

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

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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.¹ 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 U.S. 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

* Due to space constraints, most footnotes and supporting citations were omitted in the printed version of this document. This, the online version, includes those previously omitted materials and is available at <https://law.ucdavis.edu/faculty/bruch/>.

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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.

studies of children and their parents following divorce.² Sociologists provided initial data on California divorces.³ 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.⁴

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 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."

² See JUDITH S. WALLERSTEIN, JULIA M. LEWIS & SANDRA BLAKESLEE, *THE UNEXPECTED LEGACY OF DIVORCE: THE 25 YEAR LANDMARK STUDY* (2000); E. MAVIS HETHERINGTON & JOHN KELLY, *FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED* (2002).

³ See Lenore J. Weitzman & Ruth B. Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns For Child Custody, Support and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 471 (1979).

⁴ See Carol S. Bruch & Norma J. Wikler, *The Economic Consequences of Divorce as Affected by Child and Spousal Support Award Levels*, 36 JUV. & FAM. CT. J. 5 (1985) (updating and presenting in essay form 1981 judicial education materials we co-authored with sociologist Lenore Weitzman for the National Organization for Women Legal Defense and Education Fund (NOW LDEF) and the National Association of Women Judges).

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.⁵ 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.⁶ 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.

⁵ See Carol S. Bruch, *Parenting At and After Divorce: A Search for New Models*, 79 MICH. L. REV. 708, 714 (1981) (essay review of JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980)).

⁶ *Id.* at 712; WALLERSTEIN & KELLY, *supra* note 5, at 122; Judith S. Wallerstein & Julia M. Lewis, *Divorced Fathers and Their Adult Offspring: Report from a Twenty-five-Year Longitudinal Study*, 42 FAM. L.Q. 695, 708 (2009); accord, E.M. Hetherington, M. Cox & R. Cox, *Effects of Divorce on Parents and Children* in NONTRADITIONAL FAMILIES (M.R. Lamb, ed. 1982). The lack of predictability was also reflected in fathers' patterns of child support payments. See Judith S. Wallerstein & Shauna B. Corbin, *Father-Child Relationships After Divorce: Child Support and Educational Opportunity*, 20 FAM. L.Q. 109, 115 (1986), also reporting abrupt termination of support at 18, the age of majority in California, and many fathers' refusal to assist voluntarily with college expenses, despite good father-child relationships during the post-divorce years. *Id.* at 124-25.

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,⁷ 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.⁸ 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,⁹ but only 3 years to enact joint custody in 24 states and introduce bills in almost every other state.¹⁰

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

⁷ Weitzman & Dixon, *supra* note 3, at 493. Gradually “reasonable” came to mean an overnight each weekend plus a mid-week dinner or overnight visit, and the terms “generous visitation”, “shared custody”, “divided custody”, “alternating custody” and “joint physical custody” were sometimes used. Carol S. Bruch, *And How Are The Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States*, 30 FAM. & CONCILIATION CTS. REV. 112, 116 (1992) (reporting that the changing physical custody terminology was not matched by changes in actual time shares). These definitional problems persist. In Wisconsin, for example, until 2004, a parent who cared for children 25% of the time was considered a visiting parent for child support purposes; that time share now qualifies as “shared custody” under a special formula that previously required at least 30% time for its application. See WIS. D.C.F. 150.04(2)1; Maria Cancian, Daniel R. Meyer, Patricia R. Brown & Steven T. Cook, *Who Gets Custody Now? Dramatic Changes in Children's Living Arrangements After Divorce*, 51 DEMOGRAPHY 1381, 1382-83 (2014).

⁸ Weitzman & Dixon, *supra* note 3, at 488.

⁹ Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and its Implications for Women and Children*, 12 GOLDEN GATE L. REV. 539, 546 (1982). The “best interests” language had been included in California statutes since 1931, albeit with a tender years provision. *Id.* at 546 n.42.

¹⁰ *Id.* at 545-46.

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" ¹¹ 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."¹² 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.¹³ 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.¹⁴

¹¹ The language remains in the Code, but is now qualified. See CALIF. FAM. CODE § 3020(b) (West 2004). See also note 14 & accompanying text, *infra*.

¹² See *id.* at § 3040(a)(1) (West Supp. 2015) (providing the current language).

¹³ See *id.* at § 3040(c) (West Supp. 2015); cf. § 3080 (West 2004) (establishing a presumption in favor of joint custody when parents agree to it). The presumption was enacted when most judges refused to grant joint custody that both parents wanted.

