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Awarding Custody: The Best Interests of the Child and Other Fictions

Andrea Charlow*

The "best interests of the child" is the standard for awarding child custody in the United States, a standard that presumably places paramount importance on the child's physical and psychological well-being. While in theory this standard appears enlightened, in practice custody decisions focus on parents rather than children and are marred by personal and cultural bias. Predictions are made without a scientific foundation and, frequently, in contravention of research findings and constitutional equal protection requirements. Because the "best interests of the child" standard is more a vague platitude than a legal or scientific standard, it is subject to abuse both by judges who administer it and parents who use it to further their own interests.

This article begins with an explanation of the best interests standard and the problems caused by the vagueness of the standard. The second section critiques attempts to simplify the decision-making process through presumptions in favor of the mother, the primary caretaker, the psychological parent, and joint custody. The third section discusses research findings, which suggest that minimized familial conflict and continued contact with both parents should be the most important goals in custody awards. The final section of the article proposes a new method for achieving these goals, by awarding custody to the party most willing and able to minimize conflict for the benefit of the child.

I. The Current Standard

Child custody law in the United States has evolved from the early European concept of absolute paternal power,¹ to a presumption

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1. Under this concept of paternal power the child was treated as a chattel and the father was granted complete rights, including the power to terminate the child's life. *See, e.g., Rex v. Greenhill*, 11 Eng. Rep. 922 (1836).

that the mother should be granted custody of young children,² to the current standard, which dictates that the custody award be made in the best interests of the child.³

A. The Best Interests of the Child

Some states provide a list of factors to be considered in determining the best interests of the child,⁴ while others leave the determination of which facts are material to the discretion of the court.⁵ In either case, courts make custody decisions on an individual basis. Statutes do not establish the weight to be accorded to any particular factor. Furthermore, it is not clear whether the "best interests of the child" means a "happy" childhood or a childhood that leads to a well-adjusted adult regardless of the happiness experienced during minority.⁶ The answer to that question, like the weight to be given to each factor, depends on judicial discretion.

Despite its shortcomings, the current best interests standard provides a welcome departure from the rigidity of previous rules. Rules that automatically prefer one parent on the basis of sex are not sensitive to the unique characteristics of each family or to the needs of individual children. Furthermore, the best interests standard ostensibly focuses the inquiry on the child's needs rather than the parents' rights. Given the relative fragility of the child and the fact that the child did not participate in decisions concerning its conception or the divorce, this focus on the child is admirable.

Theory and practice in custody decisions, however, do not coincide. Frequently, the hearing and the law attend more to the competing claims of the parents than to any consideration of the child's interests. Proceedings revolve around the fitness of the respective parents;⁷ courts frequently do not request children's opinions; and

2. See, e.g., *Boone v. Boone*, 150 F.2d 153 (D.C. Cir. 1945).

3. See, e.g., Ariz. Rev. Stat. Ann. § 25-332 (1986); Cal. Civ. Code § 4608 (West 1983 & Supp. 1987); Fla. Stat. Ann. § 61.13 (West 1984); Ind. Code Ann. § 31-1-11.5-21 (Burns 1986); Ky. Rev. Stat. Ann. § 403.270 (Bobbs-Merrill 1984); Md. Fam. Law Code Ann. § 5-203 (1984 & Supp. 1986); Mich. Stat. Ann. § 25.312(3) (Callaghan 1984); Mo. Ann. Stat. § 452.375 (Vernon 1986); N.J. Stat. Ann. § 9:2-4 (West 1976); Tenn. Code Ann. § 36-6-101 (1986); Tex. Fam. Code Ann. § 14.07 (Vernon 1986); Wis. Stat. Ann. § 767.24 (West 1981).

4. See, e.g., Ky. Rev. Stat. Ann. § 403.270 (Bobbs Merrill 1984); Wis. Stat. Ann. § 767.24 (West 1981).

5. See, e.g., N.J. Stat. Ann. § 9:2-4 (West 1976); Tenn. Code Ann. § 36-6-101 (1986).

6. See Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 Mich. L. Rev. 477, 487-99 (1984) for a detailed discussion of the problem of defining the best interests of the child.

7. Lowery, *Child Custody Decisions in Divorce Proceedings: A Survey of Judges*, 12 Prof. Psychology 492 (1981).

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children routinely do not receive legal representation.⁸ The deference paid to the parents is so obvious that one author has suggested that the courts abandon the best interests charade and openly consider the parents' interests along with the child's.⁹

B. The Problem

The landmark case of *Painter v. Bannister*¹⁰ demonstrates the problems inherent in the current application of the best interests of the child standard. That case involved a custody contest between the father and the maternal grandparents (after the mother's death). The trial judge awarded custody to the father; the Iowa Supreme Court reversed and awarded custody to the grandparents. In its decision, the court conceded that both parties were fit parents.¹¹ However, the court characterized the father's lifestyle as "unstable, unconventional, arty, Bohemian, and probably intellectually stimulating,"¹² while that of the grandparents was characterized as "stable, dependable, conventional, middleclass, middlewest. . . ."¹³

The *Painter* decision offered trial judges little instruction for deciding future custody cases. The court did not identify factors that determine what best serves the interests of the child, making the decision appear arbitrary, based on the justices' personal preference for one lifestyle over that chosen by the lower court judge. Perhaps the decision indicated that stability constitutes the single most important factor in determining the best interests of the child. But because the decision did not explicitly rely on stability or any other factor, it sets no useful precedent. The decision is imprecise because the standard is vague. The *Painter* case illustrates that "the best interests of the child" is not a standard, but a euphemism for unbridled judicial discretion.

The vagueness of the best interests of the child standard does not represent its only shortcoming: judges also express discomfort with the decisions they have made utilizing the standard. One study, conducted to determine whether judges could identify the "psychological parent" as ably as mental health professionals, found no sig-

8. S. Settle & C. Lowery, *Child Custody Decisions: Content Analysis of a Judicial Survey, Therapists, Lawyers & Divorcing Spouses* 125, 133 (1982).

9. Chambers, *supra* note 6, at 499-503.

10. 140 N.W.2d 152 (Iowa 1966).

11. 140 N.W.2d at 154.

12. 140 N.W.2d at 156.

