.2d at 969-74. The court delineated the major factors that should be considered in determining the appropriateness of joint custody because it recognized the danger to children of awarding joint custody without careful consideration of the advantages and disadvantages. *See id.* at 302-03, 508 A.2d at 970.
 8. *See, e.g.*, L. HOCHHEIMER, A TREATISE ON THE LAW RELATING TO THE CUSTODY OF INFANTS INCLUDING PRACTICE AND FORMS § 23 (2d ed. 1891); *Ross v. Pick*, 199 Md. 341, 351, 86 A.2d 463, 468 (1952).

to courts in their exercise of general equity jurisdiction.⁹ Traditionally, courts have had the power to make temporary arrangements for the child,¹⁰ to determine who shall have permanent custody of the child,¹¹ and to modify or amend a custody decree.¹² Additionally, courts are not required to abide by custody agreements¹³ or to heed the claim by one party for custody of a child over another party who does not seek custody.¹⁴ Thus, courts in their exercise of equity power historically have maintained broad discretion in fashioning custody decrees.

In their exercise of equity jurisdiction, courts have relied on various legal principles in the custody decision making process.¹⁵ At English common law, a father had a property right to his children and custody almost inevitably was given to him.¹⁶ In the colonial courts, the father's duty to support and discipline his children formed the basis of his right to custody.¹⁷ It was not until the middle of the nineteenth century that the father's right to custody gave way to the tender years doctrine. This doctrine, which posited that very young children need to be with their mothers, resulted in mothers gaining custody.¹⁸ The origin of the tender years doctrine has been traced to the Maryland case of *Helms v. Franciscus*.¹⁹

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9. L. HOCHHEIMER, *supra* note 8, § 23. In divorce proceedings, jurisdiction over child custody attaches as soon as the custody of a child becomes an issue. *Id.* § 71.
 10. *Id.* § 73; see also *In re Welch*, 74 N.Y. 299 (1878) (temporary custody awarded to one other than legal guardian). Temporary custody arrangements give the court time to decide permanent custody.
 11. *E.g.*, *In re Arlene G.*, 301 Md. 355, 361, 483 A.2d 39, 42 (1984); *Ross v. Hoffman*, 280 Md. 172, 174, 372 A.2d 582, 585 (1977).
 12. *E.g.*, L. HOCHHEIMER, *supra* note 8, § 79; *Ross*, 280 Md. at 174, 372 A.2d at 585.
 13. *Mazur v. Lazarus*, 196 A.2d 477, 478 (D.C. 1964); L. HOCHHEIMER, *supra* note 8, § 75.
 14. See, e.g., *Mullinix v. Mullinix*, 12 Md. App. 402, 411, 278 A.2d 674, 678 (1971); *Finlay v. Finlay*, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925).
 15. See generally Ester, *Maryland Custody Law - Fully Committed to the Child's Best Interests?*, 41 MD. L. REV. 225 (1982) (contains an excellent discussion of the history and development of child custody principles).
 16. *E.g.*, *Montgomery County Dep't of Social Servs. v. Sanders*, 38 Md. App. 406, 414-15, 381 A.2d 1154, 1160 (1977); Davidson & Gerlach, *Child Custody Disputes: The Child's Perspective*, in LEGAL RIGHTS OF CHILDREN (R. Horowitz & H. Davidson eds. 1984 & Supp. 1986). *But cf.* *Shelley v. Westbrooke*, 37 Eng. Rep. 850 (1817) (the poet Percy Bysshe Shelley lost custody of his children because he was an atheist).
 17. *E.g.*, *McAndrew v. McAndrew*, 39 Md. App. 1, 4, 382 A.2d 1081, 1083 (1978); *Sanders*, 38 Md. App. at 415, 381 A.2d at 1160.
 18. Davidson & Gerlach, *supra* note 16, at 234. The doctrine first appeared in Talfourd's Act in England in 1839 which gave the court authority to award custody of children under seven to the mother. Miller, *Joint Custody*, 13 FAM. L.Q. 345, 354 (1979).
 19. 2 Bland Ch. 519 (Md. 1826). In *Helms*, the court summarized the evolving approach: "[y]et even a Court of common law will not go so far as to hold nature in contempt, and snatch helpless, puling infancy from the bosom of an affectionate mother, and place it in the coarse hands of the father." *Id.* at 536; *accord* *Chapsky v. Woods*, 26 Kan. 650 (1881); *United States v. Green*, 26 F. Cas. 30, 31-32 (C.C.D.R.I. 1824) (No. 15256); *Jenkins v. Jenkins*, 173 Wis. 592, 181 N.W. 826 (1921).

