

BARGAINING IN THE SHADOW OF THE BEST-INTERESTS STANDARD: THE CLOSE CONNECTION BETWEEN SUBSTANCE AND PROCESS IN RESOLVING DIVORCE-RELATED PARENTING DISPUTES

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I

INTRODUCTION

In his seminal 1975 article, Professor Robert Mnookin analyzed the emergence and problematic characteristics of the best-interests standard for adjudicating custody disputes.¹ Four years later, in another important article, Mnookin and coauthor Lewis Kornhauser trained their keen analytic lens on the process of divorce bargaining and explored “how the rules and procedures used in court for adjudicating disputes affect the bargaining process that occurs between divorcing couples *outside* the courtroom.”² In this article, I seek to engage both of Mnookin’s path-breaking articles by examining the close connection between changes in substantive child-custody doctrine and changes in custody dispute–resolution processes over the past thirty years.

In part II of the article, I will explore how the widespread adoption of an unmediated best-interests standard, and the ensuing rejection of the sole-custody paradigm, paved the way for the shift from adversarial to nonadversarial resolution of divorce-related parenting disputes. Just as the adoption of no-fault divorce facilitated the private ordering of divorce disputes, so too has the endorsement of postdivorce coparenting as a legal norm helped mediation and collaboration replace adjudication and adversary negotiation as the preferred means of resolving custody disputes between divorcing and separating parents.

In part III of the article, I will reverse the direction of Mnookin’s analytic lens to examine how the shift from adversarial to nonadversarial dispute resolution has affected both the substantive legal norms that govern custody

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1. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (Summer 1975).

2. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979) (emphasis in original).

contests and the role of law and lawyers more generally in the custody-decisionmaking process. I will suggest that the shift from adjudication and adversary negotiation to mediation and other nonadversary processes has delegitimized custody decisionmaking and has diminished the importance of custody as a legal concept in the context of disputes between parents. The primary purpose of this analysis will not be to evaluate the desirability of these changes, but to underscore the close connection between changes in substantive legal doctrine and changes in dispute-resolution processes.

II

THE INFLUENCE OF SUBSTANCE ON PROCESS: THE SHIFTING SHADOW OF DIVORCE AND CUSTODY DOCTRINE

In their seminal article on divorce bargaining, Professors Mnookin and Kornhauser explored the connection between the substantive family-law doctrines applied by courts and the negotiations and bargaining that occur *outside* the courtroom. Indeed, with the shift from fault-based to no-fault divorce, the authors identified the primary function of divorce law “not as imposing order from above, but rather as providing a framework within which divorcing couples can themselves determine their postdissolution rights and responsibilities.”³ Mnookin and Kornhauser argued convincingly that divorce law should give spouses wide—albeit not unlimited—authority to create their own legally enforceable commitments; the authors then developed a bargaining model designed to predict how different financial and custody rules are likely to affect negotiations between spouses and their representatives at the time of divorce.

Although Mnookin and Kornhauser did not dwell on the forms of divorce bargaining, their argument suggested that changes in divorce doctrine would also affect the nature and structure of the private ordering in which divorcing parties are likely to engage. In particular, their analysis predicted that the elimination of fault as a prerequisite to divorce would significantly undermine the utility of traditional adversary procedures for resolving divorce-related conflict—both inside and outside the courtroom. And this is precisely what has occurred.⁴ With fault requisites to divorce removed, neither courts nor private negotiators need to consider whether a spouse has engaged in actionable behavior, nor to ascertain who is responsible for the breakdown of a marriage—backward-looking tasks for which the adversary process is arguably well suited. Instead, the primary role of the legal system at the time of divorce is to determine the financial and parenting consequences of the marital dissolution. Thus, a no-fault system encourages both public and private decisionmakers to focus on the future, rather than the past, and to consider what financial and

3. *Id.* at 950.

4. See generally Jana B. Singer, *Dispute Resolution and the Post-Divorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363 (2009) [hereinafter Singer, *Dispute Resolution and the Post-Divorce Family*].

parenting arrangements will work for the reconstituted family.⁵ For these essentially forward-looking tasks of family reorganization, adversary procedures are, at best, unwarranted.

Moreover, the deregulation of intimate relationships that accompanied the no fault–divorce revolution provided an important impetus for the adoption of nonadversarial dispute-resolution processes such as mediation and collaborative law. With the shift from fault to no-fault divorce, the court system largely abandoned its role as the moral arbiter of marital behavior and ceded to divorcing couples themselves the authority to determine whether and how to end their union.⁶ Unlike formal adjudication, and the lawyer-driven negotiation that accompanies it, mediation and other nonadversary processes offer divorcing couples a way to exercise this authority directly and privately, guided by their own preferences and values. Thus, the shift from fault-based to no-fault divorce not only shifted the locus of divorce-related decisionmaking from the courtroom to the conference table, it also affected the nature of the conversation and disputation that occurred around that table.

A. The Challenge of an Unmediated Best-Interests Standard

Perhaps even more important than the shift from fault to no-fault divorce in transforming family dispute–resolution processes were two related changes in child-custody doctrine: (1) the rise of an unmediated best-interests standard for resolving divorce-related custody disputes, and (2) the displacement of the prevailing sole-custody regime in favor of a commitment to postdivorce coparenting. As Mnookin explained in his 1975 *Law and Contemporary Problems* article, the history of legal standards governing interparental custody disputes “reveals a dramatic movement from rules to a highly discretionary principle gradually shorn of narrowing procedural devices.”⁷ Although the best-interests standard predated the demise of fault-based divorce, it was operationalized during that era through a series of gender and fault-based presumptions. These included the tender-years doctrine, under which mothers were preferred over fathers as custodians of young children, and the often-competing presumption against awarding custody to a parent who had committed adultery or who was otherwise at fault for ending a marriage.⁸ The rejection of fault and the rise of gender-equality concerns in the 1970s and early 1980s largely eliminated these mediating presumptions. The result was an unmediated and highly individualized best-interests standard that required a decisionmaker to determine, in each case, which custody arrangement would

5. See Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CAL. L. REV. 161, 175 (2002).

6. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1471 (1992) [hereinafter Singer, *The Privatization of Family Law*].

