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## Child Custody Law Needs a Course Correction: Thoughts from California\*

*Carol S. Bruch\*\**

Half our lifetimes ago, in 1978, I met a talented young couple, Dagmar Coester-Waltjen and Michael Coester, while they were writing their *Habilitationschriften* and I was conducting research at the then L.M.U. Institute for Private International Law and Comparative Law.

A great deal has happened since.<sup>1</sup> Now, on the occasion of Professor Coester-Waltjen's birthday, I am delighted to join in honoring her brilliant, continuing contributions to the law. In this essay, I look back over these years in American child custody law and emphasize the forces that shaped developments in California, where I watched and took part. Noting where I believe things went wrong, I will suggest what might improve the quality of our child custody standards and procedures. Although my topic focuses on American law, many issues will be familiar to readers elsewhere.

Let me begin by painting a picture of US family law in the 1970s. The women's movement had already taken center stage, and one legal rule after another was being made gender neutral. Men's and women's roles in daily family life had not changed much, but aspirations were high. Psychologists were publishing early reports from what became long-term studies of children and their parents following divorce. Sociologists provided initial data on California divorces. And, as the decade ended, two sociologists and I produced a judicial education script that identified the economic consequences of the country's new no-fault divorce laws.

None of the news was particularly good for children or for their mothers, who were the custodial parents in all but unusual cases. But the research provided truly newsworthy findings, and the press was listening. Improved support, marital property and child custody laws would surely follow soon, we thought, to ease many of the hardships.

What actually happened was quite different.

Equality between the spouses seemed to have become a widely accepted goal. But increasingly equality was assumed to exist already, even where it was clearly not yet the case. At the California Senate, for example, I listened as a witness spoke of a continuing

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\* Due to space constraints, citations are omitted here. They can be found in the version of this essay that is available at <https://law.ucdavis.edu/faculty/bruch/>.

\*\* Distinguished Professor Emerita, School of Law, University of California, Davis, Dr. h.c. (Universität Basel). The author thanks the colleagues with whom she has spent 45 years in law reform and remembers especially the late Dorothy Jonas and Judith Wallerstein.

1 A particularly pleasant event 14 years later was to return to the Institute for further studies, this time as the guest of Professor Coester-Waltjen.

need for long term spousal support awards following lengthy marriages in which women had taken on traditional child care and homemaker duties, while their husbands had worked outside the home to build their careers. Divorce in this setting found men in their peak earning years and many women with no marketable experience or skills. Now, in their middle or old age, these women were being expected to join the workforce and support themselves. The response from the committee's chair made clear that the facts didn't matter. "You women asked for equality," he said, "and now you've got it."

Of course his backlash reasoning had nothing to do with either equal opportunity or equal treatment for men and women. It was echoed, however, in other family law settings. A similar misapplication of equality principles was soon seen, for example, in some child support laws. Courts began allocating the assumed costs of rearing children pro rata to former spouses, according to the amount of time each spent with the children. No adjustment was made for disparities in their incomes, even when they were large and the direct consequence of joint career and child care choices.

A marital partnership model, such as the one used in California's community property law, would have suggested instead that the spouses share equally in both the costs and the benefits of their marital choices. Independently, concern for consistency in children's standards of living as they moved between their parents' households would have dictated substantial child support awards to a parent whose wages would, at best, produce only modest net income.

Neither happened. Further, as with spousal support awards, child support award levels were set by local traditions, without reference to objective data.

These developments were compounded by no-fault divorce laws. In state after state, access to divorce no longer required a marital wrong such as abandonment, abuse, or infidelity. The financial leverage of women, who had previously been the petitioning ("innocent") spouse in most divorces, disappeared as they could no longer block the other spouse's divorce.

At the same time, a "tender years" doctrine that had given most mothers the custody of their young children was gradually being replaced by a gender-neutral formulation, "the best interests of the child." Women's bargaining positions decreased further.

