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# Taking Children Seriously: Promoting Cooperative Custody After Divorce

Andrew Schepard

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# Taking Children Seriously: Promoting Cooperative Custody After Divorce

Andrew Schepard\*

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## Introduction

Each year more than one million children experience the divorce of their parents.<sup>1</sup> In 1981, the last year for which complete figures are available, about five million children lived with a divorced parent—nine percent of all children under age eighteen in the United States.<sup>2</sup>

1. After a prolonged period of rising dramatically, the divorce rate has recently stabilized at the rate of about 5.0 per 1,000 population. Approximately 55% of all divorces involve children. National Center for Health Statistics, *Advance Report of Final Divorce Statistics 1981*, MONTHLY VITAL STATISTICS REP., Jan. 17, 1984, at 1-2. See generally Spanier & Glick, *Marital Instability in the United States: Some Correlates and Recent Changes*, 31 FAM. REL. 329 (1981) (highlighting the demographic consequences of marital instability for children and families).

2. National Center for Health Statistics, *supra* note 1, at 1; see also BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-23, No. 84, DIVORCE,

All of these children contract what may be thought of as a disease of childhood—a disease usually without physical symptoms, but posing a serious threat to a child's emotional, financial, and educational well-being. Most of the time its effects are short-term and containable. Sometimes the child who contracts it emerges emotionally stronger as a result. Sometimes, however, the disease has complex, long-term ramifications from which the child never recovers. The attending physician for the child affected by this disease is not a medical doctor but the system of custody law and procedure. The most important goal of divorce-related child custody law is to act in the best interests of the child, the most vulnerable member of the dissolving family. The most important principle of medical treatment is that a doctor should do the patient no harm. Judged by either legal or medical standards the current legal system fails to meet its obligations to the child.

A divorce-related custody dispute often causes more damage to the affected child than if lawyers and judges had never become involved. Contested custody disputes often drag on for years without resolution, leaving the child trapped between battling parents, adversarial lawyers, and overburdened courts applying uncertain substantive standards through procedures that increase parental conflict and expense.

One reason that the legal system does not deal effectively with divorce-related custody disputes stems from its confused sense of mission about them. In the past, the legal system essentially designated one sex as the winner of a custody dispute—first the father, then the mother virtually always won.<sup>3</sup> Now, however, no-fault divorce, evidence suggesting the importance of both parents in the child's life, the increase in the number of working women with children, and the national movement for legal equality between the sexes all challenge the assumptions behind this prevailing pattern of custody awards. Increasing recognition that the lives of parents and children are interdependent after divorce as well as before and that legal certification of marital dissolution does not destroy the family's continuing relationships also challenge the assumptions behind sole custody.

This undermining of the premises of traditional custody law and procedure has thrown the legal system into a crisis of purpose. Courts cannot decide if their job is to choose between parents or to seek to rec-

CUSTODY AND CHILD SUPPORT 1-2 (1979) (finding the increase of children living in single parent homes headed by women results mainly from the increase in the divorce rate, even though the increase in the number of children who live with a mother who never married the father has exploded in recent years, particularly among blacks); *Recommendations*, *supra* note \*, at 108 n.7 (charting the comparative dimensions of the one-parent family phenomena by marital status).

3. For a review of the history of standards for determining custody, see *infra* subpart I(A).

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oncile them. The legal system cannot make the life of the child in a custody dispute better if it does not know what making life better means or what procedures can help accomplish that goal.

This Article tries to resolve this "identity crisis" by describing and defending a new model for the custody dispute resolution system—one whose overriding aim is to better serve the needs of the child affected by divorce by promoting cooperation between divorced parents. The Article has four themes.

First, the child's interests in reducing the emotional trauma of divorce and receiving adequate financial support are best served if society promotes the long-term involvement of both parents in the child's postdivorce life. The assumptions behind the traditional sole custody award do not adequately recognize that, for the child, divorce should not be the death of the family but the occasion for its reorganization. The assumptions, philosophy, and especially the symbolism of joint custody are, on the other hand, in the best interests of the child. The risks of joint custody are risks worth taking in the interests of trying to shift divorcing parents from combat to cooperation.

Second, change in the procedures for resolving custody disputes is an indispensable component of a shift in the substantive law to favor joint over sole custody. The state cannot mandate that parents cooperate after divorce unless it also provides procedural mechanisms—mediation and neutral evaluations—that encourage them to do so. To promote cooperative parenting, the state must, through its procedures for dispute resolution, create an atmosphere for negotiation that encourages both parents to make concessions that will insure the other parent is involved in the child's postdivorce emotional and financial life. Once that atmosphere is created, the state should, to the maximum extent possible, honor parental agreements on custody arrangements.

Third, the role of the state must change to encourage a shift from combative to cooperative postdivorce parenting. The state should not play the role of referee for parental combat in a one-shot decision allocating the child. Rather than wishing custody disputes would go away,<sup>4</sup> courts must function for a family in crisis like a trustee in bankruptcy

4. Several empirical studies confirm that judges dislike handling custody cases and regard them as undesirable duty because of the intensity of emotion associated with them and the absence of "legal issues." Lombard, *Judicial Interviewing of Children in Custody Cases: An Empirical and Analytical Study*, 17 U.C.D. L. REV. 807, 812 & n.31 (1984). The strain of decision making in custody cases also seems particularly intense. "A judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision he renders." B. BOTEIN, TRIAL JUDGE 273 (1952); see also Pearson & Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703, 722 (1982-1983) (citing similar statements by other judges).

seeking to restore a firm in crisis to economic viability. Society must view a custody dispute as a phase in the judicially supervised reorganization of the family. Intervention by the state should generally be brief and in all cases be aimed at restoring the family to health by reestablishing its capacity to deal with its problems autonomously.

Finally, the cooperative custody system must recognize, but not be dominated by, the special economic needs of women who were the primary caretakers of children before divorce. A mother who has devoted herself to child care and who does not possess marketable job skills suffers economically when her family structure dissolves. Society has a responsibility to protect her financial stake in the marital partnership. Society, however, also has a responsibility to the child, and must avoid allowing the mother to hold the child's need for a paternal relationship hostage for the payment of support obligations. Linking custody and money in divorce negotiations and enforcement only creates disengaged fathers,<sup>5</sup> mothers who do not receive the economic support they deserve, and children deprived of a relationship with one of their parents. The cooperative custody system could break that cycle by inducing regular payment of support through reducing the atmosphere of hostility that surrounds the divorce, custody, and child support enforcement process and by creating an emotional climate in the reorganized family that welcomes the long-term postdivorce involvement of both parents in the child's life.

The body of this Article documents and explains these basic themes, which are interwoven throughout. Part I describes the history and current status of substantive custody law. Part II analyzes empirical evidence on the effects of divorce on the child, and on whether sole or joint custody is in the best interests of the child. It also considers how the legal system should resolve questions raised by empirical uncertainty over what custody rule is in the best interests of the child, and over the fairness of sole and joint custody to the child's parents.

Part III describes how adversary procedures for resolving custody disputes aggravate the problems of the family after divorce. Part IV evaluates the principal proposals that have been made to "fix" the problems of the sole custody/adversary procedure system for resolving custody disputes: making divorce more difficult for parents to obtain; appointing a lawyer for the child; and using court-appointed neutral mental health experts to help formulate a custody plan.

5. This Article uses "father" to identify the noncustodial parent. This assumption does not always ring true. It is estimated that almost one million fathers in the United States have custody over their children though not necessarily all because of divorce.

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Part V describes the procedure and basic substantive law of a cooperative custody dispute resolution system, and Part VI defends the principal features of the cooperative custody system described in Part V. Finally, Part VII describes how a cooperative custody system deals with serious conflicts between divorced parents by discussing how it copes with a parent's desire to relocate with the child.

### I. Substantive Custody Standards: Where We Are and How We Got There

The assumptions behind the general rule of sole custody to the mother have been challenged by social science evidence, the movement away from fault in divorce, and the drive for legal equality of the sexes. Widely agreed-upon alternative assumptions have not emerged to fill the void. The result is a crisis of purpose in the legal system's struggle to resolve custody cases in the child's best interests. Some definitions and background are necessary to describe the confusion of current custody law.

#### A. *The Functions of the Substantive Standards*

Most states group two different functional concepts under the single label of "custody" when referring to disputes between divorcing parents—"physical" and "legal" custody.<sup>6</sup> Even though this conceptual division exists in theory, the parent who receives primary physical custody usually controls all major decisions concerning the child's upbringing. Nonetheless, this division lies at the heart of most states' approach to child custody disputes and, therefore, requires explanation.

Physical custody refers to the child's living arrangements and to the responsibility for the child's day-to-day care.<sup>7</sup> Joint physical custody occurs in an intact family—the parents live in the same house with their child. When one parent moves out, the problem of deciding how to allocate physical custody rights between them arises.<sup>8</sup>

Legal custody refers to decisions for the child, such as where the

6. *Beck v. Beck*, 86 N.J. 480, 486-87, 432 A.2d 63, 65-66 (1981); see, e.g., CAL. CIV. CODE § 4600.5(d) (West Supp. 1986) (defining "legal" and "physical" custody); MINN. STAT. ANN. § 518.003 3(a), (c) (West Supp. 1986) (same). Cf. TEX. FAM. CODE ANN. §§ 14.02, 14.04 (West Supp. 1985) (organizing custody under a managing conservator and a possessory conservator).

7. Comment, *Joint Custody: An Alternative for Divorcing Parents*, 26 UCLA L. REV. 1084, 1087 (1979).

8. The separated parents may live great distances apart; one parent may want to minimize the amount of time the other parent spends with the child; one parent may want to place conditions on the actions of the other parent when the child is present. One such condition might be no overnight stays in the same house when the other parent's lover is there.

child's primary residence should be, which school the child will attend, what the child's religious training will be, whether the child can enter into a contract, and what medical treatments the child will undergo. "Graphically stated, the legal custodian chooses the nursery school; the physical custodian determines the child's bedtime."<sup>9</sup>

Courts traditionally allocate legal and physical custody between divorcing parents who do not reach an agreement on these issues using the framework of "sole" custody. In it, the court designates one parent as the child's primary physical custodian, entitling that parent to most of the child's physical custody. The court then grants "visitation" rights to the other parent, which amount to temporary physical custody of the child, preserving a role for both parents in the physical custody of the child. A noncustodial parent who meets the minimum standards of the abuse and neglect laws has a virtually absolute right to some visitation with the child even over the objections of the other parent and the child.<sup>10</sup> Courts almost uniformly recognize the desirability of the child's maintaining contact with both parents through visitation with the non-custodial parent. Courts will, at least in theory, enforce visitation rights by contempt and other sanctions.<sup>11</sup> Many courts, for example, have placed significant restrictions on the right of the primary physical custodian to move the child away from the jurisdiction and defeat the visitation rights of the child and the noncustodial parent.<sup>12</sup> Nevertheless, the traditional visitation award severely limits the time that the noncustodial parent may spend with the child, usually to two weekends a month and some period of the child's summer vacation.<sup>13</sup>

In a sole custody framework, courts tend to award both primary physical and legal custody of the child to the same "sole" or "primary" custodial parent.<sup>14</sup> Unlike standards for physical custody, however, stan-

9. Comment, *supra* note 7, at 1087.

10. See, e.g., *French v. French*, 452 So. 2d 647 (Fla. Dist. Ct. App. 1984) (overturning total ban on visitation of father with children even though father failed to acknowledge the impropriety of an extramarital affair and "appeared insensitive to the emotional pain he caused the wife and children"); *Katz v. Katz*, 97 A.D.2d 398, 467 N.Y.S.2d 223 (1983) (father who abused wife in child's presence cannot be denied all visitation with child); *Cabalquinto v. Cabalquinto*, 100 Wash. 2d 325, 669 P.2d 886 (1983) (visitation cannot be restricted because of parent's homosexual lifestyle). See generally *Novinson, Post-Divorce Visitation: Untying the Triangular Knot*, 1983 U. ILL. L. REV. 121 (exploring the competing interests involved in the resolution of visitation disputes and the constitutionality of different approaches to visitation arrangements).

11. But see Note, *Visitation Rights: Providing Adequate Protection for the Noncustodial Parent*, 3 CARDOZO L. REV. 431, 436-40 (1982) (describing lack of enforceability of visitation orders).

12. See *infra* Part VII.

13. See generally M. ROMAN & W. HADDAD, *THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY* 1-21 (1978) (describing with personal stories the limitations courts place on fathers' visitation rights).

14. Comment, *supra* note 7, at 1087.

dards governing legal custody generally do not formally preserve a role for both parents. Decision-making power over major matters in the child's upbringing is allocated to the primary custodial parent.<sup>15</sup>

### B. A Brief Historical Overview

The rules allocating sole custody to one parent or the other have varied over time according to changes in child-rearing practices and in the relative social and economic positions of mothers and fathers. At early English common law, for example, the father had an absolute right to physical and legal custody of his child.<sup>16</sup> In part, this rule was a logical extension of the wife's property-like relationship to her husband. It also reflected a view of the family that was closely tied to the ownership and preservation of property through a patriarchal system of heredity.<sup>17</sup>

In the colonies, the courts began to inquire into "fault" in awarding custody to one parent or the other. This gave the mother a chance to win custody where none existed before. Most of the early decisions, however, focused on the parents, and it was not until the early 1900s that the focus truly shifted to the child's interest.<sup>18</sup>

15. *E.g.* *Patrick v. Patrick*, 17 Wis. 2d 434, 438, 117 N.W.2d 256, 258 (1962); *see also* Comment, *supra* note 7, at 1087 (discussing the relationship between legal and physical custody). Absent a provision in a parental agreement about custody rights restricting the custodial parent's decision-making power over the child, courts usually will not "second-guess" a primary custodial parent's determination about a child's religious upbringing even if the noncustodial parent is opposed to it. *E.g.* *Bentley v. Bentley*, 86 A.D.2d 926, 448 N.Y.S.2d 559 (1982); *Mester v. Mester*, 58 Misc. 2d 790, 296 N.Y.S.2d 193 (Sup. Ct. 1969); *see also In re Adoption of Vogt*, 219 N.W.2d 529, 531 (Iowa 1974) (noncustodial parent with visitation rights but who does not provide financial support cannot veto adoption of child by a stepparent). *But cf.* *Caban v. Mohammed*, 441 U.S. 380 (1979) (unconstitutional to permit unmarried mother but not involved unmarried father of child veto power over child's adoption).

Absent agreement to the contrary, the noncustodial parent generally does not have a right to be consulted on major decisions about the child, *Lerner v. Superior Court*, 38 Cal. 2d 676, 242 P.2d 321 (1952), and has no common-law right of access to information about the child from sources such as public school records, *Graham v. Graham*, 428 S.W.2d 941 (Mo. Ct. App. 1968). The Family Educational Records and Privacy Act of 1974, 20 U.S.C. § 1232(g) (1982), now requires that in the absence of a court order to the contrary, noncustodial parents have the same right of access to public school records as custodial parents. *See also* TEX. FAM. CODE ANN. § 14.04(c) (West Supp. 1985) (extending noncustodial parent's access to all school, medical, and dental records).

16. *See Ex Parte Devine*, 398 So. 2d 686, 688-92 (Ala. 1981) (discussing paternal preference); R. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICES CONNECTED WITH IT 465 (1858); *see also* Foster & Freed, *Life with Father: 1978*, 11 FAM. L. Q. 321, 321-33 (1978) (summarizing the evolution of custody rights from paternal to maternal preference). *But see* Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption and the Courts, 1796-1851*, 73 NW. U.L. REV. 1038, 1053 n.48 (1978) (describing instances when judges exercised discretionary power to deny custody rights of fathers in favor of best interests of child).

17. Zainaldin, *supra* note 16, at 1049.

18. Certain courts did inquire into the interests of a child. In the earliest reported American decision in a child custody dispute, the court rejected the rule that custody should automatically be awarded to the father and exercised discretion by determining it was in the child's best interests to leave him with his mother and maternal grandfather in whose care he had been doing well. Nickols

The presumption that the child's interest usually lay with the mother resulted from the change in social and economic trends in the late nineteenth century. Industrialization, and its demand for workers, removed men from the home and changed the economic nature of the family.<sup>19</sup> Wages replaced property as the economic base of most families.<sup>20</sup> Women undertook the full-time responsibility of rearing children and managing the household, while men earned the wages that provided the family's economic support. It became "natural" in the sense of the prevailing social pattern that mothers reared children as a full-time occupation.<sup>21</sup>

Once this prevailing social pattern became established, it received "scientific" support from early psychoanalytic preoccupation with the primacy of the mother-child relationship in the child's emotional development.<sup>22</sup> Because of Freud's influence, "the prevailing assumption in American developmental psychology [became] that the more secure and undiluted the infant's attachment to a single caregiver, the greater the child's ability to form close emotional relationships and to cope with psychological stress in the future."<sup>23</sup> Given prevailing economic and social patterns, the mother usually filled this role.

Judges responded to this scientific wisdom and social necessity. Although they declared over and over again that custody decisions would be made solely on the basis of the child's best interests, with neither parent having a primary possessory right, courts decided repeatedly that a child of "tender years" should be in the custody of its mother, who alone had the innate ability to nurture.<sup>24</sup> Until the 1970s, this doc-

v. Giles, 2 Root 461 (Conn. 1796), described in Zainaldin, *supra* note 16, at 1052-53. Since the 1840s, New York statutes and court decisions have instructed judges to make the welfare of the child the dominant consideration in custody decisions. See Zainaldin, *supra* note 16, at 1069 & n.131.

19. Zainaldin, *supra* note 16, at 1051.

20. Stack, *Who Owns the Child?: Divorce and Custody Decisions in Middle-Class Families*, 23 SOC. PROBS. 505, 506 (1976).

21. See Zainaldin, *supra* note 16, at 1047-52; see also E. SHORTER, *THE MAKING OF THE MODERN FAMILY* (1976) (exploring the history and development of the modern nuclear family).

22. "Although Freud acknowledged that infants did . . . identif[y] with both parents . . . he stressed that both boys and girls formed their first and most important relationships with their mothers." Lamb, *Fathers and Child Development: An Integrative Overview*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* 7 (2d ed. 1981). Recently psychoanalytic thinking has shifted its emphasis. See Machtinger, *The Father in Psychoanalytic Theory*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* 113-53 (2d ed. 1981) (examining psychoanalytic literature from 1975-1980 about the "meanings and functions of the father"; the literature "stress[es] the importance of the father in aiding the process of psychic differentiation and individuation in the child").

23. Clingempeel & Reppucci, *Joint Custody After Divorce: Major Issues and Goals for Research*, 91 PSYCHOLOGICAL BULL. 102, 112 (1982).

24. See Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 432-38 (1976-1977); Zainaldin, *supra* note 16, at 1072-74. Conversely, for a time many courts believed adolescent boys belonged in the custody of their fathers who could prepare them for occupations in the world of which mothers had no knowledge. Zainaldin, *supra* note 16, at 1073-74.

trine dictated a prevailing pattern for custody awards<sup>25</sup> that granted the mother primary physical and legal custody of the child and limited the father's legal role in the child's life to visitation rights.

Four dramatic developments have challenged most of the assumptions underlying this predominant pattern: the rise of no-fault divorce; the entry of women into the labor force; the drive for legal equality of the sexes; and the empirical evidence establishing the importance of the child's father in the child's life both before and after divorce.

To some extent, the prevailing pattern of custody awards to the mother was reinforced by an unarticulated premise that philandering husbands were "at fault" for most divorces, leaving virtuous wives without cause. In the 1960s, however, the value of using fault as an appropriate basis for the legal system to make decisions about the availability of divorce came under intense scrutiny.<sup>26</sup> Beginning with California,<sup>27</sup> every state has enacted no-fault divorce of one kind or another.<sup>28</sup> The philosophical assumptions of no-fault divorce are the direct antithesis of those underlying the fault system. The theory of no-fault divorce is that the interaction of people in intimate relationships is too complex to make fault assessments based on individual acts. It posits that in most cases the partners share blame in some sense, or neither is to blame.<sup>29</sup>

A number of other problems with fault divorce also fueled the no-fault movement. Fault standards encouraged perjury and false creation of residency in states with lenient divorce grounds for couples who agreed to divorce by mutual consent. In addition, fault determinations required judicial fact-finding about the intimate details of family life, a

25. In some states, the "tender years" presumption was codified by statute; in other states it became law through the pronouncements of the appellate courts, sometimes in spite of a statute that declared the sexes had equal rights to custody. See Roth, *supra* note 24, at 432-38.

26. Prior to the 1960s, fault played a central role in the availability of divorce and in the accompanying custody decisions. The state asserted a strong interest in preserving the marriage relationship. The state thus reserved the right to divorce to a spouse who could prove that the other spouse created the problems in the marital relationship by committing a morally blameworthy act, usually thought of as drunkenness, loose morals, or adultery. In that context, sole legal and primary physical custody of the children in part rewarded the virtuous spouse and in part punished the guilty spouse's wrongful conduct. See C. FOOTE, R. LEVY & F. SANDER, *CASES AND MATERIALS ON FAMILY LAW* 1073-1101 (2d ed. 1976) (containing an imaginary discourse on divorce policy among a bishop, a law professor, and a doctor, in which the bishop articulates much of the rationale underlying a fault-based divorce system); see also *id.* at 1101 nn.95-109 (discussing the theoretical basis of fault and no-fault divorce); M. WHEELER, *NO-FAULT DIVORCE* (1974) (providing an overview of the history and policy basis of divorce reform in the United States).

27. See CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY, *REPORT* (1966) (commonly considered the landmark event in the development of no-fault divorce).

28. Freed & Walker, *Family Law in the Fifty States: An Overview*, 18 FAM. L.Q. 369, 379-89 (1985).

29. See C. FOOTE, R. LEVY & F. SANDER, *supra* note 26, at 1073-1101 (law professor advocating a no-fault approach to divorce).

distasteful, privacy-invading process that seemed to further alienate the spouses from each other rather than end the marriage with some sense of dignity and mutual responsibility for its failure.<sup>30</sup>

As a result of the no-fault movement, divorce may be obtained by mutual consent of the spouses and in many states on the request of one spouse alone. The creation of the new legal regime and accompanying social milieu seriously questions the value of determining the virtuous spouse.<sup>31</sup> The no-fault movement emphasized that the state's role in divorce is not dispensing retribution but encouraging sensible management of effects, a role that helps to protect the interests of an innocent and helpless third party to the divorce transaction—the child.<sup>32</sup>

The entry of women into the work force also contributed to the changing notions of child custody after divorce. During the development of the prevailing pattern of sole custody, in middle-class families the father worked full-time and the mother stayed home full-time to take care of the children. It was thus logical, and perhaps inevitable, that sole custody should be awarded to the mother who had the time and energy to devote to the “private” dimensions of family life after divorce and few skills with which to earn money in the marketplace.

Out of choice or economic necessity, women have entered the labor force in staggering numbers, undermining the “mother stays home while father works” assumption of the sole custody system.<sup>33</sup> The prevailing work pattern no longer supports the theory that only the mother has the necessary time to devote to proper child-rearing.<sup>34</sup> Even for those women who do not work during their marriage, six months after their divorce they will probably be working.

30. *Id.* at 1089; M. WHEELER, *supra* note 26, at 13.

31. Many courts downplay the role of fault in making divorce related economic determinations. See *Wilson v. Wilson*, 101 A.D.2d 536, 544, 476 N.Y.S.2d 120, 125 (1984) (generally excluding marital fault from consideration in maintenance awards); *Blickstein v. Blickstein*, 99 A.D.2d 287, 292, 472 N.Y.S.2d 110, 113 (1984) (generally excluding marital fault as a factor in distributing property under the state's equitable distribution statute, except for “blatant disregard of the marital relationship—misconduct that ‘shocks the conscience’ of the court”); *Hinton v. Hinton*, 11 FAM. L. REP. (BNA) 1005 (N.C. Ct. App. 1984) (rejecting fault as a discretionary factor in distributing marital property under state equitable distribution statute after reviewing cases from many states).

32. See *infra* subpart II(B)(2)(a).

33. In 1970, 39% of all mothers with children under eighteen worked outside the home; in 1982, the proportion was 55%. HOUSE SELECT COMMITTEE ON CHILDREN, YOUTH AND FAMILIES, U.S. CHILDREN AND THEIR FAMILIES: CURRENT CONDITIONS AND RECENT TRENDS, 98th Cong., 1st Sess. 12 (1983) [hereinafter cited as HOUSE COMMITTEE REPORT]. In 1970, 29% of all mothers with children under five worked outside the home. The figure in 1982 was 46%. *Id.* at 13. Divorced and separated mothers are more likely to be in the labor force than mothers who are married. Sixty-seven percent of divorced mothers with children under age five work outside the home; the comparable figure for married mothers is 48.7%. Of divorced mothers with children over age six, 83.6% work outside the home; for married mothers, the comparable figure is 63.2%. *Id.*

34. This can also be seen in the shift away from permanent alimony.

The increasing drive for legal equality of the sexes spurred by the women's movement also undermines the assumptions behind awarding sole custody to the mother. Some in the women's movement emphasize the need for child care and other responsibilities to be shared within the family so that women can enter the labor force and realize their personal and economic potential through work.<sup>35</sup> Others emphasize the importance of equalizing the status of women who work in the home with their wage-earning husbands.<sup>36</sup> These notions form the basis for the drive for legal equality within the family expressed in the partnership theory of marriage, the dominant modern metaphor for describing the legal organization of the family.<sup>37</sup> Under a partnership model of the family, husbands and wives remain legal equals, although they might contribute in different ways and in different degrees to the total welfare of the family unit.

The partnership theory has been generally applied only to the economic aspect of marriage. For example, community property states reflect this theory in recognizing that all income and property received during marriage belongs to both partners equally, regardless of which partner actually "earned" the wages.<sup>38</sup> The partnership concept, however, cannot logically and emotionally be limited to dollars and cents. Its reach extends to the other major task of the family, raising children. If marriage is an economic partnership regardless of the role a partner plays in creating the family's economic wealth, it is also a parental partnership regardless of the role each parent actually plays in raising the child.<sup>39</sup>

A final development that undermined the traditional pattern of sole custody to the mother is the increasing amount of empirical evidence questioning its psychoanalytic underpinnings: the primacy of the

35. Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 109-11 (1978).

36. COMMITTEE ON CIVIL AND POLITICAL RIGHTS, REPORT OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN 16-18 (1963).

37. See Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticisms and Suggestions for Reform*, 67 CORNELL L. REV. 45, 64-77 (1981) (describing the partnership theory as the basis of both the community and equitable distribution systems of allocating marital assets after divorce).

38. See, e.g., *Connor v. Connor*, 97 A.D.2d 88, 97, 468 N.Y.S.2d 482, 490 (1983) (description of a community property system by a common-law court).

39. Cf. Jacobs, *Treatment of Divorcing Fathers: Social and Psychotherapeutic Considerations*, 140 AM. J. PSYCHIATRY 1294, 1296 (1983) ("Within the intact family, many of these [divorced men the author treated] felt they were doing their best for their children by being the breadwinner and allowing the mothers to fulfill the nurturing role for both of them. With marital separation, some fathers no longer viewed their wives as functional extensions of themselves . . ."). For a discussion of the role of the partnership principle and the primary caretaker preference in custody law, see *infra* subpart II(B)(2)(b).

mother-child relationship and the importance of a child's intense attachment to a single caregiver for future emotional well-being. Numerous studies confirm the importance of both parents in the child's emotional life in intact families<sup>40</sup> as well as in divorced families.<sup>41</sup> These findings have confirmed that the partnership theory of parenting not only symbolizes the legal equality of the sexes but also reflects the reality of life for most children. Both parents remain important to a child's development despite the difference in the amount of time each spends with the child.<sup>42</sup> Available evidence indicates that a child generally has emotional attachments to both parents as well as other significant persons in his life like caretakers and grandparents.<sup>43</sup> Except perhaps for unweaned breastfed babies, neither one of the child's parents serves as *the* psychological parent with whom a child's relationship is more necessary than with the other.

All of these changes have slowly begun to affect custody decision making. Most states have abrogated the "tender years" presumption by statute or case law.<sup>44</sup> As with the removal of any presumption in law, the inquiry shifts from a simple issue to a wide-ranging, multifactor inquiry into what custody arrangements are in the best interests of the child.<sup>45</sup> Some statutes simply direct courts to make custody decisions in the child's best interests,<sup>46</sup> leaving it to case law to flesh out the meaning

40. See Cochran & Vitz, *Child Protective Divorce Laws: A Response to the Effects of Parental Separation on Children*, 17 FAM. L.Q. 327, 340 (1983) ("The great importance of the father in the development and education of his children—sons and daughters—is one of the best documented findings within the social sciences within the last twenty years."). For an overview of the research about the father's role in child development, see Lamb, *supra* note 22.

41. For a discussion of the extensive evidence concerning the importance of involvement of both parents in the child's life after divorce, see *infra* subparts II(A)(1)(a)-(c).

42. See Clingempeel & Reppucci, *supra* note 23, at 107-10 (discussing how interaction with the noncustodial parent helps the child's adjustment to divorce). Other than for children under six months of age, the emotional significance of a parent to the child does not seem related to the child's age or the parent's sex. See Lamb, *supra* note 22, at 13-14 (citing numerous studies that "confirm that most infants are attached to both their parents from the second half year of life"). The emotional significance also does not seem to be proportionate to the amount of time a parent spends with the child. See *id.* at 5-6 (citing numerous studies).

43. See *infra* text accompanying notes 67-68.

44. Some states continue to recognize the tender years presumption. Some require a showing of "unfitness" to deprive a mother of custody, while others employ a "primary caretaker" custody presumption, using it as a "tie-breaker" when both parents are deemed equally fit. See *infra* notes 184-85 and accompanying text. No Supreme Court decision has declared the "tender years" presumption to be unconstitutional on the grounds that it discriminates against men, and state courts that have considered the issue are divided on it. See *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1333-38 (1980) [hereinafter cited as *Developments*].

45. See *Salk v. Salk*, 89 Misc. 2d 883, 393 N.Y.S.2d 841 (Sup. Ct. 1975) (illustrating wide breadth of the "best interests" inquiry); see also Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1 (1984) (summarizing standards used). See generally Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975) (discussing the indeterminacy of current standards).