¹⁴ A comparison of the Sacramento County court's website with that of the California Judicial Council reveals local deviations from controlling substantive law that are reminiscent of James Cook's scheme as originally enacted, not as it has been qualified by subsequent legislative amendments. The Sacramento court's website makes clear that sole custody is disfavored there. The website states a primary goal of assuring children "close and continuing contact" with both parents, then, in posted orientation materials, sets strict limitations on the availability of sole custody orders. Both are inconsistent with the case-specific exercise of discretion that the Code now prescribes. The California Judicial Council's website, in contrast, states mediation's goals in neutral

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.¹⁵ 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.¹⁶ Less apparent has been how their economic fortunes affected child custody case law and practice.

language (to produce an agreement that serves the children's best interests and "lets them spend time with both parents"). *Compare* <http://www.saccourt.ca.gov/family/fcs.aspx#orientation> (last visited Aug. 24, 2015), (Sacramento County's materials on purposes of mediation and unnumbered pages 14-15 of the hyperlinked "Online Orientation," which state restrictions on access to sole custody orders) *with* <http://courts.ca.gov/1189.htm> and <http://www.courts.ca.gov/17975> (last visited Aug. 24, 2015) (California Judicial Council materials) *and* CAL. FAM. CODE §§ 3083-3085 (West 2004) (seeking to avoid stalemates if parents with joint legal custody disagree by permitting each to act unilaterally, as during marriage, except where the court orders joint decisionmaking for specific matters; to avoid returns to court in those situations, the order is also supposed to state a specific default result -- for example, which school the child will attend -- if the parents fail to agree on an issue for which joint decisionmaking is ordered). Legislative staff had asked me to clarify joint custody case law, and these provisions, which I drafted for a committee bill, were enacted without opposition. Although they remain as written, the Sacramento court responded by requiring joint parental consent for all issues in joint legal custody cases. The court's stated default result for a failure to agree was a requirement that the parties return to mediation, precisely the result the legislation sought to avoid.

¹⁵ See Bruch, *Parenting*, *supra* note 5, at 723 n.15.

¹⁶ See TIMOTHY GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2011, CURRENT POPULATION RPTS. (Oct. 2013), at 5 fig.1, *available at* <http://www.census.gov/prod/2013pubs/p60-246.pdf> (showing custodial mothers' households poverty rates approximately twice those of custodial fathers').

Attorneys and mental health professionals were far more likely to be hired by fathers than mothers in contested custody cases.¹⁷ 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.¹⁸

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.¹⁹ 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

¹⁷ Although California law authorized an order making the party with greater financial resources pay the other's attorney fees, in practice courts usually did not make such awards until late in the case. As a result, a spouse who could not afford counsel had to find an attorney willing to gamble on what fees would ultimately be awarded. Also, expert fees were often allocated 50-50, although the spouses' economic circumstances were far from equal. In 2010 a California Judicial Council Task Force addressed the problem and recommended that courts make need-based fee awards before trial. Two year later, new rules of court and forms had already implemented the reform. See JUDICIAL COUNCIL OF CALIFORNIA, ELKINS FAMILY LAW TASK FORCE: FINAL REPORT AND RECOMMENDATIONS 60 (April 2010), *available at* <http://www.courts.ca.gov/documents/elkins-finalreport.pdf>; *id.*, ELKINS FAMILY LAW IMPLEMENTATION TASK FORCE, FACT SHEET 2 (May 2012), *available at* <http://www.courts.ca.gov/documents/ElkinsTF.pdf>.

¹⁸ My former student had just heard me speak about the relocation of custodial households. I had criticized the unsupported claims by some zealous mental health and legal writers on the topic. See generally Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law*, 40 FAM. L.Q. 281 (2006). 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. See also notes 28-41 & accompanying text, *infra*.

¹⁹ Although telling critiques 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 2012 refusal by the American Psychiatric Association to include a variant called Parental Alienation Disorder in its updated Diagnostic and Statistical Manual (DSM-5) has not stopped its use. See PSYCHIATRIC NEWS ALERT (Dec. 2, 2012) (reporting approval of DSM-5 by the American Psychiatric Association's Board of Trustees and its refusal to include parental alienation syndrome).

policy rationales of their adherents,²⁰ 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.