The practical impact of these developments was dramatic. Wallerstein reported that children who had historically grappled with their fathers' departure when parents separated now also found their mothers increasingly absent and preoccupied. The women were expected to find full-time employment outside the home, deal with a plunge in their household's living standard, and find affordable housing and child care in a society largely bereft of both. They displayed severe physical and emotional exhaustion, the researcher said, and, in two-thirds of the cases, the quality of their parenting was significantly reduced for many months.

Yet most fathers, she found, refused to help lighten the load by spending additional time with their children, even when it would not have interfered with other commitments. And, in one of the study's most surprising findings, the quality of a father's relationship with his child during the marriage was completely unrelated to his parenting after separation. The result for too many children was that they faced the storm largely by themselves.

In hindsight, I conclude that the law got ahead of itself in the 1970s and 1980s. It often confused goals with accomplishments, and even as studies began to explain

what was actually happening, selective use of the research took shape. A backlash to the women's movement played a profound role, as did the spouses' relative post-separation financial circumstances. Sometimes the matter was as overt as the above legislator's comment. More often, women shared in the enthusiasm for new rules that seemed fair, only to recognize their dark sides a decade or more later.

My focus here, child custody law, provides a view into how these forces played out. In 1968 and 1972, 90% of California custody orders provided sole custody to one parent and reasonable visitation to the other. Only 5% provided details, and disputes were frequent.

Although media coverage suggested that men had taken on a significantly greater role and interest in caring for their children, only roughly 15% of California divorcing fathers sought physical custody in 1968 and 1972, while well over 80% of mothers did. Mothers received sole physical custody awards in 88% of the cases and fathers in 9%.

It took more than 20 years to replace the "tender years" custody rule with a gender-neutral "best interests of the child" standard in 35 states, but only 3 years to enact joint custody in 24 states and introduce bills in almost every other state.

Increasingly, instead of focusing on children's well-being, equal custody rights for fathers and mothers became the mantra of new fathers' rights groups. The movement's founder, James Cook, was a divorced father who became, in effect, a full-time unpaid lobbyist. Buoyed by press coverage and a backlash to the women's movement, his first major success was legislation amending California law to say that "frequent and continuing contact" with both parents following separation or divorce was the state's public policy and intended "to encourage parents to share the rights and responsibilities of child rearing ... ." Although this language seemed merely hortatory, it had two companion provisions with teeth.

One placed joint custody just before sole custody in the first sentence of a provision that listed permissible custody forms, while the second sentence directed California courts, if awarding sole custody, to favor the parent who is "more likely to allow the child ... frequent and continuing contact with the noncustodial parent." In committee, Cook assured members that, since both custody forms were in the code's first enumerated preference, their order made no difference – they were co-equal. Yet, as soon as the bill became law, he claimed the order expressed a legislative preference for joint custody. The press announced his success and courts accepted his reasoning until women's advocates secured an amendment stating that the custody forms are co-equal options, neither being preferred to the other. But decades later, psychiatrists who served as expert witnesses continued to believe that California law mandated joint custody. Cook had won the public relations war, and his view triumphed over the clarified and clearly controlling statute.

That second sentence, which became known as a "friendly parent" provision, had a more perverse effect. As Cook later pointed out, it "sends a message in advance" that a parent who seeks sole custody may thereby prompt precisely the opposite result, a sole custody award to the other parent. Again, his drafting had the effect he sought. Women who feared sole custody awards to their children's fathers, increasingly petitioned for joint custody, even when their children's interests or their own would have been better served by sole custody orders.

Simple economic realities were another powerful force in shaping new child custody doctrines. The relatively greater wealth of men following divorce is now well



documented. Less apparent has been how their economic fortunes affected child custody case law and practice.

Attorneys and mental health professionals were far more likely to be hired by fathers than mothers in contested custody cases.<sup>2</sup> Quite naturally, they wanted to “do something” for their male clients, as one of my former students put it, even when a dispassionate view of a case suggested that the father’s desires would not serve his children’s needs, his own long-term interests, or family law goals.<sup>3</sup>

Two particularly harmful developments in substantive child custody law and practice reflected these forces. The first concerned allegations of Parental Alienation Syndrome (PAS) and subsequent variations on it.<sup>4</sup> The second dealt with relocation cases, where noncustodial parents sought to prevent children from moving as part of their custodial parents’ households. Because I have already identified the distorted science and policy rationales of their adherents, I will not treat them here in detail. I nevertheless mention them to note how they came about and the incalculable harm they have brought to children and custodial parents.

