1461

THE CONSTITUTIONAL RIGHTS OF

NON-CUSTODIAL PARENTS

David D. Meyer\*

I. INTRODUCTION

The legal treatment of non-custodial parents has become a lightning

rod in modern family law. The topic is obviously important. Every year

in this country, about one million children see their parents divorce.1 In

addition, roughly a third of all children are born to parents who are not

married.2 Many of these parents, of course, will never live together, and

those who do face a high risk of breaking up before the children are

grown.3 Taken together, the trends suggest that fewer than half of all

\* Professor of Law and Mildred Van Voorhis Jones Faculty Scholar, University of Illinois

College of Law. An earlier draft of this Article was delivered as the 2006 Sidney & Walter Siben

Distinguished Professorship Lecture at Hofstra University School of Law. I am most grateful to

Professor John DeWitt Gregory and the rest of the Hofstra faculty for their generous hospitality and

insightful comments on the lecture.

1. See ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY

MODELS FOR DIVORCING FAMILIES 28 (2004).

2. See Brady E. Hamilton et al., Births: Preliminary Data for 2002, NAT’L VITAL STAT.

REP. (Ctrs. for Disease Control & Prevention, Hyattsville, Md.), June 25, 2003, at 3 (indicating that

33.8% of all U.S. births in 2002 were to unmarried women), available at

http://cdc.gov/nchs/data/nvsr51\_11.pdf; Robert D. Plotnick, Seven Decades of Nonmarital

Childbearing in the United States, at 1 (Feb. 2004), available at

http://npc.umich.edu/news/events/others/SevenDecades.pdf.

3. In the United States, most non-marital births are to women who are not cohabiting with a

partner. See Marsha Garrison, Is Consent Necessary? An Evaluation of the Emerging Law of

Cohabitant Obligation, 52 UCLA L. REV. 815, 881-82 (2005) [hereinafter Garrison, Is Consent

Necessary?]. Unmarried parents who do cohabit are more likely to split up; most cohabiting

relationships dissolve within five years. See id. at 839 & nn.90-92; Margaret F. Brinig & Steven L.

Nock, Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?, 64 LA. L. REV. 403,

408 (2004) (discussing social science evidence showing that cohabiting “relationships . . . last a

shorter time than marriage, even if there are children”); Marsha Garrison, Reviving Marriage:

Should We? Could We?, at 19-22 (Oct. 2005) (unpublished paper available at

http://ssrn.com/abstract=829825) (discussing evidence of comparative instability and qualification

of commitment in cohabiting relationships and noting that “[e]ven the arrival of a child does not

appear to alter the feeling that cohabitation is fundamentally different from marriage”) [hereinafter

Garrison, Reviving Marriage]; Elizabeth S. Scott, Marriage, Cohabitation and Collective

Responsibility for Dependency, 2004 U. CHI. L. FORUM 225, 244-46 (discussing the greater

instability of cohabitating relationships); Robin Fretwell Wilson, Evaluating Marriage: Does

Marriage Matter to the Nurturing of Children?, 42 SAN DIEGO L. REV. 847, 857, 869-70 (2005)

(discussing growing incidence of childrearing and the high rate of dissolution among unmarried,

cohabiting couples). As David Popenoe notes, the effective shift of childbearing from marriage into

generally less stable non-marital relationships means that even as the divorce rate has leveled off,

“[t]he estimated combined breakup rate of both married and unmarried unions . . . continues to

escalate.” DAVID POPENOE, LIFE WITHOUT FATHER 20 (1996).

Type text here

2006] NON-CUSTODIAL PARENTS 1463

circle of non-custodial parents.10 Because non-custodial parents are

overwhelmingly men, the clash over custody is often seen as a front in

the so-called “gender wars.”11 Certainly, it is true that the cause of noncustodial

parents is championed most visibly by a newly energized

Fathers’ Rights movement,12 and that a distressing share of the internet

polemics on the topic crackles with misogynistic invective.13 The gender

implications of the topic are real, but the issue is not solely about the

rights of fathers. There are smaller numbers of women, too—both noncustodial

mothers and the new partners of non-custodial fathers—who

are agitating for greater empowerment of non-custodial parents.14

Significantly, the push for non-custodial parents’ rights is doing

much more than generating headlines; it has already spurred significant

changes to family law in some states and, indeed, around the world. The

movement’s influence can be seen in laws affecting custody, visitation,

child support, and paternity, not only in the United States but also in

Australia, Canada, and Europe.15 Non-custodial parents have gained new

10. See Patrick Parkinson, The Past Caretaking Standard in Comparative Perspective, in

RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE

LAW OF FAMILY DISSOLUTION 446, 461 (Robin Fretwell Wilson ed., 2006).

