CHILD SUPPORT AND VISITATION: RETHINKING THE CONNECTIONS

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The complex personal and legal relationships between child support and visitation have led to the development of different sets of rules which "connect" or "disconnect" these two issues to varying degrees. Connecting rules link the two together. For example, a parent who fails to pay child support can be denied visitation, and vice versa. Conversely, a parent sued for nonpayment of child support could assert denial of visitation as a defense. Some states have developed more restrictive connecting rules which permit linkage between child support and visitation only by court order or parental contract. The current trend is toward developing disconnecting rules. Under these rules, one parent's failure to pay child support or permit visitation bears no relationship to the other parent's duty to pay support or permit visitation. That trend, however, is neither universal nor unidirectional.¹

A successful solution to the questions of whether, how and to what degree, child support and visitation should be connected is one which strikes the right balance among three interests: the child's needs for financial support and emotional and physical nurturance from both parents; the parents' need for human association; and the parents' need for personal autonomy. Unfortunately, neither the connecting rules nor the disconnecting rules satisfactorily balance these interests.

Both sets of rules fail the child. They permit optional parenthood on

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the part of the nonresidential parent who is free to decide whether to participate in the upbringing of the child or to ignore the child completely. Connecting rules even further disadvantage the child. The nonresidential parent can withhold support payments whenever she believes visitation is being denied, depriving the child of necessary financial support.

Both connecting and disconnecting rules fail the parents as well. The residential parent’s need for personal autonomy goes unsatisfied because neither set of rules requires the nonresidential parent to share in the nurturing tasks. At the same time, under connecting rules, the nonresidential parent can be denied opportunities to be with the child, thus limiting her need for human association. Moreover, gender bias permeates both sets of rules. Under connecting rules, the father’s desire for contact with his child is given a preference over the mother’s need for regular financial support for the child. Further, she is subject to indefinite and restrictive standards about facilitating the father’s access to the child, while he is subject to no standards about what he must do. Under disconnecting rules, the parental paradigm is a gendered one of distinctly separate mother/father, female/male roles. Nurturing work is associated exclusively with women and mothers and is accorded no recognition. At the same time, the sole legally cognizable paternal contribution is money, no matter what the level of nurturing a particular father may have been giving to his children.

A new and different approach is needed to balance the relationships between child support and visitation — an approach which serves the needs of the children and parents and does so in gender-neutral ways. Under a new approach, priority should be accorded to the needs of the child for security on both the financial and emotional/physical levels. Both parents should be given incentives to be responsible to the child on both levels. At the same time, the needs of both parents for personal autonomy and for human association should be considered and accommodated to the extent possible that is consistent with the child’s needs. Finally, both parents’ needs should be considered without regard to gender. This type of

2. "Residential parent" refers to the parent with whom the child resides and "nonresidential parent" refers to the other parent. This terminology avoids distinguishing between those parents who have a court order for custody and visitation and those who do not, since presence or absence of a court order is rarely determinative of the issues being considered here. Also, such terminology avoids contrasting "custodial" parents with "visiting" parents because both terms misstate the roles played by such parents in the lives of each other and the child.

3. See infra notes 130-47 and accompanying text.
4. See infra notes 150-56 and accompanying text.
5. See infra notes 150-54 and accompanying text.
6. Id.
approach, a dual parent/dual responsibility formula, calls for both parents
to provide the child with support of all kinds, whether financial, emotional
or physical. It recognizes that the child and both parents are members of a
family system, even though they occupy separate households, and that the
actions of each one affects the others.

I. CURRENT RULES

Most states are moving toward adopting disconnecting rules with
regard to visitation and child support. However, these developments are
not occurring uniformly or at the same pace within the states. Currently,
the various state laws can be grouped into three categories which can be
seen through a review of case law development in four representative
states.

A. Child Support and Visitation are Always (or Almost Always)
Disconnected: California and Pennsylvania

By recent statute and case law, California follows the disconnecting
rule that a court may not condition future visitation on the payment of child
support,7 and child support cannot be excused or terminated for the failure
of the residualent parent to permit visitation.8 Furthermore, denial of

will not deny visitation rights to a father delinquent in payments through no fault of his
own); Price v. Dawkins, 242 Ga. 41, 247 S.E.2d 844 (1978) (visitation rights should not be
made to depend on whether alimony or child support has been paid); Hess v. Hess, 87 Ill.
App. 3d 947, 409 N.E.2d 497 (1980) (lack of payment has no bearing, per se, on visitation
rights); Crooks v. Crooks, 425 So. 2d 385 (La. App. 1982) (court's conditioning visitation
privileges upon support payments was an abuse of discretion); Henshaw v. Henshaw, 83
Mich. App. 68, 268 N.W.2d 289 (1978) (support payments may not be used as a weapon
to force a child's visitation); Fiore v. Fiore, 49 N.J. Super 219, 319 A.2d 414 (App. Div. 1958)
duty of support and right of visitation are not dependent on each other); Galdos v. Galdos,
48 Wash. 2d 276, 293 P.2d 388 (1956) (duty of support is not quid pro quo for visitation
privilege).

denied, Roesch v. Roesch, 440 U.S. 915 (1979); Smith v. Sup. Ct. of San Mateo County, 68
Reiter v. Reiter, 225 Ark. 157, 278 S.W.2d 644 (1955) (child should not be deprived of right
to father's continued support because of mother's misconduct in alienating the child from
father); Prager v. Smith, 195 A.2d 257 (D.C. App. Div. 1963) (father not relieved of duty to
support sons where mother and second husband turn sons against their father); Comiskey v.
Comiskey, 48 Ill. App. 3d 17, 366 N.E.2d 87 (1977) (father's failure to pay child support
constitutes contempt of court regardless of mother's assertion that she would accept
payments or because father was not allowed to see the child); Sweat v. Sweat, 238 Iowa 999,
29 N.W.2d 180 (1947) (father's right to visit children is not conditioned on his timely
compliance with support payment); Dalton v. Dalton, 367 S.W.2d 840 (Ky. 1963) (children
visitation is no defense to a claim for support brought under the Uniform Reciprocal Enforcement of Support Act (URESA). California will,

should not be deprived of father's support because of parents' dissensions); Stancill v. Stancill, 286 Md. 530, 408 A.2d 1030 (1979) (denial of visitation privileges is not defense to nonpayment of child support or alimony); State ex rel. McDonnell, 337 N.W.2d 645 (Minn. 1983) (deprivation of visitation is not proper factor to consider in determining what level of support is appropriate); State ex rel. Williams, 647 S.W.2d 590 (Mo. App. 1983) (neither obligation for payment of support not duty to permit visitation are suspended by one party's failure to comply with divorce decree); Appert v. Appert, 341 S.E.2d 342 (N.C. App. 1986) (order overruled placing child support paid by father in escrow with visitation allowed); Otten v. Otten, 245 N.W.2d 506 (S.D. 1976) (father seeking modification of divorce decree to provide visitation rights is not justified in withholding child support payments); Pendray v. Pendray, 35 Tenn. App. 284, 254 S.W.2d 204 (1951) (father not relieved of obligation to support his children because their mother had allegedly alienated their affection). But see In re Marriage of Boudreaux, 201 Cal. App. 3d 447, 247 Cal. Rptr. 234 (1988) (court held that deliberate sabotage of visitation rights may justify modification of original support and custody orders as a method to enforce visitation).

9. Unif. Reciprocal Enforcement of Support Act, 9B U.L.A. 393 (1968). One form or another of this Act is in force in every state and territory plus the District of Columbia. There is sufficient similarity between all versions of the Act so that it is reciprocal in every state and territory. H. Clark, Law of Domestic Relations § 6.6 (1968). In regard to the defense of denial of visitation under the Act, see Moffat v. Moffat, 27 Cal. 3d 645, 612 P.2d 967, 165 Cal. Rptr. 877 (1980); Smith v. Superior Court of San Mateo County, 68 Cal. App. 3d 457, 137 Cal. Rptr. 348 (1977). Accord Gruber v. Wallner, 198 Colo. 235, 598 P.2d 135 (1979) (father's support obligation was not suspended by the mother's violation of visitation provisions); People ex rel. Argo, 97 Ill. App. 3d 425, 422 N.E.2d 1005 (1981) (under URESA, violation of visitation rights does not suspend or excuse the other parent's failure to comply with child support obligations); Beneventi v. Beneventi, 185 N.W.2d 219 (Iowa 1971) (district court lacked jurisdiction to condition child support under Uniform Support of Dependants Law on father's right to have children visit him outside state of mother's residence); Brown v. Turnbloom, 89 Mich. App. 162, 280 N.W.2d 473 (1979) (in URESA action, Michigan circuit judge, in determining amount of support, should not have considered alleged denial of obligator's visitation rights); England v. England, 337 N.W.2d 681 (Minn. 1983) (alleged interference with father's parental rights by wife's moving children to Louisiana was not a proper factor to consider in enforcing interstate support obligations under URESA); Pifer v. Pifer, 31 N.C. App. 486, 229 S.E.2d 700 (1976) (trial judge had no jurisdiction to condition support payments upon certain visitation privileges for defendant with his children); Craft v. Hertz, 182 N.W.2d 293 (N.D. 1970) (under URESA, defense of denial of visitation was not available to husband in suit by wife for child support); Todd v. Pochop, 365 N.W.2d 559 (S. Dak. 1985) (custodial parent's fictitious and contemptuous inference with visitation rights could not be raised as equitable defense in URESA action); Hoover v. Hoover, 271 S.C. 177, 246 S.E.2d 179 (1978) (in URESA proceeding, court of the responding state has no subject matter jurisdiction to adjudicate matters of visitation); Hester v. Hester, 59 Tenn. App. 613, 443 S.W.2d 28 (1969) (refusal to divorced mother to honor visitation provisions of divorce decree and to allow divorced father to see the children in her custody did not relieve father of his obligation to honor support provisions of divorce decree). Contra Washington ex rel. Burton, 196 Cal. App. 3d 451, 241 Cal. Rptr. 812 (Cal. App. 5 Dist. 1987) (under URESA, custodial parent, who concealed herself and her children from noncustodial parent, could not recover child support arrearage accrued during period of concealment); Chandler v. Chandler, 109 N.H. 477, 256 A.2d 157 (1969) (URESA did not preclude court from
however, enforce a term in an out-of-state decree which makes the payment of child support dependent on the provision of visitation.\footnote{10} And, in a URESA case, no duty of support will be found if a court in the state with jurisdiction over the divorce decree ordered the duty suspended because of interference with visitation.\footnote{11}

Pennsylvania, too, will not excuse child support arrearages because of a denial of visitation. The Pennsylvania courts have adhered to this disconnecting rule even in such extreme cases as where the residential parent hid the child for six months\footnote{12} or moved to another state.\footnote{13} They also apply the same rule in claims brought under URESA.\footnote{14} However, unlike the California exception, Pennsylvania will find a duty of support under

reducing a support order until such time as agreement could be reached by parties as to reasonable rights of visitation); Porter v. Porter, 25 Ohio St. 2d 123, 236 N.E.2d 299 (1971) (trial court did not abuse discretion in conditioning father's duty to support the children upon the mother's compliance with reasonable visitation privileges, so long as mother was able to fully support the children).

California also holds the nonresidential parent liable for support under URESA where he or she has a custody order and is being deprived of custody by the residential parent. Clark v. Clark, 246 Cal. App. 2d 619, 54 Cal. Rptr. 875 (1966). Accord Clearwater v. Pettrash, 198 Colo. 231, 598 P.2d 138 (1979) (violation by one parent of the terms of a custody decree may not be raised as a defense in an action under URESA to obtain child support from the other parent); State ex rel. Terry, 80 N.M. 185, 453 P.2d 206 (1969) (issue involved in proceedings under URESA did not involve question of custody nor choice of abode of parties but only the support of two minor children); McCoy v. McCoy, 53 Ohio App. 2d 331, 374 N.E.2d 164 (1977) (mother's removal of child from the jurisdiction in contravention of court order was of no consequence in regard to father's duty under URESA to reimburse the other state); State ex rel. Hubbard v. Hubbard, 110 Wis. 2d 683, 329 N.W.2d 202 (1983) (matters relating to custody could not be raised as a defense or counterclaim in URESA action). \textit{Contra}, State v. Morales, 35 Ohio App. 2d 56, 299 N.E.2d 920 (1973) (where father had obtained order of custody of children and mother thereafter removed children out of court's jurisdiction, father had no duty to make payments to mother for child support).


