
The Determination of Child Custody

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Abstract

This article reviews briefly the history of child custody decision making and describes current custodial arrangements in the United States. It examines both the manner in which parents and courts make decisions regarding custody and access, and the changes in visiting patterns in recent decades. The author discusses the impact of reforms in the law and the implementation of newer dispute resolution and educational interventions, and then makes recommendations for policy and practice.

The process for determining custodial arrangements for children of divorce is important to parents, their children, and society. Because children's well-being is dependent, in large measure, upon the extent and quality of parenting received throughout their childhood, it is in society's interest to ensure that children will have the best possible upbringing after divorce. The roles that parents are expected to assume in raising their children during marriage and after divorce have changed considerably over time from both a societal and a legal perspective, and continue to evolve today.

An understanding of how custody is determined is complicated by the fact that custody laws differ from state to state, and judicial and social practices vary considerably across the country. In addition, clear legal rules presuming that custody should be awarded to the father or to the mother have been replaced by less well-defined standards for making custody decisions. And as societal norms more recently have de-emphasized gender-linked differences in the workplace and within the family, uncertainty about the appropriate role of each parent in the child's life after divorce has increased. The purpose of this article is to present the historical and current perspective of the process of custody determination, and to acquaint the reader with the continuing struggle in our society and legal systems to make custody decisions which will be beneficial to children and fair to their parents.

Custody Decision Making in Historical Context

In Roman law, children were viewed as the property of their father, who had the absolute power to sell his children and enter them into enforced labor. Mothers had no legal rights with respect to their children, even as guardians in the event of the father's death.¹

In later English common law, fathers continued to have near absolute powers, and the legal obligation to protect, support, and educate their children. Thus, in divorce, until the mid-nineteenth century, fathers had a right to custody as well, regardless of circumstances, and mothers had very restricted access to their children after divorce.¹ A landmark change was initiated with the British Act of 1839,² which directed the courts to award cus-

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tody of children under the age of seven to mothers, and to award visiting rights to mothers for children seven years and older. This “tender years” doctrine advanced by the English lawyer and author Justice Thomas Noon Talfourd, though intended to determine custody only until the children were old enough to be returned to the father’s custody, provided the first major challenge to the paternal presumption.

In the seventeenth and eighteenth centuries, America had a patriarchal legal system, and upon divorce the paternal preference was applied to divorce custody cases.³ However, by the nineteenth century, the paternal preference was not as strictly applied as in English law.⁴ While many states adopted statutes modeled on the Talfourd Act, several states radically departed from English common law by enacting laws giving both parents equal rights to custody of the children.¹

Several major historical trends also converged to weaken the paternal presumption in the late 1800s, including society’s increasing concern for children’s welfare and the effects of the industrial revolution. As fathers sought work beyond the

intellectual underpinning in the 1940s from Freudian psychoanalytic theory, which emphasized the mother’s role as “unique . . . the first and strongest love object . . . the prototype of all later love relations.”⁵ The subsequent body of theory and research on the development of infant attachments to the mother was equally influential in supporting the maternal preference.^{6,7} Later research indicating infants formed meaningful attachments to both of their parents by the middle of the child’s first year⁸ provided support to paternal claims for sole or joint custody.

The maternal presumption for custody remained firm for many decades, challenged only after the divorce rate began its dramatic rise in the 1960s. Spurred on by fathers’ claims of sex discrimination in custody decisions,⁹ constitutional concerns for equal protection,⁹ the feminist movement,¹⁰ and the entry of large numbers of women into the work force, which weakened the concept of a primary maternal caretaker, most states abandoned the maternal presumption by the mid-1970s in favor of gender-neutral laws.^{1,11,12} The Uniform Marriage and Divorce Act, approved in 1970, provided for a straight *best interests* standard, and was adopted in varying forms by the majority of states.¹ For the first time in history, custody decisions were to be based on a consideration of the needs and interests of the child rather than on the gender or rights of the parent.

In attempting to define this newer but more vague standard of the child’s best interests, the ground-breaking concept of the psychological (rather than biological) parent, the need for continuity in parenting, and the need for expedited decision making were proposed as important criteria.¹³ And, consistent with the best interests focus, children’s own wishes with respect to custody were newly considered if they were deemed to be of sufficient age to form an intelligent opinion.

The historic shift to gender-neutral and best interests standards prepared the path for a new custody arrangement to emerge, that of *joint custody*. The concept of joint custody originated in the early 1970s from a small number of fathers, including mental health professionals, who desired continuity in their relationship with their children after divorce and strongly objected to being disenfranchised of their parental rights simply because divorce had occurred.¹⁴ Newly formed fa-

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farm or village, mothers remained at home as primary caretakers of children. The resultant division of family responsibilities into wage earner and child nurturer influenced subsequent custody decisions. In addition, according to Mason, the movement toward a maternal preference was accompanied by an increase in the legal status of women in the United States during the nineteenth and twentieth centuries.³ The paternal preference was gradually replaced by a maternal preference, and by the 1920s, the maternal preference in custody determinations became as firmly fixed as the earlier paternal preference, both in statutes and in judicial decision making.¹

The assumption that mothers were better suited to raise children received an

thers' rights advocacy groups provided the impetus for a joint custody movement,¹⁵ supported in the early 1980s by lay and scholarly publications which described various advantages of joint custody for society, parents, and children.¹⁶⁻²¹

The growing interest in shared custody as a means of preserving parental status and responsibilities was enhanced by several parallel developments. First, after focusing almost exclusively on mothers and children for decades, the child development field began, in the early 1970s, to study the father's contributions to the development of the child.²² The expanding literature suggested that fathers' contributions to their children's development had been undervalued, as had the importance of children's attachment to their fathers.^{23,24} Second, gender roles within families began to shift, particularly in dual-career families. More mothers began to work outside the home in addition to carrying out domestic responsibilities. To distribute the work load more evenly, larger numbers of fathers in dual-career families participated more fully in household and child-rearing responsibilities. While women still spend significantly more time than men caring for children and performing household tasks,²⁵⁻²⁷ the increase in paternal involvement may reflect a social trend.²⁶ As a result, many mothers and fathers wanted fathers to play a greater role in their children's lives after divorce. And third, as divorce engaged the attention of the nation, numerous studies documented the sense of loss and alienation experienced by noncustodial parents and children in traditional custody arrangements after divorce.^{19,28-30}

