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Are Mothers Losing Custody?

MARY ANN MASON* and ANN QUIRK**

Judges are often called upon to make the sensitive decision as to where and with whom a child will live. Currently, more than a quarter of all children under eighteen years of age have experienced the divorce or separation of their parents.¹ In addition, a substantial number of children have lived through the breakup of their unwed parents.² While most custody arrangements are voluntarily arranged by the parents,³ when disputes arise, judges must make the final determinations.

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³ Richard E. Behrman & Linda S. Quinn, Children and Divorce: Overview and Analysis, 4 THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE 1:1-14, 6 (Spring 1994). Behrman and Quinn note that this proportion is expected to grow to 40%. Id. For the past two decades more than 1 million children each year have experienced a family divorce. Id. at 1.
⁴ In 1990, 7.7% of children under 18 were living with single, never-married parents. Id. at 1.
⁵ See LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 217 (1985) (noting that contested custody cases account for 10% of divorces involving children); ELEANOR E. MACCoby & ROBERT H. MNookIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 100 (1992) (citing study of 1,100 Northern California families filing for divorce, in which fewer than one quarter filed conflicting custody requests); Robert H. Mnookin et al., Private Ordering Revisited: What Custodial Arrangements Are Parents Negotiating?, in DIVORCE REFORM AT THE CROSSROADS 37, 38 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (noting most custody conflicts are not adjudicated, though the exact proportion is not known).
Judicial and legislative opinion as to which parent is the most suitable has changed throughout history. At common law and during the colonial era, the father had a superior, undisputed right to custody. The late nineteenth century saw the rise of a maternal preference, at least for younger children, based on the “tender years” doctrine developed by the courts. The tender years doctrine, based on the notion that women were better suited for custody because of their greater nurturing capacities, held sway in the courts well into the twentieth century. During the last two decades, however, most states have comprehensively rewritten their custody laws, eradicating any gender preferences.

Despite the shift to gender-neutral statutes, many observers claim a maternal presumption still remains which is widely reflected in judicial decisions. They assert that while judges may not overtly state a preference for maternal custody, such partiality is found in the overwhelming proportion of judgments made to mothers. Statistics, which have been marshaled, show only 10 percent of awards are for sole paternal custody.

Opponents of the view that courts favor mothers argue that these statistics merely reflect the desires of the parents. In a study of Utah custody decisions from 1970 to 1993, researchers found only 13 percent


An example of the legislative attempt to eradicate custodial preferences based on gender can be found in Florida law: “After considering all relevant facts, the father of the child shall be given the same consideration as the mother in determining the primary residence of a child irrespective of the age or sex of the child.” Fla. Stat. Ann. § 61.13 (West 1995).


9. Jennison, supra note 8, at n.9 (citing David J. Miller, Joint Custody, 13 Fam. L.Q. 345, 353-54 (1979)). See also Maccoby & Mnookin, supra note 3, at 112-13 (citing study of 1,100 divorcing families that found fathers received sole custody less than 10% of time).
of fathers requested sole custody. Moreover, this camp argues, if these fathers actually take the initiative and sue for custody they have a very good chance of winning. A Los Angeles study showed that fathers won in court 63 percent of the time, and a similar study in Massachusetts found fathers won in 70 percent of the cases.

Other studies of judicial awards show mixed results. An American Bar Association study found that judges consider the fact of motherhood fairly insignificant in considering the child’s best interests—it is mentioned as a prime factor only 10.6 percent of the time, compared with greater economic stability (46.5 percent) or role as primary disciplinarian (33.3 percent), traits more often associated with fathers.

Our study seeks to answer the controversy surrounding maternal custody and other issues of judicial decision making in a comparative historical framework. The question is, while we know that custody laws have changed, have the results changed as well? Has the abolition of a maternal preference, as well as other substantive and procedural changes such as the increased use of expert witness testimony, made a difference in how appellate court judges talk about custody and in their actual determinations?

While other studies have polled judges and examined appellate cases from a single time period to investigate the decision-making processes of the court, there has been no systematic attempt to discern long-term patterns in this rapidly changing area of the law. This study investigates the changing patterns of custody decisions as manifested in appellate court decisions during three distinct eras of custody law—1920, 1960,
1990, and 1995. Choosing 100 cases to examine from each year, we pay attention both to what the courts say and what they do. The changing patterns of custody arrangements and the explicit judicial reasoning which supports them are separately addressed.

The study uses 1920 as a baseline, as that date marks roughly the beginning of the modern era of custody law. We know from legal historians that by 1920, judicial precedents mandating the "best interests" of the child had almost completely superseded the English common law rule supporting the "paramount interests of the father."

Nearly all state legislatures erased the father's advantage by proclaiming that fathers and mothers had equal custodial rights. Courts went farther than the legislatures by turning common law on its head in virtually all states and proclaiming that mothers, with their nurturing capacities, were presumed to be the better custodial parent for children of tender years.

The study then examines 1960, a year within recent memory and yet nearly a decade before the revolution in divorce and custody law which began with the pioneering California Family Law Act (Act) in 1969. This Act introduced no-fault divorce and initiated an era of rapidly changing family structures in all states, including the abolition of a maternal preference and the introduction of joint custody. Finally, the years 1990 and 1995 were chosen as representative of the current state of the law, reflecting the dramatic changes in custody law experienced in most states in the wake of the "divorce revolution." By 1990 the majority of states had established gender-neutral custody statutes. Some states were also making moves toward mandatory joint custody or a statutorily imposed primary caretaker preference.

The 1990s have also seen a dramatic increase in the influence of the social and behavioral sciences in the courtroom in the form of expert witnesses and psychological reasoning. By 1995 these innovations were more firmly in place, changing the decision-making process markedly.