46. E.g., N.Y. DOM. REL. LAW § 240 (McKinney 1984).

of that term. Other statutes describe factors that go into a "best interests" analysis, such as the love and affection between parents and child, the "moral fitness" of the parents, or the preferences of the child if "reasonable."<sup>47</sup> Yet the factors remain general considerations, without rank or order and include a catch-all allowing the judge to consider "any other factor . . . relevant to a particular child custody dispute."<sup>48</sup> In such jurisdictions, the typical trial court "best interests" decision becomes a potentially idiosyncratic prediction of which parent is more suitable to be primary custodian based on comparative evaluation of their fitness for the task.<sup>49</sup> A presumptive shield from appellate review confirms that wide discretion is given to a trial court's "best interests" determination.<sup>50</sup>

Despite these new trends most state trial court decisions in custody cases in "best interests" jurisdictions still favor the mother. A recent empirical study of contested custody cases in three Colorado judicial districts found that "[w]hen the father gets custody in contested situations, it is almost always the result of mother misconduct. . . . Mothers, on the other hand, do not seem to have to prove that their husbands are unfit. The mother will get custody more often when all things appear equal . . . ."<sup>51</sup>

### C. Joint Custody

The changes undermining the traditional award of sole custody to the mother have spurred the movement for joint custody, which seeks to expand the role of both parents in the child's postdivorce life.<sup>52</sup> The term

47. *E.g.*, MICH. COMP. LAWS ANN. § 722.23.3 (West Supp. 1983).

48. *Id.*

49. *Salk v. Salk*, 89 Misc. 2d 883, 885, 393 N.Y.S.2d 841, 843 (Sup. Ct. 1975). The factors that are considered in the comparative fitness evaluation are described and analyzed on the basis of reported opinions in *Atkinson*, *supra* note 45, at 4-36. For an empirical study of the factors trial judges in one state use to measure comparative fitness of parents for custody, see *Pearson & Ring*, *supra* note 4. Constitutionally suspect criteria such as the race of the parents and child cannot, however, be a basis for the trial court's sole custody decision-making calculus. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

50. See *Mnookin*, *supra* note 45, at 253-54 (noting that a presumptive shield arises from the inherent value judgments made on the basis of witness demeanor at trial).

51. *Pearson & Ring*, *supra* note 4, at 716. Fathers fare better in the appellate custody courtroom. A recent review of all reported appellate custody cases in the West Reporter system between January 1, 1982, and May 4, 1983, found that each sex won on appeal about 50% of the time. *Atkinson*, *supra* note 45, at 8-11. One can only speculate about why the results on appeal indicate equality of result between the sexes in custody contests while the picture in the trial courts is different. Fathers may contest custody in trial courts knowing they have no significant chance of winning to increase bargaining strength on economic issues. Alternatively, fathers who lose at trial may be discouraged from appealing by the general belief courts favor mothers; thus only the strongest father custody cases are appealed. National results like those in the appellate survey also lump together states in which the mother always wins with states in which the results are more equally divided.

52. See *Folberg & Graham*, *Joint Custody of Children Following Divorce*, 12 U.C.D. L. REV. 523, 529 (1979); *Miller*, *Joint Custody*, 13 FAM. L.Q. 345, 361-66 (1979).

refers to parents sharing both physical or legal custody or merely aspects of each. Joint custody does not always contemplate an equal division of the child's physical presence.<sup>53</sup> Physical custody plans in joint custody arrangements take into account the parents' work schedules, the child's school hours, and the geographic proximity of the parents' postseparation residences. Although in some states joint custody works out to be no more than a label, generally, the physical custody aspects of joint custody arrangements involve both parents spending significantly more time with the child than a "visiting" parent would.<sup>54</sup>

Joint custody usually means continuing shared parental decision-making power over and shared rights to information about the child after divorce on such major matters as education and medical care.<sup>55</sup> Shared decision making, however, does not mean that parents must consult about every rule in the child's life. The parent who has physical custody of the child at the particular time sets most of the day-to-day rules.

Joint custody flows logically from the trend of no-fault divorce and the partnership theory of marriage. It assumes that the child benefits from continuing relationships with both parents, even though they no longer live together. Neither parent is presumptively more "fit" or the superior legal or physical custodian for the child.

Approximately thirty states now provide some mention of joint custody in their state custody statutes,<sup>56</sup> with four degrees of preference given to joint custody in contested decision making: 1) the court may approve a parental agreement for joint custody;<sup>57</sup> 2) the court may order joint custody;<sup>58</sup> 3) joint custody is a preferred option in contested cases;<sup>59</sup> and 4) the court presumes joint custody unless shown that one or both parents are unfit.<sup>60</sup>

53. *Beck v. Beck*, 86 N.J. 480, 486-87, 432 A.2d 63, 65-66 (1981).

54. *Miller*, *supra* note 52, at 361.

55. *Id.* at 360.

56. *Scott & Derdeyn, Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 456 n.5 (1984).

57. *See, e.g.*, NEV. REV. STAT. § 125.490 (1983) (rebuttable presumption that joint custody is in the child's best interests "if parents have agreed to an award of joint custody"); *see also* *Scott & Derdeyn*, *supra* note 56, at 475 ("when parents agree to joint custody . . . ratification will be forthcoming absent unusual circumstances").

58. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-56(a) (West Supp. 1986) ("the court may assign the custody of any child to the parents jointly"); HAWAII REV. STAT. § 571-46.1 (1984) ("joint custody may be awarded in the discretion of the court"); MICH. COMP. LAWS ANN. § 722.27(a) (West Supp. 1985) (court may "[a]ward the custody of the child to *1 or more* of the parties involved") (emphasis in original).

59. *See, e.g.*, CAL. CIV. CODE § 4600.5(a) (West Supp. 1985) (presumption that joint custody is in the child's best interest, determined by factors including health and safety of the child, and history of abuse against the child).

60. *See, e.g.*, LA. CIV. CODE ANN. art. 146(c) (West Supp. 1985) (rebuttable presumption that joint custody is in the child's best interest; presumption rebutted by consideration of various factors, including the moral, mental, and physical health of the parties involved).

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### II. Substantive Custody Rules: Empirical Evidence, Moral Fairness, and Decision Making Under Uncertainty

The previous Part's background aids our consideration of how the legal system should approach the problem of custody after divorce. This Part analyzes the basic substantive standard that courts should apply when facing a custody dispute. It proceeds on the premise that although substantive custody law must try to be fair to the competing claims of the parents, the most important test is whether a proposed substantive custody rule serves the best interests of the child.

#### A. *The Empirical Evidence on the Best Interests of the Child*

Most of the research on the effects of divorce on a child points to similar conclusions.<sup>61</sup> First, divorce produces significant and threatening instability in a child's life that can cause the child to suffer in a variety of ways—emotionally, financially, and in school achievement as compared to her peers in two parent families. Second, the child's regular and meaningful relationship with both parents following divorce can alleviate much of this suffering.

##### 1. *The Effects of Divorce on Children.*

(a) *Emotional crisis and decreased parental competence.*—All researchers report that physical separation of parents creates a stressful, frightening, and lonely period of a child's life. The protective bubble of

61. Description of and reliance on available research results, however, must begin with cautions, disclaimers, and qualifications. There is much we do not know. Research thus far on the effects of divorce on children is less than perfect in design. The studies tend to involve small, self-selected members of families undergoing separation who are studied without comparison to a control group. We thus have little or no data comparing levels of conflict and tension between children who are and are not experiencing divorce. Further, we do not have many studies that isolate divorce from other possible variables in the lives of children, such as race and class, that may affect their emotional, financial, and educational status. See Biller, *Father Absence, Divorce and Personality Development*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* 490-92 (2nd ed. 1981); Clingempeel & Reppucci, *supra* note 23, at 103-06; Jacobs, *The Effect of Divorce on Fathers: An Overview of the Literature*, 139 AM. J. PSYCHIATRY 1235-36 (1982); Kurdek, *Concluding Comments*, in *CHILDREN AND DIVORCE* 84 (L. Kurdek ed. 1983); *Children of Divorce: Recent Research*, 24 J. AM. ACAD. CHILD PSYCHIATRY 515 (1985). Earlier assessments of the available research contain similar cautions. See Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication: An Effort to Rely on Social Science Data in Formulating Legal Policies*, 4 LAW & SOC. REV. 167, 169-79 (1969). Review of the available evidence on the effects of divorce on children creates a profound wish for more knowledge to help clarify what custody arrangements serve the child's best interests. That better data do not exist attests to some extent how seriously our society takes the needs of children. In the absence of definitive data, our choices are to conclude we know nothing and therefore should do nothing, or to formulate public policy based on inconclusive inferences from the research that does exist. For an illuminating general discussion of the uses and abuses of social science data in the formulation of legal policy, see Kalven, *The Quest for the Middle Range: Empirical Inquiry and Legal Policy*, in *LAW IN A CHANGING AMERICA* 56-74 (G. Hazard ed. 1968).

the child's family bursts, causing intense anxiety and provoking fear of the future.<sup>62</sup>

Divorce simultaneously creates a crisis in parental competence and availability for the child. Parents after divorce must adjust to new financial constraints, the demands of creating a social life for themselves, decreased emotional support, and the sense of failure that accompanies the dissolution of significant relationships.<sup>63</sup> These parents must cope with enormous changes, hindering their capacity to help their child at a time when the child needs more guidance and support from adults.

The capacities of children to manage the emotional stress of parental divorce and the crisis of parental competence it creates vary significantly. In a landmark study of fifty families experiencing divorce in Marin County, California, Wallerstein and Kelly found that thirty-four percent of the children had made appropriate progress in adjustment to the divorce.<sup>64</sup> About a third of the children in their sample, however, reported significant depression and problems in school and social adjustment.<sup>65</sup>

Other studies support Wallerstein and Kelly's findings. A major study by Heatherington and Cox followed preschool children of forty-eight white middle-class divorced couples over two years and compared them with forty-eight carefully matched children from intact families.<sup>66</sup> Children from divorced families tended to act aggressively, weep, whine, and throw temper tantrums more often than their counterparts. This deterioration in behavior interacted with and reinforced a deterioration in the quality of parenting the children of divorce received. Divorced parents set fewer rules for their children, disciplined them inconsistently, and showed less affection toward them.

Those children whose parents encourage visitation with the noncustodial parent are best able to surmount the divorce crisis.<sup>67</sup> The empirical evidence thus confirms the psychological theory that interaction with both parental figures shapes the child's emotional life. A child bases his impressions of an absent parent on fantasy and idealization, resulting in

62. J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAK-UP: HOW PARENTS AND CHILDREN COPE WITH DIVORCE 35-54 (1980).

63. *Id.* at 230-31.

64. *Id.* at 209.

65. *Id.* at 211.

66. The Heatherington and Cox research has been reported in a number of sources. Heatherington, *Children and Divorce*, in PARENT-CHILD INTERACTION: THEORY, RESEARCH AND PROSPECTS (R. Henderson ed. 1981); Heatherington, Cox & Cox, *Family Interaction and the Social, Emotional and Cognitive Development of Children Following Divorce*, in THE FAMILY: SETTING PRIORITIES (1979); Heatherington, Cox & Cox, *The Aftermath of Divorce*, in MOTHER-CHILD, FATHER-CHILD RELATIONS 149-76 (1978).

67. J. WALLERSTEIN & J. KELLY, *supra* note 62, at 215; see also Clingempeel & Reppucci, *supra* note 23, at 107-09 (reviewing numerous studies).

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an unrealistically positive or negative image of that parent. Meaningful contact with both parents after divorce allows a child to understand the nature of the new familial relationships.<sup>68</sup> Such contact also reduces the child's fear that the divorce means the loss of a parent and relieves the child's misdirected sense of personal guilt for "causing" the divorce. Evidence of children's expressed desires also shows that, for the most part, children want more frequent interaction with the non-primary-caretaking parent than the time provided for in a typical alternate weekend visitation schedule.<sup>69</sup>

Regular contact with both parents not only provides emotional comfort for the child whose parents divorce but also increases the quality of parenting the child receives as a result of it. A study by Hess and Camera,<sup>70</sup> for example, compared sixteen white middle-class divorced families to a matched group of nondivorced families,<sup>71</sup> measuring four variables: stress, work effectiveness, social relations, and aggression. The quality of the child's relationship with both parents predicted best the child's rating on the outcome variables. Children who had positive relationships with both parents had lower stress and aggression ratings, and higher work effectiveness and social relations ratings than children who had little contact and poor relationships with one or both parents.<sup>72</sup>

Overall, a recent and extensive review of the empirical research on the effects of divorce on children concluded:

In the majority of cases, frequent interaction with the noncustodial parent has been found to have a positive effect on children's adjustment to divorce . . . . Exceptions occurred in cases of mental disturbance of the noncustodial father and/or a high level of conflict between the parents . . . .

. . . .

. . . A continued relationship with both parents [following separation] not only provides additional emotional support [for the child] but also potentially offers a larger array of positive characteristics to model and a greater variety of cognitive and social stimulation.<sup>73</sup>

68. See Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 465-66 (1983) (reviewing and citing numerous studies).

69. This dissatisfaction is particularly acute among younger children. Clingempeel & Repucci, *supra* note 23, at 107.

70. Hess & Camera, *Post-Divorce Relationships as Mediating Factors in the Consequences of Divorce for Children*, J. SOC. ISSUES, Fall 1979, at 79.

71. The parents of the divorced families had lived in different households for two to three years. The parents, children, and the children's teachers were interviewed; school records examined; and a behavior checklist was completed on each family.

72. Hess & Camera, *supra* note 70, at 92.

73. Clingempeel & Repucci, *supra* note 23, at 107-09.

(b) *Financial support of children.*—Divorce places a great strain on the economic resources available in the family for the support of the children. The typical child living in an intact family enjoys three times the family income of a child living in a single parent family.<sup>74</sup> After separation, the parents must run two households rather than one. The economies of scale that existed in maintaining a single family in a single household no longer exist and the same amount of income must be stretched to fit greater economic needs.<sup>75</sup>

These economic changes magnify the anger and bitterness of divorce. A custodial parent and child might resent a decreased standard of living, fueling bitterness against the noncustodial parent, particularly if the child perceives that the noncustodial parent's new family is better off economically. Such economic disparity strains relationships between the parents, increases the stress on the custodial parent, and makes children hostile and less trusting of adults in general. Although wealth may be transferred from one parent to another in the form of child support payments, noncompliance is commonplace, and the child support enforcement system functions inadequately,<sup>76</sup> a problem the legal system is just beginning seriously to address.<sup>77</sup>

Evidence suggests, however, that fathers who remain significantly involved in the life of their children after divorce are more likely to pay child support, thus increasing the financial well-being of the child and the mother.<sup>78</sup> David Chambers' landmark study of the effectiveness of child support enforcement concluded that men who regularly visited their children paid court-ordered child support at an especially high av-

74. HOUSE COMMITTEE REPORT, *supra* note 33, at 15. This statistic, however, may overstate the disparity because a large percentage of single parents have never been married.

75. The problem of reduced income is compounded if one or both parents starts a new family after separation without an increase in available income. Whatever income the family had will now have to provide for the needs of even more people. See D. CHAMBERS, MAKING FATHERS PAY 42-66 (1981) (reviewing the effects of divorce on standard of living).

76. See generally D. CHAMBERS, *supra* note 75 (acknowledging the realities of nonpayment in the present system); Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1253-56 (1981) (citing several studies concerning problems with noncompliance).

77. The recently enacted federal Child Support Enforcement Amendments of 1984, 42 U.S.C. § 666(a)-(b) (Supp. 1984), "mandate that the states enact a number of specific remedies and procedures to improve their child support enforcement programs as a condition of continued state eligibility to participate in AFDC. [The amendments] also seek to equalize the treatment of AFDC and non-AFDC families." Dodson & Horowitz, *The Child Support Enforcement Amendments of 1984: New Tools for Enforcement*, 10 FAM. L. REP. (BNA) 3051, 3051-62 (1984). In general terms, the federal amendments mandate that all states use the child support enforcement techniques found most effective in those states that currently use them, including income withholding, liens, bonds, tax refund intercepts, and provision of information on delinquent child support payments to credit reporting agencies. See *infra* note 293 and accompanying text (discussing higher compliance rates in cases involving parental agreements).

78. D. CHAMBERS, *supra* note 75, at 127-28.

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erage rate and that men who had no contact with their children had the lowest rate of payment.<sup>79</sup> Chambers also found that conflicts over visitation resulted in lower child support payments,<sup>80</sup> to the child's detriment. Yet these conflicts presented only short-term problems, easily remedied, because both parents, in essence, cared enough about the child to find the matter of visitation important, and therefore could be persuaded to care about the welfare of their child.<sup>81</sup>

Evidence from studies of families in joint custody arrangements confirm the link Chambers identified between parental involvement with the child after divorce and the likelihood of payments of child support.<sup>82</sup> Deborah Leupnitz compared sixteen sole custodial mothers, sixteen sole custodial fathers, eighteen parents with joint custody, and the ninety-one children involved in these various custodial arrangements through in-depth interviews and comparison of results on standard psychological tests. She reports:

*Fifty-six percent of the single-custody mothers had to return to court because their ex refused to pay child support. One-third of these women had not been successful at the time of their interview in receiving any money from their ex. In contrast, none of the joint custody parents had returned to court over money. Although there were serious disagreements over money among the joint parents, they were able to negotiate them out of court. This is clearly preferable, both in terms of emotional stress and the costs of legal battles.*<sup>83</sup>

Other studies generally support the findings of Chambers and

79. Though Chambers cautions against drawing sweeping conclusions from his limited sample, he observed:

For most men, both payments and visitation probably flow from a common source—affection for the child. In some cases, perhaps many, visitation may help induce continued payments by keeping the child's needs vivid in the father's mind. If the latter is the case, policies that encourage visitation may help produce higher collections.

*Id.* at 128.

80. "For many divorced couples, visitation is the one event within the mother's control that she knows the father cares about, and child support payments are one event within the father's control that he knows the mother cares about." *Id.*

81. "[M]en who fight over visitation are those who are, on the whole, involved with their children and that involvement is a good sign for high lifetime [child support] payments." *Id.* at 129.

82. These studies generally focus on postdivorce families in which the parents have agreed to joint custody arrangements before trial, indicating a higher level of cooperation than parents who litigate custody and support arrangements. This issue is discussed extensively *infra* subpart II(A)(2)(a), as is the comparative emotional impact of joint and sole custody on children. The present point is only that more extensive involvement by parents with their children after divorce, as symbolized by joint custody arrangements, seems to result in fewer problems in enforcing child support obligations. Indeed, the available evidence indicates that parental agreement of *any* kind on how child support obligations are to be satisfied leads to higher levels of child support payments than if obligations are imposed by court order. See *infra* note 293 and accompanying text.

83. D. LEUPNITZ, CHILD CUSTODY: A STUDY OF FAMILIES AFTER DIVORCE 67 (1982) (emphasis in original).

Leupnitz,<sup>84</sup> and point to the not-surprising conclusion that a child is more likely to receive financial support from his or her divorced father if the father has a meaningful relationship with him or her.

(c) *School performance.*—The current research in this area indicates that children in one-parent families do not perform as well in school as children in intact families. A 1980 survey of 18,000 students in twenty-six elementary and secondary schools in fourteen states conducted by the National Association of Elementary School Principals (NAESP) gauged the academic achievement and school performance of children in one- as compared to two-parent families.<sup>85</sup> The NAESP study confirmed that

children from one-parent families have more trouble in school than do children whose families fit what we think of as the traditional family mode. . . . [A]s a group, one-parent children show lower achievement and present more discipline problems than do their two-parent peers in both elementary and high school. They are also absent more often, late to school more often and may show more health problems as well.<sup>86</sup>

In the elementary schools surveyed, thirty-eight percent of children living with only one parent were classified as low achievers compared to only twenty-three percent of the children from two-parent families. Only seventeen percent of children living with one parent were ranked as high achievers in elementary school as compared to thirty percent of the children from two-parent families. The patterns of achievement in the secondary schools echoed the elementary school results.<sup>87</sup>

The findings from NAESP as well as other studies<sup>88</sup> on the effects of

84. See, e.g., Grief, *Fathers, Children and Joint Custody*, 49 AM. J. ORTHOPSYCHIATRY 311, 319 (1979) (concluding that fathers with joint custody are more likely to involve themselves in all aspects of their child's growth development); Steinman, *The Experience of Children in a Joint Custody Arrangement: The Report of a Study*, 51 AM. J. ORTHOPSYCHIATRY 403, 408 (1981) (stating that in the study of joint custody parents, financial arrangements were generally cooperative and individually tailored to their capabilities).

85. NAESP Staff Report, *One Parent Children and Their Families*, 60 PRINCIPAL 31 (1980). The study did not distinguish between children in one-parent families because of divorce or separation pending divorce from those in that situation for other reasons.

86. *Id.*

87. In secondary schools, 34% of the one-parent students were low achievers as compared to 22% of the two-parent children; 26% of one-parent children were high achievers as compared to 38% of their two-parent peers. *Id.* One-parent children are absent from secondary school an average of 11.1 days per semester, while their two-parent counterparts miss school an average of 7.16 days a semester. One-parent children are significantly more likely to be late to school. They are also more likely to be truants or drop-outs. Because of this, one-parent children seem to be more likely to be suspended or expelled. *Id.* at 33-34.

88. Wallerstein and Kelly conducted interviews with the children and parents in the divorced families they followed and with school personnel, and they reported significant drops in school performance among the children in their sample, especially severe among adolescents. The decrease in

divorce on children's academic achievement are confirmed by yet another source: the body of research on the effect of father absence on a child's cognitive development. Many divorces result in reduced involvement by fathers with their children over time.<sup>89</sup> The absence of father involvement is associated generally with lower cognitive achievement.<sup>90</sup>

(d) *The child's need for speedy stability.*—When parents divorce, the child needs stability of environment through continuing access to the educational, emotional, and financial resources of both parents. This stability, however, must be created as quickly as possible after the parents' physical separation. A child has a special sense of time unlike that of an adult,<sup>91</sup> and the younger the child, the more distorted is this sense of time. To a very young child a week can be perceived as a year, a month, a decade. Furthermore, a child is far less capable of bearing uncertainty and risk than an adult. The sooner the child's postdivorce family environment achieves equilibrium, the more likely the child will be able to surmount the crisis the parental separation created.<sup>92</sup>

2. *Sole Versus Joint Custody.*—The child thus has a major interest in continuing relationships with both parents after divorce. In a perfect world that allows parents to dissolve imperfect marriages, joint custody seems to be an ideal form for a child's postdivorce family. Empirical observations of the problems of sole custody from the perspective of the child's interests reinforce this intuitive response.

Sole custody's major problem results from the adversarial battle it often creates. The state designates one parent as the "winner" and the other the "loser" of a prize—the child. The loser tends to internalize his or her status as the less important parent and withdraws from the child's

capacity to perform in school accompanied the depression and anger the children felt as a result of the divorce. J. WALLERSTEIN & J. KELLY, *supra* note 62, at 264-84. Furthermore, in the immediate aftermath of the physical separation occurring after divorce, the teachers of two-thirds of the students involved in the study noticed a significant change in behavior generally described as a new and unaccustomed "restlessness"; to one degree or another these children had difficulty concentrating on their work. *Id.* at 267-68.

A large percentage of the children Wallerstein and Kelly studied raised their school performance level within a year after the divorce, but even five years after the divorce a significant subgroup was still intensely angry and school performance still suffered. *Id.* at 282-84.

89. M. ROMAN & W. HADDAD, *supra* note 13, at 74-75.

90. Biller, *supra* note 61, at 506-07; Clingempeel & Reppucci, *supra* note 23, at 109; Lamb, *supra* note 22, at 21-23.

91. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 43 (1973).

92. See Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1132-33 (1978) (discussing the importance of swift adjudication in child custody disputes).

life,<sup>93</sup> running away from the reminder of an extremely traumatic experience. A kind of "repetitive farewell" syndrome sets in every time visitation ends, with the visiting parent feeling rejected as the loser once again. Rather than face the pain, these parents tend to decrease their visitation and contact with the child.<sup>94</sup> Loss of financial, educational, and emotional support follows.

Some parents do overcome the feelings associated with being designated the less important parent, and they visit and support their children regularly. For them, the problem centers on the nature of their relationship with their children; it is not fully that of parent and child.<sup>95</sup> Their time with the child, usually limited to weekends and holidays, verges on the fantasy world; the "Disneyland Daddy" syndrome develops and the child perceives his or her relationship with the visiting parent as pure fun and games.<sup>96</sup> This syndrome contributes to another defect of sole custody—responsibility for parenting is placed on one parent who must balance its demands with economic and social stress.<sup>97</sup> Several studies suggest that joint custody arrangements mitigate these problems of sole custody, at least where the parents agree to such an arrangement without court order.<sup>98</sup>

When the parents agree to a joint custody arrangement, such an arrangement fosters the child's continuing relationship with both parents better than a sole custody arrangement. Debate, however, centers on how much coercion the state should wield in promoting joint custody to parents who will not initially agree to joint custody for emotional and financial reasons.

(a) "*Voluntary*" and "*involuntary*" joint custody.—A prominent school of psychological theory suggests that if a court imposes joint custody over the objections of one or both parents, the child's psychological environment will become unstable because of continuing conflict between the parents. The classic statement of this argument appears in

93. See Jacobs, *supra* note 61, at 1236-37. See generally M. ROMAN & W. HADDAD, *supra* note 13, at 74-75 (discussing effects of divorce on the parents).

94. Jacobs, *supra* note 61, at 1237; Scott & Derdeyn, *supra* note 56, at 459-60 & n.20.

95. See *supra* text accompanying notes 76-77, 93.

96. Some visiting parents—in an effort to make brief visits as pleasurable as possible—do not take responsibility for imposing rules and limits on the child's behavior, which often creates an unrealistic and undesirable contrast between the child's life with the custodial parent and the fantasy life with the visitor. The child has one parent and a fairy godfather.

97. See *supra* notes 63-84 and accompanying text.

98. See D. LEUPNITZ, *supra* note 83; Grief, *supra* note 84; Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C.D. L. REV. 739 (1983). See generally Clingempeel & Reppucci, *supra* note 23 (reviewing several studies concerning single parent custody).

Goldstein, Freud, and Solnit's *Beyond the Best Interests of the Child*.<sup>99</sup> The authors argue that if the parents cannot agree on a custody arrangement themselves, the child's welfare requires that a single custodian be chosen. Their theory asserts that a consistent relationship with one adult authority figure is a precondition to the child's development of stable relationships with other adults in later life. A child cannot relate well to two adults in conflict because of the parents' inability to agree on custody arrangements. When parents do not agree on custody, the task of the legal system is simply to provide a rule of decision that protects the stability of the child's ongoing emotional relationships with his "psychological" parent.<sup>100</sup> Goldstein, Freud, and Solnit contend that, once the court identifies this parent, the child's interest in emotional stability requires that the court grant the psychological/custodial parent the right to make all decisions for the child, including the decision whether the other parent should even be allowed to visit the child.<sup>101</sup>

*Beyond the Best Interests of the Child* does not explicitly state whether the authors would allow the legal system to ratify parents' negotiated joint custody arrangements.<sup>102</sup> In later writings, however, the authors indicate that parents should be able to negotiate any custody arrangement they wish.<sup>103</sup> Presumably, then, the authors do not believe that divorcing parents are always in such conflict that joint custody will inevitably upset the child's psychological equilibrium. Yet their basic assumption divides the universe of divorcing parents into two parts: parents who agree voluntarily on joint custody arrangements and are thus capable of a continuing relationship, and those who do not and are thus in such great conflict that the state should not impose joint custody on

99. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 91, at 37-39. The book has been extensively cited by courts and criticized by social scientists. Crouch, *An Essay on the Critical and Judicial Reception of Beyond the Best Interests of the Child*, 13 FAM. L.Q. 49 (1979).

100. One "who, on a continuing, day-to-day basis, through interaction, companionship, interplay and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 91, at 98.

101. *Id.* at 38. The Goldstein, Freud, and Solnit premise has been severely criticized: "[T]he slender volume, *Beyond the Best Interests of the Child*, is an academic example of over-reacting and replacing inflexibility with rigidity." Foster & Freed, *supra* note 16, at 331.

102. In *Beyond the Best Interests of the Child*, the authors indicate that the determination of the "custodial parent" will be made "either by agreement between the divorcing parents or by the court in the event each claims custody." J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 91, at 38 n.\* (emphasis added). The authors do not mention the possibility of joint custody or even agreements about visitation. The implication of their argument may be that a court should not approve a parental separation agreement with provisions concerning custody unless it provides for a sole custodian with power to control the noncustodial parent's visitation rights.

103. See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 12 (1979) (urging a "policy of minimum coercive intervention by the state"); see also J. GOLDSTEIN & A. SOLNIT, *DIVORCE AND YOUR CHILD: PRACTICAL SUGGESTIONS FOR PARENTS* 41-46 (1984) (describing issues parents should consider in devising joint-custody agreements).

them. Pretrial agreement becomes the test of whether the parents can handle joint custody. Absent an agreement, the best interests of the child require that the state should declare a winner and grant sole custody.

In the dozen years since the publication of *Beyond the Best Interests of the Child*, the book has become the target of severe criticism from social scientists who question its methodology, its conclusions, and the benefits of adopting its premise. As one critique starkly stated, "[t]he book's greatest utility may be as an example of the wrong way to employ social science to solve problems of social policy."<sup>104</sup>

Three "major flaws"<sup>105</sup> have been identified in Goldstein, Freud, and Solnit's research methodology: (1) the authors were casual in their research methods, (2) they ignored pertinent findings of other studies, and (3) they never described the group of children from whose experiences the authors drew their conclusions.

Only minimal data were presented in support of their position. In the few instances in which data were provided, the design limitations of the studies were overlooked. Indeed, [other social scientists] stated that the authors of *Beyond the Best Interests of the Child* have shown an overall tendency to "disregard the limitations on the inferences which can be drawn from the social science evidence they introduce."<sup>106</sup>

The subjects of the research on which Goldstein, Freud, and Solnit based their conclusions were apparently *infants*<sup>107</sup> who were being placed in foster or adoptive homes because they had been abused or neglected in the homes of their biological parents, or had been abandoned. As noted by the Group for the Advancement of Psychiatry, the needs of these deeply troubled children whose parents have wounded or abandoned them are not the same as the child involved in a custody dispute between two fit parents both seeking the greater share of involvement in the child's postdivorce life:

The proposals advanced in their [Goldstein, Freud, and Solnit's] work appear valid, as they apply to adoption and foster care . . . . The extension and extrapolation, however, to custody disputes in divorce is not validated. . . . [O]ur disagreements with these authors are basic.

. . . .

104. Katkin, Bullington & Levine, *Above and Beyond the Best Interests of the Child: An Inquiry into the Relationship Between Social Science and Social Action*, 8 LAW & SOC. REV. 669, 669 (1974).

105. Felner & Farber, *Social Policy for Child Custody: A Multidisciplinary Framework*, 50 AM. J. ORTHOPSYCHIATRY 341, 343 (1980).

106. *Id.* (citations omitted).

107. "The importance of continuity is . . . one of the 'findings' . . . . This follows from the fact that the 'findings' derive from studies of young infants." Kadushin, *Beyond the Best Interests of the Child: An Essay Review*, 48 SOC. SERVICE REV. 508, 513 (1974).

## Cooperative Custody

. . . [W]e noted above that the empirical work . . . demonstrates that the child from early infancy on can and often does have more than one psychological parent. . . .