These converging trends, amplified by the fact that more than one million children were involved in divorce each year, resulted in pressure to pass new laws permitting joint custody as a viable option for postdivorce custodial status. In 1979, the first joint custody statute was enacted in California, followed by Kansas, and Oregon.¹⁸ By 1991, more than 40 states had statutes in which joint custody was either an option or a preference, and most other states had recognized the concept of joint custody in case law.^{31,32} The effect of such legislation has been to promote increasingly positive attitudes toward greater paternal involvement after divorce among parents, lawyers, mental health professionals, and judges.³³⁻³⁵

Strong resistance to joint custody statutes remains among some feminists,^{11,36,37} who advocate for primary caretaker standards which, in their view, reflect the distribution of labor regarding children during the marriage. As a result, several states have adopted language that favors the primary caretaker of the child in custody disputes. The prevailing basis at this time for determining custody is that of the best interests of the child.

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Parents now have a variety of custodial arrangements available to them for providing care to their children after divorce. The struggle between various advocacy groups to influence custody legislation and practice, particularly feminists and fathers' rights groups, is likely to continue for some time.

Type and Incidence of Custody Arrangements

Nearly all states have distinguished in their legislation, either explicitly or implicitly, between *legal custody*, which refers to decision making regarding the child's health and welfare, and *physical custody*, which refers to the living arrangements of the child on a day-to-day basis. Table 1 describes different types of possible custody arrangements. Considerable variation exists among states in the definition of joint custody and the circumstances under which it is permitted or denied.³² Because joint physical custody statutes do not require fifty-fifty time sharing or define how much time the child resides with each parent, actual resident time may range along a continuum from somewhat expanded visiting to equal time in each household. Most noncustodial parents seeking joint physical custody object to being a visitor in the child's life and want their child to live with them at least part of the time rather than visit infrequently. One study found that, when joint-custody parents do not have equal time sharing, mothers always have the larger share of time.³⁴

Table 1

Types of Custody Arrangements	
Sole Custody	
Sole legal custody	Custodial parent is assigned all legal rights, duties, and powers as parent; all decisions affecting welfare of child. Noncustodial parent has limited rights and powers; has access to child's medical and school records.
Sole physical custody	Custodial parent has primary physical custody of child. Noncustodial parent is usually awarded visitation rights.
Joint Custody	
Joint legal custody	Both parents retain rights and powers to make decisions regarding child's health and welfare. Decisions must be specified in some states to preserve the authority.
Joint physical custody	Both parents retain right to share in day-to-day residential care of child; generally not defined as equal sharing, but intended to grant substantial periods of time to each parent.
Divided Custody	Each parent has child for a portion of the year or in alternating years. Each parent has legal rights for decision making when child is in that parent's care.
Split Custody	Each parent has sole legal and physical custody of one or more children; noncustodial parent has visitation rights.

The legal trend over the past decade has been to favor shared parental legal authority over shared residential custody.³¹ It is not possible to determine, on a national basis, what percentage of parents have joint legal or physical custody, as these data must be obtained from individual divorce decrees. Studies in California and Massachusetts indicate that the incidence of joint legal custody rises dramatically when statutes permit it,^{35,38-40} with three California studies finding joint legal custody in 80% to 90% of decrees in the mid-1980s.^{35,38,40}

The number of joint physical custody orders also increases after enabling legislation is passed, but at a much lower rate.^{35,39-41} In the absence of national data, regional studies suggest that joint legal and sole maternal physical custody is today the most common legal custody arrangement in the United States, followed by sole legal and physical custody to the mother. Divided and split custody

orders are rare, accounting for less than 5% of orders.^{35,39} While judges appear to share society's belief that siblings should not be separated, such arrangements evolve informally between parents in the years after divorce, particularly with older children.^{19,35,42}

Despite changes in law and social custom over two decades, physical custody arrangements have remained rather stable. In the 1970s, women had sole custody of the children 85% of the time, and men retained sole custody 10% of the time, with the remaining 5% a variety of other custody arrangements.⁴³ Recent studies, based on census and survey data that reflect which parent has the child in residence more than half the time, indicate that father-custody figures may be closer to 15%.⁴⁴

However, the incidence and type of joint physical parenting arrangements are difficult to determine. In divorce research,

living arrangements are categorized as joint physical custody when the child lives with one of the parents from 30% to 50% of the time.^{35,41,45-47} Using this criterion, between 17% to 34% of families shared physical custody in the mid-1980s in a jurisdiction (California) permitting joint custody.^{35,41,45} Because these are not random sampling studies, actual rates outside the San Francisco Bay Area and California may be lower. Studies in other states indicate that from 12% to 24% of children are visiting their fathers often enough to be considered living in shared residence arrangements.^{48,49} All studies find that shared custody is more common among more educated parents.^{35,41,46,47,50}

How Are Custody Arrangements Decided?

Decisions regarding custody arrangements range along a continuum from the very informal, those agreements reached privately between parents, to those decided through the most formal procedural process, by judicial determination following trial. Parents theoretically have the most control over the outcome of their private agreements if they each participate fully in the decision making. In contrast, parents have the most uncertainty and least control regarding the custody arrangement when the decision is made by a judge.

Private Agreements

The notion of parents making private decisions regarding custody and visitation is an appealing one, from both a psychological and an economic viewpoint. Parents can discuss their children's particular needs and reach agreements reflecting those needs, parental desires, and family values, and they can do so without depleting their economic resources. Two California studies indicate that at least 50%³⁵ and as many as 68%⁴¹ of parents make private decisions between themselves about custody and visiting. In the first study, an additional 30% settled these issues after further negotiation.

Although private decision making regarding custody and visitation can be advantageous for parents, one of the major disadvantages of this approach is that parents often make these important decisions without full knowledge of the options available to them and without detailing plans for the long run.⁴¹ For example,

some parents base their custody agreement on the cultural assumption that the mother will have physical custody of the children, when, in fact, other options are available. In addition, many parents avoid discussion of the details of visitation because of fear of conflict. Educating parents regarding the options available to them and how to plan for the long term would be very useful to those parents who make private decisions.