URESA even when a court in another state relieved the obligor of the duty because of denial of visitation.\textsuperscript{15}

As to visitation, Pennsylvania does not permit the failure of the nonresidential parent to pay child support to affect that parent's right to visitation.\textsuperscript{16} At the same time, Pennsylvania will not require a child to visit a parent who is paying support.\textsuperscript{17} The only exception to the strict disconnection of visitation from support is where the failure to pay support by a financially-able parent is considered evidence that visitation rights are being asserted solely for harassment purposes.\textsuperscript{18}

\textbf{B. Child Support and Visitation are Sometimes Connected: Florida}

Florida courts have created an unusual, but not unique, set of interrelationships between child support and visitation. The payment of future child support may be conditioned on the residential parent permitting visitation, and arrearages accrued during a time when visitation was denied may be excused.\textsuperscript{19} Also, if the child being supported refuses to visit,

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  Even Pennsylvania has its exceptions, however. In one, child support arrearages were excused where the residential mother denied the nonresidential father and the probation department knowledge of her and the children's whereabouts for nearly 14 years. \textit{Commonwealth ex rel.} Chila, 226 Pa. Super. 336, 313 A.2d 339 (1973). In the other, arrearages were excused when the residential mother waited an extended period of time before seeking to collect them and the nonresidential father had been told by the court clerk that he was not liable for the arrearages. \textit{Kramer v. Kramer}, 265 Pa. Super. 58, 401 A.2d 799 (1979).
  
  
  
  
  19. Craig v. Craig, 157 Fla. 710, 26 So. 2d 881 (1946); Warrick v. Hender, 198 So. 2d 348 (Fla. App. 1967); Denton v. Denton, 147 So. 2d 545 (Fla. App. 1962); Hardv v. Hardy, 118 So. 2d 106 (Fla. App. 1960); Cortina v. Cortina, 108 So. 2d 63 (Fla. App. 1958). \textit{Accord} Barnaby v. Barnaby, 290 Mich. 335, 287 N.W. 535 (1939) (father not obliged to make child support payments unless permitted to see child); Levell v. Levell, 183 Or. 39, 190 P.2d 527 (1948) (mother's refusal to permit father to visit children while they are out of state relieves father of support obligation); Weinbaum v. Weinbaum, 153 A. 303 (R.I. 1931) (father's child support payments suspended while child was out-of-state); Krause v. Krause, 58 Wis. 2d 499, 206 N.W.2d 589 (1973) (conditioning order permitted if in children's best interest).
  
  In Illinois, arrearages will not be excused where the nonresidential parent withheld support in a self-help effort to induce the residential parent to permit visitation, but a court
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child support may be terminated. In a URESA case, however, denial of visitation may not be raised as a defense, unless the child support duty had been conditioned on visitation by court order.

While Florida permits a nonresidential parent to withhold support, without prior court approval, if the residential parent has refused to allow visitation, the opposite is not generally allowed. A decree may not be entered which conditions all future visitation on the nonresidential parent being current with child support. A residential parent may be permitted to deny the nonresidential parent visitation only for a particular day and only if a particular support payment is unpaid.

C. Child Support and Visitation are Always (or Almost Always) Connected: New York

Of the four states surveyed here, New York has the greatest number of ways to connect child support and visitation. The oldest New York cases involve contracts between separating mothers and fathers which provided that the father would financially support the children if he was permitted to visit them. The earliest of these contracts may have been entered into because no statute accorded the custodial mother the right to future child support unless the child was indigent. Despite its possible origin as a substitute for a statutory right to child support, the reciprocal, child support for visitation, separation contract has survived the creation of such child support laws. Currently, such a reciprocal separation contract remains enforceable even after divorce, unless the issues are covered by the divorce decree.

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may order that future support will be paid only if visitation occurs. Cooper v. Cooper, 59 Ill. App. 3d 457, 375 N.E.2d 925 (1978).
25. See infra note 29 and accompanying text.
A separation contract is reciprocal when it requires the nonresidential parent to pay child support as long as the residential parent permits visitation, and vice versa. In the earliest case, decided in 1890, a New York court found that the father (nonresidential parent) had a complete defense to the mother's claim for unpaid support arrearages if he could show that she had denied him the contractual right of visitation.

Under a reciprocal separation contract, the nonresidential parent can be excused from the duty to pay child support permanently if the residential parent willfully or in bad faith denies visitation. Bad faith can be demonstrated by the residential parent leaving the state without first advising the other parent, or by the residential parent refusing visitation on the ground that the child's safety may be in danger when that issue had already been adjudicated in the nonresidential parent's favor in a prior

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Keller, 20 Misc. 2d 303, 189 N.Y.S.2d 829 (1959); Magrill v. Magrill, 16 Misc. 2d 896, 184 N.Y.S.2d 516 (1959); see also Wheeler v. Wheeler, 299 N.C. 633, 263 S.E.2d 763 (1980) (each party's respective duties under separation agreement were interdependent and no dependent, and thus former husband's duty to pay alimony existed so long as former wife performed her duties under contract). Contra Abreu v. Abreu, 46 Misc. 2d 942, 261 N.Y.S.2d 687 (1965) (dependent covenants of support and child visitation contained in separate maintenance agreement were no longer dependent after their incorporation into Alabama divorce decree).

A parent losing the right to collect child support under the terms of an unmerged agreement is not barred from seeking an award of child support under the terms of the divorce decree or under the statutory duty of child support. The latter duty, however, may be only owed only to impoverished children. See Baumann v. Goldstein, 201 N.Y.S.2d 575 (1960); Magrill v. Magrill, 16 Misc. 2d 896, 184 N.Y.S.2d 516 (1959); Bowen v. State, 56 Ohio St. 235, 46 N.E. 708 (1897). Contra Callender v. Callender, 37 A.D.2d 360, 325 N.Y.S.2d 420 (1971) (where separation agreement required husband to pay support, gave wife custody of child and gave husband visitation rights also provided that its terms should not be affected by any decree of divorce, separation agreement survived husband's divorce decree). Despite having reciprocal terms, an agreement which is incorporated into a divorce decree but not merged will not necessarily produce a decree with reciprocal terms, although it will serve to evidence the parties' intentions if a modification of future support is sought. See Webster v. Webster, 14 Misc. 2d 64, 176 N.Y.S.2d 799 (1958).


28. During the period from roughly 1890 to 1940, reciprocal child support/visitation contract terms were litigated in a number of states in addition to New York and upheld by most. See, e.g., Stuart v. Stuart, 133 F.2d 411 (D.C. Cir. 1943); Hammond v. Hammond, 131 F.2d 351 (D.C. Cir. 1942), cert. denied, 318 U.S. 770 (1943); Cole v. Addison, 153 Or. 688, 58 P.2d 1013 (1936); James v. Golson, 174 S.W. 688 (Tex. Civ. App. 1915).


proceeding.\textsuperscript{39} If no willfulness or bad faith is found, child support can still be excused for the period when visitation was denied — regardless of the residential parent’s reason for denying visitation.\textsuperscript{39} For example, one mother whose occupation required her to travel was denied child support for the seven months she took the child out of state while she worked.\textsuperscript{34} Another was denied child support for the six months she was out of the country seeking medical treatment for herself and one of the children.\textsuperscript{38} In a third case, a divorce decree incorporating a reciprocal contract was modified to eliminate the support duty because the child was in another state with his mother, who had moved there with her new husband.\textsuperscript{36}

Even where the parents have not entered into a reciprocal contract, New York courts have occasionally approved the entry of a child support order in which payment of support is conditioned upon the child visiting the nonresidential parent.\textsuperscript{87} Most often, however, the support decree is unconditional in the absence of a reciprocal contract.

Under an unconditional decree, New York courts usually follow the disconnecting rule that the denial of visitation does not excuse the child support obligation, whether the enforcement action is brought in New York or in another state under URESA.\textsuperscript{88} The unconditional decree is enforced without exception when the child is in need of public assistance.\textsuperscript{89} In cases where the child is not impoverished, exceptions abound in both URESA and non-URESA cases. For example, the residential parent may be denied the use of the contempt remedy to enforce the past and future support obligation if he or she has moved with the children to another state.

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  \item 32. \textit{In re} Estate of Noel, 173 Misc. 844, 19 N.Y.S.2d 370 (1940).
  \item 33. \textit{See infra} notes 34-36 and accompanying text.
  \item 34. Richards v. Richards, 5 Misc. 2d 46, 157 N.Y.S.2d 874 (1956).
  \item 35. Muth v. Wuest, 76 A.D. 332, 78 N.Y.S. 431 (1902).
  \item 36. Webster v. Webster, 14 Misc. 2d 64, 176 N.Y.S.2d 799 (1958).
\end{itemize}
or country, or has "pervasively interfered" with the nonresidental parent's visitation rights. In such cases, it may be important that the nonresidental parent had objected to the children's move, although there are instances where such objections are not even discussed. Enforcement of the support order may even be denied when it is the child, rather than the custodial parent, who refuses visitation to the nonresidental parent.

Also, New York courts have entered orders conditioning the right of visitation on the payment of child support so long as the nonresidental parent had adequate financial resources to pay support. However, no visitation suspension order has been upheld since the mid-1970's when


41. Biamby v. Biamby, 114 A.D.2d 830, 494 N.Y.S.2d 741 (N.Y. App. Div. 1985). Under a section of the Domestic Relations Law adopted in 1978, a nonresidental parent who is denied visitation is free to withhold spousal support, but according to a 1986 amendment, he or she may not withhold child support. While a court may suspend child support if visitation is denied, the nonresidental parent remains liable for child support until such an order is entered. N.Y. DOM. REL. LAW § 241 (McKinney 1988).


45. Sandfort v. Sandfort, 278 A.D. 331, 913, 105 N.Y.S.2d 343 (1951); Ex parte Rich, 254 A.D. 6, 3 N.Y.S.2d 689 (1938); New York ex rel. Norris, 209 N.Y.S.2d 232 (N.Y. App. Div. 1960); Ex parte Travis, 126 N.Y.S.2d 130 (N.Y. App. Div. 1953). Accord Johnston v. Johnston, 229 Ala. 592, 158 So. 528 (1934) (divorced husband was required to keep up alimony payments as condition to seeing children and having temporary custody of them once a week); Reardon v. Reardon, 3 Ariz. App. 475, 415 P.2d 571 (1966) (trial court could properly find that minor children of divorced parties would be benefited by conditioning father's visitation privileges upon payment of support); Lewis v. Lewis, 260 Ark. 691, 543 S.W.2d 222 (1976) (deliberate nonsupport, violence or possible harm to children are valid reasons for denying visitation rights); Raible v. Raible, 242 Md. 586, 219 A.2d 777 (1966) (court has power to make rights of visitation dependent upon performance of financial obligations imposed by decree); Rohr v. Rohr, 709 P.2d 382 (Utah 1985) (restricting father's visitation rights as a result of his willful and intentional failure to support his child was proper); Prins v. Prins, 88 Nev. 261, 496 P.2d 165 (1972) (father's visitation rights conditioned upon payment of all arrearages in child support, and in being current in his continuing payments); Hallberg v. Hallberg, 113 N.J. Super. 205, 273 A.2d 389 (App. Div. 1971) (fact that husband was in arrears in support payments was not ground for denial of his application for two weeks visitation with children where there was a factual question as to his ability to comply with a support order); Ledsome v. Ledsome, 301 S.E.2d 475 (W. Va. 1983) (when court finds that parent's refusal to make child support payments is contumacious, or willful or intentional, that parent's visitation rights may be reduced or denied, if welfare of the child so requires).
courts began requiring evidence that the particular child would be harmed by the nonresidential parent’s failure to pay support. In URESA cases, most New York courts find that, while they lack the power under the statute to enter an original visitation order, they do have the power to enforce an existing visitation order or agreement by excusing support or conditioning its payment on the entry of a visitation plan. Further, the amount of support awarded in a URESA case may be lowered because the out-of-custody parent’s visitation expenses are high.

D. Application of the Current Rules

How the three sets of approaches operate in practice can be illustrated by applying them to a series of hypotheticals which reflect issues that commonly affect the lives of many divided families. Child support and visitation may be connected in an affirmative way. That is, the nonresidential parent both pays child support and spends time, on a regular basis, with the child, while the residential parent receives the support and fosters

49. In creating these examples, I have drawn on my experiences as a clinical faculty member representing people in domestic cases and on the case law relating to child support and visitation.