The litigational posture of controlling or physically abusive men had improved when no-fault divorce ended testimony about marital wrongs. And they improved further yet when preferences for maternal custody disappeared. The impact of these two changes contributed to an unanticipated, yet profound, difficulty for many women.

I well remember a psychologist who said that the mother of one of her young patients was seeking sole custody, alleging that her husband had sexually abused the girl. The therapist’s tone revealed considerable distaste for the woman’s actions. Yet, when I asked whether she believed the abuse had taken place, she did not hesitate before saying, “Yes”.

The therapist had not yet realized that changes in the law left the mother unable to protect her child without revealing and proving facts she also might have preferred to keep private. If the woman did not, it was now extremely likely that her husband would be awarded generous access to their daughter or – under the new friendly parent provision – even her sole custody. The same held true for battered women, who would also be subjected to joint custody or even a loss of custody unless they spoke up.

But would they be believed? Child abuse had emerged from the shadows only a decade earlier, and domestic violence was rarely mentioned, even in professional cir-

2 California law authorized ordering one party to pay the other’s attorneys’ or experts’ fees, but courts often did not make fee awards until long after an attorney had to invest time without any assurance of payment. And experts’ fees were often allocated 50-50, although the spouses’ economic circumstances were far from equal.

3 My former student had just heard me speak about the relocation of custodial households. I had criticized the unsupported claims by some mental health and legal writers on the topic. Their work provides another unhappy example of harm to family members in recent decades that has come from supposed experts whose biases or financial interests seem to have overcome their objectivity.

4 Although telling critiques of the doctrine were published long ago, many courts around the world continue to remove children from competent caregivers under the doctrine or a variation on it. Even a 2013 refusal by the American Psychiatric Association to include a variant called Parental Alienation Disorder in the updated Diagnostic and Statistical Manual (DSM-5) has not stopped its use. And some who opposed its inclusion on scientific grounds have developed their own questionable variations.

cles.<sup>5</sup> Freed of the need to hear sordid details to establish grounds for divorce, courts were loath to listen to them in custody cases. There was (and remains) wide disbelief that abuse occurs in all socio-economic groups. Too, judges and mental health professionals alike often overlooked or discounted evidence of violence in family law cases. Ultimately, in California and elsewhere, judges tried to divert high-conflict cases from their courtrooms.

Many procedural reforms began as well-intended efforts to assist families in reaching their own custody agreements and improving their parenting at a difficult time. But courts' funding began to suffer, and as the cuts grew, it became important to resolve more and more cases with less and less judicial and staff time. And if parties had resources, private professionals began to offer new services.

The first steps were cost-free, voluntary parental education programs. Sessions often contained information about how children of differing ages respond to parental separation, ways to lessen their distress, the judicial process, local resources, and discussions (led by a mental health professional) of the parents' concerns.

Mediation was also initially offered as a free, voluntary service to help couples reach agreement about their children's custody. It was hoped that the process would be less inflammatory than litigation and that parties would honor their promises.

As time went on, the process became increasingly more coercive. First, mediation became mandatory in California for every case in which the parties had not resolved custody.<sup>6</sup> Next, many courts directed their mediators to recommend a disposition if the parties did not come to agreement, making mediation in these counties *de facto* arbitration, albeit without the protections that arbitration provides in other settings.

Although sharp disparities often existed in the spouses' legal knowledge and relative power, in almost every California county, they met alone with the mediator, unaccompanied by attorneys or others who might advise them or provide emotional support. This was a particular problem when it exposed individuals to physical attack.

Courts improved security and installed panic buttons, but persisted in their belief that voluntary agreements to serve children's best interests could be reached in this setting. Statutory amendments forced practices that ameliorated some of the difficulties, and mandatory mediation continued in domestic violence cases.

