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The San Diego Family Law Council For Children Newsletter

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Council To Host Conference Featuring Isolina Ricci, Ph.D. : 2nd Annual Guiding The Lives Of Children Of Separation and

The San Diego Family Law Council for Children will hold its 2nd Annual "Guiding the Lives of Children of Divorce and Separation" educational seminar at the University of San Diego's (USD) Manchester Executive Center on Saturday, June 24, 2006. The keynote speaker is renowned author, clinician and consultant, Isolina Ricci, Ph.D.

Dr. Isolina Ricci will be presenting on her new book: *Mom's House, Dad's House for Kids: How To Feel At Home in One Home or Two*, an inspiring, upbeat approach for children and their parents that goes well beyond coping to building skills that foster resiliency, trust, confidence, and a sense of family. Dr. Ricci is recognized as a pioneer in the field of separation, divorce, co-parenting, and family mediation. She began her work first as a family researcher more than 30 years ago, then became a child and family therapist, a family mediator, educator, then the head of a statewide office for Family Court Services for the California Administrative Office of the Courts. Beginning in the early 1970s, she championed the right of children to a continuing relationship with both parents after separation and challenged the assumption that divorcing parents could never learn to work together for the sake of the children. Many of her pioneering concepts such as the Parenting Agreement/Plan have been adapted by lawmakers, the legal profession, and the mental health community. Her work has been cited in several appellate court decisions.

Professionals will gain new knowledge and skills to use in their practice. After a successful long-term adjustment for children and parents. With a focus on clinical experience, Dr. Ricci presents clear directions designed to support the "best interests of children."



Isolina Ricci Ph.D.

She will suggest specific actions attorneys, and mediators can take to promote healthy reduce long term hostilities between the today, living arrangements and co-parenting, tives designed to support the "best interests of children and explore the concept of a "value view of selected research and drawing on will itemize the keys to resiliency and suc-

Parents and concerned others will have the opportunity to learn practical ways to help their children cope with change, solve problems, and become stronger and more resilient. Dr. Ricci will also discuss ways parents can manage an acceptable working relationship with the other parent and ways to define personal boundaries.

Dr. Ricci's books will be available for sale at both the morning and afternoon seminars at a discount to participants, and Dr. Ricci will be happy to sign your book.

Co-Sponsors:



Note: There will be two sessions to this educational seminar. The morning session will provide professional education for Legal and Mental Health Professionals. The afternoon session will provide practical education for Parents and Others concerned with children of divorce and separation.

DIVORCE INNOVATIONS- ALTERNATIVES TO THE TRADITIONAL DIVORCE PROCESS BY BARNEY CONNAUGHTON, ESQ.

Divorce involves resolving a number of complex and diverse issues during a very chaotic and emotionally charged time for the couple. There are financial issues related to valuing and dividing assets and debts from the marriage, strained cash flow issues related to the need for the family income to now support two homes rather than one, child welfare issues related to how each parent's relationship with the children will continue after separation, and all mixed in with mental health issues with each parent experiencing some sense of loss from the breakdown of the marriage. The trust between Husband and Wife that was the cornerstone of the marriage is gone, and with the lost trust is the fear that the other spouse will stop at nothing to take more than his or her fair share.

The traditional divorce process has Husband and Wife hire separate attorneys to "fight for their rights." Husband and Wife are adversaries and their attorneys set out to paint their client in the most favorable light, while focusing on drawing out the shortcomings of the other spouse. The Court must sift through these biased interpretations of the facts and make a decision regarding these complicated issues, often-times considering diametrically opposed accounts of the same incident. Judges are placed in a situation where they must make final decisions about how property will be divided, how much support will be paid, and when each parent will spend time with their children, but these same Judges will admit that they are not the ideal people to be making these decisions.

This adversarial process exacts a substantial toll. Whether or not parents intend it, the children sense the conflict between the parents, and can easily feel as if they have been placed in the middle of the dispute. During the divorce, whatever trust that had remained after the breakup of the marriage is further destroyed by the battle waged in the process. In addition, there are substantial legal fees involved in getting the case before the Judge before the determination. It is seldom that the litigated outcome is just what the client wanted as more often each spouse leaves trial feeling they have lost.

Many divorce professionals have recognized the shortcomings of this adversarial approach. A focus has been placed on finding a way to resolve the issues of the divorce in a way that protects the children from the process, involves the couple in making their own decisions, and strengthens rather than further deteriorates the relationship between the couple.