Mediation

When parents are unable to settle custody and visiting arrangements on their own, other nonadversarial forums are available. Some parents turn to trusted advisors or decision makers outside the legal system—including extended family members, the clergy, or psychotherapists—for assistance. In the past decade, another dispute settlement option, custody or comprehensive divorce mediation, has become more widely available. In mediation, decision making remains with the parties. The role of the mediator is to assist parents in reaching mutually acceptable agreements. In contrast to adversarial proceedings, mediation emphasizes cooperative problem solving and addresses the needs of all family members.⁵¹⁻⁵³

Five states⁵⁴ now mandate mediation as a first step process in attempting to resolve custody or visiting disputes. As of 1991, court-connected custody mediation was available in seven additional states on a discretionary basis or for specified circumstances.⁵⁴ Strong objections to manda-

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tory mediation have been voiced in feminist jurisprudence and by some feminist groups.^{37,55,56} Mediation is perceived by them as dangerous and disadvantageous to women, based on the belief that women in our society do not have sufficient power and resources to represent their views adequately in mediation. However, a growing body of mediation research does not support these claims. Studies of court-

related custody mediation⁵⁷ indicate very high levels of satisfaction among both men and women, even when the agreements reached do not reflect their most highly desired outcome.⁵⁷⁻⁶⁰ Women are significantly more likely than men to report that mediation gave them an opportunity to express their views^{57,59} and increased their confidence in their ability to stand up for themselves with their ex-spouses.⁵⁹ The vast majority of women indicate a willing-

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ness to use mediation services again to resolve disputes.⁵⁹ Further, research thus far does not support the claim that women are either forced by mediation to give away custody or primary care "entitlements"⁶¹ or disadvantaged financially by the strategic use of custody conflicts.³⁵ (See the article by Katz in this journal issue for a further discussion of mediation.)

Adversarial Processes

At a more formal level of decision making in custody disputes, parents must use the adversarial process to present their respective positions about what is in their child's best interest. Attorneys advise clients about their rights and likely out-

comes, and either assist their clients to reach negotiated settlements or encourage further litigation as a means of settling custody or visiting disputes.

When parents are unable to reach negotiated settlements, a range of the most formal legal processes requiring judicial determination is used for settling custody disputes, including judicial hearings, pre-trial settlement conferences, and custody trials. In states without mediation programs, trials are a more common process for resolving disputes, representing an estimated 15% to 20% of all contested custody or visiting cases.⁶² In California, mandatory mediation has reduced the number of custody trials to between 1% and 5% of all contested custody cases.^{35,62} Adjudicated custody disputes are expensive (ranging from \$30,000 to \$300,000) and require up to three years for settlement.⁶³ They can create massive upheaval in the lives of all family members, generating higher levels of mistrust and acrimony.^{64,65}

Do Your Own Divorce (*In Pro Per*)

In states with legislation enabling parents to reach agreements and file their own divorce papers (*in pro per*), the use of attorneys has decreased dramatically. In large part, disenchantment with the prohibitive costs, inefficiency, erratic outcomes, the acrimony of the adversarial divorce process,^{66,67} and the availability of excellent self-help resources⁶⁸⁻⁷⁰ account for this social trend. It is estimated that, in California, more than 50% of

divorce cases have one or both parties handling their own divorce⁶² (including large numbers of parents disputing custody or access),⁴⁰ and in one jurisdiction with a predominantly lower socioeconomic population, close to 80% are not using attorneys.⁷¹ Mandatory custody mediation services have enabled parents to reduce their costs and reliance upon attorneys or to bypass adversarial proceedings altogether.⁶²

Influences on Decision Making

Regardless of the level at which custody decisions are made, powerful influences on these decisions arise from statutory, judicial, cultural, educational, and research sources. Certainly most powerful in influencing custody outcomes are the statutes governing each state and the related case law which has evolved to test, modify, or expand the intent of the statutes. Although only a small percentage of litigating parents require judicial decision making, statutory law pervades all lower level decisions, as attorneys and parents negotiate "in the shadow of the law."⁷² The reliance upon legal and judicial precedent for making decisions is at the heart of the adversarial process and limits diverse or innovative outcomes. At the parental level, if a parent seeks an agreement which is at odds with state or case law, the parent's attorney will either discourage that option⁷³ or advocate trial and appeal in an attempt to create new case law.

Cultural traditions and socioeconomic factors also heavily influence parental decision making about custody and visiting. The predominance of mother-custody families reflects the mainstream American cultural view that women should be the primary caretakers for children after divorce. In some ethnic minority groups, the role of extended family support systems and the strength of kinship bonds will be powerful determinants of the custody and visiting patterns. Among ethnic groups, for example, that encourage divorced mothers to move back into their parents' home, the father's role may become even more peripheral than in families where the mother lives alone with the children.⁷⁴ Socioeconomic factors, such as employment, education, and level of income, also influence decision making, particularly the amount of contact that nonresident parents will have with their

children,^{46,49,74,75} in part because they determine such parents' ability to maintain a separate residence large enough for the children or to travel for visits when separated by long distance.

The use of mediation to settle custody disputes may also influence parental decision making, although the direction and degree of this influence will depend upon the range of custody options available within a jurisdiction. Mediators describe various options for parents to consider when parents are at an impasse. This feature of mediation is accorded high levels of approval from both men and women.^{57,59,76}

Educational materials and parent education programs are also influencing the decision making of parents, attorneys, and judges. In many courtrooms across the country, divorce-related educational video presentations are required viewing for parents disputing custody or visiting matters.⁷⁷

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Most materials seek to educate parents about the impact of divorce and conflict on their children, and children's need for continuity in their relationships with both parents after divorce. The effectiveness of such materials or divorce-related parent education classes is relatively unknown, although one study found that noncustodial parents in an educational intervention group had more contact with their children one year later when compared with parents in the control groups.⁷⁸ And some books written for parents have influenced both parents and attorneys in making custody arrangements.^{16,17,19,35}

Research on the effects of divorce on children, including postdivorce parent-child relationships and the adjustment of children in sole and joint custody, has had widespread influence on decision making at parental, judicial, and legislative levels.^{19,28,35,79} For example, the dissatisfaction of children in mother-custody homes with twice monthly weekend visitation and their sadness and/or depression resulting

from the diminished presence or the loss of the father from their lives^{19,28,80,81} provided a strong impetus in many jurisdictions to encourage increased access of the father to the child after divorce.

