Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance

LINDA D. ELROD* AND MILFRED D. DALE**

I. Changing Times, Changing Families, and Children in Conflict

The law on custody is unique in giving one human being the right to control the body and mind of another, without requiring either the subject person's consent or an individualized finding of lack of capacity . . . children remain the last group subject to legal control based purely on their status.[1]

The last fifty years of child custody law reflect paradigm shifts and pendulum swings in the prevailing scientific and societal views of what is in the "best interests" of a child. In 1958, divorced mothers had sole custody of children in the vast majority of cases. Today, most children maintain contact with both parents according to negotiated parenting plans. When unable to agree on a plan, however, some parents may engage in strategic and harmful behaviors. The legal and mental health professionals working to protect the children in these families face daunting tasks. Both literally and figuratively, the interests of children hang in the balance.

Current perspectives on custody disputes exemplify the radical transformations of the American legal, cultural, social, and economic landscape that have inspired volatile debates and resulted in children being caught in the middle. Modern child custody law has its roots in the turbulent 1960s. The advent of birth control pills, civil rights legislation, no-fault divorce, gender equality, and rights for children born out of wedlock competed for

* Richard S. Righter Distinguished Professor of Law and Director of Washburn Law School Children and Family Law Center; Editor of the *Family Law Quarterly*.

** Licensed Psychologist, Private Practice, Topeka, KS; JD 2009.

1. Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 816 (1999).

headlines with the Vietnam war abroad and the War on Poverty at home.

In the last fifty years, there has been a "plethora of federal legislation, Supreme Court decisions and international treaties . . . [resulting] in a federalization of many areas of family law."[2] Beginning in the mid-1960s, United States Supreme Court decisions have affected nearly every area of family law, transforming what many had seen as ordinary family problems into debates over individual rights.[3] The United States Congress authoritatively stepped into the traditionally state-controlled area of family law[4] to address serious problems that states were either unwilling or unable to resolve.[5] For example, to deter forum shopping, Congress enacted the Parental Kidnapping Prevention Act of 1980 (PKPA) requiring states to give full faith and credit to custody orders made in accordance with the federal law.[6]

Family law issues are no longer just local or national. More disputes between parents who live in different countries have resulted in the need for more cooperation in the enforcement of custody orders. Family law has become more global because of United States' participation in international organizations, such as the United Nations and the Hague Conference on Private International Law. The Hague Conference has promulgated eleven conventions that focus on children;[7] the United States has ratified two—the 1980 Hague Convention on Child Abduction and the 1993 Hague Convention on International Adoption.[8] There have been four World Congresses on children's issues; a fifth will be held in 2009 in Halifax, Nova Scotia.

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2. Linda Henry Elrod, *Epilogue: Of Families, Federalization, and a Quest for Policy*, 39 FAM. L.Q. 843, 846 (1999).

3. *Id.* at 849–51, n.22–37 (citing cases). *See* David Meyer, *Constitutionalization of Family Law*, 42 FAM. L.Q. 529 (2008).

4. Ankenbrandt v. Richards, 504 U.S. 689 (1992)(quoting *In re* Burrus, 136 U.S. 586, 593-594 (1890) ". . . [t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States").

5. *See* Elrod, *Epilogue, supra* note 2, at 846–49, n.8–21 (citing federal statutes cover areas of child support; child custody jurisdiction; child welfare, abortion, childbirth and family planning; foster care and adoption; bankruptcy; health insurance after divorce; pensions; recognition of marriages; family violence; tax; family leave policies; and parental rights). *See also* Anne C. Dailey, *Federalism and Families,* 143 U. PA. L. REV. 1787 (1995); Jill Elain Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. Rev. 1297 (1998).

6. 28 U.C.S. § 1738A.

7. Merle H. Weiner, *Codification, Cooperation, and Concern for Children: The Internationalization of Family Law in the United States Over the Last Fifty Years*, 42 FAM. L.Q. 619 (2008)

8. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89. It was implemented by the International Child Abduction Remedies Act, 42 U.S.C. § 11601 et seq. The 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134. The United States is likely to ratify the Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance (2007).

Just as family law has become more federal and international, the laws of the fifty states have become more uniform due to the efforts of the National Conference of Commissioners on Uniform State Laws.[9] The increase in the number of divorces with young children, the mobility of the population[10] and the fact that child custody is modifiable throughout the child's minority led to interjurisdictional disputes over child custody. A major effort to encourage interstate cooperation and deter child abduction resulted in the promulgation of the 1968 Uniform Child Custody Jurisdiction Act (UCCJA), which all fifty states enacted.[11] In 1997, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) replaced the UCCJA. It prioritized the jurisdictional bases for jurisdiction to match the PKPA and added interstate enforcement provisions.[12] It has been adopted in forty-six states. Most recently, the Uniform Child Abduction Prevention Act seeks to prevent child abduction by helping lawyers and judges identify potential risk factors and possible remedies.[13]

Other nationalizing influences have been the establishment of national organizations that bring lawyers and other professionals together to work on family law issues. For example, the Section of Family Law of the American Bar Association began in 1958, and the Association of Family and Conciliation Courts in 1963. Both have been instrumental in encouraging research, standards, and best-practice models for lawyers and mental health professionals. In addition, numerous national organizations developed to meet the expanding needs for professional specialization in family law (e.g., the National Association of Counsel for Children, the National Council of Juvenile and Court Judges).

9. NCCUSL has promulgated the following family law acts, Adoption Act (1969) and 1994; Interstate Enforcement of Domestic Violence Protection Orders Act (2000)(2002); Uniform Child Custody Jurisdiction Act (1968); Uniform Child Custody Jurisdiction and Enforcement Act (1997); Uniform Parentage Act (1973)(2000)(2002); Uniform Marriage and Divorce Act (1970); Model Juvenile Court Act (1968); Uniform Marital Property Act (1983); Uniform Child Abduction Prevention Act (2006); Uniform Premarital Agreement Act (1993); Uniform Transfer to Minors Act (1966); Uniform Interstate Family Support Act (1993)(2001) (2008) (replacing the Uniform Reciprocal Enforcement of Support Act and Revised Act). *See* John J. Sampson, *Uniform Family Laws and Model Acts*, 42 FAM. L.Q. 673 (2008).

10. Linda D. Elrod, *A Move in the Right Direction? Best Interests of the Child Emerges as Standard for Relocation Cases*, 3 J. CHILD CUSTODY 29 (2006)(noting that an estimated twenty-five percent of custodial mothers moved within the first four years following divorce).

11. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 261 (1999). *See* Brigette Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 203 (1981).

12. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, 9 U.L.A. 649 (1999).

13. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 34 (Supp. 2007). *See* Patricia M. Hoff, *"UU" UCAPA: Understanding and Using UCAPA to Prevent Child Abduction*, 41 FAM. L.Q. 1 (2007); *Uniform Child Abduction Prevention Act (Statutory Text, Comments and Unofficial Annotations by Linda D. Elrod, Reporter)*, 41 FAM. L.Q. 23, 39–44 (2007) (listing risk factors for abduction).

Dynamic changes also occurred in the composition of the American family as the number of divorces grew, unwed fathers won parental rights, and more couples, heterosexual and same sex, chose to live together and have children without getting married. The dissolution of these relationships and the recognition of "parental rights" in persons not related by biology or marriage have resulted in more children being placed in the middle of adult conflicts than at any time in history.[14]

When judges have to award "custody" in cases where two fit parents do not agree, the universal standard is "the best interests of the child." Judges must determine if it is in the child's best interests to be in the sole custody of the psychological parent,[15] to have more residential time with the primary caretaker, or to be placed in a shared parenting arrangement. As legislators, judges, and parents have searched for solutions to contentious, and seemingly unresolvable, custody issues, two things have become apparent. First, the expensive, time-consuming adversarial legal process does not work well for parents engaged in hostile custody disputes. High-conflict parents keep their children and themselves in perpetual turmoil, consume an extraordinary amount of court services, and deplete their own personal and financial resources. Secondly, judges find themselves ill prepared to make future predictions about parents and their children. Untrained in the dynamics of interpersonal relationships and the developmental needs of children, judges increasingly looked to mental health professionals and the social sciences for help in determining the child's best interest.[16] Social science research over five decades has demonstrated that

14. *See* United States Census Bureau Statistical Abstract of the United States, Vital Statistics 75 (1999) (divorces increased 65% between 1984 and 1994 with 65% having minor children). *See* Nat'l Ctr. for Health Statistics, Ctrs. for Disease Control & Prevention, *Births, Marriages, Divorces and Deaths: Provisional Data for 2006*, 55 NAT'L VITAL STAT. REP. 20, Aug. 8, 2007, at tbl.A (showing rate of divorce at 3.6 per 1000).

15. JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD 37–38, 98 (1973) (psychological parent was the parent "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."). *See also* JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, BEFORE THE BEST INTEREST OF THE CHILD (1979); JOSEPH GOLDSTEIN, ANNA FREUD, ALBERT J. SOLNIT, & SONJA GOLDSTEIN, IN THE BEST INTEREST OF THE CHILD (1986).

16. Courts have sought help from psychiatrists, social workers, therapists, psychologists, and family law attorneys. *See* LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE ch. 11 on Experts (2004 rev. ed & Supp. 2009). *See also* Philip M. Stahl, *An Historical Perspective on Child Custody Evaluation: A 20-Year Personal Perspective on Child Custody Evaluations*, 1(3) J. CHILD CUSTODY 9 (2004); Janet M. Bowermaster, *Legal Presumptions and The Role of Mental Health Professionals in Child Custody Proceedings*, 40 DUQ. L. REV. 265 (2002); Allison Glade Behjani, *Delegation of Judicial Authority to Experts: Professional and Constitutional Implications of Special Masters in Child-Custody Proceedings*, 2007 UTAH L. REV. 823.

children's lives are altered by even the most amicable of divorces[17] and that a high level of parental conflict has a destructive impact on children.[18]

This article explores five decades of child custody law, starting with the changes in families and the problems posed by high-conflict families. Part II discusses the legal changes from presumptions to factor-based best-interests-of-the-child analysis. Part III outlines how the court system has tried to adapt to the growing numbers of high-conflict cases. Part IV sets out the increasingly complex role of mental health professionals in custody disputes.

A. Challenges Posed by Redefined Families

> *The demographic changes of the past century make it difficult to speak of an average American family . . . . persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing . . .*[19]

17. *See* ELIZABETH MARQUARDT, BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE 21–22, 30–31 (2005) (summarizing national survey of 1,500 young adults indicating that children of divorce who maintained contact with both parents indicated they grew up in two distinct worlds, which created endless and often painful complications); JUDITH S. WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2000) (finding that divorce is a cumulative experience for children, and its impact increases over time); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE 202–03 (1989) (demonstrating how divorce "affects their entire growing up and certainly their attitudes as young adults, toward themselves and toward the adult world."); JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980). *See also* E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED (2002) (noting that 20% to 25% of children of divorce manifest serious social, emotional or psychological problems); Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation, in* 15 THE FUTURE OF CHILDREN: MARRIAGE AND CHILD WELLBEING 75, 77 (2005) (conducting a meta analysis of 93 studies published in the 1960s, 1970s, and 1980s and confirming that children of divorce score lower than those of married parents on educational and psychological measures, exhibit more behavioral problems, more symptoms of psychological maladjustment, lower academic achievement, more social difficulties, and poorer self concepts, among other things); Michael E. Lamb et al., *The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment,* 35 FAM. & CONCIL. CTS. REV. 393, 395–96 (1997) (finding children experience declines in economic circumstances, fear of abandonment by one or both parents, diminished capacity of parents to attend to child's needs, diminished contact with extended family and friends).

18. *See* Janet R. Johnston, *High-Conflict Divorce, in* 4(1) THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE 165 (1994) (inter-parental conflict after divorce and the custodial parent's emotional distress are jointly predictive of an increase in problematic parent-child relationships and adjustment problems for children); Robert E. Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 PSYCHOL. BULL. 310 (1982); Marsha Kline et al., *The Long Shadow of Marital Conflict*, 53 J. MARRIAGE & FAM. 297, 305 (1991); WALLERSTEIN & BLAKESLEE, SECOND CHANCES, *supra* note 17, at 301–02. For a discussion of how to read and understand social science data, see Robert F. Kelly & Sarah H. Ramsey, *Assessing Social Science Studies: Eleven Tips for Judges and Lawyers*, 40 FAM. L.Q. 367 (2006).

19. Troxel v. Granville, 530 U.S. 57, 63–64 (2000).

The "average" American family no longer exists in its idealized 1950s form. Once defined by marriage or biology, families have changed dramatically due to a steady divorce rate, a growing number of out-of-wedlock births, and the volume of children living with persons outside the traditional nuclear family. As late as 1970, 40% of American families met the model of one wage earner, a stay-at-home-wife, and two children;[20] today less than one in four families do. Divorces quadrupled between 1960 and 1999, and single-parent families more than tripled between 1970 and 2003. Because over half of divorced persons remarry, children may be exposed to an assortment of stepparents, stepsiblings, live-ins or other persons. One in three children are born to unwed mothers.[21]

Fit parents have the superior right to the care, custody, and control of their children,[22] but blended, same-sex families and reproductive technologies challenge and expand the definition of "parent." Legislatures and courts protect a growing number of "nontraditional" families.[23] In 1970, there were less than 475,000 unmarried cohabitants; today nearly six million. Same-sex couples can marry in two states (and five countries), have civil unions in several states, and form domestic partnerships in others. Many of these couples have children who are either the biological or adopted child of only one of the partners. The conception of children by assisted reproductive technologies sometimes raises complex issues of parentage.[24] An adult who is neither a biological nor adoptive parent of a

20. *See* U.S. Bureau of Census, U.S. Dep't of Commerce, Current Population Reports, Family and Living Arrangements: 2003, 2 (2004).