The maternal preference presumption, a corollary to the tender years doctrine, has guided courts in making custody determinations since the early twentieth century.²⁰ Under the maternal preference presumption, the mother, absent compelling circumstances, was given custody of the child.²¹ The maternal preference presumption differed from the tender years doctrine in that the presumption applied regardless of the age of the child. In *McAndrew v. McAndrew*, the court of special appeals abrogated the maternal preference presumption in Maryland.²² The *McAndrew* court examined a 1974 amendment to a Maryland custody statute that provided "in any custody proceeding, neither parent shall be given preference solely because of his or her sex,"²³ and concluded that the legislature intended to abolish the maternal preference presumption.²⁴ Some states, however, still apply the maternal preference presumption in making child custody decisions.²⁵

Courts have also recognized a presumption against an adulterous parent.²⁶ This presumption was gradually relaxed in Maryland until it was abrogated in *Davis v. Davis*.²⁷ The *Davis* court recognized adultery as relevant only when it had an effect on the child and consequently reflected on lack of parental fitness.²⁸ Other states have followed

20. See *Hines v. Hines*, 192 Iowa 569, 572, 185 N.W. 91, 92 (1921); *Hild v. Hild*, 221 Md. 349, 157 A.2d 442 (1960); *Tuter v. Tuter*, 120 S.W.2d 203, 205 (Mo. App. 1938); *Freeland v. Freeland*, 92 Wash. 482, 483-84, 159 P. 698, 699 (1916).

Commentators have criticized the maternal preference presumption as a violation of equal protection. See, e.g., M. ROMAN & W. HADDAD, *THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY* 34-45 (1978); Rabbino, *Joint Custody, Toward the Development of Judicial Standards*, 48 *FORDHAM L. REV.* 105, 108 (1979). At least one commentator, however, has suggested that tilting the scales toward mothers in custody decisions helps to correct structural inequalities found within the family unit such as wage differentials between husband and wife. P. CHESLER, *MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY* 439 (1986) (quoting H. LEVINE & A. ESTABLE, *THE POWER POLITICS OF MOTHERHOOD* (1983) (unpublished manuscript)).

21. See *supra* note 20.

22. 39 Md. App. 1, 382 A.2d 1081 (1978).

23. *Id.* at 8, 382 A.2d at 1085.

24. *Id.*, 382 A.2d at 1086.

25. The presumption operates either as a tiebreaker when all things between the parents are equal, or the presumption requires courts to award custody to the mother absent a finding of the mother's unfitness. E.g., *Fitzpatrick v. Fitzpatrick*, 4 Ohio App. 2d 279, 207 N.E.2d 794 (1965) (award to mother as long as she is fit); *McCreery v. McCreery*, 218 Va. 352, 355, 237 S.E.2d 167, 168 (1977) (tiebreaker).

26. E.g., *Davidson & Gerlach*, *supra* note 16, at 238; L. HOCHHEIMER, *supra* note 8, § 75. Maryland courts had recognized this presumption. See, e.g., *Palmer v. Palmer*, 238 Md. 327, 331, 207 A.2d 481, 483 (1965); *Wallis v. Wallis*, 235 Md. 33, 36-37, 200 A.2d 164, 165-66 (1964).

27. 280 Md. 119, 372 A.2d 231, *cert. denied*, 434 U.S. 939 (1977).

28. *Swain v. Swain*, 43 Md. App. 622, 406 A.2d 680 (1979). Remnants of the presumption still surface. In *Taylor*, the judge mentioned the mother's indiscretion as a factor in his custody decision without having any further information about how the children might have been affected by the mother's behavior. *Taylor v. Taylor*, 60 Md. App. 268, 271, 482 A.2d 164, 165, *vacated*, 306 Md. 290, 508 A.2d 964 (1986).

suit.²⁹

A growing concern for the child led to modifications in the judicial approach used to determine child custody.³⁰ Although courts always have considered the welfare of the child, many courts eventually discarded old presumptions³¹ and adopted a standard based solely upon the best interests of the child. This standard, adopted in the Uniform Marriage and Divorce Act,³² is the approach currently favored by the majority of states.³³ Maryland follows this approach in all custody decisions. In *Montgomery County Department of Social Services v. Sanders*,³⁴ the court of special appeals set forth the criteria for judicial determination of a child's best interests.³⁵

29. See, e.g., *Bartley v. Bartley*, 197 Neb. 246, 248 N.W.2d 39 (1976); *K.L.H. v. G.D.H.*, 318 Pa. Super. 330, 464 A.2d 1368 (1983); *Spaulding v. Spaulding*, 278 N.W.2d 639 (S.D. 1979).

