SURVEY OF ILLINOIS LAW: JOINT CUSTODY DILEMMAS AND VIEWS FROM THE BENCH

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1. INTRODUCTION

The present Illinois Marriage and Dissolution of Marriage Act[1] authorizes a state trial court to approve joint custody of a minor child or children where agreed to by the parents or to impose joint custody on one or both parents in an appropriate case. The entire issue of joint custody is an emotionally charged matter, particularly from the standpoint of various special interest fathers' rights groups. Putting aside the issues of inappropriate outside pressures, the entire concept of judicial independence and the possibility of future legislative changes, the present joint custody situation in Illinois presents a difficult dilemma for the family court judge laboring in the trenches of the custody litigation battlefield as it exists at the present time.

The purpose of this Article is to examine closely the present state of Illinois law as it pertains to joint custody and to provide some guidance to family law attorneys and trial judges in advising clients and in presiding over cases. Part I will provide a general overview of the present joint custody statutory scheme. Part II will provide a general review of Illinois cases dealing with the issue of joint custody and the relevant statutory scheme. Part III will

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1. *See* 750 ILL. COMP. STAT. 5/602.1(b)(c) and (d) (West 2004).

be an attempt to decipher lessons to be learned by lawyers from the existing precedent. Part IV will deal with suggestions to trial judges in regard to their suggested gatekeeper function and responsibilities in joint custody cases.

This article is intended to be a practical and helpful guide to both attorneys and trial judges in attempting to deal with the conflicting issues surrounding joint custody. It is certainly not intended as any kind of intellectual treatise on the subject.

II. BACKGROUND

The concept of joint custody had its genesis in Illinois on September 17, 1982 when Public Act 82–1002 became section 603.1 of the Illinois Marriage and Dissolution of Marriage Act.[2] The former joint custody statute mandated that joint custody could only be ordered by the court if both parties agreed to joint custody. In addition, the statute made a defined distinction between "joint legal custody" and "joint physical custody."

The revised joint custody statute became effective on January 1, 1986.[3] The present statute deleted the language regarding the agreement of the parties as a condition precedent to an award of joint custody. The court may clearly now impose joint custody at the request of either party or on its own motion. In addition, the statute requires that before a joint custody order can be entered, the parties must present to the court a Joint Parenting Agreement for approval. Even without an agreed Joint Parenting Agreement, the court may still impose a Joint Parenting Order containing the same basic elements as is required in a Joint Parenting Agreement if the court finds joint custody to be in the best interest of the minor child or children taking into consideration the various factors mandated by the statute. Finally, the revised statute deleted the use of the terms "joint legal custody" and "joint physical custody."[4] There is now only "joint custody."

The present statute does not define "joint custody."[5] The statute merely states that joint custody "means custody determined pursuant to a joint

2. *See* Illinois Marriage and Dissolution of Marriage Act, Public Act 82–1002, 1982.
3. 750 ILL. COMP. STAT. 5/602.1 (b) (c) and (d).
4. 1 H. JOSEPH GITLIN, GITLIN ON DIVORCE, A GUIDE TO ILLINOIS MATRIMONIAL LAW, § § 11–13, 11(94)–11(98) (3d ed. 2006) contains an excellent analysis of the distinction between the former and present statute.
5. In *In re Marriage of Seitzinger*, 333 Ill. App. 3d 103, 109, 775 N.E.2d 282, 287 (4th Dist. 2002), the fourth district stated that "joint custody means joint responsibility and not shared physical custody. It is simply a tool to maximize the involvement of both parents in the life of a child."

parenting agreement or a joint parenting order."[6] The statute goes on to note that any "agreement [or order] shall specify each parent's powers, rights and responsibilities for the personal care of the child and for major decisions such as education, health care, and religious training."[7] The statute further makes it clear that joint custody does not equate to equal parenting time.[8] The physical residence of the child is to be determined by the agreement of the parties or an order of the court. There is no presumption for or against joint custody.

III. ILLINOIS APPELLATE COURT CASES

Considering that Illinois has had a joint custody statute since 1982, there are only eighteen reported Illinois Appellate Court cases to provide the trial court and attorneys guidance in initial ancillary cases before the court dealing with the issue of joint custody (cases attempting to modify joint custody were excluded from this analysis). The limited number of cases, considering the number of years joint custody has been available in Illinois, undoubtedly stems from the fact that most initial awards of joint custody are by agreement of both parties, and that in most contested custody cases each party generally seeks sole custody. Each appellate court case will be discussed in chronological order from the earliest to the most recent.

The very first Appellate Court pronouncement dealing with joint custody was *In re Marriage of Manuele*.[9] That case was decided one month prior to the passage of Public Act 82–1002, which interjected joint custody into the Illinois statutory custody scheme. The trial court in that case awarded joint custody of the minor children to the husband and wife, with the wife awarded physical custody, subject to specified visitation by the husband. There was substantial evidence in the record of an inability of the parties to cooperate regarding the children. The fourth district reversed the trial court strongly indicating that joint custody should rarely be awarded and emphasizing that split authority would likely lead to continuous disputes between the parents unless the parents had a very strong ability to cooperate. The court concluded as follows:

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6. 750 ILL. COMP. STAT. 5/602.1(b), (2006).
7. *Id.*
8. 750 ILL. COMP. STAT. 5/602.1(d), (2006).
9. *In re* Marriage of Manuele, 107 Ill. App. 3d 1090, 438 N.E.2d 691 (4th Dist. 1982).

> We recognize that joint participation by parents, whose marriage has been dissolved, in making decisions concerning the welfare of the children can strengthen the relationship of the children to the parents. However, unless the parents have unusual capacity to cooperate, when the vestige of the authority in the parent not having physical custody is not specific, substantial bickering and dispute, damaging to the children and harassing to the parent with physical custody, is likely to result.[10]

In *In re Marriage of Pool*,[11] the trial court awarded the parties joint legal custody of the children with physical custody to the father approximately three months prior to the initial joint custody statute. There was testimony regarding non-cooperation and discord by the parties during the separation period. The third district reversed the trial court and remanded for an award of sole custody to one of the parents stating, in language extremely critical of joint custody, as follows:

> It was an abuse of discretion to award custody of the children to the parties jointly. Few concepts in the area of family law have met with more widely voiced derision than that of "joint custody." An oxymoron, "joint custody" is a term that is so susceptible to varying meanings that it defies definition . . . . Such an arrangement was strongly criticized in *In re Marriage of Manuele*. . . . Recognizing that the experience of other jurisdictions had demonstrated the general unworkability of this Utopian scheme, the *Manuele* court stated that such orders would be discouraged and should be used only where both parents have displayed an "unusual capacity to cooperate." Such is not the case here.[12]

In *In Re Marriage of Birt*,[13] the parties represented to the trial court that custody was not an issue and that the wife should be awarded sole custody. The trial court, however, awarded joint custody on its own motion and entered a "joint parenting order." The appellate court reversed, simply stating that no testimony had been presented regarding the parenting abilities of the parties or the best interests of the children.