In contrast, 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.²¹ If the woman did not, it was now

²⁰ See, e.g., Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245 (1996); Carol S. Bruch, *Parental Alienation Syndrome and Alienated Children -- getting it wrong in child custody cases*, 14 CHILD & FAM. L.Q. 381 (2002); Bruch, *Sound Research*, *supra* note 18.

²¹ Similar legal changes have taken place in Oregon, where empirical research confirms the consequences for families who suffer abuse. In 1997, the Oregon state legislature enacted a "frequent and continuing contact" policy and created a presumption in favor of "joint parenting" (i.e., joint physical custody), except for cases entailing spousal or child abuse. Douglas W. Allen & Margaret Brinig, *Do Joint Parenting Laws Make Any Difference?* 8 J. EMPIRICAL LEGAL STUDIES 304, 307-08 (2007). The results were a surge in protracted litigation over abuse allegations, greater contentiousness, increased costs and longer times to divorce. Wives made most of the abuse allegations and were successful in most; fathers increased their abuse allegations considerably, but established few. The new frequency of fathers' claims altered the relative incidence of the spouses' complaints, bringing mothers' allegations down from 91% of all claims to 82%. *Id.* at 320-21. Surprisingly, however, the new law brought no increase in joint parenting, although fathers received more sole custody orders than before, and split custody orders (in which at least one child lived with each parent), previously declining in number, also increased. The upshot was that maternal custody orders declined from 66% to 59% of the cases. *Id.* at 314, 321. The study does not, however, address the degree

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 circles.²² Freed of the need to hear sordid

to which parents' actual physical custody tracked their orders, either initially or later. Nor does it report on cases in which the parents were not married. That demographically distinct and less affluent population comprises a growing percentage of the cases. For a study of similar statutory changes in Wisconsin, but one that does not examine how the new law may have affected the frequency or outcome of abuse allegations, see Cancian et al., *supra* note 7; note 46 *infra* (discussing the study).

²² As recently as 1992, two highly regarded 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 except in passing. It spoke instead of "intense hostility," mentioned that one "angry husband" had threatened his wife's life, said a few parents did not want their former spouses to know where they lived, and reported that, when asked whether their former spouses supported or undercut their parenting, "in extreme cases" parents said that children had witnessed physical or verbal abuse between the parents. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 90-91, 215, 232 (1992). Wallerstein and Kelly, however, reported that well over half of the children in their study had witnessed physical violence between their parents, and for one-quarter, it was an ongoing part of their lives. WALLERSTEIN & KELLY, *supra* note 5, at 16. See generally Paul R. Amato, *Reconciling Divergent Perspectives: Judith Wallerstein, Quantitative Family Research, and Children of Divorce*, 52 FAM. RELATIONS 332 (2003) (finding broad agreement between quantitative research and Wallerstein's qualitative work, but without specifically addressing the incidence of violence). Other sources, however, are generally consistent with Wallerstein's observations, although precise statistical comparisons are unavailable. See Renee McDonald, Ernest N. Jouriles, Suhasini Ramisetty-Mikler, Raul Caetano & Charles E. Green, *Estimating the Number of American Children Living in Partner-Violent Families*, 20 J. FAM. PSYCHOLOGY 137, 140 tbl.1 & accompanying text (2006) (reporting that 30.4% of dual-parent households with children present had experienced intimate partner violence within the past year and identifying reasons for likely underreporting); Katherine M. Kitzmann, Noni K. Gaylord, Aimee R. Holt, & Erin D. Kenny, *Child Witnesses to Domestic Violence: A Meta-*

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.²³ Next, many courts directed their

Analytic Review, 71 J. CONSULTING & CLINICAL PSYCHOLOGY 339 (2003) (reporting that children who witnessed either inter-parental verbal or physical abuse suffered statistically similar negative effects that also differed significantly from the experience of children who were not exposed to either form of violence).

²³ See CAL. FAM. CODE § 3170 (a) (West Supp. 2015). 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

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 disputes. Yet burgeoning numbers of custody cases needed a disposition, and ever larger numbers of parents could not afford counsel.²⁴ Legal Aid, which had always been meager, was rarely available.

the supposed voluntary agreement was less favorable to the acquiescent spouse than an order following trial might have been. See Bruch, *And How Are the Children*, *supra* note 7, at 123-30.