7. Mnookin, *supra* note 1, at 233.

8. Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 391 (2008).

best serve the needs and interests of the particular child or children before it.⁹

As Mnookin's *Law and Contemporary Problems* article pointed out, several aspects of this unmediated best-interests standard are in tension with a traditional adversary regime. First, unlike most legal questions, "custody disputes under the best-interests principle require 'person-oriented,' not 'act-oriented,' determinations."¹⁰ Adversary and adjudicative decisionmaking typically involves the application of act-oriented rules that focus on discrete events and avoid broad evaluation of a disputant as a social being—for example, whether specific actions by a defendant constituted negligence or breached an enforceable legal obligation.¹¹ By contrast, to resolve a custody dispute under the best-interests standard, a decisionmaker must evaluate the attitudes, dispositions, and parenting capacities of each parent, as well as the child's relationships with both caregivers.¹² The process thus "centers on what kind of person each parent is, and what the child is like"¹³—broad person-oriented inquiries that are difficult to address in an adversarial context. Moreover, the most relevant questions about children's interests and family dynamics are ones that neither judges nor lawyers—the primary actors in an adversary system—have the expertise to answer.¹⁴

Second, adjudication and other adversary procedures are primarily designed to determine past acts and facts, not to predict future events. But applying the best-interests standard requires an individualized prediction about which parenting arrangement will be best for a child in the months and years to come.¹⁵ To be sure, courts are required to make predictions about the future in other contexts, but they are generally able to formulate presumptions or rules of thumb that make the outcome turn on a showing of ascertainable facts about the present or the past; the tender-years presumption and the presumption of unfitness based on adultery are examples of the sorts of mediating presumptions that were once applied in the custody context. The rejection of these rules of thumb exacerbates the mismatch between a backward-looking dispute-resolution regime and a future-oriented best-interests standard.

9. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 740 (1988) (arguing that with the removal of the tender-years presumption, application of the best-interests standard grew more complex and custody decisions became more difficult for judges).

10. Mnookin, *supra* note 1, at 251.

11. *Id.* at 250–51; see also Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978).

12. Mnookin, *supra* note 1, at 251.

13. *Id.*

14. See Elrod & Dale, *supra* note 8, at 384; Fineman, *supra* note 9, at 738 (“[T]he best interest test required judgments and predictions about psychological and social factors that judges were uncomfortable making.”).

15. Mnookin, *supra* note 1, at 251; see also Francis J. Catania Jr., *Accounting to Ourselves for Ourselves: An Analysis of Adjudication in the Resolution of Child Custody Disputes*, 71 NEB. L. REV. 1228, 1238–39 (1992).

A third problem with the best-interests standard in the context of an adjudicative regime is that the accuracy of a decisionmaker's prediction depends, in significant part, on the future behavior of both parents, and that behavior is itself dependent on the parents' reaction to the decisionmaker's ruling.¹⁶ For example, a judge may determine a child's interests would be best served by awarding primary custody to the mother, with frequent and regular visitation by the father. But a father who perceives this result as "losing" a custody contest may decline to visit and gradually withdraw from the child's life, thus altering a central assumption on which the best-interests prediction was based.¹⁷

The shift from an adjudicative to a mediative regime ameliorates many of these tensions. Indeed, the very qualities that create the mismatch between adversary procedures and an unmediated best-interests standard play to the strengths of mediation. First, the person-oriented nature of the best-interests standard is consistent with mediation's emphasis on facilitating individualized solutions based on the participants' unique needs. Unlike adjudication, mediation does not favor act-oriented rules that focus on discrete events; rather, participants are encouraged to view their situation holistically and to consider a range of potential solutions, as opposed to a set of binary choices.¹⁸ Moreover, mediation's insistence on the direct participation of disputants—and its rejection of evidentiary and procedural constraints—enhance the ability of participants to engage in wide-ranging, person-oriented inquiries. Mediation is also future-oriented—designed to shift attention away from past acts and grievances and toward the future-oriented predictions the best-interests inquiry requires.¹⁹ Thus, the predictive and person-oriented aspects of the best-interests standard, which confound adjudication and adversary negotiation, cohere well with the core assumptions of mediation.

Moreover, as mediation's proponents emphasize, parents are better situated than either judges or lawyers to understand their children's needs and to consider a range of options for meeting those needs. Parents are also in a much better position than outside decisionmakers to predict their future behavior and that of their children. The fact that mediation actively engages parents in crafting a postdivorce-parenting arrangement also makes it more likely that parents will shape their future behavior to make the plan work.²⁰ Thus, the

16. Mnookin, *supra* note 1, at 251–53.

17. See generally James R. Dudley, *Noncustodial Fathers Speak About Their Parental Role*, 34 FAM. & CONCILIATION CTS. REV. 410 (1996) (compiling findings on postdivorce mindsets of noncustodial fathers and the effects of those mindsets); Edward Kruk, *Psychological and Structural Factors Contributing to the Disengagement of Noncustodial Fathers After Divorce*, 30 FAM. & CONCILIATION CTS. REV. 81 (1992) (arguing that structural limitations and the fathers' postdivorce mindsets lead to disengagement).

18. See Catania, *supra* note 15, at 1236–38 (discussing binary nature of adjudication).

19. See Singer, *The Privatization of Family Law*, *supra* note 6, at 1530–31 (discussing future-oriented nature of mediation).