One such option is mediation. The couple hires a mediator to help identify the issues of their divorce and to help the couple communicate with each

other to come up with their own solutions. The mediator is not providing legal advice to either spouse and is not a decision maker. The mediator attempts to navigate the couple through any emotional issues that may hinder communication, so the couple can focus on resolving the issues of the divorce. Some drawbacks to mediation include problems with assuring that both spouses are able to make educated decisions, assuring that both spouses are informed of their individual rights, assuring full disclosure by both spouses, and resolving situations where there is an imbalance in power between spouses.

To remedy many of these shortcomings with mediation, a second alternative to the

traditional divorce process is Collaborative Divorce. In Collaborative Divorce each spouse hires an attorney trained in Collaborative Divorce. In addition, each spouse hires a coach who is a mental health professional to help with the emotional issues of the divorce, and to help each party effectively communicate with one another. The couple also jointly hires a financial planner and if there are complicated child issues, a child specialist. The couple and the "team" of professionals sign a Collaborative agreement stating that the couple will resolve the issues of the divorce outside of Court. The parties further agree that they will provide full disclosure including agreeing to obtain any necessary documents to accurately value assets.

Collaborative Divorce allows for the most qualified professionals to be available to help the couple when needed. When considering the future financial needs of the couple, a trained financial planner is in a better position to provide projections and sound financial advice than an attorney. When trying to resolve emotional fallout from the breakdown in the marriage which is hindering communication, a trained mental health professional is in a better position to help the couple through the issue. The attorney has much more opportunity to focus on the legal issues of the case.

Collaborative Divorce is also not for everyone. Having five or six professionals working on a case can be financially intimidating to the couple trying to come up with an alternative to the traditional divorce process. There is no question that Collaborative Divorce is a healthier alternative to traditional divorce. The agreement to cooperate with full disclosure and to not litigate saves substantial costs associated with formal discovery and associated with the preparation of declarations otherwise used in litigated cases. Even so, many couples who are open to using alternate methods to resolve their divorce feel Collaborative Divorce is too cost prohibitive.

There are many variations to these alternate forms of handling a divorce. For instance, one variation of mediation uses two mediators, with one of the mediators being

an attorney and one of the mediators being a mental health professional. Many of the pitfalls with communication problems and power disparity can be addressed better with this combination than with a single mediator. Participating in mediation does not mean that either or both of the spouses cannot have an attorney, and any mediated divorce can and should be reviewed by an attorney for each spouse.

While the preferred Collaborative Divorce model calls for the full team of professionals discussed above, another option is a variation of the Collaborative Divorce using a partial team. The full team approach recognizes that when difficult couples dynamics prevent the successful resolution of the dispute it is more helpful to have a mental health professional available for the couple than an attorney. Likewise, the financial specialist's training places them in a much better position than an attorney to consider the future impact of the property and support decisions being made at the time of divorce. However, when the couple, to their credit, have already overcome some of the obstacles to a smooth and civil divorce process, the couple can attempt to proceed collaboratively with a partial team. Agreeing to the use of a partial team is a commitment by the couple to resolve their own issues with the help of select professionals, and this approach, while maybe not the ideal one, is certainly better than the traditional litigated divorce. Some options include the couple using one joint coach through the process, or using the financial planner in a more limited capacity. For example, Family law attorneys are accustomed to dealing with the financial issues surrounding divorce and may be able to resolve the case in a Collaborative fashion without the full team of professionals. The couple may be able to effectively communicate without the assistance of a coach.

Cooperative Divorce is another variation to the alternate forms of handling a divorce. Cooperative Divorce is where the couple selects Collaboratively trained attorneys to represent them in the divorce. An agreement is signed again with the couple agreeing to full disclosure and agreeing not to litigate. If either spouse chooses to litigate, both spouses must find a new attorney. The attorneys and the couple work on coming up with creative solutions to the problems. If communication issues arise, then the couple, with the advice of their counsel, may involve a coach or another appropriate professional to help them through difficult issues. This approach assures that the couple and their respective attorneys are committed to working as a team to come up with a healthy and reasonable solution to the issues. This approach has the

potential to be cost effective, efficient and civil.

A common thread involved in all of these alternative approaches to divorce is that by involving the couple in the process and setting up open lines of communication between the couple and the professionals, a much more favorable result can be reached. By finding a way to work together to come up with their own solutions, the couple can begin to respectfully communicate and begin to re-establish the trust that may have been lost. This ability to communicate civilly and solve problems effectively sends a message to the minor children that their parents are going to be alright. The end result is that the people most familiar with the case are making the decisions with the assistance of professionals focused on fashioning successful solutions.