21. National Center for Health Statistics, Preliminary Births for 2004, available at http://www.cdc.gov/nchs/products/pubs/pubd/hestats/prelim_births04.htm. National Center for Health Statistics, 52 (10) NAT'L VITAL STAT. REP. 49, tbl.13 (Dec. 17, 2003) (showing 68.2% of African-American children were born to unmarried mothers; 28.5% of white children). *See* Brady E. Hamilton et al., *Births: Preliminary Data for 2003*, 53 NAT'L VITAL STAT. REP. 9 (Ctr. for Disease Control & Prevention 2004).

22. Troxel v. Granville, 530 U.S. 57 (2000) (citing Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925). *See generally,* ELROD, CHILD CUSTODY PRACTICE, *supra* note 16, ch. 1, 7.

23. MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 1 (1989) (noting a progressive increase in regulation of the economic and child-related consequences of formal and informal cohabitation). *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977); Braschi v. Stahl Assoc. Co., 543 N.E.2d 49 (N.Y. 1989); Hann v. Housing Authority of Easton, 709 F. Supp. 605 (E.D. Pa. 1989); U.S. Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

24. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998). *See also* Lane v. Lane, 912 P.2d 290 (N.C. 1996) (noting that:

> Twentieth-century science has complicated the law of paternity. Advances in biology make it possible both to determine and to create biological parents in ways not contemplated a few decades ago. On the one hand, laboratory technicians can now rebut the presumption that the husband of the mother at the time of conception is the biological father. On the other, physicians can now enable infertile couples to have children who do not share both parents' genes. Legislatures have been attempting to design paternity statutes that properly balance the important interests at stake).

child can seek custody or visitation rights as a "de facto" parent[25] or a parent by estoppel.[26] As more individuals are identified as parents and more kin caregivers are providing homes for children,[27] courts must "protect children's interests within the context of nontraditional families."[28] It is up to the policymakers to decide how to protect the interests of children involved in disputes not only between divorcing mothers and fathers but also in a myriad of other family formations.[29]

B. Protecting Children in High-Conflict Cases

> *High-conflict custody cases are marked by a lack of trust between the parents, a high level of anger and a willingness to engage in repetitive litigation. High-conflict custody cases can emanate from any (or all) of the participants in a custody dispute—parents . . .; attorneys . . .; mental health professionals . . .; or court systems . . .*[30]

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25. *See* C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004); A.H. v. M.P., 857 N.E.2d 1061 (Mass. 2006); Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); LaChapelle v. Mitten, 607 N.W. 2d 151 (Minn. Ct. App. 2000); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000). *See* Deborah L. Forman, *Same-Sex Partners: Strangers, Third Parties or Parents?*, 40 FAM. L.Q. 23 (2006); Nancy G. Maxwell & Caroline J. Forder, *The Inadequacies in U.S. and Dutch Adoption Law to Establish Same-Sex Couples as Legal Parents: A Call for Recognizing Intentional Parenthood*, 38 FAM. L.Q. 623 (2004).

26. *See* Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000) (applying estoppel principles to bar legal parent from disputing visitation claim of former partner). *See also* ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03(1) (2002) (giving the same rights and responsibilities as legal parents to a man who has lived with a child for two years or since birth and believed that he was the biological father and continued taking parental responsibilities even after the belief no longer existed, or when an adult has lived with a child since birth or for two years, accepting full and permanent responsibilities and holding the child out as his or her own, pursuant to a coparenting agreement with the parent, and recognition as a parent would serve the child's best interests).

27. Elizabeth Barker Bryant, *De Facto Custodians—A Response to the Needs of Informal Kin Caregivers?*, 38 FAM. L.Q. 291 (2004).

28. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L. J. 459, 482 (1990). Expanding the right of privacy to consenting adult homosexuals clears the way for recognition of nontraditional families. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

29. *See* Troxel v. Granville, 530 U.S. 57, 88 (2000) (J. Stevens dissenting) (noting the parent's interest must be balanced against the "child's own complementary interest in preserving relationships that serve her welfare and protection."). *See also* Margaret F. Brinig & Steven L. Nock, *Legal Status and Effects on Children*, 5 U. ST. THOMAS L.J. 548, 550 (2008) (citing research, that shows that children do better with two married parents, even if they subsequently divorce; that children do better when their fathers are in the home or if a stepparent has adopted them; and that children do better with adoptive parents than living with relatives).

30. Wingspread Conferees, *High-Conflict Custody Cases: Reforming the System for Children*, 34 FAM. L.Q. 589 (2001). The American Bar Association Section of Family Law cosponsored a Wingspread conference that brought together an international and interdisciplinary group of judges, lawyers, and mental health professionals to discuss improving the system for children. *See* Linda D. Elrod, *Reforming the System to Protect Children in High-Conflict*

Divorce causes anxiety and life disruptions for parents and children alike. The majority of separating parents, however, work through their changing emotions and return to some semblance of "normal" within two to three years.[31] The same is true for children. Tragically, a small, but significant, number of parents engage in a type of guerilla warfare, litigating repeatedly, clogging courts and harming their children.[32] As a Canadian study noted, some couples ". . . perpetuate their conflict regardless of developments in the lives of their children, their own remarriage and prohibitive legal expenses."[33]

High-conflict harms children whether it originates with the parents or is fueled by others in the adversarial system.[34] The level and intensity of parental conflict is now thought to be the most important factor in a child's postdivorce adjustment and is the single best predictor of a poor outcome.[35] Highly conflicted custody cases disrupt and distort the development of children, placing them at risk for depression and mental disorders, educational failure, alienation from parents, and substance abuse.[36]

Custody Cases, 28 WM. MITCHELL L. REV. 495 (2001). The Section of Family Law cosponsored two earlier interdisciplinary "think tanks" on the topic of "Best Interest of the Child"—one with the Johnson Foundation at Wingspread in 1998 and one with Ripon College in 1990.

31. *See* SHEILA KESSLER, THE AMERICAN WAY OF DIVORCE: PRESCRIPTION FOR CHANGE (1979) (noting that divorcing persons go through stages of grief similar to death of a loved one, experiencing emotions ranging from hurt, anger, grief, self-righteousness, guilt, jealousy, revenge, and vulnerability); Geoffrey Hamilton & Thomas S. Merrill, *"Why is My Client Nuts?" An Inquiry into the Psychodynamics of Divorce*. ABA Section of Family Law Annual Compendium C-1 (1993).

32. MARY ANN MASON, THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE AND WHAT WE CAN DO ABOUT IT (1999). *See also* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 100, 159 (1992) (noting that fewer than 25% filed conflicting custody requests); CONSTANCE AHRONS, THE GOOD DIVORCE 56 (1994); JANET R. JOHNSTON & VIVIENNE ROSEBY, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN 4 (1997). *See generally* UNEXPECTED LEGACY OF DIVORCE, *supra* note 17.

33. SPECIAL JOINT COMMITTEE OF THE PARLIAMENT OF CANADA, REPORT ON CHILD CUSTODY AND CHILD ACCESS: FOR THE SAKE OF CHILDREN 73 (1998).

34. *Wingspread Conference Report*, *supra* note 30 (noting that "High conflict cases can arise when parents, attorneys or mental health professionals become invested in the conflict or when parents are in a dysfunctional relationship, have mental disorders, are engaged in criminal or quasi-criminal conduct, substance abuse or there are allegations of domestic violence, or child abuse or neglect").

35. *See* Joan B. Kelly & Robert E. Emery, *Children's Adjustment Following Divorce: Risk and Resilience Perspectives*, 52(4) FAM. REL. 352 (2003) (finding child's postdivorce well-being is inversely related to the level of parental conflict before, during, and after divorce); CARLA B. GARRITY & MITCHELL A. BARIS, CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE 19 (1994); Paul R. Amato, *Children's Adjustment to Divorce: Theories, Hypotheses, and Empirical Support*, 55 J. MARRIAGE & FAM. 23 (1993).

36. Janet Johnston et al., *Ongoing Postdivorce Conflict in Families Contesting Custody: Effects on Children of Joint Custody and Frequent Access*, 59 AM. J. ORTHOPSYCHIATRY 576 (1989); Emery, *Interparental Conflict and the Children of Discord and Divorce*, *supra* note 18; *see also* ELIZABETH M. ELLIS, DIVORCE WARS: INTERVENTIONS WITH FAMILIES IN CONFLICT,

Children exposed to violence and high conflict "bear an acutely heightened risk of repeating the cycle of conflicted and abusive relationships as they grow up and try to form families of their own."[37] These children often are afraid of intimate relationships and lack the abilities to manage conflict themselves.

In many high-conflict families, there may be a multitude of problems. The parties are angry, distrustful, often contemptuous of the other parent. One or both parents may struggle with serious personality characteristics that distort relationships and make them unable to tolerate negative emotions.[38] Such parents typically possess little insight into their own role in the conflict and fail to understand the impact of the conflict on their children. They may perpetrate or make allegations of child abuse or domestic violence, alienate the child from the other parent, or even abduct the child. The dynamics of the conflict will vary; sometimes there may be just one high-conflict parent.[39]

Sometimes contextual factors drive the conflict. For example, relocation cases are often "no win" high-conflict cases. One parent's right to travel conflicts with the other parent's wish to remain geographically close to the child. The interests of the child may conflict with both.[40] Because each case is fact sensitive, and there currently are no uniform standards,[41] the potential for conflict is great.[42] Polarized parents, who frequently argue over which legal presumptions and burdens should prevail

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ch. 2 (2000) (summarizing research); Catherine C. Ayoub et al., *Emotional Distress in Children of High Conflict Divorce: The Impact of Marital Conflict and Violence*, 38 FAM. & CONCIL. CTS. REV. 297 (1999); Kline et al., *supra* note 18.

37. JOHNSTON & ROSEBY, IN THE NAME OF THE CHILD, *supra* note 32, at 4, 5.

38. JANET JOHNSTON & LINDA E.G. CAMPBELL, IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT (1988). *See also* WILLIAM A. EDDY, HIGH CONFLICT PERSONALITIES: UNDERSTANDING AND RESOLVING THEIR CUSTODY DISPUTES (2003); Carl F. Hoppe, *Test Characteristics of Custody-Visitation Litigants: A Data-Based Description of Relationship Disorders*, *in* EMPIRICAL APPROACHES TO CHILD CUSTODY DETERMINATION (Stefan Podrygula ed., 1993). See AMERICAN PSYCHIATRIC ASSOCIATION: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) (4th ed 1994). *See also* Johnston, *High Conflict Divorce, supra* note 18, at 169 (two thirds of 160 parents in study had personality disorders—parents exhibit either narcissistic, obsessive-compulsive, histrionic, paranoid, psychotic or borderline personalities); Joan B. Kelly, *Parents with Enduring Child Disputes: Multiple Pathways to Enduring Disputes*, 9 J. FAM. STUDIES 37 (2003).

39. Kelly, *Parents with Enduring Child Disputes*, *supra* note 38.

40. *See* Elrod, *A Move in the Right Direction?*, *supra* note 10 (discussing the various approaches states take to relocation). *See also* JEFF ATKINSON, 1 MODERN CHILD CUSTODY PRACTICE, ch. 7 (2d ed. 2008).

41. The Uniform Law Commission has established a drafting committee for a Uniform Relocation Act. It held its first meeting October 10-11, 2008. For current status, see nccusl.org

42. *In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996); Tropea v. Tropea, 642 N.Y.S.2d 575 (1996). S*ee also Special Issue on Relocation,* 15 J. AMER. ACAD. MATRIMONIAL LAWYERS (1998) for legal and social science perspectives.

to allow or block a move, may lose the focus on their child.[43] Relocation cases leave less room for parents to compromise and force an examination of underlying preferences and values. Some social scientists and lawyers favor maintaining the stability of the relationship with the custodial parent over keeping parents geographically together.[44] Others argue that maintaining the relationship with the nonmoving parent should be the decisive factor. Yet others advocate a benefit-risk analysis.[45] Courts have increasingly used a case-by-case "best interests" analysis.[46] Absent a predictable standard, the potential for litigation and conflict are increased.

II. The Law's Search for the Best Interests of the Child

The best interest standard represents a willingness on the part of the court and the law to consider children on a case-by-case basis rather than adjudicating children as a class or a homogeneous grouping with identical needs and situations.[47]

A. From Presumptions to Parenting Plans

Because divorce bargaining and negotiations occur "in the shadow of the law,"[48] presumptions, or the lack of presumptions, play a pivotal role in negotiations. For example, if a presumption favors one parent, the other parent may only pursue litigation if he or she feels there is sufficient evidence to overcome the presumption. For centuries, the patriarchal and

43. Winn v. Winn, 593 N.W.2d 662, 669 (Mich. Ct. App. 2000) (noting that the ideal would be for the child to develop a close relationship with both parents through an equal division of parenting time, but the ideal was difficult to achieve when the parents lived in different communities; reminding trial judge that the paramount consideration in a child custody decision is the child's best interests, not those of his parents). *See* Janet Leach Richards, *Children's Rights v. Parents' Rights: A Proposed Solution to the Custodial Relocation Conundrum,* 29 N.M. L. REV. 2345 (1999).

