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Rethinking the Modification of Child Custody Decrees

Joan G. Wexler†

I. INTRODUCTION

Before they reach the age of eighteen, almost one-third of the children in the United States will experience the divorce of their parents.¹ Deservedly, considerable scholarly attention has been paid to what happens to those millions of children at the time of divorce. Members of the legal profession and social scientists have debated at length the functions and drawbacks of the "best interests of the child" standard traditionally used to decide custody upon divorce.²

Little attention, however, has been paid in the literature to the fact that

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1. Dr. Paul Glick, Senior Demographer of the Population Division of the U.S. Census Bureau, projects that this figure of one-third will be reached by 1990. Glick, *Children of Divorced Parents in Demographic Perspective*, J. SOC. ISSUES, Fall 1979, at 170, 175. Another authority estimates that forty to fifty percent of children born during the 1970's will spend some time living in a single-parent home. Hetherington, *Divorce: A Child's Perspective*, 34 AM. PSYCHOLOGIST 851, 851 (1979).

2. See, e.g., J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1979); Beaber, *Custody Quagmire: Some Psycholegal Dilemmas*, 10 J. PSYCHIATRY & L. 309 (1982); Foster, *Child Custody and Divorce: A Lawyer's View*, 22 J. AM. ACAD. CHILD PSYCHIATRY 392 (1983); Foster & Freed, *Child Custody* (pts. 1 & 2), 39 N.Y.U. L. REV. 423 (1964), 39 N.Y.U. L. REV. 615 (1964); Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226; Pearson & Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703 (1982-83); Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55 (1969); Weitzman &

life continues after divorce and that the legal system continues to hold open the custody issue long after the initial custody decision has been made. This lack of attention is particularly surprising since there appear to be more hearings and trials concerning the modification of custodial arrangements than there are concerning initial custody decisions.³

The modification of custodial arrangements is such a hotbed of litigation in part because of the fluidity of the modern American family. Today's family is increasingly "extended," not in the sense of spanning generations but in the sense of shifting and expanding its membership.⁴ Noncustodial parents frequently urge modification of custody on the ground of changes in circumstances that are common to many post-divorce families. Consider the hypothetical case of the Smiths.

The divorce of John and Mary Smith was, like most divorces today, accomplished by their joint consent. To arrive at their marital settlement, Mr. and Mrs. Smith went through the usual negotiations about who got what. Although Mrs. Smith obtained custody of the children, this was one of the points negotiated, and in exchange for giving up custody and retaining only a right of visitation,⁵ Mr. Smith bargained for and obtained rights to marital property and income that Mrs. Smith otherwise would at least have contested. After this negotiated settlement was incorporated into a court order, Mrs. Smith went home with the children, and Mr. Smith returned to his new bachelor's flat.

Mr. Smith, now relieved of domestic responsibility, was more able than

Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C.D. L. REV. 473 (1979).

3. See Sharp, *Modification of Agreement-Based Custody Decrees: Unitary or Dual Standard?*, 68 VA. L. REV. 1263, 1264 n.8 (1982) (great majority of litigated custody decisions involve motions to modify); cf. Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody In and Out of State*, 46 U. COLO. L. REV. 495 (1975) (discussing custody modifications after divorce).

4. See M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 3-4 (1981).

5. This comports with the traditional custody arrangement in which the mother is usually the custodial parent and the father the noncustodial parent. See J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 121 (1980) (mothers obtained custody in over 80% of the cases in the authors' study); Hetherington, Cox & Cox, *Divorced Fathers*, 25 FAM. COORDINATOR 417, 417 (1976) (as of 1975, only 8.4% of children of divorced parents resided with their fathers); Messinger & Walker, *From Marriage Breakdown to Remarriage: Parental Tasks and Therapeutic Guidelines*, 51 AM. J. ORTHOPSYCHIATRY 429, 433 (1981) (in approximately 90% of divorces, mothers receive sole custody of the children). This Article will refer to the custodial parent by the feminine pronoun "she" simply because that nomenclature is accurate in the vast majority of cases. Likewise, this Article will address the custodial modification problem in the context of sole custodial arrangements despite the recent scholarly and legislative interest in joint custody, because sole custodial arrangements are far more prevalent. See Abarbanel, *Shared Parenting After Separation and Divorce: A Study of Joint Custody*, 49 AM. J. ORTHOPSYCHIATRY 320, 320 (1979); Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C.D. L. REV. 523, 540-41 (1979); Miller, *Joint Custody*, 13 FAM. L.Q. 345, 353 (1979). In a survey of family law practitioners, three-quarters reported the use of a joint custody arrangement in fewer than 15% of their cases. *Survey Report Profiles Members of ABA Family Law Section*, 8 FAM. L. REP. (BNA) 2683, 2685 (1982).

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Mrs. Smith to spend time socializing, and he soon found a “significant other.” Mrs. Smith, meanwhile, was hard pressed to control things at home, for the children, upset by the divorce, were acting out their emotional conflicts. Mrs. Smith coped as best she could, and she, too, sought solace in the companionship of the opposite sex.

Mr. Smith’s relationship with his new companion soon blossomed into a second marriage. Settled down once more, Mr. Smith began again to appreciate the values of family life which he had once enjoyed so well. More and more, he yearned for his children to join him in his new home, where, he thought, he and his new wife could give them a real family life. Mr. Smith also perceived that the children’s life with Mrs. Smith was chaotic.

Accordingly, Mr. Smith consulted his matrimonial lawyer about obtaining custody. The lawyer informed Mr. Smith that the usual legal requirement for changing an initial custody decision was a substantial change in the circumstances of the parties. Under that standard, Mr. Smith had a good chance of modifying the decree, because his remarriage was a new circumstance in his favor, while Mrs. Smith’s extramarital relations with a member of the opposite sex could hurt her chances of retaining custody. Moreover, Mr. Smith’s attorney reported that there was a trend in the law, including a recent decision by the prestigious New York Court of Appeals,⁶ to dispense with the need to show changed circumstances at all, and to judge modification applications under a flexible “best interests” standard, particularly when the prior order had been based on an agreement between the parties, as in the Smith’s case, rather than on an adjudication by a court after trial. Mr. Smith’s attorney counseled that there was good reason to think that a modification of custody was in the best interests of the Smith children—Mr. Smith now had a stable family home, whereas the children were having difficulties under the current custody arrangement.

The lawyer’s advice proved correct. Mr. Smith was awarded custody. Mrs. Smith was given standard visitation rights: She was allowed to see her children one evening after school during the week and on alternate weekends. All the incidents of custody—the right to make educational, health, and other significant decisions regarding the children—were transferred to Mr. Smith.

The thesis of this Article is that only in the most myopic view of the issues presented is anyone’s interest served by legal standards that allow such a result. Focusing on the post-divorce family as well as on the configuration of the family at the time of divorce, this Article argues that the

6. *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893 (1982).

law today is moving in precisely the wrong direction. There is a marked trend toward making custody modifications fairly easy to obtain. Instead, rigorous statutory criteria should firmly limit both the parents' ability to bring such litigation and the courts' discretion to make such custodial modifications. The Article points out that the current trend raises serious constitutional issues that have not yet been addressed, or even acknowledged, either by courts or commentators.

In arguing for a stricter standard, the Article relies on a growing body of social science findings that dispute important assumptions routinely made by the courts. These findings strongly suggest that divorce is a process, not a fixed event, and that the custodial parent and child require a period of time to adapt to the new post-divorce situation. Research indicates that courts generally do not appropriately evaluate the various factors that affect the child's adjustment during this process. For example, although courts have considered both the remarriage of the noncustodial parent and the custodial parent's sexual activity as factors supporting an application to modify custody, it appears that neither factor necessarily supports such a change. When more meaningful variables are considered—such as interparental conflict, residential changes, and the young child's attachment needs—it becomes clear that custody modification is justified only in special cases.

II. AN OVERVIEW OF MODIFICATION STANDARDS

The law in every state, whether statutory or common, permits the courts to modify orders directing the custody of a child upon the divorce of his or her parents.⁷ Even if the court that made the initial custody decree did not reserve jurisdiction, the modifying court will exercise its power either by express statutory authority or by its common law equity powers over the welfare of children.⁸ The rule that jurisdiction is always available applies whether the initial decree was consensual or resulted from litigation.

While judicial power to modify is universally recognized, states vary as to what showing the moving party in a modification application must make to obtain relief. There are three such standards. One permits modification if there is a substantial change in circumstances that makes a modification of custody in the child's best interests. An even more flexible test allows modification if it is in the child's best interests regardless of whether there has been any change in circumstances since the initial

7. See H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 17.7, at 598 (1968); 1 A. LINDEY, *SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS* § 14, at 14-123 to 14-124 (rev. ed. & Supp. 1984).

8. H. CLARK, *supra* note 7, § 17.7, at 598-99.

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award. A third standard permits modification only consensually or upon a showing of serious harm to the child. The first test will be referred to here as the "traditional standard" because for many years it has been the controlling doctrine in the great majority of jurisdictions. Recently, however, the law has been gravitating away from the traditional test toward the second, pure best interests test. The third standard has never been the law in more than a few jurisdictions, and today the law seems to be more hostile than ever to its relatively inflexible approach.

A. *The Traditional Standard*

The traditional custody modification standard allows modification of an initial custody decree if the court determines that a subsequent, substantial change of circumstances warrants a change of custody in order to promote the best interests of the child.⁹ The party seeking to modify the decree bears the burden of demonstrating both that a substantial change in circumstances has occurred and that a modification will be in the child's best interests. In some states, this allocation of burdens is mandated by statute.¹⁰ In the majority of states, however, it represents judge-made law, often adding a gloss to general statutes which provide that modification may be ordered in a child's best interests.¹¹

9. Foster & Freed, *Child Custody* (pt. 2), 39 N.Y.U. L. REV. 615, 623 (1964). See, e.g., *Nabors v. Nabors*, 418 So. 2d 143 (Ala. Civ. App. 1982); *Vaughn v. Vaughn*, 418 So. 2d 155 (Ala. Civ. App. 1982); *Ryan v. Ryan*, 652 S.W.2d 313 (Mo. Ct. App. 1983); *Pact v. Pact*, 70 Misc. 2d 100, 107, 332 N.Y.S.2d 940, 949 (N.Y. Fam. Ct. 1972); cf. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 984 (1979) (standard represents a compromise by making agreements difficult though not impossible to reopen). There is sometimes the additional requirement that the custodian's or child's circumstances change, rather than those of the noncustodian. See, e.g., UNIF. MARRIAGE & DIVORCE ACT § 409(b) 9A U.L.A. 211-12 (1973). But see *Ivins v. Jennings*, 308 N.W.2d 75, 78 (Iowa 1981) ("A party seeking a change of custody must show a superior claim, based upon an ability to minister to the child's needs more effectively than the custodial parent."). Other courts consider proof of the unfitness of the custodial parent as a factor in the changed circumstances/best interests test. See, e.g., *Helgenberger v. Helgenberger*, 209 Neb. 184, 306 N.W.2d 867 (1981) (mother's sexual conduct did not require custody modification under the best interests test); *Nowak v. Nowak*, 65 A.D.2d 957, 410 N.Y.S.2d 478 (N.Y. App. Div. 1978) (declining to change custody absent finding of custodial parent's unfitness even if other parent more fit). Another variation requires proof that the change in circumstances be permanent as well as substantial. See, e.g., *Chislett v. Cox*, 102 Idaho 295, 629 P.2d 691 (1981) (declining to change custody where evidence failed to support movant's claim that a permanent change in conditions had occurred); *In re Marriage of Mikelson*, 299 N.W.2d 670 (Iowa 1980) (finding insufficient evidence of permanently changed circumstances).

10. See N.C. GEN. STAT. § 50-13.7 (Supp. 1983) (party must show changed circumstances); WASH. REV. CODE ANN. § 26.09.260(1) (West Supp. 1985); WIS. STAT. ANN. § 767.32(2) (1981 & West Supp. 1984).

11. Compare *Parker v. Parker*, 269 Ala. 299, 303, 112 So.2d 467, 471 (1959) (requiring showing of material change in conditions) with ALA. CODE § 30-3-1 (1977) (court may grant custody as seems right and proper); compare *Thompson v. Thompson*, 213 Ark. 595, 212 S.W.2d 8, (1948) (finding insufficient evidence of material change adversely affecting child's welfare) with ARK. STAT. ANN. § 34-2726 (Supp. 1983) (best interests test for custody award); compare *Hall v. Hall*, 186 Conn. 118, 122, 439 A.2d 447, 449 (1982) (modification of custody award must be based on a material change of circumstances which alters best interests of the child or on finding that original award not in best

Under the traditional standard, the trial court has almost as much discretion in modification applications as it does in making the initial award of custody—which is to say a great deal of discretion. The court decides what constitutes a change in circumstances and whether that change has an impact on a child's interests on the facts of each case, and the court's appraisal of the individuals and circumstances before it is accorded great weight on any appeal.

Custody litigation, unlike most other litigation, attempts to predict the future rather than to understand the past.¹² In most other litigation, the result will depend upon the court's determination that some event did or did not take place at an earlier time.¹³ Aside from possibly bearing on credibility, the litigants' personality, priorities, lifestyle, financial resources, emotional stability, and other personal attributes have no relevance to the outcome. In custody litigation, however—at least under the best interests and traditional modification standards—those very factors will determine the result in large measure, with the court making a judgment as to whether the child is likely in the future to be "better off" with one parent than with the other. Not surprisingly, decisions made in this framework are less a product of reasoned application of precedent than of the personality, temperament, background, interests, and biases of the trial judge or of the community that elected him.

Moreover, appellate judges with only a trial record before them are reluctant to second-guess the assessment of the trial judge. This reluctance is considerably greater than an appellate court's normal reluctance to impose its own views when the application of a legal rule turns heavily on fact finding. Because the legal rules involved—changed circumstances, best interests of the child—are so imprecise, it is difficult for any court that conceives of its function as one of review rather than *de novo* decisionmaking to disagree with a trial court's decision. In addition, appellate judges may believe that the application of the legal rules to the facts involves an assessment of intangibles that only the trial court can truly perceive and evaluate.¹⁴

There are, of course, some restraints on what a trial court may do. The traditional modification standard requires a finding that a significant

interests of child) *with* CONN. GEN. STAT. ANN. § 46b-56 (West Supp. 1984) (court shall apply best interests test); *compare* Gibson v. Gibson, 196 Or. 198, 213, 247 P.2d 757, 763 (1952) (parent seeking modification has burden of showing change in circumstances) *with* OR. REV. STAT. § 107.137 (1981) (best interests test).

12. Mnookin, *supra* note 2, at 250-52.

13. *Id.* at 250-51.

14. *See, e.g.*, Smith v. Smith, 117 Ariz. 249, 253, 571 P.2d 1045, 1049 (Ariz. Ct. App. 1977) ("A child custody proceeding more than any other court hearing challenges the trial judge to view and weigh the various personalities, motives and abilities of all the parties.").

change in circumstances actually occurred, and the best interests prong of the test often at least gives lip service to the social policy that stability and continuity are usually in a child's best interests.¹⁵

Yet the principle of finality is foreign to custody litigation under this test. Normally, a party may not relitigate a claim based on facts known at the time of the earlier trial; even to reopen a case on the basis of new evidence, a litigant must satisfy a heavy burden.¹⁶ In custody proceedings, however, the traditional modification standard virtually invites relitigation. A custodial decree is *res judicata* only as to what was then before the court; it is final only until conditions affecting the child's best interests change.¹⁷

The traditional standard's "prior unknown facts exception" doctrine, recognized in many jurisdictions, further undermines the principle of finality. Under this rule, even facts that existed at the time of the initial decree but were not brought to the court's attention are admissible in a modification proceeding.¹⁸ A custody decree, therefore, is *res judicata* only

15. Thus, for example, in *Wout v. Wout*, 32 A.D.2d 709, 710, 300 N.Y.S.2d 24, 26 (N.Y. App. Div. 1969), the court stated that the "overriding consideration of the child's welfare dictates that a continual shifting back and forth of custody should be avoided whenever possible." See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 2, at 31-39; Bodenheimer, *supra* note 3, at 498; Watson, *supra* note 2, at 71; see also *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980) ("once custody of children has been fixed it should be disturbed only for the most cogent reasons"); *In re Marriage of Melton*, 256 N.W.2d 200, 205 (Iowa 1977) ("settled principle that once custody is fixed it should seldom be disturbed and only then for the most cogent reasons"); *Nehra v. Uhlar*, 43 N.Y.2d 242, 250, 372 N.E.2d 4, 8, 401 N.Y.S.2d 168, 172 (1977) (continual shifting to be avoided); *De Francesco v. MacNary*, 74 A.D.2d 966, 967, 425 N.Y.S.2d 885, 886 (N.Y. App. Div. 1980) ("usually in the best interest of the child to avoid shifting custody from one parent to another whenever possible"). In addition, courts recognize that the potential for continual relitigation under claims of changed circumstances is detrimental to children's welfare because of the likelihood that parents will use their children as weapons for hurting each other. See H. JAMES, WHAT MAISIE KNEW 4-5 (1897) (parents, each awarded custody for six months annually, "had wanted [the child], not for any good they could do her, but for the harm they could, with her unconscious aid, do each other"); see, e.g., *Helgenberger v. Helgenberger*, 209 Neb. 184, 187, 306 N.W.2d 867, 869 (1981) (children are not chattels and should not be the subject of continual contest between divorced parents at expense of their well being); *Nehra v. Uhlar*, 43 N.Y.2d 242, 372 N.E.2d 4, 401 N.Y.S.2d 168 (1977) (continual relitigation as to which parent should have custody not in long range best interests of child and may encourage child snatching); *Buchholz v. Sogge*, 303 N.W.2d 115, 116 (S.D. 1981) (courts, parties, and children must be protected from endless and vexatious litigation and resulting uncertainty).

16. See generally RESTATEMENT (SECOND) OF JUDGMENTS § 70-71 (1980) (burden on party seeking relief from judgment based on mistake or procured by corruption, duress or fraud).

17. See, e.g., *Whaley v. Whaley*, 61 Ohio App. 2d 111, 113, 399 N.E.2d 1270, 1272 (1978) (exception to rule of finality of judgments if a change of circumstances necessitates a change of custody to serve child's best interests); *Hershey v. Hershey*, 85 S.D. 85, 90, 177 N.W.2d 267, 270 (1970) (decree is *res judicata* unless substantial change of circumstances affecting child's welfare is shown).

18. See, e.g., *Wilson v. Wilson*, 408 So. 2d 114, 116 (Ala. Civ. App. 1981), *cert. denied*, 408 So. 2d 117 (Ala. 1982); *Henkell v. Henkell*, 224 Ark. 366, 369, 273 S.W.2d 402, 404 (1954); *Smith v. Smith*, 212 So. 2d 117, 118 (Fla. Dist. Ct. App. 1968); *Warren v. Warren*, 191 N.W.2d 659, 661 (Iowa 1971). Some state statutes and the Uniform Marriage and Divorce Act recognize this exception. See, e.g., MO. ANN. STAT. § 452.410 (Vernon Supp. 1984); WASH. REV. CODE ANN. § 26.09.260 (West Supp. 1985). The UMDA restricts its application by stating that the court may consider facts unknown to it at the time of the prior decree, but that it may not grant a modification unless one of three alternate standards are met. See UNIF. MARRIAGE & DIVORCE ACT § 409, 9A U.L.A. 211

as to the facts actually presented to the court. A party seeking a custody modification need not in these jurisdictions show that circumstances subsequent to the decree require a change, only that matters existing at the time of the earlier adjudication, but of which the court was unaware, should be considered in making the custodial determination. A court's willingness to use the prior unknown facts exception to alter an initial custody decree will no doubt depend on whether the new evidence would have a substantial impact on the best interests determination.¹⁹

In most civil litigation, courts will entertain such new evidence only if, *inter alia*, it was "newly discovered," as provided in the Federal Rules of Civil Procedure.²⁰ Some states do require the moving party in a custody modification proceeding to demonstrate that the newly advanced facts were unknown to him at the time of the earlier decree and could not have been ascertained with due diligence.²¹ Most states, however, impose no such requirement; the court's only concern is whether the newly advanced facts were within the court's, not the party's, knowledge.²² Courts justify

(1973); *infra* p. 774-75.