SAN DIEGO COUNTY BAR ASSOCIATION CHILDREN AT RISK COMMITTEE

by Donna L. Mallen, Esq., and Enrique A. Monteagudo, J.D.



The San Diego Family Law Council for Children is dedicated to easing the impact of divorce and other family-splitting events on the lives of children. Often, family break-ups and emotional risk for the children go hand-in-hand. When the family is de-stabilized, the child is often left floundering and troubled, coping with the overwhelming events at home by acting out angrily in school or seeking companionship with other troubled children.

Looking at the flow of criminal and juvenile offenders and brings many an attorney or judge to ask what makes the difference in one child's life, causing him or her to grow up to be a part of that flowing stream, instead of becoming a more productive member of society. What can be done to change the course of that stream? How can I make a difference?

Asking themselves these questions, and then taking action to help channel that flow into a positive direction, a very active and dedicated group of attorneys, judges and law students have become involved in the San Diego County Bar Association's Children at Risk Committee, co-chaired this year by attorneys Elizabeth Balfour and Dawn Davies. This committee has come up with some exemplary solutions that really do make a difference.

In addition to supporting the like-minded activities of other community organizations such as the Credit Abuse Resistance Education Program (CARE) project of the US Bankruptcy Court for the Southern District of California, the San Diego Teen Court, the San Diego Paralegals Association, and the San Diego Family Law Council for Children, this action-oriented committee focuses on interactive projects with the students whose schools they have adopted.

Through their Literacy Program, members go the school to read with the children, not only helping them with their reading abilities, but demonstrating as adult role models that reading is an important and valued skill. The Literacy Program is augmented by the Committee's annual Children's Book Drive.

The same interactive role-modeling takes place in their Conflict Resolution Skills Training, consisting of Peer Mediators Training (teaching students to become peer counselors who will mediate disputes between other students) and Conflict Resolution Skills Training (introducing basic conflict resolution skills to the whole

classroom). A lead trainer from the Children at Risk Committee teaches core concepts to the students and leads class discussion, and attorney volunteers teach the skills directly to small groups of students.

Like adults in mediation or in a parenting class, through the Conflict Resolution Skills training and the Mock Video project, the children come to understand how to listen to both parties' positions and participate in working toward a solution that will consider both parties' interests.

The Committee's Mock Trial Video is designed to give fourth and fifth graders an experience of being on a jury. The trial involves two students who are accused of selling drugs at school. All roles are acted out by children. After an introduction by Judge Leo Papas, the video proceeds with certain structured pauses, at which time the presenting attorney or judge can stop the tape to raise discussion and respond to questions.

Like adults in mediation or in a parenting class, through the Conflict Resolution Skills training and the Mock Video project, the children come to understand how to listen to both parties' positions and participate in working toward a solution that will consider both parties' interests.

For High School students, the Committee has adopted a local school, where the members participate in programs such as the Legal Eagle Program (attorneys mentoring students), the Job Shadow Program (students "shadow" an attorney at work), Senior Exhibition (attorneys evaluate the Seniors' presentations related to their career interests), Career Day (a group of representatives of the legal profession field questions from the high school students), and Law Academy Scholarship Contest (an essay contest related to interest in a career in law, with a \$500 scholarship award).

The guidance and attention given to these children by the members of the Children at Risk Committee through their face-to-face volunteer work undoubtedly give them a head start on channeling their own lives in a positive direction. They have answered the question, "How can we make a difference?"



Joint Physical Custody -A working definition (Part I)

by Enrique A. Monteagudo, J.D.

This article is the first of two, which will result in a working definition for the legal term “Joint Physical Custody”. It is the intent of these articles to add clarity to the law, increase its predictability, and encourage educated discussion. This first article will provide an overview of the legal term “Joint Physical Custody”. Specifically, it will begin with the statutory definition of “Joint Physical Custody” along with its legislative history, and distinguish it from lay definitions. This first article will then provide contextual framework by discussing the common sense outer limits of a working definition, as well as the national treatment of the subject. This article will conclude with the framework and tools for the working definition to be set forth in the second article.

As with many terms that have a legal meaning, “Joint Physical Custody” has been defined by statute. Specifically, the Legislature has defined “Joint Physical Custody” to mean “that each of the parents shall have significant periods of physical custody,” and that joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents. See, Family Code § 3004. As such, when two parents have joint physical custody of a child, each is afforded “significant periods” of time to spend with the child. Put another way, when each parent has physical custody of the child for “significant periods”, the parents share physical custody jointly. Thus, joint physical custody” is expressly tied to the *de facto* parenting of the child, and a parent does not have joint physical custody where he/she is not having “frequent and continuous contact” with the child.