²⁴ Some parents were ending marriages, increasing numbers had cohabited without marriage, and a final group had more casual relationships. Although this article speaks of divorce, U.S. custody rules apply equally to all of these cases. For a useful overview of developments and efforts to address the estimated 80% of California's 200,000 annual divorce filings in which at least one spouse is without counsel by the time of judgment, see Bonnie Hough, *Self-Represented Litigants in Family Law: The Response of California's Courts*, 1 CALIF. L. REV. CIRCUIT 15, 15-16 (2010) (Paper 52), available at <http://www.californialawreview.org/wp-content/uploads/2014/10/Self-Represented-Litigants-in-Family-Law-the-Response-of-Califor.pdf>; see also California Judicial Council publications, *supra* note 17. Hough reported (in 2010) that the average family law attorney in California then charged over \$300 per hour and required a retainer of approximately \$5,000, while the average Californian earned only \$47,363, or \$22.77 per hour, before taxes. *Id.* at 16-17 (citing 2007 income figures).

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.²⁵

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.²⁶ Parties who have not resolved custody are scheduled for a

²⁵ See, e.g., http://www.sdcourt.ca.gov/portal/page?_pageid=55,1524197&_dad=portal (last visited Aug. 28, 2015). Not necessarily attorneys, these employees do not provide legal advice. “Self-help” materials on a broad variety of legal topics are also posted at a California Judicial Council website that had more than 4 million visitors annually by 2010. Hough, *supra* note 24, at 16. The site’s child custody materials can be found at <http://www.courts.ca.gov/selfhelp-custody.htm> (last visited Aug. 29, 2015).

²⁶ Telephone interview with Diane E. Wasznicky, Partner, Bartholomew & Wasznicky, in Sacramento, Cal. (Feb. 6, 2015) (concerning current Sacramento County child custody practice). Reflecting legislation that went into effect in 2012, what had been the court’s “recommending mediation” is now called “Child Custody Recommending Counseling” (CCRC). See CAL. FAM. CODE § 3183 (West Supp. 2015). A new form of “Confidential Mediation” was also authorized by the legislation, but has not yet taken effect, because implementation was made contingent on funding and subsequent California Judicial Council action, neither of which has occurred. See CAL. FAM. CODE § 3188 (West Supp. 2015). That anticipated form of “mediation” would begin as true mediation (i.e., mediators would not be permitted to make recommendations), an option that California Family Code § 3177 (West 2004) already authorizes, but Sacramento and other “recommending counties” did not use. It is now also an option in Sacramento. Under the not-yet-authorized provision, however, if the parties failed to agree during “confidential” mediation, the court would be free to order a second session with a new mediator who, this time, would be authorized to make recommendations to the court if the parties again failed to agree. The Sacramento court’s website clearly favors the CCRC recommending procedure over true mediation. See <https://www.saccourt.ca.gov/family/fcs.aspx#orientation> (last visited Aug. 28, 2015). In accord with the new terminology, mediators are sometimes called counselors. Although these professionals rarely speak to them, children between 5 and 17 years of age must accompany their parents to CCRC and mediation appointments so that they

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.²⁷ 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."²⁸ This brought warring parties from the courtroom to their offices in what I have called an "extended, coercive, [and] highly intrusive judicial intervention."²⁹ Family law judges appointed attorneys or therapists in private practice to make ongoing decisions in high-conflict

are available, in case the counselor or mediator decides to do so. Wasznicky Interview, *supra* this note. See also note 14 *supra*, discussing Sacramento's position on sole custody, which deviates from controlling law.

²⁷ See Cal. Fam. Code 3111 (West Supp. 2015). The parties may be required to pay, as the court determines.

²⁸ See Bruch, *Parental Alienation Syndrome*, *supra* note 20, at 394-97.

²⁹ *Id.* at 394.

cases.³⁰ 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.³¹ 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.³²

³⁰ In doing so, the model would ignore several protections granted to individuals by the law of the state in which the drafters practice. The model's recommendation that judges order waivers of patient-therapist confidentiality, for example, violates California evidence law. *Id.* at 395 n.74.

³¹ See *Ruisi v Thieriot*, 62 Cal. Rptr. 2d 766, at 771–75 (Ct. App. 1997).

³² See BARBARA JO FIDLER, NICHOLAS BALA & MICHAEL A. SAINI, CHILDREN WHO RESIST POSTSEPARATION PARENTAL CONTACT -- A DIFFERENTIAL APPROACH FOR LEGAL AND MENTAL HEALTH PROFESSIONALS 142-43 (2013) (noting the great cost of these programs and the absence of objective evidence establishing their effectiveness, yet failing to consider whether courts should therefore stop ordering parties to participate in and pay for them). The volume also does not address known research inadequacies of several professionals whose work it impliedly endorses. *Cf.* Bruch,

The 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.³³ No information is given about program results, leaving courts and families to hope for the best.³⁴ 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.