I. Historical Perspective

The background for this study is the volatile twentieth century. Assumptions regarding family, child-raising, and even human nature

15. MASON, supra note 5, at 61–62.
16. Id. at 114.
17. Id. at 49–83.
18. CAL. CIV. CODE §§ 4000-5317 et seq. (Deering 1995).
19. For a discussion of the "divorce revolution" brought about by the introduction of no-fault divorce statutes, and its subsequent repercussions, see WEITZMAN, supra note 3.
20. See MASON, supra note 5, at 213 n.8.
21. See supra notes 7 & 35.
changed over the course of this era. Before engaging in an empirical examination of case law, we will present a brief introduction to custody law prior to the twentieth century, followed by a broad-brush view of the relevant historical trends that affect our study.

A. The Rise and Fall of the Maternal Presumption

Common law doctrine gave virtually absolute custody of any children to the father. This suited the country's needs during its first 200 years. The economic demands of a labor-scarce economy made children's labor an important asset in the colonial era. The father was economic head of the household, in charge of children, apprentices, and other laborers in his home. In the rare event of divorce, it was assumed that the father could better provide for and supervise the child.

Challenges to the paternal presumption began in the early 1800s, marking a notable shift in court intervention surrounding custody disputes. As early as the 1820s, private bills for divorce in state legislatures (the only mode of divorce in states which disallowed it) began awarding children to the mother. Legal historians estimate that between 1823 and 1846, awards of custody to mothers had grown to more than 20 percent of private divorce bills. During the course of the nineteenth century the judiciary began to re-balance the rights of the spouses in custody determinations. The progression of legal preference evolved from absolute paternal custody, to maternal custody in "exceptional cases," to parental equality with a preference for maternal custody in certain situations, e.g., "the tender years.'

The judiciary found justification for awarding children of tender years to their mother through the concept of the best interests of the child, a notion not considered in decisions of the colonial era. Relevant factors under the rubric of best interest included: the desires of the parents, the wishes of the child, the child's needs, any special mental or physical conditions, the child's sex and age, parental fitness, the

25. Id.
27. Teitelbaum, supra note 22, at 1143.
28. See Mercein v. The People, 25 Wend. 65 (N.Y. 1840); Commonwealth v. Addicks, 5 Binn. 520 (Pa. 1813).
moral fortitude of the parents, and a presumption in favor of the mother if the children were young.\(^{29}\) The maternal presumption became firmly embedded in case law, exemplified in language such as, "Courts do not hesitate to award the care and custody of young infants to the wife as against the paramount right of the husband where the wife has shown herself to be a proper person. . . ."\(^{30}\)

The shift to a maternal presumption was due in part to changes in the status of women. As women began to obtain greater social and economic power, their ability to provide for their children's maintenance and education increased proportionally. Coupled with this change in status was a change in the societal perceptions of childhood and children's needs. Women were perceived to be better suited to caring for children by virtue of their maternal instincts.\(^{31}\) The "cult of motherhood" as it developed in the nineteenth century focused on the superior nurturing and moral qualities of women that suited them for child-rearing.\(^{32}\) The welfare of the child was no longer clearly served best by the father.\(^{33}\)

**B. After the Fall of the Maternal Presumption**

The maternal presumption was firmly in place for the first six decades of the twentieth century. However, thereafter the presumption began to disappear rapidly. This retreat occurred within the context of the feminist movement toward equal rights before the law. The presumption that the interest of a child of tender years is best served in the custody of the mother was legally abolished, or demoted to a "factor to be considered," in nearly all states between 1960 and 1990.\(^{34}\) In the vacuum created by the demise of the maternal presumption, state legisla-

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31. See, e.g., Mercein v. The People, 25 Wend. 65 (N.Y. 1840); Commonwealth v. Addicks, 5 Binn. 520 (Pa. 1813).

32. See *MASON*, *supra* note 5, at 49–84.

33. *Id.* at 49–84 (discussing factors involved in rise of maternal custody awards); Andre P. Derdeyn, *Child Custody Contests in Historical Perspectives*, 133 AM. J. PSYCHIATRY 1369, 1370–71 (1976) (noting presumption for mothers corresponded with rise in women's rights and change in society's perception of children's needs).

34. By 1982 only seven remaining states gave mothers a preference over fathers for children of tender years. They were: Alabama, Florida, Kentucky, Louisiana, Mississippi, Utah, and Virginia. Atkinson, *supra* note 14, at 11. Since that time these states have all eliminated this preference.
Legislative efforts to replace the maternal presumption with a new preference followed two general trends. Many legislatures suggested joint custody as an alternative. This solution gave fathers and mothers equal rights, thereby avoiding the problem of having to choose between legally equal parents and at the same time displaying deference to equal treatment. Alternatively, some states adopted a primary caretaker preference, a standard quantifying time spent with the child to facilitate the decision-making process. Most states, however, maintained a vague best interest standard, with no clear preference. The language of post-maternal preference statutes varies widely, offering a laundry list to guide judges, who ultimately are given vast discretion to make their own decisions.

II. The Study

A. Methods

Only a small percentage of child-custody disputes reach the trial court and only a fraction of these are appealed. However, when

35. The Uniform Marriage and Divorce Act, put forth by the Commissioners on Uniform State Laws, defines the child's best interest as a composite of the following factors:

1. the wishes of the child's parent or parents as to his custody;
2. the wishes of the child as to his custodian;
3. the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;
4. the child's adjustment to his home, school and community;
5. the mental and physical health of all individuals involved. The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child.


36. See, e.g., LA. CIV. CODE ANN. art. 131(c) 1983 Amendment (repealed 1992) (creating a rebuttable presumption for joint custody).

37. For a general discussion of the pros and cons of joint custody, see generally JOINT CUSTODY AND SHARED PARENTING (JAY FOLBERG, ed. 1984).

