RECONSIDERING JOINT LEGAL CUSTODY IN CASES INVOLVING INTIMATE PARTNER VIOLENCE

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Custody cases often require courts to make challenging decisions in the best interests of children. These decisions include what custody arrangements will best meet the needs of a specific child. Too often, mental health professionals assessing cases for the courts (whether through child custody evaluations or as Child Custody Recommending Counselors), as well as the courts themselves, default to an assumption that joint legal custody, joint physical custody, and a 50/50 timeshare are what is best for all children. This article seeks to examine more closely the considerations relevant to legal custody in cases where there is a history of intimate partner violence.

Whereas physical custody and timeshare focus on a child's relationship with his/her/their parents, legal custody focuses instead on the relationship between the parents themselves. Joint legal custody requires parents to communicate and to cooperate in order to make decisions together in their child's best interests. While this often is the best option, it is unfair to children—and especially to younger children not yet able to fully articulate their own needs—to *assume* that requiring their parents to engage in joint decision-making about their health, education, and welfare is what will be best for them. This article explores some of the challenges of joint legal custody and invites greater reflection into when it is appropriate.

LEGAL CUSTODY:

Joint legal custody "…means that both parents shall share the right and the responsibility to make the decisions relating to the health, education, and welfare of a child." (Fam. Code, § 3003.)

What this means, in practical terms, is this:

> Legal custody involves decision-making about major issues affecting a child, including the child's health, education, and religion [footnote omitted]. Joint legal custody [footnote omitted] means that the parents will confer and make decisions together, with the result that neither has a final "say," or the legal ability to override the other, in the event of a disagreement. In contrast, sole legal custody designates one parent to make decisions. Consequently, although the parents may confer on major decisions, if they do not do so or they do not agree, the designated parent decides.

(See Ver Steegh & Gould-Saltman, *Joint Legal Custody Presumptions: A Troubling Legal Shortcut* (April 2014) Fam. Ct. Rev., Vol. 52 No. 2, 263.)

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Sole legal custody "…means that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child." (Fam. Code, § 3006.)

When Is Joint Legal Custody Appropriate?

Every mental health professional assessing a family on behalf of a court—and every family court judge—presumably shares the goal of determining what timeshare will best meet the child's needs. Typically, at least in high conflict cases, these professionals understand there may need to be a detailed plan in place for how exchanges will occur, as well as for interim communication between the child and the non-custodial parent (e.g., Facetime calls between physical visits). But it is quite common for the attorneys and mental health professionals involved in custody cases—and for our family court judges—to pay far less attention to the specific details involved in requiring parents in conflict to share *legal* custody of a child.

It makes sense that all fit parents should be allowed to participate in important decision-making about their children, and presumably the prevalence of joint legal custody orders comes from a desire not to exclude a fit parent from playing a meaningful role in the process of making important decisions for their child. In many cases, joint legal custody is the right choice—even when the parents

need therapeutic support (e.g., co-parenting counseling) to learn the necessary communication skills to support healthy joint decision-making. However, the notion that it is *always* the right choice should be soundly rejected. The hope of this article is to inspire professionals involved with our family court system to be more thoughtful about legal custody recommendations and decisions, particularly in the context of families where there are more than two parents, and especially in cases where there is a history of intimate partner violence (IPV).

Although many courts consider joint legal custody the "gold standard," in fact it only is appropriate where the parents demonstrate a capacity for respectful collaboration about their child's care and where cooperative decision-making is logistically practical. As explained in the above-referenced article:

> Unfortunately, for some families joint legal custody will escalate conflict and lead to other detrimental effects. For those with a history of … deep-seated and unresolved arguments on major parenting issues, joint legal custody will exacerbate problems and trap children in untenable situations.

(Ver Steegh & Gould-Saltman, *supra,* at p. 265.)

Authors Ver Steegh and Gould-Saltman quote with approval Professor Dana Harrington Conner's conclusion, based on her work on intimate partner violence, violence against women, family health, and inequality, that "five parental factors are important for successful joint legal custody: (1) effective communication, (2) cooperation and equality of negotiating power, (3) trust, (4) how the parties behave toward each other, and (5) setting and respecting boundaries." (Ver Steegh & Gould-Saltman, *supra,* at p. 264 (quoting from Conner, *Back to the Drawing Board: Barriers to Joint Decision-making in Custody Cases Involving Intimate Partner Violence* (2011) 18 Duke J. Gender L. & Policy 223, 257-258.)