Modification has also been permitted under the prior facts exception if there are facts demonstrating fraud or misrepresentation at the time of the initial decree. *See, e.g., Swycaffer v. Swycaffer*, 271 P.2d 585 (Cal. Dist. Ct. App. 1954) (modifying custody order in situation of extrinsic fraud); *Juri v. Juri*, 61 Cal. App. 2d 815, 143 P.2d 708 (Cal. Dist. Ct. App. 1943) (fraudulent misrepresentations would justify modification); *Hendricks v. Hendricks*, 69 Idaho 341, 206 P.2d 523 (1949) (same); *Gibson v. Gibson*, 196 Or. 198, 247 P.2d 757 (1952).

19. Thus, when urged to consider prior unknown facts, the Supreme Court of Oklahoma ruled that

the movant has the burden to establish not only that these facts would, if they had been known to the court, have had a material effect upon that court's determination of the question involving custody of the children, but to also show that it would now be for the best interest of said child to modify the original order

Weatherall v. Weatherall, 450 P.2d 497, 499 (Okla. 1969). *See also Gantner v. Gantner*, 39 Cal. 2d 272, 246 P.2d 923 (1952); *Stratton v. Stratton*, 87 Idaho 118, 391 P.2d 340 (1964). Other courts are more lenient in admitting evidence, particularly when the facts sought to be introduced relate to pre-divorce parental conduct of which the court disapproves. *See, e.g., Mathewson v. Mathewson*, 207 Cal. App. 2d 532, 24 Cal. Rptr. 466 (1962) (mother's deceitful and immoral conduct sufficient to overcome presumption that child be placed with the mother); *Harwell v. Harwell*, 253 Iowa 413, 112 N.W.2d 868 (1962) (adultery not known at time of decree constitutes a "change in circumstances"); *Youngberg v. Youngberg*, 193 Neb. 394, 227 N.W.2d 396 (1975) (mother's meretricious relationship did not require change in custody where mother was trying to stabilize and legalize the relationship). *But see Swindle v. Swindle*, 242 Ark. 790, 415 S.W.2d 564 (1967) (where parent failed to produce evidence available to him at time of custody hearing regarding custodial parent's illicit relations, he may not rely on that evidence in later modification proceeding); *Merrill v. Merrill*, 167 Cal. App. 2d 423, 334 P.2d 583 (1959) (evidence of acts known prior to entry of decree cannot show a change of conditions); *Carney v. Franklin*, 207 Ga. 39, 59 S.E.2d 909 (1950) (same); *Baker v. Baker*, 119 Utah 37, 49, 224 P.2d 192, 197-98 (1950) (trial court properly rejected evidence concerning incidents which occurred prior to divorce hearing).

20. FED. R. CIV. P. 60(b). Rule 60(b) further provides that to be admissible, such evidence could not, by due diligence, have been discovered in time to move for a new trial under Rule 59(b) (requiring motion for new trial to be served not later than ten days after entry of judgment).

21. *See, e.g., Gantner v. Gantner*, 39 Cal. 2d 272, 276, 246 P.2d 923, 927 (1952); *Olson v. Olson*, 95 Cal. App. 594, 597, 272 P. 1113, 1114 (Cal. Ct. App. 1928); *Ness v. Ness*, 357 P.2d 973, 975 (Okla. 1960); *Rowles v. Reynolds*, 29 Tenn. App. 224, 196 S.W.2d 76 (1946).

22. *See, e.g., Sparkman v. Sparkman*, 217 Ala. 41, 114 So. 580 (1927); *Meadows v. Meadows*, 78

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this approach by what they perceive as the overriding need to serve and protect the welfare of the child. As one court stated:

[O]ur recent emphasis has been on what the decretal court actually knew, not on what the parties knew, should have known or should have produced at the earlier trial. This has been necessitated by our continued adherence to the principle that the best interest of the child is the governing consideration.²³

In sum, under the traditional modification standard, child custody decisionmaking may be characterized as highly flexible. It may also fairly be characterized as highly undisciplined and highly uncertain. Relitigation is not discouraged, out of concern that freezing a relationship may damage the innocent child. The interest of the child is the focus of the inquiry; the determination of the child's best interests is necessarily subjective and discretionary; and that determination is subject to reconsideration and revision as the spectrum of amorphous factors that can influence the determination changes over time. The sole brake on this broad power to modify is the requirement that the moving party must show either that some change has occurred since the initial custody award or that some material fact was overlooked at the time of that decree.

B. *Relaxing the Traditional Flexible Requirements for Modification*

There is today a discernible trend toward relaxing the already loose traditional custody modification standard. Recently, several state courts have held that a pure best interests standard, rather than a standard of changed circumstances, should apply to applications to modify an initial custody award to which the parents had consented.²⁴ Other courts, while

Fla. 576, 83 So. 392 (1919); *Stewart v. Stewart*, 86 Idaho 108, 383 P.2d 617 (1963); *Serotzke v. Serotzke*, 335 Ill. App. 485, 82 N.E.2d 375 (1948); *Warren v. Warren*, 191 N.W.2d 659 (Iowa 1971); *Hill v. Hill*, 228 Kan. 680, 620 P.2d 1114 (1980); *Person v. Person*, 172 La. 740, 135 So. 225 (1931); *In re Custody of R.L.S.*, 632 P.2d 703 (Mont. 1981), *modified on other grounds sub. nom. R.L.S. v. Barkhoff*, 674 P.2d 1082 (Mont. 1983); *Commonwealth ex rel. Moss v. Moss*, 159 Pa. Super. 133, 47 A.2d 534 (1946); *In re Marriage of Timmons*, 94 Wash. 2d 594, 617 P.2d 1032 (1980); *Wendland v. Wendland*, 29 Wis. 2d 145, 138 N.W.2d 185 (1965).

23. *Warren v. Warren*, 191 N.W.2d 659, 661 (Iowa 1971). At least one other court has suggested another rationale. In *Simons v. Simons*, 172 Conn. 341, 374 A.2d 1040 (1977), the court first found that none of the facts presented constituted a material change of circumstances affecting the welfare of the child. It then held that other facts, predating the initial custody award, were determinative and required a modification of custody. 172 Conn. at 344-346, 374 A.2d at 1042-43. The court reasoned that at the time of the initial decree, the parties (and presumably the court as well) had focused primarily on the issue of the termination of the marriage. "[U]nder this pressure," stated the court, "some custody awards may be made which are not in the best interests of the child." 172 Conn. at 347, 374 A.2d at 1043.

24. Cases in which custodial decrees were based on default divorces, stipulations, or separation agreements will all be referred to in this Article as nonlitigated or "consensual" decisions. Most courts do not distinguish among these situations because in each case the custodial decision was not judicially

not expressly abolishing the changed circumstances standard, have reached the same result in the case of consensual initial awards by using the prior unknown facts exception.²⁵ Still other courts have simply abandoned the changed circumstances standard in favor of a pure best interests test in both consensual and non-consensual cases.²⁶

1. A "Best Interests" Test for Modification of Consensual Initial Decrees

Kansas is representative of several jurisdictions whose courts have recently rejected the changed circumstances rule for nonlitigated decrees. In a series of cases prior to 1980, Kansas' highest court had clearly established that prior orders of custody, whether based on the parties' agreement or on evidence presented at a contested hearing, could be modified only on a showing of a material change in circumstances.²⁷ Then, in 1980, in *Hill v. Hill*,²⁸ the Kansas Supreme Court reevaluated the issue.

At the time of their divorce, Mr. and Mrs. Hill had agreed that Mrs. Hill was to have custody of their son, and this agreement was incorporated in a default divorce decree. Four months after the divorce was granted, Mr. Hill filed a motion to change custody. In support of his application, Mr. Hill showed that his former wife was living with an unmarried male, a situation he had discovered "around the time of the divorce."²⁹ Although the evidence indicated that Mr. and Mrs. Hill both loved and wanted their child and would give him good physical care, the

imposed.

25. The prior unknown facts exception does not logically apply in cases where there has been no prior litigation. In such cases there were *no* facts previously before the court; therefore, there can be no facts which the parties or the court have overlooked. As the court stated in *Wilson v. Wilson*, 408 So. 2d 114 (Ala. Civ. App. 1981):

Although facts disclosed to the court and considered by it in fashioning the original custody decree cannot be "rehashed" in a subsequent modification proceeding, facts existing at the time of the original divorce decree but not disclosed at that time may be considered by the court in a subsequent modification proceeding, even though these facts do not relate to a change of circumstances subsequent to the original divorce decree. . . .

The provisions of the original divorce decree were, in the present case, based upon the stipulations and agreement of the parties. Apparently, no testimony concerning the child custody issue was offered. Under such circumstances, facts relating to the parties' pre-divorce conduct should be considered by the trial court in a modification proceeding.

Id. at 116 (citations omitted). See also, e.g., *Randolph v. Dean*, 27 Ill. App. 3d 913, 916, 327 N.E.2d 473, 475 (1975); *In re Marriage of Timmons*, 94 Wash. 2d 594, 617 P.2d 1032 (1980).

26. There are also decisions in several states permitting de novo hearings only in cases involving nonlitigated decrees from sister states. See, e.g., *Mirras v. Mirras*, 202 So. 2d 887 (Fla. Dist. Ct. App. 1967); *Borys v. Borys*, 76 N.J. 103, 386 A.2d 366 (1978); *Brooks v. Brooks*, 530 P.2d 547 (Or. Ct. App. 1975). These decisions, of course, raise troublesome jurisdictional and conflict of laws issues.

27. See *Simmons v. Simmons*, 223 Kan. 639, 576 P.2d 589 (1978); *Hardenburger v. Hardenburger*, 216 Kan. 322, 532 P.2d 1106 (1975); *Hardman v. Hardman*, 203 Kan. 825, 457 P.2d 86 (1969).

28. 228 Kan. 680, 620 P.2d 1114 (1980).

29. *Id.* at 683, 620 P.2d at 1117.

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trial court granted Mr. Hill's motion because "the child would be in a better and more stable environment with the father."³⁰ The intermediate appellate court reversed that decision on the ground that Mr. Hill had not proved a change of circumstances since the original custody order.³¹

The Kansas Supreme Court, announcing a new rule of law, reinstated the trial court's decision. The court pointed out that, because the initial custody award was consensual, no court had ever evaluated the facts and the child's best interests. In such a case, the court reasoned, to require a finding of changed circumstances before a court may modify custody might conflict with the child's best interests:

[W]here a custody decree is entered in a default proceeding, and the facts are not substantially developed and presented to the court, the trial court may later, in its discretion, admit and consider evidence as to facts existing at the time of the earlier order, and upon the full presentation of the facts the court may enter any order which could have been made at the initial hearing whether a "change in circumstances" has since occurred or not.³²

Thus, under this approach, the distinction between a litigated initial custody award and a consensual award is material to a custody modification application. A consensual award, according to the Kansas Supreme Court and the courts of at least four other states,³³ is *always* subject to de

30. *Id.* at 682, 620 P.2d at 1116 (quoting the trial court). The 52-year-old brother of Linda Hill's male friend also lived with them, although he was often away for four or five days at a time. When he was there, he shared a room with Linda's son. As for Linda Hill's relationship with her friend, the judge stated: "I suppose that there is absolutely not any way for me to not be somewhat prejudiced by that type of morality . . . I don't condone people living together that are single, and I assume in most states it's against the law." *Id.* at 681, 620 P.2d at 1116 (quoting trial court). For these reasons the trial judge found that the father would provide a better and more stable environment.

31. *Id.* at 682-83, 620 P.2d at 1117 (quoting trial court).

32. *Id.* at 685, 620 P.2d at 1119. In *Anhalt v. Fesler*, 6 Kan. App. 2d 921, 636 P.2d 224 (1981), a lower court expanded the holding of *Hill v. Hill* and eliminated the changed circumstances requirement for the modification of custody decrees entered upon the written stipulation of the parties.

33. The four states are Washington, South Dakota, Wisconsin, and Illinois. Under WASH. REV. CODE ANN. § 26.09.260(1) (Supp. 1984), patterned after the Uniform Marriage and Divorce Act, the "court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred." In *Timmons v. Timmons*, 94 Wash. 2d 594, 599-600, 617 P.2d 1032, 1036 (1980), the court concluded that pre-decree facts were "unknown" within the meaning of the statute whenever a dissolution was uncontested. See also *McDaniel v. McDaniel*, 14 Wash. App. 194, 196, 539 P.2d 699, 701 (1975) (facts not permitted into evidence at previous hearing considered unknown); *Rankin v. Ferriter*, 76 Wash. 2d 533, 537, 458 P.2d 176, 179 (1969) (where prior decree by default, it cannot be assumed that the court knew all the circumstances).

In *Kolb v. Kolb*, 324 N.W.2d 279 (S.D. 1982), the Supreme Court of South Dakota eliminated the substantial change of circumstances test for modifying custody awards based on prior agreements, ruling that a full custody hearing under a best interests review was appropriate.

Whether Wisconsin and Illinois have adopted a dual standard is less clear. In Wisconsin the standard for modification of nonlitigated decrees differs from that for an initial award of custody because in modification cases the moving party has the burden of proof. In 1977, the Wisconsin statute was

novo judicial review under a pure best interests standard. If initial custody was awarded after litigation, those states would still apply the traditional modification test.

2. *The Prior Unknown Facts Doctrine Applied to Consensual Awards.*

Courts in other jurisdictions have used a variant of the prior unknown facts doctrine to avoid the changed circumstances requirement in cases involving prior uncontested decrees.³⁴ While theoretically utilizing a

changed to require that a custody modification be based "on a finding that such removal is necessary to the child's best interest as shown by substantial evidence supporting a change in custody." Wis. STATS. ANN. § 767.32(2) (West 1981). The Wisconsin Supreme Court ruled in *Groh v. Groh*, 110 Wis. 2d 117, 127, 327 N.W.2d 655, 660 (1983), that this statute left intact the common law rule that an award of custody made pursuant to a stipulation of the parties is not *res judicata* on the issues surrounding a custody determination. Instead, in an application to modify a custody decree based on agreement, evidence of the party's pre- and post-custody conduct may be adduced, but the noncustodial parent has the burden of showing by substantial evidence that a change of custody is in the best interests of the child. *See also Delchambre v. Delchambre*, 86 Wis. 2d 538, 273 N.W.2d 301 (1979) (applying change of circumstances test); *Freye v. Freye*, 56 Wis. 2d 193, 197, 201 N.W.2d 504, 506 (1972) (when original custody based on stipulation, parties in subsequent litigation have equal burden to show best interests of child); *Wendland v. Wendland*, 29 Wis. 2d 145, 157-58, 138 N.W.2d 185, 192 (1965) (previously existing but undisclosed facts may be admitted); *Corcoran v. Corcoran*, 109 Wis. 2d 36, 42-43, 324 N.W.2d 901, 904 (Ct. App. 1982) (under § 767.32(2), burden of proof is on the moving party). For a decision regarding the evidence necessary to establish a change in circumstance justifying a custodial modification, see *Gould v. Gould*, 116 Wis. 2d. 493, 342 N.W.2d 426 (1984).

In Illinois a majority of the lower appellate courts have applied different standards for litigated and nonlitigated prior decrees, despite the adoption of the Uniform Marriage and Divorce Act standard during this period. *See, e.g., Blonsky v. Blonsky*, 84 Ill. App. 3d 810, 405 N.E.2d 1112 (1980); *De Franco v. De Franco*, 67 Ill. App. 3d 760, 384 N.E.2d 997 (1979); *Boggs v. Boggs*, 65 Ill. App. 3d 965, 383 N.E.2d 9 (1978); *McDonald v. McDonald*, 13 Ill. App. 3d 87, 89, 299 N.E.2d 787, 789 (1973). *But see In re Custody of La Marca*, 78 Ill. App. 3d 26, 397 N.E.2d 31 (1979) (in determining suitability of child's present environment, it is irrelevant that original custody arrangement was by agreement).

34. The Idaho courts announced this rule in the 1960's. *See Stratton v. Stratton*, 87 Idaho 118, 391 P.2d 340 (1964); *Stewart v. Stewart*, 86 Idaho 108, 113-14, 383 P.2d 617, 619-20 (1963); *McMurtrey v. McMurtrey*, 84 Idaho 314, 318, 372 P.2d 403, 405 (1962). More recently, the Idaho Supreme Court has emphasized the requirement of material and substantial changes in circumstances subsequent to the entry of the original decree even in cases involving parental stipulations as to custody. *See Chislett v. Cox*, 102 Idaho 295, 629 P.2d 691 (1981). The earlier cases have not, however, been overruled and there are other indications that in the appropriate case, the Idaho courts will consider facts that occurred prior to the initial custody decree. *See Cope v. Cope*, 98 Idaho 920, 576 P.2d 201 (1978); *Poesy v. Bunney*, 98 Idaho 258, 561 P.2d 400 (1977). In the 1970's, Iowa and South Carolina adopted the approach of the early Idaho cases. *See Warren v. Warren*, 191 N.W.2d 659, 661 (Iowa 1971); *Cook v. Cobb*, 271 S.C. 136, 144, 245 S.E.2d 612, 616 (1978). Furthermore, the Supreme Court of Nebraska has flirted with adopting a similar standard. In 1978 that court indicated that evidence that a party had been aware of facts concerning custody but had failed to bring these facts to the court's attention would itself constitute a material change of circumstances. *Cline v. Cline*, 200 Neb. 619, 620, 264 N.W.2d 680, 682 (1978). In *Cline* the mother contended that, in reliance on her husband's promise that he would give her custody at a later time, she had agreed not to appear in the divorce proceedings. Arguably, therefore, the husband had received custody fraudulently. Although the decision's language did not limit the admission of prior facts to cases involving fraud or misrepresentation, later cases have so interpreted the court's ruling. *See, e.g., Kuhn v. Kuhn*, 204 Neb. 363, 367-69, 282 N.W.2d 43, 46 (1979); *see also Carper v. Rokus*, 194 Neb. 113, 116-18,

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changed circumstances standard, these courts permit consideration of all facts and circumstances relating to custody, including those existing prior to the initial consensual award of custody, in ruling on a modification petition.

*Newsome v. Newsome*³⁵ illustrates this developing authority. Mr. and Mrs. Newsome were separated in September 1976 and divorced in October 1977. Before the Newsomes had agreed upon custody, but after Mr. Newsome had moved out of the house in 1976, Virginia Gooding, an employee of the County Department of Social Services, moved in with Mrs. Newsome and the Newsome's daughter, Amy. Pursuant to their separation agreement, Mrs. Newsome received custody of Amy. Mr. Newsome later contended, and adduced proof, that Mrs. Newsome and Ms. Gooding had a homosexual relationship ever since Gooding had moved in.³⁶ Mrs. Newsome's mother also testified that, shortly after the separation but before the divorce, she had observed Ms. Gooding engage in overtly sexual play with Amy.³⁷

The trial court granted Mr. Newsome's application for custody modification and awarded custody to him. On appeal, Mrs. Newsome argued that Mr. Newsome had not demonstrated any change in circumstance subsequent to the initial custody decree because Ms. Gooding had begun living with Mrs. Newsome and Amy before the custody agreement was reached. Without such evidence, she contended, custody could not be modified.

The appellate court said it "need not tarry long"³⁸ on Mrs. Newsome's argument. The reason for the requirement of a change in circumstance, the court pointed out, is to prevent relitigation, and that assumes that there has been litigation. "When, however, . . . facts pertinent to the custody issue were not disclosed to the court at the time the original custody

230 N.W.2d 468, 470-71 (1975) (refusing to adopt exceptional rule for default cases on the grounds that proof offered as to prior facts lacked specificity and that, therefore, usual rule requiring evidence of new facts and circumstances since the prior decree should apply).