38. See, e.g., 1995 Mont. Laws ch. 47 (H.B. 444) (adopting a rebuttable presumption for the primary caretaker).


40. Most custody disputes are settled through mediation or agreement between the parties. See supra note 3.

41. See Gary Crippen, The Abundance of Family Law Appeals: Too Much of a Good Thing?, 26 FAM. L.Q. 85, 86-87 (1992) (stating only 34% of family law decisions in Minnesota were appealed, for a total of 366 filings in 1990).
compared over several decades, appellate court decisions yield im-
portant comparative data regarding trends in decision making and legal
thinking about custody. They provide a comparison of appellate court
reasoning and are perhaps the only accurate method of assessing the
changes in judicial decision-making in a particular area of the law over
a long period of time. They are also the only reliable way to determine
whether there are clear trends, at least among those cases that are
appealed, favoring either mothers, fathers, or third parties. The infor-
mation appellate cases provide about the testimony at the trial court level
is sometimes incomplete. However, when used strictly for comparative
purposes, and when a significant number of cases are examined, this
inadequacy equalizes due to the similarity of comparative sources.

To investigate developing trends in appellate court decisions in the
twentieth century, we performed two separate studies. The first was
a three-decade study in which we analyzed 100 appellate court cases
each from 1920, 1960, and 1990. The first 100 child custody cases,
as indicated by three different topic headings relating to child custody
(Infants, Divorce, and Parent and Child) were selected from the West
Digest for each noted year. The cases were coded according to state,
parties involved, and the number and age of affected children. Also
recorded were the child-custody arrangement determined at the trial
level (i.e., which parent was awarded which child and whether siblings
were split), the appellate court reasoning, and which party the appellate
court favored. We also coded for the use of expert witnesses and,
when possible, determined which party hired the expert, what type of
expert was used, and the nature of the testimony. In addition, we noted
whether the judge cited social scientific or psychological authority in

42. It should be noted, however, that appellate decisions may not be representative
of custody disputes overall. This study focuses on what custodial arrangements appellate
court judges are favoring, not what parents themselves are deciding. As noted in note
3 supra, most custodial placements are voluntarily arranged by both parents rather
than determined by a trial judge. The most common situation is joint legal custody
and sole maternal physical custody, followed by sole maternal legal and physical
custody. Kelly, supra note 7, at 124.

43. Because there are too few published child custody cases from the 1920s, the
period of 1920–24 was used, rather than only one year.

44. Cases in which the child had been removed from parental custody by the state
were excluded.

45. In the great majority of these cases (more than 70%) the appellate court affirmed
the trial court's decision, honoring the judicial discretion of the lower court. Most
cases that are reversed are reversed for reasons other than the custody arrangement
determined by the trial court. No significant trend of reversal is evident in the small
percentage of cases that overturned a ruling in favor of mother or father.
making a custody decision. The resulting analysis was compared for each of the three decades.

A subsequent search was performed for cases from 1995 using the same topic headings. The first 100 cases which met the above criteria were analyzed in a similar manner. These results were then compared to the prior outcome to verify the differences noted in 1990. Two separate years in the 1990s, rather than one, were selected to determine if there are accelerating trends in the current era. Examining these two years in sequence provides a more accurate view of current trends.

### Table 1

*Reasons Stated for Custody Decisions*

(Cases may state multiple reasons.)

<table>
<thead>
<tr>
<th>Factors Stated in Opinion</th>
<th>1920 (n=92)</th>
<th>1960 (n=96)</th>
<th>1990 (n=106)</th>
<th>1995 (n=100)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Best Interest</td>
<td>59</td>
<td>76</td>
<td>68</td>
<td>65</td>
</tr>
<tr>
<td>Maternal preference</td>
<td>26</td>
<td>21</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Moral Fitness</td>
<td>36</td>
<td>36</td>
<td>11</td>
<td></td>
</tr>
<tr>
<td>Biological Relationship</td>
<td>19</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Love &amp; Affection</td>
<td>14</td>
<td>3</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Stability</td>
<td>12</td>
<td>16</td>
<td>27</td>
<td>15</td>
</tr>
<tr>
<td>Child's Age</td>
<td>12</td>
<td>10</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Time Spent W/ Child/Primary Caretaker</td>
<td>10</td>
<td>22</td>
<td>27</td>
<td>14</td>
</tr>
<tr>
<td>Parental Wrongdoing</td>
<td>10</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Inappropriate Second Spouse</td>
<td>9</td>
<td>6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wealth Of Parent</td>
<td>11</td>
<td>8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Same Sex Parent</td>
<td>8</td>
<td>8</td>
<td></td>
<td></td>
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<tr>
<td>Mental Stability</td>
<td>8</td>
<td>3</td>
<td></td>
<td></td>
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<tr>
<td>Desertion</td>
<td>8</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Custodial Time Length</td>
<td>6</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Child's Preference</td>
<td>9</td>
<td>7</td>
<td>4</td>
<td></td>
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<tr>
<td>Statutory Presumption Favoring</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Joint Custody</td>
<td>5</td>
<td>9</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Keep Siblings Together</td>
<td>5</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Expert Opinion</td>
<td>4</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Friendly Parent/Active Alienation Of Other Parent</td>
<td>4</td>
<td>12</td>
<td></td>
<td></td>
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<tr>
<td>Domestic Violence</td>
<td>6</td>
<td></td>
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<td></td>
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<tr>
<td>Parental Fitness</td>
<td>5</td>
<td></td>
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<tr>
<td>School Access</td>
<td>4</td>
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<td>Health</td>
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<td></td>
<td></td>
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<tr>
<td>Homosexuality</td>
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<tr>
<td>Sexual Abuse</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Parent-Child Relationship</td>
<td>3</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
III. The Findings

A. What Judges Say: Trends in the Discourse of Decision Making

The discourse of appellate opinions from the 1920s to the 1990s has shifted dramatically. Certain explicit considerations in choosing the custodial parent have remained constant over the seventy-year period surveyed, while most others have faded in importance. The general rule of the best interests of the child has been cited continuously as the primary justification for custody decisions overall. However, what constitutes a child's best interest has changed.