44. *See* Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present,* 30 FAM. L.Q. 245 (1996); Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move—Psychological and Legal Considerations in the Relocation of Children Following Divorce,* 30 FAM. L.Q. 305 (1996); Carol S. Bruch, *Social Science or Wishful Thinking: Lessons from Relocation Law,* 40 FAM. L.Q. 281 (2006).

45. William G. Austin, *A Forensic Psychology Model of Risk Assessment for Child Custody Relocation Law,* 38 FAM. & CONCIL. CTS. REV. 192 (2000).

46. *In re* Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005) (noting the court's duty was not to determine which theories are correct but to determine the best interest of a child based on the facts of each individual case); *See* Elrod, *A Move in the Right Direction?, supra* note 10 (citing cases).

47. Joan B. Kelly, *The Best Interests of the Child: A Concept in Search of Meaning,* 35 FAM. & CONCIL. CTS. REV. 377, 385 (1997) (noting that the lack of scientific knowledge by the decision maker may result in a custody decision based on personal experience and beliefs of the judge).

48. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce,* 88 YALE L.J. 950, 956 (1979).

hierarchal societal structure treated children to a large extent as the property of their fathers.[49] Divorces were few, but fathers were named the custodians of children. The nineteenth century saw the Industrial Revolution, the movement for women's rights (one position at the 1848 Seneca Falls Convention was that women should have a right to equal custody of their children), and the first references to awarding custody according to the best interests of the child.[50] The paternal presumption gave way to a view that placement of the children with their mothers, who were in the home to nurture them, was in their best interests.[51] Until the 1960s, unless the mother was "unfit" or at fault in the divorce,[52] judges presumed that it was in the best interests of a child "of tender years" to be in her sole custody.[53] Fathers were often awarded "visitation." Without legal rights to their children, unwed fathers seldom sought custody or visitation.

The 1970s saw the judicial and legislative removal of the maternal preference. Families became more egalitarian. Mothers entered the workforce in record numbers and started seeking equal rights in the marketplace. Fathers assumed more parental responsibilities and started seeking more equal rights in the care of their children following divorce. The U.S. Supreme Court moved the states towards gender equality using the Fourteenth Amendment[54] and recognized due process rights for unwed fathers.[55] In addition, a growing body of scientific research supported the importance of fathers in the development of their children.[56] Giving unwed fathers independent parental rights combined with changes in the

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49. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 453 (1765). *See also* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES (1994).

50. *See In re* Bort, 25 Kan. 308 (1881) (noting that "in a controversy for the custody of an infant of tender years, the court will consider the best interests of the child, and will make such order for its custody as will be for its welfare, without reference to the wishes of the parties, their parental rights, or their contracts"); *See also* Chapsky v. Wood, 26 Kan. 650 (1881).

51. *See* Marcia O'Kelly, *Blessing the Tie that Binds: Preference for the Primary Caretaker as Custodian*, 63 N. DAK. L. REV. 481, 487–88 (1987); Henry Foster, *Life with Father*, 11 FAM. L.Q. 327 (1978); MICHAEL GROSSBERG, A JUDGMENT FOR SOLOMON (1997).

52. *See* Robert J. Bregman, *Custody Awards: Standards Used When the Mother Has Been Guilty of Adultery or Alcoholism*, 2 FAM. L.Q. 384 (1968).

53. MASON, THE CUSTODY WARS, *supra* note 32, at 123; HOMER CLARK, DOMESTIC RELATIONS § 17.4(a) (1968); ELROD, CHILD CUSTODY PRACTICE, *supra* note 16, at § 1:06 & § 4:05 (describing the tender years doctrine).

54. *See* Reed v. Reed, 404 U.S. 71 (1971); Stanton v. Stanton, 421 U.S. 7 (1975). *See also* Weinberger v. Weinberger, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Schlesinger v. Ballard, 419 U.S. 498 (1975); Craig v. Boren, 429 U.S. 190 (1976); Califano v. Wescott, 443 U.S. 76 (1979); Orr v. Orr, 440 U.S. 269 (1979).

55. *See* Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983).

56. Robert F. Cochran, Jr. & Paul C. Bitz, *Child Protective Divorce Laws: A Response to the Effects of Parental Separation on Children*, 17 FAM. L.Q. 327, 340 (1983).

family, no-fault divorce, and the removal of the maternal preference[57] to leave the best-interest standard without an anchor.

The impact of child custody law's paradigm shift to the gender-neutral best interests of the child standard in the 1970s almost defies description. Rather than basing custody decisions on gender- or status-based presumptions, judges were suddenly charged with making individualized determinations without presumptions or a clear default position. As Joan Kelly noted:

> . . . each recommendation, each decision made, considers the individual child's developmental and psychological needs. Rather than focusing on parental demands, societal stereotypes, cultural tradition, or legal precedent, the best interests standard asks the decision makers to consider what this child needs at this point in time, given this family and its changed structure . . . [58]

Having judges exercise the state's *parens patriae* power was not new; not knowing what the judge would say or what might happen if the parents did not agree was new.[59] Parents who made daily decisions about their child during the marriage suddenly faced an unpredictable legal process before a judge. In a highly formal, but often truncated, proceeding, the judge would tell parents with whom the child would live and what decisions each could make.

The best-interests-of-the-child process for an individual child is the ultimate exercise in examining the "how" and "why" connections between behaviors, attitudes, and attributes of parents and the psychological and developmental characteristics of their children. Finding the best interests of the child is an attractive public policy and a lofty objective, but it is a difficult operational standard. When compared to the legal presumptions it replaced, the best interests standard has been assailed as indeterminate and unpredictable.[60] Judges, without the requisite training in child development and adequate resources to fully investigate these intensely fact-sensitive

57. *See* Bazemore v. Davis, 394 A.2d 1377 (D.C. 1978); Johnson v. Johnson, 564 P.2d 71 (Alaska 1977); *In re* Marriage of Bowen, 219 N.W.2d 683 (Iowa 1974); State *ex rel.* Watts v. Watts, 350 N.Y.S.2d 385 (1973); Devine v. Devine, 398 So. 2d 686 (Ala. 1981); Pusey v. Pusey, 728 P.2d 117 (Utah 1986).

58. Kelly, *The Best Interests of the Child, supra* note 47.

59. *See* Ford v. Ford, 371 U.S. 187, 193 (1962) (noting that "experience has shown that the question of custody, so vital to a child's happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where . . . the estrangement of husband and wife beclouds parental judgment with emotion and prejudice."); Santosky v. Kramer, 455 U.S. 745 (1982) (state has *parens patriae* interest in preserving and promoting the welfare of children).

60. Most lists of the classic critiques include: Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy,* 39 LAW & CONTEMP. PROBS. 226, 269–70 (1975) (offering numerous examples in which judges relied on personal values about race, sexual intimacy, middle-class values and concluding that courts lack capacity to discern a child's best interest); David L. Chambers, *Rethinking the Substantive Rules for Custody*

cases, tend to rely on their own values.[61] While many judges continued to look at the importance of stability, past caretaking and emotional bonds, others considered a variety of factors, leading some to argue that the neutral best-interest standard hurt mothers.[62] The last forty years have seen various attempts to reign in judicial discretion with new presumptions, preferences, and lists of factors.[63]

1. Enumerated Factors from UMDA, Friendly Parents and Domestic Violence

In 1970, the National Conference of Commissioners on Uniform State Laws adopted a Uniform Marriage and Divorce Act (UMDA) with five gender-neutral factors: (a) the wishes of the child's parents; (b) the desires of the child; (c) the interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests; (d) the child's adjustment to the child's home, school, and community; and (e) the mental and physical health of all parties. In addition, the UMDA admonished courts to not consider conduct of a parent that did not affect his relationship with the child.[64] This provision was to keep judges from awarding custody solely because of the judge's

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Disputes in Divorce, 83 Mich. L. Rev. 477, 481–82 (1984) ("legislatures have failed to convey a collective social judgment about the right values"); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. Chi. L. Rev. 1 (1987); Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 Fam. L.Q. 189, 194 (1993) (noting custody litigation has intense emotionalism and the indeterminate qualities of the best interest standard invite judges to make decisions based on whose attributes and values most resemble their own).

61. *See* Painter v. Bannister, 140 N.W.2d 151 (Iowa 1966) (awarding custody to Iowa grandparents over father who lived a more "Bohemian" lifestyle).

62. *See* Mary Becker, *Maternal Feelings: Myth, Taboo and Child Custody*, 1 S. Cal. Rev. L. & Women's Stud. 133, 175 (1992) (judges tend to apply the best interest standard in ways that are systematically biased against mothers who are sexually active, have less money than the father, lesbian, work outside the home, or marry a person of another race); Martha Albertson Fineman, The Illusion of Equality: The Rhetoric and Reality of Divorce Reform 149 (1991) (suggesting that best interest standard undercut mother's ability to retain custody and devalued their contributions); Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. Fam. L. 1, 48 (1991) (noting that gender-neutral laws deny the biological and social reality of the importance of children to women and hold mothers to a competitive male model); Amy D. Ronner, *Women Who Dance on the Professional Track: Custody and the Red Shoes*, 23 Harv. Women's L.J. 173 (2000) (noting that mothers who work have encountered some gender stereotyping). *But see* Stephen J. Bahr et al., *Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference?* 28 Fam. L.Q. 247 (1994).

63. John J. Sampson, *Bringing the Courts to Heel: Substituting Legislative Policy for Judicial Discretion*, 33 Fam. L.Q. 565 (1999). *But see* Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best Interest Standard*, 89 Mich. L. Rev. 2215 (1991) (arguing that judicial discretion has some advantages).

64. Unif. Marriage & Divorce Act § 402, 9A U.L.A. 288 (1979). The Uniform Law Commission has moved the UMDA to the status of a model act.

view of a parent's fault in the divorce, sexuality,[65] race, or religion.[66] Although the entire UMDA was only adopted in eight states, many state legislators began with the five UMDA factors, then added others to focus the analysis and resolve conflict by adding more predictability. In some jurisdictions the factors were judicially created.[67]

Factors added to address specific concerns have often stimulated vigorous debates when combined with advocacy in the adversarial court system. Advocates quickly learned that factors intended as "shields" can just as easily become "swords." For example, to prevent one parent from interfering with the other's contact with the child, some states added a "friendly parent" factor.[68] Meant as a tool that judges could use to protect the parenting time of noncustodial parents, predominantly fathers who felt marginalized, these provisions were stretched far beyond this purpose.

When broadly construed, friendly parent provisions can profoundly impact cases by becoming the lens through which everything is viewed. In the visitation context, such provisions can function as two-sided shields. On one side they simultaneously protect against unwarranted withholding of parenting time and frivolous allegations of abuse or unfit parenting, while on the other side they may hinder reasonable inquiry into inappropriate or questionable parenting practices if such inquiries are labeled "unfriendly." The two types of problems most directly impacted by the provision—domestic violence and parental alienation—involve difficult-to-prove allegations and counter-allegations. They illustrate how the friendly parent provision is all too often a double-edged sword for parents and children caught in the middle of conflicts.

The awareness of the dramatic and long-term detrimental effects of domestic violence on children[69] led to all states adding the consideration

65. *See* Fulk v. Fulk, 827 So. 2d 736 (Miss. Ct. App. 2002); Taylor v. Taylor, 110 S.W.3d 731 (Ark. 2003) (refusing to change custody just because mother had a roommate who was a lesbian when there was no evidence of a sexual relationship between them).

66. Palmore v. Sidoti, 466 U.S. 429 (1984). *But see* Kendall v. Kendall, 687 N.E.2d 1228 (Mass. 1997), *cert. denied* 524 U.S. 953 (1998) (upholding restriction on fundamentalist Christian father taking child who was Orthodox Jew to his church because he ridiculed child's beliefs). *See* Kent Greenawalt, *Child Custody, Religious Practices, and Conscience*, 76 U. COLO. L. REV. 965 (2005).

67. Albright v. Albright, 437 So. 2d 1003 (Miss. 1983) (including UMDA factors and adding which parent had the continuity of care prior to separation and which has the best parenting skills and the willingness and capacity to provide primary child care).

68. *See* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Redefining Families, Reforming Custody Jurisdiction, and Redefining Support Issues*, 34 FAM. L.Q. 607, 654, Chart 2 (2001).

69. *See* Peter Jaffe, *Children of Domestic Violence: Special Challenges in Custody and Visitation Disputes, in* DOMESTIC VIOLENCE AND CHILDREN: RESOLVING CUSTODY AND VISITATION DISPUTES, A NATIONAL JUDICIAL CURRICULUM 19, 22 (Nancy K.D. Lemon, ed. 1995) (the majority of abusive husbands grew up in families where they witnessed their fathers abuse

of spousal abuse as a factor in custody determinations.[70] Twenty-four have a rebuttable presumption against awarding custody to the abusive parent.[71] Domestic violence cases are high-conflict cases that pose serious safety concerns for both parent and child.[72] Some studies indicate that sixty percent of litigating parents report domestic violence of some kind. Differentiating between valid reports of domestic violence, the type of violence, and strategic allegations is not always easy.[73] Batterers may contest custody to punish, control, or hurt their female partners and their children.[74] When mothers raise allegations of domestic violence and child abuse in contested custody cases, there has been a tendency for judges (and lawyers) to discount the allegations,[75] even though research indicates that the majority of accusations are substantiated.[76] Some domestic violence victims flee the jurisdiction to avoid violence[77] or protect the child

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their mothers); Joy D. Osofsky, *The Impact of Violence on Children, in* 9(3) THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN 33 (1999).