In *In re Marriage of Drummond*,[14] evidence was presented of conflict, hostility and an inability to communicate between the parties. Both parties requested sole custody of the minor children. The trial court awarded joint custody to both parties with the husband given custody during the school year

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10. *Id.* at 1094–95, 438 N.E.2d at 694 (citing, Beck, *Joint Custody: A Revolution in Child Custody Law?* 20 WASHBURN L.J. 326 (1981)).
11. *In re* Marriage of Pool, 118 Ill. App. 3d 1035, 455 N.E.2d 887 (3d Dist. 1983).
12. *Id.* at 1037–38, 455 N.E.2d at 889 (citations omitted).
13. *In re* Marriage of Birt, 157 Ill. App. 3d 363, 510 N.E.2d 559 (2d Dist. 1987).
14. *In re* Marriage of Drummond, 156 Ill. App. 3d 672, 509 N.E.2d 707 (4th Dist. 1989).

and the wife given visitation rights in the summer. The fourth district reversed, using language extremely critical of the trial court, and awarded sole custody to the wife stating as follows:

> Holding in accordance with the policy enunciated in *Manuele* and *Pool*, the joint custody order is in error. Additionally, the order was not in compliance with statutory requirements. There was never a joint-parenting agreement made by the parties or entered by the court . . . . Testimony presented at the trial indicated that the parties were unwilling to cooperate and quite vindictive to each other. Additionally, the trial court failed to note the geographical distance between the parents. Wife currently resides in Washington, Illinois, while husband is living in Keller, Texas. Under these circumstances, the trial court abused its discretion in making the joint-custodial award.[15]

In *In Re Marriage of Bush,*[16] there was substantial evidence of conflict, hostility and lack of cooperation between the parties, and each party requested sole custody of the minor child. The trial court awarded joint custody to both parties with physical custody to be with the wife during the school year with husband to have visitation all summer. The fourth district, once again, reversed awarding sole custody to the wife, noting that no joint parenting agreement was entered into by the parties and no joint parenting order was imposed by the court. The court also reaffirmed its earlier holdings and made additional comments extremely critical of joint custody, stating as follows:

> "This court, in the case of *In re Marriage of Manuele* discouraged the awarding of joint custody, specifically noting that such orders are usually unworkable and should be rarely entered. . . . Finally, we note that unless parents have an unusual capacity to cooperate, substantial disagreement shall arise, ultimately resulting in harm to the child."
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> We reversed the joint custody award made in the *Drummond* case because there was no joint parenting agreement or order, mediation between the parties failed, testimony indicated the parties were unwilling to cooperate with each other, and the trial court failed to consider geographical distance between the parties.
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> The award of joint custody in this case was manifestly an abuse of discretion. The parties have repeatedly exhibited hostility toward each other, sometimes resulting in physical confrontation. Counsel for both parties agreed at oral argument that there is little chance of the parties ever overcoming their mutual feelings of animosity. Most importantly, the record clearly indicates

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15. *Id.* at 680–81, 509 N.E.2d at 713.
16. *In re* Marriage of Bush, 191 Ill. App. 3d 249, 547 N.E.2d 590 (4th Dist. 1989).

> the parties have been unable . . . to cooperate on matters involving their son. Joint custody will only insure continuing litigation.[17]

In *In re Marriage of Hacker*,[18] the fourth district again reversed a joint custody award by the trial court. In *Hacker*, a full custody evidentiary hearing was held and neither party requested joint custody. The trial court, on its own motion, awarded both parties joint custody of the minor children and ordered that the physical custody of the children would shift between the parents generally on a weekly basis. The court reversed and, in a foreboding of its later opinion in *In re Marriage of Seitzinger*,[19] held as follows:

> This court has set aside joint custody orders entered pursuant to section 602.1 of the Act in the cases of *In re Marriage of Bush* and *In Re Marriage of Drummond* where the evidence indisputedly showed that the parents had too much animosity to be able to cooperate. Here the evidence is not the same as there. The Circuit Court could have concluded that both parties were reasonably loving and capable parents who were sufficiently able to cooperate even though each party attempted to prove the other was less capable.
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> . . . . The decision to order joint custody was not necessarily erroneous but the decision to have the children live with one parent one week and another the next week was error. No testimony concerning the workability of such a program was presented. We conclude that the constant shifting would obviously be detrimental to the minor children who were seven, five and three years of age at the time of decree . . . . On remand, the court must reconsider the custody arrangement. We are not prohibiting a joint custody order, but the order must give some permanency to the physical custody of the children and not attempt to equalize the time the children spend with each parent.[20]

In *Kocal v. Holt,*[21] a paternity case, the trial court granted joint custody over the objection of the mother. The joint custody encompassed joint decision making by the parties as to all major decisions regarding the child, such as education, health care and religious training. All day-to-day decisions were to be made by the mother, who was designated as the primary residential custodian. The father was granted specific visitation. The evidence at trial indicated that the parties lived a distance apart geographically, that there was no communication between the parties, that there was hostility between the

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17. *Id.* at 263, 547 N.E.2d at 598 (citations omitted).
18. *In re* Marriage of Hacker, 239 Ill. App. 3d 658, 606 N.E.2d 648 (4th Dist. 1992).
19. *In re* Marriage of Seitzinger, 333 Ill. App. 3d 103, 775 N.E.2d 282 (4th Dist. 2002).
20. *Hacker*, 239 Ill. App. 3d at 661, 606 N.E.2d at 651 (citation omitted).
21. Kocal v. Holt, 229 Ill. App. 3d 1023, 595 N.E.2d 169 (3d Dist. 1992).

parties, and that there was a total lack of communication between the parties. The third district reversed, simply stating that the parties have not displayed an ability to cooperate effectively to make joint custody work.

In *In re Marriage of Evans*,[22] the fourth district reversed another joint custody order entered by the trial court. The evidence at the trial did not indicate any antagonism or hostility between the parents, and each party requested sole custody. The mother lived in Illinois, the father lived in Tennessee, and the child was mentally handicapped. The trial court awarded the parties, on its own motion, joint custody with the Respondent designated as the primary residential parent. The fourth district found that the trial court abused its discretion in awarding joint custody in light of the special needs of the child, the fact that the mother had always been the primary parent, the child had always lived in Douglas County since he was one year old and had extended family there, and the fact that the father had no contact with the child for six years prior to the hearing date. The court then awarded sole custody to the mother.

In *In re Marriage of Marcello*,[23] the first district affirmed a trial court award of joint custody over the mother's objection. The evidence presented was that the father was actively involved in the child's activities, that the mother testified that the father should not be excluded from major decisions, and that the parties lived in close geographical proximity. The mother's primary concern with the father was surprise visits by the father to her house and the child's school. The first district found that the trial court award of joint custody was not against the manifest weight of the evidence stating as follows:

> The cases in which this court has overturned joint custody are factually distinguishable from the present case. In the *Drummond* case, there was no joint parenting agreement or order, mediation between the parties failed, testimony indicated the parties were unwilling to cooperate with each other, and the trial court failed to consider geographic distance between the parties (one lived in Illinois, the other Texas). In *Bush*, the parties repeatedly exhibited hostility toward each other, sometimes resulting in physical confrontation. In addition, counsel for both parties agreed at oral argument that there was little chance of the parties ever overcoming their mutual feelings of animosity that had existed since the child's birth. While Cynthia complained that Michael's surprise visits were disruptive, the trial judge was

22. *In re* Marriage of Evans, 229 Ill. App. 3d 932, 595 N.E.2d 237 (4th Dist. 1992).
23. *In re* Marriage of Marcello, 247 Ill. App. 3d 304, 617 N.E.2d 289 (1st Dist. 1993).