In general, the strongest shift in discourse has been from consideration of maternal presumption and moral fitness to the amount of time spent with children and stability of relationships as principal factors to be considered. Other modern factors include a concern for domestic violence and a nod toward the "friendly parent" who will allow access to the other parent and recognition of joint custody.

1. Maternal Presumption

As might be expected, discourse regarding the maternal presumption, prominent in both the 1920s and 1960s, is not stated as a factor in any of the judicial reasoning offered in 1990 and 1995.\(^{46}\) In terms of actual usage, maternal preference has disappeared in the 1990s, but it has been replaced by almost the same number of references to primary caretaker language. Only a few states have adopted a statutory primary caretaker preference.\(^{47}\) However, this study indicates that the language of primary caretaking, e.g., time spent with the children and stability, as well as the term "primary caretaker," are the most commonly enunciated factors in the judicial discourse of the nineties. Critics of a primary caretaker approach complain that it is another way of introducing a maternal preference.\(^{48}\) This study gives some weight to this criticism. However, as will be seen, it is not clear how this shift in language affects the actual determination between mother and father.

2. Moral Fitness

Like maternal preference, moral fitness has nearly disappeared from the discourse of custody decision making in the nineties, and no equivalent category replaces it. Moral fitness was a strong component of the

\(^{46}\) This may be more a function of statutory prohibitions against favoring a maternal presumption than an actual purging of it as a factor for consideration.

\(^{47}\) See, e.g., 1995 Mont. Laws ch. 47 (H.B. 444) (adopting a rebuttable presumption for the primary caretaker).

\(^{48}\) See supra note 39.
best interest standard until fairly recently. In both 1920 and 1960 the largest number of judicial references to determinative factors, second only to the best interests of the child, were made to moral fitness (thirty-six for each year). Cases in the 1920s and in the 1960s routinely stated that custody of young children belonged to the mother, if the mother was "fit." By fit, the courts usually meant morally fit. Adultery on the part of the mother was the most common challenge. However, by the 1960s moral fitness was no longer so rigidly defined, or at least it was balanced by other mitigating factors. For example, allegations of adultery were the basis for the maternal unfitness claim in Messner v. Messner, a 1960 case. In this instance, the custodial mother of five children had lived with her current husband before marrying him.

The appellate court, however, in affirming the trial court's decision, stated:

The law is well settled to the effect that in cases of custody of children, the mother is to be preferred unless she is shown to be morally unfit. The question posed here is, does the one indiscretion she has committed render her morally unfit? A person who is puritanically inclined would say that she is; one who is more practical would say she is not. Courts always endeavor, when possible, to take the practical view of such matters. We do not think that because of this one error in her life, grievous as it was, she should be deprived of the legal custody of the child, especially one of such tender age, requiring her care and attention more than that of the father.

Moral unfitness, as evidenced by extra-marital relationships, appears to hold even less weight in appellate decision making of the 1990s. In In re Wilson, the court noted that the mother had "developed a relationship with another man prior to the separation." She also left the home in the evenings from time to time. Upon divorce the trial court granted physical custody of the two children to their mother. In addressing the mother's adulterous relationship, the appellate court stated:

We do not place great emphasis on Janis' relationship with another man during the later part of the marriage. Although "moral misconduct" is a consideration in custody determinations, it is only one factor. [Citations omitted.] Janis may have stayed out late at night on occasions shortly before the separation without Charles knowing how to contact her, but the children were never placed in danger by her activities.

49. 122 So. 2d 90 (La. 1960).
50. Id. (quoting Estopinal v. Estopinal, 66 So. 2d 311, 313 (La. 1953)).
51. 532 N.W.2d 493 (Iowa Ct. App. 1995).
52. Id. at 495.
3. **Friendly Parents, Domestic Violence, Sexual Abuse, and Joint Custody**

Perhaps the most important small but emerging trend of the 1990s is the recognition of the friendly parent (cited twelve times in 1995). Several states have passed laws which give preference to the parent who is more likely to grant the other parent access to the child.\(^5\) Some of these cases involve allegations of sexual abuse.\(^4\) In several of these cases (5), the friendly parent doctrine is applied in modifications of custody due to interference with the noncustodial parent-child relationship, partially based on later findings of false or unfounded allegations of abuse.\(^5\) In the context of divorce proceedings, allegations of sexual abuse have been portrayed as increasingly common and "the quickest way to get custody of the children."\(^5\) In fact, however, most estimates place the incidence of allegations of sexual abuse at about 2 to 20 percent of all custody or visitation disputes.\(^5\) Our study showed that

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54. In the context of divorce and access proceedings, sexual abuse allegations are becoming increasingly common. One author surveyed California news accounts and concluded that "a wave of false allegations, filed by persons in the midst of custody and visitation disputes, is flooding the police and the courts." Ass'n Fam. & Conciliation Cts., The Sexual Abuse Allegations Project, Final Report (Nancy Thoennes, ed. 1988) [hereinafter Final Report], citing L. Coleman, False Accusations of Sexual Abuse: Have the Experts Been Caught With Their Pants Down? 26 (1985) (unpublished manuscript). Information on the Final Report may be obtained by writing to Nancy Thoennes, Ph.D., Association of Family and Conciliation Courts, Research Unit, 1720 Emerson St., Denver, CO 80218.

In actuality, however, there are only "a small but growing number" of such charges. Estimates of the incidence of sexual abuse allegations range from 2% to 20% of all divorce and visitation cases.