30. *Montgomery County Dep't of Social Servs. v. Sanders*, 38 Md. App. 406, 416, 381 A.2d 1154, 1161 (1977).

31. See *supra* notes 15-29 and accompanying text.

32. UNIFORM MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 197-98 (1987). The Act provides:

The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

(1) the wishes of the child's parent or parents as to his custody;

(2) the wishes of the child as to his custodian;

(3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school, and community; and

(5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

Id.

33. See, e.g., *Cappetta v. Cappetta*, 196 Conn. 10, 16, 490 A.2d 996, 999 (1985); *Costigan v. Costigan*, 418 A.2d 1144, 1146 (Me. 1980); *Williamson v. Williamson*, 122 Mich. App. 667, 672-73, 333 N.W.2d 6, 7-8 (1982); *Fitzgibbon v. Fitzgibbon*, 197 N.J. Super. 63, 67, 484 A.2d 46, 48 (1984); *Coulter v. Stewart*, 97 N.M. 616, 617, 642 P.2d 602, 603 (1982). A number of commentators have criticized the standard for being ambiguous and destructive in its dependence on judicial discretion. See *Sanders*, 38 Md. App. at 419-20, 381 A.2d at 1163; *Robinson, Joint Custody: Constitutional Imperatives*, 54 CINN. L. REV. 27, 59-60 (1985). The standard has been attacked for subordinating the child's interests to that of the parents', and thus commentators have urged a "least detrimental alternative" standard which focuses primarily on placing the child with the psychological parent. "A psychological parent is one who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." A. FREUD, J. GOLDSTEIN & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 53-64, 98 (1973).

34. 38 Md. App. 406, 381 A.2d 1154 (1977).

35. The *Sanders* decision identified the following factors: (1) fitness of the parents; (2) character and reputation of the parties; (3) desire of the natural parents and agreements between the parties; (4) potentiality of maintaining natural family relations; (5) preference of the child; (6) material opportunities affecting the future life of the child; (7) age, health, and sex of the child; (8) residences of parents and opportunity for visitation; (9) length of separation from the natural parents; and (10) prior voluntary abandonment or surrender. *Id.* at 420, 381 A.2d at 1163.

A small but increasing number of states have determined that the best interests of the child require consideration of which parent provides the primary care for the child.³⁶ Primary caretakers perform such tasks as meal preparation, bathing, disciplining, and educating.³⁷ Courts employing this approach emphasize the primary caretaker role because a custody award to the primary caretaker helps to ensure that the child has continuing access to the parent who has tended to the child's psychological and physical needs.³⁸

Many states consider joint custody as a possible means of furthering the best interests of the child.³⁹ In furthering such interests, these states have taken four approaches.

Under the first approach, a court awards joint custody to the parents if there are no circumstances compelling an award of custody to one parent or the other.⁴⁰ There are two standards a court applies to deter-

36. Annotation, *Primary Caretaker Role of Respective Parents as Factor in Awarding Custody of Child*, 41 A.L.R.4th 1129 (1985) (analyzes cases where courts have considered which parent was the primary caretaker).

37. The primary caretaker standard was enunciated most clearly in *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). The *Garska* court identified ten factors to apply in determining which parent is the primary caretaker:

- (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or girl or boy scout meetings; (6) arranging alternative care, i.e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e. religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing and arithmetic.

Id. at 363. See generally Polik, *Why are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RIGHTS LAW RPT. 235, 241-43 (1982) (analyzes the *Garska* opinion).

38. See *In re Maxwell*, 8 Ohio App. 3d 302, 306, 456 N.E.2d 1218, 1222 (1982).

39. See *infra* notes 40-57 and accompanying text. Severe criticism of sole custody and the pressure of father's rights activists led the courts to consider joint custody in their decision making. Sole custody has been criticized for promoting pathology by weakening the father-child relationship, burdening the mother, and promoting intense court battles. See, e.g., Miller, *supra* note 18, at 355-59; Robinson, *supra* note 33, at 31-32; ROMAN & HADDAD, *supra* note 20. One commentator, however, has suggested that joint custody only became popular as a tool to fight the feminist demand for men and women to share parenting, and to help fathers avoid paying child support. P. CHESLER, *supra* note 20, at 433-34, 439.