35. 42 N.C. App. 416, 256 S.E.2d 849 (1979). *Newsome* was decided by North Carolina's intermediate appellate court. North Carolina law remains unclear on the issue. In *Barnes v. Barnes*, 55 N.C. App. 670, 286 S.E.2d 586 (1982), the plaintiff appealed the denial of a motion to modify custody, arguing that a showing of changed circumstances adversely affecting the child should not be required where the question of custody had never been litigated. The court refused to accept this argument, stating that case law clearly established the requirement of changed circumstances. The analysis is incomplete because it failed to indicate whether the plaintiff either met or attempted to satisfy the standard set forth in *Newsome*.

36. 42 N.C. App. at 418, 256 S.E.2d at 850.

37. *Id.* at 419, 256 S.E.2d at 851.

38. *Id.* at 424, 256 S.E.2d at 854.

decree was rendered, courts have held that a prior decree is not *res judicata* as to those facts not before the court."³⁹ The concern behind such rules is plain. As the *Newsome* court put it:

Suppose, for instance, it should appear that, unknown to the first judge, the child had been regularly confined to a closet for long periods of time or otherwise abused but those facts are made known to the second judge. Surely it could not be said that the second judge is powerless to act merely because the circumstances are the same in that the abuse is no greater or the environment no worse than before.⁴⁰

Everyone would agree that a court in such a case should not be powerless to act. But it is not at all clear that this expansion of the prior unknown facts doctrine is the most appropriate rule of law pursuant to which the court should act. If the court seeks to protect the present best interests of the child, why should its inquiry focus on what facts existed years ago when the consensual custody decree was entered? And why should the court's power to intervene be limited to cases in which the initial decree was consensual?

3. *Pure "Best Interests": Complete Abandonment of the Traditional Rule*

A third developing line of authority holds that it is not necessary to find any substantial change in circumstances before a custodial decree may be modified—regardless of whether the unknown facts exception applies and regardless of whether the initial decree was litigated or consensual.⁴¹ That authority is perhaps best represented by the New York Court of Appeals decision in *Friederwitzer v. Friederwitzer*.⁴² Prior to *Friederwitzer*, the New York Court of Appeals had adhered to the traditional changed circumstances standard.⁴³

39. *Id.* at 424–25, 256 S.E.2d at 854.

40. *Id.* at 426, 256 S.E.2d at 855.

41. *See, e.g.*, *Deivert v. Oseira*, 628 P.2d 575 (Alaska 1981); *King v. King*, 477 P.2d 356, 360 (Alaska 1970) (“[T]he ‘substantial change’ of circumstances is not an initial obstacle which must be overcome by either party in order to have the court redetermine custody. It is simply one of the factors to be weighed”); *Urquhart v. Urquhart*, 196 Cal. App. 2d 297, 16 Cal. Rptr. 469 (1961); *Cope v. Cope*, 98 Idaho 920, 576 P.2d 201 (1978); *Posey v. Bunney*, 98 Idaho 258, 261, 561 P.2d 400, 403 (1977) (policy goal of changed circumstances standard to prevent continuous relitigation of custody matters “is of secondary importance when compared to the best interest of the child, which is the controlling consideration in all custody proceedings”); *Kavanaugh v. Carraway*, 435 So. 2d 697, 700 (Miss. 1983) (“When viewing the totality of the circumstances, to determine whether there has been a material change of circumstances adversely affecting the children, the trial court must keep foremost in mind the best interests of the children”).

42. 55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893 (1982).

43. *See, e.g.*, *Nehra v. Uhlar*, 43 N.Y.2d 242, 372 N.E.2d 4, 401 N.Y.S.2d 168 (1977). The court

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In *Friederwitzer* the Court of Appeals announced that the standard for custody modifications is nothing more and nothing less than the best interests of the child when all of the applicable factors are considered, and not whether one or more circumstances exist that can be denominated new or extraordinary.⁴⁴ In other words, modification applications are to be judged by the same standard that controls the initial award of custody. The *Friederwitzer* court also made clear that the totality of circumstances test is not limited to cases involving unlitigated initial decrees. Even when the prior award was the result of litigation, the best interests test governs the modification proceeding. In determining what the child's best interests are, however, the court should accord more weight to the initial custody award if that award was based on a judge's decision after a plenary trial.⁴⁵

The facts that moved the Court of Appeals to make this change in the law deserve attention. Mr. and Mrs. Friederwitzer were divorced in July 1979. Pursuant to the parties' separation agreement; the decree provided for joint custody of the couple's two daughters, and gave physical custody to Mrs. Friederwitzer and visitation privileges to Mr. Friederwitzer. Nine months later, in April 1980, when the children were aged eleven and eight, the father applied to the court for sole custody.⁴⁶

Mr. Friederwitzer's case for custody modification consisted of three points: Mr. Friederwitzer showed, first, that Mrs. Friederwitzer had at times left her daughters home alone in their apartment in the evenings, sometimes until as late as midnight, even though they told her they were frightened. Second, he showed that, although Mrs. Friederwitzer claimed to follow the tenets of Orthodox Judaism, she failed, except on rare occasions, to take the girls to religious services on Saturdays, and she permitted her boyfriend to stay in the apartment, share her bed, and turn on the television during the Sabbath. Finally, Mr. Friederwitzer presented testimony from the children. The older daughter, Lisa, said she wanted to live

had initially awarded custody of the two children to the father. One year after that court award, the mother snatched the children and brought them to New York with her for the next 4½ years. At that time, the father applied to the New York courts for return of the children. The Court of Appeals stated that the children, then aged 11 and 9, had a strong interest in not being shifted from one parent to the other. Despite this interest in stability, the court ruled that the mother's custody for the past 4½ years, without more, was not a change in circumstances sufficiently extraordinary to justify upsetting the determination of the Michigan court. *Id.* at 250, 372 N.E.2d at 8, 401 N.Y.S.2d at 172. The court was concerned with deterring child abduction, but it is difficult to conceive of a more extraordinary change in circumstances than separation from the parent with custody for 4½ years.

44. 55 N.Y.2d 89, 95, 432 N.E.2d 765, 768, 447 N.Y.S.2d 893, 896 (1982). The court also relied on a procedural rule that a court retains jurisdiction to modify for reasons "it finds appropriate under the circumstances existing at the time application for that purpose is made to it." *Id.* (quoting 22 N.Y.C.R.R. 699.9, Approved Forms, J13) (emphasis supplied by the court).

45. *Id.*

46. *Id.* at 91-92, 432 N.E.2d at 766-67, 447 N.Y.S.2d at 894-95.

with her father. The younger daughter, Nicole, said she wanted to continue to live with her mother, but she also did not wish to be separated from her sister.⁴⁷

Mrs. Friederwitzer admitted at the modification hearing that she sometimes left the girls alone at night. She explained that most of those times were evenings when she went to her therapist. She also stated that her mother, whom her daughters knew they could call in case of a problem, lived only twenty blocks away.⁴⁸ As for the children's religious upbringing, the trial judge tried without success to ascertain whether regular attendance at Saturday services was required of Orthodox Jewish women.⁴⁹ The separation agreement imposed no requirements with respect to the religious upbringing of the children. The evidence showed that both girls attended a Yeshiva and that Mrs. Friederwitzer maintained a Kosher home.⁵⁰ Mrs. Friederwitzer conceded that she found her relationship with her male friend difficult to reconcile with the precepts of her religion.⁵¹ Lisa testified that she was uncomfortable about her mother's relationship with the man, but she admitted that she had not told either her mother or the counselor her mother had taken her to, about her feelings.⁵²

On the basis of this evidence, the trial court granted Mr. Friederwitzer's motion, finding that Mrs. Friederwitzer was less fit than Mr. Friederwitzer to have custody. The trial court found that Mrs. Friederwitzer's personal affairs appeared to be of paramount concern to her, "to the total exclusion of the best interests of her children."⁵³ The court further found, and relied upon the fact, that Mrs. Friederwitzer had acted in violation of Orthodox Judaism.⁵⁴

The trial court found Mr. Friederwitzer "more fit" than Mrs. Friederwitzer even though he presented little evidence of his parental fitness. The court did not examine his religious or sexual behavior, his care for the children prior to the divorce, or his plans relating to their care if his motion were granted. Mr. Friederwitzer did testify that he intended to remarry. The court appears to have relied on that stated intention and

47. *Id.* at 92-93, 432 N.E.2d at 767, 447 N.Y.S.2d at 895.

48. Transcript at 318-320, *Friederwitzer v. Friederwitzer*, No. 21095/78 (N.Y. Sup. Ct., Nassau Cty. 1980) [hereinafter cited as *Transcript*].

49. *Id.* at 23-26.

50. *Friederwitzer v. Friederwitzer*, No. 21095/78, unreported opinion at 3 (N.Y. Sup. Ct., Nassau Cty. Oct. 2, 1980).

51. *Transcript*, *supra* note 48, at 322.

52. *Id.* at 87-89.

53. 55 N.Y.2d at 92, 432 N.E.2d at 767, 447 N.Y.S.2d at 895.

54. *Id.*

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assumed that Mr. Friederwitzer could offer the children a “normal” two-parent home.⁵⁵

One seemingly critical piece of evidence concerning Mr. Friederwitzer had been presented, but the court overlooked it. Lisa testified that her father had told her that Mrs. Friederwitzer’s boyfriend was the cause of her parents’ divorce.⁵⁶ It therefore seems that Mr. Friederwitzer himself caused at least part of Lisa’s discomfort with her mother’s new relationship.

The *Friederwitzer* facts have a familiar ring to them—they are similar to those in the hypothetical Smith case and in many other modification cases found in the reported decisions.⁵⁷ One could argue that Mrs. Friederwitzer lost custody⁵⁸ because she was having difficulty coping with the experience of divorce and sought professional assistance to help her deal with her new situation; because she developed a relationship with a man other than her former husband; and because one of her children was uncomfortable with that new relationship. Conversely, Mr. Friederwitzer gained custody without showing parental fitness. The New York courts assumed that Mrs. Friederwitzer’s difficulties weighed heavily in support of the application for modification. As discussed below, this approach is highly dubious.

C. *The Uniform Marriage and Divorce Standard*

While the state courts are relaxing the traditional custody modification standard, the model Uniform Marriage and Divorce Act (the “UMDA”),

55. *Friederwitzer v. Friederwitzer*, No. 21095/78, unreported opinion at 4 (N.Y. Sup. Ct., Nassau Cty. Oct 2, 1980). There was conflicting testimony about Mr. Friederwitzer’s exercise of his visitation rights. Mrs. Friederwitzer testified, with the aid of a calendar she had marked, that from September 1979 until May 1980 he had seen the children on six entire weekends and one Sunday. During one two and one-half month period, according to her notes, he had not seen them at all. Compare *Transcript*, *supra* note 48, at 277–81 with *id.* at 199–201, 228–32.

56. *Transcript*, *supra* note 48, at 123–26.

57. Only the religious aspect of the case distinguishes it, yet that aspect of the case is equally troubling. Mrs. Friederwitzer appears to have lost her children at least in part because she was in some sense hypocritical about her religion. The court’s personal reaction is a disturbing ground upon which to base a modification decision. Courts should not evaluate whether religious principles and practices are being adequately observed and religious training adequately given. Traditionally courts have been careful not to intervene in the area of religion unless there is evidence of serious harm to the children; none was presented in *Friederwitzer*. For a discussion of the use of religion as a factor in custody cases see, e.g., Mangrum, *Exclusive Reliance on Best Interest May Be Unconstitutional: Religion as a Factor in Child Custody Cases*, 15 CREIGHTON L. REV. 25 (1981).

58. The court did not consider alternative remedies. Mrs. Friederwitzer had physical custody only; the parents’ agreement specified consultation on matters pertaining to the girls’ health, welfare, education, and upbringing. The court could have transferred physical custody to Mr. Friederwitzer, but left both parents with joint custody. None of the courts that reviewed the case discussed the joint custody issue or whether that arrangement made any difference to the applicable legal principles.

written in 1970,⁵⁹ was designed to propel the law in the opposite direction. The UMDA standard is the third modification standard in use, although it is the law in very few jurisdictions.

The UMDA's drafters believed that the child's interest in continuity make ensuring the finality of a custody decree more important than determining which parent is the more fit custodian.⁶⁰ They were also concerned that noncustodial parents not be permitted to punish former spouses with frequent motions to modify.⁶¹ Nonetheless, because the interest in continuity might be outweighed by other interests, they recognized that custody should be modifiable—but only in limited circumstances. Finally, the UMDA's drafters pointed to what they characterized as the "real issue in modification cases"⁶²—the effect of the change itself. They sought to focus on that issue by requiring the courts to find, before ordering any change in custody, that "the harm likely to be caused by a change of environment is outweighed by the advantages [of a change]."⁶³

With these as their guiding principles, the UMDA's drafters enunciated a test that incorporates the traditional standard but then tightens it considerably. The UMDA standard is set forth in three sentences. The first provides: "[T]he court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interest of the child."⁶⁴ This is but a restatement of the traditional test. The next sentence, however, contains significant new limitations:

In applying these standards the court shall retain the custodian appointed pursuant to the prior decree unless:

- (1) the custodian agrees to the modification;
- (2) the child has been integrated into the family of the petitioner with consent of the custodian; or
- (3) the child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him.⁶⁵

59. UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 101-506 (1973). The Uniform Marriage and Divorce Act was amended in 1971 and 1973.

60. *Id.* § 409, Commissioners' Note.

61. *Id.*

62. *Id.*

63. *Id.* § 409(b)(3).

64. *Id.* § 409(b).

65. *Id.* As a further deterrent to relitigation, the Act also provides that attorneys' fees and costs shall be assessed against a party seeking modification if the court finds that the modification action is vexatious and constitutes harassment. *Id.* § 409(c).

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Finally, the UMDA standard provides that the courts may not entertain any application to modify an initial decree (whether consensual or court-imposed) during the first two years after the initial award of custody unless the movant can show by affidavit “that there is reason to believe the child’s present environment may endanger seriously his physical, mental, moral, or emotional health.”⁶⁶

The UMDA represents a significant departure from the other standards of custody modification. Under the UMDA, no nonconsensual change may ever be made unless the petitioner proves that there has been some change that seriously endangers the child’s health. Another significant distinction is that the UMDA requires the courts to recognize and to address the possibility that any change in custody may be harmful to the child; it requires proof by the petitioner that the advantages of a change outweigh such harm.

The UMDA’s drafters also heralded what they called the statute’s “two-year waiting period following each modification decree.”⁶⁷ The drafters stated that the statute’s affidavit procedure constituted a “‘safety valve’ for emergency situations.”⁶⁸

In fact, however, there is precious little distinction under the UMDA between modification proceedings within two years of a decree and those brought after the two-year period. To be sure, a noncustodial parent who petitions within the two-year period must, before obtaining a hearing, submit proofs by affidavit that “there is reason to believe that the child’s present environment may endanger seriously . . . his health.”⁶⁹ But to prevail ultimately, any noncustodial parent must prove that “the child’s present environment endangers seriously his . . . health.”⁷⁰ Thus, the substantive standard that petitioners must satisfy as a threshold matter in the first two years is no more onerous than the standard that all petitioners must satisfy in order to prevail. The hurdle the UMDA places in the path of proceedings within the first two years of a decree is wholly procedural, and that procedural hurdle is hardly a high one. Because custody litigation is highly charged with emotion, affidavit proofs can be expected to be somewhat less than objective. For that reason, and also because judges will likely be disinclined to decide such important issues on the basis of the papers filed, the UMDA’s waiting period seems to be something of a paper tiger. Its main practical effect may be to prevent consensual modification within the first two years of a custody award.

66. *Id.* § 409(a).

67. *Id.* § 409, Commissioners’ Note.

68. *Id.*

69. *Id.* § 409(a).

70. *Id.* § 409(b)(3).

Very few states have adopted the UMDA standard. Only two, Colorado and Kentucky, have statutes that fully incorporate the UMDA's provisions.⁷¹ Illinois had such a statute, but as of July 1982 the Illinois legislature amended the law to permit the parties to stipulate to a modification prior to the UMDA's two-year "waiting period." The new Illinois statute also removes from the statute the prohibition on custody modification after the "waiting period" unless certain findings are made; instead, the revised Illinois statute provides for the traditional changed circumstances standard after the expiration of the two-year period.⁷² Several other states have enacted parts of the UMDA test. For example, Washington's statute omits the two-year "waiting" limitation but otherwise follows the UMDA.⁷³ Arizona, meanwhile, applies the UMDA "waiting period" rules for the first year after a custody decree but permits modification thereafter in accordance with the same best interests of the child standard used in deciding initial custody matters.⁷⁴

Despite the recent amendment to its statute, Illinois' case law still represents the largest body of judicial interpretation of the UMDA test. While the UMDA provisions⁷⁵ were in effect, from October 1, 1977 until July 1, 1982, the state appellate courts decided a large number of cases interpreting these provisions. Some of those decisions focused on the procedural aspects of the statute.⁷⁶ In perhaps the most important such procedural decision, the Supreme Court of Illinois ruled in 1979 that, to support a modification of custody, a trial court must explicitly find that one of

71. COLO. REV. STAT. § 14-10-131 (Supp. 1983); KY. REV. STAT. § 403.340 (1984).

72. ILL. REV. STAT. ch. 40, § 610 (1982).

73. WASH. REV. CODE ANN. § 26.09.260(1) (Supp. 1982).

74. ARIZ. REV. STAT. ANN. § 25-332 (West Supp. 1983-84). See also MINN. STAT. § 518.18 (West Supp. 1982) (permits modification within one year if there is "persistent and wilful denial or interference with visitation"); MONT. CODE ANN. § 40-4-219 (1978) (omits two year limitation but otherwise approximates the UMDA standards for modification); TEX. FAM. CODE ANN. § 14.08 (Vernon 1975) (provides for one year waiting limitation subject to an endangerment exception, but otherwise provides for change of circumstances test).

75. Illinois Marriage and Dissolution of Marriage Act, ILL. REV. STAT. ch. 40, § 610(a)(b).

76. See, e.g., *In re Marriage of Braje*, 85 Ill. App. 3d 744, 407 N.E.2d 1091 (1980); *In re Marriage of Swift*, 76 Ill. App. 3d 154, 394 N.E.2d 923 (1979); *In re Marriage of Farris*, 69 Ill. App. 3d 1042, 388 N.E.2d 232 (1979). In 1981, the Supreme Court of Illinois held that the affidavit requirement was not intended as a limitation of the subject matter jurisdiction of a court otherwise competent to hear and decide a case. *In re Custody of Sexton*, 84 Ill. 2d 312, 418 N.E.2d 729 (1981).

The Illinois courts failed to discuss substantively the facts necessary to meet the standard set out in § 610(a). In *In re Marriage of Farris*, 69 Ill. App. 3d 1042, 1044, 388 N.E.2d 232, 234 (1979), the court stated that although the petitioner's affidavit lacked desirable specificity, any failure to comply more closely with the dictates of § 610(a) did not amount to reversible error. By comparison, in three Montana cases, petitioners lost either because they did not submit the prescribed affidavits or because those they did submit did not properly set forth facts supporting the requested modification. See *Hamilton v. Hamilton*, 176 Mont. 488, 580 P.2d 104 (1978); *Strouf v. Strouf*, 176 Mont. 406, 578 P.2d 746 (1978); *Olson v. Olson*, 175 Mont. 444, 574 P.2d 1004 (1974).

