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

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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

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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 law⁴ 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; 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.

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.
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).

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

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


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).

children's lives are altered by even the most amicable of divorces\(^\text{17}\) and that a high level of parental conflict has a destructive impact on children.\(^\text{18}\)

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.

\textbf{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...\(^\text{19}\)
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; 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.

Fit parents have the superior right to the care, custody, and control of their children, 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. 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. An adult who is neither a biological nor adoptive parent of a

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 or a parent by estoppel. As more individuals are identified as parents and more kin caregivers are providing homes for children, courts must "protect children’s interests within the context of nontraditional families." 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.

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 . . .


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).


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 Conference, 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.\(^{36}\)

\(\text{ Custody Cases, 28 WM. MITCHELL L. REV. 495 (2001). The Section of Family Law cosponsored two earlier interdisciplinary "think tanks" on the topic of "Best Interest of the Child"—one with the Johnson Foundation at Wingspread in 1998 and one with Ripon College in 1990.}^{31}\)

\(\text{ See SHEILA KESSLER, THE AMERICAN WAY OF DIVORCE: PRESCRIPTION FOR CHANGE (1979) (noting that divorcing persons go through stages of grief similar to death of a loved one, experiencing emotions ranging from hurt, anger, grief, self-righteousness, guilt, jealousy, revenge, and vulnerability); Geoffrey Hamilton & Thomas S. Merrill, "Why is My Client Nuts?" An Inquiry into the Psychodynamics of Divorce, ABA Section of Family Law Annual Compendium C-1 (1993).}^{32}\)

\(\text{ See also ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 100, 159 (1992) (noting that fewer than 25% filed conflicting custody requests); CONSTANCE AHRONS, THE GOOD DIVORCE 56 (1999).}^{33}\)

\(\text{ See Joan B. Kelly & Robert E. Emery, Children's Adjustment Following Divorce: Risk and Resilience Perspectives, 52(4) FAM. REL. 352 (2003) (finding child's postdivorce well-being is inversely related to the level of parental conflict before, during, and after divorce); CARLA B. GARRITY & MITCHELL A. BARIS, CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE 19 (1994); Paul R. Amato, Children's Adjustment to Divorce: Theories, Hypotheses, and Empirical Support, 55 J. MARRIAGE & FAM. 23 (1993).}^{34}\)

\(\text{ See also ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 100, 159 (1992) (noting that fewer than 25% filed conflicting custody requests); CONSTANCE AHRONS, THE GOOD DIVORCE 56 (1999).}^{35}\)

\(\text{ See Janet Johnston et al., Ongoing Postdivorce Conflict in Families Contesting Custody: Effects on Children of Joint Custody and Frequent Access, 59 AM. J. ORTHOPSYCHIATRY 576 (1989); Emery, Interparental Conflict and the Children of Discord and Divorce, supra note 18; see also ELIZABETH M. ELLIS, DIVORCE WARS: INTERVENTIONS WITH FAMILIES IN CONFLICT, supra note 17.}^{36}\)
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." 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. 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.

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. Because each case is fact sensitive, and there currently are no uniform standards, the potential for conflict is great. Polarized parents, who frequently argue over which legal presumptions and burdens should prevail

37. JOHNSTON & ROSEBY, IN THE NAME OF THE CHILD, supra note 32, at 4, 5.
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
to allow or block a move, may lose the focus on their child. 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. Others argue that maintaining the relationship with the nonmoving parent should be the decisive factor. Yet others advocate a benefit-risk analysis. Courts have increasingly used a case-by-case "best interests" analysis. 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.

A. From Presumptions to Parenting Plans

Because divorce bargaining and negotiations occur "in the shadow of the law," 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

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).


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).

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hierarchal societal structure treated children to a large extent as the property of their fathers.\textsuperscript{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.\textsuperscript{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.\textsuperscript{51} Until the 1960s, unless the mother was “unfit” or at fault in the divorce,\textsuperscript{52} judges presumed that it was in the best interests of a child “of tender years” to be in her sole custody.\textsuperscript{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\textsuperscript{54} and recognized due process rights for unwed fathers.\textsuperscript{55} In addition, a growing body of scientific research supported the importance of fathers in the development of their children.\textsuperscript{56} Giving unwed fathers independent parental rights combined with changes in the


\textsuperscript{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).


\textsuperscript{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).

\textsuperscript{53} Mason, The Custody Wars, supra note 32, at 123; Homer Clark, Domestic Relations § 17.4(a) (1968); Elmo, Child Custody Practice, supra note 16, at § 1:06 & § 4:05 (describing the tender years doctrine).