> clear in his admonishment that such visits would not be tolerated in the future, and this warning was included in the joint parenting order.[24]

In *In re Marriage of Dobey*,[25] the trial court awarded sole custody over the husband's request for joint custody. The fourth district affirmed noting that the parties had not entered into a joint parenting agreement, the parties had not shown an ability to cooperate effectively and consistently for the best interests of the child and that the husband was required by his employment to periodically be out of town for 40 consecutive days. The court concludes by adding, "that we view joint custody as most extraordinary and counsel skepticism when trial courts hear promises from newly divorcing parents that they can surmount the manifest difficulties of a joint custody-order."[26]

In *In re Marriage of Jerome and Martinez*,[27] the trial court granted the wife sole custody over the husband's primary request for joint custody. The fifth district affirmed, noting the expert testimony that the parties were not capable of exercising joint custody or cooperating in an effective manner and the myriad problems under the parties' temporary joint custody arrangement. The court concluded by stating that "we foresee an endless battle ground with respect to any joint custody arrangement with the children being the casualties of the arrangement."[28]

In *In re Marriage of Heinze*,[29] the trial court awarded sole custody to the wife over the husband's request for joint custody. The third district affirmed stating that the record supported the court's determination that the parties were unable to cooperate. The court specifically noted in that regard the testimony of the wife of a lack of a cooperative relationship with her husband as to the children and the contested hearings before the trial court regarding visitation disputes.

In *In re Marriage of Habin*,[30] the trial court likewise granted sole custody to the wife over the husband's request for joint custody. The second district affirmed the trial court noting, primarily, that the husband resided some distance from the children thus making a joint custody arrangement difficult to manage.

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24. *Id.* at 311, 617 N.E.2d at 293–94 (citation omitted).
25. *In re* Marriage of Dobey, 258 Ill. App. 3d 874, 629 N.E.2d 812 (4th Dist. 1994).
26. *Id.* at 877, 629 N.E.2d at 812.
27. *In re* Marriage of Jerome and Martinez, 255 Ill. App. 3d 374, 625 N.E.2d 1195 (5th Dist. 1994).
28. *Id.* at 398, 625 N.E.2d at 1212–13.
29. *In re* Marriage of Heinze, 257 Ill. App. 3d 782, 631 N.E.2d 728 (3d Dist. 1994).
30. *In re* Marriage of Habin, 266 Ill. App. 3d 168, 644 N.E.2d 4 (2d Dist. 1994).

In *In re Marriage of Ivey*,[31] the trial court ostensibly granted sole custody to the husband, but gave the wife almost all major decision making authority and most of the parenting time with the child. Indeed, under the guise of a sole custody order to the husband, the trial court created a de facto joint custody order with the wife as the primary custodial parent. As may have been expected in the fourth district, the trial court order was reversed and remanded with directions to the trial court to award sole custody to the father.

In *In re Marriage of McCoy*,[32] the trial court, once again, awarded sole custody to the wife over the husband's request for joint custody. The husband appealed and emphasized that the parties had successfully operated under an informal alternate week custody schedule for more than two years. The fourth district affirmed the trial court specifically noting the wife's testimony that there was an inability to cooperate, that the husband had a violent temper, and that the wife had obtained an emergency order of protection against the husband. The court further noted that joint custody agreements are usually unworkable and should rarely be entered, particularly when the parties exhibit hostility to each other. The court's comments in that regard are instructive:

> Since joint custody requires extensive contact and intensive communication, it cannot work between belligerent parents. In *Drummond*, this court noted that joint-custody orders are usually unworkable and should rarely be entered. We have found that it was an abuse of discretion to award joint custody where the parties repeatedly exhibited hostility, including physical confrontations, and were unable to cooperate in matters involving their child.[33]

In *In re Marriage of Swanson*,[34] the trial court awarded joint custody after the parties were unable to enter into a joint parenting agreement. The trial court designated the wife as primary custodial parent but established a schedule whereby the children would live with the husband the last fourteen days of each month. The fourth district once again, as might be expected, reversed and remanded for a finding of sole custody in one of the parents stating that the parties had not demonstrated an "unusual ability to cooperate," specifically noting several failed mediation attempts, an inability to agree on a joint parenting agreement, testimony of the wife regarding domestic abuse by the husband and various disputes between the parties. The court was also

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31. *In re* Marriage of Ivey, 261 Ill. App. 3d 200, 632 N.E.2d 1121 (4th Dist. 1994).
32. *In re* Marriage of McCoy, 272 Ill. App. 3d 125, 650 N.E.2d 3 (4th Dist. 1995).
33. *Id.* at 130, 650 N.E.2d at 6 (citing *In re* Marriage of Drummond, 156 Ill. App. 3d 672, 679, 509 N.E.2d 707, 712–13 (1987) (citations omitted)).
34. *In re* Marriage of Swanson, 275 Ill. App. 3d 519, 656 N.E.2d 215 (4th Dist. 1995).

critical of the fourteen days of visitation for the husband monthly, indicating that an alternating physical custody schedule is viewed with disfavor. The court notes in this regard as follows:

> The statute does not imply or presume that joint custody means each parent has equal time as physical custodian. The order must give some permanency to the physical custody of the children and not simply attempt to equalize the time the children spend with each parent. Constantly shifting children between houses is detrimental. Children need a home base.
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> . . . joint custody is not a substitute for making a difficult choice between two good parents. Particularly, where alternating physical custody will occur, joint custody may add to the insecurity frequently experienced by children as a result of divorce.[35]

In *In re Marriage of Deem*,[36] the trial court imposed a variant of joint custody in that it gave the wife custody during the school year and the father custody during the summer. The fourth district reversed the finding of summer custody for the husband and remanded for a trial court determination of the husband's summer visitation. The Court shares its view of alternating custodial arrangements as follows:

> Alternating or rotating custodial arrangements are viewed with disfavor, particularly with young children, as they tend to appease the selfish desires of the parties while denying the child a permanent and stable home environment. . . . Alternating custodial arrangements have been looked upon with disfavor unless the child is mature enough to cope with the custodial arrangement and visitation is difficult to organize because of the child's activities.
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> This court has recognized that the problem with alternate custodial arrangements is the potential development of insecurity and a sense of transience in social relationships in the child occasioned by the change of households and environments, playmates, and health-care providers. The order must give some permanency to the physical custody of the children and not simply attempt to equalize the time the children spend with each parent. . . . While the Act contemplates some flexibility in the trial court's custody determinations, that flexibility has limits.[37]

Finally, in *In re Marriage of Seitzinger*,[38] the trial court awarded joint custody with the wife designated as the primary custodial parent over the

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35. *Id.* at 524, 656 N.E.2d at 219–220 (citations omitted).
36. *In re* Marriage of Deem, 328 Ill. App. 3d 453, 766 N.E.2d 661(4th Dist. 2002).
37. *Id.* at 456–57, 766 N.E.2d at 664 (citations omitted).
38. *In re* Marriage of Seitzinger, 333 Ill. App. 3d 103, 755 N.E.2d 282 (4th Dist. 2002).

objection of both parties who each sought sole custody. The trial court also split the major decision responsibilities giving the husband schooling decision authority and the wife religious decision authority. The wife argued on appeal that the trial court had abused its discretion since the parties could not cooperate sufficiently in regard to decisions concerning the child. The fourth district curiously affirmed the trial court noting the following: the parties were able to agree on a temporary custody order providing an equal split of time with the child; the parties abided by that agreement for a number of months; the parties cooperated on counseling for the child; neither party voiced criticism of the care provided by the other; and both parties signed a joint parenting agreement to implement the court's imposition of joint custody. The court concluded as follows:

> Joint custody means joint responsibility and not shared physical custody. It is simply a tool to maximize the involvement of both parents in the life of a child. In this case, both parents had a great deal of involvement in Sabrina's life during their marriage and both desired to continue with their involvement as both sought sole custody. Ample evidence showed the parties' ability to cooperate. Therefore, the trial court did not abuse its discretion in awarding joint custody; neither was its decision against the manifest weight of the evidence.
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> . . . [W]e believe joint parenting should require the parties to discuss important issues and make joint decisions. Thus, we [also] conclude the parties should share the decision on schooling and religion; we affirm the custody award as modified to reflect this shared decision making.[39]

IV. ADVICE FOR FAMILY LAWYERS

The obvious question is what lessons can be gleaned from a family law practitioner standpoint from a review of the existing case and statutory law?