20. See, e.g., Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 139 (2002).

aspects of the best-interests standard that render it most problematic from an adversary and adjudicative perspective evoke the strengths of mediation and other nonadversary processes.

B. From Sole Custody to Postdivorce Coparenting

The shift from adversary to nonadversary dispute resolution was accelerated by a second important change in substantive child-custody doctrine: The shift from a sole-custody regime to a shared-parenting paradigm. Under the sole-custody regime that prevailed until the mid-1980s, the job of a custody decisionmaker was to identify a single, preferred custodian and assign that parent primary legal rights to the child, with the goal of ensuring stability for the child and minimizing the opportunity for future parental discord.²¹ Both judicial decisionmakers and private divorce negotiators operated within a similar win-lose structure—a structure that was compatible with the binary nature of adjudication.²²

Prevailing psychological theory supported this sole-custody model. In particular, Professors Goldstein, Freud, and Solnit, in their influential book, *Beyond the Best Interests of the Child*, asserted that the interests of children would be best served if courts ensured the continuity of the child's relationship with one "psychological parent" to whom the child was already attached.²³ Indeed, the authors placed such importance on the stability of this primary custodial relationship that they advocated granting the psychological parent the power to preclude visitation by the other parent, for fear that court-ordered visitation would be emotionally disruptive.²⁴ Although no jurisdiction took the policy of stability this far, the authors' emphasis on a child's relationship with a single psychological parent provided an important justification for the sole-custody model.

The sole-custody model also cohered with then-prevailing gender roles within the family—roles that were reflected in the tender-years doctrine that identified mothers as the preferred custodians for young children upon divorce, unless a mother was at fault for the divorce or was shown to be unfit.²⁵ This emphasis on the mother-child bond discouraged some divorcing fathers from seeking custody at all; when custody disputes did occur, the focus on maternal fitness turned them into intense adversarial contests, involving claims and

21. See ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 14–15 (2004) [hereinafter SCHEPARD, CHILDREN, COURTS, AND CUSTODY] (describing sole-custody model). The sole-custody model was also consistent with the "clean break" idea that animated early no-fault-divorce regime. *Id.* at 16.

22. Mnookin & Kornhauser, *supra* note 2, at 977–78 (noting that although a joint-custody rule had been seriously proposed, no jurisdiction had adopted such a rule).

23. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 38 (1973) ("Children have difficulty in relating positively to, profiting from, and maintaining the contact with two psychological parents who are not in positive contact with each other.").

24. *Id.* See also SCHEPARD, CHILDREN, COURTS, AND CUSTODY, *supra* note 21, at 20.

25. See Elrod & Dale, *supra* note 8, at 391.

counteraccusations of unfitness that would have qualified as grounds for divorce under the fault-based regime.²⁶

The legal and social movement for gender equality that began in the 1970s undermined both the tender-years doctrine and the sole-psychological-parent model.²⁷ Faced with constitutional and popular challenges to gender-based classifications, courts and legislatures abandoned reliance on the tender-years doctrine, in favor of a gender-neutral best-interests inquiry.²⁸ At the same time, more fathers began to contest custody, often asserting claims based on equal parenting rights. Family courts were thus faced with a burgeoning caseload just as they lost the “lodestone doctrine[s]” of fault and maternal preference that had previously guided custody decisionmaking and limited the number of custody contests.²⁹ Already uncomfortable making custody determinations, judges increasingly looked to mental-health professionals (MHPs) for expertise and assistance in resolving the increasing number of contested custody cases.³⁰

At the same time, prevailing psychological theory shifted away from Goldstein, Freud, and Solnit’s emphasis on a single psychological parent, and toward the view that even young children were capable of forming close emotional attachments to more than one parent. These new theories coincided with growing research on the importance of fathers in childrens’ lives.³¹ This research fueled an emerging mental-health consensus that children generally do best if they are able to maintain ongoing relationships with both parents following divorce or parental separation—a result the prevailing sole-custody model failed to facilitate. Thus, a custody-decisionmaking regime that was designed to effectuate the best interests of children was now subject to widespread critique as failing to serve children’s needs.

The doctrinal response to these developments was the widespread acceptance of joint custody—a development commentators have described as a “small revolution . . . in child custody law.”³² The core premise of this revolution is that, although divorce may terminate the spousal bond, it does not dissolve

26. Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 402 (2000) [hereinafter Schepard, *Evolving Role*].

27. See generally Robert H. Mnookin, *Foreword*, 19 COLUM. J.L. & SOC. PROBS. 393, 394 (1985).

28. See Mnookin, *supra* note 1, at 235. (“At the present time, maternal-preference standards are being displaced by a formal insistence on a neutral application of the [best-interests] standard.”).

29. Schepard, *Evolving Role*, *supra* note 26, at 402; see Patrick Parkinson, *Family Law and the Indissolubility of Parenthood*, 40 FAM. L.Q. 237, 238 n.4 (2002) (discussing sharp increase in custody filings).

30. For a general discussion of these developments, see Fineman, *supra* note 9. For a thoughtful critique of the legal system’s reliance on MHPs in custody cases, see Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 LAW & CONTEMP. PROBS., no. 1, 2014 at 69.

31. See generally Joan Kelly, *Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce*, 19 J. AM. ACAD. MATRIMONIAL LAW. 237, 242–49 (2005) (discussing research on the importance of a father in a child’s life).