Debate continues regarding the extent to which social science should be used to influence legislation, judicial practices, or parental decision making. Because of flaws

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in methods and samples, divorce studies have been of varying usefulness, and most have used measures that assessed pathological child behaviors or symptoms to the exclusion of more healthy or coping behaviors. The studies have, for the most part, also neglected to obtain data from fathers and children, and have not measured parental adjustment and the quality of both parent-child relationships. While clearly there is growing convergence on a number of divorce-related findings,^{38,79} they currently remain inconclusive or contradictory with respect to a number of important issues, and continued well-designed research is needed. The current practice of feminist writers and fathers' rights groups to use a particular research finding to bolster a political or gender-linked point of view while ignoring other data makes it difficult for legislators, judges, attorneys, or parents to obtain a balanced, informed view.

Factors Considered in Custody Determinations

When parents are able to settle custody or visiting disputes privately between themselves, they are free to rely upon any criteria of their own choosing for determining the outcome. Although it has not always been so, if parents stipulate to mutual agreements regarding their children, judges in many jurisdictions will automatically approve their custody or parenting plan. The trend in judicial practice in the past decade has been to de-emphasize the role of the state as "big brother," passing judgment on privately ordered parenting

arrangements simply because a divorce has occurred.⁶⁷ In states requiring mediation, written parenting plans, or other educational interventions, judges more often limit their scrutiny to contested parenting matters.⁶⁷

Parents who cannot agree on custody and access become subject to the legal criteria for determining custody outcomes that have been adopted by their state's legislature and related case law. The most common standard is the best interests of the child, a gender-neutral referent which allows mothers and fathers to compete for custody on an equal footing. In a few states the courts are directed to consider the primary caretaker standard as the major factor in determining custody. A third standard is the child's preference for custody, if the child is of sufficient age and intelligence to make a judgment.

The Best Interests Standard

The Uniform Marriage and Divorce Act, presented by the commissioners on uniform state laws, defines the child's best interests as a composite of the following factors: (1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school, and community; (5) the mental and physical health of all individuals involved. The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child.⁸² This standard is simple to state and difficult to apply. There is not full consensus among legal, judicial, or mental health communities regarding what the child's best interests are as they apply to a custody dispute. There are advantages and disadvantages to utilizing this criterion as the benchmark for custody decision making. The most important advantage of relying upon a determination of the child's best interests is that decision making is centered on children's developmental and psychological needs, rather than on parental demands, societal stereotypes, or legal tradition. The best interests standard indicated a willingness on the part of the legal system to consider custody outcomes on a case-by-case basis, rather than adjudicating children as a class or homogeneous grouping.⁴ To those

concerned with each individual child's psychological and developmental well-being, this more discerning, individuated approach was highly appropriate.

A second advantage of the best interests standard is that it is potentially responsive to changing social or legal trends outside custody law. The best interests standard enabled fathers who had engaged in significant caretaking roles in the marriage to have an expanded role in the child's life after divorce, and some fathers were appropriately awarded custody who would not have been considered under the maternal presumption rule. Further, the advances made by the physically handicapped or homosexuals in federal legislation have been reflected in a growing number of custody decisions awarding physical custody to disabled or gay parents, based on a consideration of the child's emotional ties and needs.

The core problem of the best interests standard arises from lack of uniformity regarding which interests to consider, how to define and weigh the different factors, and how to account for children's changing developmental needs over time.⁸³ The effect of such unclarity is that attorneys, court workers, and custody evaluators may consider and emphasize different factors or interpret the same concepts, such as continuity or stability, in diametrically opposed ways designed to benefit the parent they represent or favor. Without clear guidelines, judges often make these difficult decisions by relying upon their own subjective value judgments and life experiences, resulting in unevenness in outcomes across or within jurisdictions.⁴

To make the decision-making process more uniform, a number of states have adopted provisions listing multiple criteria to be considered in determining the child's best interests. Michigan, for example, adopted 11 such criteria, including the parents' mental and physical health, and the love and emotional ties existing between parents and child.⁸³ With the wider adoption of such criteria, there is likely to be more uniformity in outcomes and less uncertainty in bargaining. Proponents of the case-by-case approach argue that, with good criteria, appropriate information about the family gathered by an impartial evaluator, and reliable and accessible social science and developmental research, judges can make appropriate judgments which respect children's needs.

Some feminist critics argue that the best interests standard disadvantages women by discounting the importance of primary caretaking usually undertaken by women,^{11,36} reduces women's bargaining power,¹¹ complicates divorce negotiations, and encourages unnecessary litigation because of the uncertainty of outcome.^{4,11} The best interests standard does not inherently discount the importance of primary caretaking. Indeed, in many states, the primary caretaking role is one of the criteria to be considered in determining custody. It does, however, expand beyond primary caretaking functions to include a consideration of the child's age, gender, emotional ties to each parent, parental

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adjustment, and the quality and meaning to the child of each parent-child relationship. In this sense, the best interests standard dilutes the presumption that the primary caretaker shall continue exclusively in that role after divorce, and thus it receives the support of fathers' rights groups and many professionals who believe there should be continuity in the relationship between both parents and child after divorce, unless found to be inappropriate.⁸⁴ Recent research indicates that women do not appear to be disadvantaged in the bargaining process by the best interests standard,^{35,50} that is, the uncertainty of custody outcomes does not cause women to trade off child support to avoid risk. The existence of mandatory child support guidelines reduces further such potential bargaining inequities. Earlier in this century, the maternal presumption rule undoubtedly deterred legal action, even when maternal custody was perceived to be deleterious to children. The larger philosophical question is whether one favors an approach that focuses on children's interests or an approach that favors greater simplicity and efficiency in the legal system and gender-linked outcomes. In states relying on the best interests standard, child-focused, court-connected interventions such as media-

tion reduce litigation time, expense, and conflict in custody disputes.^{34,58,60,85}

The Primary Caretaker Standard

At the urging of some feminist groups, several states (for example, Minnesota, Washington, and West Virginia) have adopted language which favors the primary caretaker of the child during the marriage in determining contested custody outcomes. While the concept of the

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primary caretaker is technically gender neutral, there are many who perceive this approach as a return to a disguised maternal preference standard. Feminist critics acknowledge that the primary caretaker standard is a mechanism for protecting mothers' greater interest in retaining custody.⁸⁶ Some feminists also claim that the primary caretaker standard is better for young children and protects the child's primary attachment to the mother.^{11,12} If divorce occurs during the child's first three years, the child has been cared for almost exclusively by the mother, and a healthy attachment is in evidence, this argument may be compelling.