What these authors do not recognize is that, in these disputes, we are usually dealing with two psychological parents, a mother and a father. . . . The child needs both parents.<sup>108</sup>

The authors of *Beyond the Best Interests* have also been castigated for their disregard for other research. "[The book] does not contain a single reference to any empirical study in the extensive literature on adoption and foster placement. In fact, its references to material from the social sciences include only a single citation to nonpsychiatric or nonpsychoanalytic literature."<sup>109</sup>

Second, other studies undertaken after the publication of *Beyond the Best Interests* have produced empirical evidence that contradicts the assumptions of the earlier book. A major premise of the book was that a child can have only one psychological parent: "The Wallerstein and Kelly study provides substantial evidence contradicting the Goldstein, Freud and Solmit position that a noncustodial parent will have difficulty in serving as an object for love, trust and identification for the child."<sup>110</sup>

Finally, commentators have questioned the benefits of adopting the *Beyond the Best Interests* premise that giving one parent all powers over the child is truly in the child's best interests.

[T]he visitation proposal advocated by Goldstein *et al.* might actually lead to an increase in parental strife and custody battles in court. . . . [O]ne possible unintended consequence of the recommendation of Goldstein *et al.*, due to the failure to consider the adversarial nature of the legal system, may be to encourage a situation that increases parental strife, certainly not the "least detrimental alternative" for the child.<sup>111</sup>

108. COMMITTEE ON THE FAMILY, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, DIVORCE, CHILD CUSTODY, AND THE FAMILY 77-78 (1980) (footnote omitted).

109. Katkin, Bullington & Levine, *supra* note 104, at 672.

Studies . . . are cited without acknowledging the existence of major criticisms both of the methodologies used and the conclusions reached in those studies. In consequence, the authors are in the position of urging the enactment of legislation based not so much on "social science facts" as on "social science issues in controversy."

*Id.* at 673 (citations omitted). "Many of the studies cited by Goldstein [et al.] in support of their contention that separation is harmful for children do not actually deal with the concept of separation, but with parental deprivation." *Id.* at 675. "The book's greatest importance . . . is in its failures. . . . Decisions that might influence the lives of millions need to be based on more satisfactory data and on a more thorough examination of alternatives . . ." *Id.* at 683.

As another critic stated, "[T]he book rests its case on one principal footnote listing a limited number of studies, all of which are more than a decade old, supplemented by a few scattered, additional, more recent citations." Kadushin, *supra* note 107, at 512. "In many respects I think the book creates more problems than it pretends to solve." *Id.* at 509.

110. Cochran & Vitz, *supra* note 40, at 353.

111. Felner & Farber, *supra* note 105, at 345. As another critique put it: "Goldstein [et al.]

Despite these critical comments, Goldstein, Freud, and Solnit's analysis underlies the views of some courts, legislators, and commentators about the range of cases in which joint custody is appropriate if the parents do not agree on it. The leading case on the subject in New York, *Braiman v. Braiman*,<sup>112</sup> holds that the failure of parents to agree on joint custody generally forecloses it as an option for courts to order.<sup>113</sup>

propose major changes in the laws that regulate families without any overt recognition that their proposals might cause undesirable disruptions in existing social and political arrangements." Katkin, Bullington & Levine, *supra* note 104, at 678.

112. 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978). For recent comparable views from other courts, see *In re Pool*, 118 Ill. App.3d 1035, 455 N.E.2d 887 (Ill. App. Ct. 1983); *Burchell v. Burchell*, 10 FAM. L. REP. (BNA) 1670, 1671 (Ky. Ct. App. 1984) (concurring and dissenting opinion); *Gonzalez v. Gonzalez*, 672 S.W.2d 887 (Tex. Civ. App.—Corpus Christi 1984, no writ). *But see* *Taylor v. Taylor*, 609 Md. App. 268, 275, 482 A.2d 164, 167 (Md. Ct. Spec. App. 1984) (rejecting suggestion that joint custody should never be awarded when parents are actively litigating because such a holding would amount "to a holding that it is an abuse of discretion to award joint custody in a contested custody action").

113. The facts in *Braiman* were not conducive to a court's taking a liberal view of joint custody. The appeal resulted from a custody modification proceeding brought by a father after the mother had sole custody of two children under a separation agreement for two years. The father initiated the modification proceeding when the mother sought to leave the state with the children. Accusations of unfitness by both the mother and the father abounded at the trial, centering on the father's alleged gambling and physical abusiveness and the mother's alleged sexual promiscuity in front of the children. Witnesses supported each parent's claims. The trial court awarded sole custody to the father. The intermediate court of appeal reversed and awarded joint legal custody, with the children residing weekdays with the mother and weekends with the father. The New York Court of Appeals stayed this order, pending consideration of the father's appeal. The father thus retained primary physical and legal custody. During the period of the stay, approximately two years, the father defied a court order and denied the mother visitation; the mother apparently disappeared. The Court of Appeals remanded the case to the trial court for a new hearing and recommended that the trial court appoint a guardian *ad litem* to investigate and independently recommend a custody plan.

Against this background of intractable and increasing interparental hostility, the Court of Appeals took the opportunity to provide guidelines to lower courts to decide when joint custody awards were and were not appropriate. The Court stated that "joint custody is . . . primarily . . . a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion." 44 N.Y.2d at 589-90, 378 N.E.2d at 1021, 407 N.Y.S.2d at 451. Although it mentions the advantages of joint custody, the *Braiman* opinion emphasizes the difficulties and disadvantages in such an arrangement. "Children," the *Braiman* court declares, "need a home base . . . [p]articularly when alternating physical custody is directed, [because] such custody could, and would generally, further the insecurity and resultant pain frequently experienced by the young victims of shattered families." *Id.* at 589, 378 N.E.2d at 1021, 407 N.Y.S.2d at 451 (emphasis added).

The *Braiman* court went on to emphasize that joint custody is a disfavored and closely scrutinized exception to the sole custody system:

*In the rare case*, joint custody may approximate the former family relationships more closely than other custodial arrangements. It may not, however, be indiscriminately substituted for an award of sole custody to one parent. *Divorce dissolves the family as well as the marriage, a reality that may not be ignored.*

*Id.* at 591, 378 N.E.2d at 1021, 407 N.Y.S.2d at 452 (emphasis added). The restrictive language and skepticism about joint custody that permeates the opinion indicates that the court would favor giving either parent a veto over joint custody. At the very least, the fact that one parent objects to joint custody is a presumptive indication that it "will not work" in that particular family and that a sole custody/visitation arrangement should be ordered. Indeed, *Braiman* presumably could be read as holding that the court should modify a joint custody award even if the parents initially agreed to it, because the very fact that one of the parents no longer wishes to continue in the joint custody arrangement would be a strong indication of their lack of ability to cooperate.

## Cooperative Custody

The rigid distinction between “voluntary” and “imposed” joint custody arrangements both Goldstein, Freud, and Solnit and the *Braiman* court make, however, does not take the “shadow of law” insight into account.<sup>114</sup> Although most divorcing parents make custody arrangements for their children out of court,<sup>115</sup> the formal legal system provides an important source of bargaining endowments and social values that shape the outcomes of out-of-court settlements. As Marc Galanter recently wrote:

Adjudication provides a background of norms and procedures against which negotiation and regulation . . . takes place. This contribution includes, but is not exhausted by, communication to prospective litigants of what might transpire if one of them sought a judicial resolution. Courts communicate not only the rules that would govern adjudication of the dispute but possible remedies and estimates of the difficulty, certainty, and cost of securing particular outcomes.<sup>116</sup>

Substantive law favoring sole custody may give the parent likely to be designated sole custodian a significant incentive to withhold agreement to joint custody in return for financial concessions.<sup>117</sup> It may also precipitate a negotiating game of strategic “chicken” between the parents, leading to a trial even though both would cooperate in a joint custody arrangement if custody were the only issue for them to resolve in pretrial negotiations.<sup>118</sup>

114. See Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (discussing the impact of the legal system on negotiations which occur outside the courtroom).

115. No accurate method calculates exactly the percentage of custody disputes that are settled by self-help by one parent or the other; negotiated by the parents themselves with or without the participation of lawyers; filed in court but settled before trial with or without the intervention of mediator or outside evaluator; or actually tried. Best estimates are that less than ten percent of custody cases filed in court are actually tried. See *id.* at 951 & nn.2-3.

116. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 32-33 (1983).

117. Assume that a mother is likely to be awarded sole custody by a court after trial because the jurisdiction has adopted the Goldstein, Freud, and Solnit standard and she is likely to be found to be the child's “psychological parent.” Assume further that under the operative rules of the jurisdiction, the father will likely not be ordered to pay maintenance to the mother because she is capable of financial self-support. The father wants joint custody; the mother wants money. The mother believes, however, that the father is a wonderful parent and that it is important for the children to have a relationship with him after divorce. She is also favorably disposed toward joint custody to relieve herself of some of the pressures of being a sole custodial parent. The father too is willing to cooperate with the mother in custodial arrangements. Because of the mother's incentive to trade her potential sole custody award for greater financial concessions from the father, however, the mother may disguise her cooperative attitude toward the father and withhold agreement to joint custody unless the father offers to pay maintenance. The father may not make such an offer because he feels the mother's financial demands are too high.

118. For the converse hypothetical to the one set forth *supra* note 117 demonstrating how a substantive law preference for joint custody will disadvantage a parent who seeks sole custody in

If the substantive law, however, favors joint custody unless one of the parents is "unfit," parents would have far less incentive to oppose joint custody: if they fail to agree and wind up in court, the final order will probably be joint custody.<sup>119</sup> The distinction between "voluntary" and "imposed" joint custody on which Goldstein, Freud, and Solnit and *Braiman* rely does not do justice to the complex interplay between custody and financial issues in divorce settlement negotiations between divorcing parents and to the influence of substantive standards on the balance of negotiating power. Some parents will reach agreement on joint custody before trial regardless of the incentives created by the substantive law; others will never agree, regardless of such incentives.<sup>120</sup> The critical group is those parents who will be influenced by law to reach joint custody arrangements. A preference for sole custody in the substantive law, however, presumably moves this marginal group in the other direction.

(b) *Parental conflict and joint custody.*—Although "voluntariness" of parental agreement to a custody framework is not a dispositive issue in the sole versus joint custody debate, the amount of continuing parental conflict likely under either legal form does control. A high level of continuing parental conflict seems to be a key factor in impairing a child's adjustment to parental divorce.<sup>121</sup> It also significantly influences how well a child develops even if the parents do not separate. Some level

divorce settlement negotiations, see Scott & Derdeyn, *supra* note 56, at 477-79. The disadvantaged parent in the Scott and Derdeyn hypothetical is a long-term homemaker with no job skills. Scott and Derdeyn argue that a joint custody rule is unfair to her because she spent more personal effort on raising the children than her husband, who "pursued an ambitious career as a lawyer." *Id.* at 483. Nowhere in their analysis of the "fairness" of competing custody rules do Scott and Derdeyn examine whether a sole custody rule is fair to the ambitious lawyer under the partnership principle of marriage. See *supra* notes 37-39 and accompanying text.

119. Negotiating power on financial issues would also change in the father's favor, raising questions of public policy. See *infra* text accompanying notes 181-83.

120. Based on her ten-year study of her sample of divorced families, Judith Wallerstein believes that

[t]he troika of forces that seems to propel many parents who become trapped in chronic litigation over children includes the sense of outrage at the betrayal or exploitation at the hands of the other parent, a regressive dependence on the child, and an inability to tolerate the absence of the child without suffering acute anxiety.

Wallerstein, *The Overburdened Child: Some Long-Term Consequences of Divorce*, 19 COLUM. J.L. & SOC. PROBS. 165, 178 (1985). The parents that Wallerstein describes, like Mr. and Mrs. Braiman, see *supra* note 113, may well not be suited for joint custody. The mythology and war stories such parents create, however, should not obscure the fact that the cooperative custody system described in this Article does not pretend to be able to influence such people. The aim of the system is to help parents who can be influenced develop a cooperative postdivorce parental relationship. We do not know how representative of divorcing parents the Braimans are and should not accord them undue influence in shaping custody policy.

121. Most of the relevant research is summarized and cited in Scott & Derdeyn, *supra* note 56, at 490-92 and accompanying notes.

of conflict is present between parents in many intact families and many children seem able to cope with it.<sup>122</sup> Conflict between some parents may be reduced, not increased, by divorce, presumably benefitting the children's emotional adjustment. Conversely, conflict between other parents may be increased by divorce, because the incentive to compromise may thereby be dissolved.<sup>123</sup>

Analysis of conflict in sole and joint custody arrangements must begin with the recognition that some risk of parental conflict after divorce must be tolerated. The only way to eliminate all risk of conflict between parents after divorce is to take the Goldstein, Freud, and Solmit approach: choose one parent as the child's custodian, give the custodian the right to decide arbitrarily whether the noncustodial parent has any role in the child's life, and hope that the noncustodial parent does not snatch the child. A parent's right to visit and maintain a relationship with his or her child—and the child's right to know both parents—makes such a solution untenable. Indeed, one may view these rights as constitutionally protected.<sup>124</sup> Visitation benefits both parent and child, and should be vigorously enforced by the state. The courts do now enforce visitation rights, thereby agreeing to at least some level of continued conflict between parents. Given such a tolerance, the question then turns on which substantive standards engender more parental conflict—sole or joint custody.

Few studies explore how legal forms of custody and presumptions influence interparental conflict after divorce. The available research indicates that conflict in families that agree to joint custody without court order is generally lower than in families that end up with a sole custody arrangement.<sup>125</sup>

The level of continuing parental conflict in situations in which a court has imposed sole custody is very high, as measured by relitigation rates.<sup>126</sup> Unpublished data from a study of custody cases in the Minnesota court system suggest that the greatest proportion of cases that return to court for postjudgment modification are those in which the court de-

122. M. ROMAN & W. HADDAD, *supra* note 13, at 52.

123. See Scott & Derdeyn, *supra* note 56, at 490-92.

124. See *infra* note 151 and accompanying text.

125. See *supra* note 98 and accompanying text; see also Steinman, Zimmelman & Knoblauch, *A Study of Parents Who Sought Joint Custody Following Divorce: Who Reaches Agreement and Sustains Joint Custody and Who Returns to Court*, 24 J. AM. ACAD. CHILD PSYCHIATRY 554 (1985).

126. One study reviewed court records for 148 consecutive divorce cases, 105 of which involved children. Although only 5% of the cases not involving children returned to court, 51% of the cases involving children resulted in relitigation. Moreover, in 31% of the 51%, child related issues were relitigated two to ten times. Westman, Cline, Swift & Kramer, *Role of Child Psychiatry in Divorce*, 23 ARCHIVES GEN. PSYCHIATRY 416, 417 (1970).

terminated the child's custody plan after a full adversary hearing.<sup>127</sup>

Data directly comparing conflict in mandated joint custody and mandated sole custody awards are extremely scarce. Such comparisons are complicated by different definitions of joint custody, which range from equally shared physical and legal custody to shared legal custody with the physical custody pattern in the family approximating a traditional primary caretaker/visitation award.

Among the limited data available are the results of a recent empirical study of 414 custody cases in a Los Angeles trial court over a two year period.<sup>128</sup> Based on their analysis of the case records, investigators concluded that "[i]n those cases which were returns to court, the proportion of relitigation for joint custody families was one-half that of exclusive custody families."<sup>129</sup> As is true with most studies of the effects of legal arrangements on postdivorce conflict between parents, the authors found it impossible to control for all variables that might have affected their sample. They acknowledge, for example, lower relitigation rates for joint custody arrangements may have resulted from the court awards of joint custody to parents who seemed more likely to cooperate without future judicial supervision. Other aspects of their data, however, suggest that more sole custody awards in their sample were based on parental agreement than were joint custody awards.<sup>130</sup>

These limited data suggest that the imposition of joint custody awards would not result in more conflict than the already high levels of continuing parental conflict in mandated sole custody arrangements. More research is necessary to determine if parents on whom joint custody is imposed can adjust to it over time as they go through the stages of adjustment to the divorce and come to recognize the benefits of joint custody for the child.<sup>131</sup> When the alternative of a parent's using the

127. The Minnesota data is reported in ADVISORY COMMISSION ON FAMILY LAW TO THE CALIFORNIA STATE SENATE SUBCOMMITTEE ON THE ADMINISTRATION OF JUSTICE, REVISED DRAFT REPORT ON CONCILIATION COURTS AND COUNSELING 15 (Jan. 17, 1979) (on file with the author).

128. Ilfeld, Ilfeld & Alexander, *Does Joint Custody Work? A First Look at Outcome Data of Relitigation*, 139 AM. J. PSYCHIATRY 62 (1982).

129. *Id.* at 65.

130. *Id.* at 64.

131. Scott and Derdeyn overstate by asserting that "[n]o existing empirical evidence supports this hope that joint custody will reduce conflict between parents or that most parents will be able to separate hostility toward the former spouse from parental concerns." Scott & Derdeyn, *supra* note 56, at 492. They dwell on the acknowledged research design difficulties of the Los Angeles and similar joint custody studies, *see supra* note 61, and do not take into account the similar research design-difficulties in studies that emphasize how much conflict occurs between parents after divorce. *Id.* at 492-94. Scott and Derdeyn also overlook the fact that there is no evidence undermining the hope that mandated joint custody will facilitate future parental cooperation and that decision theory gives that hope some basis. Finally, Scott and Derdeyn do not consider the evidence that compares the outcomes of custody mediation programs with custody disputes settled in the shadow of the

power of a court to enforce her will is blocked by a joint custody award, one may speculate that experience in having to work out conflict may develop both parents' ability to compromise and negotiate. Decision theory suggests that people who have to deal with each other over the long-term on a range of issues are more likely to cooperate than those whose relationships are less intertwined.<sup>132</sup> If so, a joint custody arrangement which forces parents into a long-term relationship over a period of time may, in the end, promote cooperation rather than inflame conflict.

(c) *The child's responses to joint custody.*—The way in which a child responds to a joint custody arrangement is the ultimate test of the arrangement's success. Based on psychoanalytic theory, certain authorities argue that the child needs the emotional stability of a solid relationship with only one parent.<sup>133</sup> This argument arises from the fear that the child will face emotional instability from shifting from one parent to the other. The limited empirical evidence from studies of children in joint custody arrangements voluntarily agreed to by both parents suggests that continuity of emotional relationships with both parents seems to be a more important value to most children than continuity of physical environment.<sup>134</sup> Most children in joint custody arrangements are able to keep complex schedules in mind and develop a sense of mastery about switching homes. In Deborah Luepnitz' study, only two of twenty-five children in joint custody arrangements expressed any confusion about their living arrangements at all. "Not only were most joint children not confused," Luepnitz reports, "but three-quarters were able to cite advantages to the two-household lifestyle. They described their arrangements as 'more fun,' 'more interesting' or 'more comfortable.'"<sup>135</sup> Susan Steinman reports similar results. Only about twenty-five percent of the children in joint custody studies—usually girls in the four-to-five-year-old age group and boys in the seven-to-nine-year-old age group—were anxious and insecure about switching homes.<sup>136</sup> These findings "to some extent, attenuat[e] concerns about the deleterious effects of separations

adversary system. Such evidence suggests that mediation promotes more lasting joint custody outcomes. See *infra* notes 306-23 and accompanying text. It is important to remember that this Article advocates a combined substantive and procedural approach to promoting cooperative custody. Such a combined approach would provide a stronger incentive for cooperation between divorcing parents than would a substantive or procedural change alone.

132. See R. AXELROD, *THE EVOLUTION OF COOPERATION* (1984) (indicating that continuing interaction makes cooperation more likely).

133. See *supra* notes 22-23, 40-43, 99-110 and accompanying text.

134. See sources cited *supra* note 98.

135. D. LEUPNITZ, *supra* note 83, at 47.

136. Steinman, *supra* note 98, at 746-47.

and reunions in joint custody."<sup>137</sup>

The assumption that a child cannot adjust to differing rules and adult authority figures remains questionable. Children in school are able to adjust to different sets of rules and expectations imposed by different adults in the classroom and the home without suffering crippling conflict. Also, children spend considerable time under the control of adults other than their parents as they get older. Therefore, there does not seem to be any reason to assume that most children cannot adjust to different sets of rules imposed by divorced parents.

Although it may be theoretically desirable for children to have one set of norms, the issue is whether the benefits of a sole custody arrangement outweigh the costs. Joint-custody children may be able to manipulate rules more easily than their sole-custody counterparts; yet, on the other hand, sole-custody parents tend to have more difficulty disciplining than parents in joint-custody families largely because they feel overwhelmed by the task of child raising alone. Further, joint-custody parents can continue their role as parents after divorce, rather than one as a parent and the other as an "indulging aunt or uncle."<sup>138</sup>

Overall, the available data provide almost no empirical support for the proposition that mandated sole custody is generally in the best interests of the child. There are risks to children in adopting either sole or joint custody given the current state of knowledge. One risk is that of causing confusion for some children and placing them in the middle of permanently embattled parents. Another risk is that of creating a legal regime and a parental mindset that discourages the involvement of both parents in the child's life after divorce.

#### *B. Dealing with Empirical Uncertainty: Deregulation and Regulation of Judicial and Parental Custody Decisions*

The question then is how to set policy in the face of continuing empirical uncertainty about what type of custody arrangements are in the best interests of the child. There are two possible paths to take. One path is to deregulate custody decisions by judges by eliminating all presumptions about what custody arrangements are in the best interests of the child. This approach would allow judges in contested cases to shape custody orders on a case-by-case basis, choosing sole or joint custody or elements of each. Such deregulation of custody decisions would be to

137. Clingempeel & Reppucci, *supra* note 23, at 112. Interestingly, no complete study of sole custody with its visitation rights has ever been completed with regard to this question.

138. D. LEUPNITZ, *supra* note 83, at 96-97.

allow parents complete discretion to negotiate custody settlements, subjecting them to little or no state scrutiny.

A second approach is to create more certainty in custody law by enacting presumptions favoring one kind of custody arrangement. Such a presumption would resolve the empirical uncertainty about what is in the best interests of the child by removing the need to decide that question in the great percentage of cases.

### 1. *Deregulation*

(a) *Judicial deregulation.*—One possible resolution to the empirical uncertainty is to eliminate any custody preference. This approach would give a court authority to impose sole or joint custody, or elements of each, over the objections of one or both parents on a case-by-case basis.

Although increasing judicial discretion is certainly a rational approach to empirical uncertainty, several factors caution against this solution. Most judges are skeptical about whether joint custody “works”<sup>139</sup> and are unlikely to impose it over the objections of one parent. Thus, an increase in discretion to choose between joint and sole custody without a presumption in favor of joint custody would result only in a small increase in joint custody plans in contested cases. If joint custody is the right direction in which to move, judicial deregulation would be a small step in the right direction—but, for the most part, it would only continue the sole custody status quo.

An increase in judicial discretion would also increase uncertainty and the potential for arbitrariness. There is little data<sup>140</sup> and no statutory guidelines to help judges choose which seemingly intractably conflicted parents will make mandated joint custody a success. The result of increasing discretion in the absence of standards would likely be arbitrariness of application. Families in identical circumstances could have sole or joint custody “imposed” on them based on the happenstance of which judge decides their particular dispute.

An increase in judicial discretion could also decrease the capacity of parents negotiating a divorce settlement to predict what result a court will impose if they do not reach agreement. Inability to predict the result tends to benefit the parent who is willing and able to take a gamble in

139. See Pearson & Ring, *supra* note 4, at 721-22.

140. A recent study does begin to address the particular problem. See Steinman, Zimmelman & Knoblauch, *supra* note 125, at 561-62. The authors conducted a three-year study of 51 joint custody families and listed the characteristics of those families likely to succeed and the characteristics of those families likely to fail.

court. Given the trauma the family experiences because of custody litigation,<sup>141</sup> increasing the incentive to litigate seems precisely the wrong direction to take. Allowing discretion encourages parents to seek sole custody. Such a position may allow a parent more bargaining room, yet it effectively sets sole custody as a standard. This system would award intransigence, not cooperative parenting.

(b) *Parental deregulation.*—Another possible response to the indeterminacy of which substantive custody rule is in the best interests of the child is to suggest, as Mnookin and Kornhauser do in their landmark article, that parents be free to negotiate whatever custody arrangements they want, trading off desired financial concessions, such as increased property or desired maintenance, for custody arrangements.<sup>142</sup> Freedom to make such trade-offs maximizes the satisfaction both parents have with the resulting arrangements, and is more likely to lead to negotiated settlements. More negotiated settlements, in turn, lead to fewer cases in which the atmosphere between the parents is poisoned by trial combat.

[G]iven the epistemological problems inherent in knowing what is best for a child, there is reason to doubt our capacity to know whether any given decision is a mistake. Therefore, the possibility that negotiated agreements may not be optimal for the child hardly can be a sufficient argument against a preference for private ordering.<sup>143</sup>

Deregulation of parental custody negotiations, however, still takes place within a framework of substantive doctrine to decide cases that cannot be settled by negotiations. We do know that a child is likely to be better off if he has a meaningful relationship with both parents after divorce. As previously discussed,<sup>144</sup> the completely unregulated exchange of custody for money can have precisely the opposite effect.<sup>145</sup> Further-

141. See *infra* notes 194-98 and accompanying text.

142. Mnookin & Kornhauser, *supra* note 114, at 963-65.

143. *Id.* at 958. Mnookin and Kornhauser share the *Braiman* court's skepticism about the range of cases in which court-ordered joint custody is appropriate. *Id.* at 980 & n.99. They do recognize, however, that the state has a "responsibility to inform parents concerning the child's needs during and after divorce" and an "interest in facilitating parental agreement." *Id.* at 958. It is thus likely they would support many of the procedural aspects of the cooperative custody system described in Part V—especially mediation of custody disputes—though not the presumption of joint legal custody this Article advocates. As will be discussed subsequently, although procedural and substantive changes in the way custody disputes are conceived of are inseparable, procedural change is more important. See *infra* text accompanying notes 191-93.

144. See *supra* notes 117-20 and accompanying text.

145. One commentator has suggested that linking custody and money issues in divorce negotiations "come[s] close to active abandonment of ethical propriety insofar as the child's interests are concerned." Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 59 (1969).

more, it is not certain that allowing parents to barter custody for money freely in divorce settlements will in fact promote more parental agreement. The opposite is also possible. Decision theory suggests that if parties reach agreement on a subset of the issues in dispute they can decompose their dispute into more manageable pieces and create a foundation on which subsequent agreements can be built.<sup>146</sup> If, in fact, small agreements can lead to larger ones, then the state (and the child) has a legitimate interest in encouraging parents to reach agreement on some issues by narrowing the range of discretion within which parental bargaining can occur, or by requiring certain issues to be settled before others. Use of presumptive statutory formulae to set the amount of child support each parent has to pay<sup>147</sup> exemplifies how a state can promote parental agreement on a particular issue by narrowing the range of discretion within which parents may bargain.<sup>148</sup>

2. *Regulation by Substantive Custody Presumptions.*—The alternate approach to the empirical uncertainty of whether sole or joint custody is in the best interests of the child is to resolve the uncertainty by creating presumptions that refer to fairness between the parents.

(a) *The "innocent spouse" preference.*—One possible presumption might state that a parent at fault for the dissolution of the family should not be awarded sole or joint custody. Such a presumption may appeal to an abstract sense of "moral justice," but it raises the same problems that existed under the fault concept of divorce.<sup>149</sup> The bitterness and anger resulting from divorces under the fault system would again enter the litigation in order to determine custody. Fault requires that one marital partner or the other be blamed for the break-up of the marriage, but in most cases blame is shared, if the concept is relevant at

146. See R. AXELROD, *supra* note 132, at 131-32; R. FISHER & W. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 72-73 (1982); T. SCHELLING, THE STRATEGY OF CONFLICT 45 (1960); see also M. DEUTSCH, THE RESOLUTION OF CONFLICT 369-70 (1973) (noting that "[l]arger conflicts are more likely to take a destructive turn than small ones," and urging that the conflict be reduced by diminishing the perceived opposition in interests or beliefs through controlled communication, role reversal, and encounter groups).

147. Many states have already adopted such guidelines. See, e.g., IND. CODE ANN. § 31-1-11.5-12 (West Supp. 1985); MINN. STAT. ANN. § 518.551, (5) (West Supp. 1986); MO. REV. STAT. § 452.340 (1978); see Cassetty, *Child Support: Emerging Issues for Practice*, 65 SOC. CASEWORK 74 (1984). Federal law now requires all states to have support guidelines in place by October 1, 1987. 42 U.S.C. § 667 (Supp. 1984).

148. It may be that once the parents have settled on levels of child support because of the formula, it will be easier for them to agree on other matters in dispute. Indeed, the state may have an interest in separating child support from other divorce-related economic issues because the parent's satisfaction of the child support obligation is more important than how property is divided or how much spousal maintenance is paid.

149. See *supra* notes 26-30 and accompanying text.

all. Fault determinations encourage parents to dwell on the past and blame each other for the marital dissolution rather than regard it as a tragedy to be overcome by focusing on the future.<sup>150</sup>

Reliance on marital fault to make postdivorce custody determinations also creates a danger of inconsistent and unfair application affecting constitutionally sensitive parental rights.<sup>151</sup> Yet, the main problem of such a presumption is that it shifts the focus of the inquiry to the parents' relationship with each other, rather than to the parent's relationship with the child.<sup>152</sup> The child has a significant interest in a relationship with both parents after divorce, even if the child harbors anger at the parent "at fault" for causing the dissolution of the family. In the long run, a child needs to come to terms with the strengths and weaknesses of both his parents, a process aided by a continued relationship with each.<sup>153</sup>

(b) *The primary caretaker preference.*—Perhaps the best justification for sole custody comes from the notion that custody arrangements after divorce should parallel the family's custody arrangements before

150. *Id.*

151. The Supreme Court has recognized that a fit, involved parent has a constitutionally protected interest in maintaining the parent-child relationship. That relationship generally cannot be terminated absent some manifestation of parental abandonment or other parental fault. *See, e.g., Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (noting that an unwed father's interest in contact with his child is protected by the due process clause); *Caban v. Mohammed*, 441 U.S. 380, 389 (1979) (holding that a New York statute giving unwed mother but not unwed father the right to block adoption violates equal protection clause of fourteenth amendment); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (noting that unwed father is constitutionally entitled to hearing on fitness as a parent before children could be removed from his care). *See generally Developments, supra* note 44, at 1328 (discussing constitutionally protected family relationships in other contexts); *Novinson, supra* note 10, at 124-40 (discussing constitutional protection of parent-child relationship against government interference).