As public funds became ever more limited, particularly over the past decade, court budgets were repeatedly trimmed and, with them, access to justice for family law dis-

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5 As late as 1992, two Stanford faculty members, one a psychologist and one a lawyer, reported the frequent use of joint custody to resolve high conflict cases, both in settlement agreements that were entered on the eve of a custody trial and in courts' dispositions in cases that went to trial. The authors expressed deep concern about this use of joint custody, but did not mention child abuse or domestic violence. Wallerstein, however, reported that well over half of the children in her study witnessed physical violence between their parents.

6 Because mediators' job evaluations depended on achieving agreements in a high percentage of their caseloads and doing it quickly, it affected the process. Accordingly, rather than declare mediation unsuccessful if one spouse was intransigent, the mediator often turned to the more reasonable spouse to help the mediator secure an agreement. When this was successful, it seems likely that the supposed "agreement" was actually less favorable to the reasonable spouse than an order following trial might have been.

putes. Yet burgeoning numbers of custody cases needed a disposition, and ever larger numbers of parents could not afford counsel. Legal Aid, which had always been meager, was rarely available.

To standardize practice, simplify paperwork, and assist those who represented themselves, the California judiciary developed forms that now deal with virtually any family law matter. And courts opened offices for new specialists, family law "facilitators", who were charged with providing unrepresented individuals with generalized guidance on court procedures.

The quality of custody decision making nevertheless deteriorated, and what developed was an inexpensive way to handle large case volumes, but at the cost of individualized decision making.

Current practice in Sacramento, a "recommending" county, provides an example. Parties who have not resolved custody are scheduled for a single two-hour session with a court mediator; attorneys may not attend. Each party's evidence is limited to 10 pages. In a particularly troubling case, if no agreement is reached, the mediator may ask the court to order a formal custody evaluation by a mental health professional who meets statutory requirements. Typically, however, the mediator will recommend a custody disposition to the court after only the two-hour meeting and a review of the limited paperwork. No independent inquiries are made by the mediator, not even a telephone call to a teacher, therapist or doctor, as had been possible until recent cutbacks.

For obvious reasons, attorneys now recommend that clients with funds employ a qualified professional outside the court system to conduct a process that may include multiple sessions and supplementary inquiries. Although skilled counsel and expert testimony may overturn a court mediator's recommendation, it is a gamble that need not be taken by those who can avoid it. The court's program, in other words, is justice for those who cannot afford better.

Yet few seem to have considered the possibility that traditional litigation and sole custody awards may be better than mediation, at least for high-conflict cases.

Mental health professionals and attorneys in Northern California, for example, developed instead yet another dispute resolution model: "special masters". This brought warring parties from the courtroom to their offices in what I have called an "extended, coercive, [and] highly intrusive judicial intervention." Family law judges appointed attorneys or therapists in private practice to make ongoing decisions in high-conflict cases. The possible disputes were endless, of course, when an angry or controlling parent lacked kindness, flexibility, and common sense. Once appointed, a special master often served for years or until the parties or one of them (usually the mother) could no longer afford to pay the court-ordered fees.

The practice was already well-established when a California appellate court held it an impermissible delegation of judicial functions to a non-judicial officer. Undeterred, the same group developed supposedly "voluntary" special master agreements. I predict these, too, will ultimately be set aside, because in practice they are far from voluntary when judges let it be known that someone who does not want a special master may like the court's orders even less.

These professionals also originated "collaborative law" arrangements for a different clientele, parties who wished to resolve their divorces without acrimony and



hoped to save money in the process. As with special masters, the originators again recommended that the parties waive many legal protections.

It is, of course, possible that professionals devised these programs because they hoped to enhance the post-divorce experience for some or all family members. While they experimented, however, they asked courts to coerce participation and payment for their efforts, despite a lack of data to establish that the program will help, either immediately or over the long term.

Their most recent innovation is a five-day residential camp for high-conflict families in which a child refuses to visit the noncustodial parent. The program's website explains that most families attend only because a court has coerced the attendance of at least one person. No information is given about program results, leaving courts and families to hope for the best.<sup>7</sup> As with special masters, the proposed order suggests dividing the \$9600 fee equally between the former spouses, although there is no reason to expect them to have equal abilities to pay.