Opponents of the primary caretaker standard cite developmental research which demonstrates the child's strong attachments to both parents in the first year of life²⁶ and note that research suggests at best a weak preference for a primary caretaker standard for children under the age of five.⁸⁷ No empirical evidence supports the distinction between primary and secondary caretaker after age five, as children's greatly increased social, cognitive, and emotional maturity creates changes in the meaning of attachments and parent-child relationships to the child.⁸⁷

The primary caretaker is defined by the parental activities undertaken during marriage, including which parent spent the most time preparing meals, bathing and dressing, purchasing clothes, obtaining medical care, putting the child to bed,

disciplining, educating, and teaching elementary skills such as reading. While fathers' participation in family care has increased,²⁷ it is well documented that, in most families, women still spend more time than men performing physical caretaking tasks, even when both parents are employed.^{8,25} In the primary caretaker proposals advanced by some feminists, there is little, if any, credit given for the activities and interactions more typically undertaken by men, including playing, encouraging interest in sports, coaching teams, providing intellectual stimulation and homework assistance—activities that also have real and symbolic meaning to children.^{8,23,26} Further, no credit is given for earning income to support the family and its activities, despite the fact that mothers and fathers see this during marriage as fathers' most important function on behalf of the family.⁸⁸ The issue is further clouded by evidence that many women say they want their husbands to be more involved in child-rearing activities, yet exclude them from these activities in the marriage or criticize fathers' parenting efforts as a means of retaining power and control in their perceived domain.⁸⁹

The most serious problem with use of the primary caretaker standard is that it ignores the quality of the relationship between the child and the primary caretaker in favor of counting hours and rewarding many repetitive, concrete behaviors. Indeed, the most important emotional and interactive behaviors promoting children's development and psychological, social, and academic adjustment, such as love, acceptance, respect, encouragement of autonomy, learning, and self-esteem, moral guidance, and absence of abusive interactions, are not considered. A second problem is that the primary caretaker standard disadvantages men, who are essentially punished after divorce for being the primary wage earner, even if their caretaking activities have been considerable.

A third problem is that the psychological adjustment of the primary caretaker is not taken into consideration, despite evidence that it is a central factor in the postdivorce adjustment of children.^{45,90} Whether male or female, primary caretakers range from being abusive, neglectful, and emotionally disturbed to being the most stable and nurturing of parents. In relying upon the primary caretaker standard, the child's core interests may be dismissed in custody decisions. It is cer-

tainly appropriate, however, in determining the child's best interests, to consider the range and quality of each parent's care, activities, and interactions with the child during the marriage.

The Child's Preference

In many states, the child's preference is either given great weight or is determinative in a custody dispute, if the child is deemed to be of sufficient age and capacity to form an intelligent opinion. While popular belief is that the court will accord great weight to the preference of children over the age of 14, statutes are not specific in this regard, and judges may include the reasoned arguments of younger children in their deliberations as well.⁶² No body of legal literature exists regarding children's wishes, primarily because the courts have focused historically on parental rights rather than on children's rights or interests.⁶² As a result, there is no uniformity regarding how children's preferences are to be considered and weighted. Some judges rely upon custody evaluators and children's counsel to present children's preferences directly to the court and do not interview children themselves. Other judges believe that judicial interviews with older children and adolescents humanize the process and provide the judge with a better "feel" for the case.⁹¹ When judges do interview children in chambers, they must consider whether the session is confidential or if a court reporter is to be present and whether they have adequate interview skills to elicit reliable and sufficient information from children who may be anxious and reticent to be forthcoming in a formal, adversarial setting.⁶⁵

Access as a Primary Factor in Custody Determinations

During the decades of maternal presumption, the limited visitation given to non-custodial fathers reflected the perceived insignificance of the father in children's development. Many fathers visited infrequently or ceased contact because of lack of interest, personality problems, maternal opposition to visits, long distances, limited income, or the belief that they were not important to their children. Other fathers became infrequent visitors because of the pain of loss experienced each time they visited and the increasing superficiality of the father-child relationship over

time.^{19,48,73,92} The increased number of divorces in the 1970s and new research on children of divorce forced a reexamination of the concept of limited access. Early studies of children in maternal custody described children's intense dissatisfaction with infrequent contact with the father, the diminution over time of the father's importance to the child,^{19,28,80,81} and reported a positive relationship between visit frequency and children's adjustment, particularly for boys, unless the parent was poorly adjusted or extremely immature.^{19,28} In response to these findings, legislation encouraging "frequent and continuing contact" between noncustodial parent and child was passed in many states, and visitation patterns slowly expanded in the 1980s.^{19,49,93} Increased access was often achieved by adding a weekly mid-

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week overnight to the every-other-weekend pattern, thereby shortening the number of days children waited between visits and doubling the amount of time that children were spending on a monthly basis with their noncustodial parents, usually fathers, from less than 15% to nearly 30%.