Family, no-fault divorce, and the removal of the maternal preference 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

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. 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. The last forty years have seen various attempts to reign in judicial discretion with new presumptions, preferences, and lists of factors.

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. This provision was to keep judges from awarding custody solely because of the judge's
view of a parent’s fault in the divorce, sexuality, race, or religion. 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.

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. 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 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).


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).


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.\textsuperscript{70} Twenty-four have a rebuttable presumption against awarding custody to the abusive parent.\textsuperscript{71} Domestic violence cases are high-impact cases that pose serious safety concerns for both parent and child.\textsuperscript{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.\textsuperscript{73} Batterers may contest custody to punish, control, or hurt their female partners and their children.\textsuperscript{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,\textsuperscript{75} even though research indicates that the majority of accusations are substantiated.\textsuperscript{76} Some domestic violence victims flee the jurisdiction to avoid violence\textsuperscript{77} or protect the child
if the court does not believe the claim of abuse.\textsuperscript{78} Advocates for these parents argue that the friendly parent provision unfairly penalizes a victim who is trying to protect herself and the child.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{84}

\begin{itemize}
\item \textsuperscript{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).
\item \textsuperscript{80} For cases discussing alienating parents, see, e.g., Schutz v. Schutz, 581 So. 2d 1290 (Fla. 1991); \textit{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).
\item \textsuperscript{83} Joan B. Kelly & Janet R. Johnston, \textit{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, \textit{Divorce Wars}, supra note 36, at 205–33 (noting that cases involving alienation evidence a wide range of family dynamics).
\item \textsuperscript{84} Leslie M. Drozd & Nancy W. Oleson, \textit{Is It Abuse, Alienation, and/or Estrangement? A Decision Tree}, 1(3) J. Child Custody 65 (2004).
\end{itemize}
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.\(^8^5\)

The statutory and judicial lists of “best interests” factors have mushroomed. Some states include eleven or more factors.\(^8^6\) 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.\(^8^7\)

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.\(^8^8\) Joint legal custody, which allows both parents to retain decision-making authority, solved the “winners and losers” problem for judges.\(^8^9\)


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


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).
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.

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. 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, 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. Inappropriate use of joint custody may “cement rather than resolve chronic hostility and condemn the child to living with two tense, angry parents indefinitely.”

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).


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.”).


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, the rate of relitigation is roughly the same as when a parent has sole custody. Many believe that neither joint legal nor joint physical custody should be imposed in cases of high conflict or in cases involving domestic violence. 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. These problems are exacerbated when one parent does not pay his or her child support obligation or a portion of the child’s expenses. Constructing an objective, mathe-
A mathematical 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

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

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 determinacy, the approximation rule appears to offer a relatively easy to administer, more predictable process.¹⁰⁷


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{110} Opponents argue that the Principles themselves list numerous factors\textsuperscript{111} as well as high-conflict circumstances\textsuperscript{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."\textsuperscript{113} Likewise, Oregon’s experience with a default joint-custody presumption increased the number of abuse actions and postdivorce custody motions.\textsuperscript{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


\textsuperscript{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).


\textsuperscript{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).

\textsuperscript{112} Id. at 121 (noting that the rule is limited in cases involving child abuse and domestic violence, substance abuse, and persistent interference with a parent’s access to the child).


needs, wants, and schedules. 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.

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. 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.

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. When negotiating overnight issues, battles often erupt over the relative importance of attachments to primary caregivers versus the benefits of multiple attachments to multiple caregivers, as well as the merits of

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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.


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.\textsuperscript{122}

\section*{B. Recognizing "Rights" for Children}

Children's rights have moved from the margins of discussion to center stage\textsuperscript{123}

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

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{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).
\item[\textsuperscript{123}] Woodhouse, supra note 1, at 815.
\item[\textsuperscript{127}] See Linda D. Elrod, Client-Directed Counsel for Children: It's the Right Thing to Do, 27 PAGE 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).
\end{enumerate}
\end{footnotesize}
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.\footnote{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, Children's 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).}

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.\footnote{See VIRGINIA COIGNYE, 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).} Even though the child is not considered a "party" to the custody action,\footnote{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).} 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.\footnote{Barbara A. Atwood, The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform, 45 AIAZ. 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.} Research indicates that children want to be heard on matters
affecting them and that they understand the difference between providing input and making decisions. The UN Convention on the Rights of the Child calls for the child's voice to be heard on all matters affecting their custody.