The state of Washington's statute does not contain a section comparable to UMDA § 409(a). It does, however, require the filing of an affidavit with supporting facts establishing adequate cause before a modification hearing can be held. WASH. REV. CODE ANN. § 26.09.270 (Supp. 1982). In

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the UMDA's prerequisites for a change of custody had been satisfied; those statutory prerequisites, the court said, were not simply an aid or guideline for an appellate court but were "indispensable requirements of the statute."⁷⁷

The Illinois decisions shed light on the meaning of several of the UMDA prerequisites. For example, when does something sufficiently "endanger seriously" the child's physical, mental, moral, or emotional health so as to support a modification of custody? And, in determining whether a change should be made, how should a court weigh the harm likely to be caused by the change against the potential advantage of a change?⁷⁸

In some cases, the Illinois courts relied upon rather meager facts to satisfy the UMDA's serious endangerment test. For example, one trial court found serious danger to a child in her present environment because she "is not achieving her potential, although she is doing well in school, she is not putting out her best. . . . Rachel is suffering from lack of nurturing. She is suffering from pseudomaturity and boredom."⁷⁹

Roorda v. Roorda, 25 Wash. App. 849, 611 P.2d 794 (1980), the court addressed the issue of the standard that should be applied in determining whether "adequate cause" in accordance with the statute had been demonstrated to authorize a hearing of the modification motion. The court ruled that adequate cause "requires something more than prima facie allegations which, if proven, might permit inferences sufficient to establish grounds for a custody change." *Id.* at 852, 611 P.2d at 796. *See also* *Nice-Peterson v. Nice-Peterson*, 310 N.W.2d 471 (Minn. 1981) (trial court should deny motion for modification unless accompanying affidavits set forth sufficient justification, if facts alleged therein are true, to justify modification).

77. *In re Custody of Harne*, 77 Ill. 2d 414, 420, 396 N.E.2d 499, 501 (1979). *See also In re Marriage of Baltierra*, 87 Ill. App. 3d 592, 409 N.E.2d 378 (1980) (remanded for specific findings); *Schiele v. Sager*, 174 Mont. 533, 571 P.2d 1142 (1977) (trial court erred by ignoring jurisdictional prerequisites of UMDA); *In re Custody of Dallenger*, 173 Mont. 530, 568 P.2d 169 (1977) (same). *But see Georgia v. Georgia*, 27 Ariz. App. 271, 553 P.2d 1256 (1976) (statute merely sets guidelines). Recall that the Illinois legislature deleted this statutory requirement as of July 1, 1982. *See supra* pp. 775-76.

78. ILL. ANN. STAT. ch. 40, § 610(b)(1) (Smith-Hurd 1980), since rescinded, permitted a change in custody where the custodial parent agreed to the modification. Furthermore, § 610(b)(2) allowed modification where "the child has been integrated into the family of the petitioner with the consent of the custodian." *See, e.g., In re Custody of Iverson*, 83 Ill. App. 3d 493, 498, 404 N.E.2d 411, 415 (1980) (emotional dependency that five-year-old child developed for her older sister while residing for more than a year with the noncustodial parent held sufficient to satisfy integration requirement of § 610(b)(2)); *In re Custody of Burnett*, 75 Ill. App. 3d 998, 1000, 394 N.E.2d 58, 60 (1979) (consent requirement of § 610(b)(2) satisfied where custodial parent allowed his child to reside with family of noncustodian and knowingly permitted the child to become integrated into new family).

79. *Kraft v. Kraft*, 108 Ill. App. 3d 590, 597, 439 N.E.2d 491, 496 (1982) (quoting trial judge). In another case, the court held:

The evidence of respondent's inability to devote sufficient time to the children and her lack of concern for their well-being together with the evidence of the advantages to the children of living with their father, support the trial court's conclusions, implicit in its ruling, that the children's present environment endangers seriously their physical, mental, moral, or emotional health and that the harm likely to be caused by a change of environment is outweighed by its advantages to them.

In re Marriage of Farris, 69 Ill. App. 3d 1042, 1046, 338 N.E.2d 232, 235 (1979). *See, e.g., Applegate v. Applegate*, 80 Ill. App. 3d 81, 399 N.E.2d 330 (1980); *Russell v. Russell*, 80 Ill. App. 3d 41,

This liberal approach to an intentionally illiberal statute was not confined to the Illinois trial courts, as the Illinois Supreme Court's decision in *Jarrett v. Jarrett* illustrates.⁸⁰ In that case, the court had awarded custody to the wife at the time of the divorce in December 1976. Four months later, she informed her ex-husband that a male friend of hers would begin living with her and the children, with no present plan to marry. The former husband promptly applied for a change of custody. In his supporting affidavit, he described a "living arrangement [that] was contrary to his own personal beliefs."⁸¹ The trial court granted the petition as "necessary for the moral and spiritual well-being and development" of the children.⁸² The intermediate appeals court reversed, saying there was no evidence, as required for a modification of custody, of neglect or negative effects.⁸³

The Illinois Supreme Court reinstated the trial court's custody modification. The high court ruled that Ms. Jarrett's behavior was not only deviant but criminal, and that it offended community morals and public policy as expressed by the state legislature.⁸⁴ According to the court, living in an environment that openly flouted state criminal law posed danger to the children's development because "it could well encourage children to engage in similar activity in the future."⁸⁵ In so holding, the supreme court stated that the courts could act under the Illinois statute even without "tangible manifestation of damage to [the children's] character."⁸⁶

399 N.E.2d 212 (1979); *De Franco v. De Franco*, 67 Ill. App. 3d 760, 384 N.E.2d 997 (1978).

80. 78 Ill. 2d 337, 400 N.E.2d 421 (1979), *cert. denied*, 449 U.S. 927 (1980).

81. *Jarrett v. Jarrett*, 64 Ill. App. 3d 932, 934, 382 N.E.2d 12, 14 (1978), *rev'd*, 78 Ill. 2d 337, 400 N.E.2d 421 (1979), *cert. denied*, 449 U.S. 927 (1980).

82. *Id.* at 935, 382 N.E.2d at 14.

83. *Id.* at 937, 382 N.E.2d at 16-17.

84. 78 Ill. 2d at 345-48, 400 N.E.2d at 423-25.

85. *Id.* at 346-47, 400 N.E.2d at 424.

86. *Id.* at 349, 400 N.E.2d at 425. *Jarrett* has been both praised and criticized for the court's willingness to "protect" a child's "moral development" prior to tangible evidence of damage to her. Compare Note, *Modification of Child Custody Predicated on Cohabitation of the Custodial Parent: Jarrett v. Jarrett*, 1981 B.Y.U. L. REV. 169, 174-77, 179-81 (court acted properly to protect children from moral injury their mother's cohabitation would inflict on them) with Note, *Child Custody: Parental Cohabitational Relationships and the Best Interest of the Child Standard: Jarrett v. Jarrett*, 29 DE PAUL L. REV. 1141 (1980) (court infringed on rights of both child and parent in custody disputes). See also *Bell v. Bell*, 154 Ga. App. 290, 292, 267 S.E.2d 894, 896 (1980) (cohabitation sufficient in and of itself to justify change of custody); *Thompson v. Thompson*, 96 Ill. 2d 67, 78, 449 N.E.2d 88, 93 (*Jarrett* did not establish conclusive presumption that cohabitation of custodial parent harms child), *cert. denied*, 104 S. Ct. 242 (1983); *In re Marriage of McKeever*, 117 Ill. App. 3d 905, 910, 453 N.E.2d 1153, 1157 (1983) (*Jarrett* not controlling where cohabitation not open and notorious); *In re Marriage of Padiak*, 101 Ill. App. 3d 306, 313-14, 427 N.E.2d 1372, 1377-78 (1981) (statute contemplates modification of custody on basis of potential as well as actual harm to child); *In re Marriage of Olson*, 98 Ill. App. 3d 316, 319, 424 N.E.2d 386, 389 (1981) (under *Jarrett*, trial court should look to moral values custodial parent actually demonstrates to children); *Willcutts v. Willcutts*, 88 Ill. App. 3d 813, 817, 410 N.E.2d 1057, 1060 (1980) (*Jarrett* does not mandate change in custody where cohabitation is occasional rather than open and continuous); *Hill v. Hill*, 228 Kan. 680, 690-91, 620 P.2d 1114, 1122 (1980) (fact of cohabitation sufficient to support change in custody; proof of harm to child not required); *Jacobson v. Jacobson*, 314 N.W.2d 78, 81 (N.D. 1981) (citing

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This judicial willingness to construe the UMDA liberally in favor of modification applications raises several important questions. Is any attempt, legislative or otherwise, to restrict judicial activism in this area doomed to failure? Is there some institutional imperative that makes inevitable the courts' exercise of substantial discretion in this field? Is it impossible to expect a judge to abide by a cold statutory mandate and to set aside his or her personal views on what should become of the child in the peculiar circumstances presented? Is it possible to draft a rule that strikes a proper balance between the long-term policy considerations behind the UMDA and the immediate need to protect vulnerable innocents? Finally, and perhaps most critically, is it possible to persuade judges that they do not necessarily know what is best, either in the long-term or in the short-term, for the children involved?

D. *Analysis and Evaluation of the Current Standards*

Each of the approaches to modification applications described above represents an attempt to balance competing policy interests. Trying to balance the policies behind the *res judicata* doctrine on the one hand, and the policies in favor of making the best-advised contemporary determination of the child's welfare on the other, the traditional changed circumstances doctrine holds that not just any changed circumstances, but only substantial ones, should warrant changing custody. The prior unknown facts exception to the traditional rule supposedly allows for just results in situations in which, under the usual approach, children might be left in harmful situations.

Despite its apparent rationality, the changed circumstances standard has been rejected by some courts and legislatures on the ground that the interests of the children far outweigh the policies behind the *res judicata* doctrine, and that therefore a pure best interests standard is preferable. Criticism of the traditional standard has also come from the opposite pole, with the assertion that there is no inconsistency between *res judicata* policies and an individual child's best interests; children are more likely to fare best when left with their current custodian.

In the context of the initial custody decision, the best interests test has of course occupied the field. At present, almost every jurisdiction uses some formulation of the best interests standard to decide initial custody disputes.⁸⁷ The use of that standard in that context has been criticized as resulting in an indeterminacy perhaps unparalleled in any other area of

Jarrett in support of decision to change custody because homosexual cohabitation violates social mores); *Dailey v. Dailey*, 635 S.W.2d 391, 394-95 (Tenn. Ct. App. 1981) (citing *Jarrett* in support of decision to change custody because homosexual cohabitation threatens child's development).

87. For a history of the development of the standard, see Foster & Freed, *Life With Father*:

the law. Numerous commentators have bemoaned the unpredictability of the best interests standard, but none has suggested a better approach to the initial settlement of custody disputes.⁸⁸ After an extensive review and analysis, Professor Mnookin concluded that no other alternative offered "assurance of being plainly superior to adjudication under the indeterminate best-interests principle."⁸⁹

Resigned acceptance of the best interests standard for initial custody determinations may be a by-product of the recognition that in the matter of custody determinations, there is almost always more than one acceptable solution to any set of facts. The child will most likely develop within the parameters of normalcy no matter which decision is made. In almost all cases—certainly in the classic "hard" cases, where two caring parents square off against one another—the issue is one of value choices. For example, is the child best served by a warm, affectionate parent who has difficulty setting limits and is inconsistent, or by a parent who is more consistent but is demonstrably less affectionate? Is the child best served by a non-working parent who may encounter problems simply because he or she spends so much time with the child, or by a parent who works but whose time with the child will, it is hoped, be "quality time"? The nature of this inquiry—for this particular child, which parent will be better in the future—makes it unlikely that the choice of one parent over the other will result in serious detriment to the child.

While the best interests standard may be the "least worst" standard for

1978, 11 FAM. L.Q. 321 (1978); Mnookin, *supra* note 2, at 233-37; Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423 (1977); Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672 (1942). A majority of the states provide by statute for a best interests of the child standard. *See, e.g.*, KAN. STAT. ANN. § 60-1610(a) (1983); LA. CIV. CODE ANN. art. 157 (West Supp. 1984); MASS. GEN. LAWS ANN. ch. 208, § 31 (West Supp. 1984-85); N.H. REV. STAT. ANN. § 458:16 (1983); N.J. STAT. ANN. § 9:2-4 (West 1976); N.Y. DOM. REL. LAW § 240 (McKinney Supp. 1977-84); N.C. GEN. STAT. § 50-13.2 (Supp. 1983); PA. STAT. ANN. tit. 48, § 92 (Purdon 1965); TENN. CODE ANN. § 36-828 (1977). Some statutes identify factors to be considered in making the best interests determination. *See* ALASKA STAT. § 25.24.150 (1983); ARIZ. REV. STAT. ANN. § 25-332 (Supp. 1984-85); CAL. CIV. CODE § 4600 (West 1983); COLO. REV. STAT. § 14-10-124 (1973 & Supp. 1983); CONN. GEN. STAT. ANN. § 46b-56 (West Supp. 1984); DEL. CODE ANN. tit. 13, § 722 (1981); D.C. CODE ANN. § 16-911 (1981); FLA. STAT. ANN. § 61.13 (Harrison 1984); GA. CODE ANN. § 19-9-1 (1982); IDAHO CODE § 32-717 (1983); ILL. ANN. STAT. ch. 40, § 602 (Smith-Hurd 1980); IND. CODE ANN. § 31-1-11.5-21 (Burns 1984); KY. REV. STAT. ANN. § 403.270 (1984); MICH. COMP. LAWS ANN. § 722.23 (West Supp. 1984-85); MINN. STAT. § 518.17 (West Supp. 1984); MO. ANN. STAT. § 452.375 (Vernon Supp. 1984); MONT. CODE ANN. § 40-4-212 (1983); NEB. REV. STAT. § 42-364 (1978); N.M. STAT. ANN. § 40-4-9 (1978); N.D. CENT. CODE § 14-09-06.2 (1981); OHIO REV. CODE ANN. § 3109.04 (Page Supp. 1983); OR. REV. STAT. § 107.137 (1981); S.C. CODE ANN. § 20-3-160 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 30-27-19 (1984); TEX. FAM. CODE ANN. § 14.07 (Vernon 1975 & Supp. 1984); UTAH CODE ANN. § 30-3-10 (Supp. 1983); WASH. REV. CODE ANN. § 26.09.190 (Supp. 1984-85); WYO. STAT. § 20-2-113 (1977).

88. *See, e.g.*, J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 2; Mnookin, *supra* note 2; Oster, *Custody Proceeding: A Study of Vague and Indefinite Standards*, 5 J. FAM. L. 21 (1965).

89. Mnookin, *supra* note 2, at 292.

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initial custody proceedings, the same approach is not necessarily the “least worst” standard for custody modification proceedings. This is particularly true with respect to cases involving custody awards that were the product of initial agreement between the divorcing spouses—as most such awards are today.⁹⁰

Modification decisions in cases involving consensual initial awards often reflect a judicial view that judges, because they are not emotionally involved in the dispute, can better assess what is best for the children. It has never been proven, however, that emotionally uninvolved decisions concerning child custody are superior to emotionally involved ones. To the contrary, most commentators who have addressed the issue have concluded that parents, not courts, are better equipped to make child custody decisions.⁹¹ Moreover, if custodial decisions based on parental agreement can readily be opened, then the value of agreeing in the first place is diminished, and the litigation of initial disputes will be encouraged.⁹²

If the discretionary best interests approach is flawed, the traditional changed circumstances standard is not much better. Change of circumstance decisions uncannily resemble those decided under the best interests standard, for it is not necessary to prove any extraordinary new circumstance; rather, a variety of factors may be considered.

Recall the hypothetical Smith family. Even if the court were to find that the Smiths’ children related well to both parents and were happy and well-adjusted in their mother’s custody, the court could find also that there was a substantial difference in the parents’ lifestyles and values. The court could then conclude that the father could provide the children with a better physical, moral, spiritual, social, and educational environment and on that ground award custody to the father. In cases such as that of the Smiths, courts find the required changed circumstances in such factors as developments in the custodial parent’s social life, work, home conditions, or in the noncustodial parent’s financial security and remarriage.⁹³ The

90. See Kirshner, *Child Custody Determination—A Better Way!* 17 J. FAM. L. 275, 286 (1978-79); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 955 n.23 (1979); Watson, *supra* note 2, at 57.

91. See, e.g., Bodenheimer, *supra* note 2, at 506; Mnookin, *supra* note 2, at 288; Trombetta, *Joint Custody: Recent Research and Overloaded Courtrooms Inspire New Solutions to Custody Disputes*, 19 J. FAM. L. 213, 227 (1980-81).

92. There is also an increasing awareness of the potential role of mediation at the time of divorce. Mediated agreements may provide a more satisfying and less acrimonious means to decide controversies. In addition, this process is one method of stemming the tide of family litigation. Certainly, public policy should not encourage divorcing couples to mediate their custody disputes and then give their consensual decision short shrift when one party seeks to modify it. Any standard that gives less weight to parental agreements than to judicial awards of custody is justified only if, in fact, judicial awards are demonstrably “better.”

93. Some of the factors courts have recognized as constituting the required change in circumstances are mother’s employment, see, e.g., *Simmons v. Simmons*, 223 Kan. 639, 644, 576 P.2d 589, 593 (1978); *Hansen v. Hansen*, 327 N.W.2d 47, 48 (S.D. 1982), mother’s part-time attendance at

courts appear to be defining changed circumstances as a change in any circumstance pertinent to the best interests of the child, so that the two standards merge *de facto*.

The UMDA standard has not been immune from this tendency to merge with the best interests standard. Some courts have found "serious endangerment" under circumstances similar to those in the Smith hypothetical.⁹⁴ Furthermore, the UMDA's two-year waiting period provision does little to insure the "finality" of the custody decree even for the first twenty-four months of the decree's life.

In sum, it is not only private choices but the law itself that makes the shape of the family after divorce so uncertain. The applicable legal standards are so flexible that divorced parents, long after their divorce, can wage battle after battle over the custody of their children, and children can be moved from one home to another and back again based on subjective factors which would not carry much weight, if any, in other types of lawsuits.

E. *A New Standard for Custody Modification*

Children of divorce, and their families, need a new, more restrictive standard for custody modification. No custodial modification should be allowed (aside from consensual decisions to alter custodial arrangements) unless the child is seriously endangered. The definition of endangerment should be as specific as possible, focusing on whether the custodial parent is taking prudent care of the child, not on whether the child's best interests are somehow being maximized. This new test would not differ substantially from model statutes that define when the state may, due to parental neglect, intervene in family decisionmaking and assume responsibility for a child.⁹⁵

night school, *see, e.g.*, *Lightfoot v. Bylsma*, 412 So. 2d 813, 814 (Ala. Civ. App. 1982), mother's cohabitation, *see, e.g.*, *Bell v. Bell*, 154 Ga. App. 290, 292, 267 S.E.2d 894, 896 (1980), mother's sexual activity, *see, e.g.*, *Trunik v. Trunik*, 179 Conn. 287, 288, 426 A.2d 274, 275 (1979); *In re Marriage of Goddard*, 57 Or. App. 390, 644 P.2d 651, 653 (1982), father's remarriage, *see, e.g.*, *Walker v. Walker*, 262 Ark. 648, 655, 559 S.W.2d 716, 720 (1978); *Trunik v. Trunik*, 179 Conn. 287, 288, 426 A.2d 274, 275 (1979), father's superior financial situation, *see, e.g.*, *Hansen v. Hansen*, 327 N.W.2d 47, 48 (S.D. 1982); *Walker v. Walker*, 262 Ark. 648, 655, 559 S.W.2d 716, 720 (1978), mother's failure to discipline child adequately, *see, e.g.*, *Lagrone v. Lagrone*, 311 So. 2d 290, 291 (La. App. 1975), and increased age of child, *see, e.g.*, *King v. King*, 114 R.I. 329, 331, 333 A.2d 135, 137 (1975).