A father’s support represents a way in which the father can make an important contribution to raising the child, and the benefits to the child are both financial and emotional.

Financially, child support makes available resources to help meet the child’s daily material needs — resources especially important because of the financial difficulties that confront many households headed by women. Child support is also
contract between the child and the nonresidential parent. As one would expect, families that end up in court are those whose members make negative links between child support and visitation. The three examples which follow are typical.

1. The Young Divorced Couple

When John and Mary decided to separate last year, John moved to an apartment and Mary remained in the family home with their son Stuart, age 3, and daughter Susan, age 1. With the help of their lawyers and the blessing of the Family Court, John and Mary agreed that John would pay child support of $50 per child per week. Mary agreed that John could see the children “at all reasonable times.” In the beginning, John stopped by every Saturday for several hours and took Stuart out for dinner on Wednesday evenings.

After several months, John found visiting more and more difficult because the children were not responding to him the way they had when they were living together. Consequently he skipped a few Saturday visits

integ rally related to the father’s ongoing involvement in raising the child. The father is not there on a daily basis to wake the child in the morning, bring him or her to school, answer innumerable questions, offer guidance with personal problems, put the child to bed, and provide the countless doses of encouragement and consolation that daily life requires. Nonetheless, by helping to meet the child’s daily material needs, the father can let the child know that the father is committed to participating in the child’s upbringing. Meals, clothes, toys, and other things made possible by this support represent this commitment even when the father cannot be there to affirm it himself.

The role of child support in providing a “critical bond” between father and child is documented in studies on divorced families. “[C]hild support is unquestionably one of the major strands in the relationship between fathers and children during the years following divorce.” As one national study concluded:

“The performance of the parental role, especially for males, is linked to the ability to provide material support for the child following marital dissolution. It has been suggested that lower-status males withdraw from the paternal role when they cannot contribute materially to the welfare of the child. [This study provides] evidence that fathers who pay some support are much more likely to see their children on a regular basis.”

Thus, aside from its intrinsic importance, child support is a strand tightly interwoven with other forms of connection between father and child. Removal of this strand can unravel all the others.

Id. at 3024-25 (citations and footnotes omitted).

Studies have produced inconsistent results about the prevalence and causes of affirmatively connected child support and visitation conduct, although many researches note that the phenomenon exists. See, e.g., Furstenberg, Nord, Peterson & Zill, infra note 66, at 894; R. HASKINS, A. DOBELSTEIN, J. AKIN & J. SCHWARTZ, ESTIMATES OF NATIONAL CHILD SUPPORT COLLECTION POTENTIAL AND THE INCOME SECURITY OF FEMALE-HEADED FAMILIES 54-65 (1985); G. GREIF, infra note 66, at 124.
without first calling and then missed a Wednesday dinner. Mary found that the children became more and more difficult the less they saw John. The following Wednesday Mary took the children out without telling John her plans. When John arrived to pick up Stuart the house was empty. That week John withheld child support because, in his words, “If I don’t get to see the kids, why should I pay anything for them?” As a result, Mary called her lawyer, who then called John’s lawyer, who then called John. The agreement they reached was that John would resume the usual visitation schedule and continue to pay child support. Nothing was done about the missed visits or the unpaid child support.

Subsequently John continued to miss visits without notice and to complain that Mary was uncooperative about scheduling visitation. At times John would arrive at the house on a Saturday or Wednesday and find it empty. He would then withhold child support payments for one or two weeks. Mary continued to complain that John’s irregular visits and frequent long absences made the children angry and much more difficult to raise. She found that if she did not find something for them to do on Saturday afternoons and Wednesday nights, Stuart in particular would get so distraught that he became uncontrollable. Also, because her salary was small, Mary knew she could not maintain the children’s accustomed lifestyle without regular child support payments.

Thus, after six months, Mary petitioned the Family Court to hold John in contempt for not paying child support. She also wanted to ask the court to hold him in contempt for failing to visit the children regularly, but her lawyer advised her that the court lacked power to do so.

In defense to the child support claim, John asserted that he had been denied visitation and counter-petitioned that Mary be held in contempt for failing to permit visitation.

Under the disconnecting rules of California and Pennsylvania, John would not be excused from the duty to pay child support because of Mary’s denial of visitation.\textsuperscript{51} Under rules like those in Florida, however, Mary could not collect support arrearages if it were found that she denied John visitation. In addition, future support payments could be made conditional on her permitting visitation.\textsuperscript{52} John could also be denied visitation on a specific occasion for failure to pay a particular support installment; although, as a general matter, his right to future visits would be enforced irrespective of whether he became current on missed payments.\textsuperscripts{53}

If John and Mary lived in a state like New York, they could enter into an enforceable separation contract stipulating that child support and

\textsuperscript{51} See supra notes 7-18 and accompanying text.
\textsuperscript{52} See supra note 19 and accompanying text.
\textsuperscript{53} See supra notes 23-24 and accompanying text.
visitation were dependent promises. During their separation, and even after a divorce, if the contract was not merged into the divorce decree, John’s support obligation could be excused during any period when Mary failed to make the children available for visitation. Her reason for denying visitation would be irrelevant to the court except on the issue of good faith. If she were found to have removed the children to undermine their relationship with their father, his contractual support duty could be terminated because she acted in bad faith. However, Mary’s visitation misconduct would not affect John’s statutory duty to support his children, if Mary and the children became poor enough. Under the statutory duty, John might not be required to pay the full amount he contracted for; his duty would extend only to that amount the children are found to need.

2. The Unmarried Teenage Parents

Rachel and Bill were 17 when their baby Eddie was born. At first, Rachel and Eddie lived with Rachel’s family, and Eddie spent a lot of time with Bill and his family. Bill gave Rachel whatever money he felt he could spare, and he bought Eddie toys and other small gifts. Rachel applied for public assistance for herself and Eddie, and was required to assign her rights to child support to the state and cooperate in collection efforts. She named Bill as Eddie’s father, and paternity proceedings were begun. At the hearing, Bill admitted paternity. Because he was working for minimum wage at a fast food restaurant, a minimum order of $10.00 a week was entered. Subsequently, Bill stopped his gifts of money to Rachel and things for Eddie. Rachel’s economic situation was no worse, however, because the first $50.00 collected under the assignment each month was paid to her by the state with no reduction in her public benefits.

When Eddie was about a year old, Rachel and Bill broke up. Though Bill and his family wanted to continue to spend time with Eddie, matters with Rachel were tense and arrangements were often difficult to make. During this time Bill was also having a hard time keeping a job and making his support payments.

Rachel, with her family’s support, got a job. Since she no longer received public assistance, Rachel was not required to cooperate in collecting support from Bill. Relieved that she no longer had to deal with him, she stopped seeking support. Although Bill wanted to continue to see his son, he felt he could not push hard because he could not afford to contribute much to Eddie’s support. Soon months would pass between visits, then a year, then two years.

Under the disconnecting rules of states like California and Pennsylvania, Rachel and Bill would be treated like John and Mary. Bill’s inability to
pay support would not affect his right to visitation.\textsuperscript{54} Conversely, if Rachel decided at some point to sue for arrearages, Bill could not contend that his duty to pay support should be excused because he no longer had a relationship with Eddie.

In states like Florida, where the denial of visitation is a defense to a claim for child support, Bill could claim that he did not visit Eddie because Rachel would not let him. Depending on how many years had passed without visitation and on how unclear everyone’s memory had become, he might succeed in having the arrearages excused by the court or through settlement negotiations.\textsuperscript{56}

In New York, Bill could claim relief if Rachel was doing well financially. But if she was on welfare or living on a relatively small income, his child support arrearages would not be excused, even if he could show that Rachel deliberately denied him visitation with Eddie.\textsuperscript{56}

In light of Rachel’s satisfaction at having Bill out of her life since she went off welfare, she might consider petitioning the court to terminate his visitation rights. The decision would probably turn on whether Bill could afford to pay support. If he could not, his failure to pay support would not be grounds to terminate his visitation. If, however, his financial situation improved and he still refused to pay support, he would be vulnerable to a petition to terminate his visitation rights. Such a petition might be successful if Rachel could show that Eddie has been harmed by Bill’s failure to pay \textit{and} that Eddie would not benefit from visits with his father.\textsuperscript{57}

3. The Violent Husband

Ed and Susan had been married five years and had had one child, Sally, before Susan left because Ed had beaten her again. Susan obtained a court decree for interim child support which also provided for Ed to have reasonable visitation rights. Ed rarely paid the support, forcing Susan to obtain a wage lien. Although Ed had rarely visited Sally after the separation, he began insisting on visitation after the wage lien was entered. Susan felt compelled to comply with his demands, even though Sally spent most of her visiting time with Ed’s mother or girlfriend and usually returned home upset. When Susan sued for divorce, Ed cross-petitioned for joint custody. He said he would only agree to give Susan sole custody in exchange for a reduced amount of child support, substantial visitation rights and a clause prohibiting Susan from moving. Based on advice from

\begin{itemize}
  \item \textsuperscript{54} See supra notes 7-18 and accompanying text.
  \item \textsuperscript{55} See supra note 19 and accompanying text.
  \item \textsuperscript{56} See supra notes 37-44 and accompanying text.
  \item \textsuperscript{57} See supra notes 45-46 and accompanying text.
\end{itemize}
her lawyer concerning the cost and unpredictability of a custody hearing, Susan agreed to Ed's terms.

Several months after the divorce Susan remarried. Shortly thereafter, Sally, now age five, came home unusually upset after a visit with Ed. She complained that her father had hit her several times very hard. Based on her own experiences with Ed, Susan believed Sally. Susan reported the incident to the child protection agency, which examined Sally, found no physical evidence of abuse and dismissed the charge. Susan refused to let Ed have Sally for the next scheduled visit. Ed sued her for contempt and put the child support in an escrow fund. Susan was ordered to allow Ed to visit and Ed was ordered to pay Susan the back child support.

Sometime later, Susan’s new husband, Jason, a member of the Air Force, was ordered to a base in a distant state. Susan petitioned to modify the decree to permit her to move with her husband. Her petition was denied on the grounds that it was not in Sally’s best interest to be separated from her father who was attentive and who had complied with the terms of the support decree. Susan moved anyway. A week later, Ed petitioned the court to modify the decree to award him custody and, in the alternative, to terminate his child support duty because Susan’s violation of the court order deprived him of visitation.

Under the disconnecting rules of California and Pennsylvania, Ed would continue to be liable for support despite Susan’s move. He would not be successful in having his support duty terminated because of the denial of visitation. However, in some other state, which does not follow the disconnecting rules, Ed might get the support payments terminated or suspended. And if Ed were then to move to a state like California, and Susan sued to regain support under URESA, the termination of his support duty would not be overturned. If he moved to a state like Pennsylvania instead, however, his duty to pay would be enforceable under URESA.

Under Florida’s connecting rules, Ed’s petition to terminate child support would probably be granted because Susan’s move denies him visitation. If Susan sued him in Florida for arrearages, his defense that she denied him visitation by moving would succeed. If she sued him under URESA, however, her success would depend upon the timing: if his

58. See supra notes 8-15 and accompanying text.
59. Under URESA, the law of the state where the nonresidential parent lives determines his or her support obligation. UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT § 7, 9B U.L.A. 393 (1968).
60. See supra note 15 and accompanying text.
61. See supra notes 19-22 and accompanying text.
62. Id.
petition had been granted prior to her suit, he would prevail; if not, she
would.63

Like Florida, New York courts would probably grant Ed's petition to
terminate his support duty after Susan moved. But even if Ed's petition was
denied, Susan, because of the move, would be unsuccessful in enforcing the
support duty either through contempt or under URESA. Additionally, in
New York, enforcement might also be denied on the grounds that Ed
objected to the move or because Susan disobeyed the court's order denying
her the right to move.64 If Susan attempted to claim child support under
URES A, Ed could defend, probably successfully, on the same grounds,
unless Susan were destitute or nearly so.65

These examples demonstrate that the resolution of divided families’
child rearing problems depends heavily on which state they live in at the
time an important decision is made. More importantly, they demonstrate
that none of the family members are treated with much respect by the
courts. Although most judges would assert that they are acting in the best
interests of the children, none can point to any research which supports this
conclusion. Few judges would claim that parents' interests are served,
because the children are the focus, not the parents. Whether the judges are
or should be right on that point, however, is a major question. Further, to
the extent that parents' needs should be served, they should be served
without regard to gender. Finally, some judges would agree that some of
the rules are designed to serve only one interest — that of the taxpayers in
being reimbursed for welfare benefits paid on behalf of children — and that
the other rules serve only the desire of the court to be obeyed. Whether
these are appropriate interests to be served at all is at best questionable, but
their priority over the interests of children and parents is without doubt
wrong.