A. Lesson Number One

The first piece of advice is to avoid advising a client to pursue joint custody in a contested custody case where the other party does not agree and is seeking sole custody, particularly in the third and fourth districts and particularly if there is any sign of conflict between the parties (which there will always be once the case reaches the contested custody stage).

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39. *Id.* at 109–10, 755 N.E.2d at 287–88.

Even if you are persuasive enough to convince the trial judge to award joint custody over the other parent's objection (an unlikely scenario for most trial judges working in family law in Illinois), your chances of keeping the award on appeal are not good. There were thirteen reported cases discussed above where joint custody or some form thereof was awarded by the trial court over the objection of one or both parents, and the trial court award was reversed in eleven of the thirteen cases.[40] Ten of those eleven cases were from the third and fourth districts. There were five reported cases discussed above where the trial court awarded sole custody to one parent, and the other parent appealed, partly or wholly, on the basis that the trial court should have awarded joint custody. All five of those cases were affirmed on appeal.[41] Three of those five cases were from the third and fourth districts. In only two cases did a trial court get affirmed in granting joint custody where one parent objected.[42]

A noted family law commentator also observes that the odds of reversal are extremely high when a trial court orders joint custody or joint decision making over the objection of one parent.[43] Similar statistics are cited by the authors.[44]

B. Lesson Number Two

Joint custody can certainly be used by family law practitioners in many cases to avoid a custody dispute. Many family law practitioners will readily admit that in a large percentage of cases, joint custody is simply used as a tool

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40. *In re* Marriage of Manuele, 107 Ill. App. 3d 1090, 438 N.E.2d 691 (4th Dist. 1982); *In re* Marriage of Pool, 118 Ill. App. 3d 1035, 455 N.E.2d 887 (3d Dist. 1983); *In re* Marriage of Birt, 157 Ill. App. 3d 363, 510 N.E.2d 559 (2d Dist. 1987); *In re* Marriage of Drummond, 156 Ill. App. 3d 672, 509 N.E.2d 707 (4th Dist. 1989); *In re* Marriage of Bush, 191 Ill. App. 3d 249, 547 N.E.2d 590 (4th Dist. 1989); *In re* Marriage of Hacker, 239 Ill. App. 3d 658, 606 N.E.2d 648 (4th Dist. 1992); Kocal v. Holt, 229 Ill. App. 3d 1023, 595 N.E.2d 169 (3d Dist. 1992); *In re* Marriage of Evans, 229 Ill. App. 3d 932, 595 N.E.2d 237 (4th Dist. 1992); *In re* Marriage of Ivey, 261 Ill. App. 3d 200, 632 N.E.2d 1121 (4th Dist. 1994); *In re* Marriage of Swanson, 275 Ill. App. 3d 519, 656 N.E.2d 215 (4th Dist. 1995); and *In re* Marriage of Deem, 328 Ill. App. 3d 453, 766 N.E.2d 661 (4th Dist. 2002).

41. *In re* Marriage of Jerome and Martinez, 255 Ill. App. 3d 374, 625 N.E.2d 1195 (5th Dist. 1994); *In re* Marriage of Dobey, 258 Ill. App. 3d 874, 629 N.E.2d 812 (4th Dist. 1994); *In re* Marriage of Heinze, 257 Ill. App. 3d 782, 631 N.E.2d 728 (3d Dist. 1994); *In re* Marriage of Habin, 266 Ill. App. 3d 168, 644 N.E.2d 4 (2d Dist. 1994); and *In re* Marriage of McCoy, 272 Ill. App. 3d 125, 650 N.E.2d 3 (4th Dist. 1995).

42. *In re* Marriage of Marcello, 275 Ill. App. 3d 519, 656 N.E.2d 215 (1st Dist. 1995) and *In re* Marriage of Seitzinger, 333 Ill. App. 3d 103, 755 N.E.2d 212 (4th Dist. 2002).

43. H. Joseph Gitlin, *Joint Custody in Illinois: From Panacea to Placebo*, 83 ILL. B.J., No. 4 (April 1995) as updated by Gunnar J. Gitlin for the Illinois Institute for Continuing Legal Education, 2006.

44. *Id*. at 3.

to avoid a costly and emotionally destructive custody battle.[45] This is to be distinguished from the situation where both parties are extremely cooperative as to the child or children, truly want what they believe is best for the child or children, would never subject their child or children to a destructive and lengthy custody contest, and can put aside their own differences that led to the breakup of their relationship for the good of the child or children.

Indeed, if it works and if it makes the client happy and if the trial court will approve the joint custody agreement, this tool obviously should be used by the practitioner. The fact that joint custody often masks underlying problems regarding the parent's ability to cooperate is certainly observed by the trial court when problems arise at a later time. The precipitating factors are generally a new spouse, a new significant other, the child reaching school age, a child going into high school, and a desire by one parent to relocate. At that point the joint custody agreement often implodes, and the trial court must deal with custody issues that were avoided at the time of the marital dissolution or the initial custody determination.

C. Lesson Number Three

If the parties have entered into a joint custody arrangement and there is some or substantial conflict between the parties, the attorneys should adequately prepare their clients for the court appearance. The client will possibly be asked by the attorney or the court how long they have been sharing custody, whether there have been any conflicts, whether the parties have the ability to cooperate now and in the future to make joint custody work, and how visitation has been working. Some judges may be more interested in making inquiries than others. Some judges may ask no questions, and some judges may simply approve the agreement without even a hearing (assuming that findings as to grounds have previously been made).

It is amazing how many clients have been given no advice in advance of a hearing and have no idea that "ability to cooperate" is a factor to be considered by the court, and that the court has authority to not approve a joint custody agreement. Indeed, a little pre-court preparation can go a long way toward avoiding problems with the trial court. Individuals left to their own

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45. The data obtained by this writer for this proposition is highly unscientific and extremely anecdotal. This information was obtained by this writer from discussions with many active and prominent family law attorneys throughout central Illinois. Their estimates of the use of joint custody to avoid a custody fight varied between 20% and 70%. In addition, this writer actually practiced law for over twenty years and handled a number of custody cases involving joint custody issues.

devises may be a little too "honest" for their own best interests in this regard. A little coaxing can simply give the clients the proper wording to present to the court within the confines of the truth.

D. Lesson Number Four

There is absolutely no legal difference between sole custody with specific visitation rights in the non-custodial parent and joint custody with specific visitation rights in the non primary residential/custodial parent in certain scenarios.

In Scenario One, A and B are parents of a child and obtain a dissolution of their marriage. A is awarded sole custody, and B is the non-custodial parent. B's specified visitation is every other weekend, one night a week, every other major holiday and five weeks in the summer. B pays A $450.00 bi-weekly in child support.

In Scenario Two, A and B are parents of the same child and also obtain a dissolution of their marriage. A and B are awarded joint custody with A designated as the primary residential/ custodial parent. B has similar specific visitation of every other weekend, one night a week, every other major holiday and five weeks in the summer. A has the authority to make all major decisions regarding the child. B also pays to A $450.00 bi-weekly in child support.