The authors note that even for parents who otherwise might be capable of joint decision-making, practical realities may make such a plan unworkable: "such as where a parent is on military deployment, travels extensively, [or] lives far away…." (Steegh & Gould-Saltman, *supra,* at p. 264.) The authors conclude that:

> Parents who disagree about the advisability of shared decision-making, or who jointly oppose it, are not strong candidates for joint legal custody. Whatever the cause, they are signaling more disagreements, potential danger, or parenting problems down the road. … From a child's perspective, the quality of decision-making is far more important than any particular allocation of authority between parents.

(*Id.* at pp. 266, 268.)

Unlike some of the states discussed in the above-referenced article, and contrary to popular belief, ***California has no preference or presumption favoring joint legal custody over sole legal custody.*** (Fam. Code, § 3040, subd. (d).) I suggest that our family courts—and the professionals appearing in and advising them—should put the same degree of thought into the best interests of children when it comes to decision-making as they do into considering the allocation of parenting time. This may ultimately lead to a recommendation for joint legal custody; but it also could lead to a recommendation for information-sharing between the parents with one parent having the right to make final decisions; or it might lead to a recommendation that one parent has the right to make decisions about certain issues (e.g., education) while the other parent has the right to make decisions about others (e.g., health care). Just as no one schedule is best for all children, no one legal custody arrangement is best for all children. Far more attention is needed on this issue.

A Note About COVID:

During COVID, we have seen numerous examples of otherwise (apparently) reasonable parents disagreeing on so many issues. What safety protocols are appropriate with babies and children too young for masking or vaccination? Does a parent get to take the child to spend time with extended family despite potential associated health risks? What if this necessitates travel to other states (especially states where compliance with public health recommendations is less consistent)? Should the child be vaccinated at the first opportunity or is it more prudent to wait until more data becomes available on the long-term effects of the vaccines? Or should the parents forego vaccination entirely and rely on the robust immune systems of many healthy children? At what point is it okay to send a baby back to childcare, a toddler back to preschool, a youngster back to school? During the pandemic, more than ever, our children have needed their parents to be able to make decisions that protect them—and then to reconsider those decisions, often on short notice and under stress, as circumstances have changed and changed again. The absence of a clear protocol for how decision-making authority will be allocated between the parents is unfair—and potentially unsafe—for children caught up in the continuing chaos caused by the pandemic.

Legal Custody in Multi-Parent Families:

It is becoming more and more common in California for our family courts to find that children have more than two people filling the role of parents. Although there are many children being raised by more than two parents without conflict, some multi-parent cases arise out of significant conflict and/or litigation. In these cases, it is common for some parents to have difficulty accepting that other parents (particularly non-biological parents) will have an equal right to share in all aspects of parenting the child.

Where a child has more than two parents, our Legislature has specified joint custody between all parents is not preferred.

> In cases where a child has more than two parents, the court shall allocate custody and visitation among the parents based on the best interest of the child, including, but not limited to, addressing the child's need for

continuity and stability by preserving established patterns of care and emotional bonds. The court may order that not all parents share legal or physical custody of the child if the court finds that it would not be in the best interest of the child…. (Fam. Code, § 3040, subd. (e).)

A bit of history: Prior to 2013, it was questionable whether a California court could find a child had more than two parents unless all parents agreed (in which case this could be accomplished via a consensual "third parent" adoption process). This changed with the enactment of Senate Bill No. 274 (2013-2014 Reg. Sess.) ("SB 274"). The previous version of the bill was vetoed by Governor Brown due to concerns voiced by the family law bar about more than two parents creating chaos for children caught up in custody disputes. This specific concern was addressed in SB 274 as follows:

> **Bill Addresses Family Law Concerns:** While more than two parents may be highly desirable in a dependency case, where more loving parents may help keep a child out of a group home or other foster care placement, multiple parents in a family law proceeding, where warring parents are fighting for custody, could be more troublesome. This bill addresses that concern in two ways. First … it allows a court to recognize more than two parents [over the objection of at least one of the existing parents] only when it would be detrimental to the child not to do so. The bill provides courts with guidance on finding such detriment, by requiring the court to consider all relevant factors, including the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical and psychological needs for a substantial period of time. Second, this bill recognizes that concern and provides that the child's best interest, including the need for stability for the child, must guide custody determinations. Moreover, *the bill specifically states that not all parents may share legal or physical custody of the child. While this is true in all custody cases, this statement should provide guidance to family courts to ensure that the child has stability and that if legal or physical custody is shared with too many parents, such stability may be lacking.* (See SB 274, Analysis of the Assembly Judiciary Committee, at p. 7, emphasis added.)

Our courts have long held that "the children involved in a custody proceeding should not be made the pawns of [] personal desires, either on the part of the contestants or the court, no matter how sincere such desires may be." (*In re Marriage of McCloren* (1988) 202 Cal.App.3d 108, 115, (quoting *Juri v. Juri* (1943) 61 Cal.App.2d 815, 819).) The Court of Appeal in *McCloren* went on to note, "Although we may sympathize with the court's compassionate view that ultimately the children's best interests would be served by their having a full and involved relationship with each parent, the reality of the parents' conflicts unavoidably hampers the realization of that goal." (*Id.* at pp. 115-116.) Thus, where there is a documented history of one or more parents being hostile toward others—as frequently is the case in situations where the courts have had to determine parentage—that history should inform the court's ruling on legal custody. In cases where the parents have a history of being unable to agree even on the fact that they all *are parents*, it is a lot to ask for them to be able to engage in the cooperative decision-making required for joint custody to be successful.

Even more than in a more typical custody dispute, in cases where a child has ended up with more than two parents due to consecutive—and often chaotic—parenting arrangements involving multiple (often discordant) adults, courts and the professionals advising them need to look to historical patterns of care, including patterns of how decisions have been made and by whom, and set rules and standards to assure that a child's every need does not end up fodder for further parental conflict. Overlooking legal custody concerns can leave children vulnerable to inter-parental conflict, and leave otherwise responsible parents unable to make even basic decisions necessary to assure their children are well cared for.

Cases Involving Intimate Partner Violence:

Family Code section 3044 creates a rebuttable presumption that it is inappropriate to grant *either sole or joint* legal custody to a perpetrator of intimate partner violence ("IPV") for five years following perpetration of the abuse. Family Code section 3044 provides in relevant part:

> (a) Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence within the previous five years against the other party seeking custody of the child, or against the child or the child's siblings, or against any person in subparagraph (C) of paragraph (1) of subdivision (b) of Section 3011 with whom the party has a relationship, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interests of the child, pursuant to Sections 3011 and 3020. This presumption may only be rebutted by a preponderance of the evidence.
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> (b) To overcome the presumption set forth in subdivision (a), the court shall find that paragraph (1) is satisfied and shall find that the factors in paragraph (2), on balance, support the legislative findings in Section 3020.
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> (1) ***The perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interests of the child pursuant to Sections 3011 and 3020. In determining the best interests of the child, the preference for frequent and continuing contact with both parents, as set forth in subdivision (b) of Section 3020, or with the non-custodial parent, as set forth in paragraph (1) of subdivision (a) of Section 3040, may not***

be used to rebut the presumption, in whole or in part.

(2) Additional factors:

(A) The perpetrator has successfully completed a batterer's treatment program that meets the criteria outlined in subdivision (c) of Section 1203.097 of the Penal Code.

(B) The perpetrator has successfully completed a program of alcohol or drug abuse counseling, if the court determines that counseling is appropriate.

(C) The perpetrator has successfully completed a parenting class, if the court determines the class to be appropriate.

(D) The perpetrator is on probation or parole, and he or she has or has not complied with the terms and conditions of probation or parole.

(E) The perpetrator is restrained by a protective order or restraining order, and he or she has or has not complied with its terms and conditions.

(F) The perpetrator of domestic violence has committed any further acts of domestic violence.