11. See generally MARY ANN MASON, THE CUSTODY WARS: WHY CHILDREN ARE LOSING

THE LEGAL BATTLE, AND WHAT WE CAN DO ABOUT IT 2 (1999) [hereinafter MASON, CUSTODY

WARS]; June Carbone, The Missing Piece of the Custody Puzzle: Creating a New Model of Parental

Partnership, 39 SANTA CLARA L. REV. 1091, 1095 (1999) (noting that “[t]he battle lines” over

custody “are well drawn and they are gendered ones”); Herma Hill Kay, No-Fault Divorce and

Child Custody: Chilling Out the Gender Wars, 36 FAM. L.Q. 27, 34-39 (2002) (discussing the

“gender wars over custody” spurred by claims of fathers’ rights).

12. See Dominus, supra note 6, at 26; Parkinson, supra note 10, at 467; William C. Smith,

Dads Want Their Day: Fathers Charge Legal Bias Toward Moms Hamstrings Them as Full-Time

Parents, 89 A.B.A. J. 38, 39-40 (Feb. 2003).

13. See Nancy E. Dowd, Fathers and the Supreme Court: Founding Fathers and Nurturing

Fathers, 54 EMORY L.J. 1271, 1272 (2005) [hereinafter Dowd, Fathers and the Supreme Court]

(noting that some strains of fathers’ rights advocacy are “strongly antifeminist, even womanhating”)

(footnotes omitted); Martha Albertson Fineman, Fatherhood, Feminism and Family Law,

32 MCGEORGE L. REV. 1031, 1043 (2001) [hereinafter Fineman, Fatherhood] (observing that “[a]

substantial amount of fathers’ rights discourse characterizes mothers in negative and malicious

stereotypes, arguing for monitoring, punishment, containment and control over mothers”).

14. See, e.g., Julian v. Julian, No. M1997-00236-COA-R3-CV, 2000 WL 343817, at \*1

(Tenn. Ct. App. Apr. 4, 2000) (asserting constitutional rights of non-custodial mother). Reportedly,

a third of the members of Fathers 4 Justice are women. See Activist: How I Stormed Lottery Show,

PLYMOUTH EVENING HERALD, May 22, 2006, at 9, available at 2006 WLNR 8797790. To

dramatize the point, one of the six custody-rights activists who stormed a BBC studio in May 2006

was a woman. Id.

15. See Smith, supra note 12, at 39 (noting that “[f]athers’ rights advocates have lobbied

several states to adopt a legal preference for joint custody, pressed for stricter enforcement of

noncustodial fathers’ visitation rights, and pushed for DNA paternity tests in child support

proceedings” and that “this loosely organized movement has demonstrated its political clout in state

legislatures and family courts nationwide”). Surveying recent development in child custody law in

Australia, Canada, Denmark, England, France, Hong Kong, Portugal, and the United States, Helen

1464 HOFSTRA LAW REVIEW [Vol. 35:1461

rights to enforce visitation, limit their support obligations based on

additional time caring for the child, and even to “disestablish” their

parental status (and obligations) altogether based on DNA proof of nonpaternity

later in the child’s life.16

Most of the changes so far have come through legislative action,

and proponents are presently pushing many new initiatives in state

legislatures across the United States.17 Increasingly, however, noncustodial

parents are turning their attention to the courts as well,

demanding better or equal treatment as a matter of constitutional right.

Michael Newdow, the California father who took his fight against the

Pledge of Allegiance at his daughter’s school all the way to the U.S.