40. FLA. STAT. ANN. § 61.13(2)(b)2 (West Supp. 1988); IDAHO CODE § 32-717B (1983); LA. CIV. CODE ANN. art. 146 (West 1988); MASS. GEN. LAWS ANN. ch. 208, § 31 (West 1987); N.M. STAT. ANN. § 40-4-9.1 (1986). This approach is advocated by father's rights activists. ROMAN & HADDAD, *supra* note 20, at 173. One commentator has argued that there is a constitutional right to custody of one's children and that a joint custody presumption is necessary to recognize this right. Robinson, *supra* note 33, at 29. *But cf.* P. CHESLER, *supra* note 20, at 433 (joint custody presumptions discourage joint parenting during marriage because the father knows he can get custody later and thus, joint custody presumptions result in the continuation of male dominance).

Vermont has indicated that joint custody is presumed to be against the best

mine if joint custody should be bypassed for an award of sole custody. The first is satisfied if the court finds that joint custody would be detrimental to the child.⁴¹ The second standard is satisfied if the court finds that joint custody would not be in the child's best interests.⁴² Essentially, the "detriment standard" requires a specific showing of the harm that would come to the child, whereas the best interests standard allows the court to consider a broader range of factors.

Under the second approach, the court primarily considers whether the parents agree on joint custody. Eight states invoke a presumption for joint custody upon parental agreement⁴³ and three states permit the court to consider joint custody only if the parents agree.⁴⁴ In the eight states using the presumption, the trial judge who declines to award joint custody generally must state the reasons for the denial.⁴⁵ Those states permitting awards of joint custody upon parental agreement leave more discretion to the trial judge,⁴⁶ who may consider other relevant factors such as whether the parents have an understanding of the rights and responsibilities of joint custody.⁴⁷

The third approach concerns joint custody upon the application of one parent. Most states using this approach consider the request of one parent for joint custody as a factor to be weighed, leaving the court with broad power to determine if joint custody is in the best interests of the child.⁴⁸ Two states, however, invoke a joint custody presumption upon

interests of the child and that an award of joint custody requires a specific finding of special circumstances. *Lumbra v. Lumbra*, 136 Vt. 529, 532, 394 A.2d 1139, 1142 (1978).

41. FLA. STAT. ANN. § 61.13(2)(b)2. For example, if one parent's household is abusive or neglectful then it would be harmful for a child to live with that parent. *Robinson*, *supra* note 33, at 61.
42. IDAHO CODE § 32-717B; LA. CIV. CODE ANN. art. 146c(2); MASS. GEN. LAWS ANN. ch. 208, § 31; N.M. STAT. ANN. § 40-4-9.1. In Louisiana, for example, the inability of the parents to cooperate is sufficient to show that joint custody is not in the child's best interests. *Turner v. Turner*, 455 So. 2d 1374, 1380 (La. 1984). *But cf.* *Baudoin v. Herbert*, 463 So. 2d 78 (La. Ct. App. 1985) (court required father to post property bond to ensure compliance with joint custody award).
43. CAL. CIV. CODE § 4600.5 (West Supp. 1987); CONN. GEN. STAT. ANN. § 46B-56a (West 1986); ME. REV. STAT. ANN. tit. 19, § 752(6) (Supp. 1987); MINN. STAT. ANN. § 518.17(2) (West Supp. 1988); MISS. CODE ANN. § 93-5-24(4) (Supp. 1987); MONT. CODE ANN. § 40-4-224 (1987); NEV. REV. STAT. § 125.490 (1986); N.H. REV. STAT. ANN. § 458.17 (1983).
44. OHIO REV. CODE ANN. § 3109.04 (Page Supp. 1987); OR. REV. STAT. § 107.169 (1987); WIS. STAT. ANN. § 767.24(1)(b) (West 1981).
45. *See supra* note 43. Maine requires substantial evidence to overcome the presumption. ME. REV. STAT. ANN. tit. 19, § 752(6).
46. *See supra* note 44. In Oregon, however, the court cannot order sole custody when the parties agree to joint custody; the court can later modify the order. OR. REV. STAT. § 107.169.
47. *See In re Bolin*, 336 N.W.2d 441, 447 (Iowa 1983).
48. HAW. REV. STAT. § 571-46 (1985); IOWA CODE ANN. § 598.41 (West Supp. 1987); MICH. COMP. LAWS ANN. § 722.26a (West Supp. 1987); MISS. CODE ANN. § 93-5-24(3) (Supp. 1987); N.H. REV. STAT. ANN. § 458.17 (1983); OKLA. STAT. ANN. tit. 12, § 1275.4 (West Supp. 1988).