Over the years, some research findings were misunderstood. Others were distorted. In either case, later publications that could have helped to correct errors were often overlooked.<sup>8</sup>

Many researchers, for example, reported that the quality of the mother-child relationship was the single strongest protective factor for children in the post-divorce years. And, some reported, the children who did best of all were those whose had continuing contact with their noncustodial fathers.

The research did not, however, establish why children who had contact with their fathers did best. Nor did it explain why some men maintained or created long-lasting relationships with their children, while others did not. It did, however, report a particularly surprising finding: a father's parenting during marriage did not predict his post-separation parenting.

Nevertheless, Wallerstein found that some fathers who received counseling in the period immediately following separation could be encouraged to visit their children. And there was a remarkable stability in father-child contact that had become established by 18 months post-separation and that which existed at 5 years. Authors also expressed their conviction that parents who were helped to focus on their children's needs during the post-separation period would improve their parenting. Both insights supported individual counseling for fathers.

Major misapplications of research findings, however, now merit correction.

Nothing, for example, had said that "frequent or continuing contact" between children and noncustodial parents would necessarily enhance children's lives. To the contrary, both of the American long-term studies revealed that "frequent" contact was not what mattered to children's well-being. Nor was the distance between the parents' households dispositive. Instead, reliability of contact was key – whether once a week, once a month, or once a year.<sup>9</sup>

7 The program requires pre- and post-camp treatment programs at home, recognizing that a few days will not cure these families' difficulties.

8 Lawyers and judges often expected mental health practitioners to keep them informed, but these professionals sometimes lacked the ability or incentive to do so.

9 This is probably because predictability prevents the painful feelings of paternal abandonment that haunt many children and persist into adulthood.



Further, no one suggested that the same benefits to children would follow if visitation were ordered over the objection of a parent or a child.<sup>10</sup> Instead, a study of court-ordered overnight visits between infants and their noncustodial fathers raised grave developmental concerns. The visits caused a serious deterioration in the child's attachment to its mother, without improving the child-father attachment.<sup>11</sup> And, other researchers studied older children who resisted contact with their noncustodial parents, explained the forces that could be at play, and advised against forced contact.

Additionally, none of the research suggested that joint custody should become a preferred custody form.

Finally, no credible researcher recommended that a child should be kept from moving to a new home with its custodial parent. To the contrary, several major studies made clear that protecting the child's relationship with that parent and the well-being of that parent were critical to the child's welfare and far more salient than adjustments that might be required in the child's contacts with the other parent.

The authors had neither suggested nor supported any of these extrapolations from their research data. Instead, particularly in the context of non-consensual joint custody orders, Dr. Wallerstein, my decades-long colleague and friend, often expressed her deep concern that the law was now "experimenting with an entire generation of children."

The results of that experiment are starting to come in, and it is time to find better ways to meet children's needs after their parents' relationship has ended.<sup>12</sup>

To do so, it is important to know about current families. To what extent, for example, have the egalitarian hopes of the 1970s been realized? Are men now sharing in child care and housework? Are women now enjoying equal access to careers outside the home?

Although in 2011, fathers had nearly tripled the time they spent with the children compared to 1965, mothers nevertheless spent twice as much time in childcare in 2011, 14 hours a week versus 7. Similarly, men devoted more than twice as many hours each week to housework than in 1965 (up from 4 hours a week to 10), also a considerable change. But women still carried much more of the housework burden (despite having had their housework drop over the period to 18 hours weekly from 35 in 1965).

More striking changes occurred in the paid labor force. Women, who spent an average of 8 hours weekly on paid work in 1965, were spending 21 hours instead by 2011. In addition, their workforce aspirations also changed remarkably in recent years. The share of mothers with minor children in the home who said they would prefer full time paid work went from 20% in 2007 to 32% only 5 years later.