Supreme Court, may be the best known of these litigants.18 But, with less

fanfare, many other parents have also gone to court claiming a

constitutional entitlement to play a larger and co-equal role in the

Rhoades and Susan Boyd observe that a “common thread” is “the central role played by fathers in

triggering the legislative reviews, and the tendency for new policies to embrace a normative shift

towards a shared parenting model.” Helen Rhoades & Susan B. Boyd, Reforming Custody Laws: A

Comparative Study, 18 INT’L J.L. POL’Y & FAM. 119, 119 (2004). Australia enacted new legislation

in 2006 strengthening its legal preference for “shared parental responsibility.” See Family Law

Amendment (Shared Parental Responsibility) Act 2006, available at

http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/1D1968BB157D8090CA257178000B

0A56?OpenDocument&VIEWCAT=item&COUNT=999&START=1. For further discussion of

“shared parenting” initiatives in Australia, Canada, and Europe, see Ian Curry-Sumner & Caroline

Forder, The Dutch Family Law Chronicles: Continued Parenting Notwithstanding Divorce, in THE

INTERNATIONAL SURVEY OF FAMILY LAW 261 (Andrew Bainham ed., 2006); Parkinson, supra note

10, at 456-70; and Helen Rhoades, The Rise and Rise of Shared Parenting Laws, 19 CAN. J. FAM. L.

75 (2002).

16. See, e.g., Margaret F. Brinig, Does Parental Autonomy Require Equal Custody at

Divorce?, 65 LA. L. REV. 1345, 1347-48 (2005) [hereinafter Brinig, Parental Autonomy] (discussing

Oregon legislation strengthening non-custodial parents’ rights concerning visitation and child

support); Marygold S. Melli, The American Law Institute Principles of Family Dissolution, the

Approximation Rule and Shared-Parenting, 25 N. ILL. L. REV. 347, 358-61 (2005) [hereinafter

Melli, Shared-Parenting] (discussing reductions of child support based upon shared parenting);

Linda Lea M. Viken, Child Support in South Dakota from Obligor Only to Shared Responsibility,

an Overview, 48 S.D. L. REV. 443, 447-52 (2003) (recounting changes in South Dakota law). For

critical analyses of the recent legislative and judicial trend allowing legal fathers to “disestablish”

paternity, see generally Melanie B. Jacobs, When Daddy Doesn’t Want to Be Daddy Anymore: An

Argument Against Paternity Fraud Claims, 16 YALE J.L. & FEMINISM 193 (2004); Jana Singer,

Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption, 65 MD. L.

REV. 246 (2006).

17. Many of the pending legislative initiatives are summarized on the website of the

American Coalition for Fathers and Children, https://secure2.convio.net/acfc/site/SPageServer?page

name=SharedParentingLegislation&JServSessionIdr002=ytmwy06ur1.app6a.

18. See Elk Grove Uniform Sch. Dist. v. Newdow, 542 U.S. 1 (2004). Profiles of Michael

Newdow, the medical doctor and law school graduate who argued his own case pro se in the

Supreme Court, appeared widely in the press. See, e.g., Dominus, supra note 6. Recently, Newdow

reemerged in the headlines when he filed a lawsuit challenging the constitutionality of the use of “In

God We Trust” on U.S. currency. See Atheist Targets Currency, GRAND RAPIDS PRESS, Nov. 19,

2005, at A8, available at 2005 WLNR 18779412.

2006] NON-CUSTODIAL PARENTS 1465

upbringing of their children. In the fall of 2004, for example,

coordinated class-action lawsuits were filed in forty-four states

challenging the constitutionality of prevailing custody law and asserting

a constitutional right to “shared parenting,” or equal time with and

authority over their children.19

To date, non-custodial parents have met mostly with frustration in

their resort to constitutional law.20 There have been some important

successes over the years—most notably, the series of U.S. Supreme

Court decisions recognizing the parenting status of some unwed

fathers.21 But, in large measure, recent claimants asserting a right to

equal parenting prerogatives have been stymied by a battery of

impediments relating to standing, jurisdiction, or the merits.22 As

discussed in greater detail below, the broad view that emerges from this

litigation, in varied contexts, is that parents are not constitutionally

entitled to a co-equal role in raising their children following separation

or divorce. The state, in this view, retains considerable discretion to

allocate parental authority and access following dissolution, including

giving one parent a superior and dominant child-rearing role, without

having to prove extraordinary or compelling grounds.

This Article scrutinizes that conclusion. Is it right to think that the

Constitution, which is said to zealously protect the rights and authority

of parents within the intact family, falls away so sharply following

divorce or family break-up? And, if so, why and on what ground? In my

view, the Constitution does in fact tolerate unequal roles for parents in

the divided family, although not for the reasons most courts have given.