13. 140 N.W.2d at 154. Two years later, the child decided to live with his father, and the grandparents acquiesced. W. Wadlington & M. Paulsen, *Cases and Other Materials on Domestic Relations*, 663 n.1 (successor ed. 1984).

nificant difference in their ability to do so but found that the judiciary was less comfortable with its determinations.¹⁴ Unlike mental health professionals, however, judges grant custody on the basis of their assessments. Judges cannot be certain that their decisions are best for the children involved; science has not yet provided a sound basis for such decisions.¹⁵ Nor can judges be certain that their decisions are legally correct, because the law remains undefined. Judicial action lacks a scientific or legal foundation and must be based on guesswork.

This high level of discretion not only increases the possibility of error, but also may encourage litigation.¹⁶ The outcome is hard to predict in a child custody case, because the court applies a vague standard to a unique fact pattern. When the outcome is uncertain, each party is more likely to litigate, believing that he or she will prevail. In fact, the relitigation rate in divorces that include children is 10 times greater than in those without children.¹⁷

Recent studies have attempted to determine if there is any pattern in the application of the best interests standard by judges. In one study, Kentucky circuit court judges and commissioners reported on their weighting of 20 factors in child custody decisions.¹⁸ The study indicated that the most important factors were the judge's assessment of each parent's: (1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency; and (7) sense of responsibility for the child. Only the last of these factors involves the parent's relationship with the child, as opposed to characteristics of the parent as an individual.¹⁹ The study also revealed a limited emphasis on factors related to the continuity and diversity of social relationships within the custodial home.²⁰

14. Charnas, Practice Trends in Divorce Related Child Custody, 4 J. Divorce 57 (1981).

15. Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 Law & Contemp. Probs., Summer 1975, at 226, 229.

16. Meyer & Schlissel, Child Custody Following Divorce: How Grasp the Nettle, 1982 N.Y. St. B.J. 496.

17. Scott & Derdeyn, Rethinking Joint Custody, 45 Ohio St. L.J. 455, 493 (1984). Unfortunately, the available data do not make clear whether custody issues alone are being disputed. Similarly, the data do not disclose whether noncustodial parents relitigate because they believe they can regain lost custody rights or whether they relitigate because they simply cannot accept the loss of their child.

18. Lowery, *supra* note 7.

19. *Id.* at 496.

20. *Id.*

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The evidence from the Kentucky study supports the argument that judicial inquiry generally focuses on the parents' rather than the child's best interests. The focus on the parents is justified by the need to assess parental character in making judicial predictions of the child's future welfare. However, the advisability of such speculation is questionable.²¹ In the absence of scientific indications that particular characteristics will translate into successful custody arrangements, the decision must be based on the judge's personal values and bias. Many of the Kentucky judges readily admitted that their decisions were based on "gut" reactions.²²

The authors of the Kentucky study also pointed out that some of the criteria utilized by the judges demonstrated a failure to comply with legislation and to accept the results of current psychological research. Specifically, one-fourth of the judges gave priority to the mother over the father when the parents were in conflict.²³ The father was never given preference over the mother solely on the basis of his sex.²⁴ Scientific research, however, has disproved the sex-based "tender years" doctrine—the proposition that young children are best placed with their mothers.²⁵

A more recent study of judicial decision-making, in contested custody cases in Colorado,²⁶ concluded that older judges (averaging 63.7 years of age, with an average of 19.1 years on the bench) were more likely to award custody to mothers than fathers in contested cases and that the burden in those cases was on the fathers to prove that the mothers were unfit.²⁷ Younger judges (averaging 38.2 years of age, with an average of 3.2 years on the bench) also granted custody to mothers more often than to fathers but rejected the tender years doctrine or a general maternal preference.²⁸ Younger

21. Mnookin, *supra* note 15, at 229.

22. Settle & Lowery, *supra* note 8, at 136.

23. *Id.* at 127.

24. *Id.* at 134. This phenomenon occurred despite the fact that Kentucky had passed legislation four years earlier requiring equal consideration for both parents regardless of the age of the child. See Ky. Rev. Stat. Ann. § 403.270 (Bobbs-Merrill 1984).

25. Settle & Lowery, *supra* note 8, at 134.

26. Pearson & Ring, Judicial Decision-Making in Contested Custody Cases, 21 J. Fam. L. 703 (1982-83).

27. *Id.* at 718-21.

28. *Id.* at 719. Despite the apparent sex bias found in these two studies, other research shows that men are more likely to obtain custody than women in contested cases. Sheppard, Unspoken Premises in Custody Litigation, 7 Women's Rts. L. Rep. 229 (1982). Contested custody case estimates range from eight to thirteen percent of all divorces involving children. In the remaining 87 to 92% of the cases, the mother is overwhelmingly agreed between the parties to be the parent with physical custody. Weitzman & Dixon, Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce, 12 U.C.D. L. Rev. 473, 517-19

judges reported greater reliance on interim custody arrangements than older judges.²⁹ Most of the judges in both groups, however, stressed the need for discretion and individual analysis in child custody disputes.³⁰

The Colorado judges, like those in Kentucky, reported that they were not fond of domestic relations cases. In the words of one, "I am playing God. . . . You can do extreme damage. Usually before a decision I do not sleep. My stomach hurts. I would rather send someone to life in the penitentiary."³¹

These studies lead to several conclusions. First, the results of this research must be interpreted with caution. Self-reporting is a highly suspect research method because of inaccuracies and biases that occur absent an objective control methodology.³² At the same time, it is hard to believe that a judge who admits noncompliance with a statute or higher court ruling is not being candid. One judge admitted that he concealed his reliance on temporary custody awards, an action prohibited by the state supreme court, by couching his decision in terms of psychological parenting.³³

Second, judges' backgrounds and values strongly influence custody decisions.³⁴ The gut feeling admission cited above and the protestations of the authors of the *Painter* decision indicate that subconscious values affect the process judges use to decide contested custody cases even if it is impossible to measure this influence precisely.

In addition, the studies demonstrate that the current decision-making process allows too much judicial discretion. Use of the indeterminate best interests standard permits individual judges to ignore the results of scientific research and to substitute their prejudices and values for those of legislatures—specifically to substitute sex-biased custody decisions for sex-neutral statutory standards. Although limited judicial discretion is necessary to ensure that case-specific issues are addressed, the current best interests standard provides too much latitude in which judges can obscure

(1979). Perhaps these data indicate a reverse sex bias in contested cases, although since these studies are based on statistics rather than interviews with judges, it is difficult to interpret their findings.