152. Courts may often evaluate acts which would constitute marital fault between parents against a "demonstrated detriment to the child," not against a moral outrage standard. Adultery *per se* tends not to disqualify a parent from sole or joint custody under this test; sexual intercourse with a lover repeatedly conducted in the presence of a child might, however, particularly if it continued despite obvious evidence the child was emotionally distressed by it. *Developments, supra* note 44, at 1343-44; *see Matter of Rodolfo CC v. Susan CC*, 37 A.D.2d 657, 657, 322 N.Y.S.2d 388, 390 (1971) (proof that men on occasion remained overnight with the mother in the presence of her son did not constitute such "gross moral turpitude as would render her unfit for custody particularly since there is no showing that such conduct was actually affecting Robert's upbringing"); *cf. French v. French*, 452 So. 2d 647, 649 (Fla. Dist. Ct. App. 1984) (visitation restriction based on father's sexual conduct can stand only if supported by substantial evidence showing conduct has an adverse effect on morals or welfare of the child); *Doe v. Doe*, 16 Mass. App. Ct. 499, 503, 452 N.E.2d 293, 296 (1983) (homosexual relationship does not justify denying otherwise devoted mother from joint custody because no resulting adverse effect on child demonstrated).

153. *See supra* notes 67-73 and accompanying text. Some therapists believe this principle applies even if the parent committed the most serious acts against the child, such as incest. *See, e.g., Giarretto, Humanistic Treatment of Father-Daughter Incest*, in *CHILD ABUSE AND NEGLECT: THE FAMILY AND THE COMMUNITY* 143 (1976) (discussing the theory and results of a sexual abuse family therapy program). *Cf. Santosky v. Kramer*, 455 U.S. 745, 765 n.15 (1982) (noting that permanent removal from a child's natural home does not necessarily improve his welfare).

divorce. If before divorce the child-rearing responsibilities are divided unequally between the parents, it may be argued that the parent who bears the greater burden of child care, usually the mother,<sup>154</sup> should be awarded sole custody.<sup>155</sup> The arguments for a primary caretaker preference can be grouped around the interests of those involved in a custody dispute: child, parents, and state.<sup>156</sup> From the perspective of the child, a custody preference for the primary caretaker can be said to preserve continuity in the custody arrangement and thus to be in the child's best interests.<sup>157</sup> From the perspective of the parents a primary caretaker preference can serve several functions. It can be seen as compensation for the extra effort the primary caretaker expended on behalf of the child during the marriage.<sup>158</sup> It might be responsive to the primary caretaker's greater emotional need to have custody after divorce, a need arguably greater than the secondary caretaker's.<sup>159</sup> Finally, it can be seen as strengthening the bargaining power of the economically weaker party in divorce settlement negotiations.<sup>160</sup> From the perspective of the state the primary caretaker preference can provide a measure of certainty of outcome which discourages usually disastrous custody litigation and conserves judicial resources.<sup>161</sup>

Many of these arguments have thoughtful adherents and some plausible empirical basis. Overall, however, the empirical evidence in support

154. See LOUIS HARRIS AND ASSOCIATES, INC., THE GENERAL MILLS AMERICAN FAMILY REPORT 1980-81: FAMILIES AT WORK: STRENGTHS AND STRAINS 28 (1981) (national sample indicating women generally take primary responsibility for childcare in 59% of families; responsibility is shared equally in 36% of families and father has primary responsibility in 3% of families); Sanik, *Division of Household Work: A Decade Comparison—1967-1977*, 10 HOME ECON. RESEARCH J. 175, 180 (1981) (study in Syracuse Standard Metropolitan Statistical Area (SMSA) finding that "the wife makes the largest time commitment to household production, even when she is employed"). Some empirical evidence indicates that in families in which both parents work, husbands are significantly increasing their share of child-care and household functions, even though the division between the sexes remains unequal. See Juster, *A Note on Recent Changes in Time Use*, in TIME, GOODS AND WELL-BEING 397-419 (1984) (publication forthcoming) (University of Michigan Institute for Social Research survey comparing division of household work in same households in 1975-1976 and 1981-1982 showing significant increase in male participation when both husband and wife work); Pleck, *Men's Family Work: Three Perspectives and Some New Data*, 28 FAM. COORDINATOR 481, 487-88 (1979) (reporting on a 1977 representative national sample and its comparison with earlier studies with a "finding of non-trivial increments in husbands' family work associated with wives' employment").

155. Uviller, *supra* note 35, at 108.

156. See Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

157. This is essentially the argument of Goldstein, Freud, and Solnit analyzed earlier. See *supra* subpart II(A)(2)(a). Chambers summarizes the research in support of this position. See Chambers, *supra* note 156, at 527-38.

158. See Scott & Derdeyn, *supra* note 56, at 483.

159. Chambers, *supra* note 156, at 541-49.

160. *Id.* at 563-64.

161. Garska v. McCoy, 278 S.E.2d 357, 360-62 (W. Va. 1981).

of a primary caretaker presumption is just that—plausible, but not dispositive. It is subject to alternative interpretations that make the whole notion of a primary caretaker preference questionable public policy. A better way to view how a family's predivorce arrangements affect custody decisions is through the partnership theory of marriage.<sup>162</sup> The departure from the partnership principle is particularly serious in custody disputes because it invites parents to confuse their own interests with the child's best interests. State policy should seek to do the exact opposite.

(i) *The child's best interests.*—Given the uncertainty of knowing what custody arrangements are best for the child, one may argue that the child's need for continuity and stability is best served by awarding sole custody to the primary caretaker.<sup>163</sup> Notions of a predivorce contract between parents that establishes what the child's best interests are after divorce support such a rule. In the intact family, parents delegate child-rearing responsibilities and their decisions receive a large measure of autonomy from state interference.<sup>164</sup> A decision made in the intact family that the primary caretaker mother should have principal responsibility for raising the child should not be questioned by the state merely because the parents wish to divorce.

Relying on the parent's allocation of child-care responsibilities before divorce to shape judicial custody determinations, however, only helps allocate physical, not legal, custody. Presumably, both parents participated, or at least did not somehow waive the right to participate, in major decisions about the child, whatever their predivorce child-care responsibilities, even though one parent may have made more day-to-day decisions about the child than the other.

Perhaps the strongest consideration against the argument of "continuity" behind the primary caretaker presumption is that the new living arrangements will not likely reflect the intact family situation. Divorce creates a radical change in circumstances for parents and children. The state dissolves the parental partnership that created the situation in

162. See *supra* notes 36-39 and accompanying text.

163. Cf. Atkinson, *supra* note 45, at 16-17 (noting that since 1982 many appellate courts have explicitly mentioned that primary caretakers have closer relationships with the child, more parental experience, and a demonstrated commitment to caring for the child).

164. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding first amendment gives Amish parents the right to hold their children out of public schools after the eighth grade despite the state's interest in compulsory universal education); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding fourteenth amendment gives parents and teachers the right to instruct children in a foreign language). See generally *Developments*, *supra* note 44, at 1351-57 (discussing cases that acknowledge the constitutional right of parents to control the upbringing of their children).

which one parent acted as the primary caretaker.<sup>165</sup> Divorce dramatically changes the lives of husband, wife, and child as new jobs, stresses, and lovers enter the family environment. After divorce, a child in a sole custodial arrangement is thus not in the same circumstances as she was before the parents separated. In the new living arrangements, the mother will probably have a job,<sup>166</sup> entirely new financial and social stresses, and will no longer have the time she once had to devote to rearing the child. Arguing that continuity justifies a primary caretaker preference ignores the reality that continuity will not occur. Divorce requires all members of the previously intact family to reorganize.

If any contract principles apply, “impossibility of performance” or “changed circumstances” seem a more apt analogy than a “benefit of the bargain” analysis. The harsh consequences of divorce, though, make formalistic reasoning based on contract analogies an inappropriate mode of determining the best interests of children after divorce. Examination of the research, however, does not answer the question whether the majority of children are better off in the care of their predivorce primary caretaker.

Chambers’ recent review of the empirical evidence reestablishes the paucity of our knowledge of which custody arrangements promote the best interests of children. After examining virtually every modern study of reasonable methodological exactness, Chambers concludes that the evidence suggests that the child’s trauma in losing either the primary or secondary caretaker is of approximately equal magnitude.<sup>167</sup> In addition, based on a review of the impressionistic research on the capacities of fathers to parent, Chambers concludes that “there is less reason than in the past to fear that a secondary-caretaking father, if given custody, will meet his child’s basic needs for continuity of attachment and nurturing less satisfactorily than primary-caretaking mothers.”<sup>168</sup> Strangely, Chambers does not then conclude that the empirical evidence does not support the sole custody system. Instead, he chooses to try to increase sole custody’s certainty of outcome through a primary caretaker preference for children under five. He reasons:

There is still no methodologically rigorous research on children placed in the custody of secondary caretakers at an early age. Thus, where one comes out in the end with regard to custody deci-

165. See *infra* notes 219-28 and accompanying text (discussing whether the state should set more stringent standards for divorce).

166. Over two-thirds of mothers with children under the age of five work after divorce, see *supra* note 33.

167. Chambers, *supra* note 156, at 536.

168. *Id.*

sions involving young children will depend in large part not on empirical research but on the persuasiveness of theory.<sup>169</sup>

In Chambers' view, the persistent, though empirically tenuous,<sup>170</sup> belief in the importance of placing the young child in the custody of the primary caretaker in the psychological and psychiatric community justifies a primary caretaker preference for very young children.

There is, however, an equally plausible hypothesis, also supported by the empirical evidence, that has significant support in the informed psychiatric and psychological community, although perhaps a minority thereof. This view states it is impossible to identify an inherently more important parent to the child.<sup>171</sup> A subsidiary premise of this view is that primary and secondary caretaking parents can switch roles if necessary, over time and with support.<sup>172</sup> With these premises it is also plausible to believe that it is in the child's best interests to reallocate some of the child's predivorce physical custody, if necessary, to promote the child's relationship with both.<sup>173</sup>

(ii) *Emotional justice to parents and the primary caretaker preference.*—If the empirical evidence on the child's best interest is—and for the foreseeable future will be—in equipoise, the question of how to allocate the burden of persuasion becomes central to the controversy between sole and joint custody. One way of allocating the burden is by reference to the partnership principle in marriage. By enacting a preference for a primary caretaker, the state provides one parent a greater legal entitlement to a subpart of the family's total labor based on her role in the family before divorce. Viewed as a legal entitlement, this presumption takes on new meaning. Placed alongside state statutes that require valuation of homemaker contributions in divorce-related economic decisions, the primary caretaker custody presumption then allows the primary caretaker to double-dip the family's assets. The burden of persuasion should rest on those who seek to depart from the partnership

169. *Id.* at 537.

170. *See id.*

171. *See generally id.* at 532-38 (reviewing relevant empirical studies that indicate that the secondary parent fulfills an important role in the child's life).

172. *See id.* at 533-38.

173. A child's predivorce physical custody arrangements, however, do provide a useful but rebuttable starting point for considering the postdivorce physical custody arrangements. Radical change in a child's living arrangements should not be made precipitously and without consideration of potential adverse impact on the child. Adults do, however, seem to underestimate a child's capacity to adapt to new physical surroundings and willingness to accept change for the sake of continuing relationships with the parent who left the family home. *See supra* notes 133-37 and accompanying text (describing the research on the reactions of children in joint physical custody arrangements).

principle rather than on those who emphasize the importance of the unit as a collectivity.

Chambers, in effect, argues that the partnership principle does not apply in custody determinations. He recognizes that the child's needs should be paramount, but then asserts that the parents' needs should govern when all other things are equal. His reasoning is based "on a desire to inflict the least total emotional harm on all the members of a family in a context in which some emotional harm is inevitable under any resolution."<sup>174</sup> Chambers concludes that the greater emotional harm inflicted on a primary caretaker from loss of custody reinforces the primary caretaker preference and justifies that preference in contested cases even though the interests of the child or parent, standing alone, would not.<sup>175</sup>

Chambers cannot rely solely on the "greater harm to the primary caretaker" rationale, however, because evidence suggests that both primary and secondary caretakers suffer equally from loss of custody, though they perhaps articulate the depth and nature of that loss in different ways.<sup>176</sup> Both perceive divorce as a major failure that the loss of custody will only exacerbate. Social policy should assume that all parents, no matter what role they play in raising the child, are anguished by their potential loss. Indeed, after careful review of all the extant studies, Chambers himself acknowledges:

On all the current evidence, it is thus plausible to hypothesize a trauma of comparable magnitude for both primary and secondary caretaker deprived of the custody of children. . . . We simply do not have enough evidence to reach a firm conclusion either way. My own hunch is that, in general, primary caretakers suffer more and for a longer period, but it is only a hunch.<sup>177</sup>

Hunches about comparative harm to parents do not justify departure from the important policies and principles that underlie the partnership theory of marriage. Recognizing that comparing the emotional needs of parents for custody departs from that core principle, Chambers acknowledges that a primary caretaker preference cannot be justified on the grounds that the primary caretaker has earned custody by contributing more to childraising. "If the primary caretaker 'deserves' the child because of her contributions as childraiser, then the other parent 'deserves' to keep all stock and other assets held in his name, because they

174. Chambers, *supra* note 156, at 502.

175. *Id.* at 561.

176. *See id.* at 547-49.

177. *Id.* at 549.

were acquired from his labors."<sup>178</sup> Nowhere, however, does Chambers reconcile the primary caretaker preference with the principle of partnership marriage, nor does he justify why, if a departure from partnership on the grounds of comparative parental emotional suffering is supportable in the custody area, it is not also supportable on the same grounds when the state divides economic assets for the divorcing spouses. One can plausibly hypothesize that the secondary caretaker will suffer much greater emotional harm from loss of control of a business he nurtured than the primary caretaker. In the interests of inflicting the least total emotional harm on the family, by the same logic, his needs should be taken into account in making the distribution decision.

The pervasive problem with comparing the emotional impact of custody loss on the primary and secondary caretaker is that the loss is impossible to measure accurately, and asking the question deflects the focus of state policy from the child to the parents. Consistent application of the partnership principle to both custody and economic decisions prevents the state from speculating about postdivorce emotional needs based on roles played in the intact family.

In the custody context, application of the partnership principle performs the even more important function of asking parents to place their child's needs above their own.<sup>179</sup> In some cases, parental failure to distinguish their own needs from their child's needs is a cause of long-term postdivorce emotional problems in both the child and parents. Based on her ten-year study, Judith Wallerstein has found that one characteristic parental pattern that results in overburdened and deeply troubled children of divorce is a

repressed dependence on the child's presence as well as the parent's acute anxiety engendered even by the child's partial absence. In these cases, the parent consciously or unconsciously equates the partial loss of the child for even several days of visiting with the other parent . . . with the total loss of the child.<sup>180</sup>

All primary caretakers are, of course, not regressively dependent on their children for satisfaction of their emotional needs. Wallerstein's identifi-

178. *Id.* at 501.

179. Chambers quotes a parent in Leupnitz's study as "summariz[ing] well the case for primary caretakers: 'He is an excellent parent, but [the children] are the most important thing in my life, and I would not have survived without them. They would have been happy either way, but I wouldn't have pulled through if I had lost them.'" *Id.* at 544 (quoting D. LUPENITZ, *supra* note 83, at 23-24). Rather than stating the case for primary caretakers, this parent's justification of custody based on her own interests, not the children's, illustrates the danger of creating a primary caretaker presumption.

180. Wallerstein, *The Overburdened Child: Some Long-Term Consequences of Divorce*, 19 COLUM. J.L. & SOC. PROBS. 165, 177-78 (1985).

cation of such dependency as a long-term and a very serious problem for many children of divorce even ten years after the event, however, points out the danger in the "comparative emotional harm to parents" test for evaluating custody rules. By its very nature, that test invites parents to confuse their own postdivorce needs with those of their children. Some research indicates that children need two parents more than they need either one of them, no matter how emotionally distraught one or the other parent is because of impending custody loss. State policy should encourage parents to ask what is good for the child at the time of divorce, not to wallow in their own misery, however real and important it is to them.

(iii) *Social and economic justice between spouses.*—To a large extent, the justification for a primary caretaker preference is independent of the child's welfare: the primary caretaker, usually the mother, deserves or needs a preference to compensate for a general history of discrimination against women. Giving the mother sole custody based on the primary caretaker presumption not only rewards her for the extra time she spent with the child, but also strengthens her bargaining position in divorce settlement negotiations. Assured of sole custody, the mother can barter increased visitation rights for more support payments.

It is not at all clear, however, that sole custody promotes the long-run economic benefit of divorced primary caretakers. Sole custody does not promote regular child support payments, reentry into the labor force, or remarriage and thus may be a net economic detriment to mothers after divorce. In addition, time spent on child care decreases earning potential for the mother. If fathers assumed more responsibility for care of their children after divorce, the job opportunities and income of divorced women might increase. Empirical evidence also suggests that the presence of children from a first marriage may somewhat hinder a mother's chances of getting remarried.<sup>181</sup> A custody preference for primary caretakers may thus hinder, not help, women in taking the most easily accessible steps to ease their economic adjustment to divorce.

More significantly, the basic objection to considering custody as a

181. Compare Spanier & Glick, *supra* note 1, at 291 (reporting that divorced women with children find it more difficult to remarry as compared with divorced women with no children, although some of this difference may be explained by the differences in age and length of the first marriage) with Mott & Moore, *The Tempo of Remarriage Among Young American Women*, 1983 J. MAR. & FAM. 427, 431-32 (reporting that the presence of children in the home "is not a significant predictor of remarriage" among white women once divorced) and Mueller & Pope, *Divorce and Female Remarriage Mobility: Data on Marriage Matches After Divorce for White Women*, 58 SOCIAL FORCES 726, 730 (1980) (reporting "data suggest[ing] that the presence of children does not affect the remarriage mobility of those [white women] who remarry").

form of compensation for the economic suffering of primary caretakers at divorce is that it places the parents' needs above the child's.<sup>182</sup> This Article has already shown how trading money for custody is more likely to harm than benefit the child.<sup>183</sup> If the goal of the legal system is to promote the child's best interests, it should not promote social policy to benefit a parent—even those who have suffered past discrimination—at the child's expense. A child should not be a form of indirect compensation for economic wrongs, however real. Consistent application of the partnership principle to postdivorce custody and economic determinations should preclude wealth as a factor in a custody test. Under that principle, the wealth created by the family belongs to both members, and both are equally important to the child's postdivorce life. The state should set fair rules for wealth distribution without using the child as a covert tool for this purpose.

(iv) *The need for certainty to reduce litigation.*—A final set of reasons that might support a primary caretaker preference springs from the social interest in discouraging custody litigation. An explicit primary caretaker preference provides much greater certainty about the result of a custody trial than an unpredictable, multifactor "best interests of the child" standard. An explicit preference may thus discourage the nonprimary caretaking parent from litigating. The primary caretaker preference is more attractive in this respect than the father or mother presumptions that preceded it because it is sex-neutral. Furthermore, it rewards the economically weaker parent in the divorce, the one less likely to have the resources necessary for a custody fight. Finally, because the empirical

182. Chambers also recognizes this fundamental flaw in the "economic compensation" argument for the primary caretaker preference. Chambers, *supra* note 156, at 541. However, *not* taking into account the competing parent's comparative potential to provide the child with material things seems inconsistent with Chambers' basic test for custody determinations—that a judge should exercise substituted judgment on behalf of the child and decide the custody dispute by projecting how a child would experience the outcome of competing choices. *Id.* at 493-99. If anything, under Chambers' test, custody should be awarded to the parent who can provide the child with the most material resources, an approach which some states seem to allow and that would disadvantage primary caretakers. See MICH. COMP. LAWS ANN. § 722.23 (c) (West Supp. 1985) (listing the "capacity . . . of the parties involved to provide the child with food, clothing, medical care . . . , and other material needs" as a factor to be taken into account in judicial custody determinations). Chambers recognizes the difficulties of "defin[ing] some elemental qualities of life . . . that most children would want for themselves as they grow up and after they have grown," Chambers, *supra* note 156, at 497, a task necessitated by the nature of the judicial inquiry he proposes. One of those "elemental qualities" for many children would be more money—or an adult could at least so project on the child's behalf. Although, from the child's perspective, the amount of money a parent has available is not the only determinant of the quality of postdivorce life, it is certainly an important and easy-to-measure factor in that equation. Many children, alas, are as mercenary—or can be deemed to be as mercenary—as adults.

183. See *supra* note 117 and text accompanying notes 117-20.

evidence for deciding between parents in a custody dispute is incomplete, the primary caretaker presumption is as good a rule as any, all things considered.<sup>184</sup>

One problem with this analysis is the task of identifying one parent as the primary caretaker. The certainty and predictability offered by the primary caretaker rule varies depending on the division of child care responsibilities in an intact family. In an increasing number of families, both parents work, and the child's primary caretaker may be a day care center. In other cases, family circumstances change—for example, one parent might become ill for an extended period of time—thereby changing the primary caretaker of the children.<sup>185</sup> It is not hard to imagine a couple in a custody dispute vying (with the help of lawyers and injunctions) to be the primary caretaker of the child in a jurisdiction with a primary caretaker preference. Social policy and reality should encourage flexible division of roles between spouses to adapt to changing circumstances and needs. The primary caretaker presumption does exactly the opposite.

Whatever its difficulties of application, however, the primary caretaker presumption will work in many families. Even in families with two working parents, a court should be able to find some objective indicia of which parent is the primary caretaker. A jurisdiction that enacts a primary caretaker preference will thus almost surely discourage some custody litigation.

The adverse effects of custody litigation on the postdivorce family<sup>186</sup> may justify a presumptive rule of some kind to discourage litigation, but it does not necessarily justify a particular rule. A presumption in favor of joint custody would also create greater certainty. The question remains

184. Such was essentially the reasoning of the West Virginia Supreme Court in *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981), which created a sole custody presumption in favor of the "primary caretaker parent, if he or she meets the minimum, objective standard for being a fit parent . . . regardless of sex" for deciding custody disputes about children of "tender years." *Id.* at 363. The opinion sets forth a number of standards for determining who the child's primary caretaker is, basically turning on which parent takes major responsibility for tending to the child's physical needs. *Id.*

185. The West Virginia Supreme Court applied *Garska* to a case in which the mother was the first primary caretaker of the child but then lost that status when she left the family home for treatment of mental illness, illustrating some of the difficulties of applying the primary caretaker rule and its inconsistency with the partnership theory of marriage. Although the father became the primary caretaker of the child, the West Virginia Supreme Court held that the trial court erred in awarding custody to the father under the *Garska* rule because "under circumstances where the status of primary-caretaker parent has been lost temporarily as a result of circumstances that are beyond the control of that parent it is inappropriate for a court to look to who the primary-caretaker parent was immediately before the divorce." *J.E.I. v. L.M.I.*, 314 S.E.2d 67, 71 (W. Va. 1984). The supreme court, however, affirmed the trial court's award of custody to the father on the basis of its finding that it would be in the best interests of the child in large part because of its conclusion that the mother was unable to take care of the child. *Id.* at 72-73.

186. See *infra* notes 194-99 and accompanying text.

whether the price of a particular presumption is worth paying. The primary caretaker presumption risks: tearing the partnership theory of marriage; reinforcing the perception that courts favor mothers in custody disputes under sex-neutral labels; and decreasing the quality of the relationship between the child and the nonprimary caretaking parent. The primary caretaker preference thus suffers the same defects as any other sole custody rule. Based on this analysis, the justifications for the primary caretaker presumption do not arise from the substance of the presumption, and thus cannot be considered any more tenable than a presumption for joint custody.

### C. *Summing Up*

The empirical evidence tentatively supports a presumption of joint *legal* custody. There is certainly no compelling reason to prefer sole *legal* custody. At the very least a court should have the power to order joint legal custody over the objections of one or both parents even if substantive law creates no preference for joint custody. If risks have to be taken with children, they should be those which err on the side of keeping both parents involved in the life of the child.

A presumption of joint legal custody also finds significant support in the partnership theory of marriage. The important social policies behind the partnership theory suggest that the state should be extremely cautious in making judgments that one marital partner has a greater legal entitlement than the other to anything created by the family unit.<sup>187</sup> That caution is especially appropriate in state decisions about the allocation of parental rights that have a significant measure of constitutional protection. A presumption of joint legal custody, viewed in this light, is a "less restrictive alternative" to the sole custody model. By using a joint legal custody presumption, the state does not diminish the status of a capable and caring parent in the child's life absent a compelling showing based on the best interests of the child.<sup>188</sup>

The empirical base, however, does not yet justify a presumption that *physical* custody should always be split equally between parents. Research has not yet isolated the parent, child, and environmental variables that go into making an equally split joint physical custody arrangement

187. Cf. B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 44-45 (1980) (articulating a principle of neutrality in distribution of resources by the liberal state that prevents one citizen from making a claim to a scarce resource based on an argument of unconditional superiority to other citizens).

188. At least one commentator has suggested that a presumption of joint custody may be a constitutional mandate. See *Developments, supra* note 44, at 1331-32.

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successful.<sup>189</sup> A fifty-fifty physical custody presumption radically departs from the child-care arrangements that exist in most families prior to divorce.<sup>190</sup> Endorsing such a presumption without further empirical analysis of its effects on the reorganized family unit would involve significant risks for the emotional lives of many children of divorce.

Without compelling a presumption of joint physical custody, however, the current data base and social policy strongly support the principle that physical custody arrangements after divorce cannot blindly mirror intact family patterns if the child is to have a meaningful relationship with both parents. Predivorce physical custody patterns should thus be a starting point for analysis of what custody arrangements should be utilized after divorce but no more than that.

Additionally, current data supports the principle that the legal system should strongly encourage each parent to be as generous as possible to the other parent in allocating physical custody, and not view the child's time with the other parent as something the parent has lost. Combined, these principles lead to the conclusion that, if a court has to order a physical custody plan, it should try to maximize the time each parent spends with the child and, if possible, avoid grossly disproportionate distributions of physical custody.

Most significantly, the available data base illuminates the child's, and thus the state's, enormously important interest in encouraging parental agreement and recognition by each parent that both remain enormously important to the child despite divorce. As will be seen in the next Part of this Article, the adversary procedures traditionally used to resolve a custody dispute fail utterly in this respect. Whatever the substantive law standard to deciding custody, the state must create procedural mechanisms to encourage parents to work through their immediate postdivorce anger and into a reasonably cooperative parental relationship.

### III. Adversary Procedure and Postdivorce Parental Cooperation

Skepticism about the legal system's ability to induce cooperation between divorced parents concerning their children creates skepticism about the possibility of joint custody when the parents do not agree. The notion that "[d]ivorce dissolves the family as well as the marriage, a real-

189. *But see* Steinman, Zimmelman & Knoblauch, *supra* note 125, for a good start in the right direction.

190. If, however, the choice is between the current policy of "sole custody, visitation on weekends only" presumption and a 50-50 joint physical custody presumption, the empirical evidence and public policy suggests that the joint physical custody presumption, easily rebuttable, is preferable.

ity that may not be ignored,"<sup>191</sup> promotes the idea that the legal system's job is simply to declare the marriage dead and do an autopsy for ex-partners who cannot agree on their children's custody. Under this view the legal system must declare a winner and a loser in any custody conflict. The assumption that divorce dissolves the family as well as the marriage leads to the conclusion that the state has no obligation to facilitate cooperation between the parents for the child's benefit.

This view of divorce justifies the state's treatment of divorcing parents as adversaries whose competing claims to the child should be settled through the traditional procedures used in all litigation. The state must only provide the divorcing family an adversarial forum to decide which parent's claims about the child are in some sense "right."

Adversary procedure, however, works against the best interests of the child by encouraging delay in parental settlement, increasing antagonism between parents, and placing stress on the child's loyalties to each parent. The present adversary system encourages parental settlement negotiations to link custody and money issues, which, in turn, encourages parents to put their financial interests ahead of their child's interest in a relationship with both parents.<sup>192</sup> Control of the process of resolving the dispute is placed in the hands of the parents' lawyers, who have an uncertain commitment to the welfare of the child and who are trained in adversarial combat, not conciliation for the child's best interests.<sup>193</sup> In short, to use the adversary procedural system falsely assumes that parents and their lawyers, acting in their own self-interest, will provide protection for the child's best interests.

### A. *The Custody Trial*

*[The] experience of [a litigated custody dispute] reduced two fairly sane adults to desperate, ranting maniacs whose behavior often badly frightened the little girl they supposedly cared for above all else.—Mother involved in a custody fight with her husband.*<sup>194</sup>

The procedural handmaiden to the comparative fitness standard of the "best interests" sole custody system is the adversarial trial between parents on that issue. Thirty years ago Walter Gellhorn described the

191. *Braiman v. Braiman*, 44 N.Y.2d 584, 591, 378 N.E.2d 1019, 1022, 407 N.Y.S.2d 449, 452 (1978).

192. See *supra* note 117 and text accompanying notes 117-20, 142-48.

193. The argument for adversary procedure is at its strongest when the parties do not have postjudgment continuing relationships with each other. Given the constitutionally based status of the right to visitation this will not be the case in a custody dispute, see *supra* text accompanying note 124 and note 151.

194. Quoted in *Miller*, *supra* note 52, at 412.

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emotional ambience of this procedural and substantive package in terms equally applicable today:

As if the problem [of deciding custody] were not difficult enough intrinsically, it comes to the court obscured in complications. When the break-up of the marriage is stormy, the children are all too likely to become ammunition to be expended in the bitter emotional struggle between the parents, which grows intensified as the legal contest takes shape. Forcible seizures of the child from one parent by the other are common newspaper stories. Attempts by both parents to embroil the child in the parental conflict by creating hostility and even by inducing the child to help build a legal case against the other are not unknown. These conditions of emotional conflict, aggravated by the inevitable transfer of the struggle to the courtroom, enormously complicate the judge's getting at the facts, let alone his making nice judgments as to how the welfare of the child will be best advanced.<sup>195</sup>

Adversary trial procedure focuses on confrontation between parents about the past. It is hard to believe that a procedure which dwells on past conflict and indiscretions promotes parental cooperation in the future, the child's principal need.

The trial encourages each parent to present arguments and evidence that maximize the shortcomings of the other parent in an attempt to escape responsibility for marital and parental failure.<sup>196</sup> Adversary procedure provides an official license and awards a prize, sole custody, to a parent for being simultaneously self-righteous and defensive. Like the fault system of divorce, adversary custody procedure invites each parent to take an extreme view of the other's faults and adopt the attitude that he or she is more important to the child. Cross-examination on past faults and indiscretions does not encourage parents to treat each other civilly after a custody trial, much less to cooperate for the child's postdivorce future. The symbolism and structure of the adversary custody trial functions directly against what the state, if concerned about the child's best interests, should be trying to promote.

Adversary procedure also infects the child involved in a custody dispute. The child's preference may be significant ammunition in the adversary struggle.<sup>197</sup> Parents are very aware of the importance of the child's

195. W. GELLHORN, *CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY* 308 (1954) (footnote omitted).

196. A transcript of a particularly bitter custody trial that illustrates its emotional ambience can be found in J. AREEN, *FAMILY LAW* 429-535 (1978).