II. PROPERLY CONSIDERED INTERESTS

A. The Child's Needs

In recent years substantial research has been done on the lives of
children who reside with only one parent.66 Some of the relatively settled

63. See supra notes 21-22 and accompanying text.
64. See supra notes 40-44 and accompanying text.
65. See supra note 39 and accompanying text.
66. See generally J. WALLERSTEIN & S. BLAKESLEE, SECOND CHANCES: MEN,
WOMEN, AND CHILDREN: A DECADE AFTER DIVORCE (1989); G. GREIF, SINGLE FATHERS
(1985); J. LIEBERMAN, CHILD SUPPORT IN AMERICA (1986); D. LUEPNITZ, CHILD
CUSTODY: A STUDY OF FAM I LI ES AFTER DIVORCE (1982); J. WALLERSTEIN & J. KELLY,
SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980);
findings are pertinent to whether child support and visitation should be interrelated concepts.  

Generally, children in divided families do better when both the residential and the nonresidential parent are actively involved in their lives. Such children tend to experience less stress from the physical separation of their parents and maintain greater emotional and intellectual stability than children who must rely on only the residential parent. And, because the availability of the nonresidential parent helps a child become better adjusted and less stressed, it also makes the job of parenting somewhat easier for the residential parent.

Generally speaking, residential mothers see the father’s involvement with the children as positive. The mother will often welcome and facilitate such contact, even when such contact provides her with no personal or financial benefit. One study concluded that the continued involvement of the nonresidential parent is one of the two most salient supports a divorced residential parent can have for effective parenting.

While the availability and involvement of the nonresidential parent


67. Nearly all of the research examines parents who are or have been married. See supra note 66. Little suggests that the outcome would be different for parents who have lived together but never married. While circumstances may be different for parents who have never lived together, I have seen nothing that persuades me that the differences are significant to the issues I am discussing, especially at the levels of generalization which apply.

68. I use the term “divided families” rather than divorced or separated families for two reasons. First, I intend to include parents who have never married and who may never have lived together. Second, whether married parents are separated or divorced makes little difference to the resolution of the issues I am discussing.


70. Id. at 238-39; G. Greif, supra note 66, at 106-11; J. Wallerstein & J. Kelly, supra note 66, at 218-20.


72. T. Arendell, Mothers and Divorce: Legal, Economic and Social Dilemmas 118-19, 121-22 (1986); G. Greif, supra note 66, at 109-11, 138-39; J. Wallerstein & S. Blakeslee, supra note 66, at 236.

usually helps both the child and the residential parent, there are instances where the nonresidential parent can do the child more harm than good.\textsuperscript{74} Typically, such parents are emotionally immature or suffer from significant emotional problems, including poor adjustment to the divorce.\textsuperscript{75} Such maladjusted parents often cause severe conflict which may culminate in physical abuse. These cases may result in extreme difficulties in cooperating about the children.\textsuperscript{76}

Even in situations where a child is benefitting from the involvement and availability of the nonresidential parent, within two years after separation most nonresidential parents have stopped having regular contact with the child.\textsuperscript{77} A child suffers from the absence of the nonresidential parent. He longs for contact and may fantasize about the parent or experience intense anger.\textsuperscript{78} Absence of a nonresidential parent is associated with difficulty in a child's relationship with the custodial parent, intellectual and emotional problems at school, and generally poor adjustment to the divorce.\textsuperscript{79}

A nonresidential parent's failure to provide financial support also has negative consequences for the child, the residential parent and the relationship the child has with each parent. Children who make the most successful adjustments to a divorce or separation often are those who experience the fewest material changes in their environment.\textsuperscript{80} Lack of financial resources often necessitates frequent moves and school changes, which adversely affect the child's social and intellectual development.\textsuperscript{81} If the financial burdens are not shared equally by the residential and nonresidential parents, the child is likely to develop feelings of intense anger against the wealthier parent.\textsuperscript{82} Further, the child may also experience anger at the residential parent because of that parent's inability to

\textsuperscript{74} J. Wallerstein & S. Blakeslee, supra note 66, at 113-23.
\textsuperscript{75} J. Wallerstein & J. Kelly, supra note 66, at 253-57.
\textsuperscript{76} J. Wallerstein & J. Kelly, supra note 66, at 253-57; McKinnon & Wallerstein, A Preventive Intervention Program for Parents and Young Children in Joint Custody Arrangements, 58 Am. J. Orthopsychiatry 168, 176-77 (1988).
\textsuperscript{77} T. Arendell, supra note 72, at 110.
\textsuperscript{80} J. Wallerstein & J. Kelly, supra note 66, at 230-31; J. Wallerstein & S. Blakeslee, supra note 66, at 42, 157-60.
\textsuperscript{82} J. Wallerstein & J. Kelly, supra note 66, at 230-31; L. Weitzman, supra note 73, at 320-21.
provide materially, whether that inability is the result of a low-paying job or the failure of the nonresidential parent to share resources through child support. 83

Despite this bona fide need of children for financial support from the nonresidential parent, in 1983, nearly two-thirds of residential parents reported to the Census Bureau that they received no child support from nonresidential parents. 84 About half of these residential parents are entitled to support under a court order, but their awards, on the average, are pitifully small. The average amount of court-ordered support for one child in 1983 was $1,965 a year. 85 Even if that money were paid, most children living in divided families would be impoverished. The remainder of their support is provided by the residential parent, who, in ninety percent of the cases, is the mother. 86 Since women, on the average, earn less than two-thirds of the income of men, they have little to share with their children. 87

Given children's need for both financial support and nonfinancial nurturance from the nonresidential parent, legal rules should be tailored to encourage the nonresidential parent to pay appropriate child support and to provide the child with appropriate levels of emotional and physical nurturance. Neither the connecting nor the disconnecting rules described earlier fully meet these goals. The connecting rules of New York and Florida, which permit denial of visitation as a defense against a claim for child support, encourage a nonresidential parent to withhold financial support whenever any controversy, no matter how slight, arises about


84. B. BERGMANN, The Economic Emergence of Women 245 (1986). Another economist says that, in 1985, only 40 percent of residential parents received no child support, but another 36 percent received less than the full amount which was ordered. P. ZOFF, American Women in Poverty 38 (1989).

85. B. BERGMANN, supra note 84, at 247. Of that amount, only $1,380, on the average, was received. Id.


87. See generally B. BERGMANN, supra note 84; D. CHAMBERS, Making Fathers Pay (1979); L. WEITZMAN, supra note 73; I. GARFINKEL & S. McLANAHAN, supra note 81, at 22-23.
visitation. The worst that can happen to such a parent is that he or she may be required to pay arrearages if the visitation default cannot be proved, or to pay support at the usually lower level required for Aid for Families with Dependent Children (AFDC) reimbursement. At the same time, neither state directly provides encouragement for the nonresidential parent to participate in raising the child. In John and Mary's case, for example, Mary's decision to take the children out rather than expose them to the possibility that their father would not show up, could serve as the basis for excusing John from paying support for that week. And while the children would spend a week without their father's financial or emotional support, John would get the perverse reward of retaining the child support. Moreover, no sanction is even considered against John for depriving his children of the emotional support and involvement they need.

The California and Pennsylvania decisions disconnecting child support and visitation pose problems for children as well. Although they do not permit a tit-for-tat deprivation of child support in exchange for visitation, they do not encourage involvement of the nonresidential parent either. Ironically, the Pennsylvania and California rules eliminate one incentive for parents which New York and Florida may unintentionally provide: that feeling that if they must pay child support, they will insist on their right to visit, and, conversely, if they receive the support, they must permit visitation. Ed and Susan illustrate this when Ed insists on visitation after a wage lien is entered against him, even though he rarely visited before, and Susan feels that she cannot deny his requests since he is paying support. In New York and Florida, Ed's feeling can be translated into legal and economic consequences if Susan denies him visitation. In Pennsylvania and California, on the other hand, Ed's payment record has no impact on his right to visitation; he will be permitted to visit even if he has failed to pay and he cannot terminate his duty to pay solely because Susan will not allow him to visit.88

88. See supra note 39 and accompanying text.

89. Bill also has the feeling that his ability to pay support is connected to his ability to spend time with his child. Unlike Ed, however, Bill has little money, and feels that his inability to pay means he has no right to insist on visitation. Although one would assume that states with connecting rules would translate Ed's feelings into legal consequences and deny him visitation, that is not generally the outcome. Even New York, with its multiple means of connecting child support and visitation, does not deprive a nonresidential parent of the right of visitation unless it would harm the child to see the parent. No such order has been reported for over 15 years. Considering Bill's limited economic resources, this result serves the needs of Bill's son Eddie. However, in the case of a wealthy nonresidential parent, this result makes it tempting to connect child support and visitation to add pressure on the parent to pay. This temptation grows where the child learns from the visits that the nonresidential parent lives better than the child does with his or her residential parent. A
Since neither the connecting nor the disconnecting rules satisfy the child's needs for parental involvement and financial support, a new approach must be found regarding the relationship between child support and visitation. Any such approach must consider that children whose parents are not living together have the greatest chance for success when they receive adequate financial and nonfinancial support from both parents. Moreover, since any new approach must include enhanced emotional and material involvement from both parents, their needs must be considered as well.

B. Parents' Needs

Of all the needs that parents have, the ones most pertinent to rules relating to child support and visitation are their needs for human association and personal autonomy. In having a child, people are, at some level, making a decision to accept the benefits and burdens of sharing their life with another human being. However, they do not expect that the child will fulfill every need or occupy all of their time. Parents still want to be independent from the child for many important aspects of life. If properly balanced, parental needs for human association and personal autonomy can be given weight at the same time that the child's needs for parental support are served.

The need for human association involves the desire to be connected with another person, such as in a parent/child relationship. It encompasses the type of physical caretaking and emotional involvement that characterizes normal parent/child relationships. Parents who are involved with their children have the potential to create lifelong emotional connections. It may be a happy connection or a painful one over the long run, but it is nonetheless a vital part of the human experience. When a parent and child do not share a home, however, the relationship is different. The parent is not present for the many small moments of care that create and foster the connection. For such a parent to make this connection, different and more difficult caring tasks must be performed. Nonresidential parents who have a strong need for human association undertake this difficult work, and through it they can retain the connection with their children.

Personal autonomy encompasses those aspects of a person's life which primarily satisfy one's own needs, rather than the needs of others. It

rule conditioning visitation on support, however, permits the parents to take their conflict out on the child and risks alienating the child from the nonresidential parent. Even in these circumstances, therefore, a connecting rule provides a poor solution. A better solution is to improve the child support enforcement process.
involves expressing one's need for independence, activity and enterprise. Parents often find expression for their need for personal autonomy in those aspects of their lives which are separate from their children as, for example, with hobbies and at work.

Parents' needs for human association and personal autonomy ought to be met in affirmative and balanced ways. Both parents should be able to feel that their needs are served to the greatest extent possible given the legitimate desires and needs of the child and the other parent. Although current law may be meeting these needs to some extent, often it fails to do so in a way that satisfies these criteria. One example where current law balances the various needs in an affirmative way involves the disconnecting rules in states like Pennsylvania and California. In the situation of Ed and Susan, Susan's decision to move with her second husband can be made without risking the loss of the Ed's financial support for Sally. Thus, her autonomous choice about marriage is respected. Ed's concern for losing his connection with his child as the result of the move is not ignored, but is not a defense to a failure to pay child support either. Rather, Ed's concern must be raised in a separate proceeding to modify the custody and visitation order. On the other hand, in states like New York, Susan's move would be grounds for Ed to terminate his child support. Susan's autonomy, then, would only come at the cost of Ed's support for Sally.

Other situations exist where neither the connecting rules nor the disconnecting rules adequately balance the competing needs of the parents. For example, in John and Mary's situation, John's difficulties in being consistent and reliable in visiting his children results in leaving Mary to handle the job of parenting by herself. So between her job and her responsibilities at home, Mary has no time left to satisfy her need for personal autonomy. There is no legal mechanism available to Mary that can require John to spend time with his children and share in the job of parenting. Thus, John's autonomy is respected while Mary's is ignored.