For more on the types of circumstances under which allegations of sexual abuse during a divorce occur, see Kathleen Faller, Sexual Abuse Allegations in Divorce, in Understanding Child Sexual Maltreatment, 211-40 (1990); Lucy Berliner, Deciding Whether a Child Has Been Sexually Abused, in Sexual Abuse Allegations in Custody and Visitation Cases (E. Bruce Nicholson & Josephine Bulkley, eds. 1988).


sexual abuse allegations were explicitly mentioned directly in only a few appellate custody decisions (two in 1990), but were more frequently a factor in the friendly-parent cases (five in 1995).

Domestic violence and joint custody also made small but significant inroads into the courts' explicit reasoning, particularly in 1995. As we will discuss, joint custody also became a solution for custody disputes between mothers and fathers in a small but growing number of cases.

B. Custody Preferences

The data from 1920, 1960, and 1990 reveal remarkably little change in the distribution of custody awards between father and mother. In the 1920s, mothers were more frequently favored as the custodial parent in appellate court decisions than fathers, 46 percent to 35 percent (although fathers were usually granted liberal visitation). Appellate courts were even more likely to prefer maternal custody than paternal in 1960 (50 percent vs. 36.7 percent). By 1990, however, fathers gained on mothers and were favored equally (44 percent vs. 45 percent). The increase of preference to fathers corresponds to a decrease in awards to third parties. This pattern holds true for 1995 as well. This greater even-handedness towards parents is further reflected by the increase of joint custody awards seen in 1995, which allow both parents to retain custody.

Overall, however, it must be emphasized that while there is a slight trend toward fathers, and an even slighter trend against mothers over the course of these four samples, the trends are not statistically significant. The overall pattern is more that of continuity than of change.

1. Third Party or Split Custody

Perhaps the most significant trend across time is not between mothers and fathers, but rather the decline of awards of custody to third parties. In the early 1920s, children were awarded to parties other than the parents in almost 11 percent of the cases, whereas by 1995 only 1...
Table 2
Custody Preferences: Appellate Courts

<table>
<thead>
<tr>
<th>Year</th>
<th>No.</th>
<th>Mother</th>
<th>Father</th>
<th>Both/</th>
<th>Split</th>
<th>Third</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>joint*</td>
<td>Sibs</td>
<td>Parties</td>
</tr>
<tr>
<td>1920</td>
<td>92</td>
<td>42 (46%)</td>
<td>32 (35%)</td>
<td>1 (1.1%)</td>
<td>5 (5.4%)</td>
<td>10 (10.9%)</td>
</tr>
<tr>
<td>1960</td>
<td>98</td>
<td>49 (50%)</td>
<td>35 (36.7%)</td>
<td>2 (2.2%)</td>
<td>9 (9.2%)</td>
<td>3 (3.1%)</td>
</tr>
<tr>
<td>1990</td>
<td>106</td>
<td>47 (44%)</td>
<td>48 (45%)</td>
<td>3 (2.8%)</td>
<td>4 (3.8%)</td>
<td>4 (3.8%)</td>
</tr>
<tr>
<td>1995</td>
<td>100</td>
<td>45 (45%)</td>
<td>42 (42%)</td>
<td>9 (9%)</td>
<td>3 (3%)</td>
<td>1 (1%)</td>
</tr>
</tbody>
</table>

* Joint custody awards refer here to joint physical custody. Joint legal custody awards combined with sole physical custody are tabulated under the applicable gender category.

percent of cases involved a custody award to nonparents. One proffered explanation for this trend is that courts placed less significance on biological parenthood in these early decisions. However, rather than reflecting changed judicial attitudes about biological parenthood, these decisions may reflect more the lack of social support services which frequently forced parents (particularly mothers) to leave their children with others for long periods of time.

Several of the 1920s cases suggest that many of these children were placed with a relative, friend, or neighbor for several years while the parents struggled with either personal or financial problems. For example, the parents in Buseman v. Buseman\(^6\) found themselves in financial straits following their divorce and placed their child with a family who agreed to raise her. Seven years later, when the parents tried to reestablish their parental rights, the court interpreted their agreement to relinquish their daughter as a confession of their unfitness and held that the best interests of the child did not require that she be removed from her new family.\(^6\)

Another trend is a decrease in the practice of splitting siblings, possibly a result of the abolition of the maternal preference. Both in 1920 and 1960, courts were more willing to split siblings than in the 1990s. Almost 10 percent of the cases in 1960 involved split custody arrangements where each parent was awarded custody of at least one child.\(^6\)

In the 1920s, such arrangements were usually court-ordered and justified by the tender years doctrine.

For instance, in Jenkins v. Jenkins,\(^6\) the trial court granted all three children to the husband based on the reasoning that although the wife

\(^{62}\) 299 N.W.2d 807 (S.D. 1980).
\(^{63}\) See also State v. Hoover, 229 S.W. 15 (Ark. 1921).
\(^{64}\) Often, however, these seemed to be voluntary arrangements agreed upon by the parties. See, e.g., Jones v. Jones, 104 N.W. 2d 449 (Iowa 1960); Bryant v. Bryant, 102 N.W.2d 800 (N.D. 1960); Jenkins v. Jenkins, 348 P.2d 1108 (Or. 1960).
\(^{65}\) 181 N.W. 826 (Wis. 1921).
was an otherwise fit parent, she had left her husband without cause. On appeal, the court ignored the trial court’s placing of the children together and awarded the youngest child to the mother based on the tender years doctrine. 66

Forty years later, a court used similar reasoning in Walls v. Walls. 67 The appellate court upheld an order awarding the two younger children to the mother and the two older to the father, noting that “the law favors granting custody of small children to the mother.” 68 Presumably, without the support of the tender years doctrine, separating siblings is less justifiable in the 1990s. 69