the application of either party.⁴⁹

The fourth approach, adopted by the majority of jurisdictions, employs no presumptions and leaves the court with broad discretion in considering joint custody.⁵⁰ This approach allows the court to award joint custody without a request by either party⁵¹ or to deny joint custody even if requested by both.⁵² Some states have identified factors to guide trial judges in the exercise of this discretion.⁵³ For example, New York courts have concluded that parental capability to cooperate in matters affecting the interests of their children is a minimum condition to an award of joint custody.⁵⁴ In *Beck v. Beck*,⁵⁵ a New Jersey court determined that the threshold question in a joint custody consideration is whether the child has an established relationship with both parents so as to recognize each as a source of love.⁵⁶ Under the New Jersey approach, an award of joint custody would be inappropriate if the child has not established such a relationship with both parents.⁵⁷

49. MINN. STAT. ANN. § 518.17(2) (West Supp. 1988); MONT. CODE ANN. § 40-4-224 (1987).

50. See, e.g., *Ezell v. Hammond*, 447 So. 2d 766 (Ala. Civ. App. 1985); COLO. REV. STAT. § 14-10-124 (1987); KY. REV. STAT. ANN. § 403.270 (Baldwin 1983); N.C. GEN. STAT. § 50-13.2(b) (1984); 23 PA. CONS. STAT. ANN. § 5304 (Purdon Supp. 1987); TENN. CODE ANN. § 36-6-101 (Supp. 1987).

Washington's Parenting Act of 1987 structures the trial judge's discretion by providing that a joint custody agreement between the parties is to be approved where it is consistent with specified limitations on parental decision making and where it is knowing and voluntary. The statute also provides that joint custody is not to be awarded when both parents are opposed to mutual decision making or where one parent's opposition is reasonable. Parenting Act of 1987, ch. 460, § 9(z) 1987 Wash. Legis. Serv. 556, 566 (West).

51. *Beck v. Beck*, 86 N.J. 480, 432 A.2d 63 (1981). The trial judge in *Beck* apparently attended a custody conference during a weekend recess and subsequently decided that joint custody might be the correct award. P. CHESLER, *supra* note 20, at 258.
52. *In re Ford*, 470 N.E.2d 357, 362 (Ind. Ct. App. 1984) (court not bound by parties' agreement to joint custody and thus, judge did not abuse discretion in awarding sole custody to father); TEX. FAM. CODE ANN. § 14.021 (Vernon Supp. 1988).
53. One commentator has outlined three conditions that should be established before awarding joint custody: (1) parental fitness, (2) some degree of cooperation between ex-spouses, and (3) some sharing of child rearing values between ex-spouses. Miller, *supra* note 18, at 369-70.
54. *Braiman v. Braiman*, 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978); *Dodd v. Dodd*, 93 Misc. 2d 641, 403 N.Y.S.2d 401 (1978); *accord Smith v. Smith*, 673 P.2d 282 (Alaska 1983) (court rejected joint custody on finding that parents could not cooperate); *Wilcox v. Wilcox*, 108 Mich. App. 488, 495, 310 N.W.2d 434, 437 (1981) (court must consider parental capacity to cooperate if joint custody is raised *sua sponte*); *Brisco v. Brisco*, 713 S.W.2d 586, 590 (Mo. App. 1986) (joint custody requires evidence that parents are "emotionally equipped to deal with each other as equal partners in the care of their child"); *In re Marriage of Clement*, 52 Or. App. 101, 627 P.2d 1263 (1981) (parties must be capable of cooperating in the responsibility of child rearing for joint custody to be a proper award).
55. 86 N.J. 480, 432 A.2d 63 (1981).
56. *Id.* at 497-98, 432 A.2d at 71; see also *Mastropole v. Mastropole*, 181 N.J. Super. 130, 137-38, 436 A.2d 955, 959 (1981) (following *Beck*).
57. *Beck*, 86 N.J. at 497-98, 432 A.2d at 71.

In *Kerns v. Kerns*,⁵⁸ the Court of Special Appeals of Maryland addressed a trial judge's authority to award joint custody in the absence of a request or consent by the parties. The *Kerns* court held that a court may award joint custody if it is in the best interests of the child.⁵⁹ The *Kerns* court placed Maryland squarely within the majority approach that leaves the decision to award joint custody solely within the discretion of the trial judge.⁶⁰ The *Kerns* decision, however, provides little guidance to the trial judge faced with this exercise of discretion because the court failed to identify any factors that might be relevant to a joint custody decision.

Two years after the *Kerns* decision, the Court of Appeals of Maryland first addressed the joint custody issue in *Taylor v. Taylor*.⁶¹ The *Taylor* court, like *Kerns*, held that the circuit court, in its exercise of equity powers, has the authority to award joint custody.⁶² The court reasoned that the authority to determine custody of children is an inherent part of the court's equity power and that any limitation on this power is a matter for the legislature.⁶³ Upon review of two relevant statutes,⁶⁴

58. 59 Md. App. 87, 474 A.2d 925 (1984).