32. See SCHEPARD, CHILDREN, COURTS, AND CUSTODY, *supra* note 21, at 46–48; Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 455 (1984).

the parenting partnership. In popular parlance, “parents are forever.”³³ As Australian family-law scholar Patrick Parkinson recently explained,

The history of family law reform in the last twenty years could be said to be the history of abandonment of the assumption, fundamental to the divorce reform movement of the early 1970’s, that divorce could dissolve the family as well as the marriage when there are children.³⁴

To be sure, joint *physical* custody remains controversial, and only a minority of postdivorce-parenting arrangements involve an equal (or substantially equal) sharing of day-to-day caretaking responsibilities.³⁵ Joint *legal* custody, or equally shared decisionmaking authority, is much more common and has become the norm in many jurisdictions.³⁶ Moreover, the normative commitment to shared postdivorce parenting, which underlies the joint-custody revolution, has been widely endorsed by courts and commentators.³⁷

The doctrinal shift from a sole-custody to a shared-parenting regime required a fundamental rethinking of the appropriate procedures for resolving divorce-related custody disputes. Under a postdivorce-coparenting regime, the task of the dispute-resolution system is no longer to make a one-time custody allocation, but rather to supervise the ongoing reorganization of a family. As Professor Andrew Schepard has written, a custody court in a coparenting regime

can be analogized to a bankruptcy court supervising the reorganization of a potentially viable business in current financial distress. The business is raising children and the parents—the managers of the business—are in conflict about how that task is to be accomplished. The court’s aim is to get the managers to voluntarily agree on a parenting plan rather than impose one on them The court has an ongoing role in managing parental conflict; parents have continuing access to the settlement processes if future disputes arise or modification of the parenting plan is necessary because of changed circumstances.³⁸

Neither adjudication nor adversary procedures are well suited to accomplishing these ongoing managerial tasks. Rather, to manage the transition from spouses to parenting partners, divorcing parents need processes that are

33. See Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 770 (1985).

34. PATRICK PARKINSON, FAMILY LAW AND THE INDISSOLUBILITY OF PARENTHOOD 41 (2011).

35. See Scott & Emery, *supra* note 30, at 80. Scott and Emery report that only a few have statutory presumptions favoring shared physical parenting, while several others favor joint legal custody but not equal residential time. *Id.* at 80 n.62.

36. See Singer, *Dispute Resolution and the Post-Divorce Family*, *supra* note 4, at 365–66.

37. See, e.g., SCHEPARD, CHILDREN, COURTS, AND CUSTODY, *supra* note 21, at 45–48 (discussing a commitment to shared parenting as the underlying theme of the joint-custody revolution); Karen S. Adam & Stacey N. Brady, *Fifty Years of Judging in Family Law: The Cleavers Have Left the Building*, 51 FAM. CT. REV. 28, 31 (2013) (“Over the past two decades, the prevailing custody paradigm in regards to decision making and parenting-time schedules has shifted from sole custody to postseparation co-parenting.”); John Lande & Forrest S. Mosten, *Family Lawyering: Past, Present, and Future*, 51 FAM. CT. REV. 20, 21 (2013) (noting that courts today “[n]ormally presume that both parents will be involved in major decisions about minor children and have continuing contact with them after divorce.”).

38. Schepard, *Evolving Role*, *supra* note 26, at 396.

forward looking, collaborative, and capacity building.³⁹ Moreover, because shared parenting works best when parents are able to cooperate and make decisions together, divorcing and separating families are best served by dispute-resolution processes that diffuse, rather than exacerbate, conflict, and that focus on enhancing parents' ability to communicate.⁴⁰ And if marriage is terminable at will, but parenthood is "indissoluble," divorcing families need interventions that can help them renegotiate boundaries and disentangle their ruptured spousal bond from their ongoing connection as parents.⁴¹

Family courts across the country have embraced these insights and have adopted an array of nonadversary mechanisms designed to resolve parenting disputes without resort to adjudication.⁴² These mechanisms include not only court-connected mediation, but also court-affiliated parent-education programs, parenting coordination for high-conflict families, and early neutral evaluations conducted by MHPs for the purpose of encouraging settlement.⁴³ An increasing number of family lawyers have also rejected the adversary paradigm, in favor of a collaborative-law model under which lawyers pledge at the outset of their representation not to take a client's case to trial.⁴⁴ As two leading reformers recently stated, "[I]n the last quarter century, the process of resolving legal family disputes has, both literally and metaphorically, moved from confrontation toward collaboration and from the courtroom to the conference room."⁴⁵

These process changes were triggered, in significant part, by the doctrinal developments described above—the move from fault-based to no-fault divorce, the rise of an unmediated best-interests standard, and the shift from a sole-custody paradigm to a postdivorce-coparenting regime. This progression suggests that changes in substantive legal doctrine can produce parallel changes in dispute-resolution processes.

39. Singer, *Dispute Resolution and the Post-Divorce Family*, *supra* note 4, at 364; *see also* Lucy S. McGough, *Protecting Children in Divorce: Lessons From Caroline Norton*, 57 ME. L. REV. 13, 29 (2005) ("[T]he adversarial adjudicatory process is unequal to the task of retrofitting parents for their new roles as parents living in what will be a binuclear family").

40. *See* SCHEPARD, CHILDREN, COURTS, AND CUSTODY, *supra* note 21, at 50 ("Conflicted parents ordered to parent together by joint custody had to have some procedural forum to resolve their disputes that did not require adversary warfare.").

41. *See generally* ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATIONS (2nd ed. 2011).

42. *Cf.* Lande & Mosten, *supra* note 37, at 21 ("The primary role of family courts has shifted from adjudication of disputes to proactive management of family law-related problems of individuals subject to their jurisdiction.").

43. *See* SCHEPARD, CHILDREN, COURTS, AND CUSTODY, *supra* note 21, at 51–54 (describing "the continuum of ADR"); Yishai Boyarin, *Court-Connected ADR: A Time of Crisis, A Time of Change*, 50 FAM. CT. REV. 377, 379, 382–85 (2012) (discussing "early neutral evaluation" and "parenting coordination").

44. *See generally* PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION (2nd ed. 2008).

45. Andrew Schepard & Peter Salem, *Foreword to the Special Issue on the Family Law Education Reform Project*, 44 FAM. CT. REV. 513, 516 (2006).