29. Pearson & Ring, *supra* note 26, at 720.

30. *Id.* at 723.

31. *Id.* at 722.

32. See Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 *Psychological Bull.* 310, 311-12 (1982); Levitin, *Children of Divorce: An Introduction*, 35 *J. Soc. Issues* 1, 7-21 (1979).

33. Pearson & Ring, *supra* note 26, at 720.

34. *Id.* at 724.

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the rationales for their decisions and allows them to base custody awards on their personal values.

Finally, broad judicial discretion may exacerbate the conflict between parents. With outcomes uncertain, some parents may be encouraged to litigate. Others may enter "bad" settlements because they perceive sex bias on the part of the court that might lead a judge to deprive them of custody altogether.³⁵ For example, fathers may be discouraged from seeking custody because they believe that mothers always win, or mothers may be discouraged from seeking custody when fathers contest because statistics show that fathers now win contested cases more often than mothers.

II. Failed Solutions

Courts have attempted to confront the dilemma caused by the current approach to the best interests standard through establishment of a rebuttable presumption in favor of one parent. The presumption simplifies the task of the adjudicator by narrowing the scope of inquiry, and by providing for mechanical application of a simple legal rule. When the presumption is rebuttable, the judge may engage in a more detailed inquiry, but the likelihood of such an inquiry is decreased. A presumption may settle the disquiet felt by many judges by allowing them to abdicate responsibility for the custody decision to a legal norm. The tender years doctrine and the psychological parent theory epitomize efforts to establish these presumptions, attempts that ultimately fail because they ignore research concerning the best interests of children from divorced families.

A. Tender Years Doctrine

The tender years doctrine, which has now been formally abolished in most states, creates a rebuttable presumption in favor of granting custody to the mothers of young children. The doctrine reflects the societal stereotype that healthy development occurs most readily if young children are raised by their mothers. Unless a mother is proven unfit, courts following the tender years doctrine routinely award her custody.

Although the tender years doctrine may still claim widespread cultural support, recent psychological and sociological research chal-

35. Mnookin, *Bargaining in the Shadow of the Law: The Case of Divorce*, 32 *Current Legal Probs.* 65, 78 (1979).

lenges the notion that the mother is the best parent for a young child.³⁶ While mothers may be the primary caretakers of children in most American families today,³⁷ some fathers fulfill that role. The rationale for the presumption is not sufficiently compelling in light of the current emphasis on the importance of fatherhood, the prevalence of two-career families, and the evidentiary burden the presumption places on fathers. As a result, most states now prohibit a presumption in favor of awarding custody to the mother.³⁸

Despite legislative and appellate court action eliminating express reliance on the tender years doctrine, studies of custody decisions indicate that some judges continue to grant the mother a preference.³⁹ The broad discretion and lack of guidelines inherent in the best interests of the child standard allow the tender years doctrine to survive. As a result, some fathers do not request custody because they believe that they would not obtain custody in a contested case.⁴⁰

B. Primary Caretaker and Psychological Parent

The presumption that the primary caretaker should be granted custody is a gender-neutral version of the tender years doctrine. Instead of presuming that the mother is the primary caretaker, the court inquires into the child-rearing practices of the family in question. In most cases the primary caretaker will be the mother. The new standard provides flexibility, however, for the more recent phenomenon of homemaker fathers and two-career homes.

A more sophisticated variation on the primary caretaker presumption is the psychological parent doctrine, originally espoused by Goldstein, Freud, and Solnit.⁴¹ Goldstein defines the psychological parent as the person who maintains the strongest bond with the child as a result of daily attention to the child's physical and psychological needs.⁴² Although the psychological parent is not necessar-

36. See Santrock & Warshak, *Father Custody and Social Development in Boys and Girls*, 35 J. Soc. Issues 112 (1979); Settle & Lowery, *supra* note 8, at 134. See also *Watts v. Watts*, 77 Misc. 2d 178, 181-82, 350 N.Y.S.2d 285, 289-90 (Fam. Ct. 1973).

37. Weitzman & Dixon, *supra* note 28, at 501-02 n.85.

38. See, e.g., Or. Rev. Stat. § 107.137(3) (1983); Md. Fam. Law Code Ann. § 5-203(c)(2) (1986); *Watts v. Watts*, 77 Misc. 2d. 178, 350 N.Y.S.2d 285 (1973).

39. Lowery, *supra* note 7, at 495; Pearson & Ring, *supra* note 26, at 715; Settle & Lowery, *supra* note 8, at 134.

40. See Mnookin, *supra* note 35, at 101. See also Weitzman & Dixon, *supra* note 28, at 505.

41. J. Goldstein, A. Freud & A. Solnit, *Beyond The Best Interests of the Child* (1979) [hereinafter Goldstein].

42. *Id.* at 19.

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ily synonymous with the primary caretaker, the psychological parent concept is essentially an extension of the primary caretaker concept. The primary caretaker is generally the psychological parent, because continuity of care is the primary basis for the psychological bonding between parent and child.

Goldstein identifies four principles upon which custody decisions should be based: (1) the importance of continuity of relationships and physical environment; (2) the child's sense of time with regard to continuity and separation (since young children experience a greater sense of urgency than most adults); (3) the law's inability to supervise interpersonal relationships; and (4) the limitations of human knowledge in making long-range predictions.⁴³ Based on these guidelines, Goldstein concludes that: the psychological parent should be granted custody, except where it is destructive to the child;⁴⁴ children should not be shifted around pending a final custody decision;⁴⁵ and all custody decisions should be final.⁴⁶ In addition, according to Goldstein, the custodial parent should determine all matters regarding visitation.⁴⁷

Goldstein's theories follow logically if one accepts the proposition that continuity is the most important factor in child placement. Psychological studies demonstrate, however, that parental reaction to divorce may alter parenting abilities and change existing parent-child relationships.⁴⁸ As a result, placement with the psychological parent may not provide the desired continuity. In addition, studies show that continuity is *not* the determinative factor in healthy adjustment to divorce;⁴⁹ decreased parental conflict more directly influences child development following divorce.⁵⁰ The Goldstein proposal, unfortunately, does little to minimize such conflict.