2. A RIGHT TO COUNSEL

Over the last forty years, advocates have called for children to have attorneys to give them a voice. 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, 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. 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. While some still see the need for a lawyer to advocate for the


137. Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act,
child’s best interests, regardless of the child’s wishes, 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.

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.

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. 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. 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.


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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{146} the case can be placed within an appropriate “track” and directed to services that improve outcomes for children.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-

\textsuperscript{144} Schepard, Children, Courts, and Custody, supra note 88, at 38 (citing data from Florida, New York, and Oregon).

\textsuperscript{145} Id. at 113-24.

\textsuperscript{146} Wingspread Conference Report, supra note 30, at 597.

\textsuperscript{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).


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. 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. Court-mandated mediation, however, may be inappropriate, and even dangerous, in high-conflict cases where the imbalance of power is too great, where one of the parties is incapacitated or a victim of domestic violence, or where alienation is an issue.

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. 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. Courts have upheld requirements...
that parents attend these educational programs.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{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 Scheppard, 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).


\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 . . . .”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{167}

IV. Developments in Interdisciplinary Collaboration

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

\textsuperscript{162} Johnstone & Roseby, In the Name of the Child, supra note 32; Garrity & Baris, supra note 35.

\textsuperscript{163} See Cal. Civil Code \textsection{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 approval 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).

\textsuperscript{164} ABA, America’s Children at Risk: A National Agenda for Legal Action 53, 54 (1993).

\textsuperscript{165} Id.

\textsuperscript{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).

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.  

Although legal and mental health professionals recognized the need for collaboration to help children and families as early as the 1960s, 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. 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 groundbreaking social science research study indicated that they were not doing so well. 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

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. 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, conducted custody evaluations that differed little from traditional clinical evaluations, and often struggled because of the legal system’s poorly defined rules and expectations of mental health professionals. 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.” In court, many lawyers feared judges were simply delegating broad discretion and decision making to the child custody evaluators.

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.
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.\textsuperscript{178} Comprehensive child-custody-evaluation texts providing outlines of procedures and data collection appeared.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{182} parental alienation or alienated children,\textsuperscript{183} domestic violence,\textsuperscript{184} and relocation.\textsuperscript{185} Proponents of the forensic model claim their approach represents a paradigm shift in child custody evaluations.\textsuperscript{186}


\textsuperscript{180} GOULD, \textit{CONDUCTING SCIENTIFIC EVALUATIONS}, supra note 179.

\textsuperscript{181} \textit{Id.} See also GOULD & MARTINDALE, supra note 175.

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

\textsuperscript{183} See DROZD & OLESON, \textit{Is It Abuse?}, supra note 84; Elizabeth Ellis, \textit{A Stepwise Approach to Evaluating Children for Parental Alienation Syndrome}, 1 J. CHILD CUSTODY 55 (2004).


\textsuperscript{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.


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. 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.

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. Another study by the same research team showed that evaluators offer specific recommendations in almost every case (94%).

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. 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. 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-


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).


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 Frye200 test and the Daubert201 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.
203. ZERVOPOULOS, supra note 198.
204. Id.
207. Id.
warrant their admission into evidence.\textsuperscript{208} The forensic model views the report and testimony of mental health experts as scientific work products that can be critiqued through the \textit{Daubert} lens for admissibility of scientific evidence.\textsuperscript{206}

\textit{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.\textsuperscript{210} While judges overwhelmingly support the “gatekeeping” role \textit{Daubert} defines, research has shown that judges may be limited as gatekeepers because of their lack of scientific training.\textsuperscript{211} For example, one study shows that less than five percent of judges demonstrated a clear understanding of two of the \textit{Daubert} criteria: falsifiability and error rate.\textsuperscript{212}

Despite the emphasis on \textit{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.\textsuperscript{213} Indeed, the extent of \textit{Daubert}’s reach into court depends not just upon the evaluators but upon the lawyers as well. Neither \textit{Frye} nor \textit{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 \textit{Frye} and \textit{Daubert} principles, must identify and object to such issues.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{216}


\textsuperscript{209} See Gould, \textit{Scientifically Crafted Evaluations}, supra note 176; Gould & Martindale, supra note 175.

\textsuperscript{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?)


\textsuperscript{212} Id.

\textsuperscript{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).

\textsuperscript{214} Zervopoulos, supra note 198, at 4.

\textsuperscript{215} See Shuman, supra note 202, at 162.

\textsuperscript{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 Children218

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.

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.