Sound Research, *supra* note 18 (identifying serious errors in the work of several of these mental health professionals). It is possible that the lead author's employment by the most extreme of the programs, Overcoming Barriers, may have softened the rigor of her analysis. See note 33 *infra*.

³³ See <http://overcomingbarriers.org/programs/high-conflict-divorce-camp/> (as it read on Feb. 14, 2015). Adults, including parents' new partners who share their households, and children between 9 and 18 years of age are required to attend. Fidler and her colleagues, *supra* note 32, at 134-37, report that psychologist Randy Rand (who is not a member of the Northern California group) originated the program, which is now led by psychologists Richard Warshak and Deidre Rand. A Canadian newspaper noted serious concerns about Warshak's approach after he lectured to Canadian judges. See Editorial, "Coercion adds to trauma," *Globe & Mail*, Feb. 9, 2010. The editorial also reported that Warshak charges from \$8,000 to \$22,000 (apparently reported in Canadian dollars) for a 4-day reunification program, not including participants' travel or lodging expenses. It is not clear whether that work is independent of the Overcoming Barriers program. The Overcoming Barriers website, hyperlinked *supra* this note, was updated following completion of its summer 2015 programs. When last visited on Aug. 29, 2015, the site included as participating therapists, psychologist Matthew Sullivan of Northern California, who has been active in developments there, and Canadian psychologist Barbara Jo Fidler, the lead author of a book that collects useful information, but lacks analytical rigor. See FIDLER ET AL. & my related comments, *supra* note 32. A different, long-term counseling program in Northern California, the Multi-Modal Family Intervention (MMPI), was first proposed by a sociologist and M.S.W., Janet R. Johnston, an expert on high-conflict families. See FIDLER ET AL., *supra* note 32, at 126-29; note 40, *infra* & accompanying text.

³⁴ See <http://overcomingbarriers.org/programs/high-conflict-divorce-camp/> (last visited Aug. 29, 2015) (stating that cost for the summer 2015 program.) The program requires additional pre- and post-camp therapy for participants, recognizing that 4 days will not fully resolve their problems. Those costs are not included in the program fee.

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.³⁵

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.³⁶ 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.

³⁵ Lawyers and judges often expected mental health practitioners to keep them informed, but these professionals sometimes lacked the ability or incentive to do so. See *supra* notes 28-34 & accompanying text; Bruch, *Sound Research*, *supra* note 18, at 296-312.

³⁶ WALLERSTEIN & KELLY, *supra* note 5, at 236.

Instead, reliability of contact was key – whether once a week, once a month, or once a year.³⁷

Further, neither long-term study suggested that the same benefits to children would follow if visitation were ordered over the objection of a parent or a child.³⁸ 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.³⁹ 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.⁴⁰

³⁷ See the sources cited *supra*, note 2. This is probably because predictability prevents the painful feelings of paternal abandonment that haunt many children and persist into adulthood.

³⁸ That did not become a problem for visiting parents, however, because courts would grant rights of visitation to them, but did not order them to visit. My own suggestion that ordering noncustodial parents to visit would sometimes be appropriate produced a California statute that permits either parent to secure damages if scheduled visits do not take place. See notes 54-55 & accompanying text, *infra*.

³⁹ Judith Solomon & Carol George, *The Development of Attachment in Separated and Divorced Families: Effects of Overnight Visitation, Parent and Couple Variables*, 1 J. ATTACHMENT & HUMAN DEVELOPMENT 2, 9 (1999) (concluding that court-ordered visitation of infants and very young children leaves children without the care and protection they need). 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, even for overnights with the other parent. See Allan Schore & Jennifer McIntosh, *Family Law and the Neuroscience of Attachment, Part I*, 49 FAM. CT. REV. 501 (2011); Daniel Siegel & Jennifer McIntosh, *Family Law and the Neuroscience of Attachment, Part II*, 49 FAM. CT. REV. 513 (2011); Carol S. Bruch, *Protecting Children Who Are Abducted by a Parent*, SYMPOSIUM, Summer 2012, at 7, 11-12. See also note 53, *infra*.