Although Scenario Two may give some psychological satisfaction to B, B's legal rights are clearly no greater than if he or she was a non-custodial parent in a traditional sole custody situation under Scenario One.[46] First, B still has to pay the same amount of child support.[47] Second, the child still lives

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46. Indeed, not only does the joint custodian under Scenario Two likely have no greater legal rights than a non-custodial parent in Scenario One, he or she may have even lesser rights. 750 ILL. COMP. STAT. 5/608(a) (2006) states as follows: "the custodian may determine the child's upbringing, including but not limited to his education, health care and religious training, unless the court, after hearing, finds, upon motion by the noncustodial parent, that the absence of a specific limitation of the custodian's authority would clearly be contrary to the best interests of the child." (emphasis added). In *In re Marriage of Manuele*, 107 Ill. App. 3d 1090, 438 N.E.2d 691 (4th Dist. 1982) the court held that this provision for application to the court applies only to a non-custodial parent in a sole custody situation and not to joint or divided custody situations. *See also*, Curran v. Bosze, 141 Ill. 2d 473, 566 N.E.2d 1319 (1990).

47. There would be absolutely no reason to deviate from the statutory guidelines in this scenario. The non-residential parent has the same parenting time as the non-custodial parent in Scenario One. There is some authority that there should be no automatic deviation from the guidelines even if the non-residential parent has substantially more visitation than under a "standard" visitation schedule. *In re* Marriage of Demattia, 302 Ill. App. 3d 390, 706 N.E.2d 67 (4th Dist. 1999) (the primary residential or custodial parent under a joint custody agreement is primarily responsible for maintaining the children's standard of living). There is support for apportioning child support between the parties or

with A. Third, A makes all the major decisions for the child, including schooling, visits with grandparents, medical issues, extracurricular issues and religious issues. Fourth, if a custody dispute were to arise and B sought to modify custody at a later time, A would have the protections offered by the two year safe haven requiring B to allege serious endangerment to even file a modification petition.[48] Fifth, any attempt by B to modify the joint custody agreement would not alter B's burden of proof in such a proceeding to show by clear and convincing evidence since the entry of the original judgment that a change has occurred in the circumstances of the child or either or both parties, and that the modification is necessary to serve the best interest of the child.[49] Sixth, in any attempt by B to later modify custody (even if A agrees to terminate the joint custody), there would be a presumption applicable in the change of custody proceeding in favor of A, the primary residential/custodial parent.[50] Seventh, B would have very little additional protections in Scenario

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deviating from the guidelines in split custody situations (one parent has custody of one or more children and the other parent has custody of one or more children). *In re* Marriage of Keown, 225 Ill. App. 3d 808, 587 N.E.2d 644 (4th Dist. 1992) (affirming no payment of support when father had custody of two children and mother had custody of one child); *In re* Marriage of Duerr, 250 Ill. App. 3d 232, 621 N.E.2d 120 (1st Dist. 1993) (when custody is split the court may apportion the statutory percentage between the parents); and *In re* Marriage of Steadman, 283 Ill. App 3d 703, 670 N.E.2d 1146(3d Dist. 1996) (when custody is split the court may disregard the statutory guidelines). There is also some authority that in a pure shared custody situation (where neither party is designated the primary residential or custodial parent and where parenting time is shared on a substantially equal basis), the trial court is not obligated to follow the statutory child support guidelines. *In re* Marriage of Reppen-Sonneson, 299 Ill. App. 3d 691, 701 N.E.2d 1159 (2d Dist. 1998). It should be noted, however, that this opinion is not totally clear as to the exact type of joint parenting agreement involved.

48. 750 ILL. COMP. STAT. 5/610(a) (2006) provides as follows: "Unless by stipulation of the parties, no motion to modify a custody judgment may be made earlier than 2 years after its date, unless the court permits it to be made in the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health."

49. *In re* Marriage of England, 158 Ill. App. 3d 1005, 512 N.E.2d 95 (4th Dist. 1987); *In re* Marriage of Jones, 160 Ill. App. 3d 593, 513 N.E.2d 1181 (3d Dist. 1987); *In re* Marriage of Apperson, 215 Ill. App. 3d 378, 574 N.E.2d 1257 (4th Dist. 1991); and *In re* Custody of Pfaff, 250 Ill. App. 3d 265, 619 N.E.2d 875 (3d Dist. 1993). 750 ILL. COMP. STAT. 5/610(b) (2006) states, in pertinent part, as follows: "The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment … that a change has occurred in the circumstances of the child or either or both parties having custody, and that the modification is necessary to serve the best interest of the child"

50. When joint custody is modified to sole custody in one parent, there is a "strong" preference or presumption in favor of the primary residential/custodial parent under the joint parenting agreement. *In re* Marriage of Wycoff, 266 Ill. App. 3d 408, 639 N.E.2d 897 (4th Dist. 1994) (reversed modified sole custody award to father and ordered sole custody to mother where mother had been the primary residential/custodial parent under the joint parenting agreement for more than six years). Presumably this is the same presumption applicable in favor of the custodial parent in a sole custody order. *In re* Marriage of Wechselberger, 115 Ill. App. 3d 779, 450 N.E.2d 1385 (2d Dist. 1983); *In re* Custody

Two as a "joint parent' should A seek leave to remove the child or children from the State of Illinois.[51] Finally, B would have no additional protection

of Dykhuis, 131 Ill. App. 3d 371, 475 N.E.2d 1107 (3d Dist. 1985); *In re* Marriage of Fuesting, 228 Ill. App. 3d 339, 591 N.E.2d 960 (5th Dist. 1992); and *In re* Custody of Pfaff, 250 Ill. App. 3d 265, 619 N.E.2d 875 (3d Dist. 1993). *See also* Harne v. Harne, 77 Ill. 2d 414, 396 N.E.2d 499 (1979) (public policy favors the finality of child custody judgments and making their modifications more difficult). There is no authority on whether this presumption is an "ordinary presumption" or a "strong presumption" and on the burden of production on the part of the party attacking the presumption or attempting to burst the Thayer "bubble." *See* Michael H Graham, Cleary & Graham's Handbook of Illinois Evidence, sec. 302.5, pp. 84–89 (8th ed. 2004).

51. H. Joseph Gitlin, *Joint Custody in Illinois: From Panacea to Placebo*, 83 ILL. B. J. No. 4 (April 1995) as updated by Gunnar J. Gitlin for the Illinois Institute for Continuing Legal Education, 2006, notes that joint custody in a Scenario Two situation "does not impact upon the application for removal" by the primary residential/custodial parent. The following cases are some of the many cited by *Gitlin: In re* Custody of Anderson, 145 Ill. App. 3d 746, 496 N.E.2d 345 (2d Dist. 1986); *In re* Marriage of Jones, 160 Ill. App. 3d 593, 513 N.E.2d 1181 (3d Dist. 1987); *In re* Marriage of Stevens, 183 Ill. App. 3d 160, 538 N.E.2d 1279 (5th Dist. 1989); *In re* Marriage of Good, 208 Ill. App. 3d 775, 566 N.E.2d 1001 (3d. Dist. 1991); *In re* Marriage of Pfeiffer, 237 Ill. App. 3d 510, 604 N.E.2d 1069 (3d Dist. 1992); *In re* Marriage of Pribble and Waggenblast, 239 Ill. App. 3d 575, 607 N.E.2d 349 (5th Dist. 1993); *In re* Marriage of Coss Christienson, 247 Ill. App. 3d 51, 617 N.E.2d 302 (1st Dist. 1993); and Winebright v. Winebright, 155 Ill. App. 3d 722, 508 N.E.2d 774 (3d Dist. 1987) (in a joint custody situation a petition for removal does not constitute a petition to modify custody and only section 609 of the Act applies). *Gitlin* also cites the following language from *In re Marriage of Creedon*, 245 Ill. App. 3d 531, 615 N.E.2d 19 (3d Dist. 1993): "Still, to the extent that an order of joint custody actually reflects a closer than customary relationship between the non-custodian and the child, the existence of a joint custody order may be considered in determining whether removal is in a child's best interest." *Yndestad*, 232 Ill. App. 3d at 7, 597 N.E.2d at 219; *In re* Marriage of Bednar, 146 Ill. App. 3d 704, 711, 496 N.E.2d 1149, 1153 (1986). Gitlin concludes by positing that where a joint custody award is in effect and removal is denied, it is because of the quality of the non-residential/custodian's relationship and involvement with the child and not because of the mere existence of the joint custody agreement. Gitlin *supra.* Many of the same cases noted above are cited with the following conclusion, "[i]t is submitted that in these removal cases the result would have been the same if there had not been joint custody, and instead there had been a grant of sole custody with visitation." Gitlin *supra.* In any event, the following language from the Appellate Court opinion in *In re Marriage of Bednar*, 146 Ill. App. 3d 704, 711, 496 N.E.2d 1149, 1153 (1st Dist. 1986) holding that a removal petition by the primary residential parent in a joint custody situation is not a petition for modification of custody, stated as follows:

> We do not subscribe to the view that joint custody, in the word of the trial court, is just a placebo. Particularly in light of recent amendments regarding joint custody to the IMDMA (citation omitted), joint custody remains a viable and distinct custody award wherein both parents, by agreement or upon court order, share parental decision-making regarding matters such as the child's education, religious training, and health care, regardless of the amount of "parenting time" accorded to either parent (citations omitted). This parental cooperation may be more easily facilitated where all concerned live in close geographical proximity in the same state. Therefore, where both parents have joint custody of a child, a parent's request to remove the child from this jurisdiction should be given particularly close judicial scrutiny. The promotion of parental cooperation and involvement, however, does not in our opinion justify the imposition of section 610's requirements upon the removal petition of every joint custodial parent who wishes to reside with the child beyond

regarding decisions regarding the child's religion since A has the entire major decision making authority.[52]

E. Lesson Number Five

The obvious question from a review of the applicable case law is what is going on regarding joint custody in the first district, the vast populated area known as Chicago? Since the legislative promulgation of joint custody in 1982, there has only been one reported case in the first district whereby an appeal was taken from an initial trial court award of joint custody or from the denial by the trial court to make an award of joint custody.[53]

This writer is of the opinion that the reason for the dearth of cases in the first district is that the family law attorneys there know that the judges in the Cook County domestic relations division will not award joint custody when one party does not agree to it.[54] Hence, there are very few trial court hearings where one party is requesting joint custody and the other party is requesting

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the boundaries of the State of Illinois. (emphasis added).

52. Gitlin notes in his bar journal article, H. Joseph Gitlin, *Joint Custody in Illinois: From Panacea to Placebo*, 83 ILL. B.J., No. 4 p.178 (April 1995), as updated by Gunnar J. Gitlin for the Illinois Institute of Continuing Legal Education, 2006, that many family lawyers in Illinois believe there is a significant difference between sole custody and joint custody regarding religious upbringing. He premises his conclusion that the distinction is overstated based on the case of *In re Marriage of Minix*, 344 Ill. App. 3d 801, 809, 801 N.E.2d 1201 (4th Dist. 2003) where the Appellate Court stated that, "[a]bsent proof of harm or that the attendance at religious services with the non-custodial parent somehow interferes with the custodial parent's selection of the child's religion, the non-custodial parent is entitled to his or her visitation period without interference from the custodial parent despite the authority granted to the custodian in section 608. . . ." The reasoning is that the same protection is available both to a non-custodial parent under a sole custody order and a non-residential/custodial parent in a joint custody situation were the primary residential/custodial parent makes all major decisions, including the child's religion.

53. *In re* Marriage of Marcello, 247 Ill. App. 3d 304, 617 N.E.2d 289 (1st Dist. 1993).

54. The data obtained by this writer for this proposition is, once again, highly unscientific and extremely anecdotal. This information was obtained from discussions with family law practitioners with knowledge of Chicago area practice. This writer also wishes to thank Judge Edward R. Jordan, an experienced trial judge in the domestic relations division of the Circuit Court of Cook County and frequent lecturer on family law issues for the Illinois Judicial Conference and the Illinois Institute for Continuing Legal Education, for his input on this issue. According to Judge Jordan all forty judges in the domestic relations division of Cook County meet and have meetings with family law attorneys. It is clearly understood that if the parties cannot reach an agreement on joint custody and there is not a clear showing of cooperation between the parties, the attorneys should not expect the trial court to impose joint custody. Furthermore, according to Judge Jordan, the trial judges are clearly aware of the Appellate Court authority statewide cited in this article, and it makes no sense to enter an order that is likely to be reversed on appeal. Judge Jordan's comments confirm the information received from the attorneys that it is simply known in Cook County that the family court judges will not order joint custody and impose a joint parenting agreement when one party does not want joint custody.

sole custody. In almost all cases, joint custody is decided by agreement of the parties and approved pro forma by the court.

The obvious advice to practitioners in the first district is similar to Lesson Number One above–avoid advising clients to pursue joint custody in a contested custody case when the other party does not agree and is seeking sole custody, particularly if there is any sign of conflict between the parties.

F. Lesson Number Six

In negotiating joint custody agreements, if you want to provide the client with something more than simply the psychological satisfaction of being called a parent with "joint custody," attempt to negotiate something in the Marital Settlement and Joint Parenting Agreement that will provide your client with some enhanced legal protections or positions. First, try to avoid having anyone named the primary/residential custodial parent. Second, try to have all major decisions made jointly by both parties. Third, attempt to provide your client with some decision making responsibility at least in certain limited areas, either minor or major. Fourth, attempt to address in advance in the agreement removal from the state and any move out of the area by the residential/custodial parent. Fifth, if your client is the child support obligor, try to obtain some downward deviation from the statutory child support guidelines because of the joint custody provisions. Sixth, if the child or children are not living with your client, be clear in specifying your client's parenting time. Seventh, provide that any mediation of proposed disputes be completed prior to the ability of a party to file a motion for court resolution. Eighth, make sure that provisions for periodic review be specific as to time and place and actually take place on a periodic basis. Ninth, have express provisions in the agreement regarding your client's access to records and information regarding the child. Tenth, have express provisions in the agreement regarding advance notification to your client of all the children's major activities and events. It probably would be a good idea to have language in the agreement that each parent authorize the school to send all records, notices and reports to both parents. Eleventh, if you detect the possibility of future conflict, you might attempt to negotiate a waiver of the section 610(a) and section 610(b)[55] statutory provisions and agree that any modification of the joint custody, both before and after the expiration of the two year period, be on the basis of the "best interest" standard of section 602.[56] This would avoid

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55. 750 ILL. COMP. STAT. 5/610(a)(b) (2006).