91. A number of cases provide good examples of how disconnecting rules can protect a residential parent's autonomy by permitting her to act in her own interests without losing financial support for the child. See, e.g., Commonwealth v. Mexal, 201 Pa. Super. 457, 193 A.2d 680 (1963) (nonresidential father had struck residential mother before she moved out of state); Commonwealth ex rel. Mickey, 220 Pa. Super. 39, 280 A.2d 417 (1971) (residential mother moved to avoid contact with nonresidential father); Fritschler v. Fritschler, 60 Wis. 2d 283, 208 N.W.2d 336 (1973) (residential mother moved to achieve her independence financially and emotionally, as well as for her physical health); Thomas v. Thomas, 206 Tenn. 584, 335 S.W.2d 827 (1960) (mother moved to be with her second husband).
An example where the rules provide mixed success in satisfying the competing needs is found in Bill and Rachel's situation. Because of his need for human association, Bill wants to visit with his son Eddie. However, he does not want to give up his personal autonomy by working at an unacceptable job. He needs a job to be able to pay child support, but because of his education and socio-economic environment, he would only be able to get one where the pay is low and the prospects for advancement slim. In a connecting state such as Florida, a judge would probably try to press Bill into taking such a job and paying support before allowing him to visit Eddie. In disconnecting states like California and Pennsylvania, on the other hand, his right to visitation would be enforced regardless of his ability to pay support. With both types of rules the exclusive focus is on the interests of Bill, the nonresidential parent. Although Rachel wants Bill out of her life, her desire for separateness and autonomy is ignored even if she is willing to forego support payments.

The usual explanation for ignoring Rachel's desire for autonomy is that the child's needs should get priority and he should get to see his father. However, giving Bill the right to visit Eddie doesn't guarantee Eddie contact with his father; it simply affirms the nonresidential parent's autonomous right to make contact. Furthermore, Bill's right to visit Eddie has costs for Rachel, who must structure her schedule to accommodate the visits, and, if Bill fails to show up, console Eddie.

Given the existing cultural values of society, women are more likely to perform the child care tasks that lead to connection with children, while men are more likely to perform the occupational tasks which lead to financial independence and emotional isolation from the family. While these values have undergone some change in the last two decades, men, in both single and dual wage-earner families, are still much more likely to be treated as the primary earners while women are likely to be considered the primary care givers. Thus, another benefit of using a balanced approach to meeting the parents' needs for human association and for personal autonomy is that it requires reexamination and redefinition of the culturally assigned gender-based roles that have influenced family law.

Articulating the parents' interests when formulating legal principles affecting children has yet another benefit: it requires going behind the rhetoric concerning the best interests of the child to see whose interests are

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really being protected. For example, residential parents sometimes assert the failure of the nonresidential parent to pay child support as a defense against the denial of visitation rights. In rejecting the defense, judges say that contact with the nonresidential parent is important for the child, and thus should not be stopped, even if the nonresidential parent could have afforded to pay the support. As one judge put it:

The paramount reason for visitation is the benefit to be derived by the child from associating with its parents and its welfare should not be jeopardized by an order conditioned upon payment of support money or alimony even though such order might prove effective as a collection device.

When one examines these decisions closely, it becomes clear that the judges are not defending the child’s interests. Instead, they are protecting the nonresidential parent’s right to see the child.

The child’s best interest can be determined two different ways: by looking at the personality and experience of the particular child or by examining research about the development and psychology of children in general. But since the cases have rarely turned on either type of evidence, the judges seem not to have been basing their decisions on whether that child could benefit from contact with a parent who refuses to provide financial support. Although they couch the decisions in language about children, what they seem to be doing is elevating the parent’s desire for contact with the child over the child’s need for all the support the parent can provide.

First, permitting contact by a parent is not the same as requiring that parent to stay in contact with a child who needs the parent’s attention. It


96. There is nothing wrong, at least in theory, with ensuring that the parents’ interests receive appropriate attention. Instead, the question is what attention is appropriate. See, e.g., Caban v. Mohammed, 441 U.S. 380 (1979); Quillian v. Walcott, 434 U.S. 246, reh’g denied, 435 U.S. 918 (1978) (1978); Stanley v. Illinois, 405 U.S. 645 (1972); see Chambers, Rethinking the Substantive Rules for Custody Disputes in Divorce, 83 MICH. L. REV. 477 (1984); Elser, Solomonic Judgments: Against the Best Interests of the Child, 54 U. Chi. L. Rev. 1 (1987).

97. My research disclosed no cases in which an expert in child development or psychology testified about the impact on the subject child or children in general of the failure of the nonresidential parent to pay child support.

98. See supra note 93.
simply gives the parent the option of visiting the child. Second, since it is important for parents to give a child both financial and emotional support, it is not in the child's best interests for the parent to withhold either. When a parent voluntarily withholds financial support, the message to the child is that parents have the right to be only partially involved and invested in their children, and that the pain the child experiences because of the parent's financial nonsupport is irrelevant. The child's anger at either or both parents is ignored. The logical conclusion is that the child's interests are served by an insistence that both parents meet, to the best of their abilities, the child's needs for both emotional and financial nurturance. When a parent is allowed to opt out of that responsibility without consequences, the child's best interests are ignored.

Given that the judicial focus often is on the parents' concerns rather than the child's needs, two courses of action are possible: either eliminate the parents' interests from the calculus or create explicit criteria for serving the parents' interests. The latter is preferable for both principled and instrumental reasons. Parents are, after all, adults with lives that involve their children but are not coterminous with them. To the extent that their needs can be met without damage to the child's needs, or at least in balance with the child's needs, everyone's interests can be better served. Further, the parents and children live in a family system; whatever affects one member of that system will affect the others. To remove parents from this calculus denies the systemic impact of the judicial decision. Also, courts can do a better job in domestic conflicts if the parents' needs can be considered. For one thing, compliance with decisions involving children is necessarily the job of the parents, and people who believe that their needs have been considered are more likely to comply with such decisions.

In sum, the needs and interests of the child and each parent should be considered in deciding whether and to what extent child support and visitation should be interconnected. The child needs both parents to be involved in his welfare to the best of their ability, and both should be required to provide whatever they can in the way of financial and emotional support. Each parent has a need for human association and a complementary need for personal autonomy. Neither parent's need should be ignored; nor should either parent's interests be served to the detriment of the child or the interests of the other parent.

III. THE NEGATIVE IMPACT OF GENDER BIAS

While it seems clear that parental interests should be accommodated in a balanced way in regard to child support and visitation, the method is not self-evident. One major obstacle is gender bias. Every society has norms
about the roles men and women should play, and the culturally-assigned roles seem particularly strict when it comes to the parent-child relationship. Although the roles change somewhat over time, they seem “natural” to most people at any particular moment. Cases on child support and visitation turn on the gender-role stereotypes of their time which are unexamined because they appear “natural.”

Modern family law reform has a commitment to gender neutrality. However, that goal cannot be met simply by gender-neutralizing the terminology. Since ninety percent of residential parents are women, most people still think “female” when analyzing problems affecting custodial parents. One effective way to eliminate gender bias from new rules would be to uncover its impact in the older cases and determine whether that bias has been carried through to the modern rules.

Gender-neutral means equalizing the benefits and burdens of the parents, regardless of gender. In modern American society, gender-neutrality stands in contrast to cultural norms about family life, which prescribe that the lion’s share of parenting falls on the mother. As one Supreme Court justice put it, the mother has an “unshakable responsibility” to her child which the father does not share.

The degree of the disparity in parenting roles has been revealed by studies on parental involvement and sacrifice. One study of the work habits of separated parents showed that the parents with primary responsibility for the children (all women) spent an average of 75.3 hours per week working — including job, home chores and child care. The parents without primary child care responsibility (all men) worked ten hours less per week. The primary parent, whether single or married, suffers disadvantages in the labor market because of child care responsibilities, and that parent is almost always female. Labor market disabilities include having to work fewer hours, being late or missing work altogether. Some

100. L.J. Weitzman, supra note 73, at xi-xiv.
101. See supra note 86.
103. See generally B. Bergmann, supra note 84.
105. Id.
parents are fired because they cannot satisfy the demands of both home and work.  

While the mother is struggling under the heavy burdens of paid labor and child care, the typical father spends very little time with the children. One study found that nearly half of the children in a national sample had not seen the nonresidential parent during the last five years. Only one child in six averaged weekly contact or better. Eighty percent had not slept in their father’s home and the majority had not even been to his home. Even when together, the child and father tended to do social and entertainment activities. Very few shared the usual child-parent activities such as working on homework, projects, or playing a game or a sport. In fact, on average, contact with the father occurred only twice a month for a primarily social event.  

Legal rules which reinforce disparate parental involvement with children will tend to reinforce the gender-based stereotypes which require women to bear the greater burden of parenting. Legal rules can also be gender-biased if they give priority to the needs of one parent over the other based on the stereotypical role of the parent. Finally, gender bias occurs when the parental paradigm is oriented to the cultural norms associated with one gender rather than the other.

A. Gender Bias in the Connecting Contract Rules of New York

The oldest decisions linking child support and visitation are the New York contract cases described earlier. From the perspective of pure contract law, these agreements appear to benefit both parties. However, when examined, the cases reveal a set of assumptions about proper roles, both normative and legal, for men and women within married families. They begin with the assumption, reflective of the ideology of the time, that the father had the primary duty of providing financial support for the family. And with this duty came the reciprocal right to the children’s

106. G. Greif, supra note 66, at 135-36, 181; T. Arendell, supra note 72, at 61-64.  
107. Furstenberg, Nord, Peterson & Zill, supra note 66, at 663.  
108. Id.  
110. Id. at 897.  
111. Id. at 896-98; J. Wallerstein & J. Kelly, supra note 66, at 134-38; J. Wallerstein & S. Blakeslee, supra note 66, at 224-25, 232-40.  
112. See H.D. Krause, Child Support in America: The Legal Perspective 3-6 (1981); Foster, Freed & Midonick, Child Support: The Quick and the Dead, 26 Syracuse L. Rev. 1157, 1157-61 (1975); Bowen v. State, 56 Ohio St. 235, 46 N.E. 708 (Ohio 1897); Zilley’s v. Dunwiddle, 98 Wis. 428, 432, 74 N.W. 126, 127 (1898).
earnings and productivity. The mother, on the other hand, had little or no control over the family’s financial resources, even those she produced or brought into the marriage. Her role in the family was that of caretaker and moral educator, while her husband was responsible for training children to fulfill their roles as future providers.

The legal consequences of these assumptions about the roles of members of married families were clear so long as they remained together. Fathers were responsible for providing for the support of the family and were entitled to their children’s earnings; mothers were responsible for taking care of the home and children. If the family divided up, however, the legal situation became more challenging. When the child lived with someone other than the father, the father’s right to the child’s productive capacity stopped, as did his reciprocal duty to support the child.

The contingent nature of the father’s duty of support posed problems for children whose parents got divorced or separated. The notion of reciprocal support did not contemplate a father having to support a child who no longer lived with him and who did not owe him his services. As a result, some states decided that the father had no legally-enforceable duty to support a child in the absence of a reciprocal right to the child’s earnings. Others held that the father’s loss of custody and right to the child’s earnings was his own fault, and the innocent child should not be made to suffer the loss of the guilty father’s support. So while this reciprocal support theory did not always result in the child being deprived of the father’s support, its underlying assumptions about proper family


117. See, e.g., Ramsey v. Ramsey, 121 Ind. 215 (1889); Husband v. Husband, 67 Ind. 583, 33 A. 107 (1879); Assman v. Assman, 192 Mo. App. 678, 179 S.W. 957 (1915); M. May, The “Problem of Duty”: The Regulation of Male Breadwinning and Desertion in the Progressive Era (Series 1, Legal History Program Working Papers, Institute for Legal Studies, 1986).

118. See, e.g., Graham v. Graham, 38 Colo. 453, 88 P. 852 (1906); Riggs v. Riggs, 91 Kan. 593, 138 P. 628 (1914); Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N.E. 471 (1887), overruled on other grounds, Meyer v. Meyer, 170 Ohio St. 3d 212, 224 (1985); Evans v. Evans, 125 Tenn. 112, 140 S.W. 745 (1911); Gibson v. Gibson, 18 Wash. 489, 51 P. 1041 (1898); Beilfuss v. State, 142 Wis. 665, 126 N.W. 33 (1910); Zilley’s v. Dunwindle, 98 Wis. 428, 74 N.W. 126 (1898).
roles did not change. The father’s right to control his family members was an integral part of his duty to support them; if he lost the right to control, he might still have a duty to support, but only as an exception to the usual situation. The mother’s role did not change either. She was given custody of the children for the purpose of caring for their needs, just as she would have done absent the separation.