70. *See* Hicks v. Hicks, 733 So. 2d 1261 (La. Ct. App. 1999) (reversing joint custody with primary residence to father during school year to sole custody with mother and supervised visitation to father where evidence showed eight incidences of domestic violence); Peter-Riemers v. Riemers, 644 N.W.2d 197 (N.D. 2002).

71. Annette M. Gonzalez & Linda Rio Reichmann, *Representing Children in Civil Cases Involving Domestic Violence*, 39 FAM. L.Q. 197, 198 (2005).

72. *See* Jessica O'Brien & Lavita Nadkarni, *Domestic Violence Under the Microscope: Implications for Custody and Visitation*, 23 FAM. ADVOC. 35 (Sum. 2000); Nancy K.D. Lemon, *The Legal System's Response to Children Exposed to Domestic Violence, in* 9(3) THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN 67 (1999).

73. Peter F. Jaffe, Janet R. Johnston et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 FAM. CT. REV. 500 (2008); Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379 (2005).

74. *See* LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS (2002); CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH AND APPLIED ISSUES (George W. Holden et al., eds. 2000); Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 67 (2003).

75. *See* Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43, 44–45 (2000); Martha Albertson Fineman, *Domestic Violence, Custody and Visitation*, 36 FAM. L.Q. 211, 217–20 (2002).

76. *See* ANN M. HARALAMBIE, SEXUAL ABUSE ALLEGATIONS IN CIVIL CASES: A GUIDE TO CUSTODY AND TORT ACTIONS 35 (1999) (less than 8% not validated); Kathleen Coulborn Faller, *Child Maltreatment and Endangerment in the Context of Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 429, 430–31 (2000) (vast majority of allegations validated). *See also Symposium Issue: New Perspectives on Child Protection*, 34 FAM. L.Q. 301–552 (2000). *But see* Janet R. Johnston et al., *Allegations and Substantiations of Abuse in Custody-Disputing Families*, 43 FAM. CT. REV. 283–94 (2005) (showing substantiation in only about one-fourth of cases in the study).

77. Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, LXIX FORDHAM L. REV. 593 (2000) (finding that a majority of the abductors were women escaping violence). *See* Glen Skoler, *A Psychological Critique of International Child Custody and Abduction Law*, 32 FAM. L.Q. 557 (1998).

if the court does not believe the claim of abuse.[78] Advocates for these parents argue that the friendly parent provision unfairly penalizes a victim who is trying to protect herself and the child.[79]

In the 1980s, the gender wars, emerging father's rights, increasing allegations of child abuse at the time of divorce, and postdivorce visitation refusals produced the phenomenon identified as "parental alienation syndrome."[80] The original theory depicted a vindictive, hostile parent systematically programming the child to view the other parent as evil, dangerous, or unnecessary to the child.[81] Reaction to the theory and its use in court was immediate and highly polarizing. To some, the controversial psycholegal "diagnosis" embodied an effective, uncompromising counter-allegation to increasingly frequent allegations of physical and sexual abuse of the child. To many, however, the allegations of child abuse needed to be taken more seriously, and parental alienation syndrome reflected "junk science" that needed to be totally excluded from court.[82]

More contemporary notions of alienation cases suggest a more moderate, less blaming view. The "alienated child" theory notes that the child's rejection of a parent may be the result of multiple causes including possible alienating behavior by the favored or aligned parent, child abuse or domestic violence, or poor parenting and family conflict.[83] Within the alienated child model, alignments may reflect the child's affinity or preferences for one parent and estrangements from the other that might be due to poor or less preferred parenting.[84]

78. *See* Morgan v. Foretich, 546 A.2d 407 (D.C. 1988) (hiding child in New Zealand with grandparents when judge ordered visitation with father whom mother alleged abused child).

79. Margaret K. Dore, *The Friendly Parent Concept: A Flawed Factor for Child Custody*, 6 LOY. J. PUB. INT. L. 41 (2004). BANCROFT & SILVERMAN, *supra* note 74.

80. For cases discussing alienating parents, *see, e.g.*, Schutz v. Schutz, 581 So. 2d 1290 (Fla. 1991); *In re* Marriage of Cobb, 988 P.2d 272 (Kan. Ct. App. 1999); Foster v. Foster, 788 So. 2d 779 (Miss. Ct. App. 2000); Begins v. Begins, 721 A.2d 469 (Vt. 1998).

81. RICHARD A. GARDNER, THE PARENTAL ALIENATION SYNDROME: A GUIDE FOR MENTAL HEALTH PROFESSIONALS (1992).

82. *See* Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L.Q. 527 (2001) (discussing problems with the theory); Robert E. Emery, *Parental Alienation Syndrome: Proponents Bear the Burden of Proof*, 43 FAM. CT. REV. 8 (2005) (stating that Gardner makes sweeping and misguided claims about PAS. . . [a]nyone who presents PAS as supported by science either misunderstands the rules of science or the nature of scientific evidence.").

83. Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249, 255–56 (2001) (stating that divorces characterized by bitter and protracted legal proceedings, continued verbal and/or physical aggression after separation, unsubstantiated allegations and counter-allegations of child abuse, neglect, or parental lack of interest are . . . more likely to potentiate alienation in the child.). *See also* ELLIS, DIVORCE WARS, *supra* note 36, at 205–33 (noting that cases involving alienation evidence a wide range of family dynamics).

84. Leslie M. Drozd & Nancy W. Oleson, *Is It Abuse, Alienation, and/or Estrangement? A Decision Tree*, 1(3) J. CHILD CUSTODY 65 (2004).

Regardless of how the dynamics are framed, children in these cases are undeniably caught in the middle of the parental conflict. At stake is the child's independent sense of self in the eyes of one or both parents. Either the programming parent is using the child as a pawn, or the other parent is ignoring the child's self by interpreting the child as the other parent's pawn. For the child, loyalty binds to both parents may actually fuel alignments to one parent as a solution for the anxiety. The stakes for parents in alienation cases are high because sometimes there may be little possibility of salvaging the parent-child relationship.[85]

The statutory and judicial lists of "best interests" factors have mushroomed. Some states include eleven or more factors.[86] Although these factors are intended to focus the judge on specific parenting skills and behaviors, the diverse nature of unweighted factors still allow for substantial interpretation and discretion. The outcomes of child custody disputes remain difficult to predict and may rely on the judge's "gut" feeling tied to a factor. If parents cannot agree and cannot predict who will "win" a custody fight, they may hire expensive experts and engage in unnecessary litigation and strategic behaviors.[87]

2. Joint Custody—From Joint Decision Making to Shared Residency and Back

Sole custody was the norm until the 1970s. Because mothers received sole custody most of the time, some fathers felt disenfranchised and undervalued. Notions of gender equality eventually affected perceptions of real and model parenting relationships. When parents can cooperate and continue to co-parent, children benefit.[88] Joint legal custody, which allows both parents to retain decision-making authority, solved the "winners and losers" problem for judges.[89] Legislators quickly embraced joint

85. Janet R. Johnston, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, 38 Fam. L.Q. 757 (2004).

86. Elrod, Child Custody Practice, *supra* note 16, at ch. 4. See Colo. Rev. Stat. § 14-10-124(1.5)(a) (2007) (listing nine best interest factors); Colo. Rev. Stat. § 14-10-129(c) (2007) (if relocation of a child is involved, adding eleven additional factors); Me. Rev. Stat. 19 § 1653 (listing sixteen factors).

87. Elrod, *Reforming the System*, *supra* note 30; Mnookin & Kornhauser, *Bargaining in the Shadow of the Law*, *supra* note 48, at 956.

88. *See* Mason, Custody Wars, *supra* note 32; David J. Miller, *Joint Custody*, 13 Fam. L.Q. 345 (1979). *See also* Andrew I. Schepard, Children, Courts, and Custody: Interdisciplinary Models in Divorcing Families 46 (2004) (noting the push for legislation for joint custody came from fathers' groups).

89. *See* Dodd v. Dodd, 403 N.Y.S. 2d 401 (Sup. Ct. 1978) (noting "Joint custody is an appealing concept. It permits the court to escape an agonizing choice, to keep from wounding the self-esteem of either parent and to avoid the appearance of discrimination between the sexes."); Taylor v. Taylor, 508 A.2d 964 (Md. 1986) (generally endorsing but outlining benefits and drawbacks to joint custody).

custody.[90] Joint custody clarifies that both parents remain parents; neither becomes a "visitor." The child continues to get love, guidance, and support from both parents. When parents choose to cooperatively parent their child, indications are that these children have the best postseparation adjustment.[91]

Joint custody, however, did not prove to be a panacea for children (or their parents). While a judge can order the placement, joint custody actually requires a higher level of cooperation. Courts can only go so far in making parents communicate about their children.[92] Joint legal custody also led to questions of whether fairness and equality demanded shared residency. Although courts have determined that there is no "constitutional right" to equal time,[93] some states presume that shared parenting is in the child's best interest. Equal contact, however, does not resolve conflict. If the parents are in conflict, children often suffer more in joint custody arrangements.[94] Inappropriate use of joint custody may "cement rather than resolve chronic hostility and condemn the child to living with two tense, angry parents indefinitely."[95]

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90. *See* ELROD, CHILD CUSTODY PRACTICE, *supra* note 16, at ch. 5; Doris J. Freed & Timothy B. Walker, *Family Law in the 50 States*, 22 FAM. L.Q. 367 (1989) (noting legislative trend toward joint custody); Woodhouse, *supra* note 1, at 825 (judges seemed to have grown tired of the fighting in high-conflict cases and saw joint custody as a compromise).

91. Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 717 (1985).

92. FRANK F. FURSTENBURG, JR., & ANDREW CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART (1991); ISOLINA RICCI, MOM'S HOUSE, DAD'S HOUSE (2d ed. 1997). *See* Barton v. Hirshberg, 767 A.2d 874 (Md. Ct. Spec. App. 2001) (parents need not agree on all aspects of child rearing, but their views must not be so widely divergent or so inflexibly maintained so as to forecast continued disagreement).

93. *See* Arnold v. Arnold, 679 N.W.2d 296 (Wis. Ct. App. 2004) (finding custody award should be in the child's best interests; father had no constitutional right to 50/50 residency split); Griffin v. Griffin, 581 S.E.2d 899, 902 (Va. Ct. App. 2003) (noting the best interests tests "reflects a finely balanced judicial response to . . . parental deadlock.").

94. *In re* Marriage of Hansen, 733 N.W.2d 63 (Iowa 2007) (reviewing the social science literature and refusing to award joint custody); Parker v. Parker, 553 So. 2d 309 (Fla. Dist. Ct. App. 1989) (shifting or rotating custody, especially when the parents are not in agreement, is not in a child's best interests). *See* Woodhouse, *supra* note 1, at 825 (discussing Fisher v. Fisher, 535 A.2d 1163 (Pa. Super. Ct. 1988) (overturning custody award alternating years so child would have to change schools). *See also* Janet R. Johnston, *Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making*, 33 FAM. & CONCIL. CTS. REV. 415 (1995); Andre P. Derdeyn & Elizabeth Scott, *Joint Custody: A Critical Analysis and Appraisal*, 54 AM. J. ORTHOPSYCHIATRY 199, 202 (1984); Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM. L.Q. 201 (1998); MACOBY & MNOOKIN, DIVIDING THE CHILD, *supra* note 32, at 34; Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 507 (1988).

95. H. Patrick Stern et al., *Battered-Child Syndrome: Is It a Paradigm for a Child of Embattled Divorce?*, 22 U. ARK. LITTLE ROCK L. REV. 335, 379 (2000). *See* McCauley v. Schenkel, 977 S.W.2d 45 (Mo. Ct. App. 1998) (private school dropped children because of parents' "constant, ongoing, severe tension and bickering.").

Attempting to promote parental cooperation in every case may not be in the child's best interests. When joint custody is imposed over the objection of the parties,[96] the rate of relitigation is roughly the same as when a parent has sole custody.[97] Many believe that neither joint legal nor joint physical custody should be imposed in cases of high conflict[98] or in cases involving domestic violence.[99] Judges must determine whether imposing joint custody over the objections of one of the parents will improve or hurt the relationships between the parents and the children.

Shared residency awards that have the effect of reducing child support can create financial burdens for the child and the residential parent. Securing shared residential custody sometimes has become an effective strategy for those who wish to avoid or decrease their child support payments. Reductions in support, however, do not correspond to an offsetting decrease in the primary custodian's expenses.[100] These problems are exacerbated when one parent does not pay his or her child support obligation or a portion of the child's expenses.[101] Constructing an objective, mathe-

96. Christy M. Buchanan & Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangments*, 43 WAKE FOREST L. REV. 419 (2008) (presumption for joint custody not appropriate for high conflict).