Although generally aware of the 3044 presumption, attorneys, mental health professionals, and judges frequently skip over section 3044(a)(1) and move straight to assessing the factors detailed in section 3044, subdivision (b)(2). This is legally incorrect. Before it even considers the factors in section 3044, subdivision (b)(2), a court first must find that paragraph 3044, subdivision (b)(1) is satisfied. ("To overcome the presumption set forth in subdivision (a), *the court shall find that paragraph (1) is satisfied* and shall find that the factors in paragraph (2), on balance, support the legislative findings in Section 3020." (Fam. Code, § 3044, subd. (b), emphasis added.)

Depending on the nature and extent of the intimate partner violence, the nature and extent of any mental health issues, any history of substance abuse, as well as many other factors, *and disregarding the general proposition that children's needs are best served by frequent and continuing contact with both parents,* in many IPV cases it may be difficult or impossible for the perpetrator to demonstrate that joint legal custody is in the child's best interests. In these cases, the other parent (or parents) should retain legal custody regardless of the perpetrator's completion of a batterer's treatment program or satisfaction of the other factors outlined in 3044, subdivision (b)(2).

> A grant of joint legal custody assumes that both parents will make good choices about the welfare of their children. Such an assumption, however, is ill advised in cases involving batterers. A parent who makes poor decisions with regard to his own life is also likely to make poor decisions about his children. To state the obvious, logic suggests that vesting decision-making authority in someone who has a history of battering is risky, as individuals who commit acts of intimate partner violence are proven to be poor decision makers. Batterers often engage in other risky behavior, including abuse of drugs and alcohol, criminal behavior and abuse of children. They fail to comply with court orders and have a general disregard for the law. According to a report by the National Institute of Justice, perpetrators of intimate partner violence engage in criminal activity well beyond acts of violence against their domestic partners. "Most studies agree that the majority of domestic violence perpetrators … have a prior criminal history for a variety of nonviolent and violent offenses against males as well as females." In fact, the authors of the report assert that there is a "large overlap between domestic violence and general criminality." In addition, the prevalence of drug and alcohol abuse among batterers is high. Not only do batterers tend to make poor role models, they also place themselves and their children at risk as a result of their dangerous behavior. (Conner, *Back to the Drawing Board: Barriers to Joint Decision-making in Custody Cases Involving Intimate Partner Violence*, *supra*.)

There is a reason the California Legislature chose to enact a presumption that joint legal custody is inappropriate for five years following perpetration of domestic violence: this period of time allows parents to demonstrate whether patterns of behavior have genuinely changed enough to make joint custody physically, psychologically, and emotionally safe for the other parent and the child(ren). Until this has been demonstrated, courts and the mental health professionals advising them should think long and hard about what orders will be necessary to assure that legal custody—"the right and the responsibility to make the decisions relating to the health, education, and welfare of a child"—is allocated in a manner that assures a parent will be able to make parenting decisions in a safe and timely manner that is responsive to a child's actual needs and not the result of fear or intimidation.

Cases Involving Psychological and Emotional Abuse:

While both physical custody and timeshare considerations focus on the relationship between parent and child, ***legal custody focuses on the relationship between the parents***. Joint legal custody requires the parents to cooperate with each other in a shared decision-making process. If they are unable to do so, it creates unjustifiable risk for the child, whose well-being often requires timely decisions.

Protecting a parent from physical violence is a far more straightforward proposition than protecting that same parent from psychological and emotional harm. In cases of psychological and emotional abuse, every single interaction between the parents potentially creates a new opportunity for manipulation and gaslighting. Drafting court orders that protect against this is far more complicated than drafting stay-away orders or orders for exchanges only to occur in public places, and it therefore requires a high level of thoughtfulness and care.

The California Legislature recently acknowledged the impact of domestic emotional abuse in general, and specifically recognized the stress COVID has placed on victims of domestic violence. By unanimous vote, the Legislature passed Senate Bill No. 1141 (2019-2020 Reg. Sess.) ("SB 1141") in August 2020, which explicitly added coercive control as a basis for a restraining order under the Domestic Violence Protection Act (DVPA). The Senate Floor Analysis of SB 1141 includes the following statement: "The effect of coercive control is to 'strip away a sense of self, entrapping the victim in a world of confusion, contradiction, and fear.' It may be inflicted concurrently with physical violence but often is not." (See Senate Floor Analysis, p. 4.) This is a sadly accurate description of the impact of psychological and emotional abuse on many survivors of IPV.