197. Texas law is representative as to the weight given to children in different age groups. The child's preference carries little weight if the child is under 12; from 12-14, the preference is heard but not always followed; and for over 14 it is followed unless clearly against the child's best interests. TEX. FAM. CODE ANN. § 14.07 (Vernon 1975 & Supp. 1986). In determining what is in the best

views in the custody determination and many try to influence what the child says to the judge. The emotional and material bribery that can follow weakens the competence and authority of a parent in the child's eyes and distorts the normal parent-child relationship already dealt a crushing blow by divorce. It empowers the child to do something no child should have the power to do—choose between the two most important figures in her life for whom she should be encouraged to have equal respect.<sup>198</sup>

The effect of a child's choosing one parent over another often devastates the child's relationship with the parent who is not chosen and directly contradicts the goal of creating an emotional atmosphere in which the child has postdivorce relationships with both parents. One can easily imagine how a parent reacts to the news that a child has expressed a preference for the other parent as the primary custodian. Even if that parent emerges from the courtroom victorious, she is likely to feel that the child does not love her, and is unlikely to have the kind of meaningful relationship with the child that the child needs to cope with the stress of divorce.

The adversarial process wreaks havoc on many other aspects of the reorganization of a child's life after divorce. In addition to creating conflict in the nuclear family, it also destroys other infrastructures of the

interests of the child, in most states the judge can consider the child's preferences and give them more weight as the child grows older, but should not treat the child's expressed preferences as dispositive of the outcome of the litigation. *See, e.g.,* *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 94, 432 N.E.2d 765, 767, 447 N.Y.S.2d 893, 895 (1982) ("desires of the child are to be considered, but can be manipulated and may not be in the child's best interests"); *Dintruff v. McGreevy*, 34 N.Y.2d 887, 888, 316 N.E.2d 716, 716, 359 N.Y.S.2d 281, 281 (1974) ("[W]hile a child's view should be considered to ascertain his attitude and to lead to relevant facts, it should not be determinative."); *CONN. GEN. STAT. ANN. § 46b-56(b)* (West Supp. 1985) (directing the court to give "consideration to the wishes of the child if he is of sufficient age and capable of forming an intelligent preference"). For a recent empirical study of judicial practices in and attitudes toward interviewing children in custody cases, see Lombard, *supra* note 4. For a study of the process of being consulted in custody cases from the child's perspective, see S. Meehan, *Contested Custody Disputes: The Experiences of Children and the Implications for Social Policy* (1982) (unpublished Ph.D. dissertation) (children's opinions about the court's custody decision are based on factors including parent's feedback, court records, child's age, and extensiveness of child's participation) (available through University Microfilms International).

198. Some children actively want to choose between their parents, *see* J. WALLERSTEIN & J. KELLY, *supra* note 62, at 314-15. Many are influenced by their developmental stage and need for independence from one parent or the other. Some children choose based on their anger toward and desire to punish the parent who "caused" the divorce. Some children choose the "more vulnerable" parent, the one they deem less capable of coping with separation, to avoid inflicting further pain. Other children make their choice on the basis of which parent is more likely to be able to provide, either emotionally or materially, competent parenting to them. These children tend to underestimate the importance to them of continued meaningful relationships with both their father and mother. Many children who choose between their parents come to regret their choices and the reasons for them in later life. *Id.* Society generally shields children from making such significant choices until they reach the age of majority. The adversary procedure of the custody trial into which they are drawn forces them to grow up too fast.

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child's life such as bonds with relatives. The custody battle often pits two opposing camps in which grandparents, uncles, and aunts actively take sides to enter the fray. Furthermore, the turmoil associated with the custody fight provides a bad model for future behavior for the child. The child learns that a person must turn to an outsider to resolve disputes; a lesson diametrically opposed to the one learned from the marriage model.

The money spent on a custody trial could be better spent on the child instead of on the lawyers. Moreover, the judges handling these cases often dislike custody disputes and their general antipathy for these types of trials may affect the quality of decisions. Finally, the entire procedure is geared toward parents who do not want to agree. This bent reduces the possibility of concessions and negotiations coming to fruition.

In short, because of the effects of the trial on the parent-parent and parent-child relationships, it is hard to conceive of a process for custody decision making less designed to protect the child's interest in continuing relationships with both parents.

### *B. Negotiations in the Sole Custody, Adversary Procedure System*

Actual custody trials are the exception, and settlement of custody disputes through negotiations the norm. Nonetheless, the shadow of a custody trial creates an adversarial atmosphere and focuses negotiations on the parents' rights, not the child's needs. Furthermore, those settlement negotiations are conducted according to an adult sense of time, which often neglects the child's need for speedy stability of environment.<sup>199</sup>

Adversarial procedure legitimizes the notion that the parents are enemies after divorce and furthers the social acceptability of threatening a custody trial to extract concessions on financial matters in settlement. The custody-inoney negotiations that result mean one parent can be required to bargain away some or all of her involvement with the child in return for lesser financial obligations. Or they may mean that one parent may have to sacrifice needed financial support in return for maintaining a relationship with the child.<sup>200</sup> Furthermore, linking custody with

199. The usual time frame employed is generated by the lawyers' strategy and court calendars. The primary caretaker's lawyer tends to seek an order granting temporary custody to the primary caretaker and then tries to delay a final determination as long as possible in order to establish a status quo a judge will be unwilling to disrupt at a later time. This strategy is not designed to satisfy the child's need to find an equilibrium and adjust to postdivorce life.

200. See *supra* note 117, and text accompanying notes 117-19, 142-48.

money delays settling custody until financial concessions are made, rather than settling disputes in accordance with the child's sense of time. In any event, an adversary atmosphere shifts the focus of the question the parents must resolve in negotiations from what is good for the child's relationship with both parents to what is in the interests of one parent or the other, financially or otherwise.

Some device is thus necessary to help parents separate their interests from their child's in divorce settlement negotiations. Adversary procedure relies on lawyers to help the parents if the custody dispute is settled short of trial.<sup>201</sup> The question thus becomes whether the parents' lawyers who conduct the negotiations—rather than the parents themselves—protect the child's interests.<sup>202</sup>

Theoretically, lawyers representing the parents can bring elements of objectivity and reflection to the negotiating process not present if the parents negotiated the settlement themselves.<sup>203</sup> The ethical obligations of lawyers, however, require them to focus on the desires of their clients, not on the needs of the child. As a result, lawyers tend to have negative attitudes toward joint custody and nonadversarial dispute-resolution techniques. Counting on the parents' lawyers to protect the interests of the child in parental divorce settlement negotiations leaves those interests to the parents' selection of counsel, a choice made for any number of reasons ranging from attractive advertising to having a reputation for being the toughest, most uncompromising family law litigator in the area.

No empirical research specifies the degree to which lawyers for parents try to temper extreme positions of their clients that threaten the child's relationship with the other parent. Many prominent divorce lawyers advocate aggressive representation of the client's wishes with apparently little concern for the effect on the child.<sup>204</sup> There is no indication

201. Short of a trial, the lawyer's influence on the negotiations is the only protective check on the parent's possible selfishness. Any settlement agreed to is usually rubber stamped by a court so even the court does not impose a check unless the matter is actually litigated.

202. Another relevant question, beyond the scope of this Article, is how the child's interest in a continued relationship with both parents is protected in divorce settlement negotiations in which parents are unrepresented by counsel. There is no constitutional right to counsel for the poor in divorce cases. *In re Smiley*, 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975). Whatever protection the parents' lawyers give the child's interests in cases in which the parents are represented is not available to the children of parents too poor to pay lawyer's fees. Although there is a serious question whether appointing a lawyer to represent the child in such cases is a good idea, see *infra* text accompanying notes 229-51, the state presumably should devise some other mechanisms such as publicly funded mediation systems that will provide some protection to the children of divorce whose parents cannot afford private services. See *infra* subpart V(B).

203. Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 660-65 (1976).

204. "When I take a case . . . [a]s far as I am concerned my client is always right." R. FELDER,

that the profession seriously advocates the need to promote the child's relationship with the other parent.

The limited data available indicates that lawyers tend to be skeptical about the viability of joint custody arrangements. In informal surveys, about fifty percent of the lawyers who specialize in family law express support for joint custody in principle for "appropriate cases." Opinions differ, however, as to how many cases are actually appropriate.<sup>205</sup> Deborah Leupnitz studied eleven families in which both parents desired joint custody.<sup>206</sup> Yet, in three of those eleven cases one of the lawyers consulted opposed joint custody and tried to talk the parents out of the previously agreed upon arrangement.<sup>207</sup>

Lawyers also tend to be skeptical about mediation of child custody controversies. In 1983, only forty percent of the members of the Family Law Section of the American Bar Association indicated that custody mediation services were available in their communities, and only thirty percent of that smaller group indicated that they would recommend mediation services to their clients to resolve custody contests.<sup>208</sup>

The reasons for these views are unclear.<sup>209</sup> Many lawyers have sincere, and in some cases justified, doubts about the wisdom of joint custody and the quality of services delivered by mediation programs. Parents who encounter these attitudes in their lawyers will likely be discouraged from trying approaches to custody arrangements that are more likely to promote a child's relationship with both parents than will a sole

DIVORCE 2-7 (1971). The author describes a custody dispute in which he represented a mother with psychiatric problems who apparently had physically abused her child. The author nonetheless opposed a psychiatric examination for the mother by a court-appointed psychiatrist that the mother's own psychiatrist had recommended. *Id.* See also M. FRANKS, WINNING CUSTODY (1983) (advocating a "total war" view of custody disputes; chapter three of this book is entitled "You're at War, Buddy").

205. These opinions range from "extremely rare" to 50% on joint physical custody and from 40% to "almost every case" for joint legal custody. See Miller, *supra* note 52, at 370-71 (describing results of informal survey of "several" lawyers and mental health professionals).

206. Presumably, parents who both want joint custody are ideal candidates for such an arrangement under any standard. See *supra* notes 99-130 and accompanying text; see also Steinman, Zemelmann & Knoblauch, *supra* note 125, at 558 (observing that the successful joint custody families all had reached agreement on joint custody without court involvement).

207. D. LEUPNITZ, *supra* note 83, at 24. A recent survey of the membership of the American Bar Association's Family Law Section indicated that 36% of the respondents always encourage joint legal custody if they believe the parents could cooperate and another 35% sometimes encourage it under those circumstances. The survey, however, did not ask how frequently the lawyers believed parents could cooperate with each other after divorce to make joint legal custody workable. Smith & Troha, *A Survey of the Membership of the ABA Section of Family Law*, 17 FAM. L.Q. 225, 256 (1983).

208. Smith & Troha, *supra* note 207, at 257.

209. But see Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-51 (1982) (arguing antipathy to mediation largely results from the focus of legal education and practice on finding justice through adversarial litigation model).

custody system and adversarial litigation.<sup>210</sup> Although mediation and conflict reduction is part of the credit curriculum in many law schools, legal training emphasizes triumphing in win/lose adversarial battling,<sup>211</sup> and lawyers may thus find alternative approaches to parental custody disputes unfamiliar and somewhat frightening. Doubts about joint custody and mediation also serve the economic self-interest of many family lawyers. A joint custody settlement and mediation may reduce conflict and thus the fees paid to lawyers. For lawyers representing clients who cannot afford extensive legal fees, the negotiation and drafting of joint custody arrangements may consume more time and effort on the lawyer's part than a traditional sole custody/visitation arrangement,<sup>212</sup> thus decreasing the profit margin of a practice that relies on a high volume of clients and the use of standardized forms.<sup>213</sup>

Finally, and perhaps most significantly, the lawyer's professional responsibility obligations require her to promote the wishes and interests of the parent-client,<sup>214</sup> instead of the needs of the child. In the adversary system, decisions about the ultimate objectives of the representation (*e.g.*, whether to use custody as a bargaining chip in negotiations) are reserved for the client.<sup>215</sup> No formal ethical obligation requires a lawyer to advise a client that the positions on custody the client wants advanced are harmful to the child's relationship with the other parent; the attorney may if she so desires, but is not obligated to do so.<sup>216</sup> The Code of Professional Responsibility requires the lawyer to represent and protect vig-

210. Empirical research indicates that attitudes of the parents' lawyers are the single most important factor in whether parents are favorably disposed to try custody mediation programs. See Pearson, Thoenes & Vander Kooi, *Mediation of Contested Child Custody Disputes*, 11 COLO. LAW. 336, 340 (1982) (attorney encouragement is a key factor in motivating people to try to mediate).

211. See generally *Alternative Dispute Resolution in the Law Curriculum*, 34 J. LEGAL EDUC. 229 (1984) (advocating placing more emphasis in law school on nonadversarial conflict resolution techniques).

212. See Miller, *supra* note 52, at 384 (describing attorney resistance to joint custody arrangements).

213. Computer software now enables attorneys to prepare standardized divorces "petition through decree" for up to nine children in "less than 5 minutes." Such work is apparently profitable: "One divorce per month will pay for [the software], computer and printer." Advertisement, 49 TEX. B.J. 25 (1986). "Divorce Master [TM computer software] assembles the pleadings, inputs the client data, composes and prints the documents. The secretary does not see a word of text in most divorces until the pleadings are printed and ready to file at the courthouse." *Id.* Clearly, drafting a joint custody decree tailored to a particular family is likely to require more than the few seconds of attorney time that signing a mass-produced decree form requires.

214. Cf. Cal. State Bar Comm. on Professional Ethics, Formal Op. 1976-37 (lawyer representing parent in a child custody dispute who discovers client's interests conflict with child's may not notify court of the conflict and suggest appointment of counsel for the child).

215. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7, 7-8 (1980).

216. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980).

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orously the client's interests,<sup>217</sup> as defined by the client, with only passing mention of avoiding "needless" harm to third parties.<sup>218</sup> A lawyer with an aggressively adversarial attitude about representing a client's wishes can thus easily justify not seriously considering the child's needs if the client chooses not to.

In sum, the participation of lawyers in settlement negotiations may help some parents separate their personal needs from their child's needs in some percentage of custody disputes. The opposite effect, however, is also likely. Only some additional presence, supplied by the state and charged with advocating the child's interest in a speedy stability of environment and parental cooperation throughout the dispute settlement process, can provide any systematic assurance that parents will give their child's needs priority over their own.

### IV. Reform Proposals Within the Sole Custody-Adversary Procedure System

The combined sole custody, adversary procedure system for custody dispute resolution fails to promote the child's needs after divorce. Part V of this Article presents an alternative cooperative-custody-promoting substantive and procedural system, designed to emphasize the interests of the child.

The strengths and weaknesses of more limited reform must be identified before the suggested comprehensive change is described and defended. The proposals to be examined—restricting access to divorce for parents, appointing a lawyer for the child, and involving neutral mental health experts in the courts' custody decision-making process—essentially retain the sole custody model but seek to manipulate the substantive law or procedure of the custody dispute resolution system on the child's behalf. These proposals are well-motivated and have features that should be incorporated into more comprehensive reform. They do not, however, adequately restructure the basic premises of the sole custody-adversarial system.

#### A. "Child Protective" Divorce Laws

The state could protect children's interests by making divorce more difficult for parents to obtain. Parents who seek divorce would have to make a higher threshold showing to obtain it than would couples without

217. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

218. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-10 (1980). Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.4 (1983) (establishing bounds for attorney's conduct with regard to respect for rights of third parties).

children.<sup>219</sup> For example, married parents might have to show in addition to "irreconcilable differences" that the divorce would be better for the children than would continuation of the marriage.<sup>220</sup>

The rationale for creating a separate status of "marriage for minor children" is that, if divorce is difficult to obtain, parents who are marginally committed to divorce will not pursue it; or will at least postpone divorce proceedings until the children pass the age of majority. It is even possible that faced with great difficulty in obtaining a divorce, the unhappy parents will reconcile, to the benefit of the entire family unit.

The marriage for minor children proposal shares an assumption with certain joint custody proposals: that a state can force or at least strongly encourage a parent to continue a relationship with the other spouse after divorce.<sup>221</sup> The proposals differ, however, in that the joint custody proposal limits the relationship the state presumes the parents should continue in the child's best interests to that of parent, but the marriage for minor children proposal mandates the continuation of the marriage. Under a presumption of joint custody the parents can remarry freely; under the marriage for minor children proposal they cannot.

Restricting access to divorce might encourage some parents to reconcile or stay together for the benefit of the children. It would certainly deter parents from hasty divorces.<sup>222</sup> There are, however, other possible, less attractive effects. A parent might produce an "illegitimate" child, who carries the stigma and discrimination that label implies,<sup>223</sup> because he could not acquire a divorce under the marriage for minor children regime. A stringent divorce standard designed to benefit children in the parent's formal family might thus work unwitting harm on the children in a second, informal relationship.

In addition, it is not clear that children will actually benefit if their parents are forced to stay married. The principal concern about a presumption of joint custody is that it might subject the children to intolerable levels of continuing parental conflict.<sup>224</sup> The marriage for minor children proposal magnifies this concern. In some unknown number of intact families, the level of parental conflict dictates that the parents

219. Cochran & Vitz, *supra* note 40, at 344-49; Younger, *supra* note 37, at 90-94.

220. Younger, *supra* note 37, at 90.

221. See *supra* subpart II(A)(2)(b).

222. See M. WHEELER, *supra* note 26, at 100-01 (remarking on judges who suggest that too many couples seek hasty divorces); cf. C. FOOTE, R. LEVY & F. SANDER, *supra* note 26, at 1092-98 (judge extolling success rate of court-imposed mandatory marital counseling).

223. Cf. Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972) ("Courts are powerless to prevent the social opprobrium suffered by [illegitimate] children . . .").

224. See *supra* subpart II(A)(2)(b).

should divorce quickly in order to preserve the child's best interests.<sup>225</sup>

The marriage for minor children proposal also fails to deal with the fact that many divorces, even those involving children, occur because both spouses want it and have agreed to property division, custody, and support.<sup>226</sup> There is something extremely distasteful about a legal standard that forces two adults who both want a divorce to stay married. The marriage for minor children proposal, just as the fault divorce system, encourages collusion and perjury to satisfy the qualifying criteria for divorce.<sup>227</sup> The alternative is to devote limited state resources to detecting and punishing parental collusion, a fact of life that the history of the fault divorce system shows is easier for courts to decry than eradicate.<sup>228</sup>

The only way to make the marriage for minor children proposal even minimally feasible is to revise the current practice in most courts and conduct serious hearings into whether the custody arrangements in uncontested divorce settlements are truly in the best interests of the child. Given the difficulty of a court's making that evaluation even in contested cases and the costs to parental authority that result when a court overrules a parental agreement, it is doubtful whether a marriage for minor children proposal spends limited resources wisely.

In short, keeping parents married against their will has all the disadvantages of the presumption of joint custody plus the problems of the fault divorce system. It is far less intrusive on personal privacy to give parents the freedom to divorce but to require that they act responsibly towards their children by developing an appropriate custody plan than it is to force parents to stay married.

More significantly, a marriage for minors statute sends out a perverse message to parents already embroiled in conflict. The state essentially tells the parents that they can "win" (obtain a divorce) by creating

225. See L. FRANCKE, *GROWING UP DIVORCED* 54-55 (1983) (using children's reactions to demonstrate that a "house filled with tension can take a far greater toll on the children than resolution of the tension through divorce").

226. See M. WHEELER, *supra* note 26, at 6-8 (noting that one party must still sue the other for divorce in a fault system, even though both desire to end the marriage).

227. Cf. C. FOOTE, R. LEVY & F. SANDER, *supra* note 26, at 954-57 (describing techniques to make divorces appear uncontested in court under a fault system).

228. See *id.* at 1004 (describing experience in England with Queen's Proctor whose job it was to investigate divorce cases at random for signs of perjury). A related problem with making the grounds for divorce more stringent for parents is that unless similar grounds are adopted in every state simultaneously, the problem of "migratory divorce" that plagued the fault divorce system could reappear. Some married couples who have children and who agree to divorce quickly but who do not meet the more stringent criteria of their home state could establish residence in another state with less stringent grounds. This system would discriminate against those parents not wealthy enough to move to the more permissive state. See M. WHEELER, *supra* note 26, at 11 (describing the problem of migratory divorce under the fault system).

a climate that makes the child's life miserable. A state with a joint custody presumption, on the other hand, tells parents that they can "win" by being decent and cooperating for the benefit of their child. The marriage for minors proposal encourages conflict; the joint custody presumption fosters cooperation.

### B. *Lawyers for Children*

Many commentators advocate court-appointed counsel for the child in parental custody disputes and identify several functions such lawyers can perform.<sup>229</sup> Lawyers for children can function as mediators, attempting to reduce antagonism between parents;<sup>230</sup> they can be procedural expeditors, helping to move the dispute towards resolution in accordance with the child's sense of time; and they can serve as independent investigators and advocates for a particular result, bringing data and recommendations about the fitness of the parents and proposed custody plans to the attention of the court if lawyers for the parents do not do so because of tactical calculation or incompetence.<sup>231</sup> A lawyer for the child can be the child's ally outside the courtroom by explaining the legal process and the parents' positions, and by providing emotional comfort and counseling. Finally, the lawyer for the child can serve as the child's advocate within the courtroom, cross-examining witnesses and presenting evidence that furthers the child's preferences for a custody plan.<sup>232</sup>

All of these functions are important and serve the child's interests in speedy stability of environment and post-divorce parental cooperation. Expedited decision making, mediation, and independent evaluation are prominent features of a cooperative custody system.<sup>233</sup> Yet the assumption that all of these functions are best performed by a single, legally trained professional raises many questions. It is extremely difficult to design a service delivery system that supplies competent lawyers to perform traditional advocacy functions for children, much less nonadver-

229. The classic piece advocating the need for separate legal representation is Note, *supra* note 92. See also Guggenheim, *The Right To Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 117 n.169 (1984) (listing sources that advocate separate counsel for children in divorce-custody cases).

230. Note, *supra* note 92, at 1172-77.

231. Guggenheim, *supra* note 229, at 122-26.

232. Cf. INSTITUTE OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, JUVENILE JUSTICE STANDARDS 7 (1979) ("[T]he goals of adequate disclosure of all relevant information and the achieving of just results in juvenile proceedings can best be obtained by counsel assuming in juvenile court the functions of counselling and advocacy in the same manner as in other courts of civil and criminal jurisdiction.") [hereinafter cited as JUVENILE JUSTICE STANDARDS].

233. See *infra* subparts V(B)-(C), VI(C).

sarial tasks for which lawyers are generally not well-equipped. In a large number of cases, a competent, well-trained lawyer for the child will be torn between performing adversarial and nonadversarial functions. If a lawyer for the child takes the client-centered view that the child's preferences should govern the objectives of the representation,<sup>234</sup> the pressures on the child to choose between parents will only be increased, thereby magnifying the generally negative consequences that result from a child's having to make that choice.<sup>235</sup> If, on the other hand, the lawyer's actions are not governed by the child's preferences, the lawyer's own outlook about custody disputes becomes an additional wildcard in a decision-making process that is already too unpredictable.

Some current practices must change for the child's counsel to act as mediator, evaluator, and ally for the child both in the courtroom and in settlement negotiations. First, few states now mandate that counsel for the child be appointed in custody disputes; most states make such an appointment discretionary with the court.<sup>236</sup> Additionally, in certain states, lawyers for the child in custody disputes are not always adequately compensated for their services.

To be effective, counsel for children must be appointed routinely, as soon as the matter comes to the attention of the judicial system. In addition, compensation for counsel must be set at a level high enough to recruit competent lawyers to accept appointments in hundreds of custody cases every year, as it is unlikely enough competent lawyers will volunteer to do the job on a pro bono basis. The money to fund these lawyers cannot come from the children themselves as they do not generally have it. One possibility is to ask the parents to pay the fee of the lawyer for the child jointly in proportion to their ability to pay. This arrangement will provide compensation to the lawyer for the child in the small number of instances where the parents are well-off financially. Paying three lawyers instead of two, however, will strain the limited financial resources of many divorcing parents. For the children involved in custody disputes whose parents cannot afford to pay additional lawyers' fees, the state needs to compensate the children's attorneys.

A system for appointing counsel for children from a private panel of attorneys and compensating them from state funds currently exists in

234. The Model Rules of Professional Conduct dictate that a lawyer appointed to represent a child should, "as far as reasonably possible, maintain a normal client-lawyer relationship with the client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 and comment (1983); *see also* JUVENILE JUSTICE STANDARDS, *supra* note 232 (counsel in juvenile proceedings should act as counsel would in any other proceedings).

235. *See supra* notes 197-98 and accompanying text.

236. Guggenheim, *supra* note 229, at 117-18.

New York State Family Court.<sup>237</sup> Appointments are mandatory in some cases but discretionary in other cases, including custody disputes between parents. The rate of compensation is \$25 per hour for in-court time, \$15 per hour for out-of-court time.<sup>238</sup> This long-standing "law guardian" program provides some indication of what the likely result would be of appointing counsel for children in the large number of custody disputes that come to the courts.

A recent comprehensive empirical study<sup>239</sup> clearly establishes that in a large percentage of cases the quality of representation law guardians provide children borders on incompetence.<sup>240</sup> Few of the court-appointed counsel for children bother to interview their clients, examine necessary files and witnesses, or participate in out-of-court settlement negotiations with any vigor.<sup>241</sup> Few have familiarity with the mental health concepts and resources dealing with the relationship of children to the legal system or have any training in or special qualifications for representation of children.<sup>242</sup> Many law guardians do their clients more harm than good.<sup>243</sup> This study shows that some special system of training must be developed and an adequate level of compensation provided before the role of lawyers for children can be expanded.

Assuming that the state can somehow solve the problems of competence and compensation, there remains the serious problem of defining how a lawyer for the child should act in custody cases: whether the lawyer should advocate the child's best interests or the child's preferences. A lawyer may believe that it is in the best interests of the child-client to maintain relationships with both parents, even if the child expressly states that she does not want to see one parent ever again.<sup>244</sup> If the

237. See N.Y. FAM. CT. ACT § 249 (McKinney 1983) (authorizing court appointment of law guardians in Family Court cases).

238. J. KNITZER & M. SOBIE, LAW GUARDIANS IN NEW YORK STATE: A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN 3 (1984). Some states do not limit the amount of compensation for court-appointed counsel for children. See, e.g., TEX. FAM. CODE ANN. § 51.10(i) (Vernon 1975) (appointed attorney paid from county's general fund). Compensation is important only as it affects the quality and competence of the lawyer.

239. This study, apparently the first in the country, was conducted under the auspices of the New York State Bar Association. J. KNITZER & M. SOBIE, *supra* note 238, at 3.

240. See *id.* at 131.

241. See *id.* at 39-40.

242. See *id.* at 131-33.

243. Another aspect of the question of the lawyer's competence hinges on the lawyer's knowledge of what is in the best interests of the child in custody disputes. Many attorneys seeking a clear-cut, easy-to-apply solution might employ Goldstein, Freud, and Solnit's view of what is in the best interests of the child. See *supra* subpart II(A)(2)(a). With that background, a lawyer would be less likely to explore possibilities of joint custody.

244. For instance, assume that a lawyer has been appointed to represent a six-year-old girl who blames her father for the family break-up because of his involvement with another woman. The girl tells her lawyer that she never wants to see her father again under any circumstances. The lawyer

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child's lawyer believes it appropriate to represent the probably transitory and certainly self-defeating preferences of the child, the attorney would have great difficulty juggling the adversarial and nonadversarial functions assigned to her. Under prevailing conceptions of professional responsibility, adult clients generally have the right to control the objectives of the lawyers' representations and youthful clients generally have the right to be treated by their lawyers as adults.<sup>245</sup> Under this view, the core function of a lawyer is to maximize the possibility that the court will follow the child-client's preference. Thus, the lawyer representing the child must advocate the child's preference in settlement negotiations and in the courtroom,<sup>246</sup> thereby interfering with the attorney's mediational or neutral fact-finding role.

The only solution, short of withdrawing from representation, is for the lawyer to disregard the child's wishes. Many lawyers for children in custody disputes view their roles as mediators and facilitators of parental desires and take this course.<sup>247</sup> Data from the New York State law guardian report confirms that most court-appointed law guardians for children in juvenile delinquency and social welfare cases frequently disregard their clients' wishes and advocate instead what the lawyers perceive is in their clients' best interests.<sup>248</sup> This practice is fundamentally at odds with formal notions of professional responsibility. Departing from a model of the lawyer's representation of the child centered on client preferences frees the lawyer to advocate his or her own view of what is in the child's best interests, whether the child actually wants that result.<sup>249</sup> It is impossible to predict how a lawyer for the child advocating his own idiosyncratic views of what is in the child's best interests will influence the results of pretrial negotiations and trial. There is no guarantee that a lawyer freed from the constraints of advocating client-defined objectives will support the child's need for a continued relationship with both parents.<sup>250</sup>

for the child repeatedly counsels his client that her best interests suggest she should visit with her father regularly and frequently to redevelop a relationship with him. Nothing, however, will change this child's mind. She adamantly insists that her lawyer advocate a custody plan where she has little or no contact with her father.

245. See *supra* note 232.

246. In the hypothetical case, *supra* note 244, the attorney should take the mother's side in pretrial negotiations and make settlement proposals that limit the father's postdivorce relationship with the child, or attempt to delay proceedings, assuming good cause exists and that the mother and child's position might benefit. The attorney must also not present evidence that is favorable to the father should a custody trial occur.

247. See Note, *supra* note 92, at 1172-77.

248. J. KNITZER & M. SOBIE, *supra* note 238, at 36-43, 130-35.

249. See Guggenheim, *supra* note 229, at 100-07 (describing the function of the "champion" as "advocat[ing] what he believes to be the appropriate outcome").

250. See *supra* note 243.

If the aim of appointing a lawyer for the child is to provide mediation, neutral fact-finding, or an emotional ally for the child, then the state should explicitly outline those duties when assigning a lawyer to a custody dispute. With special training, a lawyer can be an excellent mediator or independent fact-gatherer. Nothing in a lawyer's traditional education or professional orientation, however, suggests attorneys are likely to be better than mental health professionals in performing these tasks. Indeed, given the lack of emphasis in legal education on mediation, lawyers are likely to be less suited to act as mediators or independent fact-finders in family conflict resolution than are professionals from disciplines in which formal training emphasizes encouraging cooperation and self-understanding.

In any event, appointing a lawyer for a child to perform only nonadversarial dispute resolution functions obscures the state's role in custody disputes. A court-appointed lawyer is most appropriate in cases involving teenage children whose cognitive and moral capacities approximate those of an adult and who, as a practical matter, can sabotage any custody plan to which parents agree or a court imposes.<sup>251</sup> A lawyer representing such older children should allow the child to define the objectives of representation; the lawyer's aim should be to insure the child has input into the decision-making process.

### *C. Neutral Mental Health Experts*

Another improvement frequently proposed for the sole custody system is increased reliance on mental health experts not affiliated with either parent to recommend a custody plan to the court.<sup>252</sup> A court can appoint a neutral psychiatrist to examine mother, father, siblings, and other important persons in the child's life and to present findings and conclusions to the court in a written report. The psychiatrist is available as a witness at trial and can be cross-examined by either parent. The judge can—but is not required to—rely on the psychiatrist's report and recommendations.