As a legal term, the statutory definition of “Joint Physical Custody” is controlling. This is important to understand because “Joint Physical Custody” can have many lay meanings, depending on whom you ask. For example, from the perspective of a married person, custody is generally a matter of marital status, independent of which duties are assumed by either parent. In the case of cohabitating, unmarried parents, custody may be viewed as tied to the parent’s intent to be a parent to the child. Although the issue of Physical Custody generally is not raised with respect to intact families, for illustration, consider a soldier shipped off to a foreign country, leaving her child behind. There, physical custody does not stop at the gang plank, and even though there is a clear separation between parent and child, the deployed soldier’s physical custody of the child is not considered to be suspended or otherwise disturbed. To the soldier and her husband, it is sufficient that she has status and an intent to return and remain in the child’s life. Thus, from the perspective of these parents, both would have physical custody of their child.

From different perspectives, other lay definitions are also possible. For example, taking a very narrow perspective, physical custody of a child might be considered joint only when it is shared 50/50. Likewise, taking a broader perspective, another lay definition might be that custody is shared jointly where both parents are readily available for the child, independent of where the child actually ends up staying. In other words, if one were to ask three different lay persons what “Joint Physical Custody” actually means, they’d likely provide at least three different answers.

It is important to look toward the statute as the source of the term’s meaning, since there are clearly different ways of interpreting what “Joint Physical Custody” could mean. Moreover, while alternate definitions may be interesting, the statutory definition is the only definition having the authority of law. Also, relying on definitions that lack authority may lead to confusion, reduces predictability, and may even increase conflict as a consequence.

As shown above, the law does attempt to address this matter of definition qualitatively and quantitatively. For example, while the Family Code does not give us a clear and final definition that applies to all cases, it gives us some definition in that it requires (qualitatively) that there be a time commitment from each custodial parent. The Family Code also specifies (quantitatively) that the time commitment be for “significant periods” and that it amount to “frequent and continuous contact” with the child. This overarching definition is clearly not a rigid absolute standard or a standard of mere intent, but rather it is flexible, and somewhat comprehensive.

As discussed above, as a legal term, “Joint Physical Custody” is subject to its legal interpretation rather than a lay interpretation. As such, while it is not uncommon to hear terms-of-art such as: “Primary physical custody,” “Primary residence,” “Primary parent,” etc.,

these terms are not found in the Family Code and have no legal meaning. Accordingly, the Family Code provides for only “Joint Physical Custody” and “Sole Physical Custody,” wherein the transition between the two occurs when both parents share “significant periods of physical custody.”

For further understanding of the statute, the Legislative history of this Family Code section may be consulted. However, this approach is limited. The statute’s legislative history only shows that the definition of “Joint Physical Custody” originally derives from Civil Code § 4600.5. Additionally, while the term was amended by Stats. 1983, c. 304, § 1, there was no amendment as to “significant periods.” Thus, the current statutory definition is substantially the same as when the term was originally introduced.

In contrast to “Joint Physical Custody”, the Legislature has also defined “Sole Physical Custody” as meaning that a child shall reside with and be under the supervision of one parent, subject to the power of the court to order visitation. See, Family Code § 3007. Thus, it is clear that while parents are sharing Joint Physical Custody” of a child, each has custody. On the other hand, however, with “Sole Physical Custody,” only one parent has custody and the other parent visits the child. See Figure 1.

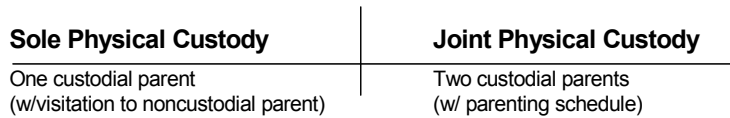


Figure 1

Without further guidance from the Legislature, the term “significant periods” is still subject to many reasonable interpretations, which in turn makes a precise definition elusive. See Figure 2. Nonetheless, a working definition, providing some predictability, is still possible.

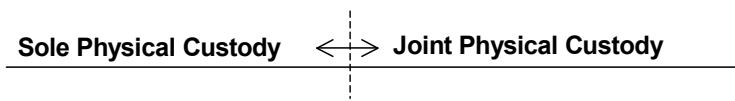


Figure 2

As a preliminary matter, it is useful to identify the common sense, clear cases of where there is, and is not, joint physical custody. At one end of the scale, where the parents parent the child equal amounts of time, there is joint physical custody. At the other end, where one parent does not see the child at all, there is not joint physical custody, but rather sole physical custody. See Figure 3. This will serve as a tool, or model, to be refined into the working definition.