97. Beverly W. Ferreiro, *Presumption of Joint Custody: A Family Policy Dilemma*, 39 FAM. REL. 420, 422 (1990). *See also* Margaret F. Brinig, *Does Parental Autonomy Require Equal Custody at Divorce?*, 65 LA. L. REV. 1345, 1358 (2005) (showing that when fathers' groups were successful in obtaining legislature changes, there were more postdivorce motions as well as more unfounded claims of abuse). *See* Hoover (Letourneau) v. Hoover, 764 A.2d 1192 (Vt. 2000); Tarry v. Mason, 710 N.E.2d 215 (Ind. Ct. App. 1999) (mother's relocation); Tibor v. Tibor, 598 N.W.2d 480 (N.D. 1999) (court permission required for relocation where parents share equal time).

98. Hildy Mauzerall et al., *Protecting the Children of High Conflict Divorce: An Analysis of Idaho Bench/Bar Committee Report to Protect Children of High Conflict Divorce's Report to the Idaho Supreme Court*, 33 IDAHO L. REV. 291, 317 (1991) (stating that "Joint legal custody is not appropriate where there is ongoing high conflict . . ."); DIANE MERCER & MARSHA KLINE PRUETT, YOUR DIVORCE ADVISOR 203 (2001) ("high contact with both parents coupled with high conflict is not in children's best interests. There is no ambiguity about this."). *See also* Johnston, *High-Conflict Divorce*, *supra* note 18, at 176 ("an association between joint custody/frequent access and poorer child adjustment appears to be confined to divorces that are termed 'high-conflict.'").

99. LUNDY BANCROFT & JAY SILVERMAN, *supra* note 74 at 243–68; Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991) (batterers should not receive joint or sole custody of children); Mildred Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, 7 MEDIATION Q. (1990); B. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 ALBANY L. REV. 1109, 1113 (1995).

100. Karen Czapanskiy, *Child Support, Visitation, Shared Custody in* CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 43 (Margaret Campbell Haynes ed., 1994).

101. *See* MACCOBY & MNOOKIN, DIVIDING THE CHILD, *supra* note 32 (noting joint legal custody often merely re-labels sole custody; joint physical custody often results in lower child support payments without a greater assumption of care by the paying parent). Jo Michelle Beld

matical formula that provides for children and the infinite variations of parental responsibilities found in parenting plans has proven to be difficult.[102]

3. PRIMARY CAREGIVER TO APPROXIMATION RULE

A West Virginia judge proposed that custody determinations would be more predictable if there were a presumption or preference for the "primary caretaker, the person who performs the largest parenting role."[103] Critics argue that the primary caretaker preference favors mothers and that divorce results in a reconsideration of parenting roles.[104] Even without a preference or presumption, courts continue to value stability and continuity of care and often award primary custody to the parent who has provided the most consistent parenting.[105]

The American Law Institute's *Principles of the Law of Family Dissolution* embraced the primary caretaker concept, recommending what has come to be called the approximation rule. The ALI proposes that parenting plans

> . . . allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation or, if the parents never lived together, before the filing of the action . . .[106]

As a proposed paradigm shift, proponents allege that the past caretaking standard focuses the court on historical facts and concrete acts of caretaking, tasks courts can handle more easily than predictions of future conduct. It does not require experts nor evaluations of complex emotional relationships. Because of greater determinancy, the approximation rule appears to offer a relatively easy to administer, more predictable process.[107]

& Len Biernat, *Federal Intent for State Child Support Guidelines: Income Shares, Cost Shares, and the Realities of Shared Parenting*, 37 FAM. L.Q. 165 (2003).

102. *See* Linda Henry Elrod, *The Federalization of Child Support Guidelines*," 6 J. AM. ACAD. MATRIM. LAW. 103 (1990). LAURA W. MORGAN, CHILD SUPPORT GUIDELINES ch. 3 (1996 & Supp. 2008).

103. Garska v. McCoy, 278 S.E.2d 357 362–63 (W. Va. 1981). *See* Kjelland v. Kjelland, 609 N.W.2d 100 (N.D. 2000) (primary caretaking is a factor in determining best interests of the child). *See* O'Kelly, *Blessing the Tie That Binds*, *supra* note 51.

104. Schneider, *Discretion, Rule and Law*, *supra* note 63, at 2283–87 (criticizing primary caretaker rule). *See also* Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427 (1990).

105. Burchard v. Garay, 724 P.2d 486 (Cal. 1986) (C.J. Bird, concurring) (noting that, "stability, continuity and a loving relationship are the most important criteria for determining the best interests of the child.").

106. ALI PRINCIPLES *supra* note 26, at § 2.08, § 2.10.

107. *See* Katharine T. Bartlett, *Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution*

The approximation rule could benefit children by reducing conflict.[108] While proponents acknowledge that quantity of caretaking may not be a valid proxy for quality of parent-child attachment in all cases, they prefer this concept to the more subjective best-interests standard with its reliance on professional evaluators.[109]

Others view the approximation rule as a pendulum swing back to the maternal preference of an earlier time and see application of the rule as unlikely to reduce conflict.[110] Opponents argue that the *Principles* themselves list numerous factors[111] as well as high-conflict circumstances[112] that can create exceptions. If high-conflict dynamics trump application of the rule, one has to question how the rule will reduce conflict. And finally, the idea that a clear-cut default rule will reduce the incidence of trials may not be a valid assumption. A primary caretaker preference in Minnesota produced a "frenzy of litigation."[113] Likewise, Oregon's experience with a default joint-custody presumption increased the number of abuse actions and postdivorce custody motions.[114] The current debate about the approximation rule illustrates how the adversarial system and gender dynamics permeate attempts at reform.

4. Agreements to Parenting Plans

Through parenting plans, time schedules, and routines are negotiated and decided for children and their parents. Some states presume the parents' agreement, once approved by a judge, reflects the best interests of the child because the parents are in the best position to know their child's

Project, 36 FAM. L.Q. 11, 24–25 (2002); Herma Hill Kay, *No-Fault Divorce and Child Custody: Chilling Out the Gender Wars*, 36 FAM. L.Q. 27, 47 (2002).

108. Robert E. Emery, Randy K. Otto, & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System,* 6(1) PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST 1 (2005).

109. Barbara A. Atwood, *Comment on Warshak: The Approximation Rule as a Work in Progress*, 1(2) CHILD DEV. PERSPECTIVES 126 (2007). *See also* Mary E. O'Connell, *When Noble Aspirations Fail: Why We Need the Approximation Rule*, 1(2) CHILD DEV. PERSPECTIVES 129 (2007).

110. Richard A. Warshak, *The Approximation Rule, Child Development Research, and Children's Best Interests After Divorce*, 1(2) CHILD DEV. PERSPECTIVES 119 (2007).

111. Among the listed factors are accommodating a child's firm and reasonable preferences, protecting the child's welfare where there is a "gross disparity" in the quality of emotional attachment between each parent and child and demonstrated ability to meet child's needs; accommodating prior agreements; avoiding substantial harm to the child. ALI PRINCIPLES, *supra* note 26, at § 208(1)(a)-(h).

112. *Id.* at 121 (noting that the rule is limited in cases involving child abuse and domestic violence, substane abuse, and persistent interference with a parent's access to the child).

113. Gary L. Crippen & Sheila M. Stuhlman, *Minnesota's Alternatives to Primary Caretaker Placements: Too Much of a Good Thing?* 28 WM. MITCHELL L. REV. 677 (2001).

114. Douglas W. Allen & Margaret F. Brinig, Bargaining in the Shadow of Joint Parenting (University of Iowa Legal Studies Research Paper No. 05-25), *available at* http://www.ssm.com/abstract=820104.

needs, wants, and schedules.[115] In the last ten years, parents have generally been encouraged to file a joint parenting plan. Some jurisdictions require parents to submit an individual parenting plan before going to court.[116]

Most parenting plans are informal, understood, postdivorce agreements between parents working flexibly with each other. Some have to be more formal, detailed, written documents for parents whose conflicts and lack of agreement persist.[117] Parenting plans typically address: legal and physical custody; holiday and vacation access; parent-to-parent communication and information exchange; healthcare and school decisions; provisions for cooperation and collaboration; and, mechanisms for review and revision.[118]

Conflicts and disagreements about parenting plans sometimes reflect gendered debates. For example, familiar arguments about the merits of sole versus joint custody permeate disputes about overnight parenting time. More than half of the children who experience divorce are age six or younger, and 75% of those children are younger than age three.[119] When negotiating overnight issues, battles often erupt over the relative importance of attachments to primary caregivers[120] versus the benefits of multiple attachments to multiple caregivers,[121] as well as the merits of

115. *See* ARIZ. REV. STAT. ANN. § 25-408 (agreement of parties, which includes provisions for relocation presumed to be in child's best interests); KAN. STAT. ANN. § 60-1610(a) (agreement of the parents is presumed to be in the child's best interests); Vollet v. Vollet, 202 S.W.3d 72 (Mo. Ct. App. 2006) (overturning decision to not approve parents' agreement to include a noncohabitation/overnight restriction without determining if restriction was in the best interest of the children). *See also* Eickbush v. Eickbush, 171 P.3d 509 (Wyo. 2007) (noting that even when the parents agree on custody, however, judges have an obligation to review the agreement to ensure the child's welfare is advanced).

116. *See* OR. REV. STAT. § 107.102 (1) (In any proceeding to establish or modify a judgment providing for parenting time with a child * * * there shall be developed and filed with the court a parenting plan to be included in the judgment.). *See, e.g.,* Arizona Supreme Court, Model Parenting Time Plans for Parent/Child Access *available at:* http://www.supreme.state.az.us/dr/Pdf/Parenting_Time_Plan_Final.pdf.

117. Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children,* 38 FAM. & CONCIL. CTS. REV. 297 (2001); Risa J. Garon et al., *From Infants to Adolescents: A Developmental Approach to Parenting Plans,* 38 FAM. & CONCIL. CTS. REV. 168 (2000); Robert Tompkins, *Parenting Plans: A Concept Whose Time Has Come,* 33 FAM. & CONCIL. CTS. REV. 286 (1995).

118. *See* Michael E. Lamb, *Placing Children's Interest First: Developmentally Appropriate Parenting Plans,* 10 VA. J. SOC. POL'Y & L. 98, 109–13 (2002); SCHEPARD, *supra* note 88, at 4.

119. ROBERT E. EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT (1988).

120. Judith Solomon & Zeynap Biringen, *Another Look at the Developmental Research: Commentary on Kelly and Lamb's "Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children,"* 39 FAM. CT. REV. 355 (2001); Zeynep Biringen et al., *Commentary on Warshak's "Blanket Restrictions: Overnight Contact Between Parents and Young Children,"* 40 FAM. CT. REV. 204 (2002).

121. Kelly & Lamb, *Using Child Development Research, supra* note 117; Richard A. Warshak, *Blanket Restrictions: Overnight Contact Between Parents and Young Children,* 38 FAM. & CONCIL. CTS. REV. 422 (2000).

vesting caretaking experiences and responsibilities in a single parent versus sharing these obligations between parents.

Regarding the persistent debate about overnights, one researcher has commented:

> Argument surfaces as parents try to develop parenting plans after separation, confronting the question of when young children should begin overnights with the second parent, how many they should do, and on what schedule. This issue . . . resurfaces time and again in the courts like an ulcer under stress.[122]

B. Recognizing "Rights" for Children

> *Children's rights have moved from the margins of discussion to center stage*[123]

Internationally, children's rights are recognized. Adopted by 192 countries, the United Nations Convention on the Rights of the Child (CRC)[124] provides a comprehensive framework for recognizing and protecting children's rights.[125] Several European initiatives have explicitly recognized rights for children.[126] The quest for rights for children in the United States, which has not adopted the CRC, has not been easy.[127] The Constitution is

122. Marsha Kline Pruett, *Guest Editorial Notes, Applications of Attachment Theory and Child Development Research to Young Children's Overnights in Separated and Divorced Families, in* OVERNIGHTS AND YOUNG CHILDREN: ESSAYS FROM THE FAMILY COURT REVIEW 5 (2005).

123. Woodhouse, *supra* note 1, at 815.

124. The United Nations Convention on the Rights of the Child, 28 I.L.M. 1448 (Nov. 20, 1989). Office of the United Nations High Comm'r for Human Rights, 11 Convention on the Rights of the Child (Nov. 20, 1989), *available at* http://www.ohchr.org/english/countries/ratification/11.htm.

125. *See* Howard A. Davidson, *Children's Rights and American Law: A Response to What's Wrong with Children's Rights*, 20 EMORY INT'L L. REV. 69, 70–72 (2006). *See also* Barbara Bennett Woodhouse, *Talking about Children's Rights in Judicial Custody and Visitation Decision-Making* 36 FAM. L.Q. 105, 108 (2002)(calling the CRC the most important children's rights document in history). It has also been called "a Bill of Rights for all the world's children." Alastair Nicholson, *The United Nations Convention on the Rights of the Child and the Need for Its Incorporation into a Bill of Rights*, 44 FAM. CT. REV. 5 (2006) (noting importance of document granting rights).

126. *See* Andrew Moylan, *Children's Participation in Proceedings—The View From Europe, in* HEARING THE CHILDREN 171, 183 (Lord Justice Thorpe & Justine Cadbury eds., 2004) (citing in addition to the U.N. Convention on the Rights of the Child, The European Convention on the Exercise of Children's Rights 1996; The Charter of Fundamental Rights in the European Union; European Convention on Contact Concerning Children 2003).