A court-appointed neutral mental health expert is an attractive concept because it softens the adversary mode of dispute resolution. A psychiatrist paid by one parent and selected by that parent's lawyer will

251. A lawyer for the child should also be appointed in circumstances where a child has significant financial interests such as a trust fund or contract income that would be affected by the divorce settlement.

252. See AMERICAN PSYCHIATRIC ASSOCIATION, CHILD CUSTODY CONSULTATION: A REPORT OF THE TASK FORCE ON CLINICAL ASSESSMENT IN CHILD CUSTODY (1982) (encouraging psychiatrists to become involved in the process); R. GARDNER, FAMILY EVALUATION IN CUSTODY LITIGATION (1982).

always be suspected of being a “hired gun,”<sup>253</sup> and often will not have the opportunity to interview the other parent before reaching conclusions.<sup>254</sup> Such reports are, therefore, inevitably incomplete and subject to attack for partisan bias. A court-appointed psychiatrist on the other hand has no financial allegiance to either parent and can insist on an interview with all parties concerned and use the compulsory process of the court to enforce this ground rule.

A court-appointed psychiatrist may also favorably affect the behavior of the parents before the trial. Parents will probably control their most aggressive actions and impulses toward each other for fear of the psychiatrist sending an unfavorable report to the court. This, in turn, might encourage settlement. Each parent might rather settle than take the risk of an adverse recommendation from the neutral psychiatrist.

The psychiatrist's report itself might stimulate the negotiation process. Her explanation of recommendations might encourage the parents to settle because of enhanced understanding of the needs of the child and their strengths and weaknesses as parents. The psychiatrist's recommendations, coming from a neutral source, are likely to be seriously considered by the judge. The parent whose custody position is weakened by the report will think seriously about settling rather than pushing the dispute to trial, where the outcome could be even worse.

Use of neutral psychiatrists to make recommendations to courts in custody disputes would be a desirable movement away from exclusive reliance on the adversary process, but it still would have some drawbacks. One is the question of funding. The system runs afoul of the same problems as the lawyer for children proposal. If the parents are required to split the fee, some families could not afford it.<sup>255</sup> If the state pays for the neutral psychiatrist, the questions of knowledge, competence, and adequate compensation arise.<sup>256</sup>

Another drawback is that use of neutral psychiatrists does not change the sole custody system. The appointment of a neutral psychiatrist, without more, will still likely result in sole custody if the psychiatrist shares the psychoanalytic assumption that one parent is more important than the other in the child's emotional life.<sup>257</sup> A psychiatrist

253. Cf. W. GAYLIN, *THE KILLING OF BONNIE GARLAND* 203-41 (1982) (describing the role of psychiatrists in the adversarial system in making determinations of insanity in criminal cases).

254. In the custody trial transcript in Judith Areen's family law casebook, numerous mental health experts testified on behalf of the mother or the father. Only one interviewed both parents and the conditions of the interview with each parent separately were greatly different. J. AREEN, *supra* note 196, at 429-35.

255. See *supra* text preceding note 237.

256. See *supra* text accompanying notes 237-43.

257. See *supra* notes 22-23, 40-43, 110-11, and accompanying text.

does not help parties settle disagreements themselves except incidentally, and then only in the coercive shadow of an adverse recommendation on custody to the court. The legal standards within which the psychiatrist evaluates the child and parents remain the same. If a case goes to trial in a jurisdiction that disfavors joint custody, the psychiatrist only helps the court decide sole custody: one parent still wins and one parent still loses.

Furthermore, there is serious question about even the very best psychiatrist's capacity to predict which of two involved, fit parents is more important to the child over several years.<sup>258</sup> Although neutral psychiatrists may be able to provide valuable descriptive data about the emotional development of the child and relationships within the family, there is no indication that they are better able than judges to identify which parent is more important to a child, especially as the available evidence indicates that children need *both* parents for optimal development.<sup>259</sup> Using psychiatric expertise to make sole custody decisions does not make the sole custody standard less problematic.

Employing neutral psychiatric experts would improve the sole custody system. The sole custody system, however, even with whatever improvement neutral psychiatrists make in it, should be a second, not first, line of defense in trying to protect the child's interests.

## V. The Cooperative Custody System

There is an alternative to the pessimistic adversarial role of the legal system at the time of divorce.<sup>260</sup> This alternative emphasizes that children's emotional and financial links with their parents and the parents' common interest in the welfare of their children continue long after marriages dissolve. Divorce is the occasion for the family's reorganization, not its funeral. As protector of the child's interest in establishing stability quickly, the state should structure parental interaction through a combination of joint custody, mediation, and active judicial management,<sup>261</sup> which together, create a cooperative custody system.<sup>262</sup>

258. See Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 711-16 (1974) (describing similar studies to the same effect); Okpaku, *Psychology: Impediment or Aid in Child Custody Cases?*, 29 RUTGERS L. REV. 1117, 1152 (1976) (rejecting psychological testimony as a basis for deciding custody cases); cf. Steadman & Cocozza, *Psychiatry, Dangerousness and the Repetitively Violent Offender*, 69 J. CRIM. L. & CRIMINOLOGY 226, 230-31 (1978) (empirical study of psychiatric predictions of violence for indicted felons found incompetent to stand trial suggests no special ability of psychiatrists to predict future violent behavior beyond that expected by chance). But see Litwack, Gerber & Fenster, *The Proper Role of Psychology in Child Custody Disputes*, 18 J. FAM. L. 269 (1979-1980) (replying to Okpaku article).

259. See *supra* notes 40-43 and accompanying text.

260. See *supra* note 113 and accompanying text.

261. See generally Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 122 (1976) (applying alternative dispute resolution methods to parental and custody conflicts). Court control legitimizes

## Cooperative Custody

The cooperative custody system places the state and the courts in the business of "family crisis management" by helping parents organize their relationship with their child to minimize the harm of divorce. The system is based on social acceptance of the tragedy of divorce<sup>263</sup> and the

the cooperative custody system in the perception of the public and the lawyers from whom it has to gain confidence and assures the system's public accountability. A dispute resolution system could also be structured around the notion that child-related divorce conflicts can be resolved more appropriately by a specialized administrative agency subject to judicial review only for abuse of discretion and procedural irregularity. The Michigan Friend of the Court, an administrative agency of local government, for example, removes from private parties the burden of initiating child support enforcement proceedings in court by delegating collection and enforcement decisions to a public official. See D. CHAMBERS, *supra* note 75, at 10-15. The Friend recently began to provide custody mediation. See MICH. COMP. LAWS ANN. § 552.513 (West Supp. 1986). Michigan thus seems to be creating a kind of administrative agency to deal with all aspects of divorce and custody problems. Delegating fact-finding and decision-making power in family disputes to an administrative agency that operates under less formal decision-making processes with minimal judicial review would raise, however, serious constitutional and policy questions beyond the scope of this Article. Cf. Foster & Freed, *Child Custody and the Adversary Process: Forum Conveniens?*, 17 FAM. L.Q. 133, 147 (1983) (noting that delegating custody cases to a panel of experts "may offend due process"). The cooperative custody system advocated by this Article assumes that for the foreseeable future the judiciary will continue to be the fact finder and decision maker in divorce related controversies and that ancillary professionals will assist the court operating under a judge's supervision. Under that assumption the finder of fact in a contested case must be a judge rather than, for example, a psychiatrist.

262. The same system might also be used to facilitate settlements of disputes between parents and grandparents concerning visitation and between parents and third parties who assume custody of a child in informal foster care type placements. There may be, however, significant objections to using mediation to resolve such disputes. Both married and involved unmarried parents claims to custody are constitutionally based. Cf. *Caban v. Mohammed*, 441 U.S. 380 (1979) (holding New York Domestic Relations law unconstitutional because it allowed an unwed mother to block her child's adoption but not the unwed father). On the other hand, traditionally parents and grandparents, and parents and third parties who have assumed care of a child have not been thought of as legal equals to parents. One underlying assumption of using mediation to resolve disputes is that both parties possess roughly equal status and rights. The legal system has historically rejected this assumption in grandparent-parent disputes, e.g., *Herron v. Seizak*, 321 Pa. Super. 466, 470, 468 A.2d 803, 805 (1983) (noting that neither Pennsylvania statutes nor case law give grandparents visitation rights over the parents' objection), and in parent-third party disputes, see, e.g., *Dickson v. Lascaris*, 53 N.Y.2d 204, 208, 423 N.E.2d 361, 363, 440 N.Y.S. 2d 884, 886 (1981) (stating that, absent grievous cause, parents' rights over third parties are supreme); *Bennett v. Jeffreys*, 40 N.Y.2d 543, 550, 356 N.E.2d 277, 284, 387 N.Y.S.2d 821, 827 (1976) (finding that only extraordinary circumstances should trigger court consideration of the child's best interests in parent/third-party custody disputes). Discussion of the uses of cooperative custody concepts in such cases, however, is beyond the scope of this Article, as is the usefulness of those concepts when one or both parents do not want legal or physical custody of the child. See generally Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984) (advocating the availability of nonexclusive parenthood alternatives and examining custody dispute resolution of the claims of stepparents, unwed fathers, foster parents, and nonparent caretakers).

263. This assumption distinguishes the cooperative custody system from the marriage reconciliation programs that accompanied the advent of no-fault divorce laws in some states. New York disbanded this program for many reasons, including lack of political support, low quality of personnel doing the work, and the apparent futility of trying to reconcile couples who had taken the emotionally significant step of consulting lawyers and filing for divorce. Articulating the goal of the system as divorce management rather than marriage preservation, however, retains the most valuable feature of the marriage reconciliation programs, helping parents cope with the consequences of

premise that, in most cases, the child will be better off if both parents remain involved in the child's life.

The child's need for a stable emotional and financial environment should cause the state to seek speedy parental agreement on custody and support arrangements. Judges should recognize and accept that working in an emotionally charged family environment will strain their emotions and test their values. The state, however, should operate on the belief that most divorcing parents are concerned about the welfare of their child and can be encouraged to work together for the child's benefit. Judges should avoid choosing between parents and, instead, reward parents who can put aside their animosity toward each other for the sake of their child.

The purpose of this Part is to detail how the cooperative custody system operates.<sup>264</sup> The following Part responds to criticisms of the system.

#### A. *The Single-Judge Calendar-Management System*

The system's work is triggered only when a parent notifies it that a controversy over custody or child support exists or an existing controversy is referred to the system from other sources; ministerial review is provided for agreements consented to by both parents. The form of the notification and the type of action<sup>265</sup> does not determine whether the problem is referred to the system; all that matters is whether a dispute exists between parents concerning a child's custody or support.<sup>266</sup>

the decision to dissolve the family. See generally M. WHEELER, *supra* note 26, at 98-115 (noting that conciliation programs help divorcing couples reach financial and custodial agreements).

264. The system about to be described does not exist in precise form in any state. The model combines the best features of the custody dispute resolution systems of several different jurisdictions. A recent report of the New York State Law Revision Commission contained the procedural but not the substantive features of the system. See *Recommendations*, *supra* note \*. Many of the features of the system to be described can be found in different states such as Connecticut, Michigan, and especially California. See CAL. CIV. CODE § 4607 (West Supp. 1986) (mandating mediation of contested issues in private custody disputes); MICH. COMP. LAWS ANN. § 552.513 (West Supp. 1986) (directing that the State's Friend of the Court make mediation services available to couples who desire it, either through state employees or preferably with private mediators under contract with the state). See generally Comeaux, *Procedural Controls in Public Sector Domestic Relations Mediation*, in ALTERNATE MEANS OF FAMILY DISPUTE RESOLUTION 79 (1982) (surveying the mediation procedures of various states, with particular emphasis on California's procedures). This Article's model is intended to be illustrative, not definitive. There are many ways to organize a dispute-resolution system promoting cooperative custody. Much more research and reflection is required before definite statements can be made about which professionals—lawyers or mental health experts—are "better" for conducting custody mediation.

265. Types of action include a complaint for divorce and custody, modification of a custody agreement or previous order, or a claim for nonpayment of child support with a defense of denial of visitation.

266. See CAL. CIV. CODE § 4607(a) (West Supp. 1985) (requiring custody disputes to be mediated when custody or visitation issues are disputed).

## Cooperative Custody

Within thirty days after the court is notified of the existence of a custody dispute, the litigants and their lawyers attend a mandatory conference with the judge who will preside over their dispute and who has special training on the needs of children of divorce. The purpose of the conference is two-fold. First, the judge becomes acquainted with the family's situation and attempts to see if the parents can agree on a custody plan without in-depth settlement efforts. Second, if the parents cannot agree quickly, the judge orders a prehearing schedule for the parents and their attorneys.<sup>267</sup>

The order reflects the family's specific situation, usually requiring the parents to mediate their dispute with the help of the court mediation service.<sup>268</sup> It calls for mental health and other evaluations to take place simultaneously with or subsequent to mediation. The order further includes a schedule for completion of financial disclosure,<sup>269</sup> other prehearing discovery, motions, and a firm custody hearing date.<sup>270</sup> It also states whether the court is appointing a lawyer for the child.<sup>271</sup> The order usually separates custody and child support from other issues in dispute.<sup>272</sup> The conference ends with the judge's strong statement to the parents and their lawyers that the court hopes that the parents will settle on a custody plan as it is in the best interests of the child that they do so; that they should cooperate with the mediation service in trying to reach agreement; and that the court will take into account one parent's willingness to facilitate the child's relationship with the other parent if the parents cannot agree.

267. *Cf.* FED. R. CIV. P. 16(b)-(f) (generally providing for pretrial conference, scheduling, and filing within 120 days of filing and for order to be issued after the conference, with sanctions for noncompliance by a party or a party's attorney, including an award of attorney's fees). Some mediators believe the parents' initial conference should be with a mediator rather than a judge. This alternative may be feasible in a jurisdiction in which the public and the bar accept mediation as the primary forum for custody dispute resolution. Some jurisdictions, like New York, have a strong adversarial tradition in family law disputes. These jurisdictions will require a greater public display of judicial support for a period of time to make the transition from an adversarial to a cooperative custody system.

268. Parents may also be allowed to opt for mediation conducted by a private practitioner on a court-approved list who agrees to be bound by the court's timetable for dispute resolution. In these cases the parents would pay the mediator's fee.

269. *See* N.Y. DOM. REL. LAW § 236(B)(4) (McKinney Supp. 1984) (requiring compulsory financial disclosure in alimony maintenance and child support controversies); N.Y. ADMIN. CODE tit. 22, § 117.2 (1983) (specifying the detailed "statement of net worth" required to satisfy the compulsory financial disclosure requirements).

270. The hearing usually occurs no later than 120 days after the conference. *Cf.* CAL. CIV. CODE § 4600.6 (West 1983) (giving contested custody cases priority over other civil cases); NEW JERSEY SUPREME COURT, COMMITTEE ON MATRIMONIAL LITIGATION, FINAL REPORT, PHASE TWO (reprinted as a supplement to N.J.L.J., July 16, 1981) (suggesting 90 day deadline) [hereinafter cited as NEW JERSEY REPORT].

271. *See supra* subpart IV(B).

272. *See infra* subpart VI(D).

## B. Mediation

A publicly-financed and compulsory program of confidential mediation for the parents is the centerpiece of the cooperative custody system. The mediators are specially trained mental health professionals or lawyers with family mediation training.<sup>273</sup> Often, two mediators, a male and female team, work together to reduce the risk of a parent feeling the mediator is biased.<sup>274</sup> The number and length of mediation sessions is unlimited. The mediation sessions are confidential—nothing said in the mediation can be revealed in court by the mediator, the parents, or their attorneys.<sup>275</sup> The mediator periodically informs the supervising judge only whether mediation sessions have taken place and whether more would be useful. At the discretion of the mediator, the parents' lawyers may be excluded from the mediation sessions,<sup>276</sup> although the parents may consult with their lawyers between sessions. The mediation covers physical and legal custody issues as well as child support issues. The mediator reviews the parents' financial disclosure forms and uses a formula to help the parents determine appropriate levels of child support in light of their income and assets.<sup>277</sup> The mediator may interview the child and, if appropriate, include the child in some of the mediation sessions.<sup>278</sup> If the parents reach an agreement, the mediator creates a memorandum of understanding embodying the essential terms of the agreement or asks the attorney for one of the parents to draft a settlement document for review by the mediator and the other parent's

273. See CAL. CIV. PROC. CODE § 1745 (West Supp. 1985) (requiring mediators in state's mandatory custody mediation program to have a master's degree in a behavioral science); FLA. STAT. ANN. § 749.01 (West 1985) (allowing counties to establish family negotiation or conciliation services); OR. REV. STAT. § 107.775 (1983) (mediator qualifications are the same as those providing conciliation services; conciliator must have master's degree in behavioral sciences, or bachelor's degree and one year graduate training in behavioral sciences and two years case work or clinical experience, or behavioral science bachelor's degree and four years case work or clinical experience).

274. A. Salus & S. Maruzo, *Mediation of Child Custody and Visitation Disputes in the Connecticut Superior Court 27-28* (November 1982) (unpublished paper by the Director and Deputy Director of the Connecticut program on file with the author). Obviously, the more professionals involved in the process of resolving a custody dispute and the higher their qualifications, the more money will be required to operate the system. See *infra* subpart V(G).

275. See Schepard, Philbrick & Rabino, *Ground Rules for Custody Mediation and Modification*, 48 ALB. L. REV. 616, 645-48 (1984) (discussing likely success of mediation in which confidentiality is assured).

276. See CAL. CIV. CODE § 4607(d) (West Supp. 1985) (allowing mediator to exclude lawyers from the custody mediation process); Schepard, Philbrick & Rabino, *supra* note 275, at 637-38 (suggesting mediation will be less adversarial when lawyers are excluded); see also *supra* notes 202-18 and accompanying text (discussing the role and effect of lawyers in divorce settlement negotiations involving children).

277. Beginning October 1, 1987, states are required to have guidelines to determine appropriate levels of child support. 42 U.S.C. § 667 (Supp. 1984).

278. See Schepard, Philbrick & Rabino, *supra* note 275, at 641-42 (suggesting factors to consider in deciding whether to include the child in mediation sessions).

attorney.<sup>279</sup>

In addition to facilitating agreement, the mediator performs different tasks for the parents, depending on their attitude toward each other and their child when mediation begins.<sup>280</sup> These tasks can include:

1. *Opening Civil Communication.*—Mediation requires the parents to be in the same room together and to listen to each other. The mediator can introduce civility into this dialogue by imposing basic procedural rules on the parents. It may be, for example, that at the end of their marriage, the husband and the wife could not speak to each other without shouting. The mediator can insist that they speak in turn without interruption. Only in an atmosphere of civility will the parents redevelop a sense of mutual respect so essential for a successful custodial arrangement.

2. *Providing the Parents with Information About the Child's Needs and Reactions to the Divorce Crisis.*—Parents interpret their child's reactions to divorce from the perspective of their own reaction to it. The parent who sought the divorce wants to believe she has not inflicted pain on the child, while the parent who did not may exaggerate the child's distress. A mediator can provide parents with objective information about how a child tends to experience divorce and with a neutral assessment of their child's reactions.<sup>281</sup>

279. *Id.* at 652-53.

280. The following list of functions that a mediator in a custody dispute could perform should give the reader a sense of how mediation can benefit parents and children involved in custody disputes. Several authors have described other systems of family mediation which accomplish to a greater or lesser degree all of the functions on the list that follows. See O. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT 26-27 (1978) (suggesting that divorce mediation include maintaining control of negotiations, approving the agreement, and evaluating the settlement); J. HAYNES, DIVORCE MEDIATION 56-78 (1981) (implementing the mediation model); H. IRVING, DIVORCE MEDIATION: A RATIONAL ALTERNATIVE TO THE ADVERSARY SYSTEM 19-20 (1981) (describing a multi-faceted system for divorce mediation); D. SAPOSNIK, MEDIATING CHILD CUSTODY DISPUTES 169-92 (1983) (delineating strategies for inducing cooperation between spouses and discussing methods of handling conflict). See generally H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 218-34 (1982) (discussing the functions mediators perform in a variety of settings).

281. See Schepard, Philbrick & Rabino, *supra* note 275, at 639-42 (discussing the mental health professional's role in assessing individual family members' interests and needs). The role of the mediator is not one of general educator. The information given by the mediator should be specific to the parents' particular dispute. The court itself can design general education programs parents must attend as part of the dispute resolution process that supplement and facilitate case-specific mediation. In California, for example, families participate in a mediation orientation session that includes viewing a videotape with interviews of divorced parents and their children and with experts discussing how to cope with children's needs during the divorce process. McIsaac, *The Family Conciliation Court of Los Angeles County*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 131, 133 (1982).

3. *Identifying Common Interests and Concerns in the Child's Welfare and Encouraging Joint Problem-Solving.*—A mediator can facilitate development of a joint problem-solving approach to the custody dispute<sup>282</sup> by getting parents to articulate and agree on their concerns for the child and plan concretely for the future. The mediator, for example, can ask both parents to make up projected schedules for the child's physical custody and finances. The mediator can then compare schedules with the parents, emphasizing the similarities in them, and suggest ways to bridge the differences.

4. *Reducing Fear.*—A mediator can reduce a parent's fear of losing the child through the divorce by explaining the dispute-resolution process and its likely results. The parent can then confirm this information with her own attorney.

5. *Identifying and Tempering Emotional and Unreasonable Positions.*—The mediator can provide parents with an objective perspective on their current positions<sup>283</sup> and the emotions they reflect. A mediator can thus help a parent distinguish between positions the parent is taking out of anger and those based on perceptions about the child's welfare.

6. *Eliminating the Perception that Compromise Means Weakness.*—A parent or her lawyer may be afraid to propose to compromise for fear of showing weakness, that might result in being taken advantage of on other issues. The possibility of such strategic posturing is substantially reduced by having proposals for compromise come from a neutral source.

7. *Narrowing Areas of Differences.*—Even if the mediator cannot facilitate agreement on all matters in dispute, he can help the parents narrow the range of disputed issues by encouraging partial agreements. For example, the parents might accept shared legal custody while disagreeing on the details of a physical custody plan; or the parents could agree on child support amounts but not on custody issues. The mediator could then report the partial agreement to the court, leaving the unresolved issues for neutral evaluation or judicial decision.

282. See generally R. FISHER & W. URY, *supra* note 146 (discussing the method of "principled negotiation" which encourages deciding issues based on objective merits by focusing on mutual gains where possible, and using independent, fair standards when interests conflict).

283. Cf. Eisenberg, *supra* note 203, at 661-64 (advocating use of affiliates in dispute negotiation because of their ability to remain objective).

## Cooperative Custody

8. *Referrals to Community Resources.*—A mediator should be able to identify parents and children who need psychotherapy on an individual or family basis, professional help in formulating a postdivorce financial plan, or job training. The mediator could refer those family members who need these services to programs in the community that meet their needs.

The overall purposes that custody mediation serves by performing these functions were well-described by Lon Fuller in a classic article:

[T]he central quality of mediation [is] its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.

... The creation of rules is a process that cannot itself be rule-bound; it must be guided by a sense of shared responsibility and a realization that the adversary aspects of the operation are part of a larger collaborative undertaking. The primary task [of the mediator] is to induce this attitude of mind and spirit, though to be sure, he does this primarily by helping the parties to perceive the concrete ways in which this shared attitude can redound to their mutual benefit.<sup>284</sup>

In essence, the mediator helps parents create rules to govern their postdivorce relationship in an effort to increase cooperation.

### C. *Neutral Evaluation*

Evaluation is a different process than mediation, and it is important

284. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325-26 (1971). It is important, however, to distinguish the classic model of mediation which Fuller articulates from the public mediation program that forms the core of the cooperative custody system. In the private mediation model, parents may agree to designate anyone they wish as mediator of their custody dispute. The parents negotiate the mediator's compensation with the mediator, as well as the "ground rules" for the mediation—what issues will be on the agenda of the mediation; whether the proceeding will be confidential; and when a parent or the mediator can terminate the mediation process. The parents' decision to mediate is entirely voluntary. The state creates no incentives or compulsion to seek mediation. The state exercises no direct control over the identity or the quality of the mediator or the way the mediation process is conducted. Finally, the state provides no financial subsidy to engage in mediation.

The cooperative custody system relies on a public mediation program that reverses many of the characteristics of private mediation while maintaining the same aim. In public mediation programs parents are compelled, or at least strongly encouraged, to mediate their dispute by the state. The mediator is a state employee, or is chosen from a panel selected by the court. Mediation services are supplied free of charge, or parents are charged according to their ability to pay. Statutes or court rules specify the ground rules and timetables for mediation. In short, in a public program the parents have little choice whether to participate in mediation, and have little control over its terms and conditions.

to keep the two conceptually and practically distinct. In mediation, a third party with no coercive power facilitates a voluntary settlement between the parents. Although the parents may experience coercion to mediate, they are not coerced to agree to anything during the process. The mediator has no power to make a recommendation to the court based on the parents' statements during mediation or based on a personal evaluation of the comparative fitness of the parents. Everything said in mediation is confidential and cannot be used against the parents.

The purpose of evaluation is different. In evaluation, a third party intervenes in the custody dispute to recommend to the court a custody plan in the child's best interests. The evaluator interviews the parents and the child in a nonconfidential setting to provide the court with information and recommendations from an informed and neutral source. A settlement may be a by-product of the evaluation process (e.g., a parent may settle before an evaluator's report is sent to the court for fear of an adverse recommendation), but it is not its principal object.

The dispute resolution system should encourage the maximum number of parental settlements with minimal state coercion and adversary procedure. Thus, evaluation of the family's situation by a court-appointed mental health professional should generally occur only after mediation between the parents reaches impasse. On the other hand, delaying evaluation until after mediation leads to delays in an ultimate custody determination and thus increases the time of instability for the child. Furthermore, simultaneous mediation and evaluation with the pressure of an impending trial might encourage parents to take mediation more seriously. In some cases, then, mediation and evaluation should take place simultaneously rather than sequentially. The judgment about the timing of mediation and evaluation, however, should be left to judicial discretion, exercised at the first conference with the judge, and should depend on the urgency of a final disposition.

In order to preserve the confidentiality of the mediation process, however, the evaluator should *not* be the same person as the mediator, unless the parents and their attorneys stipulate otherwise.<sup>285</sup> The evaluator cannot consult with the mediator nor can information revealed in mediation be imparted to the evaluator.

After discussing the evaluation process with the parents and their

285. See A. Salus & S. Maruzo, *supra* note 274, at 9 (discussing evaluation of family situation after mediation process); cf. *McLaughlin v. Superior Court*, 140 Cal. App. 3d 473, 189 Cal. Rptr. 479 (1983) (parties have a right to cross-examine mediator/evaluator who recommends a custody plan to the court under California's mandatory mediation law); *Kessler v. Kessler*, 10 N.Y.2d 445, 180 N.E.2d 402, 225 N.Y.S.2d 1 (1962) (discussing due process requirements when court-appointed mental health experts make custody recommendations to the court).

attorneys, the evaluator interviews the family members and observes the parents' interaction with the child.<sup>286</sup> Interviews with the parents focus on their plans for involvement of the other parent in the child's life. Interviews with the child focus on his reactions to the divorce and his relationships with his parents. The evaluator reviews the child's school records and discusses the child's educational progress with teachers. She also reviews any relevant social agency or medical records concerning the child and arranges for any necessary medical or psychological testing for the child and family members.

All of this information is summarized in a report to the court which meets carefully articulated standards as to its form and content. The report also contains the evaluator's recommendations for a custody plan. Before the report is filed with the court clerk, the evaluator meets with the parents and their attorneys and reviews a draft of the report with them, noting any objections in the final copy.

### *D. Custody Trials*

Even in a cooperative custody system, disputes may have to be resolved by a judge after an adversary hearing. Several major differences, however, exist between trials in the cooperative and the adversary system. The first difference concerns the issues to be decided. The court in the cooperative system separates custody and child support issues from any other disputes between the parents. Grounds for divorce, property distribution, and spousal maintenance are severed for nonpriority resolution, except for temporary support orders.<sup>287</sup>

A second major difference is that the judge in the cooperative system actively seeks to move the case to trial if settlement cannot be reached. A target date for trial is set at the initial conference and extended only on a showing of good cause,<sup>288</sup> such as the realistic possibility that further mediation sessions will result in parental agreement. The parents, their lawyers, and the mediator or evaluator must appear in court personally before the judge to request an extension of time. The judge's aim should be to hold a hearing on custody within 120 days of the initial conference date. The parent who seeks to delay a final resolution for tactical reasons does not respect the child's immediate need for a sta-

286. The following description of how the evaluation process should be conducted is largely based on the recent report and recommendations of the New Jersey Supreme Court's Committee on Matrimonial Litigation. See NEW JERSEY REPORT, *supra* note 270, at 7 (recommending increased judicial reliance upon professionals for evaluative purposes).

287. *Id.* (recommending separation of child custody from other issues in dispute).

288. *Id.* (noting importance of expeditious resolution).

ble environment, is less likely to be the better sole custodial parent, and should be treated accordingly by the judge in a final decision.

A third major difference between custody trials in the adversary system and the cooperative custody system is the routine use of the neutral evaluator in the latter. The evaluator's report and cross-examination testimony are likely to be the principal focus of the trial.

### *E. The Substantive Law Standards for Contested Cases*

In a cooperative custody jurisdiction, the judge begins with a presumption of shared legal custody, rebuttable only by a showing either of parental incompetence to make rational decisions for a child or hopeless embattlement of the parents.<sup>289</sup> If either parent contests shared legal custody, the court then tries to isolate the classes of decisions that the parents can discuss from those on which discussion is impossible. It may be, for example, that the parents can speak to each other about the child's medical care but not about education. If it is impossible to separate out some issues for cooperative decision making, the court chooses as legal custodian the parent who is more likely to consult with the *other* parent in making decisions, assuming all other things are relatively equal between them.

The division of duties between parents in the intact family only begins the consideration of the child's postdivorce physical custody plan. The court recognizes parental division of duties will necessarily change as both parents likely will be working after the divorce and making other adjustments to get on with their lives.<sup>290</sup> The judge recognizes the child's need for a meaningful and realistic relationship with both parents as a legitimate reason for changing physical custody arrangements that existed before the separation. She also recognizes the desirability of preserving the child's school and peer environment and evaluates any difficulties the child may have with a complex joint physical custody plan.

The court also asks each parent and the evaluator to submit a weekly physical custody plan for a full year that describes parental responsibilities for the child's physical care.<sup>291</sup> In evaluating the competing plans, the judge adopts a plan that gives each parent enough time with the child to develop or continue a meaningful relationship.

289. See *supra* notes 187-88 and accompanying text.

290. See *supra* text accompanying notes 165-66.

291. See Steinman, *supra* note 98, at 759-60 (explaining usefulness of parentally-developed custody plans submitted to court).