It is not possible to determine, on a national basis, how much time children are actually spending with their fathers at present, although a significant trend toward more contacts has emerged in the past decade. Early reports of families separated in the 1970s indicated that approximately half of the nation's children were not seeing their fathers at all several years after divorce, and very few were visiting their fathers once a week or more.⁹⁴ These data were collected before influential divorce research was available and prior to the adoption of joint custody or "frequent and continuing contact" statutes in most states. Compared with non-custodial fathers, noncustodial mothers have generally maintained higher levels of contact with their children,⁹⁴ although along many dimensions, mothers without

custody cannot be considered comparable to fathers without custody.⁹⁵

It is now apparent that fewer children than previously reported have no contact with their fathers after divorce, and more children are experiencing weekly contacts. A 1988 national data set indicates that 18% of the children had no contact in the prior year; 25% saw their fathers one or more times a week.⁴⁹ Recent regional studies also suggest the level of contact between divorced fathers and children is further increasing in that only about 10% of nonresident parents had not seen their children in the previous year.^{93,96,97} Separated parents who never married have much higher rates of no contact than do divorced noncustodial parents.⁴⁹ Contacts with fathers diminish with time and distance after separation,^{19,49,94,98} although recent studies suggest considerable stability in patterns of contact between fathers and children in the first several years after separation,³⁵ particularly when fathers share physical custody.^{46,93} If parents do not establish the visitation pattern immediately after separation and do not include overnights in the schedule, the likelihood of visits continuing in the future is considerably diminished.^{19,35}

The importance of noncustodial parents' continued contacts after divorce has been questioned by research finding no relationship between visit frequency and adjustment.^{45,90,99} Newer research indicates that the psychological adjustment of the custodial parent and the extent of conflict during the marriage and after di-

negatively.^{19,80,100,101} And when the custodial mother approves of the father's continued contacts with the child, the link between visiting and child adjustment is strong, particularly for boys.¹⁰²⁻¹⁰⁴ Economic advantages accrue as well, in that greater contact between child and father is associated with higher child support compliance,^{49,50} payment of more supplemental child expenses,⁵⁰ and less father dropout in the longer term.^{35,49,93,105} Research is needed to assess the longer-term effects of noncustodial parent involvement for children of different ages and gender, using a broader range of variables including father-child closeness, legal and parent conflict, parent social and psychological adjustment, the child's self-esteem, sense of being loved and supported, and academic and social functioning.^{38,100}

Specificity and Modifiability of Custody and Access Orders

Most custody orders simply state that the father will have "reasonable visitation." They do not specify what the actual monthly visiting pattern, holidays, and vacations will be.⁴¹ The failure to develop and specify detailed parenting plans creates uncertainty and conflict between parents, and anxiety and confusion for children about when they will next see the noncustodial parent. In the absence of specific orders, the nonresident parent must make a request to the custodial parent each time access to the child is sought. When the custodial parent remains angry after divorce, such requests are often denied.^{48,104} If days and times of transitions are included in final divorce orders, noncustodial parents can exercise their parental responsibilities in a predictable manner, without power struggles or conflicts. The absence of specific postdivorce parenting orders is postulated to be a major cause of the diminution in contacts between fathers and children after divorce and father dropout.⁴¹ Lack of specificity in visitation also leads to considerable postdivorce litigation (or mediation), particularly before summer vacations and holidays.⁹¹ While some attorneys and judges continue to believe that specific parenting plans create rather than lessen conflict, this view is not supported by the experience of mediators and mental health professionals working with di-

If parents do not establish the visitation pattern immediately after separation . . . the likelihood of visits continuing in the future is considerably diminished.

orce are more profound influences on children's adjustment than visit frequency.^{45,90,100} However, a number of studies suggest that continued father involvement after divorce is advantageous to children under certain circumstances. When the relationship with the noncustodial parent is a positive one, children with expanded and flexible visitation are more content and satisfied, and view the divorce less

divorced parents.^{17,41,91} Given the opportunity, the vast majority of disputing and nondisputing parents want to develop a structured parenting plan or schedule because they recognize the benefits to their children of a stable, known schedule and lessened conflict, and they appreciate being able to plan their lives with and without their children.⁴¹ Nonadversarial forums can help divorcing or divorced parents reach agreements of this kind.

In the past, visiting orders were not generally expected to be modified over time. Every-other-weekend visitation was expected to meet the developmental needs of the child no matter what the age, and of the family no matter how it changed after divorce. Custody or visiting orders could not be changed within the legal system unless they met the test of certain material changes of circumstances specified within each state. Although parents have always been entitled to modify their custody order by private agreement, most states have had limited criteria defining a change of circumstance.³² It is striking that the changing developmental needs of the child do not qualify as a change of circumstance to modify custody or visiting in most states.

In California, approximately half of the contested custody and visiting cases before the court now involve children below the age of seven.⁵⁷ Thus, it is important to reconsider the circumstances under which parents can petition to change visiting or custody orders. A parenting plan that meets the developmental needs of a fifteen-month-old child will not be optimal for a six-year-old. As statutes have permitted joint custody arrangements and as visiting patterns have expanded, many parents and the professionals that assist them have recognized the need for flexibility in custody and visiting agreements to accommodate the child's changing developmental needs. In mediation, parents will develop a parenting plan tailored to their two-year-old's immature sense of time and anxieties arising from long separations from either parent. Such parents generally agree to shift to a more appropriate plan as the child matures or to return to mediation if necessary. Flexibility is not just a need of young children; adolescents sometimes express a strong desire to change custody, particularly when they have lived in sole custody with one parent. Yet most states do not recognize the

child's wish to change custody as a change of circumstance, whether the reason is to develop a closer relationship with the other parent, to remove oneself from the household of an angry, punitive custodial parent, or to escape an alcoholic step-parent. Unless the parents can agree privately or settle in mediation, there may be no remedy for such youngsters.

Policy Recommendations in Custody Determinations

Recommendations for policy emerge from the accumulating body of divorce and mediation research focusing on children, families, and programs; observations of the shortcomings of the adversarial system in dealing constructively with divorce; and years of thoughtful input from the judges, attorneys, mediators, and mental health professionals who assist families. It is clear that parents and the judicial, legal, and mental health professionals who assist them need reliable,

Many parents and the professionals that assist them have recognized the need for flexibility in custody and visiting agreements to accommodate the child's changing developmental needs.

practical information and guidelines about divorce and children to help them make decisions that will promote their children's postdivorce adjustment and well-being. In addition, parents should have available a hierarchy of programs or services that will address their particular needs and conditions, reduce their reliance when possible upon adversarial processes, contain or reduce their conflict, and enable them to settle divorce disputes as early and as efficiently as possible.