56. 750 ILL. COMP. STAT. 5/602 (2006).

the necessity of a finding of serious endangerment and clear and convincing evidence of changed circumstances.[57]

V. THE COURT'S ROLE AS GATEKEEPER

In over six years of presiding over family court and in ten years of presiding over various family law cases, this writer observes on a weekly basis cases where joint custody should never have been granted by the court in the first place and where children are being harmed by the ongoing conflict between their "joint parents." It is obvious in these cases that the parties cannot cooperate and have tremendous hostility toward each other. The problems are frequently aggravated by such trigger events as a remarriage, a significant other entering the life of one party, family pressures, particularly from grandparents, a decision by one party to move out of state or somewhere else in Illinois, a child starting grade school or a child starting high school. The trial court observes these matters based on petitions to have the court decide the issue de jour or on petitions to modify the joint custody to sole custody. Indeed, a large percentage of custody modification cases involve original grants of joint custody.

It is also disturbing to this writer to see the number of cases before the trial court where a trial court has approved joint custody without the parties complying with the statute.[58] The deficiencies may be either the lack of any Joint Parenting Agreement whatsoever or, even more likely, a Joint Parenting Agreement that leaves out required provisions for dispute resolution or periodic review. There may also be a lack of clarity as to whether there is a primary residential/custodial parent or some ambiguity or no language in regard to who is responsible for major or minor decisions regarding the child or some lack of specificity or ambiguity regarding parenting time.

It is proposed that trial courts need to take a much more active gatekeeper role in approving joint custody agreements and adequately fulfilling its responsibility in insuring that joint custody is, in fact, in the best interest of the child. The trial courts must not simply be a "rubber stamp" for joint custody

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57. In *In re Marriage of Ortel*, 216 Ill. App. 3d 806, 576 N.E.2d 435 (2d Dist. 1991) the Court held the trial court had authority to enter an agreed order that any modification of the joint custody be on the basis of a section 602 best interest analysis and not under the standards of the more rigorous section 610 modification standards. *See also*, *In re* Marriage of Ricketts, 329 Ill. App. 3d 173, 768 N.E.2d 834 (2d Dist. 2002) (if both parties file petitions to modify joint custody to sole custody, there is a substantial change of circumstances as a matter of law, and the court may proceed directly to a best interest analysis).

58. 750 ILL. COMP. STAT. 5/602.1(b)(c) (2006).

agreements solely because both parties, for whatever reasons, want joint custody.

In order to assume its proper gatekeeper function, the trial court must closely watch for potential trouble signs indicating that there may be a lack of cooperation. This writer refers to these warning signs as the "red herrings."

A. The Red Herrings

The first obvious trouble sign is the inability of parties to enter into a Joint Parenting Agreement in the first instance. Even though the trial court has the statutory authority to order joint custody if one party objects, the lack of agreement as to this basic issue is certainly one obvious sign of an inability of the parties to cooperate.

Another obvious danger sign is temporary or permanent fighting by the parents over child support and child support related issues, such as daycare, health insurance premiums, un-reimbursed medical expenses, school fees, and tax exemptions. This would normally be manifested by petitions for indirect civil contempt or petitions to modify regarding child support. In initial custody proceedings, it could also be manifested by protracted temporary hearings on those issues.

Another area of potential concern regarding joint custody is when the parties do not live in the same county. It seems obvious that the greater the geographical distance there is between the parties, the more difficult it will be for joint custody to really work.

An obvious danger sign in an initial proceeding are various motions seeking temporary relief to restrain parties from liquidating assets or pre-trial memoranda, orders, notices or pleadings placing dissipation issues before the court. It is this writer's observation that when one party is accused of dissipating assets, there is usually a high degree of animosity and lack of cooperation, communication and trust between the parties.

Another obvious red herring is the existence of order of protection proceedings. This may be filed in the dissolution proceeding or in an independent proceeding. The same cooperation, communication and hostility concerns are present, whether or not a party actually obtains an emergency or a plenary order of protection. The mere request for an emergency and plenary order of protection may tell the court a lot about the parties' real circumstances vis-à-vis each other.

One obvious problem is the existence or prior pendency of a criminal proceeding alleging domestic violence on the part of one parent with the

alleged victim the other parent. Even if there is no conviction, an arrest and charges can validate the court's concern.

Another obvious concern is the existence of protracted initial dissolution litigation where all ancillary issues, including permanent custody and visitation, remain unresolved for long periods of time. This situation may be somewhat ameliorated by the promulgation by the Illinois Supreme Court of the new Rule 900 series requiring that most cases involving disputed custody and visitation issues be resolved within eighteen months from service of the petition.[59] The new rules, however, will certainly not totally resolve the issue of lengthy delays. In this writer's opinion, the mere existence of protracted litigation without a resolution of permanent custody or visitation disputes means there is a probability of conflict and lack of cooperation.

Another problem would be a record that reflects a number of motions or hearings in an initial custody proceeding dealing with temporary custody or temporary visitation. This could take the form of petitions for adjudication of civil contempt or petitions to set specific visitation times or specific holiday visitation or to set specific pick up and drop off points outside the residence of both parties or temporary custody hearings. Temporary litigation in this regard and pick up and drop offs of children at a commercial or a public location certainly does not instill confidence in a court that the parties have the ability to cooperate.

A sign of a potential problem may also be a resolution of the permanent custody and visitation conflict, but without a resolution of other ancillary issues. Although property, debt, maintenance, and dissipation issues do not directly affect the joint parenting of the child, such proceedings are often indicative of underlying conflict.

Another telling sign of conflict is the status or existence of alternative dispute resolution. If there is a documented record of a number of mediations, there could be real underlying communication problems. Even more telling are proceedings mandated by the court for the appointment of a guardian ad litem to report to the court under section 506(a)(2),[60] the appointment of an independent court evaluator under section 604(b),[61] the appointment of a custody evaluator at the request of one party under section 604.5[62] or the disclosure of controlled experts on custody and visitation issues. Our common sense tells us that parties are not going to go to the expense entailed by the

59. Ill. Sup. Ct. R. 900–942 .
60. 750 ILL. COMP. STAT. 5/506(a)(2) (2006).
61. 750 ILL. COMP. STAT. 5/604(b) (2006).
62. 750 ILL. COMP. STAT. 5/604.5 (2006).

above appointments or disclosures unless there is real conflict and hostility between the parties.

B. Proper Gatekeeping Responsibilities

After having noted the potential warning signs, from a practical standpoint what should the trial court do to adequately fulfill its true gatekeeper responsibility in regard to insuring that joint custody is really in the best interest of the child or children, and that the parents have the ability to cooperate effectively and consistently to make joint custody work?

The concern of this writer is that the trial court not simply act as a rubber stamp for whatever the parties place before it. It is obviously true that the trial court will not be able to ferret out all problem cases. Many conflictual situations will be masked from the court in a variety of different ways. The trial court can only do the best it can based on its own observations. Even if only a small percentage of joint custody agreements are not approved by the trial court, at least that small percentage of children will benefit and the trial court will have the satisfaction of properly performing its function. The following are my suggestions:

1. Make Sure there is a Joint Custody Agreement

This is quite basic. The trial court simply needs to make sure that a Joint Parenting Agreement is filed with the trial court. If there is no separate agreement, the trial court should review the Marital Settlement Agreement. Many attorneys simply include a Joint Parenting Agreement in the custody provisions of the settlement agreement. Most importantly, do not enter the judgment order based on a promise of a Joint Parenting Agreement being filed in the future.

2. Review the Joint Custody Agreement for Statutory Compliance

The Joint Parenting Agreement should be reviewed to make sure that there are the statutorily required provisions detailing each parent's responsibilities toward major decisions, that there are provisions for dispute resolution, and that there are procedures for periodic review.[63]

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63. 750 ILL. COMP. STAT. 5/602.1(b) (2006).

If the agreement is unclear, this is a good time to ask questions of the parties. The trial court will want to know if there is one parent designated as the primary residential/custodial parent, how are major decisions allocated, and does the agreement contain all the required provisions.