### F. *Postdecree Remedies for Parental Violations*

The cooperative custody system is based on the premise that a child needs a stable environment, both financially and emotionally. Devising effective methods for dealing with parental violations of child custody and support obligations is essential. A fundamental aim of postdecree remedies and social services should be to make failure to pay child support and interference with parent-child relationships equally serious violations of court decrees.<sup>292</sup> Treating these violations as equally important improves the perception that the legal system acts evenhandedly in dealing with the problems in the postdivorce lives of both fathers (who tend, as a class, to be more interested in enforcing custody than child support obligations) and mothers (whose interests tend to be the opposite). Resort to self-help remedies will be eliminated only if each parent has equal access to an effective and sympathetic legal system.

One major result of deemphasizing the adversary atmosphere surrounding custody and support discussions may be to encourage compliance with the resulting agreement. Evidence to support this hope is found in the significant difference in child support payment rates that exists between men paying pursuant to a court order and men paying pursuant to an out-of-court agreement reduced to writing.<sup>293</sup> Those parents who voluntarily enter into agreements to pay are far more likely to meet their obligations, perhaps because the process of negotiation helps them develop a working relationship with their spouses concerning the child.

Remedies for custody plan violations should be graduated in proportion to parental intransigence. For example, a remedy for violation of physical custody plans might include make-up time, before more drastic sanctions are tried.<sup>294</sup> The child would make-up the lost physical custody time at times and places of the aggrieved parent's choosing, consistent with the child's schedule and desires. It would temporarily increase

292. See generally Note, *Making Parents Behave: The Conditioning of Child Support and Visitation Rights*, 84 COLUM. L. REV. 1059 (1984) (urging limited use of linking child support and visitation rights and suggesting alternative remedies and enforcement mechanisms).

293. Women with court orders for payment of child support received 55% of the amount they were due. The mean amount of the court order was \$2,050, but the mean amount received was only \$1,120. In contrast, women with written agreements received 78% of what they were due and both the mean level of the payments due (\$2,870) and received (\$2,240) were significantly higher. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, SERIES P-23, NO. 124, CHILD SUPPORT AND ALIMONY: 1981 (ADVANCE REPORT) 2 (May 1983).

294. See MICH. COMP. LAWS ANN. §§ 552.601-.650 (West Supp. 1986) (comprehensive statutory scheme under which parental support and visitation obligations are treated equally includes make-up time remedy); Note, *supra* note 292, at 1081-88 (discussing alternatives to child support, or visitation sanctions, including garnishment of wages for failure to pay child support, and imprisonment for contempt for violation of visitation rights).

the presence and importance of the aggrieved parent in the child's life, counteracting the effects of the violation.

The next level of remedy might be a permanent shift of some or all legal or physical custody rights to the aggrieved parent.<sup>295</sup> Absent extenuating circumstances, parents who seek to thwart their child's relationship with the other parent do not act in the best interests of the child, and their fitness as a decision maker for the child is open to serious question. Shifting legal and physical custody to the other parent might then be appropriate, and could minimize the amount of disruption the child experiences.

### G. *Financing the System*

The system for resolving custody disputes just described is expensive; skilled personnel would be required to operate effectively and to gain the confidence of parents, attorneys, and judges. The staff must have a manageable caseload of mediation and evaluation so that the dispute is resolved in accordance with the child's sense of time and the schedule the judge sets at the planning conference. An estimate prepared for the New York Law Revision Commission calculates the expense for the mental health professionals necessary to conduct mediation and evaluations in divorce-related custody cases filed in state trial courts of general jurisdiction at approximately eight million dollars a year.<sup>296</sup> Some

295. See *Beck v. Beck*, 86 N.J. 480, 499, 432 A.2d 63, 72 (1981) ("When the actions of an uncooperative parent deprive the child of the kind of relationship with the parent that is deemed to be in the child's best interests, removing the child from the custody of the uncooperative parent may well be appropriate as a remedy of last resort."); *Strosnider v. Strosnider*, 101 N.M. 639, 647, 686 P.2d 981, 989 (Ct. App. 1984) (holding that when joint custody parents fail to accommodate one another, the court may modify custody after reevaluating the child's best interests).

296. *Recommendations*, *supra* note \*, at 105, 158-63. Readers must be cautioned that the cost estimate for New York courts quoted in the text does not cover all of the cases that the system would process. New York divides jurisdiction over custody disputes among the supreme court, the trial court of general jurisdiction, and the family court. The supreme court can decide custody disputes associated with divorce but does not currently keep statistics on how many contested divorces involve custody issues. The trial court has the exclusive power to grant divorces and can, depending on the wording of the divorce decree, also hear petitions for modification. The family court has the power to hear custody disputes on referral from the supreme court and petitions for custody modification. The family court also has jurisdiction over paternity and support actions, which can raise custody and visitation issues, and custody disputes between unmarried parents, all of which are included in the cooperative custody system described in this Article. The family court does not keep separate statistics that allow estimation of how many support and paternity actions would be subject to the system described in the text. In short, there is no way to estimate accurately how many contested custody disputes occur in New York courts every year that would be subject to the cooperative custody system. The quoted figures were included solely for "guesstimate" purposes. Each jurisdiction would have to do its own cost analysis based on available statistics describing its caseload. *Id.* at 107-09; see also Coogler, *Estimating Caseload and Personnel Requirements in Court Related Conciliation Programs*, in *ALTERNATE MEANS OF FAMILY DISPUTE RESOLUTION* 161-72 (1982) (describing an analysis for the Family Conciliation Unit of Fort Lauderdale).

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perspective on this figure can be obtained by recognizing that the operating budget for New York state in fiscal year 1984 was forty-six billion dollars<sup>297</sup> and the operating budget for the New York state court system in 1984 was 654 million dollars.<sup>298</sup>

Two possible sources of funding suggest themselves: general tax revenues and increased fees for marriage licenses and divorce filings. The argument for the former adopts the rationale behind taxing to support public education: the entire society has an interest in the welfare of the children who will be its future citizens.<sup>299</sup> Using the general tax base to support the social services necessary for the cooperative custody system recognizes that the system performs public functions that should be available to all families regardless of ability to pay.

Support for the system from an increase in marriage license fees and divorce filing fees is based on a different rationale.<sup>300</sup> For those parents who use the system, the increase in filing fees is, in effect, a user charge for the benefit of their children. The case for increasing marriage license fees to support the system is more tenuous, and can only be supported as a form of insurance payment to benefit their children.<sup>301</sup>

The cost of implementing a cooperative custody program will be offset to a certain extent by savings to the state. Divorce filings are the highest number of civil filings in our court system with about ten times the number of any other type of civil case. A cooperative system should significantly reduce the number of custody trials and therefore result in less demand for new courts. The savings could be substantial. In addition, the actual parties will save an enormous amount of money because mediation costs substantially less than a full-blown adversary procedure.<sup>302</sup> The savings would in some sense negate much of the costs.

Whatever method of funding is chosen, financing must be sufficient to attract qualified personnel who will help the mediation and evaluation processes earn the respect and support of parents and their attorneys. If

297. NEW YORK STATE EXECUTIVE BUDGET, APRIL 1984-MARCH 1985 at A-6.

298. *Id.*

299. See Ratner, *A New Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEXAS L. REV. 777, 781-85 (1985) (discussing society's interest in education).

300. If this system of financing is adopted, provision must be made for a waiver for those parents too poor to pay for the increased marriage and divorce filing fees. See *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that because of the basic position of marriage relationships in society and state monopolization of means for dissolution, due process prohibits denial of access based solely on ability to pay court costs and fees).

301. Texas, for instance, has authorized user-fee funding for Domestic Relations Offices, closely analogous to the Michigan Friend of the Court offices. TEX. REV. CIV. STAT. ANN. art. 5142a-1 (Vernon Supp. 1986).

302. Pearson & Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497, 507-08 (1984).

a choice has to be made, it would be better not to create the system than to underfund it and staff it with poorly qualified personnel. The history of the abortive New York conciliation courts provides an example of how an underfunded and poorly staffed program can do more harm than good.<sup>303</sup> State rather than local control over who is hired to perform mediation and evaluation services, uniform statewide qualification standards for personnel, and perhaps competition between the state-funded services and the private sector<sup>304</sup> might help ensure that quality services are delivered by personnel operating under the court's auspices. But above all, adequate funding for the system is essential to help ensure it comes close to achieving its aims.

#### *H. The Effects of the Cooperative Custody System on Pretrial Parental Negotiations and Settlement*

The cooperative custody system should have a profound effect on out-of-court settlement negotiations between parents. Lawyers should tell a parent-client that the court's first priority in resolving the dispute will be the welfare of their child and that their attitude toward the child's relationship with the other spouse will have a significant impact on any final custody plan. Lawyers should thus encourage clients to behave reasonably toward the other spouse. With this encouragement, negotiations should proceed primarily on a no-fault, problem-solving basis with issues concerning the child being the first items for resolution.

Some parental disputes will come to the formal system for resolution. It is hard to say with any degree of certainty what percentage of cases will settle after each stage of the dispute resolution process.<sup>305</sup>

303. In addition to being assigned the difficult task of attempting to reconcile couples, many of whom had already agreed to divorce, see *supra* note 263 and accompanying text, the quality of personnel who staffed the marriage conciliation bureaus in New York State contributed to the system's demise. Conciliation commissioners were only required to be members of the bar for five years; special training in counseling or family problems was not required. "The job [in 1974] pays thirty-four thousand dollars a year, which has made it an attractive sinecure for former legislators and judges who failed to be reelected. One New York lawyer says of the commissioners, 'They're nice enough guys, but a lot of them are political hacks.'" M. WHEELER, *supra* note 26, at 104.

304. Cf. MICH. COMP. LAWS ANN. § 552.513(1) (West Supp. 1986) (Michigan Friend of Court in local judicial districts required to provide domestic relations mediation but may use its own employees to do so only "if the service is not available from a private source, or if the [supervising] court can demonstrate that providing the service within the friend of the court office is cost beneficial."). See generally Rose-Ackerman, *Social Services and the Market*, 83 COLUM. L. REV. 1045 (1983) (advocating "proxy shopping," in which funding agencies reimburse suppliers directly for services rendered, as an alternative to state-run social services).

305. No program that currently exists incorporates all of the substantive and procedural features of the cooperative custody system just outlined in this Article. Reports from existing programs may overestimate the usefulness of mediation and evaluation to justify their continued support. Data from different jurisdictions are not comparable because of differences in programs and case classifications. Nor are many large-scale studies available that compare the processing of cases through a

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Nonetheless, the limited available data do give some grounds for optimism about the usefulness of mediation and evaluation programs in decreasing the number of custody trials and facilitating parental settlements. The data also support the proposition that mediation encourages a larger degree of postdivorce parental cooperation than adversary system procedures.

Connecticut has an established, publicly funded mediation/evaluation program in which family relations counselors attend court sessions and encourage parents and their attorneys to use the available services.<sup>306</sup> Connecticut statistics do not indicate what percentage of all custody disputes are referred for mediation and evaluation, nor do they compare outcomes in disputes referred for mediation against those that are not. The data do indicate, however, that only approximately five percent of custody disputes that go through mediation require an adversary hearing.<sup>307</sup> Sixty-eight percent of custody cases referred for mediation settle through that process alone.<sup>308</sup> The remaining settlements occur during or after evaluation but before trial.

California programs, which operate in a jurisdiction that mandates mediation of all custody disputes and has a statutory preference for joint legal custody, report similar results. The Director of the Family Counseling Service of the Los Angeles County Superior Court reports a settlement rate of about fifty-five percent of all disputes referred to mediation. Another fifteen percent of the referred families reach agreement following the breakdown of mediation but before the next court date. Another twenty-five percent of the families are referred for an evaluation and report, with most disputes being resolved after the report is submitted. Less than two percent of all relevant filings go to trial on custody issues.<sup>309</sup>

One presiding judge of the Family Law branch of the San Francisco Superior Court had five to fifteen custody cases a day on his calendar and spent two afternoons a week trying custody cases prior to the establishment of a mandatory mediation program in his jurisdiction in 1977. In the first eleven months of 1981, the entire San Francisco Superior Court

mediation system and the adversary model. We are, as usual, left with suggestive but not definitive data.

306. The description of the Connecticut program and the statistics from it are found in A. Salius & S. Maruzo, *supra* note 274, at 8-30, app. B. The counselors also identify cases they deem inappropriate for referral to mediation by the judge: cases involving child abuse; parents with serious emotional problems or pattern of violent or antisocial behavior; and families with numerous prior social service agency contacts.

307. *Id.* at 29.

308. *Id.*

309. McIssac, *supra* note 281, at 134-35.

heard only three custody cases.<sup>310</sup> Furthermore, the number of custody disputes returning to court for modification dropped dramatically after introduction of mandatory mediation.<sup>311</sup>

The beneficial effects of an out-of-court settlement on child support payment rates and the negative effects of an adversary custody trial on the family and the child combine to create a substantial incentive to settle these disputes out-of-court. The tentative mediation program data also indicate that the settlements promoted by such programs benefit the child.<sup>312</sup>

The most extensive research comparing the results of custody agreements in the sole custody/adversary system and those resulting from mediation has been conducted by the Denver Custody Mediation Project, which organizes and administers cost-free voluntary mediation services to divorcing couples in the Denver metropolitan area.<sup>313</sup> The Project evaluated the effect of mediation on custody disputes by comparing the perceptions of randomly selected participants who agreed to mediate their cases, with a random sample of custody disputes in the Denver courts in which the parents were not exposed to mediation. The results of their research can be summarized as follows:

1. *Mediation Encourages Agreements.*—The Denver project data showed that fewer than twenty percent of couples exposed to mediation actually went to trial compared to a fifty percent rate for those couples not exposed to mediation.<sup>314</sup> In effect, then, more than eighty percent of the couples exposed to mediation achieved a settlement either during or after the mediation process, but before trial.<sup>315</sup> Apparently, the mediation process creates a type of "halo effect" that facilitates a settlement by opening lines of communication and encouraging compromise and cooperation in a large number of couples with custody disputes.

310. King, *Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law*, 2 CALIF. LAW. 40, 41 (1982).

311. *Id.*

312. *Recommendations*, *supra* note \*, at 127-28; Pearson & Thoennes, *supra* note 302, at 506-07, 510.

313. The research is reported in Pearson & Thoennes, *supra* note 302. The research methodology and data are criticized in Levy, *Comment on the Pearson-Thoennes Study and on Mediation*, 17 FAM. L.Q. 525 (1984). The researchers reply to the criticisms of their study in Pearson & Thoennes, *Dialogue: A Reply to Professor Levy's Comment*, 17 FAM. L.Q. 535 (1984).

314. Pearson & Thoennes, *supra* note 302, at 504.

315. *Id.* This finding is consistent with results reported in Connecticut, A. Salus & S. Maruzo, *supra* note 274, at 28, and California, Pearson & Thoennes, *supra* note 302, at 514. It should be noted that the referrals from which the Connecticut results were obtained included a majority of postdivorce disputes. A. Salus & S. Maruzo, *supra* note 274, at 28.

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2. *Mediation Reduces Relitigation.*—Mediation also furthers the durability of settlements agreed to by the parents. Couples who reach a custody agreement through mediation are less likely to return to court to relitigate than are those who depend on the court to mandate an arrangement.<sup>316</sup> Moreover, participants report greater compliance with agreements reached through mediation than with court-imposed arrangements.<sup>317</sup>

3. *Mediation Achieves Some Cost and Time Savings.*—Economic costs of a custody trial are divided into costs paid by private litigants, mostly attorney's fees, and costs paid by the public in funding the operation of the court system. In the Denver study, mediation resulted in only a slight savings in attorney's fees, possibly because many of the parents had retained lawyers before beginning mediation and incurred substantial expense before the process began.<sup>318</sup> It is easy to speculate about more substantial cost-savings in terms of funding the courts. If mediation facilitates an agreement in a dispute that would otherwise go to trial it eliminates the need for a trial and the publicly funded custody evaluations that often precede it.<sup>319</sup>

4. *Mediation Improves the Attitude of Parents.*—The majority of couples who participated in mediation viewed the process favorably, whether or not they reached agreement. Parents who reached a compromise thought the agreements were "fair" and "just," a perception not as widely shared by couples who stipulated to custody plans before trial without exposure to mediation. Even a majority of couples who participated in an unsuccessful mediation attempt viewed the process itself as basically fair.<sup>320</sup>

5. *Mediation Facilitates Custody Arrangements that Give Children Meaningful Relationships with Both Parents.*—The Denver mediation program sought to help parents develop their own custody plan, not to promote joint custody.<sup>321</sup> Agreements facilitated by mediation, however,

316. Pearson & Thoennes, *supra* note 302, at 505, 509.

317. *Id.*

318. Because mediation for dispute resolution is not as well known and understood as negotiations between lawyers in the adversary system, parents involved in mediation for settlement of custody disputes might continue to retain counsel for security. This tendency may diminish as public confidence in the fairness and competence of the mediation process grows. It should also be noted that failed mediation in which attorneys participate can raise the costs of representation to parents.

319. The Denver study did not engage in such speculation; it is the author's own. See *supra* text preceding note 302.

320. See Pearson & Thoennes, *supra* note 302, at 505, 518-19.

321. *Id.* at 503-04.

seem to result in joint custody arrangements more frequently than custody arrangements negotiated by lawyers in the shadow of litigation or imposed by the court after a trial.<sup>322</sup> Even comparing all families who arrange for joint custody, children of divorcing parents who mediated spent more time with their noncustodial parent than did their counterparts whose parents were not exposed to mediation. Mediation thus seems to help educate the parents about the needs of their children for meaningful contact with both of them after divorce.<sup>323</sup>

### *Summing Up*

Although the available data suggest that the cooperative custody system will produce better settlements, fewer custody trials, and more joint custody arrangements, those data are far from definitive. The ultimate question for social policy is what message the legal system should send parents about what society expects from them. Because parents enjoy virtually unrestricted rights to have a child, as well as virtually unrestricted access to divorce, society has a right to ask in return that they make the child's interest their foremost consideration in dissolving the family. Adversary combat may gratify a parent's fantasy of disposing of the other parent and escaping all blame for the failed marriage, but that gratification does not justify the harm that adversary combat causes the child. The cooperative custody system symbolizes the inescapable reality that parents are forever, even if marriages are not.

## VI. The Cooperative Custody System: Commentary

This Part analyzes the policies behind, as well as the major objections to, the cooperative custody system outlined in Part V. The substantive law standards of the cooperative custody system have already been analyzed in Part II. The commentary in this Part focuses on the rationales for the procedures the system uses.

### *A. The Role of the State*

One objection to the cooperative custody system is that the state's active attempt to minimize the effects of divorce on children invades pa-

322. One probable reason is that participation in mediation helps the parents perceive the benefits of joint custody and develop the communication skills and attitudes toward each other that help make joint custody arrangements possible.

323. Another study conducted by the Divorce Mediation Center in Charlotte, North Carolina, confirms the Denver Project data on this point. Fifty-two percent of the mediated custody disputes resulted in joint custody, but only 3% of the disputes processed by the sole custody system ended in what the researcher calls "shared parenting responsibilities." L. FRANCKE, *supra* note 225, at 259.

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rental autonomy. This argument assumes that the state's only obligation to the child of divorce is to designate a single custodial parent and settle subsequent parental disputes in the adversary system.<sup>324</sup>

The state, however, has historically performed two functions in child custody cases: parental dispute resolution and child protection.<sup>325</sup> The dispute-resolution function is inescapable to prevent child stealing and violence; the question is whether the state should actively structure its dispute-resolution process to do more than just prevent these extreme actions.

The cooperative custody system assumes that the state can and must protect the child of disputing parents and realizes that both parents are likely to take positions about the child's welfare that serve their own ends, not those of the child.<sup>326</sup> In an intact family, the state must provide a large measure of autonomy to the parental decisions about the child's welfare,<sup>327</sup> because the partnership principle protects the child from overreaching by one parent.<sup>328</sup> The parents in the intact family, as a coordinated unit, decide the custody arrangement that is in the child's best interests.<sup>329</sup> Each parent is presumed to act in the child's best interests;<sup>330</sup> the necessity of mutual agreement functions as a check on the other's judgment about what those best interests are. The partnership mode thus justifies the state deferring to parents to make most major decisions about the child, except in those decisions that threaten the child's life or basic welfare.<sup>331</sup>

Divorce removes some restrictions on state interference on parental decisions; legal relationships change because the state allows parents to change their marital structure. It is no more of an intrusion into parental autonomy to mandate mediation to promote agreement on child custody than it is to award sole custody to the primary caretaker over the objection of the other parent. In each case the state helps determine the rela-

324. This is the argument adopted by the *Braiman* court, see *supra* note 113 and text accompanying notes 112-16.

325. Mnookin, *supra* note 45, at 229.

326. See *supra* notes 117-20 and accompanying text.

327. See *Developments*, *supra* note 44, at 1213-21.

328. Cf. *id.* at 1219 (distinguishing between state's interest in reserving decisions to the family unit from its interest in deciding which family member has the authority to make a particular decision).

329. See *supra* notes 163-64 and accompanying text.

330. See *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979) (stating that although parents may at times act against the interests of their children, human experience teaches that "parents generally act in the child's best interests").

331. See Goldstein, *Medical Care for the Child at Risk: On State Supervision of Parental Autonomy*, 86 YALE L.J. 645, 648-61 (1977) (advocating that limits be placed upon the power of the state to override parental decisions about health care for the child, except in extreme circumstances).

tionships that will exist between the two parents and the child. If the parents require the state to function as dispute resolver by failing to agree, the state has a moral obligation to intervene in a manner that protects the most vulnerable member of the family unit, the child.

The question then becomes how to structure that intervention. Structuring the intervention along sole custody/primary caretaker/adversary system lines still requires coercion from the state, without recognizing the primacy of the child's interest in maintaining relationships with both parents. Structuring the intervention along cooperative custody lines, on the other hand, makes the best interests of children paramount. In such a system, the state realizes that parents may be unable to project what kind of long-term relationship they really want with their child and ex-spouse in the bitter aftermath of divorce. Instead of recklessly cementing the status quo, the state fosters an environment of reflection and cooperation in order to protect the child's best interests. Although it does require some degree of intrusion into the privacy and autonomy of parents, the cooperative custody system makes the state role a creative as opposed to a static one.

### *B. State Involvement in Uncontested Parental Custody Settlements*

The converse argument suggests that the cooperative custody system does not go far enough in protecting the child's welfare because agreements made by parents will still be subject only to ministerial review. Parents will thus still be able to barter custody for increased financial support without regard to the child's welfare and without state intervention.<sup>332</sup>

The issue of whether to review parental agreements extends only to those agreements negotiated without the intervention of the cooperative custody system. For agreements reached after mediation and evaluation, the state can presume that expert personnel acting under the auspices of the state have helped structure the parental decision-making process to educate parents about what the child's welfare requires.<sup>333</sup>

The question remains of how the state should view a parental agreement not facilitated by the cooperative custody system. As previously

332. See *supra* notes 117-19, 142-48 and accompanying text.

333. See Schepard, Philbrick & Rabino, *supra* note 275, at 659-62. Empirical studies indicate that mediation leads to more joint custody agreements than the adversary process. See *supra* text accompanying notes 321-23. Agreements after evaluation have the benefit of an expert's recommendations, and a mediator's knowledge of the child's needs. The participation of outside neutral experts to facilitate parental agreement in the cooperative custody system, therefore, ensures that the agreement was made with due consideration for the child's interests, limiting the need for further judicial review of the parents' agreement.

discussed, meaningful state review of uncontested parental custody agreements ancillary to a divorce presents significant practical and conceptual problems similar to those that plagued the fault-based system of divorce.<sup>334</sup> More fundamentally, state review of uncontested custody settlement agreements conflicts with the autonomy of parental decision-making. One of the major problems of the postdivorce family is the crisis of parental competence that develops in it.<sup>335</sup> The state must balance the goal of child protection against the need to reinforce parental competence at a time of family crisis.

The state does not encourage parental competence by questioning all parental custody agreements. Society operates on the belief that parents, even if divorced, are better able to rear their child than a state-provided alternative family structure. Therefore, the state should limit its interference with the autonomy of divorced parents. The cooperative custody system seeks to diminish a parent's incentive to trade custody for money. Parents who agree on a custody and support plan already indicate that they understand the child's needs in the postdivorce family. Any review of such an agreement can only marginally improve custody plans of some children and is outweighed by the need to respect and reinforce parental autonomy. These factors suggest that once the cooperative custody system is established, the state should deem a parents' willingness to trade a relationship with the child for money—or money for time with the child—as a human failure beyond its power to affect, not a failure of its dispute resolution system.

### *C. Serving the Child's Sense of Time*

Trial courts use two basic techniques for managing their calendars: the single-judge system in which the same judge manages both pretrial and trial aspects of a dispute, and the master calendar system in which different judges may handle pretrial motions and settlement conferences and trial.<sup>336</sup> For a variety of reasons, the single-judge system is especially

334. See *supra* text accompanying notes 139-41.

335. See *supra* subpart II(A)(1)(a). Long-term diminution of parental competence is apparently a serious problem in a subgroup of divorcing families. Based on her follow-up study of the children of divorce, Wallerstein believes that some parents are never able to reconcile their conflicting desires to abandon the child at the time of divorce and "passionate attachment to and dependence on the child that intensifies or develops at the time of the marital breakdown." Wallerstein, *supra* note 120, at 168. Failure to resolve the conflicting feelings creates, in Wallerstein's view, permanently diminished parental capacity and authority. The children of such parents have to grow up too fast and become spouses and friends and, in a sense, psychological lovers of their parents rather than children. The result is a subgroup of the children of divorce who cannot maintain their normal developmental course because they shoulder responsibilities for themselves and others beyond their capacities.

336. See T. CHURCH, J. LEE, T. TAN, A. CARLSON & V. MCCONNELL, PRETRIAL DELAY: A

appropriate for parental custody disputes.

A single-judge calendar system ensures that at least one neutral person becomes familiar with the family's history and background and can support the child's interests from the time the dispute enters the system until it is resolved. Instead of appointing an attorney for the child and creating all of the problems associated with that concept,<sup>337</sup> a judge, or a mental health professional functioning under the judge's supervision, can ensure that the child does not get lost in the parental and judicial shuffle.

The single-judge calendar system also leads to more rapid disposition of civil cases.<sup>338</sup> A judge responsible for all aspects of a case tends to push for settlement and to require attorneys to adhere strictly to court rules and deadlines.<sup>339</sup> This increased efficiency processes the dispute more in accordance with the child's sense of time than a master calendar system.

The mandatory planning conference, held as soon as possible after the case is filed, allows the judge to impress upon the parents that the child's interests are the state's highest priority and that the matter must be resolved quickly. At the conference, the judge creates a coordinated schedule for mediation and evaluation as well as setting a trial date.

Creation of a short deadline for determination of custody and support ensures that lawyers will give custody cases the priority the child's sense of time requires. It will also give the parents a sense that the court is a significant presence in resolving their dispute, not an abstraction to be dealt with later. The court's power to draw inferences against a parent who delays the resolution of the dispute should encourage parents and their lawyers to be sensitive to the child's sense of time in pretrial negotiations, thereby encouraging cooperation with mediation and evaluation and preparation for trial.

Finally, the single-judge system creates the possibility that one or more judges will develop special expertise in and a concern for custody cases. Such judges usually become the principal leaders in campaigns for improvements in custody procedures and laws.<sup>340</sup>

REVIEW AND BIBLIOGRAPHY 30 (1978) (National Center for State Courts Publication No. R0036) (surveying the relative merits and disadvantages of each court calendar system).

337. See *supra* text accompanying notes 229-51.

338. The research is summarized in E. McClanahan, Memorandum No. RIS 81.122, Master v. Individual Calendar System (June 16, 1981) (available from the National Center for State Courts).

339. *Recommendations*, *supra* note \*, at 122-23. See generally E. McClanahan, *supra* note 338 (listing source materials that discuss the pros and cons of the single-judge calendar system).

340. See, e.g., Foster, *Conciliation and Counseling in the Courts in Family Law Cases*, 41 N.Y.U. L. REV. 353, 356 (1966) (noting the efforts of one family court that has undertaken innovative procedures for handling divorce). The availability of adequate mediation and evaluation services might help overcome the general judicial antipathy to custody cases, see *supra* note 4, as would a

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One criticism of the single-judge system is that the judge may have a pronounced bias about what the result should be in custody cases. Judicial bias, however, can be reduced by special training, acquainting judges with the available research on the needs of the children of divorce. Yet the greatest check on judicial bias in the cooperative custody system is mediation itself. Mediation downplays the importance of the judge in a custody dispute. The parents themselves, with the aid of a court-appointed mediator, work out an agreement. The judge functions more as a manager of dispute settlement and an arbitrator only as a last resort.

### *D. Separation of Custody and Child Support from Other Parental Disputes*

The cooperative custody system breaks the link between child-related disputes and maintenance and property division issues by encouraging the judge to sever the issues for trial and to decide the child-related issues first. Separation of issues symbolizes society's concern with the welfare of the child, not the parent's financial welfare. It reduces the capacity for parents to trade off custody and money issues in predivorce settlement bargaining and encourages agreement on smaller parts of the total dispute in the hope that agreement will then be easier to reach on the other issues in dispute.<sup>341</sup>

The principal criticism about separating custody and child support issues from the other issues in dispute between the parents is that primary caretakers of children—almost invariably the mother, who has less access to economic wealth in the immediate aftermath of divorce—will be disadvantaged in divorce settlement bargaining as a result.<sup>342</sup> Separation of issues prevents the mother from making concessions on custody matters on which she is likely to prevail in court in return for a larger share of the family financial pie.

One response to this concern is that the dispute resolution system should serve the best interests of the child, not the mother or father. Reform of the maintenance and property distribution laws protects the interests of primary caretakers better than use of the child as a bargaining chip.<sup>343</sup> Until such reform is accomplished, however, the child's fate depends on the parent's actual financial situations as well as their perceptions of the fairness of the agreements and the process that led up to

greater recognition by the legal community and the public of the importance of judges who oversee family disputes.

341. See *supra* notes 146-48 and accompanying text.

342. *Garska v. McCoy*, 278 S.E.2d 357, 360, 362, (W. Va. 1981); see *Chambers, supra* note 156, at 563-64.

343. For some suggested reforms, see *Weitzman, supra* note 76, at 1264-68.

them. The cooperative custody system must, therefore, look after the economic balance of the two households.<sup>344</sup>

Giving the primary caretaker an extra bargaining chip is not the only way to ensure the primary caretaker's economic health.<sup>345</sup> Separation of child issues from parent issues may promote the economic interests of primary caretakers. As part of a total pro-cooperative custody dispute-resolution system, it may lead to reliable child support payments and physical custody arrangements that enable divorced women to realize more of their economic potential in the job market.<sup>346</sup> By emphasizing the primacy of the child's emotional and financial interests and by creating an overall perception of fairness to both mothers and fathers, the cooperative custody system fosters an emotional climate in the reorganized family which encourages compliance with child-support obligations.