Parent Education Programs

Educational programs designed to provide divorcing parents with information regarding the potential effects of conflict and divorce on their children, various custodial and parenting arrangements available, and communication techniques that keep their children out of the middle of conflicts are important. Such programs can be offered through nonprofit agencies, churches, or by the courts. Good resource

and training materials integrating written, video, and discussion elements have been developed to ensure balanced, comprehensive programs.^{77,106,107} It would be optimal if all divorcing parents participated in these brief programs, but participation should be required of all parents disputing custody or access prior to entering mediation or initiating litigation.

The increasing number of parents doing their own divorce indicates the need for video orientation programs which provide basic information about court processes, legal rules and entitlements, and community resources available for fur-

and evaluation. Even with these more difficult issues, mediation is often an effective intervention.^{40,57}

From a public policy standpoint, the advantages of mandatory custody mediation include acceptably high settlement rates, ranging from 50% to 75%, often following one to two hours,^{40,57,58,60,108} and a much greater likelihood of reaching agreement prior to a court hearing, compared with parents who do not attempt mediation.¹⁰⁸ Some mediation settings report handling a greater case load while saving judicial resources and court overhead.⁶⁰ Further, because parents who participate in mediation more often both report feeling they have “won” in reaching settlement, compared with parents who rely on litigation and view the outcome as producing a winner and a loser,⁵⁹ the mediation alternative may reduce acrimony and relitigation.

Mandatory mediation in the public sector requires protective policies for those unable or afraid to negotiate on their own behalf, even with preparation of counsel. Feminists have expressed legitimate concern about the effect of domestic violence on women’s bargaining abilities, and some advocate that mediation should never be attempted if any history of interspousal violence is alleged.⁵⁵ Many proponents of mediation take these concerns seriously^{109,110} but also remind us that women, particularly those of color and low socioeconomic status, have not been adequately protected or represented in the adversarial system and should not be excluded from mediation if they wish to participate.¹⁰⁹ Some argue that mediation may help defuse the rage of an abusive spouse and that effective screening measures, specialized protocols and procedures (including separate sessions and the use of restraining orders), and the readiness to terminate mediation in favor of formal investigations when indicated are critical.^{90,110,114} In response to feminist criticisms, California adopted legislation addressing feminist concerns, including separate mediation sessions where there is a history of domestic violence, bringing a “support” person into mediation if the party desires, and procedures within court mediation settings designed to ensure the safety of domestic violence victims. Several regional planning coalitions of court mediation personnel, feminists, researchers, and domestic violence specialists have developed

In states offering or mandating custody mediation, orientation sessions should also be mandatory to educate parents about what mediation is and how it works.

ther assistance. Such programs should be multilingual and provided free of charge by the courts and the bar.

In states offering or mandating custody mediation, orientation sessions should also be mandatory to educate parents about what mediation is and how it works, and about screening procedures and ground rules. Video, written, and verbal information about children and divorce¹⁰⁶ and about practical communication and negotiation techniques for parents^{66,77} should also be included.

Mandatory Mediation

Mediation should be not only widely available but also mandatory as a “first step” for all parents disputing custody and access before continuing adversarial custody proceedings. The vast majority of disputes seen in mandatory mediation involve not custody, but how much time the noncustodial parent, usually the father, will spend with the children and what the pattern of contacts will be. Such disputes are generally more easily settled than custody disputes. However, settlement of issues during the mediation process should never be mandatory. Other contested issues, such as substance abuse allegations or whether a parent’s mental state requires supervised visitation, require more time

protocols for identification, safety, screening, and interviewing.¹¹⁵ There is widespread agreement that effective screening procedures should be instituted in all mandatory mediation programs.¹¹¹⁻¹¹³

From a policy standpoint, several additional considerations are important in recommending mandatory mediation. It is essential that mediators have specialized, intensive training and experience in divorce and custody matters, in domestic violence assessment, and in divorce mediation. Training and experience as a therapist, evaluator, lawyer, probation officer, or judge does not adequately prepare one to be an effective mediator. Further, settlement rates should never be considered as the sole indicator of the success of a program. Many experienced mediators believe that settlement rates in excess of 85% in custody disputes may reflect administrative or mediator coercion to settle and diminish the likelihood of client self-determination. Serious issues, such as substance abuse, impaired mental capacity, and child neglect and abuse, are often more appropriately resolved in more adversarial proceedings, including custody investigations, judicial settlement conferences, hearings, and trials.

Mediation should also be available for those who seek assistance in developing or changing parenting plans for their children. For parents who are without formal disputes but need information and assistance, a premediation consultation could be beneficial and might prevent conflict escalation. Such consultation services could be provided by courts or agencies in conjunction with educational programs, with backup mediation available for parents requiring dispute resolution services. A hierarchy of services targeted at different levels of parental conflict is likely to be the most effective combination, from both an economic and a parent-child perspective.

Mediation of Financial Disputes

Comprehensive divorce mediation, when provided by skilled, knowledgeable mediators, is more cost-effective than adversarial processes, results in equitable agreements more satisfactory to its participants, produces more compliance, contains conflict, and facilitates more cooperative communication.^{41,76,98,116,117} Clients in court-connected custody mediation often express the desire for mediators to resolve their support issues as

well. Given the increasing number of clients handling their own divorces, mediation services should be available and affordable for settling simple property and support matters. Most states require that custody and financial disputes be settled in separate proceedings. With the adoption, in many states, of child support guidelines that tie the amount of child support to the nonresident par-

It should be noted that neither custody mediation nor comprehensive divorce mediation produces significant changes in adult or child adjustment.

ent's time with the child, these two issues have become inextricably linked. The advantage of comprehensive mediation is the ability to explore financial and child-related issues separately on their own merits in one setting, acknowledging their interdependency, but reaching equitable agreements within each sphere.

It should be noted that neither custody mediation nor comprehensive divorce mediation produces significant changes in adult or child adjustment,^{60,108,117} nor should it be expected to do so, given the brevity and task focus of the process. Other than reaching an agreement with less acrimony and cost, the advantages of mediation are short-term rather than longer lasting and are limited primarily to more positive interactions between and perceptions of the divorcing spouses.^{108,117}

Special Master and Arbitration Programs

A small group of divorcing parents, estimated to be 10% to 15% in number, remain in high conflict after divorce.^{20,35,118} Members of this chronically litigating group use a disproportionate amount of the court's time and resources, and deplete their own economic resources and energies. Several California jurisdictions have initiated a *special master program* in an attempt to settle the continuing stream of postdivorce child-rearing disputes presented by this population outside the court.¹¹⁹ While some of these parents have a history of serious problems and chaotic functioning,^{19,118} others of these parents

have widely divergent child-rearing goals and values, and disagree about almost everything.