III

THE INFLUENCE OF PROCESS ON DOCTRINE: THE SUBSTANTIVE
IMPLICATIONS OF NONADVERSARY DISPUTE RESOLUTION

In part II, I examined the extent to which changes in substantive divorce and custody doctrine fueled changes in the processes used to resolve divorce-related parenting disputes. In this next part, I reverse the direction of the analytic lens and ask whether changes in dispute-resolution processes can lead to changes in substantive legal doctrine. My tentative answer is yes, at least in the context of custody decisionmaking. In particular, I argue that the shift from adjudication and adversary negotiation to mediation and collaboration as the preferred means of resolving divorce-related parenting disputes has led to the “de-legalization” of custody decisionmaking—initially by disaggregating the various components of custody and ultimately by eroding the importance of custody as an essential legal concept.

This de-legalization process has several aspects. The first is a shift from judgment to planning; rather than articulating standards for resolving contested custody cases, a mediative family-law regime focuses on assisting disputants in crafting and implementing individualized postseparation-parenting arrangements. The widespread endorsement of parenting plans as the centerpiece of custody decisionmaking embodies this shift from judgment to planning. Second, the shift from adversary to nonadversary procedures reduces the role of lawyers and legal norms in resolving parenting disputes; this both reflects and reinforces the view that divorce and parental separation are not primarily legal events, but rather ongoing social and emotional processes. Third, the shift from adversarial to mediative dispute resolution disaggregates the traditional components of child custody and thus erodes the usefulness of custody as a legal concept in the context of divorce and parental separation. These changes have both substantive and procedural implications, in the sense that each affects not only the process by which disputes are resolved, but also the way those disputes are conceptualized and the questions the family-law system purports to answer.

A. From Custody Judgments to Parenting Plans

The primary focus of an adjudicative custody regime is to arrive at a relatively stable determination about the most appropriate custody arrangement for children following a parental divorce or separation. Even when a dispute is settled, rather than brought before a judge, the focus is on allocating custodial rights and obligations in a way that approximates the result a court is likely to reach, according to the governing legal standard.⁴⁶ Under a mediative

46. Thus, the formal law in most jurisdictions grants courts the authority (and often the responsibility) to review a privately negotiated custody agreement to ensure that it serves the child's best interests. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.06 cmt. a (2002) (“The general rule is that courts are not bound by parental agreements regarding the custody of children, on the grounds that while parents can bargain away their

regime, by contrast, the overriding goal is not to allocate custody in light of a governing legal norm, but to help divorcing parents develop and implement an individualized plan to carry out their ongoing parenting responsibilities.⁴⁷

The *Principles of the Law of Family Dissolution: Analysis and Recommendations (Principles)* prepared by the American Law Institute (ALI) embody this shift from judgment to planning. The “cornerstone” of the ALI approach to children and divorce is the parenting plan, which the ALI’s *Principles* identify as “an individualized and customized set of custodial and decisionmaking arrangements for a child whose parents do not live together.”⁴⁸ Divorcing and separating parents who seek judicial intervention (including the termination of their marital status) must file, either jointly or separately, a proposed parenting plan that designates the parent with whom a child will reside on given days of the year and that allocates decisionmaking responsibility for significant matters affecting the child.⁴⁹ The parenting plan must also contain a provision that addresses how the parties will resolve future disputes arising under the plan; a key purpose of such a provision is to minimize the need for future judicial involvement.⁵⁰

A major objective of the ALI’s parenting-plan requirement is to “focus greater attention during family breakdown on planning” for children’s future needs.⁵¹ But the emphasis on planning has a substantive as well as a procedural dimension; it moves parents and other decisionmakers toward a much more capacious and detailed array of arrangements than traditional notions of custody and visitation envision.⁵² In this sense, it begins to disaggregate the collection of legal rights and responsibilities that have traditionally comprised the concept of custody. The ALI’s shift from judgment to planning also changes the nature of the question courts and disputants are being asked to resolve. No longer is that question, Which, among a predetermined set of custody outcomes, would be right or best for this family according to some external set of criteria? Rather the expectation is that the process itself will generate the options and the disputants will evaluate those options according to their own interests and values.

own rights, they cannot bargain away those of their children, which the court has an obligation to protect.”). To be sure, courts rarely exercise this authority, in practice. But its existence underscores the emphasis on judgment that characterizes a traditional adjudicatory regime.

47. See EMERY, *supra* note 41, at 103 (noting that many mediators “are less concerned with terminology than with the details of a ‘parenting plan’”).

48. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 7 (2002).

49. *Id.* § 2.05(1), (5)(a)–(b).

50. *Id.* § 2.05 cmt. g.

51. *Id.* at 6; *see id.* § 2.02(1)(a).

52. *See id.* at 7, § 2.05 cmt. a (“The parenting-plan concept presupposes a diverse range of childrearing arrangements, and rejects any pre-established set of statutory choices about what arrangements are best for children.”).