⁴⁰ See WALLERSTEIN ET AL., *supra* note 2, at 184 (every child who was forced to visit a parent on a rigid schedule rejected that parent when the child grew older); accord Janet R. Johnston & Judith Roth Goldman, *Outcomes of Family Counseling Interventions with Children Who Resist Visitation*, 48 FAM. CT. REV. 112 (2010) (reporting similar findings in a larger study that apparently includes some of the same children, and recommending that courts refrain from imposing reunification efforts on children, especially teenagers, when estrangement is primarily the child's response to serious parenting deficits).

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.⁴¹

The leading authorities 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.

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 7.⁴² 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

⁴¹ See Bruch, *Sound Research*, *supra* note 18, at 286-93 (summarizing the literature).

⁴² Kim Parker & Wendy Wang, *Modern Parenthood: Roles of Moms and Dads Converge as They Balance Work and Family*, PEW RESEARCH CENTER'S SOCIAL & DEMOGRAPHIC TRENDS PROJECT (2013) (discussing time-use data from 1965 to 2011), available at <http://www.pewsocialtrends.org/2013/03/14/modern-parenthood-roles-of-moms-and-dads-converge-as-they-balance-work-and-family/>.

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.

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.⁴³

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 1994.⁴⁴ 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 1972.⁴⁵ Because these data do not

⁴³ D'VERA COHN, GRETCHEN LIVINGSTON & WENDY WANG, AFTER DECADES OF DECLINE, A RISE IN STAY-AT-HOME MOTHERS, PEW RESEARCH CENTER'S SOCIAL & DEMOGRAPHIC TRENDS PROJECT (2014), *available at*

http://www.pewsocialtrends.org/files/2014/04/Moms-At-Home_04-08-2014.pdf

⁴⁴ See TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2009, CURRENT POPULATION RPTS. (Dec. 2011), at 2, *available at* <http://www.census.gov/prod/2011pubs/p60-240.pdf>. Cf. GRALL, *supra* note 16, at 4 (reporting 2012 figures of 81.7% maternal custody and 18.3% paternal custody that were also not statistically different from the 1994 figures). Unfortunately, these computations address neither joint physical custody nor third party custody cases.

⁴⁵ Weitzman & Dixon, *supra* note 3, at 489-90.

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.⁴⁶ If so, the more

⁴⁶ See, e.g., MACCOBY & MNOOKIN, *supra* note 22, at 72, 159-60. The Maccoby and Mnookin study is unusual in its comparison of child custody dispositions to the actual patterns of children's care. De facto placements are not addressed, for example, in an interesting study of how Oregon child custody orders differed following the state's adoption of a joint physical custody preference. See note 21, *supra*. And the same is true of a Wisconsin study that reports major changes in custody dispositions there following 2000 legislative changes. See 1999 Wis. Sess. Laws 640. Wisconsin statutory law now requires a child custody order "that maximizes the amount of time the child may spend with each parent." WIS. STAT. § 767.41(4)(a)(2)(2009) (renumbered from § 767.24(4)(a)(2)(2003-04)); Cancian et al., *supra* note 7, at 1384-85, 1388. The new law has greatly increased shared "physical placement" orders. Indeed, the most extreme version of what others call joint physical custody -- equal time shares -- jumped from 5% to 27% of all cases, while unequal shared custody increased from 3% to 18% over the study period. In more than 80% of what the Wisconsin researchers call unequal shared-custody dispositions, court records revealed that the children's mother was expected to care for them most of the time. The dramatic increase in the number of custody orders in which the less-involved parent was supposed to care for the children at least 25% of the time (as measured by overnights) left the incidence of father-sole-physical-custody almost unchanged, decreasing from 11% to 9%. But mother-sole-physical-custody orders fell from 80% to 74% between 1986 and 1993/1994, then plummeted to 42% by 2008. Cancian et al., *supra* note 7, at 1387. Some of the equal-physical-custody cases clearly resulted when judges read the maximization language to mandate that disposition. But in 2006, two years before the 2008 court records that Cancian and her colleagues collected, the Wisconsin Supreme Court clarified that the word "maximizes" does not require 50-50 time shares. It did so in light of legislative history and statutory language that directs courts to consider other factors, too, when deciding custody or custody modification cases. See *In re Marriage of Landwehr*, 715 N.W.2d 150 (Wis. 2006) (considering modification of custody). The statistics reveal that trial courts nevertheless persisted in entering large numbers of 50-50 orders, even when young children were involved, although statutory language directs consideration of the child's age and developmental needs. This finding is deeply troubling, given what we now know about the developmental needs of young children. See WIS. STAT. § 767.41(5)(am)(6)(2009) (renumbered from § 767.24(5)(am)(6)(2003-04)) ; Cancian et al., *supra* note 7, at 1387 fig.1, 1391; cf. notes 39 *supra* & 53, *infra* (discussing research on brain development and the lasting harms caused by adverse childhood experiences). It is, of course, possible