10 That did not become a problem for visiting parents, because courts would grant rights of visitation to them, but did not order them to visit. My own suggestion that this would sometimes be an appropriate rule, produced a California statute that permits either parent to secure additional child support or damages if scheduled visits do not take place.

11 Brain scans of young children who are neglected, abused or suddenly separated from their primary caregivers now reveal alterations that threaten the child's development and are relevant whenever courts force separations of infants and young children from their primary caregivers.

12 Although this essay refers to divorcing parents, it applies equally to children whose parents cohabited or never lived together.

The pendulum has nevertheless begun to swing back. The percentage of mothers who stay at home full time has rebounded in recent years. And in 2012, fully 60% of the public believed it best for children to have a full-time parent at home, focusing on the family.

While the home and workforce roles of men and women are therefore converging to some extent, the role of women as children's primary caregivers and custodial parents has changed relatively little over the past decades.

Nationwide, in 2010, 82.2% of custodial parents were women, and 17.8% were men (roughly 1 in 6), proportions that had not changed since 1994. In California, maternal physical custody percentages were somewhat higher, although not dramatically so, two decades before that, in 1968 and 1972, when they varied between 80 and 84%. Fathers' physical custody awards had roughly doubled by 1994, increasing from percentages that varied between 6 and 10% in 1968 and 1972. Because these data do not provide information on how residential time is allocated between the parents in joint physical custody orders, however, we do not know how frequently mothers' actual physical care of the children under joint physical custody orders was similar to that which they have in sole custody cases. But other sources report that they usually are, both initially and especially when joint custody arrangements fall apart. If so, the more recent percentages of maternal care are understated, and the degree to which their relative post-divorce custodial role had decreased over 50 years is small.

Given these current patterns, what custody law course corrections do we need?

With hindsight, many efforts to increase inter-parental cooperation seem naive at best. Researchers report very little decrease in hostility or growth in cooperation over the post-divorce years, even in studies that offered free counseling as an inducement to take part in the research. Instead, many former spouses remain hostile even 25 years later, and litigation rates in high-conflict cases remain high until the children age out of the system.

This should not be surprising. A particularly unhappy fact of life is that not everyone can be taught or persuaded to be nice. It is nevertheless possible that family law is slowly coming to this realization. A recent article about joint custody law reports, for example, that enthusiasm for the custody form is beginning to wane.

The goals for reform should be to provide child custody orders that will protect children's healthy development. This means, I submit, granting custody to the fit parent who has been the child's primary caretaker, preserving the child's continuing residence in that person's household if relocation occurs, and ensuring the custodian's ability to function independently on the child's behalf.

To make this possible, several doctrines must be overruled or repealed: friendly parent provisions, frequent and continuing contact rules, and joint-custody preferences.

Some services, however, provide important assistance to children and their families that should be continued, or even expanded, to the extent public funds permit. These include mandatory parenting classes and voluntary custody mediation and individual counseling.

But recommending mediation (arbitration) should be prohibited. Couples who do not resolve custody in mediation are in high conflict. The disposition of their cases should therefore seek to minimize the dangers they pose for children and custodial

parents. I conclude that an appropriate remedy should be adapted from a 1973 proposal that is well-suited to such cases: a form of sole custody to the child's "psychological parent" that gives the custodian an unfettered right to determine the nature and extent of the other parent's contact with the child. The prominent proponents, two psychiatrists and a law professor, were vehemently opposed to subjecting the child to loyalty conflicts and concluded that no contact at all with the noncustodial parent would be less harmful than continuing discord. At the time, I believed they had erred in recommending their scheme for all custody cases, including less conflict-ridden ones.