43. *Id.* at 31-52.

44. *Id.* at 19-20, 53.

45. *Id.* at 38-39.

46. *Id.* at 35.

47. *Id.* at 38.

48. J. Wallerstein & J. Kelly, *Surviving the Breakup* 108-20, 158-60, 224-25 (1980).

49. Emery, *supra* note 32, at 313. One group of authors suggests that it is beneficial to move male children to new communities after divorce because behavior problems in boys following divorce are not forgotten by adults long after the boys have readjusted and discontinued their antisocial behavior. Hetherington, Cox & Cox, *Play and Social Interaction in Children Following Divorce*, 35 *J. Soc. Issues* 26, 44 (1979).

50. Ellison, *Issues Concerning Parental Harmony and Children's Psychosocial Adjustment*, 53 *Am. J. Orthopsychiatry* 73 (1983); Emery, *supra* note 32, at 313; Hetherington, Cox & Cox, *The Aftermath of Divorce in Mother-Child, Father-Child Relations* (J. H. Stevens, Jr. & M. Matthews eds. 1978); Wallerstein & Kelly, *supra* note 48, at 215, 223.

The Goldstein proposition that the custodial parent have complete control over visitation is an invitation to cut off all contact between the noncustodial parent and the child. In those few custody cases that are contested,⁵¹ both parties are generally seeking sole custody. Often these parties are motivated more by anger against the other party than by feelings of love and concern for the child.⁵² As a result, custody and visitation rights may repeatedly be litigated after the court enters its original order. The Goldstein proposal would allow the prevailing parent to limit or prevent visitation with the noncustodial parent. According to research, however, children develop better when they continue their relationships with both parents.⁵³ Thus, granting the custodial parent complete control over visitation is not in the best interests of the child.

Goldstein apparently dismisses the possibility of more than one psychological parent. If there is more than one psychological parent, the logical conclusion from Goldstein's theory would be that the child requires a continuous relationship with both parents. But by granting absolute control to one parent, the other is likely to be cut off from the child, and the child is likely to experience a strong sense of loss.

Paradoxically, Goldstein recommends finality while emphasizing the inability of the court to predict future events. This view is merely a corollary of the principle of primacy of continuity: no change of circumstances assumes more importance than the continuity of custody. Despite the need for finality in custody decisions, however, the inability of the court accurately to predict the future requires that the courts not terminate access to the legal system. Although Goldstein correctly argues that recourse to the courts should be limited after the initial custody award, total preclusion would be dangerous. The importance of continuity in parent-child relationships, and the danger of frivolous custody relitigation, does not justify prohibition of all modification actions.⁵⁴

51. Weitzman & Dixon, *supra* note 28, at 504.

52. Scott & Derdeyn, *supra* note 17, at 493; Wallerstein & Kelly, *supra* note 48, at 103.

53. See Hess & Camara, Post-Divorce Family Relationships as Mediating Factors in the Consequences of Divorce for Children, 35 J. Soc. Issues 79 (1979); Wallerstein & Kelly, *supra* note 48, at 215.

54. Rehearings for harassment purposes should be more strongly discouraged by the legal system.

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C. Joint Custody

Joint custody appears to provide a simple and egalitarian solution to the contested custody dilemma. By awarding joint custody, the judge need not decide who is the better parent or speculate about the child's future. As research concerning divorced families recommends, children would have the benefit of contact with both parents.⁵⁵ Neither parent would face the stigma of losing a custody dispute, and extensive inquiries into the backgrounds and habits of the parents would not be necessary. In fact, contested cases might cease if the parties were certain that they would be ordered to share custody.

Unfortunately, joint custody is not a panacea. Perhaps even more unfortunately, legislatures already have passed statutes creating joint custody presumptions, without fully considering the consequences of their actions.⁵⁶ The reality of joint custody differs markedly from its conceptual ideal.

Joint legal and joint physical custody have been artificially separated in the law and have very different meanings. Legal custody relates to the legal rights of a guardian to make major decisions concerning the child and to obtain information about the child that ordinarily would be available only to a parent or guardian.⁵⁷ Physical custody refers to the actual daily care, control, and responsibility for the child.⁵⁸

Joint legal custody may be granted to both parents, even though the court grants sole physical custody to one parent. Joint physical custody does not require that half of the child's time be spent living with each parent. Custody may alternate daily, weekly, monthly, or yearly; the types of arrangements are as varied as the number of families who adopt them.⁵⁹ In an uncontested case, where the parties are amicable or the noncustodial parent is not particularly interested in daily care of the children, joint legal custody without joint physical custody does not present much of a problem. In a contested case, however, splitting legal and physical custody may in-

55. See *supra* note 53.

56. See, e.g., Cal. Civ. Code § 4600.5 (West 1983 & Supp. 1987); Iowa Code Ann. § 598.21 (West 1981 & Supp. 1987).

57. See *Dodd v. Dodd*, 93 Misc. 2d 641, 644-45, 403 N.Y.S.2d 401, 403 (Sup. Ct. 1978); Iowa Code Ann. § 598.41 (West Supp. 1987).

58. See, e.g., Iowa Code Ann. § 598.41 (West Supp. 1987).

59. See, e.g., *Dodd v. Dodd*, 93 Misc. 2d 641, 645, 403 N.Y.S.2d 401, 404 (Sup. Ct. 1978).

crease confusion and hostility without providing any benefit to the child.⁶⁰

Preliminary results of one joint custody study⁶¹ indicate that parents relitigate joint custody decisions less frequently than sole custody decisions. This study suggests that either the joint custody experience is more satisfactory to the parents or that they do not feel compelled or able to relitigate the issue. However, the study cannot be considered conclusive regarding court-ordered joint custody, since only 18 of the 138 joint custody families sampled had joint custody pursuant to court order.⁶² Thirty-three percent of those 18 families relitigated their custody arrangement, as compared to a 32% relitigation rate for sole custody arrangements.⁶³

A number of other studies illustrate the difficulty of assuming that joint custody is as appropriate in contested cases as in voluntary agreements.⁶⁴ Although most researchers surveyed relatively small groups of highly motivated families,⁶⁵ children frequently reported problems with divided loyalties and movement between households.⁶⁶ One researcher found that within one year of her initial interviews, one-third of the research sample had abandoned joint physical custody.⁶⁷ An earlier study indicated that voluntary joint custody arrangements benefited all parties, but that the few families with involuntary joint custody experienced substantial conflict and instability.⁶⁸

Research indicates that children develop better when conflict levels decrease after divorce.⁶⁹ The studies of joint custody demonstrate that voluntary joint custody provides continued contact with both parents, to a child's benefit. Involuntary joint custody, how-

60. Many states specifically provide for or allow joint legal custody without joint physical custody. *See, e.g.*, *Frey v. Wagner*, 433 So.2d 60 (Fla. Dist. Ct. App. 1985); Del. Code Ann. tit. 13, § 728 (1981); Iowa Code Ann. § 598.41 (West Supp. 1987).