3. Require the Parents To Be Present at the Approval Hearing

If there has previously been a grounds hearing or if it is a non-dissolution case, the parties will often in a resolved case send in the proposed judgment order directly to the court's chambers for signature.

It is suggested that the trial court set a protocol for the individual parties to be present at any hearing seeking approval of a joint custody agreement. At the hearing the trial court should ask each parent (if not addressed by the attorneys at the prove-up) how long they have been separated, how long the joint custody agreement has been in effect, if there has been any disagreements, if the parents have been able to cooperate regarding the child or the children, if the parties will be able to cooperate regarding the child or children in the future, and whether they believe that joint custody is in the best interests of the child or children. You may be surprised at some of the responses you receive, and you may discover real conflict from the responses.

4. Ask the Attorneys for a Best Interest Representation

It is also a good idea to ask the attorneys based upon their independent investigation and involvement in the case to make a professional representation to the trial court that in their opinion the parties can cooperate effectively and consistently and that joint custody is in the best interest of the child or children.

The attorneys obviously have a good idea what is going on "behind the scenes," and most attorneys will take seriously their representations to the court. At the least, this might deter some attorneys from presenting joint custody agreements in which they have doubts about the parties' ability to cooperate.

5. Review the Docket Sheet and Record

The record and docket sheet should be carefully reviewed. This can often be quite telling. As earlier noted, the existence of protracted proceedings, numerous motions, particularly as to child support related issues, orders of protection requests in the main case, requests for injunctive relief, notice of

dissipation claims, the existence of a mediation order, the appointment of a guardian ad litem, the ordering of a 604(b) or 604.5 report, the existence of controlled experts on custody and visitation issues, prior disputes over temporary custody and temporary visitation, the continued existence of other ancillary issues for resolution–all can or may be indicative of conflict and lack of cooperation.

6. Obtain a Representation As To Present Residency

It is quite simple to ask the attorneys or the parties where each parent presently resides. It is probably a more workable joint custody agreement if the parents live in close proximity to each other.

7. Obtain a Representation or Search for Independent Order of Protection Proceedings

The trial court must clearly ascertain if there are presently or were independent order of protection proceedings involving the parties. The court may simply ask for a representation by the attorneys or may conduct a quick search of the county docket. It may, however, be that such proceedings were filed in other counties–making attorney or client representations even more important.

It is clear that the mere filing of order of protection proceedings indicate a real concern about underlying conflict and lack of cooperation.

8. Obtain a Representation or Search For Criminal Proceedings

It is also quite simple to ask the attorneys or parties if either parent has been involved in or arrested for domestic violence with the other parent as a victim either in their home county or any other county. The local court records can obviously be checked in this regard for proceedings in the county.

These simple suggestions may, in fact, cause some delay in mass prove-up calls in courts with crowded dockets. It seems, however, that the delay does not have to be substantial once the trial judge knows the specific problem areas or the pertinent questions to ask the parties and counsel. In any event, it is a small price to pay to show that the trial court is really concerned about the best interest of children and is adequately fulfilling its function.

The dilemma that the trial court faces in being presented with joint custody agreements is threefold. First, the attorneys that work in the family law area

are generally quite able and professional practitioners.[64] They may very well have the most difficult job of any trial lawyer. They not only have to have good trial skills, but they need to be a good listener, a mediator, a good counselor, have some psychological skills and insights, and have some financial management and tax related expertise. In addition, they are dealing with often difficult clients who are struggling with the most conflictual and stressful periods of their lives–both from an emotional, a psychological and a financial standpoint. The trial court would obviously have a tendency to want to approve an agreement that the attorneys have worked to obtain and that is acceptable to his or her client. This is especially true in cases where the attorneys have spent long periods of time and effort in obtaining an agreeable resolution. Second, there is no doubt that children absolutely need the active involvement of both parents. Many of these joint custody agreements are entered into by totally sincere individuals who can truly put aside their personal differences that led to the breakup of their relationship and work in the best interest of the child or the children. A well functioning joint custody agreement and true cooperation and consistency by the parents can be great for the child or children and can help them easily overcome the trauma of the dissolution and the breakup of their parent's relationship.[65]

The above should all be weighed against the other side of the dilemma for the trial judge who is asked to approve the joint custody. A poorly functioning joint custody arrangement can be tremendously damaging to a child of the relationship. This is particularly true where there is joint major decision making–the norm in a vast majority of joint custody agreements. These stalemated agreements can go on for years if neither party moves to modify the

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64. This writer discussed the joint custody issues addressed in this article with a number of excellent and experienced family law attorneys in the central Illinois area. All the attorneys with whom this writer talked cannot be mentioned, but their comments were greatly appreciated. The following attorneys were particularly helpful and their comments were also much appreciated: Howard Feldman of Springfield, Alan Weintraub of Bloomington, Brian Bower of Charleston, Art Lerner (recently deceased), Scott Lerner, Betsy Tinney, Ann Martinkus, John Phipps, Betsy Wong, Fred Grosser, Scott Anderson and Jim Mullady of Champaign, and Barb Webber, Tom Sweeney, Kris Fischer, Kris Solberg, Bob Finch, Blake Weaver, Diana Lenik, Karina Combs, Roger Marsh and Laurie Mikva of Urbana. Sometimes the view from the bench can be quite isolating, and it is important to get a perspective from the attorneys that are actually toiling in the mine fields of family law litigation.

65. The results of one study indicated that children in joint custody situations had better behavior and emotional adjustment, had higher self-esteem, had better family relations, and had better divorce specific adjustment generally than children in sole custody situations. Robert Bauserman, Ph.D., *Child Adjustment In Joint-Custody Versus Sole Custody Arrangements: A Meta-Analytic Review*, J. FAM. PSYCHOL., Vol. 16, No. 1 (March 2002).

agreement.[66] Imagine the anguish to the child when the parties are constantly at an impasse over religious training, choice of schools, time with grandparents, choice of doctors and medical and dental providers, choice of extracurricular activities, propriety of out-of-state trips and vacations, in addition to constant bickering over visitation times. Children of broken relationships need stability, need consistency and need to live in an atmosphere of cooperation–not in a constant environment of conflict, animosity and hatred.

It is the difficult job of the trial judge to adequately balance the conflicting interests noted. The real "best interests" of children can only be achieved by the trial court at least attempting to be an appropriate gatekeeper and fulfilling its professional responsibilities toward children and toward society in general.

VI. CONCLUSION

It may very well be that the litigation and adversarial system is not the best way to deal with family law cases. It is, however, the reality of present day family law in Illinois and throughout the country. Family law attorneys and trial judges need to have a real understanding of the difficult job that each has in the custody-visitation area. Some knowledge by family law attorneys that the trial court will not simply rubber stamp every joint custody agreement will deter some joint custody arrangements where there is no real cooperation and the resolution is solely to avoid a custody fight. Likewise, an adherence by the trial court to a responsible gate keeping function will also deter some similar inappropriate joint custody arrangements and remove certain children from the battlefield.

The children of the State of Illinois impacted by the breakup of their parents' relationship truly deserve good faith efforts in the realistic world of the present system by both attorneys and trial judges to insure that joint custody agreements are truly in their best interests and that they are not subjected to substantial parental conflict for their entire minority.

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66. It would certainly be helpful if trial judges in family law cases were given the statutory authority by the legislature to vacate joint custody agreements on their own motion once lack of cooperation and conflict is clear. There are many occasions where the trial court is so frustrated by poorly functioning joint custody agreements that it implores one or both parties to file a petition to modify.