A *special master* is a hybrid court officer who has the authority to make certain decisions related to parenting and visiting that the parents cannot make themselves. Special masters' decisions and subsequent court orders are subject to judicial review upon appeal of a parent. The majority of special masters are mental health professionals with considerable training and experience in divorce, custody evaluations, child development, parenting issues, and mediation.^{119,120} Different models of decision making are used by special masters, the most common of which is a mediation/arbitration model. In this model, the special master first attempts to mediate parents' disputes; but, if parents cannot reach agreement in a brief mediation, the special master then prepares a written decision, which can become a court order.

Special masters are generally appointed upon recommendation of the parties' attorneys or judges when parents have a history of repeated litigation and high acrimony, in recognition of their very limited ability to communicate and cooperate about their children. It is recommended that pilot projects which assess different models of decision making for chronically litigating parents and which incorporate education, mediation, and arbitration roles be established and evaluated. Special educational materials for this difficult group of parents, and guidelines for parental behaviors at transition, on the phone, at children's school, and at social events should be developed and evaluated.

Judicial Education

With the latitude given to judges under the "best interests of the child" statutes for custody decision making, judicial education in basic child development concepts becomes extremely important. While judges in some jurisdictions receive specific case law and procedural training when they move onto the family law bench, few receive education that would enable them to make appropriate decisions regarding developmentally sensitive visiting or custody plans for children of different ages.^{62,71} Curricula including information about attachment, separation anxiety, continuity in relationships, and children's needs during and after divorce with particular emphasis on the implications of

such concepts and data for judicial decision making are necessary to achieve more uniformity and quality in judicial orders. Panels of neutral developmental/clinical consultants should be available to judges to explore with them the particular developmental and research issues raised by difficult custody cases so that the judiciary has a defensible, reasoned basis for making decisions.

The Most Appropriate Standard

The most appropriate statutory standard for making decisions in custody disputes is the best interests of the child. Given the increasingly larger diversity of family styles, values, and traditions in our culture, decisions about children and parent-child relationships after divorce should be case-by-case decisions. The best interests standard can be more thoughtfully applied when states adopt criteria that delineate important factors to be considered, and decisions will achieve more uniformity with appropriate judicial education. Finally, if educational and mediation programs are available in all jurisdictions, parents will be encouraged to focus on their children's needs, and the majority will settle the issues of access and custody without reliance upon adversarial processes.

Conclusions

Over the past century, the basis in law for custody decision making has shifted from a paternal presumption to a maternal presumption to current gender-neutral laws which rely upon a consideration of the best interests of the child in determining custody outcomes. While joint legal and physical custody statutes now allow parents to share child-rearing time and responsibilities after divorce as an alternative to awarding sole custody to one parent, the most common physical custody arrangement remains that of maternal physical custody. Despite profound societal changes in the past two decades which have affected family functioning and parental care traditions, it would appear that the majority of custody decisions continue to reflect, to a large degree, deeply embedded cultural traditions that view mothers as primarily responsible for their children, both during marriage and after divorce. As a consequence, mothers usually take the extremely

challenging responsibility of raising their children on their own with little assistance.

The number of families with shared residential custody arrangements is increasing, particularly in states with laws supportive of continuity in children's relationships with both parents after divorce. Visit frequency has increased between fathers and children over the past decade, in part because of research documenting the psychological and economic impact for many children of infrequent contact with fathers and because of a societal trend toward somewhat more father involvement in child rearing during the marriage. Fewer fathers are dropping out of children's lives in the years after divorce, perhaps because expanded visitation patterns enable interested fathers to maintain more meaningful relationships with their children after divorce, even if they do not have joint physical custody.

The best interests of the child standard remains firm in most states. It is argued that the best interests standard is more beneficial for children than the primary caretaker standard because it allows for a consideration of the quality of the relationships between the child and each parent, and parental psychological adjustment, critical factors in promoting children's healthy adjustment. Current gender-neutral laws, combined with the best interests standard, allow parents, evaluators, and judges to reach decisions about children on a case-by-case basis which address their individual developmental and psychological needs. It is expected that, if courts have developmentally sound and uniform criteria to be considered in determining the child's best interests, there will be more clarity in the negotiation process and increasing uniformity in decision making.

While divorce research continues to enrich our understanding of the impact of divorce on children and on parent-child relationships, there is much to learn. Although child development research has been valuable in informing decision making, we lack a full understanding of how custody arrangements should be shaped over the years to reflect the changing developmental needs of the child, and our

body of knowledge does not illuminate what kinds of custody arrangements would be suitable to the individual child within the individual family.

It is evident that, in settling custody and visiting disputes, the adversarial legal system, pitting parent against parent, is unwieldy, expensive, unsatisfactory, and unnecessary for large numbers of divorcing parents wanting to reach good agreements about their children. To diminish rather than escalate conflict, to enable parents to focus not on parental rights but on what is best for children, and to increase the likelihood of mutually acceptable custody and visiting agreements, parents need a range of educational and media-

The number of families with shared residential custody arrangements is increasing, particularly in states with laws supportive of continuity in children's relationships with both parents after divorce.

tion services. While more research assessing the efficacy of these newer interventions is needed, initial studies indicate that they facilitate dispute settlement, contain or reduce conflict, promote more cooperative communication, and result in high levels of satisfaction in mothers and fathers. Continued efforts are needed to develop and evaluate programs for divorcing parents with special needs, particularly victims of domestic violence, and parents with high levels of continuing conflict after divorce.

As society's cultural and family traditions continue to change, it is likely that child custody and visiting arrangements will reflect, at least in part, these evolving attitudes and customs. The effort to ensure that children have postdivorce parenting arrangements which promote good social and psychological adjustment is an ongoing one, involving dialogue and debate at all levels. Our children deserve no less than this.

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