127. *See* Linda D. Elrod, *Client-Directed Counsel for Children: It's the Right Thing to Do*, 27 PACE L. REV. 869 (2007) (asserting reasons for slow awareness of rights for children are (1) the lack of express grant of positive rights for children in the Constitution; (2) the failure of the United States to ratify the U.N. Convention on the Rights of the Child; (3) difficulties in defining what is included within the term "rights;" (4) the perceived incapacity of some children to exercise their rights; and (5) the fear that children's rights will come at the expense of parental rights).

silent on rights for children or their families, and the United States Supreme Court has been reluctant to enumerate substantive rights for children. In addition, those seeking rights for children have not always agreed on the type or extent of rights children should have.[128]

1. THE RIGHT TO BE HEARD

One of the most important rights for a child in the middle of a custody dispute is the right to be heard.[129] Even though the child is not considered a "party" to the custody action,[130] the child's future care and welfare will be impacted forever. Although most statutory lists of "best interest" factors include the child's preference, judges vary as to whether and how they will hear the child's preference and the weight the preference will receive.[131] Research indicates that children want to be heard on matters

128. *See* Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255 (1979) (noting children's rights include social, protective, adult, and family); JOSEPH M. HAWES, THE CHILDREN'S RIGHTS MOVEMENT: A HISTORY OF ADVOCACY AND PROTECTION (1991) (noting rights in the welfare and education areas); DAVID ARCHARD, CHILDREN'S RIGHTS AND CHILDHOOD 55–56 (2d ed. 2004) (noting children have liberty and welfare rights); Barbara Bennett Woodhouse, *Childrens' Rights in* HANDBOOK OF YOUTH AND JUSTICE 377, 388–96 (White ed., 2001)(arguing children should have basic human rights principles of equality, individual dignity, privacy, protection and empowerment); Barbara Bennett Woodhouse, *Talking about Children's Rights*, *supra* note 125; Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1344–58 (1995) (arguing that children should have same basic substantive rights as adults); Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L. J. 692, 695–710 (2006) (categorizing three approaches to justice and rights for children: procedural-securing legal rights; legal—enlarging positive rights and liberties; and social—modifying social structures that oppress certain groups); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 16 (1986) (noting that protecting individual autonomy is different from protecting human relationships).

129. *See* VIRGINIA COIGNEY, CHILDREN ARE PEOPLE TOO: HOW WE FAIL OUR CHILDREN AND HOW WE CAN LOVE THEM 197 (1975) (indicating that the right to be heard and to have some say in what happens to a person seems to be among the most fundamental of rights); Katherine Hunt Federle, *Children's Rights and the Need for Protection*, 34 FAM. L.Q. 421, 438 (2000) (noting that "the value of rights for children lies in their potential to remedy powerlessness."). *See also* Henry H. Foster, Jr., & Doris Jonas Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 347 (1972) (including the right to be "heard and listened to."). *But see* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 12 (2005) (stating that Foster and Freed confused "rights" with things that are good for children and unenforceable).

130. *In re* Marriage of Osborn, 135 P.3d 199 (Kan. Ct. App. 2006). *See also* Kingsley v. Kingsley, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993)(finding that minor lacked capacity to bring termination-of-parental-rights petition).

131. Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629, 634–35 (2003) (indicating that 80% of judges considered the preferences of teenagers to be important; 40% gave weight to 11 to 13 year olds, but 33% gave no significance to preferences of children under age ten). *See also* ANN M. HARALAMBIE, THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION AND PROTECTION CASES (ABA 1993); ELROD, CHILD CUSTODY PRACTICE, *supra* note 16, at ch.12.

affecting them and that they understand the difference between providing input and making decisions.[132] The UN Convention on the Rights of the Child calls for the child's voice to be heard on all matters affecting their custody.[133]

2. A RIGHT TO COUNSEL

Over the last forty years, advocates have called for children to have attorneys to give them a voice.[134] Many believe that a child who has the capacity to direct legal representation should be able to do so. While the Supreme Court has ruled that a child has a due process right to counsel in a juvenile case when their liberty is at stake,[135] it has not addressed the due process rights of a child to have independent advocacy in chronically conflicted custody cases. When and how to give children a voice has generated substantial controversy and resulted in numerous sets of standards and principles.[136] Most recently, the National Conference of Commissioners on Uniform State Laws found itself in the middle of the debate over counsel for children as child advocates attacked the concept of the "best interests" attorney.[137] While some still see the need for a lawyer to advocate for the

132. *See* Joan B. Kelly, *Listening to Children's Views in Disputed Custody and Access Cases*, AFCC Compendium 179 (2008); George H. Russ, *Through the Eyes of a Child: "Gregory K": A Child's Right to Be Heard*, 27 FAM. L.Q. 365 (1993); Mark Hengahan, *What Does a Child's Right to Be Heard in Legal Proceedings Really Mean?—ABA Custody Standards Do Not Go Far Enough*, 42 FAM. L.Q. 117 (2008). *See also* Patrick Parkinson, Judy Cashmore, & Judi Single, *Adolescent's Views on the Fairness of Parenting and Financial Arrangements After Separation*, 43 FAM. CT. REV. 429 (2005)(reporting half of the young people indicated they had no say at all and the danger of predicating custody arrangements on what is perceived to be fair to parents rather than fair to children).

133. United Nations Convention on the Rights of the Child, *supra* note 124, art. 12.

134. *See* Monroe Inker & Charlotte Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L.Q. 108 (1971); Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287 (1983); Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation of Children*, 59 N.Y. U. L. REV. 76, 96 (1984); Linda D. Elrod, *Counsel for the Child in Custody Disputes—The Time Is Now*, 26 FAM. L.Q. 53 (1992); Shannan L. Wilber, *Independent Counsel for Children*, 27 FAM. L.Q. 349 (1993); *Howard A. Davidson, The Child's Right to Be Heard or Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255 (1991).

135. *In re* Gault, 387 U.S. 1 (1967). *See also* Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353 (N.D. Ga. 2005) (finding the child has a right to counsel in child-in-need-of-care proceedings).

136. *See* American Bar Association, *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375 (1995); American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 129 (2003); American Academy of Matrimonial Lawyers, *Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW. 1 (1995); National Association of Counsel for Children, *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (NACC Revised Version)* (2001); ALI PRINCIPLES, *supra* note 26, at § 2.13.

137. Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act,

child's best interests, regardless of the child's wishes,[138] the trend is for a lawyer to provide traditional client-based representation that empowers a child as a "rights holder" whose wishes are presented and considered by the court.[139]

III. Developments in the Legal System

The painful fact is that no really satisfactory legal process can be devised to cope with two angry people whose love has turned to disdain.[140]

A. Role of Courts: From Fault Finder to Settlement Facilitator

As the characteristics of American families change and we know more about the needs of children, the judicial role in child custody disputes is evolving from an adversarial, adjudicative model to a more rehabilitative, service-oriented model.[141] The court's role has evolved from a strictly comparative task of identifying the better parent to facilitating and, when necessary, enforcing parenting plans. Widespread dissatisfaction with the adversarial model for custody disputes has grown over the years.[142] Particularly for these families, the use of lawyers, judges, mental health professionals, and court service workers often makes parents believe that professionals are increasingly in charge of what was once the family's private life.[143]

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42 FAM. L.Q. 1 (2008). *See* Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L.Q. 63 (2008). The URCANCPA was withdrawn in summer 2008.

138. *Compare* Auclair v. Auclair, 730 A.2d 1260 (Md. Ct. Spec. App. 1999) (guardian ad litem is agent or arm of court) *with* Roski v. Roski, 730 So. 2d 413 (Fla. Dist. Ct. App. 1999). *See* Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 32 LOY. J. PUB. INT. L. 106 (2002).

139. Elrod, *Client-Directed Counsel for Children, supra* note 127. Annette Appel, *Simon Says Take Three Steps Backward: The National Conference of Commissioners on Uniform State Laws Recommendation on Child Representation*, 6 NEV. L. REV. 1365 (2006); Katherine Hunt Federle, *Righting Wrongs, supra* note 137 (arguing that a child has a right to client-directed lawyer). *See* Gonzalez & Reichmann, *Representing Children in Civil Cases, supra* note 71, at 219 (listing custody statutes).

140. Robert F. Drinan, *Reflections on Contemporary Dilemmas in American Family Law*, 2 FAM. L.Q. 63, 71 (1968).

141. *See also* Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High Conflict Divorcing Families and Their Children, Who Needs What Kind of Help?* 22 U. ARK. LITTLE ROCK L. REV. 453 (2000); SCHEPARD, *supra* note 88.

142. *Wingspread Conference Report, supra* note 30, at 503; Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of the Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 133 (1997). *See also* SURVIVING THE BREAKUP, *supra* note 17, at 30; OREGON TASK FORCE ON FAMILY LAW: FINAL REPORT 2 (1999) (stating that the "divorce process in Oregon, as elsewhere, was broken and needed fixing . . . the sheer volume of cases was causing the family court system to collapse.").

143. Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce*

Highly conflicted families have caused dramatic increases in the domestic docket.[144] The recognition that some cases are going to require more time than others has led some courts to adopt principles of case management that classify custody disputes as low, medium, and high conflict.[145] Different tracks can be created for cases depending on the level of complexity, the need for discovery, the need for services, the need for protection, and other factors. When the court can identify a high-conflict case early enough,[146] the case can be placed within an appropriate "track" and directed to services that improve outcomes for children.[147] To encourage parties to make their own agreements and to make the process less formal and less expensive, courts have added alternative dispute resolution techniques, provided court sponsored educational programs, and expanded concepts of case management.

1. ADVENT OF ALTERNATIVE DISPUTE RESOLUTION—FROM VOLUNTARY TO MANDATORY

> *. . . someone needs to get in the middle in order to get children out of the middle.*[148]

As the volume of disputes over custody arose, reformers questioned the adversary system as the appropriate forum and searched for ways to resolve disputes more quickly, less expensively, and with more involvement of the parties.[149] Mediation embraces the philosophy that parents, not the state, should determine the best interests of their child and that self-created plans were more likely to be followed. Studies of the results verify the effectiveness of mediation in reducing burdens on the courts and improving parents' relationships with children. Mediation, whether evaluative or facilitative, can help parties learn to communicate and be more child-

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Process: Perceptions of Parents, Their Young Children and Their Attorneys, 33 FAM. L.Q. 283, 284 (1999) (finding 50% to 70% of parents characterized the legal system as "impersonal, intimidating and intrusive").

144. SCHEPARD, CHILDREN, COURTS, AND CUSTODY, *supra* note 88, at 38 (citing data from Florida, New York, and Oregon).

145. *Id.* at 113–24.

146. *Wingspread Conference Report*, *supra* note 30, at 597.

147. *Id.* (although DCM has been used in criminal and other civil cases, it is only in the last couple of years that some have suggested using the same concepts for high-conflict custody cases).

148. Robert E. Emery, David Sbarra, & Tara Glover, *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 25 (2005).

149. SCHEPARD, *supra* note 88, at 50 (discussing the 1976 Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice at which Professor Frank Sander discussed "Varieties of Dispute Resolution."). Most courts have rejected binding arbitration for custody. *See* Fawzy v. Fawzy, 948 A.2d 709 (N.J. Super Ct. App. Div. 2008); Harvey v. Harvey, 680 N.W.2d 835 (Mich. 2004).

focused.[150]

Mediation started as a voluntary option for parents. While the core of mediation is the parties' willingness to mediate, mediation quickly became court-mandated in nearly one-fourth of the states as a way to try to reduce the court's load.[151] Although some were skeptical, research indicates that when parents mediate parenting plans or custody disputes, they reach settlement 50% to 85% of the time whether mediation is voluntary or court mandated.[152] Court-mandated mediation, however, may be inappropriate, and even dangerous, in high-conflict cases where the imbalance of power is too great,[153] where one of the parties is incapacitated or a victim of domestic violence,[154] or where alienation is an issue.[155]

2. Parent Education Programs: From General to High Conflict

Parent education programs teach parents about the risks and harms to children that are associated with divorce and conflict. These programs first appeared in the late 1970s to acquaint parents with the normal stages of divorce (like grief and anger) and to educate them about how using the child as a go-between places the child at risk. These programs now exist in almost every state.[156] A few states have made whether a party has satisfactorily completed a parent education course a factor the court can consider in awarding parenting time.[157] Courts have upheld requirements

150. Jennifer E. McIntosh et al., *Child-Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Postseparation Adjustment*, 46 Fam. Ct. Rev. 105 (2008). *See also* Emery, Sbarra & Grover, *supra* note 148, at 30–32 (showing just six hours of mediation resulted in better parent-child relationships twelve years after divorce).

151. *Id.* at 58, Carrie Menkel-Meadow et al., Dispute Resolution: Beyond the Adversarial Model (2005).

152. Joan B. Kelly, Trends in Interventions for Separated Parents and Children, in Spring CLE Conference Compendium Materials 53 (May 1, 2008); Robert Emery et al., *Divorce Mediation, supra* note 148.

153. *See* Penelope Eileen Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 Buff. L. Rev. 441 (1992); Penelope Eileen Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 Fam. L.Q. 177 (1994); Linda K. Girdner, *Mediation Triage: Screening for Domestic Violence in Domestic Mediation*, 7(4) Mediation Q. (1990).

154. *See* Nancy Thoennes et al., *Mediation and Domestic Violence: Current Policies and Practices*, 33 Fam. & Concil. Cts. Rev. 6 (1995); Nancy K.D. Lemon, *The Legal System's Response*, *supra* note 72, at 74 (mediation totally inappropriate for domestic violence cases). *See Model Standards of Practice for Family and Divorce Mediation* Standard X (some cases may not be suitable for mediation because of domestic violence).