Commentators have noted that family courts around the country have tended to understand the need for detailed and specific physical custody orders to protect domestic violence victims from further abuse, but often have not taken the same care with legal custody orders. While it is extremely important in domestic violence cases to establish clear rules for how custody exchanges should take place (e.g., in a public place such as a Starbucks or in front of a police station), in cases of psychological and emotional abuse, it is at least as important to protect victims from unnecessary communication and opportunities for gaslighting and undermining in the decision-making process.

Joint legal custody can be difficult under the best of circumstances because it requires cooperation between parents who often are struggling with feelings of hurt and anger related to the parties' breakup. In IPV cases, these difficulties are compounded to the point where joint legal custody—by its definition requiring joint decision-making—can be a very bad idea. Professor Dana Harrington Conner, Director of the Delaware Civil Law Clinic, has written compellingly on this issue. In her article *Back to the Drawing Board: Barriers to Joint Decision-Making in Custody Cases Involving Intimate Partner Violence*, quoted above, Professor Conner states:

> The rarity of equality in decision-making between an abuser and his victim renders joint decision-making unworkable. The occurrence of domestic violence within a relationship … suggests that the batterer is in a superior position of power. The propensity to abuse also provides important information about the character of the batterer. If he is an abuser, he is more likely to use power to dominate and intimidate the other parent. ***By ordering joint legal custody, thus requiring joint decision-making, the court places the victim in an impossible position—she is forced to negotiate with her batterer despite her lack of power within that relationship.*** (Conner, *supra*, emphasis added.)

Professor Conner goes on to propose a framework for family courts to adopt in assessing the appropriateness of joint legal custody orders in domestic abuse cases. As stated by Prof. Connor: "Joint decision-making requires joint participation—two voices, two minds, and two opinions merging to a resolution for the betterment of the child. For the batterer, however, there is only one voice, one opinion, and one correct resolution—his own."

Family courts have recognized that parental conflict in general, and domestic violence in particular, is harmful to children.

> The conflict created by the batterer has a negative effect on the children in a variety of ways. Beyond the obvious physical dangers posed by batterers, children also undergo stress related to their exposure to the arguments and the unpredictability of the hostile decision making process caused by the batterer. Stress is significant for several reasons. At the outset, stress can cause short-term problems for children such as anxiety, depression, sleep disturbances, eating disorders and relationship problems. What our system fails to understand are the long-term implications of stress on children. In fact, experts maintain that stress in childhood can result in significant long-term negative health risks. …
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> Joint legal custody demands a greater level of contact [between the parents] than sole legal custody, which in turn provides greater opportunities for conflict between parents. In turn, these repeated conflict opportunities result in the greater potential for childhood stress. (Conner, *supra*.)

Litigation Abuse as a Factor in Addressing Legal Custody:

In cases where there is a history of IPV—whether physical, psychological, or a combination, and whether formally documented or not—it is likely to be extremely stressful for a survivor to have to appear in court repeatedly with her abuser. Beyond that, retaining legal counsel to advocate at repeated hearings can add substantially to the financial vulnerability of IPV survivors. As stated in a recent article, "legal proceedings can serve as platforms for post-separation coercive control as they enable abusive partners to have direct contact with their victims, often over an extended period of time. … Indeed, court proceedings may be the only way for abusive partners to legally maintain contact with their former partners." (Gutkowski & Goodman, *Coercive Control in the Courtroom: the Legal Abuse Scale (LAS)* (May 2022) J. Fam. Violence.) According to this article, "[q]ualitative research has documented the mechanisms through which partners use legal abuse including by forcing survivors into distressing face-to-face contact through court proceedings, attacking the survivor's parental rights or visitation time, threatening the children's safety, publicly denigrating the survivor's capabilities as a parent, and exerting financial abuse against the survivor through the process." (*Ibid*, internal citations omitted.)