61. F. Ilfield, H. Ilfield & J. Alexander, *Joint Custody and Shared Parenting* 136 (1984) [hereinafter *Ilfield*].

62. *Id.* at 137.

63. *Id.* at 139.

64. *See* Scott & Derdeyn, *supra* note 17, at 484-88.

65. *Id.* The Ilfield and Luepnitz studies included a few cases of court-ordered joint custody and Luepnitz included several "reluctant" joint custody agreements. Ilfield, *supra* note 61, at 137; D. Luepnitz, *Child Custody* 38 (1982).

66. Steinman, *The Experience of Children in a Joint-Custody Arrangement: A Report of a Study*, 51 *Am. J. Orthopsychiatry* 403, 410 (1981). The Luepnitz study also reported problems, but only two children (eight percent) complained. Luepnitz, *supra* note 65, at 46.

67. Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 *U.C.D. L. Rev.* 739, 748 (1983).

68. Luepnitz, *supra* note 65, at 149.

69. *See supra* note 50.

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ever, can maintain or increase conflict between warring parents, thus impairing the child's development.⁷⁰ As a result, most proponents of joint custody do not recommend court-ordered joint custody in contested cases.⁷¹

III. The Role of Research

Legal presumptions are useful shortcuts, but they must be based on reality. Research provides clues about the reality of child development following divorce, research that judges do not apply to their decisions. Admittedly, the social and psychological sciences have not provided definitive models for parenting or for identifying and predicting the most beneficial environment for child development. Nevertheless, conclusions from available research can provide useful guides for judges and legislators.

Wallerstein and Kelly found that the psychological adjustment of children of divorce depends more on the development and characteristics of children at the time of divorce than on those of their parents.⁷² The psychological stability of the parents affected adjustment after divorce, but did not always result in better parenting.⁷³ Despite these findings, the factors considered by judges when deciding custody cases usually focus on the parents.⁷⁴

In Wallerstein and Kelly's research sample, children whose parents adjusted poorly to divorce, children of "stressed custodial parents," experienced more developmental or psychological problems than children whose parents did not have serious adjustment problems.⁷⁵ At first glance, this finding would seem to indicate the appropriateness of focusing on the parents; however, the study also revealed that parental care before and after the divorce was not the same.⁷⁶ Most children experienced a decreased level of care in the year immediately following the divorce.⁷⁷ Some parents who neglected their children prior to divorce improved with the alleviation of the problems of the marriage, while some who were good parents prior to divorce did not adjust well, exhibiting poor parenting skills

70. Scott & Derdeyn, *supra* note 17.

71. *Id.* See also *Dodd v. Dodd*, 93 Misc. 2d 641, 647, 403 N.Y.S.2d 401, 405 (Sup. Ct. 1978).

72. Wallerstein & Kelly, *supra* note 48, at 213.

73. *Id.* at 215.

74. See Fla. Stat. Ann. § 61.13 (West 1984); Mich. Stat. Ann. § 25.312(3) (Callaghan 1984). See generally Lowery, *supra* note 7, at 496; Pearson & Ring, *supra* note 26.

75. Wallerstein & Kelly, *supra* note 48, at 224.

76. *Id.* at 99-102.

77. *Id.*

long after the initial one-year adjustment period. Still others were consistent in their parenting patterns before and after divorce.⁷⁸ Thus, parenting at the time of divorce may not be a dependable indicator of parenting following the divorce.⁷⁹

Isolation of the factors that most significantly affect post-divorce child development is the most important contribution of the Wallerstein and Kelly research. The one consistent finding of Wallerstein and Kelly and subsequent studies is that the level of parental conflict is the most important factor in child development after divorce. Children in families with decreased conflict levels fare better than their counterparts who experience continued or increased family hostilities.⁸⁰

In a review of child development research, Emery argues that interparental conflict is the principal cause of children's problems, rather than separation from one parent.⁸¹ Emery's theory draws support from research findings that: (1) there are more behavioral problems in families with only one parent because of divorce than in families with only one parent because of death; (2) children of divorced parents from homes without conflict fare better than children from intact homes with conflict; (3) children's responses to divorce and discord are similar; (4) children of divorce who no longer live with conflict do better than children of divorce with conflict present after the divorce; and (5) the problems of children of divorce are frequently present before the divorce.⁸² In addition, studies show that the negative effects of separation from a parent are only present for a limited time.⁸³

Although not as critical as decreased conflict, close contact with both parents has been identified as a positive factor in several studies.⁸⁴ Research also shows that without frequent contact, fathers eventually tend to lose all connection with their children.⁸⁵ These

78. *Id.*

79. One group of authors suggests that parents alter their behavior temporarily at the time of divorce to obtain a favorable review for custody. Scott & Derdeyn, *supra* note 17, at 496.

80. *See supra* note 50. One might argue that problems with research methodology in this area weaken conclusions based on these studies. However, as Emery notes, because independent studies each with a different methodology problem have reached the same conclusions, one may place great weight in their findings. Emery, *supra* note 32, at 311-12. *See also* Levitin, *supra* note 32, at 7-21.

81. Emery, *supra* note 32, at 313.

82. *Id.*

83. *Id.* at 314.

84. *See supra* note 53. In the case of an abusive parent, however, children fare better when they are separated from that parent. Wallerstein & Kelly, *supra* note 48, at 215.

85. Scott & Derdeyn, *supra* note 17, at 488-90 nn.162-77.

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findings underscore the need for adequate visitation with the non-custodial parent.