155. *See* J.M. Bone & M.R. Walsh, *Parental Alienation Syndrome: How to Detect It and What to Do About It*, 73(3) Fla. B. J. 44 (1999) (suggesting mediator may not recognize the deceptive and manipulative tactics and undercurrents that occur with one parent's interference with the child's relationship with the other party).

156. *See* Susan L. Pollet & Melissa Lombreglia, *A Nationwide Survey of Mandatory Parent Education*, 46 Fam. Ct. Rev. 375 (2008); Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 Fam. L.Q. 617 (1999).

157. Conn. Gen. Stat. § 46b-56(c)(16) (2007).

that parents attend these educational programs.[158]

Court experiences with education programs have been positive, although effectiveness varies according to the degree of conflict, the timing of attendance, and the content and teaching strategies.[159] Programs designed for the general divorcing population provide general information on the psychological process of divorce, the needs of children during and after divorce, and cooperative parenting. These general parent education programs, however, neither improve poor parental relationships nor substantially affect relitigation patterns. The last ten years has seen the advent of more specialized programs aimed at the parents involved in the most highly conflicted cases.[160] Some believe these specialized programs may be the best hope for reducing conflict and teaching parents how to communicate.

3. Parent Coordinators or Third-Party Neutrals

High-conflict cases often require day-to-day monitoring of the parents' activities by a neutral third-party called a parent coordinator, special master, arbitrator, or case manager.[161] When parents have failed to cooperate by either filing repeated motions or engaging in destructive behaviors, the court may appoint one of these third-party neutrals, most commonly called a parent coordinator. The parent coordinator is trained to protect

158. *See* Dutkiewicz v. Dutkiewicz, 957 A.2d 821 (Conn. 2008) (educating parents who are in the court system is not an exercise of care, custody, or control of their child so does not infringe on parental rights); Nelson v. Nelson, 954 P.2d 1219 (Okla. 1998)(statute and administrative order requiring divorcing parents of minor children to attend classes to help children cope with divorce did not violate equal protection; state has strong interests in setting terms and procedures of marriage and divorce and protecting minor children, classes were educational and specifically related to children of divorcing parents and classification reasonably related to state's interests).

159. Karen R. Blaisure & Marjorie J. Geasler, *Results of a Survey of Court-Connected Parent Education Programs in U.S. Counties,* 34 Fam. & Concil. Cts. Rev. 23 (1996); Jack Arbuthnot et al., *Patterns of Relitigation Following Divorce Education*, 35 Fam. & Concil. Cts. Rev. 269 (1997) (parents had significantly lower rates of relitigation two years after divorce). *See also* Schepard, *supra* note 88, at 68–78 (indicating that court-sponsored parent education begins when the parents enter the courthouse to file for divorce or custody).

160. *See* Nancy Thoennes & Jessica Pearson, *Parent Education in the Domestic Relations Court: A Multisite Assessment*, 37 Fam. & Concil. Cts. Rev. 195 (1999); Kevin Kramer et al., *Effects of Skill-Based vs. Information Based Divorce Education Programs on Domestic Violence and Parental Communication*, 36 Fam. & Concil. Cts. Rev. 5 (1998). *See also* Susan Blyth Boyan & Ann Marie Termini, Cooperative Parenting and Divorce: Shielding Your Child from Conflict: A Parent Guide to Effective Co-Parenting (1999).

161. *See* Hugh McIsaac, *Programs for High-Conflict Families*, 35 Williamette L. Rev. 567, 569 (1999) (indicating that parent coordinators are useful where (1) one or both parents have severe personality disorders and are chronically litigating; (2) in families with great difficulty coordinating childrearing decisions; (3) potentially abusive situations; and (4) when there is intermittent mental illness of a parent). *See also* Christine A. Coates et al., Special Issue, *Parenting Coordination for High-Conflict Families*, 42 Fam. Ct. Rev. 246 (2004).

children and to manage recurring disputes, and to assist the parties in creating and complying with judicial orders and parenting plans.[162]

Parent coordinators may appropriately handle minor decisions, but the judicial delegation of authority to a third-party neutral remains controversial. In most jurisdictions, the neutral cannot make binding decisions unless the attorneys file a detailed stipulation with the court or the court approves the decision after a judicial review.[163]

4. UNIFIED FAMILY COURTS

In 1993, an American Bar Association report on children at risk stated: "We need to reorganize the way courts work with families and children so that judges and court personnel can give each child's case the attention it demands . . ."[164] Among the recommendations were that jurisdiction over all matters involving families and children should be consolidated into one court system of the highest court of general jurisdiction with the one-judge, one-family concept.[165] The unified family court is not a new concept. The 1960 White House Conference on Children and Youth proposed a court with jurisdiction over all matters involving husbands and wives, and parents and children.[166] The idea is to have one specially trained judge address the legal issues challenging each family. By focusing on the family more holistically, court processes and social service resources can be coordinated and tailored to the individual family's legal, personal, emotional, and social needs. While statewide progress on unified family courts has been extremely slow, today there is a unified family court in at least some judicial districts in most states.[167]

IV. Developments in Interdisciplinary Collaboration

The behavioral sciences . . . are dedicated to the development and

162. JOHNSTON & ROSEBY, IN THE NAME OF THE CHILD, *supra* note 32; GARRITY & BARIS, *supra* note 35.

163. *See* CAL. CIVIL CODE § 638 (1)(2)(2006) (a special master can make a conclusive determination on some things without further action of the court; in other situations, the master makes advisory findings that do not become binding without court adoption after independent consideration). *See* Ruisi v. Thieriot, 62 Cal. Rptr. 2d 766 (Ct. App. 1997); *In re* Marriage of McNamara, 962 P.2d 330 (Colo. Ct. App. 1998); *In re* Marriage of Hanks (Gordon), 10 P.3d 42 (Kan. Ct. App. 2000).

164. ABA, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 53, 54 (1993).

165. *Id.*

166. Gerald R. Corbett & Samuel P. King, *The Family Court of Hawaii*, 2 FAM. L.Q. 32 (1968) (noting that Hawaii was one of the first states to convert the general idea into reality).

167. Barbara A. Babb, *Reevaluating Where We Stand: A Comprehensive Survey of America's Family Justice Systems*, 46 FAM. CT. REV. 230 (2008). *See Symposium on Unified Family Courts*, 37 FAM. L.Q. 327–526 (2003). Paul A. Williams, *A Unified Family Court for Missouri*, 63 U.M.K.C. L. REV. 383, 384 (1995).

> *application of knowledge to promote positive interpersonal relationships—in a sense to* prevent *or at least to dampen social conflict . . . . The law accomplishes this function by* sharpening *conflict, so as to ensure that issues in dispute are carefully posed and that they are resolved fairly in accordance with societal values.*[168]

Although legal and mental health professionals recognized the need for collaboration to help children and families as early as the 1960s,[169] the demands of custody determinations caught both unprepared. Little empirical research data existed to guide decision making. Interdisciplinary collaboration has at times been difficult as both courts and mental health professionals wrestled with whether to sharpen distinctions between parents in order to identify a primary parent or to try to prevent the conflict to allow for shared parenting.

A. Different Standards, Different Courts, and Different Outcomes

As noted earlier, fifty years ago the law definitively settled custody disputes using presumptions of what was best for children. Successful outcomes usually consisted of a completed, clean break divorce and sole custody of the children with mother. When the best interest standard became gender neutral and judges turned to experts for help, the mental health professions initially offered a theory that answered the legal system's demands. The psychological parent doctrine appeared to be both gender neutral and, by asserting that only the custodial parent had the power to make decisions regarding the child, the doctrine also had a definitive answer for conflict between parents. Too much conflict, no contact for the noncustodial parent.[170] At the time, the rights of noncustodial fathers were limited. The rights of nonmarried fathers were nonexistent. It was assumed that the children of divorced and separated parents were doing fine. Then a ground-breaking social science research study indicated that they were not doing so well.[171] Children of divorced and separated parents needed help.

Today, successful "outcome" of a divorce means parents meeting the best psychological interests of each individual child, following a negotiated parenting plan, and developing a cooperative or "friendly" relationship with the other parent who possesses equal parental rights. The evolution of the court's role to a more rehabilitative, service-oriented model

168. GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 10 (2d ed. 1997).

169. Jay Katz, *Famiy Law and Psychoanalysis—Some Observations on Interdisciplinary Collaboration*, 1 FAM. L.Q. 69, 76–77 (1967).

170. GOLDSTEIN, FREUD & SOLNIT, *supra* note 15.

171. WALLERSTEIN & KELLY, *supra* note 17.

reflects the influence of mental health professionals in custody disputes because we now know the "outcome" of divorce. About one fourth to one third of divorcing couples report high degrees of hostility and discord over the daily care of their children many years after separation and well beyond the expected time for them to settle their differences.[172] The children in these families are most at risk. The paradigm shift in the standard and the evolving paradigm shift and pendulum swings in the courts have stressed families and children, placing demands on mental health professionals to keep pace.

B. Advances in Competence, Professional Standards, and Ethical Principles

Early child custody evaluators worked in professional isolation,[173] conducted custody evaluations that differed little from traditional clinical evaluations,[174] and often struggled because of the legal system's poorly defined rules and expectations of mental health professionals.[175] Evaluators often joined the adversarial system by becoming a "hired gun" whose testimony had to be balanced or neutralized by another hired gun in a "battle of the experts."[176] In court, many lawyers feared judges were simply delegating broad discretion and decision making to the child custody evaluators.[177]

The question of how to define and regulate appropriate practice assumed an increasing importance in the 1980s and resulted in several efforts to standardize child-custody-evaluation practice in the 1990s. National professional organizations developed aspirational guidelines, standards of

172. See JOHNSTON & ROSEBY, *supra* note 32. See also MACCOBY & MNOOKIN, *supra* note 32.

173. W.G. Keilin & Larry J. Bloom, *Child Custody Evaluation Practices: A Survey of Experiences Professionals*, 17 PROF. PSYCHOL.: RES. AND PRAC. 338 (1986).

174. PHILIP M. STAHL, CONDUCTING CHILD CUSTODY EVALUATIONS: A COMPREHENSIVE GUIDE (1994).

175. JONATHAN W. GOULD & DAVID A. MARTINDALE, THE ART AND SCIENCE OF CHILD CUSTODY EVALUATIONS 4 (2007).

176. MARGARET A. HAGAN, WHORES OF THE COURT: THE FRAUD OF PSYCHIATRIC TESTIMONY AND THE RAPE OF AMERICAN JUSTICE (1997). *But see* ALLEN E. BARSKY & JONATHAN W. GOULD, CLINICIANS IN COURT: A GUIDE TO SUBPOENAS, DEPOSITIONS, TESTIFYING, AND EVERYTHING ELSE YOU NEED TO KNOW 149 (2002) (noting that "Hired Gun" experts retained by one party are likely to be given little weight by contemporary judges because ethical codes, professional practice guidelines, and published texts clearly state it is unethical to offer an opinion about custody or visitation access without having evaluated the entire family system).

177. Bowermaster, *Legal Presumptions*, *supra* note 16. *See In re* Marriage of DeRoque, 88 Cal. Rptr. 2d 618 (Ct. App. 1999) (noting the "essence of intelligent judging" is evidenced by the trial court's application of common sense in response to custody problems and not merely rubber stamping an expert's recommendations).

practice, and ethical principles.[178] Comprehensive child-custody-evaluation texts providing outlines of procedures and data collection appeared.[179] Major advances in the field have been the result.

Contemporary child-custody evaluators now perform a highly specialized forensic psychological task that demands a working knowledge of current assessment and postdivorce outcome literatures across a broad array of topics.[180] Within what has been described as the "forensic model," evaluators emphasize the development of specific psycholegal questions for evaluation, reliable evaluation methodologies rather than clinical judgment, and collecting data across multiple data sources to confirm or disprove specific hypothetical answers to the psycholegal questions.[181] Increasing levels of sophistication and specialization have emerged. Specialized protocols and models have also been developed for complex evaluations that include allegations of child sexual abuse,[182] parental alienation or alienated children,[183] domestic violence,[184] and relocation.[185] Proponents of the forensic model claim their approach represents a paradigm shift in child custody evaluations.[186]

178. Association of Family and Conciliation Courts, *Model Standards of Practice for Child Custody Evaluations*, 45 FAM. CT. REV. 270 (2007, replacing 1994 version); American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, 57 AM. PSYCHOL. 1597 (2002, replacing 1992 version); American Academy of Child and Adolescent Psychiatry, Practice Parameters for Child Custody Evaluation (1997); American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 47 AM. PSYCHOL. 677 (1994).

179. JONATHAN W. GOULD, CONDUCTING SCIENTIFICALLY CRAFTED CHILD CUSTODY EVALUATIONS 9 (2d ed., 2007); ROBERT M. GALATZER-LEVY & L. KRAUSS, THE SCIENTIFIC BASIS OF CHILD CUSTODY EVALUATIONS (1999); MARC J. ACKERMAN, CLINICIAN'S GUIDE TO CHILD CUSTODY EVALUATIONS (1995); STAHL, CONDUCTING CHILD CUSTODY EVALUATIONS, *supra* note 171; BENJAMIN M. SCHUTZ ET AL., SOLOMON'S SWORD: A PRACTICAL GUIDE IN CONDUCTING CHILD CUSTODY EVALUATIONS (1989).