Moreover, the cooperative custody system offers relief for those divorced women who work from some of the strains created by sole custody responsibilities because the system encourages more active involvement of fathers in physical custody plans in their child's postdivorce life.

It is thus not at all clear that separating issues necessarily harms women. The adversarial model advocates bargaining from a position of strength, usually in an atmosphere of hostility, and relies on the courts to enforce the agreement. The cooperative custody system promotes the development of a continuing relationship between parents and provides a process for resolving future disputes that makes it more likely that the agreement will survive without court intervention.

#### *E. Mediation: "Rights" of Parents and Inequality of Bargaining Power Between Men and Women*

Another criticism of the cooperative custody system attacks the notion that a final judicial decision—and thus adjudication of the parent's custody rights—should be delayed until the mediation process fails.<sup>347</sup>

344. One reason the cooperative custody system should ensure the mother's economic health is that wide disparities of wealth between a husband's first and second families can make the child's adjustment to divorce more difficult. See *supra* notes 74-84 and accompanying text.

345. Nor is it necessarily the best way.

346. See *supra* notes 181-83 and accompanying text. Child support payments agreed to before trial by men who have continuing access to their children after divorce and written settlement agreements are far more likely to be made than payments ordered by courts from fathers disengaged from their children. See *supra* note 277 and accompanying text.

347. See Comeaux, *supra* note 264, at 86-87.

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This objection arises from the belief that parents have a right to have their dispute settled swiftly by the court.

This objection fails for many reasons. First, nothing in the sole custody/adversary system guarantees a speedy decision by a judge; delay tends to be endemic to litigation in which initiatives by lawyers control the timetable. The cooperative custody system, on the other hand, ensures that the custody dispute receives significant attention from the court far earlier than under the alternate model. Mediation simply delays some final judicial determinations for a short period of time to give dispute resolution time to operate.

Second, the argument that a judge should decide a custody dispute rather than diverting it to mediation assumes that the issues raised require a determination of legal rights, something courts are uniquely qualified to do. Using mediation as the primary forum means that society regards the solution to the dispute as an adjustment of the parents' relationship to each other, not as an adjudication of "rights" between parents. Mediation is most appropriate for disputes in which the relationship between the people affected is continuing, emotionally complex, and not easily governable by detailed, formal rules prescribing conduct such as the ones embodied in the typical judicial decree.<sup>348</sup>

Finally, a rights-oriented perspective promotes the notion that disagreement between the parents signals an end to the potential for cooperation between them and that the function of the legal system is to decide between the competing claimants. It also promotes the view of the child as property to be allocated rather than as a human being to be preserved, because it devalues the child's most significant interest in the postdivorce family: maintaining relationships with both parents. A rights orientation benefits adults, not children.

A second major concern about mediation of custody disputes is that the "weaker" party<sup>349</sup> may not compete as well in the bargaining.<sup>350</sup> Mediation works best when the parties have roughly equal bargaining

348. See Fuller, *supra* note 284, at 325-26; see also M. Rosenberg, The Adversary System and Dispute Processing in Our Society 21-22 (1983) (paper presented at the National Conference on the Lawyer's Changing Role in Resolving Disputes, Harvard Law School, October 1982) (publication forthcoming) (copy on file with the author) (arguing that the adversarial system is ill-suited to handle disputes of an interpersonal nature). See generally Fuller, *Two Principles of Human Association*, in VOLUNTARY ASSOCIATIONS (NOMOS XI) 3-23 (1969) (arguing that principles of human associations and commitments should not be "bent to the demands of formal legal rules and due process").

349. Usually the mother, who has been the primary caretaker of children.

350. A variation of this concern is the fear that primary caretakers will be disadvantaged in divorce settlement negotiations by separation of child-related from parental disputes. See *supra* notes 341-46 and accompanying text.

power.<sup>351</sup> In a dispute involving parents, however, the bargaining positions of the parents may be far from equal.<sup>352</sup> For example, although the husband and wife may have negotiated day-to-day decisions during the marriage, the acrimony that accompanies divorce may prevent one spouse from strongly asserting herself in front of the other spouse.

In the great number of custody disputes between two basically "fit" parents, however, an assumption of equality in bargaining capacity between man and woman is generally appropriate. Formal discrimination against women in family law has largely been eliminated;<sup>353</sup> progress is being made in eliminating discrimination against men and working mothers in custody determinations.<sup>354</sup> Forty-four percent of all employed Americans are women, and employment of women in occupations requiring higher levels of education and cognitive skills has increased significantly.<sup>355</sup> Divorced women tend to have higher salaries than married women.<sup>356</sup> More women are assuming prominent places in political and economic life and in the professional schools in our society. Economic discrimination against women still exists, but our society has made a great deal of progress toward eradicating barriers based on sex.<sup>357</sup> Although we have not achieved equality between men and women, we

351. The prototypical situation in which mediation is generally thought appropriate is a labor-management dispute. In such matters the mediator and society can assume that the parties are of relatively equal bargaining capacity and are both experienced negotiators unlikely to be intimidated by the other.

352. The concept of equality of bargaining power is extremely difficult to define. Assume one parent worked while the other stayed home and took care of the child. The parent who worked may be more experienced in business or financial affairs while the parent who stayed home may be more articulate about the child's needs. In some sense both have different advantages in the negotiation process. Some cases, however, are relatively clear. An assumption that parents start with equal bargaining power is inappropriate when one parent has repeatedly physically abused the other over a long period of time. Even if the husband were a fit parent, a seriously abused wife in these cases should be able to ask the state for protection before being brought into a negotiation that makes a false assumption that she is her husband's negotiating equal. Even in custody disputes involving domestic violence, however, mediation may be a useful dispute settlement process *after* the legal system provides protection to the victim by emergency measures. See Bethel & Singer, *Mediation: A New Remedy for Domestic Violence*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 363-99 (1982).

353. See Freed & Foster, *Family Law in the Fifty States: An Overview*, 16 FAM. L.Q. 289, 321 (1983) (noting trend toward recognizing contribution of spouse as homemaker); Younger, *supra* note 37 (tracing the movement towards equality of the sexes in both community property and common-law jurisdictions). But see Johnson, *The Family in Transition: A Judicial Overview of Changing Sex Roles*, 2 FAM. ADVOC. 6 (1979) (arguing in favor of uniform family laws to counter problems faced by women as evidenced by inconsistent adjudication in different jurisdictions). See generally Freed & Foster, *Family Law in the Fifty States: An Overview*, 18 FAM. L.Q. 369 (1984) (discussing state and federal developments in family law).

354. See *supra* notes 44-51.

355. Hacker, *Men vs. Women in the Work Force*, N.Y. Times, Dec. 9, 1984 § 6 (Magazine), at 124-25.

356. *Id.* at 127.

357. *Id.* at 129.

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have progressed enough to assume that most women are capable of negotiating with men in a mediation proceeding about their child. This is particularly true when women can have the procedural protections of advice of counsel before they sign a final agreement<sup>358</sup> and when the mediator is ethically bound not to facilitate unconscionable agreements.<sup>359</sup>

Most significantly, however, equality of bargaining power between men and women is not the focus of a cooperative system. The system, instead, is designed to promote the child's interest. The fundamental aim of creating a cooperative custody system is to protect the interest of the weakest member of the reorganized family in a relationship with both parents after divorce, not to protect an arguably less equal parent.

### *F. Custody Evaluation as a Backup System*

On the surface, it is arguable that the role of a custody evaluator is not needed in a custody dispute resolution system that seeks to promote parental cooperation following separation. The job of a custody evaluator is to help the court choose between contending parents by providing neutral fact-gathering and recommendations; the goal of a cooperative custody system is to maximize cooperation between parents. As previously suggested, however, the actual operation of custody evaluations in the dispute resolution system makes the surface conflict between evaluation and promoting cooperation more apparent than real.<sup>360</sup>

The process of custody evaluation can be a powerful force encouraging parents to settle their dispute by functioning as a kind of informal arbitrator of the custody dispute.<sup>361</sup> The choice should not then be *between* evaluation and mediation. A cooperative custody system should have both. The two processes complement each other in serving the goal of promoting parental settlement, especially if carefully structured to work sequentially.

Some believe that the same person should be mediator and evaluator.<sup>362</sup> This combination, however, runs the risk of confusing parents

358. See Schepard, Philbrick & Rabino, *supra* note 275, at 638.

359. *Id.* at 650-51.

360. See *supra* subpart IV(C).

361. Some evaluators try to mediate the dispute during the evaluation process, both before and after making a recommendation. Some parents settle before the evaluator's report is transmitted to the court, either because the evaluator has successfully mediated the dispute or for fear of an adverse recommendation. Other parents settle, often on advice of counsel, after the evaluator's recommendations have been made because they recognize they face an uphill fight in the wake of the recommendations.

362. See, e.g., *McLaughlin v. Superior Court*, 140 Cal. App. 3d 473, 483, 189 Cal. Rptr. 479, 486-87 (1983) (upholding due process challenge to local court rule prohibiting cross-examination of evaluator at hearing, but encouraging combined mediator and evaluator roles under California mandatory custody mediation statute). In addition to saving money by using one professional rather

and the personnel involved as to their actual function. The result may be that neither task is performed well. More significantly, however, combining the roles of mediator and evaluator loses sight of the importance of reinforcing parental autonomy and competence in the reorganized family.<sup>363</sup> Confidential mediation is a far less intrusive dispute-resolution process than evaluation. The state should give parents and children a serious opportunity to agree on a custody plan with help but voluntarily before it applies significant coercion to promote agreement. Relying on confidential mediation initially reinforces the basic presumption of the cooperative custody system—that the parents are responsible individuals concerned about the welfare of their child, and simply need help in facilitating communication and in learning about their child's needs after divorce.

## VII. Parental Autonomy and the Cooperative Custody System: The Problem of Parental Relocation

The cooperative custody system is based on the social value of the child's continuing relationship with both parents after divorce. Its premise is that a child is more likely to benefit if the state encourages divorced parents to work together in a parental capacity than if the state delegates control of the child to one of them.

This fundamental belief, however, must contend with the realities of life in a mobile society that values personal and parental autonomy. The conflict becomes acute when one divorced parent wants to move from the geographic area where the child and the other parent live. This Part uses such relocation controversies to sketch briefly how the cooperative custody system copes with potential conflicts between the needs of a child and a parent's personal autonomy. This Part assumes that a child has two fit parents who share legal and physical custody to a significant degree so that both have a meaningful relationship with the child. As will

than two in a single dispute, such a combination could strengthen both. Making the mediator and the evaluator the same person may make parents and their lawyers take mediation more seriously, as they know that the mediator will take the willingness of parents to compromise into account in her evaluative report to the court. In effect, combining the roles of mediator and evaluator in the same person suggests that placing a veil of confidentiality around mediation deters parental settlement. If parental non-cooperation in mediation cannot be reported to the court a parent's incentive to try to reach agreement in the mediation process is reduced. All the truly cynical parent who thinks she is going to win at a hearing or evaluation need do is to stay silent during the mediation. The mediator will then report to the court that the parents cannot reach agreement, without reporting the intransigent parent's lack of cooperation. *But see* MICH. COMP. LAWS ANN. §§ 552.513(1), (3), 552.515 (West Supp. 1986) (providing for domestic relations mediation but making communication between the mediator and parties to the mediation privileged communication inadmissible in court proceedings and prohibiting the mediator from performing recommendation or enforcement functions).

363. *See supra* text accompanying notes 332-35.

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be seen, a cooperative custody system does not necessarily make relocation controversies less angry or agonizing. It does, however, keep the child's relationship with both parents the central focus of analysis and the value to be preserved.<sup>364</sup> The result does restrict the freedom of each parent to do as he or she wishes with the child. These restrictions, though, are the costs of social policies behind the cooperative custody system.

Suppose one parent wishes to move from the geographic area where both parents successfully share legal and physical custody.<sup>365</sup> How to weigh the parent's right to move against the child's interest in preserving her relationship with both parents presents a complex issue. The contemplated relocation seriously threatens the stability of a situation in which she is doing well. The child's relationship with either parent is threatened no matter what the outcome of the dispute. If the parent and child move, the quality of the child's relationship with the parent who remains may suffer because the greater distance between them will make meaningful interaction on a regular basis far more difficult. Even if the child's relationship with both parents can be maintained at some reasonably comparable level to what it was before the relocation, the child will have to adjust to a new school, peer group, and community environment. If the child's relocation is not allowed, but the parent relocates anyway, leaving the child behind, the child's relationship with that parent may suffer the same fate. If the child's relocation is not allowed and the par-

364. The analysis of parental relocation controversies that follows should also be useful to courts considering such disputes in a jurisdiction that does not adopt a joint custody preference. Even in a "best interests" or sole custody jurisdiction, courts can and should analyze the child's need to continue a meaningful relationship with a noncustodial parent.

365. For the following discussion in the text, assume that both parents meet minimum fitness standards and actively involve themselves in the child's postseparation life through a joint legal custody arrangement and a physical custody arrangement in which both participate substantially but unequally. Each supports the child's relationship with the other, though relationships between the parents remain somewhat hostile. Assume further that the child likes her school environment and seems to be adjusting to the reorganization of the postdivorce family. Finally, assume that all postdivorce support payments and wealth transfers between the parents occur as scheduled.

The child's custody and support plan functions for two years following divorce. Then, the parent who exercises more of the physical custody responsibilities plans to relocate with the child to a distant place for a combination of economic and emotional reasons: a new job; the possibility of remarriage to someone who lives in the new location; and a desire to start a new life in a new location. The parents' separation agreement contains a clause requiring the consent of the other parent or a court of competent jurisdiction before either parent can relocate, but the provision sets no substantive test for determining whether the move will be allowed. The child wants to maintain her relationship with both parents and does not want to leave her friends and school. This hypothetical is a combination of the facts of *In re Frederici*, 338 N.W.2d 156 (Iowa 1983), *Cooper v. Cooper*, 99 N.J. 42, 491 A.2d 606 (1984), and *Weiss v. Weiss*, 52 N.Y.2d 170, 418 N.E.2d 377, 436 N.Y.S.2d 862 (1981).

In this hypothetical, the child's postdivorce relationship with both her parents has developed in precisely the way that the child's and society's interests suggest it should.

ent chooses to stay to preserve a relationship with the child, the parent may resent the other parent and the child for blocking what the parent perceives as a beneficial change in life.

In a cooperative custody system, the first attempt to resolve this problem should be through mediation. If the parents had not divorced they would have negotiated with each other about proposed relocations. Mediation requires them to undertake that same negotiation with the help of a neutral party. The neutral party is necessary because the forces that encourage married parents to compromise with each other have been weakened by divorce, and the neutral party reminds them of their continuing joint interest in the welfare of their child.

The mediator can help the parents explore the variety of ways to reduce the level of family disorganization the relocation might cause. Perhaps the parent who desires to relocate can seek within the local geographic area job opportunities comparable to the one that would result from the contemplated move. Both parents may be able to relocate to an area where their relationships with the child can continue; the prospective spouse of the parent who wants to relocate may be able to move to where the parents currently live. The parents might maintain joint legal custody arrangements by periodic telephone conferences or meetings in mutually convenient sites and the sharing of information about the child. The parents might also adjust physical custody schedules so that the child and the parent who does not want to move will be compensated for the loss of time together, especially if the parent who desires the move can finance trips for the child or the nonrelocating parent.

Mediation should encourage the parents to adopt a creative joint problem-solving mode of analysis<sup>366</sup> to the relocation problem that might eliminate the need for a court to intervene. The quality of the relationship that each parent had with the child after divorce but before the relocation controversy arose might cause each parent to recognize the importance of the child's continuing relationship with the other and, therefore, compromise to maintain it.

Cooperative custody system principles and procedures also encourage parents to try to reduce the relocation's negative effects on the child's relationship with the other parent. Courts currently seem to ask implicitly whether the relocating parent is motivated by spite in seeking permission to move.<sup>367</sup> Determining "true" or "predominant" motivation for a proposed move assumes that the court can distinguish spiteful

366. See generally R. FISHER & W. URY, *supra* note 146, at 58-83 (inventing creative options for use in negotiation can be a significant aid to reaching an agreement).

367. See *In re Frederici*, 338 N.W.2d 156, 160 (Iowa 1983); *Cooper v. Cooper*, 99 N.J. 42, 56-57,

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reasons from rational reasons such as a new job and the desire to remarry. In many cases, motives may be mixed, consciously or unconsciously, or rational reasons for a move may be fabricated to mask spiteful ones. An inquiry into "predominant" motivation requires a court to reconstruct the parents' relationship since the divorce to see if the contemplated move fits into a pattern of spite and retaliation. Such an inquiry dredges up all the disadvantages of using adversary system procedures to adjust family relationships.<sup>368</sup>

The expert evaluations and court hearings in relocation controversies that follow the failure of mediation in the cooperative custody system, however, should move consideration of the parents' motivation from the abstract and the past to the concrete and the future by focusing on the adjustments the parent proposes in the current custody plan to compensate the child and the nonrelocating parent for the diminution in quality of their relationship that the relocation requires. A relocating parent's lack of willingness to make serious attempts to avoid the necessity of relocation<sup>369</sup> or to make proposals and sacrifices in future custody and support arrangements to encourage the other parent's continuing relationship with the child after relocation indicates that the relocating parent does not value that relationship seriously. Negative inferences can then be drawn from the parent's decision to relocate.

The cooperative custody system also broadens the focus of the state's inquiry into the motivation of both parents by emphasizing the importance of the child's relationship with the parent who wants to relocate. Pretrial evaluations create incentives to compromise for the parent who wants the child to remain where she is. The opposing parent should think about how to accommodate the other parent's reasons for the proposed move and assume that the move is being sought in good faith. Even if her initial opposition seems absolute and unalterable, she should be asked to assume the move will be permitted and to make proposals to adjust the child's custody and support plan to minimize the move's adverse consequences. The family unit will thus be prepared for every contingency through advance planning. The failure of the parent opposing relocation to take the other parent's needs seriously and to make contingency plans to accommodate the move should also result in adverse inferences about her if a court must make a determination for the parents.

491 A.2d 606, 613 (1984); *Weiss v. Weiss*, 52 N.Y.2d 170, 176, 418 N.E.2d 377, 380, 436 N.Y.S.2d 862, 865 (1981).

368. See *supra* text accompanying notes 194-98.

369. See *Bryan v. Bryan*, 99 A.D.2d 743, 471 N.Y.S.2d 650 (1984) (relocation request denied in part because parent who sought job opportunity in new geographic area did not make attempt to find similar job without relocation).

Mediation and evaluation take place in the shadow of the rule of law used in trials to decide relocation controversies. No dispute-resolution procedure can eliminate the need for a standard to decide cases that do not respond to settlement-promoting procedures and incentives. Ultimately, the state must decide whether to encourage or discourage the parent from relocating based on a perception of whether the move is in the best interests of the child.<sup>370</sup> Relocation controversies provide the most serious test of how much a court is willing to restrict the autonomy of a parent<sup>371</sup> for the purpose of protecting a child's continuing relationship with the other parent.<sup>372</sup>

Some courts apply a test that emphasizes the primacy of the child's continuing relationship with both parents. New York courts have, for example, created a general rule that a custodial parent cannot leave the jurisdiction because of the importance of the child's continuing relationship with the noncustodial parent, even though they have not created a general rule that divorced parents should share equally in postdivorce decision making about the child even if one of them objects.<sup>373</sup> Gener-

370. In some sense the state may have an interest in allowing the relocation to take place if the relocating parent will become economically more productive as a result, thereby increasing the total output of the economy. If so, a policy against allowing relocation at will to preserve the quality of the child's relationship with both parents should be seen as an economic investment in the welfare of future generations.

371. See *supra* note 365 and accompanying text.

372. Although the Supreme Court has not decided the issue, reasonable parental relocation restrictions following divorce imposed by a court do not seem to be constitutionally objectionable. Such restrictions should be distinguished from restrictions imposed by statutes alleged to abridge a citizen's constitutional right to travel. The great majority of right-to-travel cases deal with the equal protection problem created when a state discriminates against new residents in the distribution of important interests, such as the right to vote and the right to receive welfare benefits. In contrast, a divorced parent's right to travel is necessarily qualified by the interests of the other parent and most especially of the child. Cf. *Jones v. Helms*, 452 U.S. 412, 417-23 (1980) (upholding constitutionality of state statute escalating the crime of child abandonment from a misdemeanor to a felony when the parent left the state). It is also qualified by the state's important interest in regulating marriage and divorce, especially when the interests of a child are involved. See *Sosna v. Iowa*, 419 U.S. 393, 406-07 (1975) (upholding a state's durational residency requirement for eligibility for divorce against a right-to-travel challenge because of state's interest in regulating the "consequences of . . . moment" for parents and children that result from a divorce decree); cf. *Palmore v. Sidoti*, 466 U.S. 429, 433, (1984) ("The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause."). Many states impose some restriction on a divorced parent's right to relocate with the child. See Hillstrom, *Out-of-State Removal of Children Analyzed*, 8 Fam. L. Rep. (BNA) 4015 (Mar. 30, 1982) (emphasizing joint custody and the continued authority of both parents to be in the best interests of the child with only special circumstances being allowed to interfere with both parents' rights to raise the child). As the Kansas Court of Appeals recently stated in rejecting a challenge to a relocation restriction imposed on a sole custodial parent: "[A] divorced parent to whom custody of minor children has been entrusted may be required to forego or forfeit some rights [including the right to travel] . . . consistent with the best interests and welfare of the children and the rights of the other parent." *Carlson v. Carlson*, 661 P.2d 833, 836 (Kan. Ct. App. 1983). Recognizing that relocation restrictions are constitutional, however, does not determine whether and when they are in the child's best interests.

373. See *supra* note 113 for a discussion of New York's conservative approach to joint custody.

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ally, though, New York courts allow parents to relocate in good faith only when the move seems to be essential to career opportunities and economic advancement not available in the old location.<sup>374</sup>

Other courts and commentators emphasize the primacy of the child's relationship with the "primary" custodial parent. The Iowa

In contrast is the leading parental relocation case of *Weiss v. Weiss*, 52 N.Y.2d 170, 418 N.E.2d 377, 436 N.Y.S.2d 862 (1981), in which the New York Court of Appeals affirmed the granting of an injunction preventing a custodial mother from relocating to Las Vegas with her son. According to the trial court, relocation would interfere with the visitation rights given the father in the separation agreement, rights that the father had faithfully exercised over a period of five years. Although the separation decree contained provisions apparently allowing relocation at will, the Court dismissed the provisions as "boilerplate," *id.* at 174, 418 N.E.2d at 379, 436 N.Y.S.2d at 864, and did not permit the mother to relocate with the child.

The Court concluded that the mother's proposed compensatory visitation would create practical implementation difficulties (extra expense and the problem of finding long periods of available time) and could not give the father and son anything like the 150 to 200 days a year they had been visiting each other. The mother also did not have a "unique" or even "firm" job offer in Las Vegas, and the move was not necessitated by exceptional health or educational needs, or the obligations of remarriage.

374. See, e.g., *Schwartz v. Schwartz*, 91 A.D.2d 628, 456 N.Y.S.2d 811 (1982) (holding that the best interests of the child are served by requiring him to remain with mother in new location); *Martinez v. Konczewski*, 85 A.D.2d 717, 445 N.Y.S.2d 844 (N.Y. App. Div. 1981) (same). See generally *Florescue, Custodial-Parent Moves*, N.Y.L.J., Apr. 19, 1983, at 3, col. 1 (reviewing New York court decisions on custodial-parent moves and concluding that economic necessity is the controlling factor in judicial proceedings). The standard applied seems to be identical no matter what a separation agreement or court order says about relocation before the controversy arises. The analysis focuses on the effect of the proposed relocation on the quality of the child's relationship with the nonrelocating parent. New York courts generally require the relocating parent to minimize the harm to the other parent's relationship with the child through compensatory measures such as bearing reasonable expenses in order to support the exercise of visitation made more costly by relocation. *Martinez v. Konczewski*, 85 A.D.2d 717, 445 N.Y.S.2d 844 (1981).

The majority and concurring opinions in the New Jersey Supreme Court's recent decision in *Cooper v. Cooper*, 99 N.J. 42, 491 A.2d 606 (1984) illustrate well the different judicial approaches to the relocation problem in the context of a traditional sole custody/visitation arrangement. A recent Note in the *Stanford Law Review* suggests that judicial intervention in relocation controversies "constitutes an unwarranted interference with both family autonomy and the custodial parent's freedom." Note, *The Judicial Role in Post-Divorce Child Relocation Controversies*, 35 STAN. L. REV. 949, 949-50 (1983). The Note takes the "primary parent" position approach to relocation controversies, largely based on the Goldstein, Freud, and Solnit argument that the child's psychological/sole custodial parent should have the right to determine the extent of the child's relationship with the nonpsychological/noncustodial parent. *Id.* The Note argues that "judicial discretion should be replaced by a rule allowing the custodial parent to move whenever that parent so desires absent a privately negotiated residence restriction." *Id.* at 950. Like Goldstein, Freud, and Solnit, it fails to address the empirical evidence that shows that the child's postseparation relationship with both parents is the most significant variable in determining whether the child will successfully surmount the divorce crisis. See *supra* notes 61-73 and accompanying text. It also fails to consider the constitutional objections to a rule of law that leaves the noncustodial parent's interest in a relationship with the child subject to potentially arbitrary termination or diminution by the custodial parent. See *supra* note 151 and accompanying text. Nor, like Goldstein, Freud, and Solnit, does the Note emphasize that the power of the sole custodial parent will significantly increase, creating a huge benefit for the parent who has the resources to litigate this question. Cf. Mnookin & Kornhauser, *supra* note 114, at 980-84 (suggesting that Goldstein, Freud, and Solnit's proposal to give the "psychological parent" control over the visitation rights of the noncustodial parent will benefit the parent who not only has the resources to litigate custody disputes but who is also able to find sufficient grounds upon which to unilaterally reopen litigation).

Supreme Court, for example, has taken an approach directly opposite to the approach of the New York courts and has deferred to the custodial parent's wish to relocate even when the parents have a working joint custody arrangement.<sup>375</sup>

A third alternative to New York's presumption against relocation and Iowa's presumption in its favor is to treat the issue on a case-by-case basis without a presumption. Under this view, the standard for relocation is a multifactor "best interests of the child" analysis.<sup>376</sup>

These three standards for allowing parental relocation parallel the three basic standards for joint custody: favoring it in most cases, against it in most cases, and neutral on the subject with determinations made on a case-by-case basis.<sup>377</sup> A presumption against relocation strongly protects the child's continuing relationship with both parents and thus is most compatible with a cooperative custody system. It is also most restrictive of parental autonomy. Choosing between the competing substantive rules only emphasizes how important mediation and other agreement-inducing features of a cooperative custody system are. Parents, planning together and with respect for each other's importance in

375. In *In re Frederici*, 338 N.W.2d 156 (Iowa 1983), the Iowa Supreme Court permitted a good faith move out-of-state by a mother who was the primary physical custodian of the children, even though the father had joint legal custody with the mother and had faithfully exercised extensive visitation/physical-custody rights. *Frederici* is factually distinguishable from *Weiss*, the leading New York case, see *supra* note 373, as the reason for the mother's proposed relocation in the Iowa case was "a unique and promising career opportunity of the kind that typically motivates people in this highly mobile society to relocate." 338 N.W.2d at 160. On the other hand, *Frederici* is in one respect a stronger case than *Weiss* for prohibiting the relocation. The father in *Frederici* shared legal custody of the children with the mother.

More important than the factual similarities and differences between the cases are the differences in attitudes of the two courts toward parental relocation controversies. The Iowa Supreme Court specifically rejected the standards of *Weiss* and the subsequent New York cases. The court did not view the mother's request to relocate as the precipitating event requiring modification of the custody arrangement. Instead, the court focused on the father's opposition to the mother's request as the cause of the controversy and treated the father's opposition to the relocation as a request by the father to modify the custody plan:

A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well-being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of the children has been fixed, it should be disturbed only for the most cogent reasons.

*Id.* at 158.

The Iowa approach reflects the continuing influence of the sole custody system, even when the parents have a working joint custody arrangement. Although the father shared legal custody and had an extensive relationship with the children since the divorce, the parent who desired to relocate was allowed to do so because she had a greater degree of responsibility for physical custody of the child. The fact that the parent who desired to relocate had greater physical custody responsibilities placed the burden of persuasion on the parent opposing the move.

376. See *Weiss v. Weiss*, 56 N.Y.2d 938, 944-50, 439 N.E.2d 324, 327-31, 453 N.Y.S.2d 609, 611-15 (1982) (Meyer, J., dissenting).

377. See *supra* II(B)-(C).

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the child's life, are better able to formulate a plan to deal with parental relocations than a court could applying any conceivable substantive test.

### Conclusion

However the legal system is organized and no matter what its goals are, parental divorce will create a crisis for the affected child. The organization of the legal system, however, can make the crisis of greater or lesser proportions. The analytical tools and procedural mechanisms to organize a cooperative custody system to perform the task of crisis containment are reasonably well identified. What is lacking are resources and commitment on the part of those who operate the system.

Creating a cooperative custody system is only a partial step towards the goal of providing as many children as possible with two involved parents throughout their youth. Divorce is a less than ideal time to promote cooperative parenting; the family structure is dissolving, there is often great anger, and parental roles in many families need to be redefined drastically. Promoting the child's meaningful relationship with both parents after divorce would be easier if both parents had such a relationship before it. Cooperative custody concepts would not then seem so foreign and threatening and each parent would be more likely to recognize the importance of the child's bond with the other. As part of their basic education for citizenship, men need to learn about the importance of their being involved with their children before and during marriage.<sup>378</sup> Women must not assume children are their private preserve and, instead, should invite and encourage men to participate in the joys and problems of childrearing. Employers must come to terms with the enormous needs of working parents of both sexes for adequate child care, without which it would not be possible for many of them to balance roles in the workplace and in the family. As a nation we must recognize that an increased investment of resources in children is an investment in our own future.<sup>379</sup>

The need for basic changes in society, in the relationship between men and women and in the relationship of both with their children is not, however, a reason to delay implementation of a cooperative custody system. Changes in the larger social structure and changes in the legal structure reinforce and mirror each other. Both are necessary to move toward achieving a society where all members of the family can achieve

378. Many educational programs are beginning to emerge for this purpose. See Ciampa, *The Emerging Father*, 58 BOSTONIA 29 (1984) (description of the "Fatherhood Project").

379. For a thoughtful reflection on the future direction of national public policy toward children, see D. MOYNIHAN, *FAMILY AND NATION* (1986) (Godkin Lectures at Harvard University).

their full potential and men and women can share the joys and sorrows, credit and blame that comes with creating the next generation.