The New York courts applied this reciprocal support duty theory in their early family law decisions. Under the reciprocal support duty theory, separated and divorced fathers in New York were not responsible for the support of nonindigent children who were in their mothers’ custody. Maried parents wanting to separate responded by entering into separation contracts which provided that the father would pay support so long as the mother permitted him access to his child. In the cases interpreting these contracts, the gender-based role divisions underlying the contract provisions seem clear. Access to the child in the form of visitation was necessary so that the father could carry out his role of training a child to be productive. If the father was deprived of access, he had no duty to provide support, because he could not supervise the child. At the same time, if he failed to support the child, he would lose his right to access, because his entitlement to the child’s earnings was dependent on his providing support. The mother’s role was just as stereotyped as the father’s; she was assumed to have no role in training the child for a productive future, even if she is in the wage labor market. Her duties toward the child consisted of caretaking and providing emotional support in fostering the relationship between the father and the child.

Over time, as children’s presence in the workplace declined, the reciprocal rationale changed. The father continued to have a duty to support the children and to train and socialize them for the working world, but since child labor was no longer economically important or socially

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119. See supra note 112.
120. See supra notes 25-37 and accompanying text.
121. See supra note 45 and accompanying text.
122. See, e.g., Richards v. Richards, 5 Misc. 2d 46, 157 N.Y.S.2d 874 (City Ct. N.Y. 1956) (visitation clause interpreted to require mother not to travel with child for her work when that prevented visitation, although the clause did not explicitly preclude travel and mother had traveled for work before entering into contract); In re Noel’s Estate, 173 Misc. 844, 19 N.Y.S.2d 370 (1940) (mother’s work held to be evidence that mother waived claim for child support); Haskell v. Haskell, 201 A.D. 414, 194 N.Y.S. 28 (1922) (father’s duty is to superintend child’s education; mother’s decision to support child in refusing to cooperate held sufficient basis to deny support); Baker v. Baker, 81 N.J. Eq. 135, 85 A. 816 (1913) (father’s access to child, in mother’s custody, necessary to permit him to supervise child’s education, training and moral upbringing).
acceptable, he could no longer count on their earnings. So a continuing emotional relationship with his children took on a growing reciprocal importance. Thus, the subject of the bargain changed somewhat, although the gender-specific structure did not. The theory now read that, whether or not the father lived with or had custody of his child, he owed a duty of support and he was owed a reciprocal right to the child's company and companionship.

The reciprocal theory legitimizes the conditioning of child support and visitation on one another. Logically, under the reciprocal theory, a father who does not pay child support need not be permitted the reciprocal right of access. Equally, a child who refuses to visit his father should not be granted his support. By extension, the custodial mother, who is responsible for the conduct of the child who fails to visit, should not be given the support for the child. At the same time, if a father does not wish to have an emotional relationship with his child, he is not required to exercise his privilege of visiting, although that decision might not relieve him of the duty of support.


124. As one New York judge expressed it, "the father must not be excluded from a full opportunity to have such possession of his child as will enable him to impart to it what from the father enters into the child's character, and to indulge the affection that a father feels and bestows, whereby the boy may grow up in knowledge and love of him." Almandares v. Almandares, 186 Misc. 667, 673-74, 60 N.Y.S.2d 164, 170 (1946); see also Johnston v. Johnston, 229 Ala. 592, 158 So. 528 (1934); Henshaw v. Henshaw, 83 Mich. App. 68, 73, 268 N.W.2d 289, 291 (1978) (purpose of visitation is to encourage "filial love and respect").

125. The theory sometimes gets its best articulation when it is being rejected. A Michigan court decided against the connection rule in a case involving a father's claim that he need not continue paying child support for a daughter who had decided not to visit him. The court said:

While defendant's disinclination to support a child who feels a limited measure of affection is understandable, his plight is not much different from that of many custodial parents who find themselves estranged from their children, especially as the latter enter adolescence. . . . There is no constitutional right to be liked or loved.

Henshaw v. Henshaw, 83 Mich. App. 68, 73, 268 N.W.2d 289, 291 (1978); see Johnston v. Johnston, 229 Ala. 592, 158 So. 528 (1934); cf. Clarke v. Clarke, 4 Cal. App. 3d 583, 591, 84 Cal. Rptr. 393, 398 (1970) ("The obligation to support a child during college is not absolute, and relevant factors must be considered. Among them is the reciprocal obligation of the child to make a good faith effort to reflect appreciation, as a minimum, for the parent providing his support and education."); Silcott v. Oglesby, 721 S.W.2d 290, 292 (Tex. 1986) (in child abduction case, proper measure of damages is no longer the value of the child's earnings, because "the real loss sustained by a parent is . . . the loss of love, advice, comfort, companionship and society.").

126. In some states a child support duty was imposed on a divorced or separated father on the ground that the child should not suffer poverty because the father, by his own marital
In modern cases, a fully reciprocal rule provides that a noncustodial parent may be relieved of the duty to support the child if the custodial parent interferes with visitation, and the custodial parent can deny visitation to a noncustodial parent who fails to pay support.\textsuperscript{127} Although that sounds fair and gender-neutral, it still, in fact, reflects the gender-role stereotypes of a century ago. The central metaphor is that contact with a child is a commodity to be bought and sold. But unlike normal commodity contracts, the buyer and seller are not equals. Here, only the buyer has legal control. If he elects to purchase contact with the child by paying support, he has the right to do so; the seller cannot refuse to sell. If the buyer elects not to pick up his purchase, the seller cannot require him to do so. Since nearly all residential parents are women and nonresidential parents are men, the buyers are nearly always fathers.\textsuperscript{128} The control the father had over the child’s productive capacity in the nineteenth century is currently reflected in the continued control that the father has over the relationship with the child. At the same time, the lack of control of the mother continues to be reflected in that she has no way to compel the father to satisfy her need

\textsuperscript{127} See supra notes 19-48 and accompanying text.
\textsuperscript{128} See supra note 86.
that he share in the care of the child. She is provided only with the negative power of withholding access to the child from a father who fails to pay support. If she exercises that power, she must pay the price of having to provide all of the care for the child, as well as all of the child's economic support.

Applying the reciprocal rule equally to male and female residential parents does not make it gender neutral. That would only result in putting residential fathers in the powerless position formerly occupied by residential mothers; the structure of the relationship would remain unequal. Just as the residential mother lacks the power to require the nonresidential father to share the work of caring for the children, the residential father would be unable to require a nonresidential mother to share the work.

B. Gender Bias in the Partial Connection Rule of Florida

States like Florida have an interesting variation on the theme of reciprocity. Under this state's partial connecting rule, the nonresidential parent may withhold support without advance court approval if the residential parent denies visitation. However, the residential parent must have advance court approval before denying visitation to a nonpaying nonresidential parent, and such approval will be given only one visit at a time.\(^{129}\) Given the usual pattern of mothers being the residential parent and fathers the nonresidential one, the cases typically have involved fathers who are allowed to act without court supervision and mothers who cannot.\(^{130}\) As a result, the partial connection rule elevates the father's desire for contact with his child over the mother's need for regular financial support. That is, the mother will only be allowed to deny the father's visitation after careful judicial consideration, while the father can withhold support on the strength of his unreviewed assertion that the mother has denied him visitation. He will have to defend his decision if she sues him for unpaid support, but even if he loses, he will only owe the back support. There is no penalty, even in the form of interest on the unpaid back support. The mother, in the meantime, has been deprived of the certainty of regular payments of child support on the grounds that the father believed she deprived him of visitation.

Some actions by residential parents clearly deprive the nonresidential parent of the possibility of contacting the children. For example, when the residential parent withholds information about her whereabouts, the other

\(^{129}\) See supra notes 19-24.

\(^{130}\) See supra note 86.
parent may be unable to locate the children. But because visitation is not just a single act with simple consequences, a denial of visitation is rarely so unambiguous. Take, for example, the hypothetical situation of Ed and Susan when Susan moves to another state. If Ed stops paying support and Susan sues for the arrearages, Ed could claim that the move denied him the right of visitation. In most states with partial connecting rules that would be an acceptable reason. The situation is not as clear as it appears, however. Susan did not move in order to deprive Ed of visitation; she moved because her husband was transferred by his employer. If she did not move with him, her marriage would be in jeopardy. Ed could travel to see his child, or maintain other contacts. Neither Susan's good motives nor Ed's options are determinative, however, in states with partial connecting rules.

Ordinarily, the mother's reason for moving or otherwise limiting visitation is not even the subject of judicial inquiry. In some instances, the mother may have been forced to move near her relatives to gain financial security because the father was not providing enough support. In others, she may have been trying to escape being beaten or harassed by the father. Even when the mother's reasons are considered, her actions are still scrutinized to determine whether the father is being treated fairly or if the move is in the child's best interests. Thus, a mother who is offered a better job in a different state may be required to turn the job down in order to remain close to the father. The mother has the best chance of


134. Fish v. Fish, 280 Minn. 316, 159 N.W.2d 271, 273 (1968) (court ignored custodial mother's testimony that noncustodial father had threatened and swore at her in front of children before she moved); Iverson v. Iverson, 243 Minn. 54, 66 N.W.2d 549 (1954) (custodial mother's move to another state not grounds to deny future state where move serves best interest of children; evidence that divorce granted on grounds of noncustodial father's cruel and inhuman treatment of custodial mother ignored); Levell v. Levell, 183 Or. 39, 190 P.2d 527 (1948) (custodial mother's denial of visitation caused by her desire to avoid harassment by noncustodial father; child support can be denied in return).

persuading a court that the move was appropriate when it involves financial dependency on another man, either the mother’s father or a new husband, but even that reason is not a guarantee. The mother’s individual autonomy rarely is a primary concern. Interestingly, few cases consider whether the father was a faithful visitor before the proposed move.

Exactly what a mother must do with respect to visitation is also not clear. In some cases, she is called upon to encourage and prepare the children for visitation with the father; in another, she is required not to speak harshly about the father to the children. One mother was found to be at fault because she made visitation difficult; according to the father, “‘There was always a reason why it wasn’t convenient for [the children] to come, and it usually resulted in their not coming or my insisting.’” Another mother was faulted for failing to have the children write to their father “even when he forwarded them gifts at Christmas time, birthdays, etc.” The involvement of a new husband with the child can also constitute a denial of visitation.

At the same time, the father’s motive for raising the denial of visitation in defense to a child support claim is usually not questioned. Most judges appear uncurious about why he waited to raise the visitation problem until he was sued for child support arrearages rather than seeking

136. See, e.g., Thomas v. Thomas, 206 Tenn. 584, 335 S.W.2d 827 (1960); Klobnick v. Abbott, 303 N.W.2d 149 (Iowa 1981); Commonwealth ex rel. Firestone, 158 Pa. Super. 579, 45 A.2d 923 (1946) (move by custodial mother in order to remarry does not relieve noncustodial father of duty of child support); Commonwealth ex rel. Swinburne, 193 Pa. Super. 237, 163 A.2d 920 (custodial mother’s move because of marriage does not justify suspension of child support).


143. A notable exception is Michelson v. Michelson, 263 Minn. 356, 116 N.W.2d 545 (1962).
judicial assistance earlier. Questions concerning the father's efforts to visit the child or the degree to which he tried to be involved with the child are rarely asked, even though the father's involvement was slight in a number of cases. Even the degree of his inconvenience is rarely a subject of inquiry; a mother's move to another state is what deprives the father of visitation, even if the move is to a place in a new state only a short distance away.

In sum, the residential parent who is alleged to have lost her right to collect child support arrearages because she denied visitation will have difficulty contesting the allegation. She faces indefinite standards of performance and a difficult burden of proof. The nonresidential parent, on the other hand, has the far less difficult burden of showing, simply, that he and the children did not see each other during the relevant period of time. No standards of performance about what he should have done to seek or facilitate visitation are applied to him. The advantage of these cases thus lies with the nonresidential parent, usually the father.

Florida's rule of partial reciprocity, like New York's total reciprocity rule, cannot be remedied by gender neutralization, because the same stereotypical conceptions will continue. The nonresidential parent will have greater rights than the residential parent. Further, since mothers are likely to continue to predominate as the residential parents, formal gender neutralization will not be effective — women with children will continue to bear the entire burden of maintaining the household while the fathers retain their autonomy and authority.