59. The court concluded that MD. ANN. CODE art. 72A § 1 (1983) authorized joint custody awards and that prior case law did not prevent such an award. Additionally, the court rejected the appellant's argument that failure of the legislature to pass a joint custody bill denounced the concept. *Id.* at 90-94, 474 A.2d at 927-29.

60. *See supra* notes 50-57 and accompanying text.

61. 306 Md. 290, 508 A.2d 964 (1986).

62. *Id.* at 298, 508 A.2d at 968.

63. *Id.* Indeed, the court stated that the General Assembly's 1986 amendment to MD. FAM. LAW CODE ANN. § 5-203(c)(1) (Supp. 1986) providing that a court may award joint custody as well as sole custody was declarative of existing common law. *Id.* at 301, 508 A.2d at 969.

64. The first statute concerned jurisdiction within a court of equity:

(a) *Jurisdiction of courts of equity.* — A court of equity has jurisdiction over the custody, guardianship, legitimation, maintenance, visitation and support of a child. In exercising its jurisdiction, the court may:

(1) Direct who shall have the custody or guardianship of a child;

(2) Determine the legitimacy of a child, pursuant to § 1-208 of the Estates and Trusts Article of this Code;

(3) Decide who shall be charged with the support and maintenance of a child, *pendente lite* or permanently;

(4) Determine who shall have visitation rights to a child. At any time following the termination of a marriage, the court may consider a petition for reasonable visitation by one or more of the grandparents of a natural or adopted child or the parties whose marriage has been terminated, and may grant such visitation if the court believes it to be in the best interests of the child; or

(5) From time to time set aside or modify its decree or order concerning the child.

(b) *Jurisdiction of juvenile or criminal court not affected.* — Nothing in this section takes away or impairs the jurisdiction of the juvenile court or criminal court with respect to the custody, guardianship, maintenance, visitation, and support of a child. This section does not limit or preclude paternity proceedings under Article 16 of this Code except after the legitimation of a child under this section.

MD. CTS. & JUD. PROC. CODE ANN. § 3-602 (1980 & Supp. 1983). The current

the court found that the legislature did not intend to limit an equity court's broad power to decide child custody matters, and concluded that a court could grant joint custody of children.⁶⁵

The *Taylor* court did not reach the question of whether the trial judge abused his discretion in awarding joint custody under the facts of the case. Nevertheless, the court identified the following factors as relevant to a trial judge's consideration of joint custody: (1) capacity of parents to communicate and reach shared decisions affecting the child's welfare,⁶⁶ (2) willingness of parents to share custody,⁶⁷ (3) fitness of parents,⁶⁸ (4) relationship established between the child and each parent,⁶⁹ (5) preference of the child,⁷⁰ (6) potential disruption of child's social and school life,⁷¹ (7) geographic proximity of parental homes,⁷² (8) demands of parental employment,⁷³ (9) age and number of children,⁷⁴ (10) sincer-

relevant statute may be found at MD. FAM. LAW CODE ANN. § 1-201 (1984). The second statute related to custody and guardianship of children:

The father and mother are the joint natural guardians of their child under eighteen years of age and are jointly and severally charged with its support, care, nurture, welfare and education. They shall have equal powers and duties, and neither parent has any right superior to the right of the other concerning the child's custody. If either the father or mother dies, or abandons his or her family, or is incapable of acting, the guardianship devolves upon the other parent. Where the parents live apart, the court may award the guardianship of the child to either of them, but, in any custody proceeding, neither parent shall be given preference solely because of his or her sex. Provided: The provisions of this article shall not be deemed to affect the existing law relative to the appointment of a third person as guardian of the person of the minor where the parents are unsuitable, or the child's interests would be adversely affected by remaining under the natural guardianship of its parent or parents.

MD. ANN. CODE art. 72A, § 1 (1983). The current relevant statute may be found at MD. FAM. LAW CODE ANN. § 5-203 (1984 & Supp. 1986).