A growing number of states have adopted the parenting-plan framework endorsed by the ALI.⁵³ Some states now require a parenting plan in every custody case.⁵⁴ A number of additional states require a parenting plan when parties seek shared or joint physical custody.⁵⁵ Still other states give judges the discretion to require a parenting plan in individual cases.⁵⁶ The American Academy of Matrimonial Lawyers (AAML) has also drafted and endorsed the use of a model parenting plan. The AAML model plan is designed to “reflect the spirit of the ALI *Principles* relating to parenting plans without reference to the substantive law proposed for making child-custody and visitation decisions.”⁵⁷

Parenting-plan requirements in most jurisdictions are linked to court-connected processes such as mediation and parenting education—interventions designed primarily to enhance the capacity of parents to resolve disputes without the involvement of a judge.⁵⁸ The primary purposes of parenting education are to inform parents about the impact of divorce on children, particularly the detrimental impact of ongoing parental conflict, and to emphasize the importance of establishing a positive coparenting relationship. Armed with this knowledge and perspective, parents are referred to court-connected mediation, the goal of which is to help them develop a concrete parenting plan that will ensure the continued involvement of both parents in the children’s postdivorce lives. If parents are able to agree on such a plan, no formal custody determination is required. Indeed, the *ALI Principles* make clear a court should defer to such privately negotiated arrangements, except when an agreement is involuntary or would be harmful to the child—a much higher degree of deference than formally exists in most traditional custody regimes.⁵⁹

Although courts and other lawmakers have endorsed the ALI’s parenting-plan framework, they have been considerably less receptive to the ALI’s other major custody innovation—the “approximation standard” for judicial allocation of custodial responsibility when parents cannot agree.⁶⁰ This proposed standard had a twofold purpose; it was designed to (1) provide concrete criteria, based primarily on past-parenting patterns, to guide judicial decisionmaking when parents could not agree on a parenting plan, and (2) establish the bargaining

53. See Elrod & Dale, *supra* note 8, at 401–02.

54. See Singer, *Dispute Resolution and the Post-Divorce Family*, *supra* note 4, at 364.

55. See SHEPARD, CHILDREN, COURTS, AND CUSTODY, *supra* note 21, at 49 (“Almost half the states specifically provide for parenting plans—some requiring them in every case, some requiring them when joint custody is ordered, and some requiring them at judicial discretion.”).

56. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.05 cmt. b (2002).

57. Mary Kay Kisthardt, *The AAML Model for a Parenting Plan*, 19 J. AM. ACAD. MATRIMONIAL LAW. 223, 227–28 (2005).

58. See Singer, *Dispute Resolution and the Post-Divorce Family*, *supra* note 4, at 364.

59. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.06 cmt. a (2002).

60. See *id.* § 2.08.

backdrop against which parents and their representatives could seek agreement.⁶¹ The failure of courts and legislatures to adopt this standard (at least explicitly) has meant divorcing parents continue to negotiate their parenting arrangements in the shadow of an unmediated best-interests standard.

Several of the other articles in this issue of *Law and Contemporary Problems* offer explanations for the failure of states to adopt the ALI's approximation rule as an alternative to the much-maligned best-interests standard.⁶² But the widespread endorsement of mediation as a preferred means of resolving parenting disputes may offer a complementary explanation. The rationale for the approximation rule focuses on its advantages in a backward-looking adjudicative system.⁶³ But mediation and other nonadversarial processes largely eschew reliance on the past. Thus, the fact that the approximation rule anchors parenting negotiations in the parties' pre-separation patterns, rather than their aspirations about the future, is problematic (rather than advantageous) from the standpoint of a mediative regime. And although the approximation rule is directly applicable only when parents are unable to agree on a parenting plan, Mnookin and Kornhauser teach that legal rules inevitably affect decisionmaking outside, as well as inside, the courtroom. The fate of the approximation rule suggests the converse may also be true: The structure of decisionmaking outside the courtroom affects the content and type of doctrinal rules judges are directed to apply in contested cases.

Mediation's forward-looking orientation and its emphasis on planning, as opposed to judgment, have also shifted the balance between finality and flexibility in custody decisionmaking. Although custody decisions have always lacked the finality of other legal determinations, the legal system traditionally viewed custody as a fixed legal concept. Requests to revisit custody arrangements were treated as failures of adjudication and were limited by strict modification standards.⁶⁴ By contrast, under a parenting-plan regime, parents are encouraged to anticipate changes in their children's needs and to revisit and revise their parenting arrangements in light of these anticipated changes.⁶⁵ Thus, most mediated parenting plans include provisions for the resolution of future parenting disputes; these provisions generally require parties to return to mediation or other nonadjudicative processes before seeking judicial intervention. Many plans also provide for periodic review of parenting arrangements, even in the absence of specific disagreements.⁶⁶ This emphasis on

61. *Id.* § 2.08 cmt. a.

62. See generally Katharine T. Bartlett, *Prioritizing Past Caretaking in Child-Custody Decisionmaking*, 77 LAW & CONTEMP. PROBS., no. 1, 2014 at 29; Scott & Emery, *supra* note 30.

63. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 cmt. b (2002).

64. See *id.* at 3–4.

65. See *id.* at 12 (noting that parenting plans treat “future change and disagreement as something to be anticipated and planned for, rather than as extraordinary and unexpected”).

66. See Kisthardt, *supra* note 57, at 235 (noting that AAML model parenting plan anticipates

flexibility and change reinforces the notion of postdivorce parenting as an ongoing planning process, as opposed to a one-time custody allocation.⁶⁷

B. Reducing the Primacy of Law and Lawyers

The shift from adversary to nonadversary processes has also reduced the primacy of lawyers and legal norms in resolving divorce-related parenting disputes. Lawyers play a relatively minor role in most family alternative-dispute resolution (ADR) processes, particularly court-connected mediation.⁶⁸ In part, this is because most disputants in today's family courts are not represented by counsel.⁶⁹ Even when parties are represented, many mediators discourage attorneys from participating in mediation sessions.⁷⁰ Indeed, some mediators believe legal advocacy has no place in the mediation process.⁷¹

Even in processes such as collaborative law, in which lawyers play a more active role, lawyers increasingly share responsibility with MHPs and other nonlegal personnel.⁷² In most collaborative-practice models, lawyers work as part of an interdisciplinary team that includes both MHPs and neutral financial experts.⁷³ Often, the mental-health members of the collaborative team assume primary responsibility for helping parents negotiate a parenting plan, while

likely future changes by including an option for automatic review).