C. Gender Bias in the Disconnecting Rules of Pennsylvania and California

One set of rules that appears gender neutral is the disconnecting rules in states like Pennsylvania and California. Under these rules, a denial of visitation does not excuse child support and vice versa. Child support and visitation are seen as two distinct aspects of the lives of divided families.


which are, in a sense, separate but equal. Neither parent can trump the other by withholding access to the child or the money.\textsuperscript{147}

It would seem that both parents would be satisfied that disconnecting rules accord their needs and values equivalent treatment. A nonresidential father would not lose access to his child when he fails to provide economic support, nor would a residential mother lose access to needed economic resources when she fails to permit visitation. Thus, both parents are accorded a greater degree of security in their roles as parents than is possible under connecting rules.

The equalizing effect of disconnecting rules particularly benefits the residential mother, because courts operating under connecting rules allowed fathers to withhold money more often than they allowed mothers to deny visitation. In fact, one reason for the movement away from connecting rules may have been the recognition that they allowed a father with bad motives to claim a denial of visitation when all he wanted was to be relieved of the burden of child support.\textsuperscript{148}

Although they do benefit residential mothers more than connecting rules, disconnecting rules nonetheless involve difficult and important issues of gender bias. First, the rules assume that residential and nonresidential parents have distinct and separate responsibilities toward the child which are unrelated to each other. Since residential and nonresidential parents are most likely to be mothers and fathers, respectively,\textsuperscript{149} one would anticipate that these distinct and separate responsibilities would follow cultural norms associated with male and female roles. In fact, they do. As a result, disconnecting rules reinforce certain aspects of the gender-typed roles of mothers and fathers.

The disconnecting rules were developed during the middle part of this century, later than the New York reciprocity rules but before the renewal of the women's movement. During this period, few people in this society questioned that women belonged in the home caring for children and men belonged in the job market providing for the family. Although exceptions to that pattern were not rare, exceptions to the ideology were. Paternal

\textsuperscript{147} See supra notes 7-18.


\textsuperscript{149} See supra note 86.
visits were not considered a necessary element of child care, because the mother was expected to provide all the care required.\textsuperscript{150}

This separation of the roles is still reflected in the disconnecting rules of Pennsylvania and California. Since caretaking and financial support are provided by different parents playing different roles, there is no need to connect the two, either positively or negatively. Moreover, merely removing the gender labels from the roles, and replacing them with the terms residential and nonresidential parents instead, does not eliminate the gender bias. Keeping the parents in different roles still supports the notion that parents inevitably play distinct roles — aspects of which cannot be shared or exchanged. Thus, a nonresidential parent who seeks to play a role as the regular emotional or physical caretaker of the child is violating the norms. The same is true of a residential parent who seeks some regular time off from caretaking responsibilities.

The separation of the roles gave the traditionally female role of caretaker recognition and a status similar to that of the traditionally male economic role. Over time, however, the economic support role has become degenderized; mothers and fathers now share the responsibility of providing economic support of children.\textsuperscript{151} At the same time, the caretaking role remains solely with the residential parent — usually the mother.\textsuperscript{152} So “equality” has come to mean economic equality solely; the residential parent’s additional role as caretaker is being ignored. So far, equalizing the caretaking role along with the economic role has not been considered. The residential mother gets no recognition for her double burden.\textsuperscript{153}

Another gender-biased aspect of the disconnecting rules is the sense that it is possible to make separate categories of parental involvement with a child and not have those categories intersect. That is, the rules rest on the

\textsuperscript{150} See, e.g., N. CHODAROW, THE REPRODUCTION OF MOTHERING 5 (1978); B. FRIEDAN, THE FEMININE MYSTIQUE (1963). During the last two decades, the ideology has changed somewhat. Mothers and fathers are considered equally competent to be custodians for their children, so mothers no longer get preference in custody disputes simply because of gender. Mothers nonetheless continue to have custody of over 90\% of the children in divided families, most often because the fathers agree to that arrangement. See supra note 86.

\textsuperscript{151} H.D. Krause, supra note 112, at 4-6; Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977).

\textsuperscript{152} T. ARENDELL, supra note 72, at 76-101.

\textsuperscript{153} An illustration of how courts permit optional fatherhood is found in In re Watkins, 42 Wash. App. 371, 710 P.2d 819 (1985), where a mother sued a father for 5½ years of child support arrearages. Although the statute of limitations is 10 years, the court applied the doctrine of laches to deny recovery on the theory that the father had detrimentally relied on the mother’s failure to assert her claim earlier and had not sought visitation rights during the period. In effect, therefore, the court rewarded the father for his decision to try to save some money by not seeing his children.
notion that whether a parent provides child support has nothing to do with whether the parent should be allowed to visit the child.¹⁵⁴ Thus a parent is allowed to compartmentalize the types of support offered to a child: money is one thing, while caretaking is another.¹⁵⁸

Compartmentalization is gender-biased in a society which assigns parental roles based on gender stereotypes. The stereotypically good residential parent should act like a mother. No good mother would intentionally compartmentalize types of support which she provides a child and parcel out each type of support in limited degrees. Thus, when a judge approves of a parent doing this kind of compartmentalizing, the judge is not thinking of the usual expectations associated with residential parents. The stereotypically good nonresidential parent should act like a father, a role which is subject to less all-encompassing norms of parenting. Therefore, what a judge may be voicing in approving of compartmentalization is a culturally-approved male standard for parenting.

An interesting question is why the disconnection of child support and visitation between poor families is more extreme than those whose parents have more resources. Many judges have a candid explanation: the taxpayer should not have to bear the burden of supporting these children if they have a parent who can pay.¹⁵⁸ The more defenses that parent can raise to the

¹⁵⁴. One skeptical Arizona judge criticized this proposition as follows: The denial of right of visitation conditioned upon payment of support monies is based on the premise that the primary beneficiaries of support payments are the children and that the court may balance the equities by requiring the husband to make the payments for the benefit of the children before visitation is allowed, against allowing the father to visit the children regardless of whether the father cares enough to provide adequate support for his children or not. In the latter case, it is highly questionable whether the courts are protecting the children in their right to know and respect their father as some may insist, or whether we are not overindulging the recalcitrant and irresponsible father in preserving his “right” of visitation while refusing to use one of the better means available to the court to encourage him to discharge his obligation of support for his children. Reardon v. Reardon, 3 Ariz. App. 475, 415 P.2d 571, 574 (1966).

¹⁵⁵. One New York court pursued this line further when it insisted that a father who is upset with the mother should still pay support: “Sincere love for one’s child and genuine paternal regard ought to deter a truly devoted father from withholding moneys for essential needs out of pique against the mother or because visitation has become inconvenient or even impossible.” Almandares v. Almandares, 186 Misc. 667, 674, 60 N.Y.S.2d 164, 171 (1946).

child support claim, the less the state can recover. Since denial of visitation is one more defense, it is simply not allowed.\textsuperscript{157} The message to both parents is that only money counts; the emotional support a parent might provide or seek to provide a child has no importance at all.\textsuperscript{168}

IV. Better Solutions

Given the many deficiencies in existing sets of rules which connect and govern child support and visitation, a completely new approach is needed.

duty when child is a public charge); Robinson v. Harris, 87 Mich. App. 69, 273 N.W.2d 108 (1978) (since real party in interest is state which is seeking child support as reimbursement for welfare paid for children, cutting off child support to enforce visitation ineffectual remedy).


158. Another improper influence appears in a fairly small group of decisions concerning child support and alimony. Judges in these cases are explicit about the fact that their decisions do not turn on the needs of the child or the parents. What is at issue is the court’s desire to see its orders obeyed. Thus, a parent’s failure to comply with a prior court order is good grounds for denying the court’s assistance in collecting child support or getting visitation. As one court said when denying a residential parent the right to collect child support arrearages after she had denied the nonresidential parent contact with the child for a number of years,

In other words, having openly defied the court for more than ten years, and until the passage of time has rendered the performance of the obligations imposed upon her, to wit: to permit the respondent to enjoy the society of his little girl for occasional brief intervals — impossible, she now insists that respondent be compelled to perform the obligations imposed upon him. . . . Appellant’s conception of the duty and function of a court of equity is entirely wrong. A court of equity delights in doing equity, but nothing could be more inequitable than what appellant is asking the court to do in this case.

Stratton v. Stratton, 67 S.D. 354, 358, 293 N.W. 183, 184 (1940). See also Holmes v. Holmes, 255 Minn. 270, 96 N.W.2d 547 (1959) (where court has stated that failure of the husband to pay is not only contemptuous but studied and deliberate, the husband is not relieved of obligation of support); Williams v. Williams, 167 Miss. 115, 148 So. 358 (1933) (mother who violated visitation order may not collect future child support); Harvey v. Harvey, 58 Misc. 2d 917, 297 N.Y.S.2d 320 (1969) (mother’s denial of visitation “deliberate, willful and carefree” and her explanations “do not commend themselves to [the court’s] judgment”); Goodman v. Goodman, 17 Misc. 2d 712, 184 N.Y.S.2d 399 (1959) (where a party is seeking to invoke the court’s authority to administer the harsh remedy of punishment for contempt there should be no question of the good faith of the one seeking the order); Karrass v. Karrass, 66 N.Y.S.2d 919, 920 (1946) (mother who violated custody order not awarded child support “[a]s long as defendant continues to flout its lawful mandate, just so long will the Court’s favor be withheld from her”); Sanges v. Sanges, 44 Wash. 2d 35, 265 P.2d 278 (1953) (trial court does not abuse its authority to relieve husband of child support where wife violates divorce decree); Smith v. Smith, 18 Wash. 158, 51 P. 355 (1897) (father in arrears on child support not allowed to seek order for visitation); cf. Noble v. Noble, 86 Nev. 459, 470 P.2d 430 (1970) (mother’s violation of visitation order justifies denied right to collect alimony but child support denied only if in best interests of child); but see Wheeler v. Wheeler, 37 Wash. 2d 159, 222 P.2d 400 (1950) (father in arrears on child support allowed to seek contempt order for visitation).
Such an approach should require both parents to provide financial and physical/emotional support to the child. Under this “dual parent/dual responsibility formula,” child support and visitation would be linked, in an extended and positive way, so that the child would get the benefit of mutual and enlarged parental duties.\footnote{159}

The formula would require that financial support be calculated based on the child’s needs and the ability of each parent to pay — just as it is today in most states. Parents would fulfill their physical/emotional nurturance responsibilities differently depending on who had custody. The primary residential parent would continue to be responsible for most of the day-to-day care of the child. The nonresidential parent would also be required to provide care on a regular basis, although for a smaller amount of time. On the average, the nonresidential parent would be expected to care for the child about twenty percent of the time.\footnote{160} Under this dual parent/dual responsibility formula, the emphasis is not solely on the number of hours a parent spends with a child, but on the regularity and normalcy of the parent’s participation in the child’s life. Thus, just like the residential parent, the nonresidential parent would be expected to provide the child with care on a regular and predictable basis, whether during weekdays, weekends, vacation periods, or a combination of those times. Further, the

\footnote{159} I am indebted to Professor Carol Bruch for her consistently insightful and provocative writings about the law as an instrument for affecting the post-divorce relationship of parents and children. Her writings are the inspiration for the dual parent/dual responsibility formula discussed below. See, e.g., Bruch, supra note 71; Bruch & Wikler, supra note 81, at 5; Bruch, \textit{Developing Normative Standards for Child Support Obligation}, 16 U.C. DAVIS L. REV. 49 (1982).

While it resembles joint physical custody in some respects, the dual parent/dual responsibility formula is fundamentally different. First, the rough allocation of physical custody time is patterned after the usual sole custody arrangement, where the child spends approximately 80% of his or her time with the residential parent the remaining 20% with the nonresidential parent. Joint physical custody arrangements can vary from 10% to 50% of the child’s time being spent with the noncustodial parent. Second, and most important, if a joint physical custodian in a voluntary or court-ordered situation decides to discontinue the arrangement and provide no further care for the child, no judicial sanction seems to be available to the other parent. The dual parent/dual responsibility formula turns on the availability of the judicial sanction, which empowers the residential parent to require that the nonresidential parent fulfill his or her share of the responsibility to provide care for the child. Third, joint custody orders can restrict the custodial prerogatives of the primary custodian. The dual parent/dual responsibility formula does the opposite: it provides the residential parent with the possibility of requiring that the other parent share the parenting load. However, the residential parent is not required to divest himself or herself of legal authority over the child.