65. *Taylor*, 306 Md. at 297-302, 508 A.2d at 967-70.
66. *Id.* at 304-07, 508 A.2d at 971-72. The court considered parental ability to communicate about the best interests of the child as the most important factor and indicated that the absence of a "track record" of good communication would be sufficient to deny joint custody. *Id.*
67. *Id.* at 307-08, 508 A.2d at 972-73. The court considered the presence of a willingness to share custody as a critical factor, but declined to give "either parent veto power over the possibility of a joint custody award." *Id.*
68. *Id.* at 308, 508 A.2d at 973. Fitness involves psychological and physical capabilities. *Id.*
69. *Id.* This factor takes the child's psychological and emotional needs into account. *Id.*
70. *Id.* The weight given to this factor depends on the child's age and discretion. *Id.*
71. *Id.* at 308-09, 508 A.2d at 973. The court differentiated between physical and legal custody and suggested that any disruption may be alleviated by adjusting physical custody arrangements without interfering with the concept of joint custody. *Id.*
72. *Id.* at 309, 508 A.2d at 973. Proximity is not a prerequisite to an award of joint custody. *Id.*
73. *Id.* Flexible employment or different work schedules is preferred. *Id.*
74. *Id.* at 309, 508 A.2d at 973-74. This factor is identified as a practical consideration. *Id.*

ity of parent's request,⁷⁵ (11) financial status of parents,⁷⁶ (12) impact on state or federal assistance,⁷⁷ (13) benefit to parents,⁷⁸ and (14) other circumstances that reasonably relate to the issue.⁷⁹

By delineating these factors, the *Taylor* court's decision expands upon the *Kerns* rule while remaining consistent with the court of special appeals decision in *Sanders*,⁸⁰ thus maintaining a focus on the best interests of the child. The court adopted a flexible approach which requires trial judges to consider the implications of awarding joint custody. Unlike those states which have presumptions or bright line tests for when joint custody awards are appropriate,⁸¹ the *Taylor* court refused to adopt a simplistic solution to a complex problem.

The *Taylor* court gave full recognition to the importance of good parental communication as a factor in determining a child's best interests.⁸² Commentators have identified this factor as one of the most critical variables affecting the success or failure of a joint custody arrangement.⁸³ Additionally, the court gave careful consideration to the practical demands of joint custody such as parental employment, age and number of children, and geographic proximity of parental homes.⁸⁴ These are considerations which cumulatively have significant bearing on the stability of a child's living arrangement.⁸⁵

The *Taylor* court, despite its careful consideration of a variety of factors, failed to address some critical points.⁸⁶ The court refused to adopt a rule requiring agreement of both parties before awarding joint custody because it believed that a parent who contests joint custody forcefully during litigation may then cooperate after such an award.⁸⁷ In

75. *Id.* at 309-10, 508 A.2d at 974. This factor recognizes that a parent may demand joint custody to gain leverage in bargaining on alimony, support, or property concessions. *Id.*

76. *Id.* at 310, 508 A.2d at 974. This factor recognizes that joint physical custody places greater financial burden on both parents. *Id.*

77. *Id.* at 310-11, 508 A.2d at 974. Joint custody may have an effect on eligibility for Aid to Families with Dependent Children and medical assistance because both programs require a showing of an absent parent. *Id.*

78. *Id.* at 311, 508 A.2d at 974. This factor gives importance to a parent's feelings and recognizes that a parent's self-image affects the child. *Id.*

79. *Id.* The court here recognized that the trial judge should exercise discretion to examine other factors relevant to the consideration of custody options. *Id.*

80. *See supra* notes 34-35 and accompanying text.

81. *See supra* notes 40-45, 49 and accompanying text.

82. *See supra* note 66 and accompanying text.

83. J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP 310 (1980); P. CHESLER, *supra* note 20, at 434-35.

84. *See supra* notes 72-74 and accompanying text.

85. *See generally* Miller, *supra* note 18, at 371-73 (discusses how the presence or absence of these factors has an affect on the functioning of a joint custody arrangement).

86. The court itself indicated that the factors identified were not exhaustive. *Taylor v. Taylor*, 306 Md. 290, 303, 508 A.2d 964, 970 (1986). Nevertheless, the decision fails to address points which should have been discussed. *See infra* notes 87-95 and accompanying text.

87. *Id.* at 308, 508 A.2d at 973.

this respect, the *Taylor* court did not give adequate recognition to the factors delineated in *Sanders*⁸⁸ or the Uniform Marriage and Divorce Act.⁸⁹ The court's reasoning essentially ignores research that shows joint custody fails when ordered over the objection of one parent.⁹⁰ Moreover, the court's reasoning fails to recognize that parents may refuse to agree to joint custody for legitimate reasons such as domestic violence. A parent may oppose joint custody to protect herself/himself or a child from continued domination by an abusive spouse or parent; abusive individuals frequently seek custody as another way of maintaining control over the family unit.⁹¹ Although the *Taylor* court correctly addressed the sincerity of a parent's request for joint custody,⁹² the court only focused on how such a request can be used as a bargaining tool and did not consider the abusive spouse problem.⁹³ A careful judge should be alert to this problem and not penalize a parent who has legitimate reasons for seeking sole custody by awarding joint custody.⁹⁴

The *Taylor* court gave consideration to the relationship established between the child and each parent, but did not address the issue of whether both parents are primary caretakers.⁹⁵ If joint custody is to be awarded *only* when it is in the best interests of the child, then the court should determine whether either parent alone would be a good parent. This determination necessitates an inquiry into whether each parent performs child care tasks equally. If the answer to this inquiry is no, it makes little sense to give responsibility for a child's well-being to a parent who has had little involvement in meeting the child's needs.⁹⁶ Continuity in the relationship between child and caretaker is critical to a child's socio-emotional development.⁹⁷ A focus on primary caretaking would

88. See *supra* note 35. The court specifically failed to address adequately the "desire of the natural parents and agreements between the parties" criterion.