The reason the Constitution tolerates unequal roles is not that the

parenting interests of non-custodial parents are unprotected or

insubstantial, as some courts have reasoned, or that the “best interests”

of children is a “compelling” state interest which categorically

overcomes the fundamental rights of parents under strict constitutional

scrutiny.23 Rather, it is because constitutional protection of parental

19. See Kim Kozlowski, Divorced Michigan. Fathers Sue for Equity in Child Custody: Class-

Action Lawsuit Seeks to Make Joint Custody the First Option Judges Consider, DETROIT NEWS,

Oct. 31, 2004, available at http://www.fathers.ca/fathers\_sue\_for \_equality.htm; Sheldon Gordon,

Fathers’ Day, NATIONAL, Dec. 2003 (describing similar legal claims in Canada), available at

http://www.canadiancrc.com/articles/CBA\_Fathers\_Day\_2003.htm; see generally Maury D.

Beaulier, Establishing a Presumption for Joint Physical Custody, TRANSITIONS, Mar. 1, 2006, at 1.

For a listing and summary of the lawsuits, see the website of the Indiana Civil Rights Council,

http://indianacrc.org/classaction.html.

20. See infra notes 90-137 and accompanying text.

21. See, e.g., Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645

(1972); see also discussion infra Part III.A.

22. See discussion infra Parts III.B-C.

23. See infra notes 95-133 and accompanying text.

1466 HOFSTRA LAW REVIEW [Vol. 35:1461

rights—of custodial and non-custodial parents alike—is always

necessarily qualified by the competing interests of other family

members. By this view, the qualification—or, to be frank, the

weakness—of non-custodial parents’ rights does not so much reflect the

unique disabilities of the non-custodial parent, as it does the relative

weakness of “family privacy” rights more generally: Even within the

ongoing “intact” family, the Constitution must be understood to leave

room for sensitive accommodation by the state of the potentially

conflicting interests of various family members. My claim, finally, is

that honesty in confronting the dilemma posed by the claims of noncustodial

parents should lead courts not to ratchet up dramatically the

protection those parents receive, but to acknowledge candidly that the

Constitution permits—and even requires—the state to balance the

interests of others within the family in drawing the limits of family

privacy.

This Article proceeds in three parts. Part I describes the evolution

of modern custody law, providing a context for evaluating the present

constitutional claims. Part II then surveys how non-custodial parents

have fared in pressing their claims in court. Part III, finally, critiques the

rationales courts have used to limit constitutional protection for noncustodial

parents, and suggests an alternative basis for resolving these

claims. It concludes, moreover, by suggesting why it would be

preferable to openly concede the indeterminate nature of family-privacy

protection, even if doing so would not drastically alter the bottom-line

outcome of many family disputes over parenting.

II. THE EVOLUTION OF CUSTODY LAW: FROM SOLE CUSTODY TO

SHARED PARENTING

The law of child custody has undergone a dramatic transformation

over the past 150 years—or, more accurately, several transformations.24

American law began with a powerful presumption for custody with

fathers. The entitlement of the father—“the Lord of the fireside,” in

Chancellor Kent’s phrase—was nearly absolute and, as historian

Michael Grossberg has noted, was “[m]oored in the medieval equation

of legal rights with property ownership.”25 The father was naturally

24. See MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE

HISTORY OF CHILD CUSTODY IN THE UNITED STATES xii (1994) [hereinafter MASON, FROM

FATHER’S PROPERTY TO CHILDREN’S RIGHTS].

25. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN

NINETEENTH-CENTURY AMERICA 235, 240 (1985). Barbara Woodhouse has demonstrated how

essentially similar property notions imbued the Supreme Court’s recognition of parental rights

under the Constitution. See generally Barbara Bennett Woodhouse, “Who Owns the Child?”:

2006] NON-CUSTODIAL PARENTS 1467

entitled to the benefit of the child’s labor, it was supposed, in exchange

for the father’s investment in the child’s support.26 This rule favoring

fathers gave way only if the father was shown to be wholly “unfit”—that

is, if he were shown, in the words of one South Carolina judge, to have

“monstrously and cruelly abused” his parental power;27 otherwise,

Blackstone observed, the mother was “entitled to no power, but only to

reverence and respect.”28

This rule was then turned on its head over the course of the

nineteenth century. The rule favoring fathers in divorce had always

coexisted with one granting mothers custody of children born outside

marriage.29 So-called “illegitimate children” were essentially disregarded

by English law as “the child of no one,” but by custom lived with their

mothers.30 And in early America this custom took on the force of law,

with early custody battles recognizing a parallel entitlement of mothers

to retain custody of non-marital children.31

Further cracks began to open in the paternal preference in cases of

divorce as early as the 1810s and 1820s, with judges expressing new

concern for the interests of children and for the unique values of “mother

love,” particularly for younger children.32 By the end of the century, it

had crumbled entirely, replaced with a mirror-image preference for

mothers.33 Under the Tender Years doctrine, mothers were heavily

Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992).