2. JOINT CUSTODY

This study also shows that appellate courts are beginning to favor joint custody arrangements. The small proportion of joint custody awards does not change significantly between 1960 and 1990. However, a conspicuous increase is noted in 1995 (2.8 percent vs. 9 percent). The 1995 sample findings, however, are still lower than the estimated proportion of actual joint custody arrangements. 70 This discrepancy is probably so, in part, because joint custody awards are usually agreed upon voluntarily and do not reach the courts. Moreover, courts are often reluctant to order joint custody in disputed cases or where one parent is unwilling. 71

Despite a reluctance to force joint custody on unwilling parents, courts are not precluded from doing so and in fact have done so increas-


68. Id. at 432.

69. Many states have stated opposition to splitting of siblings. See, e.g., In re Mihalovich, 659 S.W.2d 798 (Mo. Ct. App. 1983) (reasoning that absent exceptional circumstances, children of divorced parents should not be separated); Ebert v. Ebert, 346 N.E.2d 240 (N.Y. 1976) (holding that split custody of siblings is not warranted unless the necessity for the separation of siblings is clearly demonstrated by the specific circumstances of individual cases); In re Dow, 380 N.E.2d 1174 (Ill. App. Ct. 1978) (stating that custody order that separates children is not usually in their best interests, but occasionally can be).

70. Exact determinations are difficult as states lack conformity in definitions of joint physical custody and joint legal custody. Additionally, no formal national statistics are available. However, studies have found between 12% to 34% of families with some form of shared physical custody. Kelly, supra note 7, at 124–25.

71. Reidy et al., supra note 12, at 86–87.
ingly over time under certain circumstances.\textsuperscript{72} In \textit{Alt v. Alt},\textsuperscript{73} parents shared joint legal and physical custody of their eight year old daughter. The parents had an alternating four day/three day split between the mother’s and father’s homes. Mrs. Alt petitioned the court for a modification of custody due to communication problems between the parents and Mr. Alt’s failure to provide adequate care for their daughter. The trial court found Mr. Alt was providing adequate care, but the communication difficulty was causing the arrangement to be unsuccessful and thus granted sole custody to the mother.

The Missouri Court of Appeals reversed the trial court’s decision, finding the parental problems did not warrant a change of custody. The court acknowledged the plan might need to be modified for the child’s sake, but it felt the schedule only required some fine-tuning to cure the deficiencies, not a change to sole custody. However, the court here could justify the joint arrangement as exhibiting the original intent of the parties and as the arrangement to which the child had become accustomed. Thus, under these circumstances, the court was not in the position of forcing parents into a situation they had not, at least at some point in time, desired.

3. Unwed Fathers

The demise of the maternal presumption coincided with the legal acknowledgment of unwed fathers’ rights. In the 1972 \textit{Stanley v. Illinois} case,\textsuperscript{74} the Supreme Court recognized a single father’s interest in the continuing care and custody of his children. In the twenty years following that decision, unwed fathers have made appreciable strides toward achieving equal footing with that of unmarried mothers in securing custody of their children.\textsuperscript{75} The most recent custody cases in our study,

\textsuperscript{72} See, \textit{e.g.}, \textsc{Ariz. Rev. Stat.} § 25–332 (1996) (The court may issue order for joint custody over objections of one of the parents if the court makes written findings as to why it is in child’s best interest); \textsc{Mo. Stat.} 452.375(4) (1996) (Presumption for joint custody which shall not be denied solely for the reason that one parent opposes it).

\textsuperscript{73} 896 S.W.2d 519 (Mo. Ct. App. 1995).

\textsuperscript{74} 405 U.S. 645 (1972) (holding that the court may not remove an unwed father’s children without a showing of unfitness).

\textsuperscript{75} See, \textit{e.g.}, \textsc{Cal. Fam. Code} § 3010 (Deering 1995) (the mother and the father of an unemancipated child are equally entitled to custody); \textsc{La. Civ. Code Ann. art.} 245 (1996) (custody proceeding for illegitimate child done in accordance with provision for custody incident to divorce). \textit{But see} Kara L. Boucher & Ruthann M. Macolini, \textit{The Parental Rights of Unwed Fathers: A Developmental Perspective}, 20 \textsc{N.C. Cent. L.J.} 45, 45–46 (1992) (arguing that unwed fathers have few rights in custody proceedings).
Are Mothers Losing Custody?

those from 1995, reveal a substantial number of unmarried fathers seeking court-ordered awards and winning.\textsuperscript{76}

In \textit{Miller v. Mangus},\textsuperscript{77} Gerald Miller, the biological father, filed for custody of his now fourteen year old son, J.B. The parents had lived together but had never married. The trial court awarded custody to Gerald based upon the child’s best interest and findings that the mother, Sandra Mangus, had intentionally interfered with Gerald and his son’s relationship. The Idaho Court of Appeals affirmed the lower court’s decision. The magistrate noted that although J.B. was living with his stepfather, who was fulfilling the paternal role, “the bottom line is that Gerald is J.B.’s father.”\textsuperscript{78} The magistrate expressed concern that half of J.B.’s identity was being withheld from him because his mother denied his biological father access to him. Friendly parent concerns, and an emphasis on biological relatedness, combined to override the fact that Miller was an unwed father.

\textbf{C. Expert Witness Utilization}

One of the main trends that can be ascertained from the three-decade survey is the growing use of experts in child custody cases in the 1990-95 period.\textsuperscript{79} While virtually non-existent in 1920, use of experts increased dramatically from 1960 to 1990. Expert witnesses were not mentioned at all in the 1920 samples. By 1960, however, the use of experts had gradually increased, with almost 10 percent of the cases in our sample indicating the use of expert testimony at the trial level. By 1990 the use of experts had increased more than threefold, with expert testimony evident in over 32 percent of the cases. An increase was observed again in 1995, with experts mentioned in 38 percent of cases.\textsuperscript{80} It is also worth noting that by 1990, clinical psychologists had firmly taken the lead from psychiatrists as the professionals most utilized as expert witnesses, with social workers, medical doctors and unspecified “therapists” trailing far behind.