67. See PARKINSON, *supra* note 34, at 199–200 (characterizing as “problematic” the notion of finality in children’s cases and urging “lawyers, mediators, and courts to make it clear that the process of decision making is not a process of allocation that is final, but rather is a decision for the time being, based on the circumstances at that time”).

68. See, e.g., Craig A. McEwen, Nancy H. Rogers & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1351 (1995) (“Critics and proponents of mediation alike see the absence of lawyers as a defining aspect of divorce mediation.”).

69. See Amy G. Applegate & Connie J.A. Beck, *Self-Represented Parties in Mediation: Fifty Years Later It Remains the Elephant in the Room*, 51 FAM. CT. REV. 87, 87 (2013) (“[A] survey of individual states reveals that on average, eighty percent of all family cases involve at least one self-represented litigant, while in nearly fifty percent of the cases, both litigants proceed on their own.”).

70. Ann L. Milne, Jay Folberg & Peter Salem, *The Evolution of Divorce and Family Mediation: An Overview*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 9 (Jay Folberg, Ann L. Milne & Peter Salem eds., 2004) (“Attorneys are not usually present during the mediation session.”).

71. Mark C. Rutherford, *Lawyers and Divorce Mediation: Designing the Role of “Outside Counsel”*, 12 MEDIATION Q. 17, 27 (1986) (“For mediation to succeed as a profession and to reach its highest objectives, advocacy has no place in any part of the process. For outside counsel to advocate a client’s interest contradicts the very essence of mediation and can produce inequitable results.”). Other commentators disagree and advocate a more central role for attorneys in mediation. See McEwen, Rogers & Maiman, *supra* note 68, at 1351–53.

72. See Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?*, 22 U. ARK. LITTLE ROCK L. REV. 453, 456 (2000) (asserting that collaborative approach “requires new multi-disciplinary partnerships between the courts and attorneys and mediators and MHPs, in order to arrive at viable solutions”); Lande & Mosten, *supra* note 37, at 22 (“As part of the transformation in dispute processing, family lawyers now operate as part of interdisciplinary professional workgroups solving family problems in addition to acting as advocates of their clients’ rights and interests.”).

73. See Pauline H. Tesler, *Collaborative Family Law*, 4 PEPPERDINE DISP. RESOL. L.J. 317, 330–33 (2004) (describing interdisciplinary collaborative practice).

lawyers work closely with financial professionals to address issues relating to property and financial support.

In addition to reducing the primacy of lawyers, nonadversary processes also diminish the importance of legal norms in framing and resolving family disputes. Indeed, one of the oft-cited advantages of mediation is it allows divorcing couples to exercise decisionmaking authority unfettered by traditional legal constraints.⁷⁴ As two mediation scholars explain,

The ultimate authority in mediation belongs to the parties themselves and they may fashion a unique solution that will work for them without being governed by precedent or by concern for the precedent they may set for others. The parents may, with the help of the mediator, consider a comprehensive mix of their children's needs, their interests and whatever else they deem relevant, regardless of rules of evidence or strict adherence to substantive law.⁷⁵

Mediation also reduces the importance of legal norms by conceptualizing divorce and parental separation not primarily as legal events, but rather as ongoing social and emotional processes; thus recharacterized, divorce-related parenting disputes call not for narrow legal decisionmaking, but for interventions that are holistic, therapeutic and interdisciplinary.⁷⁶ Lawyers and legal norms play, at best, a supporting role in such holistic interventions.⁷⁷

C. The Disaggregation of Custody and Its Erosion as a Legal Concept

The shift from an adversary to a mediative perspective has also led to the disaggregation of the traditional elements of custody and custody's erosion as an essential legal concept. This disaggregation began with the separation of legal from physical custody—a separation characterized by the joint-custody movement.⁷⁸ It has continued with the rejection of custody labels, a development initiated by mediators and other ADR practitioners, and endorsed by proponents of postdivorce coparenting.⁷⁹

The ALI's *Principles* reflect both the disaggregation of the traditional elements of custody and the jettisoning of custody labels.⁸⁰ Thus, chapter two of the ALI's *Principles* replace the terms “physical custody” and “visitation” with the more malleable and divisible notion of “custodial responsibility.” Similarly, the ALI *Principles* reframe the traditional concept of legal custody as “decisionmaking responsibility,” a change that is designed “to better connote a

74. See Milne et al., *supra* note 70, at 8 (“Mediation is bound neither by rules of procedure and substantive law nor by other assumptions that dominate the adversarial process of the law.”).

75. LENARD MARLOW & S. RICHARD SAUBER, *THE HANDBOOK OF DIVORCE MEDIATION* 41 (1990).

76. See Singer, *Dispute Resolution and the Post-Divorce Family*, *supra* note 4, at 364.

77. See Robert Tompkins, *Parenting Plans: A Concept Whose Time Has Come*, 33 *FAM. & CONCILIATION CTS. REV.* 286, 290–291 (1995).

78. See Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 *MD. L. REV.* 497, 503–05 (1988) (discussing differences between joint legal and joint physical custody).