IV. A Proposal

The legal system cannot eliminate all of the problems caused by antagonistic parents, but it can minimize the damage that conflict inflicts on the child. The research discussed above suggests the need to decrease parental conflict yet maintain contact between the child and both parents. It follows logically that the parent who is best able to separate parental discord from his or her relations with the child should have custody. This parent should be able to place the child's interests above his or her own in order to avoid conflict, and to allow the other parent access to the child.⁸⁶

A. Improving the Odds

A custody battle is not in a child's best interests unless one of the parents clearly is unfit.⁸⁷ In the majority of cases when parents fight about custody and neither clearly is unfit, at least one of them is not putting the interests of the child above his or her own. Research confirms this hypothesis. As Scott and Derdeyn state:

Some parents may seek custody to better maintain a sense of purpose and of continuity in the parental identity. . . . Maneuvers to punish the offending spouse are particularly prominent. By sustaining the anger, the rejected spouse may avoid the sadness that would accompany acceptance of the extent and finality of the loss. . . . [T]hese issues also provide the major route by which the couple can continue to attempt to control and frustrate each other.⁸⁸

Wallerstein and Kelly's research also suggests that interest in the child's welfare may be only one factor motivating a parent seeking custody:

Fighting between parents for the child's loyalty and affection at the time of divorce is often related to each parent's need for that child's presence to maintain self-esteem and to ward off self-criticism and depression. Litigation over custody thus may reflect the dependence of

86. It could be argued that custody should be granted to the more contentious party in the hopes that he or she would then stop fighting. This would encourage pre-hearing conflict, however, which would be detrimental to the child. In addition, there may be a greater likelihood that a contentious parent who is granted custody will interfere with visitation.

87. The term "unfit" as used in this article is distinguished from the use of the term in a situation where one parent is not as effective as the other, but he or she remains an adequate parent.

88. Scott & Derdeyn, *supra* note 17, at 493.

the adult on the child, and the adult's need to hold on to the child to maintain his or her psychic balance.⁸⁹

Although the research addresses reduced conflict levels in general, a judge cannot review all pretrial conflict to determine which parent is more contentious. Such an investigation would consume an inordinate amount of time, involve innumerable factual questions concerning reported statements by the parties, and allow judges once more to make subjective decisions in determining which parent was contentious and which was "justified" in any particular dispute.

Instead, inquiry at the custody hearing should be limited to a determination of the reasons that the custody dispute has not been resolved through negotiation. The judge should ask what has been offered and why each party has refused to agree to the other's offer. If the parents know that decreased conflict is best for the child and if neither parent is clearly unfit, they should be required to justify the court battle in terms of the child's best interests. Of course, if one parent is clearly unfit, the judge would be free to award custody to the fit parent. If both parents are unfit, the court could remove the child from both of them and place it in foster care, or terminate parental rights and place the child up for adoption.⁹⁰

By forcing the parents to justify their failure to settle out of court on the basis of the best interests of their children, the judge may discover the ability and willingness of a parent to decrease conflict and to allow access by the noncustodial parent. If the reason the parents cannot agree is that they are incapable of speaking civilly to each other, then the court could offer mediation services. If the parents cannot agree through the intervention of a neutral third party, then the parent who is blocking agreement should justify his or her refusal to agree in terms of the needs of the child. If he or she cannot, then that parent has demonstrated his or her inability to place the child's best interests over personal needs. Custody should then be granted to the other parent.

As noted above, this approach is not appropriate in cases where one or both parents are unfit. An abusive parent clearly does not avoid conflict and, therefore, would not be granted custody under the above criteria. The neglectful parent may want to do what is right to help the child, but may not have the ability or training to do

89. Wallerstein & Kelly, *supra* note 48, at 103.

90. See, e.g., Conn. Gen. Stat. § 46b-129 (1986); Minn. Stat. § 260.191, § 260.221 (1986).

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so. As a result, the hearing might cover all areas of inquiry presently explored and result in the same problems as the present system. Allegations of unfitness would be specified in the initial petition. In the proposed system an unfit parent is not a less effective one, but an ineffective one. If a parent is petty or spiteful in his or her allegations of unfitness, he or she is not placing the child's interests above his or her own to avoid conflict. The accusing parent, therefore, would be denied custody. The knowledge that frivolous allegations of unfitness may lead to loss of custody should discourage such allegations.⁹¹

One parent might insist on custody because of a belief that he or she is the better parent or that the other parent, although not legally unfit, is not a "good" parent. Many gradations of parenting skills fall short of the legal definition of unfitness. Arguably, a parent should not be granted custody over one much more able to care for the child. If one parent is truly better, however, he or she is likely to understand the need to reduce conflict for the sake of the children and less likely to raise as an issue the inadequacies of the legally fit but less capable parent.

Even if the parents lack such foresight, the proposed system should cause few problems. The parent charged with insufficient parenting skills presumably helped to raise the child prior to the divorce. The presence of both parents might have mitigated the effects of bad parenting by one, and the same might result if the parents worked out a joint custody arrangement. If the judge were allowed to decide which parent is "more fit," the system would be no different than the present one, with the same problems of broad discretion and decisions based on personal rather than scientific or legal standards. In addition, research demonstrates that decreased conflict levels correlate with healthy child development following divorce; similar findings do not exist regarding any particular style of parenting. Thus, the court should not attempt to choose between two competent parents on the basis of parenting techniques or personalities, but rather on the basis of willingness and ability to decrease conflict levels.

91. Unfortunately, at times serious allegations might appear frivolous because the complaining parent has failed to gather sufficient proof. Although the proposed system cannot alleviate this problem, the present system presents this issue as well. It is unlikely that the proposed system would exacerbate the problem.

B. Benefits of the System

The possible benefits of the proposed approach are numerous. Hearings would be brief and to the point. The court would escape the protracted testimony concerning personalities and parenting techniques that is necessary under the current system.⁹² By decreasing the period of parental conflict caused by the custody hearing, both children and the courts would benefit. In addition, although the task of predicting which parent will provide a better home for the child would remain, the criteria for that prediction generally would be more reliable. Judges would be constrained in their use of subjective factors, and the operative criteria—ability and willingness to place the child's best interests over the parent's to minimize conflict and allow contact with the noncustodial parent—would correlate with scientific findings.