Reliance solely on racial prejudice in changing custody is constitutionally prohibited. In *Palmore v. Sidoti*, 104 S.Ct. 1879, 1882 (1984), the United States Supreme Court ruled that concern for community prejudice against the interracial marriage of the custodial mother is an impermissible factor in deciding whether to remove her child from her custody.

94. *See supra* pp. 777-78.

95. For example, the statute recommended by the Institute of Judicial Administration—American Bar Association Joint Commission on Juvenile Justice Standards provides for such intervention if:

A. a child has suffered, or there is a substantial risk that a child will imminently suffer, a

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The new standard for custody modification would also provide that even when there is evidence of endangerment, modification is authorized but not required. In any modification proceeding, the petitioner would also have to prove that the benefits of any change outweigh the harm likely to be caused by a change in environment.

Moreover, the new standard should provide express protection against the modification of custody of children under three years of age.⁹⁶ A heavy statutory presumption that such a change itself would endanger the child would accomplish this goal. In addition to proving the benefits of the proposed change, any petitioner seeking to modify the custody of a child of such tender years would also bear the burden of rebutting the statutory presumption.

This new standard would retain the UMDA's procedural requirement that petitioners make an initial showing on papers for all applications within the first two years following a decree. In so providing, it would recognize that this requirement is no more than a procedural safeguard designed to weed out frivolous custody litigation, and that it is the standard's substantive provisions that must be looked to if the standard is to accomplish its purposes.

physical harm, inflicted nonaccidentally upon him/her by his/her parents, which causes, or creates a substantial risk of causing, disfigurement, impairment of bodily functioning, or other serious physical injury;

B. a child has suffered, or there is a substantial risk that the child will imminently suffer, physical harm causing disfigurement, impairment of bodily functioning, or other serious physical injury as a result of conditions created by his/her parents or by the failure of the parents to adequately supervise or protect him/her;

C. a child is suffering serious emotional damage, evidenced by severe anxiety, depression, or withdrawal, or untoward aggressive behavior toward self or others, and the child's parents are not willing to provide treatment for him/her;

D. a child has been sexually abused by his/her parent, or a member of his/her household, or by another person where the parent knew or should have known and failed to take appropriate action (alternative: a child has been sexually abused by his/her parent or a member of his/her household, and is seriously harmed physically or emotionally thereby);

E. a child is in need of medical treatment to cure, alleviate, or prevent him/her from suffering serious physical harm which may result in death, disfigurement, or substantial impairment of bodily functions, and his/her parents are unwilling to provide or consent to the medical treatment;

F. child is committing delinquent acts as a result of parental encouragement, guidance, or approval.

INSTITUTE OF JUDICIAL ADMINISTRATION & AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ABUSE AND NEGLECT § 2.1 (1981). J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 2, at 37, argue for a final, unconditional child placement decision in divorce matters. They also state that "the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits." *Id.* at 38.

96. Children under three years of age need particular safeguards against the instability resulting from custody modification. *See pp.* 797-98.

A stricter, clearer, more certain standard governing custody modification is essential. Recent social science findings have underscored the importance to those concerned in custody litigation of what the UMDA's drafters called finality. Perhaps a better term is repose. For it is repose, according to the social science data, that all the parties concerned truly need after a divorce.

III. THE SOCIAL SCIENCE DATA

The findings and informed conclusions of social scientists have played a key role in the development of legal rules and policies concerning initial custody disputes.⁹⁷ There is no reason that social science data should be any less valuable with regard to the modification issue. While such research may be far from perfect, it at least provides better guidance than the raw judicial intuition upon which we now rely so heavily in determining the effect of a changed circumstance on a child and what may be "best" for a child in a given situation.

In 1969, two prominent authorities, writing about the legislative reform of custodial adjudication, noted with concern that few empirical studies dealt with the effects of divorce and that those that did concentrated primarily on the consequences of divorce on parents rather than children.⁹⁸ Although a number of pertinent variables still need to be studied, since 1970 there has been significant research done concerning the effects of

97. See, e.g., *In re Marriage of Mentry*, 142 Cal. App. 3d 260, 190 Cal. Rptr. 843, 848 (1983); *Seymour v. Seymour*, 180 Conn. 705, 711-12, 433 A.2d 1005, 1008 (1980); *Golden v. Golden*, 95 Misc. 2d 447, 449, 408 N.Y.S.2d 202, 204 (1978); *Dodd v. Dodd*, 93 Misc. 2d 641, 648-49, 403 N.Y.S.2d 401, 406 (1978); *Lapp v. Lapp*, 293 N.W.2d 121, 130 (N.D. 1980); *In re Marriage of Ellenwood*, 20 Or. App. 486, 488 n.1, 491, 532 P.2d 259, 261 n.1, 262 (1975).

A number of authorities have also discussed the need to rely on social science findings. See, e.g., J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 2, at 53 (proposal that specific assumptions of psychoanalytic child development theory be incorporated into a new child custody standard known as "the least detrimental alternative"); Benedek, *Child Custody Laws: Their Psychiatric Implications*, 129 AM. J. PSYCHIATRY 326-28 (1972) (behavioral scientists should assist legal system in determining best interests of child); Levy, *Child Custody Determination—A Proposed Psychiatric Methodology and Its Resultant Case Typology*, 6 J. PSYCHIATRY & L. 189 (1978); Levy, *The Meaning of the Child's Preference in Child Custody Determination*, 8 J. PSYCHIATRY & L. 221 (1980); Litwack, Gerber & Fenster, *The Proper Role of Psychology in Child Custody Disputes*, 18 J. FAM. L. 269 (1979-80); Shepherd, *Solomon's Sword: Adjudication of Child Custody Questions*, 8 U. RICH. L. REV. 151, 178 (1974) ("Courts must draw on the knowledge and research of other disciplines such as psychiatry, psychology, . . . sociology, social work . . . so that those fields may demonstrate the extent to which various characteristics of the child and the custodial claimants are significant in achieving the objective of a healthy parent-child relationship."); Watson, *supra* note 2, at 73-74.

Some commentators have expressed concern over the misuse and limitations of psychological knowledge in this area. See, e.g., Bradbrook, *The Relevance of Psychological and Psychiatric Studies to the Future Development of the Laws Governing the Settlement of Inter-Parental Child Custody Disputes*, 11 J. FAM. L. 557 (1972); Okpaku, *Psychology: Impediment or Aid in Child Custody Cases?*, 29 RUTGERS L. REV. 1117 (1976).

98. Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication: An Effort to Rely on Social Science Data in Formulating Legal Policies*, 4 LAW & SOC'Y REV. 167, 179 (1969).

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divorce on children, and, in particular, concerning the process of divorce and the variables that contribute to a healthy adjustment to that process.⁹⁹

A. *The Divorce Process*

Recent social science research reveals that divorce is not a single stressful event confined to a certain moment, the date of the legal formality, but is instead a process that extends over time,¹⁰⁰ beginning prior to the formal divorce with a state of family dissolution and ending some time after the divorce in some form of family reconstitution. In that process, the people involved learn to adapt and cope with their changed situations. To reach a new equilibrium, family members experiment along the way with a variety of coping mechanisms, some successful and some unsuccessful.

Several noteworthy research projects have focused on the post-divorce adjustment of children and their parents. Hetherington, Cox and Cox conducted a two-year longitudinal study of 48 white, middle-class, divorced families with preschool children and a carefully matched sample of intact families.¹⁰¹ The study examined responses to the crisis of divorce, including new patterns of family organization, and analyzed how the characteristics of family members and the differences in family structure contributed to the family members' responses to the divorce. Data were collected at intervals of two months, one year, and two years following the legal divorce.¹⁰²

The similar demographic characteristics of the families involved limits the significance of this study. It does, however, provide a thus far unique, in-depth analysis of divorcing families and an intact family control group over time.

99. See, e.g., J. WALLERSTEIN & J. KELLY, *supra* note 5; Hetherington, Cox & Cox, *The Aftermath of Divorce*, in MOTHER-CHILD, FATHER-CHILD RELATIONSHIPS 149 (1978) [hereinafter cited as *The Aftermath of Divorce*]; A. Stolberg & D. Kiluk, A Temporal Model of Divorce Adjustment with Implications for Primary Prevention (1983) (unpublished manuscript on file with the author).

100. J. WALLERSTEIN & J. KELLY, *supra* note 5, at 303; Ahrons, *Redefining the Divorced Family: A Conceptual Framework*, 25 SOC. WORK 437, 437 (1980); Berman & Turk, *Adaption to Divorce: Problems and Coping Strategies*, 43 J. MARRIAGE & FAM. 179, 180 (1981); Felner, Farber, Ginter, Boike & Cowen, *Family Stress & Organization Following Parental Divorce or Death*, 4 J. DIVORCE 67, 68, 74 (1980); Hetherington, *supra* note 1, at 851; Kurdek, *An Integrative Perspective on Children's Divorce Adjustment*, 36 AM. PSYCHOLOGIST 856, 863 (1981).

101. The research methods included interviews with the parents, structured diary records by the parents, laboratory and home observations of parent-child interactions, parental and teacher ratings of the child's behavior, observations of the child in school, and measures of the child's sex role typing, cognitive performance, and social development.

102. Hetherington, *Family Interaction and the Social, Emotional, and Cognitive Development of Children after Divorce*, in THE FAMILY: SETTING PRIORITIES 71, 73 (1979); *The Aftermath of Divorce*, *supra* note 99, at 150-51; Hetherington, Cox & Cox, *Effects of Divorce on Parents and Children*, in NONTRADITIONAL FAMILIES: PARENTING AND CHILD DEVELOPMENT 233, 234-36 (M. Lamb ed. 1982) [hereinafter cited as *Effects of Divorce*]; Hetherington, Cox & Cox, *Play and Social Interaction in Children Following Divorce*, 35 J. SOC. ISSUES 26, 26 (Fall 1979) [hereinafter cited as *Play and Social Interaction*].

The study showed that families experience severe stress and disorganization during the first year following a formal divorce. Indeed, during that first year, family conflict escalates rather than declines.¹⁰³ On almost every measure of parental behavior, divorced parents during the first twelve months after divorce were coping far less well than non-divorced parents. Divorced parents made fewer maturity demands on their children, were less consistent in their discipline, were less apt to reason with their children, communicated less well, and were less affectionate.¹⁰⁴ The authors described a cycle of negative parent-child interaction, with the most notable effect on the mother-son relationship.¹⁰⁵ Only after that first year of heightened tension did an increased sense of well-being begin to emerge. At the two year follow-up, the most debilitating effects of the divorce on both parents and children had abated.¹⁰⁶

The other major longitudinal study of divorce and children, conducted by Wallerstein and Kelly, concerned the effectiveness of a divorce counseling service in Marin County, California; its subjects were families who had sought such assistance.¹⁰⁷ Consequently, the families involved in this study not only had similar backgrounds but were also self-selected and therefore perhaps were not representative of all divorcing families. The study also lacked an intact family control group. Despite these methodological shortcomings, this research is evidently the only longitudinal study to assess the effects of divorce on children of different ages, is rich in qualitative data, and has been well-received by social scientists.¹⁰⁸

The sample consisted of sixty divorced couples with 131 children who were between three- and eighteen-years-old at the time of the marital separation. All family members were interviewed by a therapist during the six-week divorce counseling session. Although a divorce need not have occurred prior to this session, the parents had to have separated and legal proceedings had to have begun. Family members were interviewed again twelve to eighteen months later, and once again five years later.¹⁰⁹ This five-year perspective enabled the researchers to distinguish several stages

103. See Hetherington, *supra* note 102, at 75; *Effects of Divorce*, *supra* note 102, at 261-62; *Play and Social Interaction*, *supra* note 102, at 45; *The Aftermath of Divorce*, *supra* note 99, at 161-75.

104. *The Aftermath of Divorce*, *supra* note 99, at 163; *Effects of Divorce*, *supra* note 102, at 252.

105. Hetherington, *supra* note 102, at 75; *Effects of Divorce*, *supra* note 102, at 252.

106. See Hetherington, *supra* note 102, at 75; *The Aftermath of Divorce*, *supra* note 99, at 157-75; *Effects of Divorce*, *supra* note 102, at 262, 285; *Play and Social Interaction*, *supra* note 102, at 45.

107. J. WALLERSTEIN & J. KELLY, *supra* note 5, at 7.

108. See Jenkins, Book Review, 26 SOC. WORK 256 (1981); Littlefield, Book Review, 16 SCI. BOOKS & FILMS 248 (1981); Moles, Book Review, 62 SOC. CASEWORK 380 (1981); Musmann, Book Review, 105 LIBR. J. 1172 (1980).

109. J. WALLERSTEIN & J. KELLY, *supra* note 5, at 4-5. For particulars about the design of the study and the population, see *id.* at 319-34.

in the divorce process and to report on the experiences of the children and the adults during each of these periods.

Like the subjects in the study by Hetherington, Cox and Cox, the children in the Wallerstein and Kelly study took some time to adjust to their new situation. For example, at the first follow-up, nearly half of the pre-school group, over one-third of the 7- and 8-year olds, and half of the 9- and 10-year olds, either still displayed the dysfunctional behaviors observed in the initial interviews or were in even more deteriorated psychological conditions.¹¹⁰

Eighteen months after separation, the "average" mother and father were still in transition, struggling with the process of adapting to a new environment and status. Particularly for the woman, life had not yet stabilized; close to half of the women were depressed to some considerable degree.¹¹¹ A number of both men and women continued to rage at their former partners, seemingly unaffected by the passage of time.¹¹² Substantiating the findings of Hetherington and her associates, Wallerstein and Kelly concluded that the stresses during the beginnings of a post-divorce relationship with the child were extraordinary, contributing particularly to a strain on the custodial parent's capacity to parent.¹¹³ On the other hand, at the second follow-up, almost five years after separation, most families had achieved overall stability.¹¹⁴

Other researchers have corroborated and commented upon the importance of the time factor in parental adjustment to divorce. An intimate relationship between two individuals is not easily severed. The intensity of the emotional attachment, which may include aspects of concern and friendship as well as anger, revenge, pain, guilt, and distrust, has been found to diminish with time as an individual learns to separate his or her identity from that of the former spouse.¹¹⁵ Moreover, the adjustment of

110. Kelly & Wallerstein, *The Effects of Parental Divorce: Experiences of the Child in Early Latency*, 46 AM. J. ORTHOPSYCHIATRY 20, 31 (1976); Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Child in Later Latency*, 46 AM. J. ORTHOPSYCHIATRY 256, 268-69 (1976); Wallerstein & Kelly, *The Effects of Parental Divorce: The Experiences of the Preschool Child*, 14 J. AM. ACAD. CHILD PSYCHIATRY 600, 615 (1975).

111. J. WALLERSTEIN & J. KELLY, *supra* note 5, at 154-55.

112. *Id.* at 156.

113. *Id.* at 108-09, 112.

114. *Id.* at 182, 189-94. At this point, the more pathological responses and developments were likely to be caused by a chronic state of disorganization which was exacerbated rather than caused by the divorce. *Id.* at 182. Moreover, other factors, such as remarriage, redi-orce, illness, and job changes, complicated any attempt to trace a direct causal relationship between the divorce and the eventual outcome for parents and children. *Id.* at 181.

115. See, e.g., COMMITTEE ON THE FAMILY, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *NEW TRENDS IN CHILD CUSTODY DETERMINATIONS* 101 (1980) [hereinafter cited as *NEW TRENDS*]; L. HALEM, *SEPARATED AND DIVORCED WOMEN* 160, 200 (1982); Ahrons, *supra* note 100, at 437; Berman & Turk, *supra* note 100, at 180; Kohen, *From Wife to Family Head: Transitions in Self-identity*, 44 PSYCHIATRY 230 (1981).

the children is linked to that of the custodial parent. One study found that the children's post-divorce social adjustment greatly depended upon the custodial parent's ability to achieve and maintain his or her own emotional and social adjustment.¹¹⁶

It would seem, then, that custody controversies often represent the playing out, for a significant period of time after the formal divorce, of chronic, unresolved, and acrimonious marital problems.¹¹⁷ Many custody controversies during the transitional period prior to recovery from the divorce would seem to be no more than a reflection of the lack of adjustment to the psychological trauma of divorce.¹¹⁸

In light of these findings, courts should not be permitted to modify initial custody decisions simply because a custodial parent is having difficulty coping with the fact of the divorce and the new family arrangement. Those difficulties are to be expected and most likely will be worked out over time. A re-ordering of custody would only interfere with that adjustment process.

B. *Factors Contributing to Children's Post-Divorce Adjustment*

The initial research on the impact of divorce concentrated on such issues as whether children from divorced families are more aggressive, incompetent, or dependent than their peers from intact homes. More recently, researchers have tried to identify the specific variables affecting the impact of divorce on children. This change in the research focus results from the recognition that the divorce process can be influenced by relationships and events during the period following the marital dissolution.

A number of studies have sought to identify factors affecting children's

116. Pett, *Correlates of Children's Social Adjustment Following Divorce*, J. DIVORCE, Summer 1982, at 25, 32-34. See also Kurdek, *supra* note 100, at 860 (expect children's adjustment to be related, in part, to custodial parent's, but little empirical evidence); Kurdek & Berg, *Correlates of Children's Adjustment to Their Parents' Divorces*, in CHILDREN AND DIVORCE 47, 50, 58 (L. Kurdek ed. 1983) (limited evidence supports view that children's divorce adjustment is related, in part, to that of custodial parent).

117. J. WALLERSTEIN & J. KELLY, *supra* note 5, at 28-29; R. WEISS, GOING IT ALONE 137 (1979); Chiriboga & Cutler, *Stress Responses Among Divorcing Men and Women*, 1 J. DIVORCE 95 (1977); Nelson, *Moderators of Women's and Children's Adjustment Following Parental Divorce*, 4 J. DIVORCE 71, 80 (1981); A. Stolberg & D. Kiluk, *supra* note 99, at 7-8.

118. Sociologist Robert Weiss contends that two to four years are needed before individuals are "fully themselves again," with the average recovery period nearer the four year mark. R. WEISS, MARITAL SEPARATION 236 (1975). Hetherington, Cox & Cox found that most children can cope with and adapt to the short term crisis of divorce within "a few years," Hetherington, *supra* note 1, at 852, and that there was an almost total amelioration of divorce related problems after six years. See *Effects of Divorce*, *supra* note 102, at 285. The period of adjustment for parents and children is, therefore, probably longer than the two-year statutory period. Considering, however, that the two-year period in the UMDA statute usually will date from the initial custody order in the divorce decree and that the parties are likely to have separated sometime prior to that time and to have begun the period of adjustment prior to the time of the formal divorce, the two year period is probably an appropriate benchmark.

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adjustments to divorce. Those identified include parental or familial factors, such as the ability of the noncustodial parent to maintain a relationship with the child; environmental factors, such as the source and stability of family income; and individual factors, such as the age, sex, and emotional predisposition of the child. Information about these factors is useful both in understanding the divorce experience and in identifying means to facilitate positive post-divorce adjustment. Several of these factors are particularly significant in analyzing custodial modification standards.

1. *Interpersonal Relationships*

It should come as no surprise that conflict between parents has been identified as an important influence on the behavior and well-being of children. There is, for example, considerable evidence that children living in conflict-ridden two-parent families are more poorly adjusted than children living in well-functioning single parent families.¹¹⁹ There is also evidence that continued conflict between parents after a divorce hinders the positive adjustment of children.