180. GOULD, CONDUCTING SCIENTIFIC EVALUATIONS, *supra* note 179.

181. *Id. See also* GOULD & MARTINDALE, *supra* note 175.

182. *See* DEBRA A. POOLE & MICHAEL E. LAMB, INVESTIGATIVE INTERVIEWS OF CHILDREN: A GUIDE TO HELPING PROFESSIONALS (1998); *See also* KATHRYN KUEHNLE, ASSESSING ALLEGATIONS OF CHILD SEXUAL ABUSE (1996).

183. *See* Drozd & Oleson, *Is It Abuse?*, *supra* note 84; Elizabeth Ellis, *A Stepwise Approach to Evaluating Children for Parental Alienation Syndrome*, 1 J. CHILD CUSTODY 55 (2004).

184. *See* Leslie M. Drozd et al., *Safety First: A Model for Understanding Domestic Violence in Child Custody and Access Disputes*, 1(2) J. CHILD CUSTODY 75 (2004); William G. Austin, *Assessing Credibility in Allegation of Marital Violence in the High-Conflict Child Custody Case*, 38 FAM. & CONCIL. CTS. REV. 462 (2000).

185. *See* William G. Austin & Jonathan W. Gould, *Exploring Three Functions in Child Custody Evaluation for the Relocation Case: Prediction, Investigation, and Making Recommendations for a Long-Distance Parenting Plan*, 3 J. CHILD CUSTODY 63 (2006); William G. Austin, *A Forensic Psychology Model of Risk Assessment for Child Custody Relocation Law*, 38 FAM. & CONCIL. CTS. REV. 192 (2000).

186. GOULD & MARTINDALE, *supra* note 175.

C. Using Experts to Understand and Reduce Conflict

Courts have also used custody evaluators and other mental health professionals to prevent and reduce conflict. The outcome of divorce, particularly high-conflict divorce, has very much to do with how the stormy waters of divorce are navigated, and what kind of help or hindrance these vulnerable persons get from others during the process.[187]

The cases that attorneys fail to negotiate, that mediators fail to settle, and that counselors and therapists have failed to help are referred by courts to progressively more intrusive and coercive treatment interventions. Complex treatment orders are often necessary for high-conflict families.[188] These interventions wed mental health and psycholegal interventions—court-ordered therapeutic processes, custody evaluations, ongoing parent counseling, arbitration, parent coordination, special masters, and various kinds of supervised access and visitation plans—to the social control mechanisms of the court.[189]

Courts may ask evaluators to make recommendations about specific types of interventions, protocols for selecting professionals with the skills and training to match the needs of the case, and processes for collaboration and coordination of efforts.[190] Evaluators also often provide recommendations on strategic or tactical approaches for various individuals or groupings of the parties, anticipate dynamics and resistances to intervention or behavior change, and outline possible consequences or sanctions for inappropriate behavior, including noncompliance with court orders.[191]

D. The "Ultimate Issue" Controversy: Rhetoric Versus Reality

The "ultimate issue" debate over whether an evaluator should offer specific recommendations regarding custody and parenting plans has been an ongoing controversy that encompasses broad philosophical and practical questions. Specific recommendations about custody and parenting plans are acceptable under the rules of evidence.[192] For some, however,

187. *See* STAHL, *Comprehensive Custody Evaluations, supra* note 174. *See also* Johnston, *Building Multidisciplinary Professional Partnerships, supra* note 141; JOHNSTON & ROSEBY, IN THE NAME OF THE CHILD, *supra* note 32; JOHNSTON & LINDA E.G. CAMPBELL, IMPASSES OF DIVORCE, *supra* note 38.

188. *See* Lyn Greenberg et al., *Effective Intervention with High Conflict Families: How Judges Can Promote and Recognize Competent Treatment in Family Court*, 4 J. CENTER FOR FAMILIES, CHILD. & CTS. 49 (2003).

189. *See* Johnston, *Multidisciplinary Partnerships, supra* note 141, at 466.

190. *Id.*; Matthew Sullivan & Joan B. Kelly, *Legal and Psychological Management of Cases with an Alienated Child*, 39 FAM. CT. REV. 299 (2001).

191. *Id.*

192. FED. R. EVID. 704(a) (stating that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.").

the best-interests-of-the-child standard is not a psychological construct, so specific recommendations on the child's best interests by the psychological expert may inappropriately blur the boundary between the evaluator and the judge.[193] Many have also argued that specific recommendations about custody and parenting plans are inappropriate because they are predictions that are beyond the scientific expertise of the evaluators.[194]

For the most part, the ultimate issue rhetoric ignores reality. One recent study showed that an overwhelming majority of judges (84%) and attorneys (86%) believe that child custody evaluators should directly address the ultimate issues in custody disputes with specific recommendations.[195] Another study by the same research team showed that evaluators offer specific recommendations in almost every case (94%).[196] Child custody evaluation reports can often have dramatic effects both on litigation and on the particular form a child's life will take after a judicial decision.[197] Specific recommendations appear to be what judges and attorneys want and what evaluators provide.

E. Using Legal and Scientific Principles to Evaluate Child Custody Evaluations—Frye and Daubert

Lawyers have become increasingly adept at evaluating the reports and testimony of child custody evaluators using a combination of legal rules, scientific principles, and professional standards. Lawyers may choose to examine or cross-examine on one or more of four elements of expert witness testimony.[198] These four elements include determining whether the evaluator qualifies as an expert witness, determining whether the expert's methods follow applicable professional standards, evaluating the empirical and logical connections between the expert's methods and con-

193. *See* Timothy M. Tippins & Jeffrey P. Wittman, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193 (2005).

194. *Id.* at 203 (noting also the paucity of research demonstrating that mental health professionals can predict children's adjustment postdivorce, profound relevance and reliability problems with child-custody-evaluator methodologies (e.g., psychological tests, unreliable observational coding systems, etc.), and what many claim are the erroneous inferences made by evaluators). *See also* William O'Donohue & A.R. Bradley, *Conceptual & Empirical Issues in Child Custody Evaluations*, 6 CLINICAL PSYCHOL.: SCI. & PRAC. 310 (1999) (calling for a moratorium on child custody evaluations for a lack of empirical methods, the inappropriate use of psychological tests, the improper interpretation and use of data, and the lack of usefulness to the court).

195. *See* James N. Bow & Francella A. Quinnell, *Critique of Child Custody Evaluations by the Legal Profession*, 42 FAM. CT. REV. 115 (2004).

196. *See* James N. Bow & Francella A. Quinnell, *A Critical Review of Child Custody Evaluation Reports*, 40 FAM. CT. REV. 164 (2001).

197. *See* Tippins & Wittman, *Empirical and Ethical Problems*, *supra* note 193, at 193.

198. JOHN A. ZERVOPOULOS, CONFRONTING MENTAL HEALTH EVIDENCE: A PRACTICAL GUIDE TO RELIABILITY AND EXPERTS IN FAMILY LAW (2008).

clusions, and gauging the connection between the expert's conclusions and the expert's opinion.[199]

The work product of child custody evaluators must meet the requirements of expert witness testimony. Most state courts now look to two seminal opinions of the United States Supreme Court in federal cases to gauge the evidentiary reliability and admissibility of expert witness testimony: the *Frye*[200] test and the *Daubert*[201] criteria. Both *Frye* and *Daubert* recognize the importance of separating an assessment of the expert's qualifications from an assessment of the relevance and reliability of the expert's methods and procedures,[202] yet the two cases propose different approaches to addressing the reliability of expert testimony.[203] *Frye* assesses the general acceptance of the expert's assertion among the relevant scientific community, while *Daubert* provides criteria for judges to use to directly evaluate the scientific basis of the expert's methodology and opinions.[204]

The *Frye* standard relies on the scientific community as the arbiters of acceptable child-custody-evaluation practice. Early child custody evaluators operated under the *Frye* test, and many jurisdictions still do. While some criticized early mental health professionals who portrayed themselves as uniquely qualified for the custody determination task,[205] even today clinical evaluators view their role as that of "helping" judges.[206] These evaluators note that judges, while well trained in the law, often feel poorly trained in understanding the dynamics of family relationships and other complex behavioral and psychiatric issues that some parents present.[207]

In contrast, forensic model evaluators embrace *Daubert* and its redefined standards for the admission of scientific testimony. *Daubert* emphasizes that scientific knowledge must be derived from the scientific method, thereby reaffirming that professional credentials by themselves are not enough to guarantee that opinions will be sufficiently helpful to

199. *Id.*

200. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

201. Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993).

202. Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment*, 36 FAM. L.Q. 135 (2002).

203. ZERVOPOULOS, *supra* note 198.

204. *Id.*

205. Shuman, *The Role of Mental Health Experts*, *supra* note 202.

206. Philip M. Stahl, *The Benefits and Risks of Child Custody Evaluators Making Recommendations to the Courts: A Response to Tippins and Wittman*, 43 FAM. CT. REV. 260 (2005); *See also* Jonathan W. Gould & Philip M. Stahl, *The Art and Science of Child Custody Evaluations: Integrating Clinical and Mental Health Models*, 38 FAM. & CONCIL. CTS. REV. 392 (2000).

207. *Id.*

warrant their admission into evidence.[208] The forensic model views the report and testimony of mental health experts as scientific work products that can be critiqued through the *Daubert* lens for admissibility of scientific evidence.[209]

Daubert also made trial judges responsible for ensuring that an expert's testimony is relevant to the present legal issue and that the testimony is based upon reliable and valid methods, procedures, and instruments.[210] While judges overwhelmingly support the "gatekeeping" role *Daubert* defines, research has shown that judges may be limited as gatekeepers because of their lack of scientific training.[211] For example, one study shows that less than five percent of judges demonstrated a clear understanding of two of the *Daubert* criteria: falsifiability and error rate.[212]

Despite the emphasis on *Daubert* in recent writing about child custody evaluations (particularly within the forensic model), child custody cases have been largely unaffected by changes in the legal rules addressing threshold scrutiny of expert testimony.[213] Indeed, the extent of *Daubert's* reach into court depends not just upon the evaluators but upon the lawyers as well. Neither *Frye* nor *Daubert* requires trial judges to raise questions of admissibility of expert testimony on their own motion. Lawyers, many of whom are uncertain how to apply *Frye* and *Daubert* principles, must identify and object to such issues.[214] Many argue that if society and courts wish to use mental health evaluators as experts and to make child custody cases into truly interdisciplinary endeavors, then law and science should demand rigorous scrutiny so that courts are informed consumers of expert evidence.[215] "The stakes [the best interests of children and the families in which they live] are too important to fail to speak openly about the transformation of the role of experts in custody litigation."[216]

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208. Jane Goodman-Delahunty, *Forensic Psychological Expertise in the Wake of Daubert*, 21 LAW & HUM. BEHAV. 121, 127 (1997).

209. *See* GOULD, SCIENTIFICALLY CRAFTED EVALUATIONS, *supra* note 176; GOULD & MARTINDALE, *supra* note 175.

210. Goodman-Delahunty, *supra* note 208, at 127 (noting that rather than formulate a definitive checklist of factors to assess reliability, the Court offered four guidelines: (1) Is the theory or hypothesis falsifiable or testable? (2) Have the findings been subjected to peer review and publication? (3) Is there a known or potential error rate associated with applications of a theory? (4) Is the technique or methodology in issue generally accepted?

211. Sophia I. Gatokowski et al., *Asking the Gatekeeper: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW. & HUM. BEHAV. 433 (2001).

212. *Id.*

213. *Id.*; *See also* Shuman (2002), *supra* note 202, at 135–36. (noting that any expected increase in reported decisions addressing the admissibility of expert testimony in child custody cases has not occurred).

214. ZERVOPOULOS, *supra* note 198, at 4.

215. *See* Shuman, *supra* note 202, at 162.

216. *Id.*

V. Fifty Years in Search of Consensus to Resolve Conflict

Childhood is a small stretch of time in which events and changes can alter life to its last day . . . Because we cannot undo the past we must be more careful of the present, all too soon in the life of a child, to be the past.[217]

Don't Forget the Children[218]

Child custody cases are difficult. The law has changed with the sometimes conflicting perceptions of the needs of families and children involved in conflict. The trend has been away from broad judicial discretion to a more rules-based approach. For each change that has inspired hope for better, easier, or more efficient ways of resolving painful family conflicts and dilemmas, however, there have been frustrations and uneven results. Not every change has been progress. No philosophy or process fits every child or every family. Just as forming the perfect child custody law has proven elusive, designing the perfect study about how to best raise and protect children when parents disagree has also been unsuccessful. Yet the stakes are too high to stop trying.

The future will challenge us to reform family law to minimize divisive custody battles and to develop the legal systems that help children and their families through divorce and separation. This does not necessarily mean scrapping the child-centered best interest approach.[219] It does mean that there must be a concerted effort among multiple professionals to keep developing models to help families. In sum, whatever paradigm shift occurs, whatever direction the pendulum swings, and whatever the prevailing scientific and societal views of children and families that we choose to embrace, if it does not reduce conflict, it will not be in the best interests of children.

217. Karis v. Karis, 544 A.2d 1328, 1332 (1988).

218. LAWRENCE FRIEDMAN, MENNINGER: THE FAMILY AND THE CLINIC 91 (1990) (noting that Karl Menninger who started the children's mental hospital attributed the phrase to Dr. Elmer Southard).

219. *See* Woodhouse, *Child Custody in the Age of Children's Rights*, *supra* note 1.