\textsuperscript{77} 893 P.2d 823 (Idaho Ct. App. 1995).

\textsuperscript{78} \textit{Id.} at 827.

\textsuperscript{79} For a critical interpretation of custody evaluations, see Robert J. Levy, \textit{Custody Investigations as Evidence in Divorce Cases}, 21 \textsc{Fam. L.Q.} 149 (1987).

\textsuperscript{80} This figure represents the minimum number of cases at which an expert was used. Since the expert testimony is given at the trial court level, many appellate decisions do not identify whether or not an expert was used.
Table 3  
Frequency of Use of Various Types of Experts  
(1960, 1990, and 1995)

<table>
<thead>
<tr>
<th>Expert Type</th>
<th>1960*</th>
<th>1990*</th>
<th>1995</th>
</tr>
</thead>
<tbody>
<tr>
<td>Psychiatrist</td>
<td>3 (30%)</td>
<td>11 (18.3%)</td>
<td>9 (12.7%)</td>
</tr>
<tr>
<td>Psychologist</td>
<td>0</td>
<td>27 (45%)</td>
<td>26 (36.6%)</td>
</tr>
<tr>
<td>Medical doctor</td>
<td>2 (20%)</td>
<td>5 (8.3%)</td>
<td>4 (5.6%)</td>
</tr>
<tr>
<td>Social Worker</td>
<td>3 (30%)</td>
<td>9 (15%)</td>
<td>7 (9.9%)</td>
</tr>
<tr>
<td>“Therapist”</td>
<td>0</td>
<td>0</td>
<td>6 (8.4%)</td>
</tr>
<tr>
<td>Private Detective</td>
<td>2 (20%)</td>
<td>1 (1.7%)</td>
<td>0</td>
</tr>
<tr>
<td>“Custody evaluator”</td>
<td>0</td>
<td>0</td>
<td>3 (4.2%)</td>
</tr>
<tr>
<td>Other</td>
<td>0</td>
<td>3 (5%)</td>
<td>5 (7%)</td>
</tr>
<tr>
<td>Unknown</td>
<td>4 (6.7%)</td>
<td>11 (15.5%)</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>10 (100%)</td>
<td>60 (100%)</td>
<td>71 (100%)</td>
</tr>
</tbody>
</table>

* A case may have more than one expert.

While in 1960 the parents generally employed their own experts in custody battles (75 percent of experts employed by parents), by 1990, the court itself appointed the experts in 51 percent of the cases.

1. Expert Witness Testimony

The nature of expert testimony has shifted as well. Typically in the 1960s, a psychiatrist was called on to testify regarding how the mental stability of one of the parents affected the psychological well-being of the child. In *Vishnevsky v. Vishnevsky*, 81 the father employed two psychiatrists to testify regarding the mother's emotional illness and how her "emotional disorganization would have bad effects on the children, that they would suffer and have difficulty in school and at home and in adjusting with their playmates." 82

Similarly, in *Galbraith v. Galbraith*, 83 custody of the four children was originally granted to the father; five years later the mother, who suffered from a mental illness, petitioned for modification to receive custody of her two daughters. A psychiatrist testified on the mother's behalf to the effect that she was sufficiently mentally competent to care for the children. In this case, however, the court denied her petition.

By 1990, the trend had shifted in favor of psychologists over psychiatrists. The subject of expert testimony shifted as well. The majority of experts were still called upon to predict the psychological well-being

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82. *Id.* at 318.
of the child, but now this was discussed more in terms of the strength of the parent-child bond and the emotional attachment of the child to the parent.\textsuperscript{84} For instance, in \textit{Palazzo v. Coe},\textsuperscript{85} the court appointed both a psychologist and a psychiatrist to testify regarding a personality conflict between one of the children and his mother. The stability of the child’s living arrangement was also a frequent subject for testimony in 1990.\textsuperscript{86}

The greatest change in the nature of expert witness testimony between 1960 and 1990 was the introduction of testimony regarding sexual\textsuperscript{87} or physical abuse.\textsuperscript{88} Abuse was the subject of testimony by twelve of the experts at trial in 1990, while never mentioned in 1960. When sexual abuse was at issue, frequently more than one expert testified. In \textit{Newsom v. Newsom},\textsuperscript{89} the court heard testimony from four different experts, two of whom were appointed by the court, regarding alleged sexual abuse of the children by the father. One court-appointed expert initially decided that there was no indication of abuse, but upon speaking with another counselor who had seen the children, changed his testimony based solely upon the mother having provided the counselor with explicit details of abuse, which were later determined to be untrue. In the end, the court decided to disregard the testimony of this expert, and ultimately concluded that there had been no abuse by the father.

\begin{table}
\centering
\caption{Subjects of Expert Testimony (1995 figures not available.)}
\begin{tabular}{lrr}
\hline
Year: & 1960 (n=19)* & 1990 (n=53)* \\
\hline
Psychological Well-Being Of Child & 17 & 12 \\
Lover/Paramour & 1 & \\
Good Supporter & 1 & 4 \\
Stability & & 10 \\
Sexual/Physical Abuse & & 12 \\
Psychological Theory & & 3 \\
Other & & 12 \\
\hline
\end{tabular}
\end{table}

\* Some experts gave more than one reason. Not all expert testimony is described in the appellate reports.