recent percentages of maternal care are understated, and the degree to which their relative post-divorce custodial role 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.⁴⁷ 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

that many "shared" custody orders are crafted to reduce one parent's child support obligations rather than to describe the parents' actual plans. Unfortunately, because the Wisconsin study fails to compare custody orders to children's actual living situations, we cannot know whether they are ever misaligned *ab initio* or become misaligned as time goes on. Nor, if there is a misalignment, can we know which parent is picking up a greater time share than the order prescribes. If the patterns are like those that Maccoby and Mnookin found, however, it will be mothers who provide unrecognized care, both initially and when joint physical custody arrangements end. That result would mean that child support obligations will be less than the law authorizes, and the difference will ordinarily lower the custodial household's standard of living. The preponderance of maternal primary care the Wisconsin shared custody orders reveal is therefore worth noting. It may well be understated. See MACCOBY & MNOOKIN, *supra* note 22, at 160, 268-69 (also noting that mothers carried the greater share of "managerial" responsibilities, *e.g.*, for doctor's appointments and buying everyday clothes).

⁴⁷ See Wallerstein & Lewis, *supra* note 6, at 706 ("Anger remained high twenty-five years later in half of the families."); *accord*, WALLERSTEIN ET AL., *supra* note 2, at 6 ("a third of the couples were fighting at the same high pitch ten years after their divorce was final"), 94 (serious conflict continues and even escalates after divorce); see also MACCOBY & MNOOKIN, *supra* note 22, at 240-41, 246-47 (remarking on persistence of anger over their three-year study and predicting that it will endure).

article about joint custody law reports, for example, that enthusiasm for the custody form is beginning to wane.⁴⁸

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.⁴⁹

⁴⁸ See generally Katherine T. Bartlett, *Prioritizing Past Caretaking in Child-Custody Decisionmaking*, 77 L. & CONTEMP. PROBS. 29-67 (2014), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4387&context=lcp> (last visited Aug. 25, 2015); accord Wasnick Interview, *supra* note 26 (stating that in her experience, fewer joint custody orders are now being entered by Sacramento judges). Bartlett's text unfortunately lacks the fine scholarship for which the author is known, but the article nevertheless provides a broad and useful collection of materials. Its intention was to argue again for a custody form that the American Law Institute endorsed, but has languished. That proposal's attention when determining child custody orders to the parents' relative caregiving roles during the marriage is fair to the spouses, but not necessarily best for their children. See generally HETHERINGTON & KELLY, *supra* note 2, at 126, 133-34 (commenting on the greater relevance of the primary caregiver to a child's post-divorce well-being, even when the other parent visits regularly). Given the (admittedly puzzling) lack of a correlation between a father's parenting before and after divorce, its relevance is also problematic. See, e.g., WALLERSTEIN & KELLY, *supra* note 5, at 102; WALLERSTEIN ET AL., *supra* note 2, at 312-16; Wallerstein & Lewis, *supra* note 6, at 708; Jacob E. Cheadle, Paul R. Amato & Valarie King, *Patterns of Nonresident Father Contact*, 47 DEMOGRAPHY 205 (2010) (reporting four patterns of actual father visitation and providing a disparate list of factors that differentiate the groups, including the mother's educational level, her age at the child's birth, whether the child was born during marriage, the child's age at father-child separation, whether the father pays child support regularly, and how far the father lives from the child, but not the father's parenting behavior in the pre-separation household).

⁴⁹ See generally CAL. FAM. CODE §§ 3083-3085 (West 2004) (seeking to avoid stalemates when parents with joint legal custody disagree by allowing each to act unilaterally). Maccoby & Mnookin, *supra* note 22, at 225 report that "non-residential fathers who have joint legal custody are no more likely [than other non-residential fathers] to be involved in either day-to-day decisions or major decisions."

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, 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, a law professor and two psychiatrists, 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.⁵⁰ At the time, I believed they had erred in recommending their scheme for all custody cases, including less conflicted 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.⁵¹ And I

⁵⁰ See JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* *passim* (1973).