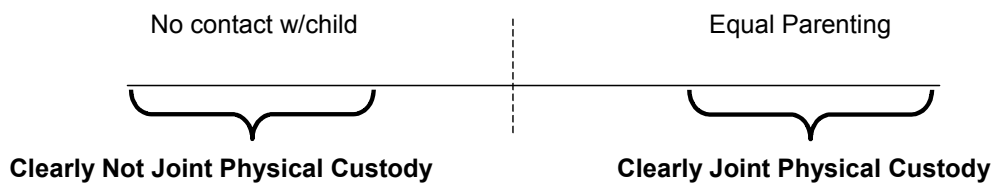


Figure 3

One step toward refining this model into a working definition would be to consider how the issue is treated throughout the nation. Looking toward other states, considerable variation exists in the definition of joint custody and the circumstances under which it is permitted or denied. Generally, joint physical custody statutes do not define how much time the child resides with each parent, and are not interpreted as dictating a 50/50 residential time sharing. Thus, parents may elect joint physical custody, but the child may spend anywhere from 25% to 50% of his time with one of his parents, and the remainder with the other. According to one author, joint physical custody is usually defined as a schedule where the child has at least a 30/70 time share between parents, although 50/50 arrangements are common. On the federal level, the definition of joint physical custody, as used in a first-of-its-kind NCHS study, reporting figures for physical custody of children, is a minimum of 30% timeshare with each parent. See Figure 4.

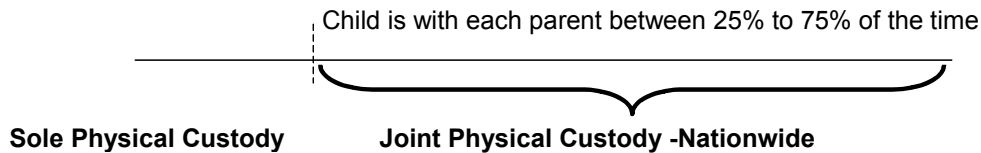


Figure 4

At this level of analysis, there is no bright-line rule for when parental involvement meets the definition of Joint Physical Custody. However there still exists sufficient information to determine the scope of the definition and the tools to better refine the definition.

For example, it is clear that the law only provides for Joint and Sole physical custody. Any other terms, however enticing they may sound, lack legal value. Accordingly, when describing the legal relationship between separated or divorced parents and their child, there are either two custodial parents sharing physical custody jointly (generally subject to some parenting schedule), or one parent having sole physical custody (sometimes affording some form of visitation to the noncustodial parent). Next, physical custody is tied to the actual time a parent cares for the child; it is not a mere matter of status or intent. And finally, joint physical custody exists when both parents are caring for the child for “significant periods” (another term having some history, but lacking a predictable definition).

With the scope of the definition and the tools for further analysis available, the second article will take a more in-depth approach at refining these definitions. It will focus on interpretations provided by leading cases and dicta, thereby leading to a working definition of “Joint Physical Custody.” The second article will close with a discussion on the meaning of Joint Physical Custody and ways to improve the predictability of the law.



[FN1] “Primary residence/custody”: has no legal meaning other than for the purpose of determining government assistance. See e.g., *In re Marriage of Rose and Richardson* (App. 2 Dist. 2002) 126 Cal.App.4th 941.

Several courts have stated that “the term ‘primary physical custody’ has no legal meaning.” (*In re Marriage of Biallas* (1998) 65 Cal.App.4th 755, 759 citing *Brody*, *Whealon*, and *Ruisi*; see also *In re Marriage of Richardson*, supra, 102 Cal.App.4th 941, 945, fn. 2; *In re Marriage of Lasich* (2002) 99 Cal.App.4th 702, 714,

[FN2] J. Folberg, ed., *Joint custody and shared parenting* 2d ed. (Appendix A: Joint custody statutes and judicial interpretation), New York: Guilford Press, 1991, pp. 298–331.

[FN3] Joan B. Kelly, Ph.D., *The Determination of Child Custody in the USA*, *The Future of Children CHILDREN AND DIVORCE* Vol. 4 No. 1 – Spring 1994 pp. 121-142.

[FN4] Isolina Ricci, Ph.D. (former Assistant Director for the California Center for Families, Children, and the Courts), *Mom's House, Dad's House*, (Macmillan, 1981).

[FN5] Clarke, S.C., *Advance Report of Final Divorce Statistics, 1989 and 1990*. Monthly Vital Statistics Report, Vol. 43, No. 9, 1995. Centers for Disease Control and Prevention/National Center for Health Statistics.

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