One factor examined in the Hetherington study was the impact of interparental conflict on the social development of children in both divorced and intact families. On the basis of interview ratings, the divorced and married parents were divided into two groups depending on whether they exhibited high or moderate to low levels of conflict with each other. This resulted in four groups: high-conflict nuclear families, low-to-moderate conflict nuclear families, high-conflict divorced families, and low-to-moderate conflict divorced families. Using a variety of measures of children's home and school behavior, the relationship between the children's adjustment and each type of family group was examined. The authors interpreted their results as indicating that, two years after divorce, the high-conflict divorced group exhibited the most adjustment problems, followed by the high-conflict nuclear, the low-conflict divorced, and the low-conflict nuclear groups. The finding that the high-conflict nuclear group had greater difficulties than the low-conflict divorced group suggests that interparental conflict, rather than family structure, has the greater impact

119. See Hetherington, *supra* note 102, at 75; *The Aftermath of Divorce*, *supra* note 99, at 175; Jacobson, *The Impact of Marital Separation/Divorce on Children: II. Inter-parent Hostility and Child Adjustment*, 2 J. DIVORCE 3, 5 (1978); McCord, McCord & Thurber, *Some Effects of Paternal Absence on Male Children*, 64 J. ABNORMAL & SOC. PSYCHOLOGY 361, 367 (1962); Nye, *Child Adjustment in Broken and in Unhappy Unbroken Homes*, 19 MARRIAGE & FAM. LIVING 356, 361 (1957); Rutter, *Parent-Child Separation: Psychological Effects on the Children*, 12 J. CHILD PSYCHOLOGY & PSYCHIATRY & APPLIED DISCIPLINES 233, 240, 255 (1971) (concluding that, while the separation of a child from his or her parent did not have any consistently negative effects on the child's adjustment, exposure to conflict between parents did).

on the post-divorce adjustment of children.¹²⁰ This conclusion supports the findings of other researchers that low levels of interparental conflict and hostility preceding and following a divorce correlate with diminished adjustment problems in children's social, emotional, and cognitive development.¹²¹

The social science literature casts light on why post-divorce conflict engenders developmental difficulties. Separation of parents often creates conflicting demands for allegiance by one or both parents, which in turn intensify a child's stress.¹²² This battle for loyalty raises anxiety and places a premature burden of responsibility upon the child for the well-being of

120. *Effects of Divorce*, *supra* note 102, at 260-62. Hetherington, Cox and Cox have also found that high levels of conflict vitiate the generally positive effect of frequent visitation by the noncustodial parent. *The Aftermath of Divorce*, *supra* note 99, at 163. Studying a sample of sixteen divorced families and sixteen intact families, all of whom had a child between the ages of nine and eleven years, Hess and Camara analyzed a number of variables: whether the family was divorced or intact; the affective relationship between the child and each parent and the level of harmony between the parents; the degree of contact between the noncustodial father and the child; and certain behavioral outcomes. Their results showed that negative child behavior was as closely related to parental harmony as it was to whether the child came from an intact or a divorced family. Hess & Camara, *Post-Divorce Family Relationships as Mediating Factors in the Consequences of Divorce for Children*, J. SOC. ISSUES, Fall, 1979, at 79, 87. See Rosen, *Children of Divorce: What They Feel About and Other Aspects of Divorce Experience*, 6 J. CLIN. CHILD PSYCHOLOGY 24, 24 (1977).

121. See, e.g., Berg & Kelly, *The Measured Self-Esteem of Children from Broken, Rejected, and Accepted Families*, 2 J. DIVORCE 363, 367-68 (1979); Emery, *Interpersonal Conflict and the Children of Discord and Divorce*, 92 PSYCHOLOGICAL BULL. 310, 313 (1982); Hodges, Wechsler & Ballantine, *Divorce and the Preschool Child: Cumulative Stress*, 3 J. DIVORCE 55, 62-63, 66 (1979); Raschke & Raschke, *Family Conflict and Children's Self Concepts: A Comparison of Intact and Single-Parent Families*, 41 J. MARRIAGE & FAM. 367, 367-68, 372-73 (1979). The other factors are a minimal depletion of financial resources, low hostility and cooperative parenting between ex-spouses, approval and love from both parents, authoritative discipline from the custodial parent, regular visitation by the noncustodial parent, and an emotional climate that helps children discuss divorce-related concerns. See Kurdek & Berg, *supra* note 116, at 49-50.

Of course most children from divorced families are also exposed to some unknown pre-divorce conflict, which may be a determinative factor. The data suggest, however, that the termination of that conflict, as opposed to its continuation or exacerbation, is to the child's benefit. See Emery, *supra*, at 314; A. Stolberg, C. Camplair, K. Currier, & M. Wells, *Individual, Familial and Environmental Predictors of Children's Post-Divorce Adjustment and Maladjustment 13-14* (unpublished manuscript on file with the author).

122. See, e.g., NEW TRENDS, *supra* note 115, at 67; A. MUsETTO, *DILEMMAS IN CHILD CUSTODY: FAMILY CONFLICTS AND THEIR RESOLUTION* 34-36 (1982); Hess & Camara, *supra* note 120, at 81-82. In one modification case brought by a father seeking custody, the child's guardian *ad litem* reported that the child did not complain a great deal about wanting to live with her father, but that she did wish to reduce the tensions between her parents. *Gratrix v. Gratrix*, 652 P.2d 76, 79 (Alaska 1982). Wallerstein and Kelly found that one of the central themes of the children's divorce experience in their study was the feeling of conflicted loyalties:

Often the conflict is exacerbated by parents and, indeed, two-thirds of the parents openly competed for the children's love and allegiance. . . . School age children particularly appeared to conceptualize the divorce as a struggle in which each participant demanded one's primary loyalty, and this conception greatly increased the conflict and unhappiness of the child.

J. WALLERSTEIN & J. KELLY, *supra* note 5, at 49. Another commentator put it this way: "Children at any developmental stage are subject to loyalty conflicts which in my opinion are the greatest dangers they confront." A. MUsETTO, *supra*, at 55. One study that relied on parental reporting about children's behavior had a surprising finding in this regard. Three quarters of the group who had experienced fully contested custodial cases reported that the children had been no harder to handle during this process. It may be that parents are unaware of or are rationalizing the effects of litigation,

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the adults upon whom the child depends. Although these demands may be implicit in every divorce situation, they become explicit when there is custody litigation. This need to behave at such a mature level of interpersonal sensitivity and awareness is often more than the child can handle at his or her stage of development. High levels of parental discord may also keep the child constantly distressed and confused, and make adjustment to the reality of the new family situation difficult.¹²³ Any post-divorce conflict, then, will affect the child's development. A lengthy and bitter custody dispute may further impair psychological development or spark regression to less mature behavioral patterns.¹²⁴

Moreover, in light of the fact that many modification decisions are at least partially based on the child's custodial preference,¹²⁵ another finding documented by Wallerstein and Kelly is most significant. In almost all divorce situations, children desperately want their parents to be reunited and are angry that they are apart. They generally express that anger toward the parent who spends the most time looking after them. Wallerstein and Kelly found that children turned against the parent who took the time to care for the child—the person who often would be the more appropriate custodial parent. This finding increased the researchers' misgivings about relying on the expressed opinions and preferences of youngsters below adolescence in deciding custodial issues.¹²⁶

What remains unanswered is whether post-divorce hostility, with its deleterious effects on children, would decrease if custody modification litigation were restricted. It is possible that some parents are able to conceal their angry feelings, even while litigating the custody issue. It is also possible that such litigation provides a therapeutic outlet for parents, thus permitting their day-to-day relationships with each other and with their children to be less hostile. More likely, however, the relitigation of custody signifies to the child just what it signifies to anyone else—that the parents are in overt conflict with one another and that this conflict is sufficiently strong to bring them to the courts. Therefore, the fact of the litigation itself means that interparental hostility exists, together with its concomitant adverse effects on the children.¹²⁷

or it may be that the effects of a custody contest are less deleterious than assumed. See Fulton, *Parental Reports of Children's Post-Divorce Adjustment*, J. SOC. ISSUES, Fall, 1979, at 126, 131-32.

123. Hess & Camara, *supra* note 120, at 83.

124. A. MUSETTO, *supra* note 122, at 41-42.

125. See Moskowitz, *Divorce-Custody Dispositions: The Child's Wishes in Perspective*, 18 SANTA CLARA L. REV. 427 (1978); Siegel and Hurley, *The Role of The Child's Preference in Custody Proceedings*, 11 FAM. L. QUAR. 1 (1977); Speca, *The Role of the Child in Selecting His or Her Custodian in Divorce Cases*, 27 DRAKE L. REV. 437 (1977-78).

126. J. WALLERSTEIN & J. KELLY, *supra* note 5, at 314-15.

127. Researchers in one recent study asked an admittedly small sample of twenty-five single divorced mothers, who had been separated an average of about six years, to evaluate the difficulty of

If that is true, then it follows that modification disputes should be discouraged. Again, there is the theoretical possibility that a standard that met this goal would have adverse consequences for a child. Parents, frustrated by the inability to bring modification suits, might become even more antagonistic to one another. On the other hand, stricter standards that set clear boundaries for modification actions should encourage parents to adjust more quickly to the reality of the post-divorce situation. Knowing that the courts are unable to help them, and that consensual changes are the only solution to custodial disagreements, parents' hostility toward each other may well decrease. In short, if the legal system provides no battleground, it is less likely that there will be a battle.¹²⁸

2. Remarriage

Recent estimates indicate that eighty percent of divorced men and seventy-five percent of divorced women eventually remarry, usually within three to five years after they divorce.¹²⁹ Because approximately sixty percent of divorced persons have children under eighteen years of age,¹³⁰ it is extremely likely today that a child who experiences divorce will also experience the remarriage of one or both parents. And it is not surprising that noncustodial parents often support their petitions for modification by pointing to their remarriage.¹³¹

Despite these statistics, there has been little research on the adjustment of children in such post-divorce stepparent families. Most studies involving stepparent families have focused on comparisons of children who are

various aspects of their divorce. Kurdek & Blisk, *Dimensions and Correlates of Mothers' Divorce Experiences*, J. DIVORCE, Summer 1983, at 1. Their findings indicate that single divorced mothers continue to experience stress in the long term post-separation period, particularly when there is frequent interaction with the ex-husband. This stress can be expected if the parents are engaged in post-divorce custodial litigation. More importantly, the study also found that the mothers' post-separation stress and interparental conflict during that period were related to their children's social and psychological maladjustment. *Id.* at 18-21. While other studies have found that contact with the ex-spouse was an integral part of children's divorce adjustment, see, e.g., J. WALLERSTEIN & J. KELLY, *supra* note 5, at 307-08, 310-11, Kurdek & Blisk found that such contact is beneficial only when it occurs in the more general context of amicable inter-parent relations. Kurdek and Blisk, *supra*, at 22.

128. The contrary premise, that eliminating the legal forum will not affect the number of disputes between squabbling ex-spouses, is, of course, also plausible. Rather than relying on intuitive responses to such issues, we need empirical evidence to resolve them.

129. See Glick, *Remarriage: Some Recent Changes and Variations*, 1 J. FAM. ISSUES 455, 465-66 (1980) (median span between divorce after first marriage and remarriage was three years for women aged 35-54, and five years for women aged 55-75 at time of the 1976 Bureau of the Census report).

130. Glick, *Children of Divorced Parents in Demographic Perspective*, J. SOC. ISSUES, Fall, 1979, at 170, 174. It is estimated that by 1990, 15 to 20% of all children under the age of 18 will be living with a stepparent. Glick, *supra* note 129, at 468.

131. See, e.g., *Simmons v. Simmons*, 223 Kan. 639, 576 P.2d 589 (1978); *Gulyas v. Gulyas*, 75 Mich. App. 138, 254 N.W.2d 818 (1977); *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893 (1982).

living (or adults who have lived) in stepfamilies, nuclear families, and/or single parent families, using broad measures of psychosocial adjustment or cognitive functioning.¹³² While the evidence is not overwhelming, it does suggest that remarriage inflicts some degree of trauma on children. For example, Bowerman and Irish concluded that of the children in their sample, the 2,145 living in households of remarriage experienced "greater levels of uncertainty of feelings, insecurity of position and strain" than did the children from intact families.¹³³ Studies have also found that stepparent-stepchild relationships are more problematic with older children and adolescents than with younger children, and that in general stepparent relationships with their stepchildren become more positive as the families' socioeconomic status increases.¹³⁴ Although the data reveal that the entry of a stepfather into a father-absent home has a positive effect on boys' cognitive and personality development,¹³⁵ there are some findings

132. See, e.g., Bowerman & Irish, *Some Relationships of Stepchildren to Their Parents*, 24 MARRIAGE & FAM. LIVING 113, 115 (1962); Burchinal, *Characteristics of Adolescents from Unbroken, Broken and Reconstituted Families*, 26 J. MARRIAGE & FAM. 44, 46-47 (1964); Chapman, *Father Absence, Stepfathers, and the Cognitive Performance of College Students*, 48 CHILD DEV. 1155, 1155 (1977); Oshman & Manosevitz, *Father Absence: Effects of Stepfathers Upon Psychosocial Development in Males*, 12 DEV. PSYCHOLOGY 479, 479 (1976); Perry & Pfuhl, *Adjustment of Children in "Solo" and "Remarriage" Homes*, 25 MARRIAGE & FAM. LIVING 221, 222-23 (1963); Pett, *supra* note 116, at 35; Santrock, *Relation of Type and Onset of Father Absence to Cognitive Development*, 43 CHILD DEV. 455, 467-68 (1972).

Two large-scale studies reported the mental health consequences for children living in a remarried family to be worse than those for children living in a family broken by divorce or death without remarriage. All three situations were worse than living in an intact family. T. LANGNER & S. MICHAEL, *LIFE STRESS AND MENTAL HEALTH* 158-61 (1963); M. ROSENBERG, *SOCIETY AND THE ADOLESCENT SELF-IMAGE* 85, 98-99 (1965). Another study, which used data from two large national surveys to analyze the differences between respondents who had lived in unbroken families and respondents who had experienced stepfather families, found essentially no differences between the groups on a large number of variables. Wilson, Zurcher, McAdams & Curtis, *Stepfathers and Stepchildren: An Exploratory Analysis from Two National Surveys*, 37 J. MARRIAGE & FAM. 526, 530, 534-35 (1975). The researchers concluded that "[t]he child who is part of a stepfather family may have a predominately [sic] positive, predominately [sic] negative, or mixed experience in that family." *Id.* at 535.

133. Bowerman & Irish, *supra* note 132, at 120.

134. See J. BERNARD, *REMARRIAGE: A STUDY OF MARRIAGE* 216 (1956) (consensus among remarried parents is that adolescents have more difficulty assimilating a new parent than do children who are very young or quite grown up); L. DUBERMAN, *THE RECONSTITUTED FAMILY: A STUDY OF REMARRIED COUPLES AND THEIR CHILDREN* 57-58, 105 (1975); T. LANGNER & S. MICHAEL, *supra* note 132, at 173-74; Duberman, *Step-Kin Relationships*, 35 J. MARRIAGE & FAM. 283, 288, 290 (1973).

135. Chapman, *supra* note 132, at 1157; Oshman & Manosevitz, *supra* note 132, at 480; Santrock, *supra* note 132, at 467. A recent study by Professor Santrock and his associates at the University of Texas supports this finding. Santrock, Warshak, Lindbergh & Meadows, *Children's & Parent's Observed Social Behavior in Stepfather Families*, 53 CHILD. DEV. 472, 472 (1982) [hereinafter cited as *Stepfather Families*]. Despite its small sample, it eliminated some of the methodological flaws of other studies. This study of the effects of the custodial parents' remarriage on children's social behavior compared three groups, each consisting of twelve children matched for age, sex, family size, and socioeconomic status. Those from the first group were from divorced homes in which the custodial mothers had remarried; those from the second group were from divorced homes in which there was no remarriage; and those from the third group were from intact homes. The children were observed while interacting with their parents.

that friction is likely to develop between a girl and her remarried mother and that girls whose custodial mothers remarry are, as a group, particularly at risk.¹³⁶ There is also some limited evidence that stepfathers have better relationships with their stepchildren than do stepmothers.¹³⁷

Most of this research is plagued with methodological problems, including the use of nonrandom, unrepresentative, or clinical samples; the combining of stepmother and stepfather families into one category; the reliance on surveys and questionnaires given to one family member only; the absence of any direct behavioral measures of stepparent-stepchild interactions or assessments of adjustment by others, such as teachers; and the failure to include nuclear family control groups. Despite these difficulties and the dearth of any longitudinal studies that follow ex-spouses into remarriage or specifically compare structurally different kinds of stepfamilies, including those that were formed after the death of a spouse as opposed to after a divorce, there is a consensus in the literature that the psychological damage done to a child by divorce is not necessarily replaced or ameliorated through remarriage of one of the parents.¹³⁸

136. Thies, *Beyond Divorce: The Impact of Remarriage on Children*, 6 J. CLIN. CHILD PSYCHOLOGY 59-60 (1977) (citing Kalter, *Children of Divorce in an Outpatient Psychiatric Population*, 47 AM. J. ORTHOPSYCHIATRY 40, 47 (1977)). Two researchers have predicted that single-parent custody arrangements function more smoothly when the child is of the same sex as the custodial parent. Santrock & Warshak, *Father Custody and Social Development in Boys and Girls*, J. SOC. ISSUES, Fall, 1979, at 112, 119. The addition of a stepfather may disrupt the relationship between mother and daughter. *Stepfather Families*, *supra* note 135, at 479. For a boy, the advantage of having a same sex parental model may outweigh the disadvantage of having to share his mother with a stepfather.

137. L. DUBERMAN, *supra* note 134, at 64; Duberman, *supra* note 134, at 290. In Wallerstein and Kelly's study, the presence of a stepfather did not have the expected result of reducing contact with the biological father. Geographic relocation caused by the remarriage did limit visiting, but the pattern of visiting seemed more affected by the remarriage of the noncustodial father. J. WALLERSTEIN & J. KELLY, *supra* note 5, at 292.

138. See, e.g., Jones, *Divorce and Remarriage: A New Beginning, A New Set of Problems*, 2 J. DIVORCE 217, 223-25 (1978); Thies, *supra* note 136, at 61; Walker, Rogers & Messinger, *Remarriage After Divorce: A Review*, 58 SOC. CASEWORK 276, 277, 283 (1977). Because the assimilation of divorce-related changes may take several years, see *supra* pp. 780-86, and the average duration between divorce and remarriage is three years, children are probably still engaged in problems associated with the divorce process when they are faced with the additional structural and relationship changes brought about by the remarried family.

Adults' unresolved personal and divorce conflicts in a remarriage may become focused on the child. Thies, *supra* note 136, at 60; Cf. Fast & Cain, *The Stepparent Role: Potential for Disturbances in Family Functioning*, 36 AM. J. ORTHOPSYCHIATRY 485, 487-88 (1966) (tendency of parent and stepparent to focus on child as source of all marital dissension and as threat to the marriage itself). One Canadian study based on questionnaire responses from 200 remarried couples and later follow-up interviews with 70 of the couples found that the "couples felt poorly prepared for the problems they faced in trying to integrate the new household formed when divorced persons with children from a previous marriage remarry." Messinger & Walker, *supra* note 5, at 430. Potential problems of children's adjustment to remarriage may be even more complex in a home with two sets of children. Jones, *supra*, at 224. Each child's feelings of territoriality and position in the age hierarchy may be disrupted. Those children moving in may consider themselves or be perceived as the interlopers, whereas those already there may consider themselves or be perceived as the invaded. Walker, Rogers & Messinger, *supra*, at 283.

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Because of the paucity of relevant research, any conclusions must be tentative. There seems to be no support, however, for the generalized judicial assumption that when one parent remarries, the new spouse will replace the lost parent, thereby creating a desirable, stable nuclear family. Quite to the contrary, stepparent relationships may cause new and additional difficulties for the children of divorced parents. It is therefore ironic that courts rely so heavily on remarriage as a ground for modifying custody decisions.

The remarriage issue is but one example of the potential abuse under amorphous changed circumstances or best interests standards. The flexibility which some see as the virtue of those standards in modification cases is thought desirable in order to permit courts to change custody in the event of a development such as the noncustodial parent's remarriage. Courts operating under such malleable substantive rules are able to use assumptions unsupported by empirical evidence to effect changes that, upon closer analysis, make no sense and would be impermissible under a more exacting standard.