84. \textit{See infra} Table 4.
86. \textit{See infra} Table 4.
89. 557 So. 2d 511 (Miss. 1990).
Table 5
Patterns of Custody Decisions by Presence of Experts at Trial
(1960, 1990, and 1995 combined)

<table>
<thead>
<tr>
<th></th>
<th>n*</th>
<th>Mothers</th>
<th>Fathers</th>
</tr>
</thead>
<tbody>
<tr>
<td>w/o expert:</td>
<td>190</td>
<td>95 (50%)</td>
<td>95 (50%)</td>
</tr>
<tr>
<td>w/ expert:</td>
<td>80</td>
<td>38 (47.5%)</td>
<td>42 (52.5%)</td>
</tr>
</tbody>
</table>

* Joint, split, and nonparent awards not included.

2. Do EXPERTS MAKE A DIFFERENCE?

Between 1960 and 1990, there was more than a fivefold increase in the use of experts in custody trials. However, when comparing overall results between cases in which experts were and were not utilized, this investigation does not indicate a statistically significant difference in determining which parent receives custody.

While one of the goals of this study was to determine the impact of social science research, particularly psychological research, on judicial reasoning in custody disputes, there was very little explicit evidence regarding this phenomenon. While expert witnesses were used increasingly between 1960 and 1990-95, appellate court judges rarely referred to the scientific authority on which the experts presumably based their judgments. In addition, despite the outpouring of psychological research regarding parenting, gender differences, and the impact of divorce on children in the mid-to-late twentieth century, cases examined in the three decade survey never referred to a social science or psychological study per se as a basis for a custody decision.

90. In an attempt to gauge the impact of social science research on custody decisions, an additional study to the one described in section II, supra, was conducted on WESTLAW in the MFL-CS (family/state law) database, limited by a key number search. Topic numbers used were 211 (infants), 134 (divorce), and 285 (parent and child). These were then further limited by key numbers relating specifically to child custody. This study examined all the custody cases that could be identified in two decades: 1960-70 and 1980-90. It revealed 2,875 cases in the 1960-70 decade, and 8,607 cases in the 1980-90 decade. These cases were then surveyed for references to experts in the relevant social science fields. Experts searched for included: Solnit, Wallerstein, Bowby, Piaget, Spock, Chambers, Mnookin, Freud, M. Meade, and Brazelton. This search revealed a modest citing to psychological authorities from the 1980s on. Only two authorities, however, were cited more than 10 times between 1980 and 1990: ANNA FREUD, AL SOLNIT & JOSEPH GOLDSTEIN, BEYOND THE BEST INTERESTS OF THE CHILD (1973), cited 22 times (.25% of the cases); and child custody expert Judith Wallerstein was mentioned 11 times (.13% of the cases), with judges referring to various of her publications.
IV. Conclusion

Perhaps the most striking finding that can be drawn from this three decade study spanning most of the twentieth century is that everything changes, and yet everything remains virtually the same. The rhetoric of judicial decision making has been completely transformed since the 1920s; maternal preference and moral fitness have been replaced by relationship criteria such as the amount of time spent with children and the stability of the child’s relationships. The modest introduction of expert witness testimony in 1960 cases presages the flood of experts which appear in the 1990s.

Still, in spite of all this outward change, mothers and fathers in 1920, 1960, and 1990-95 are each still favored close to half the time. This remarkable continuity in the face of what appears to be massive discontinuity, both in rhetoric and procedure, is not easily explained. One possible explanation is that mothers, not fathers, want custody in the vast majority of cases, but when fathers fight for custody they have always had about a 50 percent chance of winning, no matter what arguments or what experts they employ. While the “‘best interests of the child’” has been the prevailing rule in child custody decisions since at least 1920, the judicial understanding of what constitutes “‘best interests,’” at least rhetorically, has changed significantly. Mothers’ preference and moral fitness have given way to gender-neutral criteria, such as stability and time spent with the child. There are those who argue that such criteria as time spent with the child, or “‘primary caretaker,’” translates to maternal preference. That may be one explanation of why fathers have not gained more. Others have claimed that judges consider mothers more critically today. In a modern two-parent working family, mothers may be penalized for not staying home, while fathers, who may participate more than in the past, may be looked on more favorably even if they are not the primary caretaker. Perhaps “‘working mother’” has replaced “‘moral unfitness’” as a criteria for granting custody to fathers.

While experts are utilized in over a third of the cases in 1995, it is not clear how great an effect their testimony makes to the final decision. Judges infrequently state that the expert’s testimony is a determining factor, and overall comparisons show little difference in the outcomes of cases with and without experts. Nonetheless, the very strong trend

toward using expert testimony and the court-initiated appointment of these experts 51 percent of the time indicates that, at some level, expert testimony is at least perceived as useful in custody determinations. The importance of experts, particularly those court-appointed, has been corroborated by other studies which survey judges as to the factors they take into account in child custody determinations. The frequent use of experts by both parents may simply cancel each other out.

To emphasize the broad continuities, however, is not to dismiss emerging trends. In addition to the transformed rhetoric and the greatly increased use of experts, several changing patterns of appellate court custody decision making can be identified in this study, some of which may become significant in the near future. Third parties practically disappear, while joint custody makes a substantial entrance by 1995, with more than 5 percent of the cases favoring both parents. Unwed fathers also emerge as contenders for custody in a small number of cases in 1995. In addition, the 1990s witness, in a number of cases, the use of expert testimony regarding alleged physical or sexual abuse on the part of one parent to assist in a custody determination.

Seen in this larger historical context, however, it is apparent that rhetoric alone cannot predict custody outcomes. It is not clear that the factors judges claim are most important in determining custody have much to do with the ultimate result. Nor does the psycho-social rhetoric introduced by the massive introduction of experts in the courtroom seem to make a significant difference. The continuity of decision making may mean that divorcing families look much as they always have, and judges exercise the same judicial discretion to achieve similar results.

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93. Lowery, supra note 13.