Having now reviewed child custody developments since then, I have changed my mind. I therefore recommend that a court be required to grant sole custody to the child's primary caretaking parent in any contested custody case, unless that person is unfit to exercise custody. And I recommend the use of a "primary-caretaker presumption" to determine which parent is to be given sole custody.<sup>13</sup>

Although the court should be permitted to encourage parties to undertake voluntary measures it believes may assist the family, it should be prohibited from entering coercive orders (for example, to participate in a therapy or dispute resolution program against the person's will), except that it should retain jurisdiction to enter protective orders.<sup>14</sup> Finally, if the custodial parent and the noncustodial parent agree to a visitation schedule, the court should be authorized to order additional child support to the custodial parent if the noncustodial parent fails to exercise the visitation that he or she has assumed.<sup>15</sup>

I do not expect custodial parents to curb visitation in most cases. Studies report that at least 50% of mothers (those who would become sole custodians more than 80% of the time at present under the proposed rule) want their children's father to visit.<sup>16</sup> Many others are likely to agree to contact if they learn that it benefits the children, and inter-parental conflict is low or readily managed.

13 The doctrine provides a simple, objective way to identify the child's psychological parent. Its goal is to remove the ambiguity of an unadorned "best-interests-of-the-child" test (which invites litigation), to make expert witnesses unnecessary, and to honor the literature on the importance of the primary bond with a gender-neutral test. I recommend the unfitness standard to discourage frivolous, harassing claims by non-primary caregivers.

14 These custody cases are heard in civil courts. I am troubled by the frequency with which courts use coercion although no criminal behavior has been established, often at the urging of those who have developed the unproven theories and procedures discussed above – alienation theories and treatment programs, restraints on relocation, and special masters. Further, any of these services can deplete the parties' funds, something profoundly wrong-headed. Data consistently establish that custodial households are far more impoverished than those in which noncustodial parents reside. Children are far more likely to benefit in both the short term and the long term, if funds that might have been spent chasing a rainbow were available instead to improve their living situation and support opportunities to improve their own future chances.

15 To encourage paternal contact, I have suggested that courts explain to fathers that their continuing contact matters greatly to their children's well-being, urge them to maintain regular contact, and put teeth into the exhortation by ordering that a visiting parent pay increased child support to cover babysitting costs if they miss visits. I hoped this would encourage visitation, to the children's benefit. At the least, I reasoned, by removing a noncustodial parent's ability to inconvenience a custodial parent by skipping a scheduled visit, I hoped the noncustodial parent would be freed to focus on the child.

16 My dual parenting proposal was prompted by a family law attorney who said the most frequent request he received for which the law provided no remedy came from mothers who wanted their former spouses to visit the children. It was the mothers, he said, who watched their children wait in happy expectation for their fathers' arrival, only to have their hopes dashed when he did not appear.



Although courts should be restricted to sole custody awards in contested cases, couples should have broader authority to shape agreements, including joint custody. The literature is clear that conflict is what causes problems for children, not cooperation.

Data establish that sole physical custody now exists in virtually every case. Roughly 82% of the cases have maternal caregivers, and almost all of the remaining households are headed by fathers. A custodial parent's right to make decisions alone concerning the children (the same rule that applies during marriage) should considerably lessen stress in these households. Not every doctor's visit or permission slip will require a hurried interaction between the parents. More importantly, in the post-divorce context, the rule will avoid running legal battles that probably would have more to do with inter-parental dynamics than with the decisions.

Additionally, it is likely to advance the interests of noncustodial parents who have their emotions under control and want to spend time with their children, because it establishes a scheme that 30% of the noncustodial fathers Wallerstein studied came to on their own. These men did not interfere in the mother's household and deferred to her decisions. Through their self-imposed constraints and constancy, they were the fathers who enjoyed good relationships with their children and helped to shape their lives.<sup>17</sup> Although the proposed scheme offers a similar model (one in which the custodial parent's decisions control), it will work well only for noncustodial parents who work within its constraints. For those who do not, the custodial parent will be able to protect the household by curtailing disruptive contact. No return to court will be needed.

Commonly held beliefs, often shared by the judiciary, continue to diverge in important ways from what studies reveal about children's well-being following parental separation. A review of these past decades in child custody law suggests that this should be the time to improve family law by bringing the two more closely together.

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17 These men, who "tried their best not to ... question [the mother's] discipline or her decisions," nevertheless provided another dimension to the children's lives and influenced their psychological development, moral values and life choices. In no way, however, the authors said, were their contributions comparable to those of the custodial parents.