⁵¹ By looking at the parties' actual parenting behavior during marriage, the primary caretaker 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 apply a gender-neutral test that honors the literature on the importance to the child of the primary bond. See Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1985). The unfitness standard is

recommend the use of a “primary-caretaker presumption” to determine which parent is to be given sole custody.⁵²

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.⁵³ Finally, if the

meant to discourage frivolous claims by non-primary caregivers and claims that are intended to harass.

⁵² The presumption is intended to enhance the predictability of custody outcomes, discourage frivolous requests, and constrain judicial discretion. Irrational litigation will nevertheless sometimes occur, of course, but even then, the presumption should facilitate proper analysis and promote a resolution that will serve the child's interests.

⁵³ 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 reunification treatment programs, restraints on relocation, and special masters. Further, any of these services can deplete the parties’ funds while maintaining high conflict custody arrangements, a doubly wrong-headed result. Data consistently establish that custodial households are far more impoverished than those in which noncustodial parents reside and that children are harmed by continuing parental conflict. See GRALL, *supra* note 16; ROBERT ANDA, *THE HEALTH AND SOCIAL IMPACT OF GROWING UP WITH ADVERSE CHILDHOOD EXPERIENCES THE HUMAN AND ECONOMIC COSTS OF THE STATUS QUO* (2007), *available at* http://www.cestudy.org/files/Review_of_ACE_Study_with_references_summary_table_2_.pdf (reporting that “stressful or traumatic childhood experiences such as abuse, neglect, witnessing domestic violence, or growing up with alcohol or other substance abuse, mental illness, parental discord, or crime in the home . . . are a common pathway to social, emotional, and cognitive impairments that lead to increased risk of unhealthy behaviors, risk of violence or re-victimization, disease, disability and premature mortality,” probably due to disruptions in neurodevelopment that can have lasting effects on brain structure and function); *Ursprünge und Wesen der Studie*, 1 ACE RPTR. 837 (2003), *available at* http://www.cestudy.org/yahoo_site_admin/assets/docs/ACE_Reporter_-_Origins_and_Essence_-_German.127150747.pdf \. See also note 39, *supra*, discussing research on the developing brain. Children are far more likely to benefit, both in the short term and the long term, if funds that might have been spent chasing a rainbow were available instead to improve their living standard and support their own future life chances. See generally, Wallerstein & Corbin, *supra* note 6, *passim* (discussing, *inter alia*, financial support for college from parents who can afford to help).

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.⁵⁴

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.⁵⁵ 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.

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

⁵⁴ 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 baby-sitting costs if they miss visits. I hoped this would encourage visitation, to the children's benefit. At the least, I reasoned, removing the noncustodial parent's ability to inconvenience the custodial parent (by skipping a scheduled visit) might help the noncustodial parent focus instead on the child. A second disincentive for inter-parental battle at the children's expense is included in the statute, which also provides financial compensation to a visiting parent who expends funds in anticipation of a scheduled visit, only to discover that the custodial parent has made the children unavailable. *Compare* Carol S. Bruch, *Making Visitation Work: Dual Parenting Orders*, 1 FAM. ADVOCATE 22 (Summer 1978) *with* CAL. FAM. CODE § 3028 (West 2004).

⁵⁵ Indeed, my dual parenting proposal was prompted by Thomas Frankel, Esq. of Davis, California, a family law attorney who told me that 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, only to have their hopes dashed when their fathers did not appear.

the remaining households are headed by fathers.⁵⁶ 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 themselves.

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.⁵⁷ 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.⁵⁸ No return to court will be needed.

⁵⁶ See GRALL, *supra* note 44, at 2-4. These figures represent households in which children under the age of 21 live. Their relevance is therefore limited for California, where 18 is the age of majority.

⁵⁷ 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. WALLERSTEIN & KELLY, *supra* note 5, at 259, 257.

⁵⁸ As Hetherington explained, "[T]he only childhood stress greater than having two married parents who fight all the time is having two divorced parents who fight all the time." HETHERINGTON & KELLY, *supra* note 2, at 136-37. She came to this conclusion after observing that 25% of the divorcing couples she studied posed the greatest dangers to their children in several ways: "[V]isits from an alcoholic, abusive, depressed, or conflict-prone parent do nothing for a troubled child, except possibly make the child more troubled." *Id.* at 134.

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.