26. See GROSSBERG, supra note 25, at 235; MASON, FROM FATHER’S PROPERTY TO

CHILDREN’S RIGHTS, supra note 24, at 61.

27. In Prather v. Prather, 4 S.C. Eq. 33 (1809), the court wrote in an action seeking separate

maintenance and custody against an abusive husband:

With respect to the children, I do not feel myself at liberty to take them out of

the care and custody of the father. He is the natural guardian, invested by God

and the law of the country, with reasonable power over them. Unless

therefore his paternal power has been monstrously and cruelly abused, this

court would be very cautious of interfering in the exercise of it.

Id.

28. See BLACKSTONE’S COMMENTARIES ON THE LAW 196 (Bernard C. Gavit ed., 1941);

GROSSBERG, supra note 25, at 236.

29. See GROSSBERG, supra note 25, at 207-08.

30. See generally id. at 197-210; HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL

POLICY 1-8 (1971).

31. See GROSSBERG, supra note 25, at 207-11.

32. See Jamil S. Zainaldin, The Emergence of a Modern American Family Law: Child

Custody, Adoption, and the Courts, 1796-1851, 73 NW. U. L. REV. 1038, 1052-59 (1979)

(describing how the common law’s strict paternal entitlement began to give way to discretionary

judicial consideration of child welfare in early nineteenth century cases).

33. See MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS, supra note 24, at 3-4.

As Cynthia Starnes aptly notes, “[w]hat thus began as a rule of absolute paternal preference under

Roman law evolved into a rule of absolute maternal preference in U.S. law, at least in cases of

children of ‘tender’ years.” Cynthia Starnes, Swords in the Hands of Babes: Rethinking Custody

Interviews After Troxel, 2003 WIS. L. REV. 115, 120.

1468 HOFSTRA LAW REVIEW [Vol. 35:1461

presumed to be the proper custodian of young children.34 Custody went

to fathers only if the mothers were altogether “unfit” to parent.35

Explicit gender preferences in custody were finally set aside in

almost all states during the 1970s. A new intolerance for sex

discrimination in equal protection doctrine, along with the entry of more

women into the permanent workforce, made a categorical preference for

mothers untenable.36 Custody law was then recentered on a formally

gender-neutral inquiry into the “best interest of the child.”37

This did not mean, of course, that gender bias no longer infected

custody decisions, but it was largely pushed underground. Undoubtedly,

some judges continue to favor mother custody generally, and some seem

to disfavor men or women who buck traditional gender stereotypes.38 A

2004 study of family court judges in Indiana, for example, found that

more half expressed support for the Tender Years doctrine in private

interviews and acted consistently with that view in deciding cases.39 A

study in 2005 by political scientists Elaine Martin and Barry Pyle

concluded that the best predictor of voting behavior by state supreme

court judges in divorce cases generally (not only custody disputes) was

gender—with female judges favoring female litigants about 60% of the

time and male judges favoring divorcing husbands about 55% of the

34. See HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES

§ 19.4, at 799-800 (2d ed. 1988).

35. See Ramsay Laing Klaff, The Tender Years Doctrine: A Defense, 70 CAL. L. REV. 335,

342 (1982).

36. See generally Fineman, Fatherhood, supra note 13, at 1038 (2001).

37. See id.

38. A task force study of the Virginia courts, for example, concluded that “[d]ecisions in

custody matters may reflect gender bias” and that “[m]any participants in the study, particularly

men, perceive that courts are biased against men in custody matters, which may be based to a great

extent on continued application of the ‘tender years’ presumption.” Gender Bias in the Courts Task

Force, Gender Bias in the Courts of the Commonwealth Final Report, 7 WM. & MARY J. OF

WOMEN & L. 705, 718 (2001). Studies in other states have similarly concluded that gender bias

continues to influence custody decisions. See Gender and Justice in the Courts: A Report to the

Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System, 8 GA. ST. U.