89. See *supra* note 32. Here, the court did not focus on the "wishes of the child's parent or parents" as to the child custody factor of the Act.

90. Address by Deborah A. Lupenitz, Ph.D., Child Custody: The American Family in Conflict (October 25, 1986).

91. In one study, sixty-two percent of the fathers seeking custody abused their wives. P. CHESLER, *supra* note 20, at 74.

92. *Taylor v. Taylor*, 306 Md. 290, 309-10, 508 A.2d 964, 974 (1986).

93. Women in abusive situations are forced into first proving the battery, and then that the battery reflects on the abuser's fitness as a parent. See generally Schulman & Polik, *Child Custody*, in *WOMEN AND THE LAW* § 6.07 (C. Lefcourt ed. 1984) (discusses the problems of battered wives in custody disputes).

94. In Chesler's study, fifty-nine percent of the fathers awarded custody abused their wives. P. CHESLER, *supra* note 20, at 82.

95. The Women's Legal Defense Fund, as *amicus curiae*, urged the court to adopt the primary caretaker standard. *Amicus* Brief at 19, *Taylor v. Taylor*, 306 Md. 290, 508 A.2d 964 (1986) (No. 85-23).

96. One commentator suggests that this applies to joint legal custody as well as joint physical custody; otherwise, joint legal custody gives rights but not responsibilities to a parent not involved in caretaking. Polik, *supra* note 37, at 242. Judges frequently overvalue small contributions of the father. One researcher found that only twelve percent of the fathers awarded custody were involved in primary care. P. CHESLER, *supra* note 20, at 82.

97. A. FREUD, J. GOLDSTEIN, & A. SOLNIT, *supra* note 33, at 31-34.

ensure a child's best interests because awards would preserve the bond between the child and the parent who provides care and nurturance.

Had the court of appeals identified primary caretaking as a major factor in the consideration of custody awards, Maryland would have been in the forefront of adopting an approach that fosters co-parenting during marriage, reduces litigation after marriage, and minimizes the use of custody as a bargaining tool in settlement proceedings.⁹⁸ The primary caretaker standard would help to achieve such goals because parents truly interested in their child would be encouraged to share child care tasks if they knew that, in the event of divorce, they would not recover custody without a showing of primary caretaking.⁹⁹ Moreover, this approach would place the actual caretaker on firmer ground to resist threats in settlement negotiations made by the disinvolved parent because a non-caretaking parent would not have a strong bargaining tool and would be less likely to pursue a custody dispute.¹⁰⁰

Although primary caretaking was well-briefed by *amicus curiae*, the *Taylor* decision ignores primary caretaking and instead places the parents' ability to cooperate in making decisions at the forefront of the court's analysis. A parent who is removed from child care tasks may nevertheless demonstrate the requisite "track record" of communication simply because he or she acquiesced in the other parent's decisions. Therefore, a court could make a joint custody award to a parent who never engaged in child care tasks before the marriage break-up, but who suddenly developed an interest in the child. Such an award clearly would not be in the best interests of the child because an approach that focuses on cooperative decision making fails to consider properly the critical parent-child bond which is developed only through a continuing relationship between the parent and the child.¹⁰¹

Overall, the *Taylor* decision's moderate approach preserves the best interests of the child standard in joint custody decisions. It leaves the trial judge with the discretion necessary for case-by-case determinations, while providing general guidelines for the court's exercise of its broad equity power. The *Taylor* court's refusal to adopt a joint custody preference affords substantially more protection for children of divorce than those jurisdictions employing a joint custody preference with such standards. Unfortunately, the *Taylor* decision's failure to adopt a primary caretaker standard does not promote co-parenting or reduce the likelihood of custody battles. Hence, *Taylor* ultimately fails to afford the maximum possible protection for children of divorced parents.

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98. See *supra* notes 36-38.

99. See P. CHESLER, *supra* note 20, at 433.

100. See *supra* notes 36-38.

101. See *supra* note 38 and accompanying text.