Subsequent hearings to alter custody would be discouraged because the petitioning parent would have to justify the renewed conflict in terms of the child's best interests. The petitioning parent would have to show why the conflict created by repeated recourse to the courts was beneficial for the child. If the petition claimed anything short of the other's unfitness or a substantial increase in detrimental conflict, the petition would be dismissed. Relitigation for harassment purposes would be less likely because of the certainty of dismissal.

The proposed system would limit the amount of conflict in the family by shortening the custody hearing and reducing the likelihood of future legal disputes. Although parents may continue to fight after divorce, the legal system would not prolong or encourage conflict. Speedy hearings and reduced relitigation also would meet Goldstein's concern about the child's sense of urgency and need for continuity, without sacrificing recourse to the courts in the event of a substantial change in circumstances.

C. Potential Problems

Although the above proposal may provide benefits over current procedures, it creates some problems as well. The proposed system fails to eliminate all judicial discretion, since the judge still must determine whether a parent has been unreasonable in blocking agreement on custody issues. No decision-making process can eliminate

92. This testimony still may be necessary in the case of allegations that a parent is unfit. Unfounded allegations of unfitness should be discouraged, however, because they almost certainly would lead to loss of custody by the parent who made them.

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all judicial discretion, however, while protecting the best interests of the child. Discretion under the proposed system would be limited to a determination of whether refusal to accept a custody settlement offer is reasonable. Although judges' opinions will differ, the "reasonable person" standard and determinations of "good faith" are common in our legal system. Judges are trained to determine issues of reasonableness, but they are not trained to predict accurately the effects of parenting situations on healthy child development.

Another possible objection to the proposed system is that pretrial negotiations would be divulged to the court. Our legal system generally discourages such disclosure to facilitate and encourage private settlement of disputes.⁹³ Presumably, parties are more likely to reach agreement if they can speak freely, confident that statements and offers will not be repeated in court if they fail to settle. Without confidentiality, the parties might fear that settlement offers would imply admission of liability or would affect the amount of a possible court judgment.

Child custody negotiations, however, involve issues different than most settlement negotiations. There is no question of liability, and there is no monetary award that could be affected by prior offers. Suggestions for custody or visitation arrangements might be made during custody negotiations, but if the child is of ultimate importance to the parties and the proposed arrangements are reasonable, disclosure of such suggestions would not be unfair. Presumably, the parent would only make offers during negotiations that he or she felt were acceptable. Knowing that the judge might be influenced by statements made during negotiation, a parent might only offer the arrangement that he or she deems ideal and refuse to make concessions, rendering settlement more difficult. Under the proposed system, however, parents would be required to show that they were reasonable during negotiations and that they failed to agree because although one was trying to protect his or her children, the other was not.

Obstinate refusal to make concessions also could be interpreted by the judge as an inability or unwillingness to decrease conflict, especially when such concessions would be beneficial to the children. Refusal to make a concession would have to be supported by a reasonable argument that the concession would not be in the child's best interests. Likewise, unreasonable demands would indicate an inability or unwillingness to decrease conflict in the child's

93. See, e.g., Fed. R. Evid. 408; N.Y. Civ. Prac. L. & R. 3221 (McKinney 1983).

best interests and could result in loss of custody. Thus, the proposed system would facilitate settlement by encouraging the parties to make reasonable offers and demands and to be flexible during negotiations.

To the extent that this proposal inhibits negotiation for child custody based on divorce issues unrelated to the child's welfare, it would improve the present system. Our legal system should not encourage the use of children as bargaining chips to obtain monetary benefits. Under the current system, parents can threaten to contest custody or visitation to obtain a beneficial property settlement or decreased child or spousal support. The case may be settled out of court, but not until one parent has forfeited valuable rights in order to avoid a custody battle.⁹⁴ The proposed system would eliminate the possibility of such unfair bargaining producing "unfair" settlements.

Modification of the rules of evidence in child custody cases is not without precedent. General rules of evidence have been altered for other legal issues involving children. For example, hearsay may be admissible in child neglect and abuse hearings.⁹⁵ The importance of protecting children from child abuse and the difficulty of proof in abuse and neglect cases justifies admission of hearsay evidence. Similarly, the importance of protecting children from marital discord justifies admission of settlement negotiations. Because of other incentives in the proposed system, disclosure would not tend to discourage negotiation. Relaxation of the general rule to admit statements made during negotiations, therefore, should cause less of a legal dilemma than the admission of hearsay evidence in abuse and neglect hearings.

D. Encouraging Settlement

The proposed system could be characterized as an attempt to compel parties to settle custody disputes by themselves, through their attorneys, or by mediation through third parties or the court. That is exactly what should happen, if the resulting agreements further the best interests of the child. Under the current system, approximately 90% of all custody matters are settled by private agreement without court intervention.⁹⁶ Presumably this is because

94. It should be noted that the parent who loses in this case is the parent who most likely would win a custody battle under the proposed system, i.e., the parent who is more concerned about the child and about avoiding continued conflict.

95. See, e.g., N.Y. Fam. Ct. Act § 1046 (McKinney 1983).

96. Weitzman & Dixon, *supra* note 28, at 504.

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the parents know more about themselves and their children than a court can learn during a hearing. Parents also may settle because they prefer their agreements to the ones that might be produced by court orders.⁹⁷ No research is available to prove whether parents who settle are better at determining what is best for their children than judges. Given the large number of cases settled privately at present, however, the proposed system would not create problems if it produced an increase in the number of families who use these agreements rather than deferring to the court.

In addition to an increase in negotiated agreements, the proposed system might encourage an increase in mediated agreements. Results of the Denver Custody Mediation Project show that couples who reach agreement through mediation relitigate at less than half the rate of their adversarial counterparts.⁹⁸ Parents who utilized mediation expressed greater satisfaction with the process and final settlements than parents who used the adversarial process without mediation.⁹⁹ Project results also showed that parents who mediated agreed to more frequent visitation for the noncustodial parent than parents who did not.¹⁰⁰ Perhaps the most important and unexpected result of this research was that parents who failed to reach agreement through mediation nevertheless reported that the process helped them "to understand and communicate" with their ex-spouses.¹⁰¹

Although the Denver research did not test for long-term gains¹⁰² or for the effects of mediation on the adjustment and mental health of the children involved, the study provides some early indication of the possible advantages of mediation over the adversarial system. Since litigation increases parental conflict, reduced relitigation benefits the children of divorce and frees up the court's docket in the process. In addition, the increased understanding and communication between divorced parents that results from the mediation

97. This hypothesis is supported by the finding that parents who litigated felt that the process and final orders in their cases were unfair more often than parents who negotiated or mediated a custody agreement. Pearson, Thoennes & Vander Kooi, *Mediation of Contested Custody Disputes*, Colo. Law. 337, 342 (Feb. 1982).