79. See generally Parkinson, *supra* note 29.

80. For an early expression of this view, see Tompkins, *supra* note 77, at 290–91. For an early critique, see generally Fineman, *supra* note 9.

wide range of possible ways decisionmaking authority for a child can be divided.”⁸¹ Significantly, the ALI *Principles* endorse a presumption in favor of joint decisionmaking authority even when the parents cannot agree on a parenting plan, thus emphasizing the separation of decisionmaking authority from other parental responsibilities.⁸² More generally, the ALI commentary explains that the traditional concepts are undesirable because they “represent, and help to perpetuate, an adversarial, win-lose paradigm of divorce.”⁸³ The new terminology, by contrast, can “contribute to a broader reconceptualization of the enterprise from who will possess and control children to what adjustments in family roles will be most appropriate for the child.”⁸⁴

Mediation and parenting planning embody this broader reconceptualization. Indeed, for many mediators, the refusal to discuss “custody” is a key element of their practice.⁸⁵ As a well-known mediation text explains, “Our focus is on mediating a Parenting Plan, not a custody dispute, and it calls for asking an entirely different question of the parents.”⁸⁶ Leading family-court reformers similarly contrast the concept of custody with the philosophy of parenting plans:

The term “custody” makes parents think in the language of criminal law and property. It projects a negative image of the role of the visiting parent in the lives of children after divorce, thus encouraging parental competition and combat. The core idea of the parenting plan, in contrast, is to help parents plan for their mutual involvement in the future life of their child by encouraging them to think in terms of actual parenting tasks, rather than legal labels.⁸⁷

Thus, mediated and collaboratively negotiated parenting plans rarely mention custody or visitation; instead, they refer to parenting time and decisionmaking responsibility, terms that apply to both parents. Similarly, the model parenting plan drafted by the AAML avoids any mention of “custody” or “visitation,” explaining that this choice of language is intended “to send an important message to parents about their ongoing responsibility and is more reflective of what actually happens in families.”⁸⁸

Family law–reform efforts in a number of states reflect a similar move away from custody as a label and as a legal concept. For example, the Florida legislature recently revised its divorce and paternity statutes to eliminate the terms “custody,” “custodial parent,” “primary residential parent,”

81. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 8 (2002).

82. *See id.* § 2.09(2).

83. *Id.* at 7.

84. *Id.* at 8.

85. *See* Marilyn S. McKnight & Stephen K. Erickson, *The Plan to Separately Parent Children After Divorce*, in *DIVORCE AND FAMILY MEDIATION*, *supra* note 70, at 129, 133 (calling for mediators to “refuse to mediate *custody* and to instead mediate schedules, housing, even how the clothes would be exchanged or handled” (emphasis in original)).

86. *Id.*

87. SCHEPARD, *CHILDREN, COURTS, AND CUSTODY*, *supra* note 21, at 49.

88. Kisthardt, *supra* note 57, at 229.

“noncustodial parent,” and “visitation.”⁸⁹ In place of those “outdated” legal terms, Florida family-law statutes now refer simply to “time-sharing” by “parents.”⁹⁰ Thus, divorced and separated parents in Florida no longer have sole, primary, or joint custody of their children; rather, they adhere to a timesharing schedule contained in a mandatory parenting plan. Similarly, a 2005 “parenting plan” statute in Tennessee replaces all designations of custody and visitation with terms such as “residential schedule,” “temporary” and “permanent” parenting plans, and “parenting responsibilities.”⁹¹ When parents cannot agree on a plan, Tennessee courts allocate parenting responsibilities through a standardized parenting-plan order, developed jointly by representatives of the Tennessee bar and bench.⁹²

The elimination of custody designations is more than a semantic change, although such semantic changes are themselves significant, in light of family law’s important expressive role.⁹³ The changes also have a substantive component: They represent the erosion of custody as a legal concept and the recharacterization of parenting disputes as essentially nonlegal events. This recharacterization process parallels Lon Fuller’s insight about the relationship between adjudication and rights.⁹⁴ In discussing the forms and limits of adjudication, Fuller resisted the characterization that the proper province of adjudication is to make an authoritative determination of questions raised by claims of right or accusations of guilt. Rather, Fuller explained that the adjudicative process itself shapes our understanding of the claims that are submitted to it:

It is not so much that adjudicators decide only issues presented by claims of right or accusations. The point is rather that *whatever* they decide, or *whatever* is submitted to them for decision tends to be converted into a claim of right or an accusation of fault or guilt. This conversion is effected by the institutional framework within which both the litigant and the adjudicator function.⁹⁵

The recent history of custody decisionmaking suggests that nonadversarial dispute-resolution regimes engage in a similar (re)framing process. Just as adjudicative regimes tend to construct disputed issues as legal events requiring third-party judgment and an allocation of rights, mediative and managerial regimes approach those same questions as forward-looking opportunities for planning and problem solving—preferably by the disputants themselves. Thus, the shift from an adjudicative to a mediative regime for resolving divorce-related parenting disputes not only affects the process by which those disputes are resolved; it also shapes our understanding of what is at stake and the

89. See Alexa Welzien, *Life, Liberty, and the Pursuit of Parental Equality: Florida’s New Parenting Plan Remains Overshadowed by Lingering Gender Bias*, 33 NOVA L. REV. 509, 513 (2009).

90. *Id.*

91. TENN. CODE ANN. § 36-6-402(2)–(3), (5)–(6) (2010).

92. *New Uniform Parenting Plan Adopted*, 41 TENN. B.J., July 2005, at 7.

93. See Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 294–95 (1988).

94. Fuller, *supra* note 11, at 368–71.

95. *Id.* at 369 (emphasis in original).

content of the governing norms.

IV CONCLUSION

Professor Mnookin's work challenges us to see the connections between family-law doctrine and family-law dispute-resolution processes. In this article, I have taken up that challenge by examining the relationship between changes in child-custody doctrine and changes in the preferred processes for resolving divorce-related parenting disputes. The examination suggests causal arrows that run in both directions: Changes in divorce and child-custody doctrine over the past three decades facilitated the shift from adversarial to nonadversarial family dispute-resolution processes; those nonadversarial processes, in turn, fueled further substantive changes that produced a new understanding of postseparation parenting disputes and that diminished the relevance of legal norms in resolving those disputes. To return to Mnookin's original metaphor, just as divorce and custody bargaining takes place "in the shadow" of substantive legal doctrine, so too does that substantive doctrine develop and transform "in the shadow" of the prevailing dispute-resolution regime.⁹⁶

96. Mnookin & Kornhauser, *supra* note 2.