3. Residential Changes

The extent of environmental change that parents and children experience after divorce is another factor related to children's adjustment. These changes include new economic and occupational circumstances facing the custodial parent, changes in the amount of physical and emotional availability each parent has for the child, as well as changes in the parents' relationship. Among these changes, often resulting from the economic restructuring of the family, is a change of residence.¹³⁹ In addition to a new physical environment, a change of residence may also place the child in a new school with altered academic expectations, disrupt existing social relationships, and force the child to establish different ones.

In our mobile society many individuals change their place of residence each year.¹⁴⁰ Social scientists have explored the impact of these moves.¹⁴¹

139. See, e.g., D. LUEPNITZ, *CHILD CUSTODY: A STUDY OF FAMILIES AFTER DIVORCE* 63 (1982) (in research sample, 81% of fathers with custody able to stay in house they had been living in during marriage; half of mothers with custody had to move); Fulton, *supra* note 122, at 132 (in research sample, 47% of mothers with custody had not moved since the time of the divorce, but the other 53% had moved an average of two times, and some had moved eight times).

140. Over thirty-seven million Americans, approximately 17% of the population, move each year. U.S. BUREAU OF THE CENSUS, *Geographic Mobility: March 1981 to March 1982*, in *CURRENT POPULATION REPORTS: POPULATION CHARACTERISTICS, SERIES P-20*, No. 384, at 1 (1984); see also E. KAHN, *THE AMERICAN PEOPLE* 75 (1974) (reporting similar figures).

141. See, e.g., Leff, Roatch & Bunney, *Environmental Factors Preceding the Onset of Severe Depressions*, 33 *PSYCHIATRY* 293, 298, 302 (1970); Olive, Kelsey, Visser & Daly, *Moving as Perceived by Executives and Their Families*, 18 *J. OCCUPATIONAL MEDICINE* 546 (1976).

Their studies have demonstrated that individuals vary greatly in their responses to geographical relocation, and that there is probably an optimum level of mobility for each person.¹⁴² Various authorities who are primarily interested in the effects on children have concluded that moving can be detrimental in terms of adjustment.¹⁴³ Others, however, have suggested that moving is not itself detrimental to children, but that certain circumstances make some children more vulnerable to the stressful effects of moving.¹⁴⁴

One of the circumstances that appears to influence the effect of a move on a child is whether the child is a member of a divorced or an intact family. When a change in residence is combined with a divorce, harm is more likely to result. To a child from an intact home, moving may be associated with improved family conditions, such as moving to a larger home or a parent's obtaining a better job. On the other hand, to a child from a divorced home, moving is likely to indicate decreased family stability, including lowered income and moving to a less desirable neighborhood.¹⁴⁵ Moreover, even if an intact family's move is related to such negative factors, the children may be more capable of withstanding such familial strains because of the support of a stable family.

The stress that post-divorce mobility places upon children has not been thoroughly documented or described in the divorce literature. Some researchers have concluded that environmental instability is one of the factors that affects the psychopathology of children in the post-divorce period.¹⁴⁶ Stolberg and Anker, for example, have provided direct evidence that children's divorce-related difficulties, including depression, social withdrawal, and aggression, may stem from their perception that they

142. See Van Dongen, *Relationships Between Attitudes Toward Family Change of Residence and Children's Postmove Adjustment*, 3 ISSUES MENTAL HEALTH NURSING 51, 53 (1981). Response to change may be in the direction of unfolding capacities, development, and increased capacity for independence or may be in the direction of slowing down, losing capacities, or regression. Solnit, *Change and the Sense of Time*, in CHILDREN AND THEIR PARENTS IN A CHANGING WORLD: VOLUME V. THE CHILD IN HIS FAMILY 21, 22 (1978) [hereinafter cited as THE CHILD IN HIS FAMILY].

143. See, e.g., Levine, *Residential Change and School Adjustment*, 2 COMMUNITY MENTAL HEALTH J. 61, 62 (1966).

144. See, e.g., Anthony, *Theories of Change and Children at High Risk for Change*, in THE CHILD IN HIS FAMILY, *supra* note 142, at 283, 286-88; Kantor, *Some Consequences of Residential and Social Mobility for the Adjustment of Children*, in MOBILITY AND MENTAL HEALTH 86, 111-13 (M. Kantor ed. 1965); Pedersen & Sullivan, *Relationships Among Geographical Mobility, Parental Attitudes and Emotional Disturbances in Children*, 34 AM. J. ORTHOPSYCHIATRY 575, 578-580 (1964) (parental attitudes to mobility mediate stressful effects of mobility); Tooley, *The Role of Geographic Mobility in Some Adjustment Problems of Children and Families*, 9 J. AM. ACAD. CHILD PSYCHIATRY 366, 368 (1970); Van Dongen, *supra* note 142, at 60.

145. See Stolberg & Anker, *Cognitive and Behavioral Changes in Children Resulting from Parental Divorce and Consequent Environmental Changes*, 7 J. DIVORCE 23, 32 (1983).

146. See Fulton, *supra* note 122, at 133.

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have minimal control over environmental changes such as a new residence.¹⁴⁷

If a child's post-divorce adjustment is related to environmental change, then custody modification decisions and rules should reflect sensitivity to the stresses related to these changes. Invariably, changing a child's custodian will involve a change of residence. By decreasing the number of moves for children, a stricter standard for custodial modification would increase the likelihood of adjustment to divorce.

4. *Post-divorce Sexual Relations of the Custodial Parent*

As evidenced by the Illinois Supreme Court's decision in *Jarrett v. Jarrett*,¹⁴⁸ a custody modification proceeding, while theoretically addressed to the child's interests, often focuses on the custodian's sexual conduct.¹⁴⁹ As in *Jarrett*, a transfer of custody in such a case may be justified merely on notions of public policy. Whether public policy alone suffices, or more tangible evidence of harm is required, courts almost always refer to the supposed modeling effect of parental behavior on children.¹⁵⁰ In fact, there is very little empirical data concerning the effect of the custodial parent's post-divorce sexual behavior upon the child's adjustment.

Moreover, the existing research on this subject suggests that although

147. Their subjects were two groups of children, aged six to sixteen; one group was from divorced homes and lived with a custodial mother, and the other was from intact families. There were no significant differences between the two groups in sex of child, current age of child, or predivorce annual per capita income. Various behavioral measures were given to the parents and children to assess environmental and other life changes. Stolberg and Anker concluded that children "whose home environments have changed substantially following parental divorce are likely to experience some significant psychological problems." Stolberg & Anker, *supra* note 145, at 38. See also Hodges, Wechsler & Ballantine, *supra* note 121, at 62 (the more moves in the preceding five years, the greater the amount of aggression in preschool children from divorced families; this relationship did not hold true for children from intact families). But see Kurdek & Berg, *supra* note 116, at 58. These researchers found that children's divorce adjustment was unrelated to the degree of environmental change. They concluded, nonetheless, that the middle class sample may not have had an impact on the children's adjustment or that major adjustments may have already occurred. *Id.*

148. 78 Ill. 2d 337, 400 N.E.2d 421 (1979), *cert. denied*, 449 U.S. 927 (1980).

149. See, e.g., *Dunne v. Dunne*, 211 Neb. 636, 643, 319 N.W.2d 741, 745 (1982) ("sexual misconduct" is a factor in determining custody); *Small v. Small*, 412 So. 2d 283, 285 (Ala. Civ. App. 1982) (custody order modified upon evidence that mother had man "sleeping in her home"); *Brandt v. Brandt*, 99 Ill. App. 3d 1089, 1107, 425 N.E.2d 1251, 1264 (1981) (observing that mother's "living arrangement . . . might . . . compound any problems of insecurity" in younger child); *In re Custody of Boyer*, 83 Ill. App. 3d 52, 403 N.E.2d 796 (1980) (refusing to modify consent decree in part because mother was no longer sharing home with a man); *Paschall v. Paschall*, 26 N.C. App. 491, 493, 216 S.E.2d 415, 416 (1975) (trial court did not abuse its discretion in transferring custody award from mother whose adulterous relationship was contrary to "best interest of the child").

In a survey of 57 circuit judges and 23 commissioners in Kentucky, 91% reported that they consider at least some types of sexual practices as evidence of deficient moral character. Eighty-three percent reported that they use the same standards for both mother and father. Lowery, *Child Custody Decisions in Divorce Proceedings: A Survey of Judges*, 12 PROF. PSYCHOLOGY 492, 495-96 (1981).

150. See, e.g., *In re Marriage of Padiak*, 101 Ill. App. 3d 306, 312, 427 N.E.2d 1372, 1376-77 (1981); *Jarrett v. Jarrett*, 78 Ill. 2d 337, 346-47, 400 N.E.2d 421, 424 (1978).

the relationship of children, parents, and their lovers creates certain difficulties during the post-divorce period, children generally achieve a more satisfactory adjustment if the custodial parent has a satisfying adult sexual relationship. Wallerstein and Kelly describe the custodial parent's difficulties in developing a heterosexual relationship: If the custodial parent went out too frequently, she risked the displeasure and jealousy of her children or the allegations of an angry spouse that she was a "bad mother" who was not interested in her children. On the other hand, bringing her friends of the opposite sex home only increased the mother's risks and feelings of guilt and anxiety.¹⁵¹

Establishing such a relationship, however, significantly facilitates the adult's adaptation to divorce. Hetherington, Cox and Cox state that "the most important factor in changing the self-concept two years after divorce was the establishment of a satisfying, intimate, heterosexual relationship."¹⁵² There is also evidence that the child's adjustment is linked to that of the custodial parent,¹⁵³ and that, in particular, children are better adjusted if the parent is dating or seriously considering marriage.¹⁵⁴

Even where courts receive "objective" evidence of "inappropriate" behavior by a custodial parent, it may be better for the child's development to continue the ongoing custodial relationship, unless the child's safety is at risk, in order for the child to work through any ambivalence toward that parent.¹⁵⁵ According to this view, the court should not, by changing custody, confirm in the child's eyes the moral condemnation of one parent by the other. In the long run, the "inadequate parenting" caused by such "inappropriate behavior" is less dangerous to the child than the loss of trust such condemnation engenders.¹⁵⁶

The changed circumstances and best interests standards are not in themselves inconsistent with an enlightened view of this issue. Those amorphous standards, however, provide little safeguard against decisions so prevalently based on other, personal views. Both the courts and the parents need clearer guidance.

5. *Attachment and Separation*

Over twenty-five years ago, John Bowlby began his work on the effect upon a child's development of the child's attachment to another person.

151. J. WALLERSTEIN & J. KELLY, *supra* note 5, at 34.

152. *The Aftermath of Divorce*, *supra* note 99, at 159.

153. *See supra* p. 787.

154. Pett, *supra* note 116, at 37.

155. NEW TRENDS, *supra* note 115, at 91.

156. *Id.* at 146-47.

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His work, *Attachment and Loss*, remains the major statement of attachment theory.¹⁵⁷ Attachment, according to Bowlby, consists of “any form of behavior that results in a person attaining or retaining proximity to some other differentiated and preferred individual, usually conceived as stronger and/or wiser. As such [it] includes following, clinging, crying, calling, greeting, smiling, and other more sophisticated forms [of behavior].”¹⁵⁸

When a person is anxious, fatigued, or sick, attachment behavior is most obvious and can be alleviated by comforting and caregiving. At other times, although the behavior is less evident, the mere knowledge that the attachment figure is available and responsive provides a strong and pervasive sense of security.¹⁵⁹ The principal attachment figure is that person who is most responsive to the child’s signals of biological needs and who initiates and maintains social interactions with the child.¹⁶⁰ An infant usually develops concern with maintaining proximity to an attachment figure around the age of six to twelve months.¹⁶¹ Although it does not disappear, by the end of the preschool years this concern does become “somewhat attenuated.”¹⁶²

Despite Bowlby’s argument that there is a bias for a child to attach himself especially to one figure, a characteristic he has called monotrophy, a growing body of evidence now suggests that there is great individual variation in the strength and distribution of attachments, that the main bond is not always with the mother, and that bonds are often multiple. For example, if both parents work, or grandparents care for a child a

157. J. BOWLBY, *ATTACHMENT AND LOSS: VOLUME I, ATTACHMENT* (1969); J. BOWLBY, *ATTACHMENT AND LOSS: VOLUME II, SEPARATION* (1973); J. BOWLBY, *ATTACHMENT AND LOSS: VOLUME III, LOSS* (1980).

158. Bowlby, *Attachment Theory, Separation Anxiety, and Mourning*, in 6 *AMERICAN HANDBOOK OF PSYCHIATRY: NEW PSYCHIATRIC FRONTIERS* 292, 292, (D. Hamburg & H. Brodic, 2d ed. 1975).

159. Bowlby, *Attachment and Loss: Retrospect and Prospect*, 52 *AM. J. ORTHOPSYCHIATRY* 664, 668-69 (1982).

160. Goldstein, Freud, and Solnit’s concept of the psychological parent is also essentially concerned with attachment:

This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation. Only a parent who provides for these needs will build a psychological relationship to the child on the basis of the biological one and will become his “psychological parent” in whose care the child can feel valued and “wanted.”

J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 2, at 17.

161. M. RUTTER, *MATERNAL DEPRIVATION REASSESSED* 139 (1981). By this stage of development, the child has attained sufficient mental resources to maintain a positive mental representation of the nurturing parent as a living object that both provides love and becomes the object of the child’s love and expectations. Solnit, *supra* note 142, at 21, 31.

162. Ainsworth, *Attachment: Retrospect and Prospect*, in *THE PLACE OF ATTACHMENT IN HUMAN BEHAVIOR* 3, 11 (C. Parkes & J. Stevenson-Hinde eds. 1982).

good deal of the time, there may be an intricate pattern of multiple attachment relationships.¹⁶³ Nevertheless, there is some evidence that there is a hierarchy of attachment figures, with some stronger than others.¹⁶⁴

Both an initial failure to develop such attachment bonds and separation from established attachment figures have been empirically linked to acute distress, conduct disorders, developmental and intellectual retardation, and the inability to form meaningful social relationships.¹⁶⁵ The factual patterns which have been the subject of such attachment studies, however, are not particularly relevant to the issue at hand. The custody modification situation is unlike, for example, hospitalization or foster care, where the child is separated for a period of time from attachment figures, and these situations involve different environmental stresses for a child. Nor is it relevant here to evaluate the strength or quality of attachment to each parent in order to make an initial custody decision.¹⁶⁶ Instead, changes in custody create a pattern of separation that can be described as follows: The child has already been separated from the noncustodial parent, although some relationship may have been maintained. Attachment to the custodial parent, particularly for a young child, is likely to have increased during the post-divorce period. Then, if a change in custody is granted, the child is required to readjust to yet another separation experience.

Several factors are noteworthy. First, bond disruption is not a necessary consequence of separation from the custodial parent. In most situations, the original custodial parent will remain in contact with the child. More importantly, the child will have been familiar with the new custodian prior to the separation. The presence of a familiar adult may help the child maintain bonds. The more closely that parent follows the child's known daily routines, maintains similar patterns of discipline and child rearing, and encourages the child to develop his attachment to the new custodian, the less likely it is that deleterious effects will follow.¹⁶⁷ Second,

163. See Lamb, *Effects of Stress and Cohort on Mother-and Father-Infant Interaction*, 12 DEV. PSYCHOLOGY 435, 441-42 (1976); Lamb, *Twelve-Month-Olds and Their Parents: Interaction in a Laboratory Playroom*, 12 DEV. PSYCHOLOGY 237, 242-43 (1976); Radin, *The Role of the Lawyer for the Preschool Child in Custody Litigation*, 9 J. PSYCHIATRY & L. 431, 443 (1981).

164. M. RUTTER, *supra* note 161, at 141-42; Ainsworth, *Infant-Mother Attachment*, 34 AM. PSYCHOLOGIST 932, 935-36 (1979).

165. See generally M. RUTTER, *supra* note 161, at 102-08 (discussing deleterious effects of failure to form bonds and of disruption of bonds).

166. In some cases, the initial custody decision will be made only after a period of time in which the child has lived exclusively with one parent. In this situation, concerns about instability, changes of residence, and separation from established attachment figures that are incidents of custody modification also attend the initial custody determinations. Subsequent decisions should not be based solely on the length of time the child has spent with one parent or the other during the predivorce separation period. Other factors, aside from where the Fates may have adventitiously placed the child, should be considered.

167. Films made by two researchers, Robertson and Robertson, illustrate the acute distress that often occurs when children are separated from their parents and placed in a strange and potentially

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there is support for the proposition that other circumstances, such as the lack of environmental stimulation, and not the bond disruption itself, influence certain effects of bond disruption, such as the impairment of cognitive skills.¹⁶⁸ Thus, the type of care the child receives from the new custodial parent may be crucial.

Despite the possibility that the effects of separation from the custodial parent can be minimized or even eliminated, the risks involved for very young children are too great to ignore. Although a great deal is still unknown or imperfectly known about the attachment mechanism, there is an accumulation of evidence about the need to develop an attachment bond in infancy. Whether that bond is to the mother or the father is irrelevant.¹⁶⁹ For children under three years of age, stability during the post-divorce period in order to develop and maintain this bond without further disruption is quite important.¹⁷⁰

Case law under the traditional modification standard pays lip service to the importance of attachment. In order to give appropriate weight to this factor, however, as well as to the other factors noted above, it is necessary to abrogate standardless standards in favor of rules that provide clearer limits on decisionmaking.

C. Areas for Future Research

The available social science data supports the adoption of the stricter modification standard. There is, however, a need for further empirical research. The call for an interdisciplinary approach to custody adjudication has long been heard, but in order for the courts and legislatures to respond to the pertinent findings of other disciplines, those other disciplines must examine the factors that are relevant to the legal issue of custody

stressful situation. Robertson & Robertson, *Young Children in Brief Separation: A Fresh Look*, 26 *THE PSYCHOANALYTIC STUDY OF THE CHILD* 264, 312-13 (1972). The Robertsons also made films of children who were separated from their parents but who remained with the Robertsons in a small family setting. They found that distress was greatly alleviated for those children over two years old. The children received good maternal care, the Robertsons were somewhat familiar to the children, they knew a great deal about the children and their patterns of family life, and they took special care to talk about the separation. *Id.* at 295-97, 310-11.

168. See, e.g., M. RUTTER, *supra* note 161, at 84-87; Tizard & Tizard, *The Social Development of Two-Year Old Children in Residential Nurseries*, in *THE ORIGINS OF HUMAN SOCIAL RELATIONS* 147, 158 (H. Schaffer ed. 1971). It is important to note that these findings relate only to effects on intellectual functioning, conduct disorders, and social development and not to emotional or behavioral consequences of deprivation. See M. RUTTER, *supra* note 161, at 87-88. See also Davis, *Use and Abuse of the Power to Sever Family Bonds*, 12 *N.Y.U. REV. L. & SOC. CHANGE* 563-64 (1983-84) (challenging correlation between "separation *per se* and psychological harm").

169. M. RUTTER, *supra* note 161, at 121, 127.

170. One authority has suggested that a child old enough to have become attached to a primary custodian (seven or eight months), but not old enough (under three years) to sustain an attachment over a period of absence, is substantially stressed by separations. See A. CLARKE-STEWART, *CHILD CARE IN THE FAMILY* 29-32 (1977).

modification. Thus, for example, the assumption that post-divorce custody litigation results in more interparental conflict should be examined to determine whether such litigation might be cathartic, rather than fuel the fires of hostility. Even if litigation does increase marital hostilities, the possibility that parents can separate these feelings from their relationships with their children should be assessed.