98. *Id.*, at 354.

99. *See id.* at 342.

100. *Id.* It should be noted, however, that the differences were not great in terms of overall visitation time. Noncustodial parents with successful mediation set visitation at 7.7 days per month, unsuccessful mediation clients had 5.5 days per month, and parents who did not mediate were granted 4.9 days of visitation per month. *Id.*

101. *Id.*

102. The last set of results was obtained six to twelve months after final court orders were issued. *Id.* at 338. It should be noted that even in this short period, some dissipation of the beneficial effects of mediation was found. *Id.* at 354.

process is likely to decrease conflict after the divorce, even when the parents do not mediate an agreement. Finally, the increased visitation of noncustodial parents as a result of mediation contributes to healthy child development following divorce.

Mediation does not provide an answer for the problems of all divorcing parents. As with joint custody, some states have legislated compulsory mediation in custody disputes without recognizing that not all couples can mediate successfully.¹⁰³ In addition, because mediation of custody disputes is relatively new in the United States, a number of other problems, including the practice of law without a license by non-attorney mediators, informed consent, attorney-mediators who represent neither party, attorney-client privilege in the mediation session, fee sharing, the role of independent counsel, and other issues must be resolved.¹⁰⁴ Despite the problems with mediation, however, increased mediation under the proposed system would represent an improvement over the current system.

E. Summary

In summary, legislation should be enacted to clarify the best interests of the child standard in custody proceedings as follows:

1. After an initial finding that neither parent is clearly unfit, the determinative factor for granting custody in the best interests of the child is the ability of a parent to place the child's interests above his or her own in order to decrease parental conflict and allow access to the child by the noncustodial parent.

2. A parent who claims that the other parent is unfit must allege in the petition for custody the specific actions or omissions of the allegedly unfit parent that make him or her unfit. Frivolous allegations of unfitness will be held against the claimant, and claims of relative fitness will not be considered.

3. Parents should be informed that research indicates that reduced conflict and access to both parents have been found to be in the best interests of the child. They also should be informed that if the court finds that they are contesting custody for reasons other than the child's best interests, they will not be granted custody.

103. See, e.g., Cal. Civ. Code § 4607 (West 1983 & Supp. 1987); Iowa Code Ann. § 598.41(2) (West Supp. 1987). Pearson identified five groups that were poor candidates for successful mediation. Pearson, Thoennes & Vander Kooi, *supra* note 97, at 340.

104. Discussion of such problems is beyond the scope of this paper. For a detailed analysis of the issues, see *Mediation Debated, Explored* at ABA Section Meeting, 1982 A.B.A. Sec. 8 Fam. L. Rep. 2641.

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4. Custody hearings where neither parent is clearly unfit should focus on the reasons that the parents cannot agree. The purpose of this inquiry is to determine whether one or both parents are putting their own interests above the child's to instigate or prolong a conflict. The parent who cannot justify his or her refusal of a proposal on the basis of the child's best interests should not be granted custody.

5. Mediation services should be provided to parents who appear to be concerned primarily with their children's welfare but lack the ability to agree. If the judge feels that he or she can solve the impasse quickly during the hearing, he or she may do so without engaging formal mediation services for the parties.

6. Child custody hearings should be expedited and held before any other contested issues of divorce are considered. Custody awards should be appealable prior to final decisions of divorce and should be given calendar preference.

7. The only grounds for modification of final custody orders should be that the custodial parent is unfit, or that the custodial parent has consistently failed to comply with the terms of the custody portion of the divorce decree in a manner that increases parental conflict and/or unduly interferes with the noncustodial parent's visitation rights. Visitation rights also may be modified if there is a substantial change in circumstances, such as a change of residence by one parent that makes the prior visitation schedule impractical.

Conclusion

Nearly one in every two marriages in the United States ends in divorce;¹⁰⁵ 60% of the divorces involve couples with minor children.¹⁰⁶ Between eight and seventeen percent of those families will be involved in custody disputes,¹⁰⁷ and those who do not go to court to resolve custody conflicts nonetheless will be heavily influenced in their negotiations by the legal standard. The lack of definition of the best interests of the child standard and the broad discretion it allows produce uneven results for the children whose lives are di-

105. U.S. Dep't of Commerce, *Statistical Abstract of the United States 1986*, at 79 (106th ed. 1986).

106. Glick, *Children of Divorced Parents in Demographic Perspective*, 35 *J. of Soc. Issues* 170, 174-75 (1979). Glick estimates that this number represented 28% of all children under the age of 18 in 1976 and that by 1990, the figure will be approximately 33%. *Id.*

107. Weitzman & Dixon, *supra* note 28, at 518; Lowery, *supra* note 7, at 497.

rected by this system, increase the likelihood and frequency of litigation, and leave judges uneasy about the wisdom of their decisions.

The index to the Krause casebook on Family Law includes a cryptic reference to “vultures” under the child custody section.¹⁰⁸ The associated text contains an article from the *New York Times* regarding the behavior of a pair of California condors who were fighting over which one of them would take care of their egg. They fought for hours until their struggle resulted in the accidental destruction of the egg.¹⁰⁹

The implication is clear. The egg was destroyed because, in their enmity, the vultures were more interested in themselves than in the egg. They lost sight of the object of their fight. As the battle intensified, their attention became so focused on each other that they destroyed the egg.

Parents who fight over custody of their children often wage war with little regard for their offspring. Although the children, unlike the egg, may not be totally destroyed, damage is almost certain to follow. If the inquiry in contested child custody cases is confined to determination of which parent is best able to place the child's interests above his or her own in order to reduce conflict, then all of the parties involved—the court, the parents, and the attorneys—will focus on the reason for their deliberations: the protection and nurturance of the child.

108. H. Krause, *Family Law Cases, Comments, & Questions XLVII* (2d. ed. 1983).

109. *N.Y. Times*, Mar. 6, 1982, § 1, at 6, col. 13, *reprinted in* Krause, *supra* note 108, at 711.