California Courts of Appeal have acknowledged litigation abuse as a factor in deciding whether to renew domestic violence restraining orders. (See, e.g., *Ashby v. Ashby* (2021) 68 Cal.App.5th 491, 516–517: "[C]ustody and

financial disputes are often used by a restrained party as a pretext to continue harassing and controlling the protected party. Our record shows [Father] willfully violated multiple custody court orders and strategized to financially starve [Mother] and pressure her into terminating the DVRO. Judge Melzer's factual findings regarding [Father]'s spiteful litigation tactics … demonstrated a high level of viciousness and malevolence towards [Mother]." See also, *Lister v. Bowen* (2013) 215 Cal.App.4th 319.)

The question of under what circumstances, and with what frequency, review hearings should be scheduled in high conflict custody cases is one on which reasonable minds differ. There is a clear tension between the responsibility of judges in custody cases to fulfill their oversight responsibilities with regard to the best interests of the children and the need to avoid the financial and emotional stress on the parents caused by overly frequent or unnecessary hearings. In cases where the court is implementing a progressive parenting plan (e.g., starting with no overnights, then adding one to two overnights per week, and so on, en route to an equal timeshare), frequent review hearings may be needed to assess the impact of each schedule change on the child. However, the need for frequent review hearings in high conflict cases where the parenting schedule is stable is far less obvious, and the risk of misuse of the court process as a form of IPV is much higher. Granting sole legal custody to one parent—or clearly dividing legal custody between the parents in a way that does not necessitate significant interaction (e.g., one parent has legal custody regarding education while the other parent has legal custody regarding health)—can minimize opportunities for ongoing conflict, thus also minimizing the need for regular judicial review. As California family courts pay more attention to coercive control as a form of IPV, the issue of how frequent court appearances impact this issue merits further examination.

Relevance for Very Young Children:

The concerns discussed above regarding joint legal custody are true for children of all ages, but they are especially true in cases involving very young children for at least five reasons: (1) infants and toddlers are wholly dependent on their caretakers to meet their every need; (2) infants and toddlers are entirely unable to advocate for themselves; (3) infants and toddlers require consistency, reliability and stability for their emotional health and well-being, thus their care has to be more closely coordinated between households; (4) because infants and toddlers don't show stress the same way older children do, they may experience far more stress than they can manage before parents perceive that the infant is under stress; and (5) there are less likely to be outside eyes on the care being provided to infants and toddlers, and therefore there is likely to be less opportunity for other adults to mitigate the stress of interparental conflict.

In many cases, joint legal custody is entirely appropriate for even the youngest children, where both parents are able to put the baby's needs first, and are able to set aside their differences to engage in cooperative decision-making as necessary to meet the baby's needs. In these cases, there is absolutely no reason the parents should not share joint legal custody, regardless of how young the child is.

But in more complicated, more conflicted cases, the need for one parent to be able to make quick and confident decisions for her/his very young child may by necessity supersede the desire of professionals to make both parents feel fully involved. In these cases, courts and counsel—and the mental health professionals advising them—should think creatively about how to manage the flow of information and how to divide decision-making authority in a way that allows maximum healthy participation for both/all parents without putting our smallest and most vulnerable constituents at risk.

Conclusion:

Decisions about what legal custody arrangements will be best in any particular case deserve the same thoughtful, individualized consideration as decisions about what timeshare arrangements will best serve the interests of the child. Joint legal custody can be wonderful when parents are able to communicate and cooperate to address their children's needs, but it never should be treated as "just rewards" for a parent showing up and caring, nor should it be treated as an indicator of parental fitness. Parents who are unable to communicate and cooperate are not good candidates for joint legal custody, regardless of how otherwise "fit" they are, and other legal custody options should be considered—whether sole legal custody to one parent, or an allocation of legal custody between the parents based on each parent's particular skills and interests (e.g., legal custody for medical issues to one parent and legal custody for educational issues to the other). It would be of great benefit to children caught in custody disputes if the legal and mental health professionals involved would put the same degree of care into considering legal custody options as they do into considering physical custody/parenting time allocations, with particular concern for the specific issues discussed above.