L. REV. 539, 657-58 (1992); Gender Bias Study of the Court System in Massachusetts, 24 NEW

ENG. L. REV. 745, 827 n.47 (reprint 1990). But cf. Report of the Florida Supreme Court Gender Bias

Study Commission 7 (Mar. 1990) (finding that “[c]ontrary to public perception, men are quite

successful in obtaining residential custody of their children when they actually seek it,” but

acknowledging that “[n]oncustodial fathers are disadvantaged in the allotment of visitation”),

available at http://floridasupremecourt.org/pub\_info/documents/bias.pdf. See also Stephen J. Bahr

et al., Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a

Difference?, 28 FAM. L.Q. 247, 255 (1994); Solangel Maldonado, Beyond Economic Fatherhood:

Encouraging Divorced Fathers To Parent, 153 U. PA. L. REV. 921, 967-74 (2005); Cynthia A.

McNeely, Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court,

25 FLA. ST. U. L. REV. 891, 906-18 (1998).

39. Julie E. Artis, Judging the Best Interests of the Child: Judges’ Accounts of the Tender

Years Doctrine, 38 LAW & SOC’Y REV. 769, 771 (2004).

2006] NON-CUSTODIAL PARENTS 1469

time.40

Although mothers still usually end up with custody of children—

the latest census data shows that mothers lead single-parent households

by a 5-to-1 margin—some studies suggest that fathers prevail in closer

to half of all contested cases decided by a judge, a fact that in part may

reflect selection effects in that small subset of cases.41

Throughout these changes—shifting focus from fathers to mothers

to children—custody law through the 1970s remained premised on the

idea of sole custody.42 The point was always to designate a single

custodial parent who would assume primary responsibility for the child.

This parent lived with the child, tended to the daily joys and toils of

child-rearing, and had final say in major decisions affecting the child—

such as the child’s education, religious upbringing, and medical care.43

The non-custodial parent, meanwhile, was consigned to a decidedly

secondary role. These parents—in most cases fathers—were expected to

pay child support and exercise “visitation,” a term many resented

bitterly.44 In a despairing number of cases, they did neither. Whether

because of awkwardness over their new role, ongoing conflicts with the

custodial parent, or other factors, a great many non-custodial fathers

simply recede from their children’s lives following divorce—and this is

equally true even of fathers who were significantly involved with their

children before the divorce.45 Within a year of the breakup, most

40. Elaine Martin & Barry Pyle, State High Courts and Divorce: The Impact of Judicial

Gender, 36 U. TOL. L. REV. 923, 936 (2005).

41. See generally Mary Ann Mason & Ann Quirk, Are Mothers Losing Custody? Read My

Lips: Trends in Judicial Decision-Making in Custody Disputes—1920, 1960, 1990, and 1995, 31

FAM. L.Q. 215 (1997). But cf. Elizabeth Brandt, Cautionary Tales of Adoption: Addressing the

Litigation Crisis at the Moment of Adoption, 4 WHITTIER J. CHILD & FAM. ADVOC. 187, 215 n.166

(2005) (collecting conflicting data on question). Of course, only a tiny fraction of custody

arrangements are resolved by judicial decision following trial. Eleanor Maccoby and Robert

Mnookin famously found in their study of California divorces that judge-decided cases represented

just 1.5 percent of all divorces involving children. See ELEANOR E. MACCOBY & ROBERT H.

MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 137-38 (1992).

42. See Marygold S. Melli et al., Child Custody in a Changing World: A Study of Postdivorce

Arrangements in Wisconsin, 1997 U. ILL. L. REV. 773, 776 [hereinafter Melli et al., Child Custody].

43. See, e.g., Rust v. Rust, 864 S.W.2d 52, 55 (Tenn. Ct. App. 1993) (holding that “in the

absence of specific provisions in the custody decree, the parent receiving custody retains the sole

prerogative to make the significant decisions concerning the child’s education, residence, religious

training, and medical care”).

44. See, e.g., Marilyn Gardner, Yours, Mine, Then Yours Again, CHRISTIAN SCI. MONITOR,

May 3, 2006, at 13 (quoting one supporter of shared parenting as stating that “[t]he words ‘custody’

and ‘visitation’ belong to prisons and hospitals” and that “[t]his may be useful language for the legal

system, but not for families”).

45. See E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE

RECONSIDERED 118-21 (2002); Cynthia R. Mabry, Disappearing Acts: Encouraging Fathers To

Reappear for their Children, 7 J.L. & FAM. Stud. 111, 114-18 (2005); Maldonado, supra note 38, at