\footnote{160} This figure was arrived at by adding up the amounts of time provided for visitation by noncustodial parents in typical divorce decrees: alternate weekends, one weekday evening, alternate holidays and two weeks during the summer.
nonresidential parent would be expected to do normal parental tasks, such as overnight stays with the child, homework supervision and transporting the child to regular activities. Simply providing entertainment for the child would not be adequate or appropriate.

Defaults by either parent as to either the financial or the physical/emotional nurturing responsibility would be subject to judicial sanction. Thus, if a residential parent denied the nonresidential parent regular and appropriate time to provide nurturing for the child, the contempt procedures already available to enforce visitation rights could be invoked. In addition, the nonresidential parent should be entitled to substitute time with the child. At the same time, if a nonresidential parent failed to provide physical and emotional nurturance to the child, the court could be asked to intervene. Sanctions would be graduated, beginning with an order that the nonresidential parent spend time with the child. If that failed, the nonresidential parent would be required to pay for the supplemental care the residential parent supplies because of the default of the nonresidential parent. 161 If the nonresidential parent still failed to provide physical/emotional nurturance, the residential parent could be given the additional option of denying future visitation altogether. This would allow the parent and the child to rearrange their lives in light of the decision of the nonresidential parent not to participate in the child’s upbringing.

Most states already take into account the ability of both parents to provide support when establishing a child support award, so no change would be necessary. The mechanisms already in place for the collection of child support, while deficient in many ways, would not be improved by using visitation as an incentive to pay.

The basic elements of the dual parent/dual responsibility formula are designed so that the child can have both parents working to meet the child’s needs to the greatest extent possible. Within their abilities, both parents will be required to provide both financial support and emotional and physical nurturance. Unlike the present situation, the nonresidential parent will be encouraged to remain involved with the child, rather than be given incentives to avoid the child. The nonresidential parent’s interest in personal autonomy should be given less deference than previously. At the same time, his need for human association with the child is respected to a greater degree because substitute visitation would be provided if necessary, and because visitation would not be denied if he fails to pay support. The need of the residential parent for personal autonomy is elevated in

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161. See, e.g., CAL. CIVIL CODE § 4700(b) (West Supp. 1988); Bruch, supra note 71, at 22.
importance by the provisions allowing the residential parent to demand that the nonresidential parent share the nurturing of the child. She is also given recognition for the nurturing work provided the child, and at the same time is relieved of sole responsibility for providing emotional and physical support.

The dual parent/dual responsibility formula is gender neutral because the needs of both parents are treated with equivalent respect. Both are required to take part in meeting as many of the child's needs as they are capable of handling, and neither is allowed to impose their burdens on the other. The parenting model is one of interconnection and fulfillment of human possibilities, not distinct gender-typed roles; autonomous activities do not take precedence over connective activities.

The dual parent/dual responsibility formula raises three very different but equally difficult questions. First, how can a parent be made to spend time with, nurture or give support to a child? Would it not be harmful to the child to force a reluctant parent to do so? Second, what can be done about a parent whose involvement with the child could be harmful to either the child or the other parent? Third, what about parents who want nothing to do with each other, even though they share a child?

While the first question does pose a realistic problem, the solution does not lie in accepting parental noninvolvement. It is true that some nonresidential parents want to divorce their children when they divorce their spouses. They would be just as happy to have nothing to do with their children after their separation, and will resent every minute they must spend with them. One must wonder whether such a person, compelled to provide care for the children, can or will do so with competence and love, or whether a feeling of resentment will prove too great an impairment.

An initial response to that concern is that most parents can develop good relationships with their children, given time and encouragement. Indeed, it may be possible that court-mandated visitation will assist parents who would like to be with their children but who feel discouraged and guilty about their limited relationship. An additional response is that the concern must be expanded to include the entire family system, and that includes the residential parent. If the nonresidential parent fails to provide care for the child, the work falls to the residential parent, who may resent being left alone with the entire responsibility for the child. The residential parent's feelings affect the child just as the feelings of the nonresidential parent do. If the nonresidential parent shares in the burden

of providing care for the child, the residential parent gets some respite from the ongoing work of child care and may feel better about it. The child benefits from the respite because the residential parent will have more energy for and less resentment about child care. In addition, the child gets to have a relationship with the nonresidential parent; even if it is not a happy relationship, it is preferable to an abandonment.\footnote{163}

Finally, the nonresidential parent would not be without options. If the nonresidential parent does not want any contact with the child, that option can be exercised. However, the price would be compensation to the residential parent for taking on the extra parenting work that the nonresidential parent elects not to do. In addition, such a choice could be irreversible, at least in terms of judicial enforcement. Once the nonresidential parent elects to completely separate from the child, the residential parent should be allowed to deny future contact.

The second problem raised by the formula is how to handle a parent who has a history of doing harm to the child or the other parent. For example, what happens when one parent may have been abusive emotionally or physically to the child or the other parent when they were together? Will the abusive parent not use the duty to provide care for the child as a way to assert control over the other parent and the child?

Exceptions to the dual parent/dual responsibility formula are appropriate in certain circumstances, such as when a nonresidential parent is violent toward the children. For that parent to be involved with the child may be more harmful than helpful,\footnote{164} and the time such a parent can be permitted to spend with the child may be limited or denied altogether.\footnote{165} However, that parent's child support duty should not be terminated. A parent should not be rewarded for committing violent acts against a child.

\footnote{163} A similar criticism is that the dual parent/dual responsibility formula is “involuntary servitude.” What the criticism overlooks is that children need nurturing and that their residential parents, usually women, provide it. While it has its joys, nurturing work is still work. When the nonresidential parent decides he is not going to do any of it, the residential parent has to do even more. Perhaps the assumption underlying the involuntary servitude criticism is that her nurturing work is not involuntary servitude because it is the proper (and invisible) work of women. Logically, however, if requiring one parent to provide care for children is involuntary servitude, it must be the same for the other parent. Once the residential parent's work is made visible, the criticism fails: parenting is not the same as slavery, so requiring a parent to provide nurturance is not the same as involuntary servitude.

\footnote{164} J. Wallerstein & S. Blakeslee, supra note 66, at 113-25; Walker & Edwell, Domestic Violence and Determination of Visitation and Custody in Divorce, in DOMESTIC VIOLENCE ON TRIAL (Sonkin, ed. 1987).

\footnote{165} Along with laws relating to visitation, the abuse and neglect laws of most states regulate this situation. See, e.g., CHILD CUSTODY, supra note 93, at § 16.10[2], at 16-38 to 16-40.
Some nonresidential parents are psychologically impaired to the extent that contact with the child would be detrimental to the child.\(^{166}\) These rare circumstances are also instances where termination of contact with the child may be appropriate.\(^{167}\) Depending on the severity and duration of the disability, termination of the support duty should also be permitted in light of the important ties between and among all the different types of support which a parent provides a child. If the parent's disability means that he or she will have no opportunity for a relationship with the child, for reasons which the nonresidential parent did not create and cannot change, the tie should be severed altogether. Otherwise, the parent who is unable to express his or her need for human association because of his disability is nonetheless required to maintain a formal, purely monetary connection with the child. The residential parent, who will be left with the entire nurturing burden, should be allowed to call on public financial support so that he or she is not left with the entire financial burden as well.

Other exceptions to the dual parent/dual responsibility formula reflect needs of the parents. Some residential parents want to deny the nonresidential parent contact with the child because of fear for their own safety.\(^{168}\) If the nonresidential parent was violent during the relationship, that violence often does not end with separation or divorce. If structuring the points of contact between the nonresidential parent and the child do not eliminate the threat of violence to the residential parent, contact should be denied.\(^{169}\) However, again, the violence should not be rewarded with the termination of the financial support obligation. But, if the nonresidential parent can change his behavior with therapy or other assistance, parental-child contact should be allowed to resume at a later time.

The third problem arises when parents decide that their decision to divide from each other would be less painful and more satisfying if the nonresidential parent also separated from the child. They may enter into an agreement, either express or implied, that the nonresidential parent give up visitation and stop paying support as well.\(^{170}\) Under the dual parent/dual

\(^{166}\) J. Wallerstein & J. Kelly, supra note 66, at 253-57.

\(^{167}\) As with the situation of violence toward the child, whether contact with the child should be allowed is a question of state law relating to visitation, abuse and neglect. Therefore, it is not addressed in detail here. See Child Custody, supra note 93, at § 16.10[5], at 16-43 to 16-44.

\(^{168}\) While inter-spousal violence most directly harms the victimized parent, the harm to the child should not be overlooked.

\(^{169}\) As with the other situations, whether contact is denied is a matter of state law relating to visitation. Many states have recognized in recent years that inter-spousal violence is a valid circumstance for terminating or limiting visitation. See supra note 166.

\(^{170}\) Sometimes the decision is explicit. More often, it can be inferred from parental
responsibility formula, should the parents' decision should be respected? The answer is yes.

A parental agreement like this leaves the child solely dependent on the residential parent. It sacrifices the child's need to have the financial and emotional/physical support of both parents. Justifying the sacrifice is difficult unless the child gets some other benefit instead and unless the parents have no other way to serve their own needs. The child does get some benefit from such an arrangement — the certainty in the situation and in the dedication of the residential parent. The child need not experience the anger and upset that accompanies disappointed fantasies about the nonresidential parent's participation in the child's life. This is quite different from the present situation where a nonresidential parent can demand visitation rights after many years of nonparticipation. At the same time, the child is assured of the dedication of the residential parent, who is sacrificing her right to require a nonparticipating nonresidential parent to provide physical and emotional nurturance to the child. Under the current system, the child has no such assurance because the decision of the residential parent to be the sole caretaker for the child may be the result of her lack of rights, rather than a product of her real desires.

Interestingly, both parents' need for autonomy can be satisfied under present law, but only by way of adoption. That requires that the residential parent marry someone willing to adopt the child, which does not always occur. If an adoption serendipitously occurs, the nonresidential parent's duty of support and right of visitation are extinguished. Short of adoption, the only way to give cognizance to the parents' decision to separate the nonresidential parent and the child is by allowing them to waive the child's rights to support. Because most states do not permit waiver, the only

behavior. For example, a residential parent who has been unsuccessful at collecting child support on a voluntary basis may forego judicial enforcement of the child's support claim to avoid a counterclaim for enforcement of the nonresidential parent's visitation rights. The nonresidential parent demonstrates concurrence with the residential parent's desire to separate him from the children by continuing to withhold child support and by not pressing for judicial enforcement of the visitation rights.

Few courts have been sympathetic to parental contracts to forego future support and visitation. See, e.g., Blissett (Trueblood) v. Blissett, 123 Ill. 2d 161, 526 N.E.2d 125 (1988); Goedartzrad v. Goedartzrad, 185 Cal. App. 3d 1020, 230 Cal. Rptr. 203 (1986). If the custodial parent seeks arrearages, however, a contract of forbearance sometimes has been found and enforced. See, e.g., Chipman v. Chipman, 308 Mich. 578, 14 N.W.2d 502 (Mich. 1944) (custodial parent found to have agreed not to seek support if noncustodial parent would not seek visitation; suit for support brought after child grown); Washington ex rel. Blakeslee v. Horton, 722 P.2d 1148 (Mont. 1986) (custodial parent agreed to forego child support if noncustodial parent would forego visitation; after 14 years of mutual forbearance, custodial parent cannot collect child support).
parents able to give voice to their decision are those with enough money to not need welfare. If the residential parent is so poor that the child is supported by welfare, the residential parent is required to cooperate with the state when it sues the nonresidential parent for child support. Another advantage of respecting the parents’ decision to separate the nonresidential parent and the child, therefore, is that it puts the rich and the poor on the same footing.

V. Conclusion

Children who live with one parent may suffer many disabilities, ranging from poverty to deprivation to alienation from the other parent. The current legal rules governing whether and how child support and visitation should be linked have not solved the problems of these children; in some ways they have made them worse. In addition, the rules contain gender-biased assumptions which cannot easily be expunged. This permits gender-biased results which cannot easily be changed. Better approaches are needed to maintain the child’s relationship with both parents and both parents’ full responsibility to the child. The dual parent/dual responsibility formula proposed here accomplishes this goal by providing for both parents to perform all the services which they are capable of providing for the child. At the same time, the dual parent/dual responsibility formula leaves room to serve both parents’ legitimate needs for separateness and autonomy during the child’s minority.