Legal decisionmakers also need more specific information about how legal rules and procedures affect relationships. The effects of modification standards should be examined both in jurisdictions that have relatively strict standards and in those that have more relaxed standards. Do stricter standards actually result in less litigation and less stress, or does the inability to bring modification proceedings increase hostility? In those jurisdictions that use the UMDA standard, what effect, if any, has the two-year "waiting period" had on post-divorce adjustment? Does litigation or stress increase after the "waiting period" has run? Does the "waiting period" in fact screen out frivolous custody applications, or do courts in practice largely ignore the procedural barrier? Does the UMDA approach promote the healthy functioning of the children of divorced families so that, based on some broad measure of adjustment, one could argue that the children of divorce in a UMDA jurisdiction are somehow "better off"?

In addition, more information is needed about choosing between alternative arrangements for children. Although there is persuasive evidence about the effects of parental conflict on children, there has been no effort to compare, for example, whether a child would be better off living with two antagonistic parents or with one parent who is overburdened and may have some difficulties in meeting parental responsibilities, but who provides consistency.

In view of the likelihood that divorced parents will remarry, a number of additional factors also need further analysis. The research in this area has concentrated solely on the remarriage of the custodial parent. The effect of the remarriage of the noncustodian, particularly when a custodial change is also involved, should be examined. In addition, the timing of the remarriage, the sex of the stepparent and of the child, and the time between divorce and remarriage, may well be salient variables.

There is also a need for further research about the effects of a change in residence on a child. Research related to environmental stress that does not treat moving as an independent variable is not sufficient. For example, the effect on a child's development of a shift to new physical surroundings with a new custodian, and the question of whether those effects vary depending on a child's age, are still unexamined.

This research agenda is not only lengthy, it is extraordinarily complex.

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In particular, the task of determining cause and effect relationships with regard to the increase or decrease of litigation would require empirical methodologies that are as yet but gleams in the academician's eye. Nevertheless, the task is an important one, and it deserves attention.

The available empirical data provide compelling policy reasons for adopting a new stricter standard for custody modification. Either legislative change or judicial reinterpretation of what truly is in the best interests of the children of divorce could implement this stricter standard. Moreover, aside from the strong policy reasons for adopting such a standard, constitutional principles may require it.

IV. CONSTITUTIONAL CONSIDERATIONS

The federal Constitution neither requires the state legislatures to make wise legislative decisions nor invalidates legislative decisions simply because they may constitute bad public policy. Are there nonetheless constitutional principles that compel the fifty states to adopt some particular standard or rule for custody modification decisions? This question raises two issues. First, is a post-divorce familial unit entitled to constitutional protection? Second, if it is, how should the rights of the custodial and noncustodial parents be balanced against each other and against the interests of the state?

It may be useful to begin the inquiry with a hypothetical somewhat removed from the issue posed above. Assume that a governmental entity decided in its wisdom that David Jones, the son of Mr. and Mrs. Jones, is underachieving because his parents do not appreciate his abilities and are not giving him sufficient opportunities to develop his talents. Accordingly, in order to help David, the government determines that he should be removed from the Jones' house and placed with the Greens, who have expressed interest in assisting David to achieve.

It is safe to say that no court would countenance such action. Even disputatious law professors would unanimously take the view that such action was beyond the constitutional pale. And that is so even though the family is not mentioned in the Constitution, and the constitutional source for such protection is not self-evident. The Supreme Court recognized long ago, based on what at the time was an orthodox substantive due process analysis, that the parent-child relationship is entitled, at least in some contexts, to constitutional protection from state intrusion.¹⁷¹

The protection to which the parent-child relationship is entitled in a custodial modification proceeding is a novel issue, more complicated than

171. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right to choose education of one's children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (same).

others that the courts have addressed. Two parent-child relationships confront one another and vie for recognition. The state, rather than asserting its power to intervene *ab initio*, is asked "merely" to choose the "proper" parent. Nonetheless, when a child is removed from its post-divorce custodial parent as a result of a modification proceeding, it is the state which effects that removal, pursuant to state laws, rules, and standards. Therefore it is appropriate to inquire whether the Constitution sets any limits to the exercise of that power.

A. Sources of a Constitutional Right to Family Privacy

The possible sources of support for a constitutional right to family privacy or integrity were perhaps most closely analyzed in *Griswold v. Connecticut*.¹⁷² At issue in *Griswold* was a law that made the use of contraceptives a criminal offense. The Supreme Court struck down the statute, but few of the Justices agreed upon the constitutional basis for that result.¹⁷³

172. 381 U.S. 479 (1965).

173. Justice Douglas, in a plurality opinion concurred in by three other Justices, concluded from numerous constitutional provisions that there existed "penumbral [constitutional] rights of privacy and repose," *id.* at 485, which protected the intimacies of married life from government intrusion. Because the anti-contraceptive law at issue in *Griswold* invaded that protected zone of privacy, it was, in Justice Douglas' view, unconstitutional, seemingly no matter what government interest it sought to serve. In a concurring opinion, Justice Goldberg, joined by two other Justices, wrote separately in order to emphasize the importance of the Ninth Amendment. Acknowledging that the Ninth Amendment had received little attention from the Court or from the legal profession in general, Justice Goldberg wrote:

To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people . . ."

Id. at 491-92 (Goldberg, J., concurring) (emphasis added). Justice Goldberg then proceeded to discuss which rights were so fundamental as to be protected under the Ninth Amendment: "[J]udges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.'" *Id.* at 493 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). By this somewhat different road, Justice Goldberg reached the same conclusion as Justice Douglas—that "the right of privacy is a fundamental personal right." 381 U.S. at 494.

Justice Harlan concurred in the *Griswold* judgement, but not in the reasoning of either Justice Douglas' or Justice Goldberg's opinions. In his view, "the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty'". *Id.* at 500 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Justice Harlan cryptically found that it did. 381 U.S. at 500.

Justice White also concurred with the judgment, but on other reasoning. He found that the statute "deprive[s] married couples] of 'liberty' without due process of law, as that concept is used in the Fourteenth Amendment." *Id.* at 502. Rather than framing the issue in absolutist terms, however, Justice White balanced interests. Citing a series of earlier cases involving family rights, he wrote:

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Debate concerning the source of constitutional limits to the states' powers to act in family matters has advanced little in the twenty years since *Griswold*. The Court has not provided any new analysis of the issue. All that has happened is that the several analyses presented by the individual Justices in *Griswold* have gone in and out of fashion. Justice Douglas' penumbral analysis has receded into the shadows from whence it came. Justice Goldberg's forgotten Ninth Amendment has once again been forgotten. The view advanced by Justices Black and Stewart in their dissents—that the courts engage in a dangerous enterprise when they rely for constitutional interpretation upon subjective “due process” or “natural justice” analysis—has gained considerable attention, if not currency. Yet Black and Stewart's view remains a minority opinion. Despite cogent criticism of substantive due process,¹⁷⁴ that approach remains alive and well in the field of what might be called “family rights.”

*Meyer v. Nebraska*¹⁷⁵ is then quite pertinent to the issue at hand. *Meyer*, decided by the Court in 1923, was one of the first substantive due process family law cases, yet it reads very much as if it were decided last Term. *Meyer* involved a statute that forbade the teaching of any modern language other than English in the first eight grades. In the course of striking down the statute on substantive due process grounds, Justice McReynolds, writing for the Court, contrasted American values with those of Plato's *Republic*. Plato's scheme contemplated that children would live with and be brought up by official guardians. Justice McReynolds indicated that such a plan would, if enacted by some radical state legislature, quickly be struck down by the courts:

Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.¹⁷⁶

“These decisions affirm that there is a ‘realm of family life which the state cannot enter’ without substantial justification.” *Id.* at 502 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). Justice White found that the State's interest in the anti-contraception statute was insufficient to justify the intrusion.

Justices Black and Stewart dissented because they could find nothing in the Constitution which guaranteed family privacy. They criticized the other justices for employing what they characterized as a standardless substantive due process approach to constitutional adjudication. 381 U.S. at 507–531 (Black, J., and Stewart, J., dissenting in separate opinions).

174. *E.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

175. 262 U.S. 390 (1923).

176. *Id.* at 402.

In other words, it is inconceivable in America for the government to pluck David Jones from his home simply on the ground that he would be better off in another. To be sure, if parents, for example, were seriously abusing a child, the state might, consistent with the Constitution, intervene and remove him from his home.¹⁷⁷ But this intervention cannot be justified without a finding of abuse. As the Supreme Court recently said:

We have little doubt that the Due Process Clause would be offended “[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.”¹⁷⁸

The Constitution surely reserves to the people the right to decide for themselves how to try to maximize the development of their own children—whether by having a home life that emphasizes human affection, or academic skills, or religion, or cultural affinity, or materialism, or other values. While the Constitution allows state intervention to prevent parents from falling below a minimum level of tolerable behavior toward their children, it prohibits the states from intervening in other cases. Not only is the government incompetent to decide such things—who is to say how lives are to be lived and what values are best?—the government simply has no business making such choices.

177. See, e.g., Wald, *State Intervention on Behalf of “Neglected” Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 642 (1976); Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L. J. 213, 240-45 (1979).

178. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (quoting Justice Stewart’s concurrence in *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977), which first expressed this view). The Court so wrote, in passing and without explanation, in the course of holding that an unwed father’s rights were not violated when the adoption of his child was permitted by application of a best interest standard, as opposed to a finding of his unfitness. See *infra* p. 811.

The quoted passage would seem to make invalid certain state neglect laws which have long been the subject of criticism. In *Santosky v. Kramer*, 455 U.S. 745 (1982), holding that due process required proof by clear and convincing evidence of neglect before parental rights could be terminated, the Court stated: “Nor is it clear that the State constitutionally could terminate a parent’s rights without showing parental unfitness.” *Id.* at 760 n.10 (emphasis in original). See *Developments in the Law—the Constitution and the Family*, 93 HARV. L. REV. 1156, 1315-22 (1980); INSTITUTE OF JUDICIAL ADMINISTRATION & AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT, *supra* note 95; Areen, *Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 930-32 (1975); Wald, *supra* note 177; Note, *supra* note 177. Several lower federal courts and state courts have recognized limitations on the scope of state intervention. See, e.g., *Alsager v. District Court*, 406 F. Supp. 10, 26 (S.D. Iowa 1975) (constitutional limitations on procedures of termination proceedings), *aff’d*, 545 F.2d 1137 (8th Cir. 1976); *Roe v. Connecticut*, 417 F. Supp. 769, 779 (M.D. Ala. 1976) (constitutional right to “family integrity” requires state to demonstrate compelling interest before abrogation); *State v. Robert H.*, 118 N.H. 713, 716, 393 A.2d 1387, 1389 (1978) (due process limits state regulation of families); *State v. McMaster*, 259 Or. 291, 298-301, 486 P.2d 567, 570-71 (1971) (discussing constitutional doctrines of vagueness and due process in context of termination proceedings).

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B. *The Custody Modification Context*

If the state may not take a child from her home in order simply to “improve” her upbringing, are there not similar constitutional brakes upon the state’s power to take a child from a custodial parent on the sole ground that the removal is in the “best interests of the child”?

The two situations are, of course, different in several respects. One difference is that a biological parent is initiating the removal process, not the state or a third party. A second difference is that, if removed, the child would live with a biological parent, not with a non-relative. Finally, the home from which the child would be removed is already in a sense a “broken” home, because the child has once before been the subject of a custody decision.

Do these distinctions make a difference? To attempt to answer this question requires an examination of the nature of the family unit after divorce.

1. *The Post-Divorce Family Unit*

In one sense, the issue presented is: What is a family for purposes of the recognition of constitutional rights? We know what a family is prior to divorce, even though it may not be a particularly well-functioning one. In the ongoing nuclear family, custody refers to the existing relationship between parents and their child. The term encompasses a complex bundle of rights and obligations: Parents have a right to supervise, care for, and educate their child, the child has a right to receive support and maintenance from his parents, and both have rights to inherit from one another and to recover for injury tortiously inflicted on the other.¹⁷⁹ After divorce, the family unit is dissolved, and these rights and obligations are divided.

To some extent, the parties themselves can define the post-divorce family. At the time of divorce, the parents can consensually allocate custody and decide other issues themselves.¹⁸⁰ If the parents cannot agree, however, the courts are compelled to decide the issue. It is then the courts’ responsibility to determine which parent would be “best” for the child and to allocate custody, companionship, and authority rights accordingly.

179. See H. Clark, *supra* note 7, at 573.

180. Note, *supra* note 177, at 230. Most state statutes provide that each parent has equal rights to the custody of the child. See, e.g., N.Y. DOM. REL. LAW § 240 (McKinney Supp. 1983) (“In all cases there shall be no prima facie right to the custody of the child in either parent”); ALASKA STAT. § 25.20.060(b) (1983); CAL. CIV. CODE § 4600(b)(1) (West 1983); FLA. STAT. ANN. § 61.13(2)(b) (West 1983); HAWAII REV. STAT. § 571-46 (Supp. 1980); NEV. REV. STAT. § 125.480(2) (1973). Moreover, thirty states have some form of joint or shared custody statute. *FLR’s 1983 Survey of American Family Law*, 10 FAM. L. REP. (BNA) 3017, 3024-25 (Jan. 17, 1984). See, e.g., CONN. GEN. STAT. ANN. § 46b-56 (West Supp. 1984); KY. REV. STAT. ANN. § 403.270(3) (Baldwin 1984); N.M. STAT. ANN. 40-4-9.1 (1978); WIS. STAT. ANN. § 767.24(1)(b) (West 1984).

This function of the courts is not objectionable because it is a function that has been forced upon the courts by both parents.

Typically, the initial custodial decree, by separating and dividing the elements of the custodial relationship, awards sole custody to one parent and the right to visit the child on some periodic basis to the other.¹⁸¹ Unless some other arrangement is made, usually one that has been agreed to by the parents, the parent with "legal custody" has the right to make decisions about the child's education, religious training, residence, and medical treatment. Generally, this parent also has "physical" or "actual" custody which entitles her to control the child's daily activities such as sleeping, eating, and recreation.¹⁸² The rights and obligations of the non-custodial parent are a good deal more limited. Typically, that parent loses all power with respect to major decisions. The non-custodial parent's influence over day-to-day childrearing activities is limited to the period of visitation, and visitation itself is frequently confined to a brief time. Thus, the award of legal custody is highly significant.

Splitting the original intact nuclear family in this way forms a new familial unit consisting of the custodial parent and child.¹⁸³ This unit, consistently referred to by sociologists and statisticians as a single-parent family, should be recognized as a family relationship entitled to constitutional protection. In *Moore v. City of East Cleveland*,¹⁸⁴ the Supreme Court made clear that it is not only the nuclear family that is entitled to constitutional protection.

181. The state statute may specifically delineate the rights of the custodial and noncustodial parents. See KY. REV. STAT. ANN. § 403.330 (Baldwin 1984) ("Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, health care, and religious training . . ."). The judicial decree on visitation may be the result of parental agreement or a litigated contest. The court has discretion in determining the scope and amount of visitation; the award may be for "reasonable" visitation or it may specify the exact dates and time. C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 431 (2d ed. 1976). Some state statutes explicitly refer to visitation rights. E.g., KY. REV. STAT. ANN. § 403.320 (Baldwin 1984) ("A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health.").

182. See *In re J.P.*, 648 P.2d 1364, 1366 n.1 (Utah 1982) (delineating rights embodied in relationship of legal custody). Under a joint, as opposed to a sole, custody award, legal custody and/or physical custody may be divided in various ways. See Comment, *Joint Custody: An Alternative for Divorced Parents*, 26 UCLA L. REV. 1084, 1087 (1979). For discussions of various joint custodial arrangements, see P. WOOLLEY, THE CUSTODY HANDBOOK 102-12 (1979); Abarbanel, *supra* note 5, at 322; Benedek & Benedek, *Joint Custody: Solution or Illusion?*, 136 AM. J. PSYCHIATRY 1540, 1540-41 (1979); Ilfeld, Ilfeld & Alexander, *Does Joint Custody Work? A First Look at Outcome Data of Relitigation*, 139 AM. J. PSYCHIATRY 62, 62 (1982) (defining joint custody) [hereinafter cited as Ilfeld]; Kelly, *Further Observations on Joint Custody*, 16 U.C.D. L. REV. 762, 765-66 (1983); Robinson, *Joint Custody: An Idea Whose Time Has Come*, 21 J. FAM. L. 641, 651 n.26 (1983); Scott & Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 455 n.1 (1984).

183. See *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 206, 365 A.2d 27, 29-30 (Ch. Div.) (children after divorce belong to a different family unit than they did before divorce), *aff'd per curiam*, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976).

184. 431 U.S. 494 (1977).

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At issue in *Moore* was a city ordinance that limited the occupancy of a dwelling unit to members of a single family. Mrs. Moore, a grandmother who lived with her grandchildren, was convicted of violating the ordinance, because the ordinance defined “family” in a way that excluded a grandmother living with her grandchildren if those children were cousins rather than siblings. The Supreme Court reversed her conviction, holding the ordinance unconstitutional. The plurality found, in rather conclusory fashion, that the city’s claimed justifications for the ordinance—preventing overcrowding, minimizing traffic problems, and avoiding financial burdens on the school system—were only marginally served by the ordinance and therefore did not outweigh the interests of family life upon which the ordinance impinged.¹⁸⁵

Having quickly reached that result, the plurality opinion embarked upon an extraordinary defense of its mode of constitutional analysis. It expressly acknowledged that criticism had been leveled at its substantive due process type of analysis:

Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint.¹⁸⁶

Nonetheless, the opinion continued, the substantive due process analysis is the proper approach:

Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful “respect for the teachings of history [and] solid recognition of the basic values that underlie our society.”¹⁸⁷

Which such basic values were implicated in the case of the ordinance at

185. *Id.* at 499–500. The plurality opinion, written by Justice Powell and concurred in by Justices Brennan, Marshall, and Blackmun, cited substantive due process cases including *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925), for the proposition that a “private realm of family life [exists] which the state cannot enter.” 431 U.S. at 499 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). Justice Powell added that “the family is not beyond regulation. But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.” *Id.* (citation omitted)

186. *Id.* at 502. (footnote omitted).

187. *Id.* at 503 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)) (footnote omitted).

issue in *Moore*? Citing to the *Lochner* era line of family law cases, the plurality opinion stated: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."¹⁸⁸ Then, citing nothing more than census data,¹⁸⁹ a sociological study,¹⁹⁰ and a newspaper article,¹⁹¹ the plurality found that the "tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition [as the traditional nuclear family living arrangement]."¹⁹²

A dissenting opinion questioned what the ordinance at issue had to do with the basic values that underlie our society.¹⁹³ Justice Stewart pointed out that the ordinance did not prevent parents from living either together or with their children. Nor did it impede choices about procreation or dictate how children may be raised. The Court was being asked instead to rule that the "extended family" was so important in American society that the states could not interfere with it.¹⁹⁴ This was too much for the dissenters, including Justice White:

The suggested view would broaden enormously the horizons of the [Due Process] Clause; and, if the interest involved here is any measure of what the States would be forbidden to regulate, the courts would be substantively weighing and very likely invalidating a wide range of measures that Congress and state legislatures think appropriate to respond to a changing economic and social order.¹⁹⁵

Justice White acknowledged that a grandmother's interest in living with her grandchildren qualified as a liberty interest protected by the Due Process Clause.¹⁹⁶ In his balance, however, the demands of the clause were

188. *Id.*

189. *Id.* at 504-05 n.14. The census data showed that many Americans now live in family patterns other than that of the traditional nuclear family.

190. B. YORBURG, *THE CHANGING FAMILY* (1973).

191. Bronfenbrenner, *The Calamitous Decline of the American Family*, Wash. Post, Jan. 2, 1977, at C1.

192. 431 U.S. at 504. Justice Stevens, concurring in the judgment, concluded that under the limited standard of review of zoning decisions, the ordinance had not been shown to have any "substantial relation to the public health, safety, morals, or general welfare" of the city of East Cleveland and thus constituted a taking of property without due process and without just compensation. In his view the city had failed to explain the need for a rule that limited *which* of a homeowner's grandchildren might live with her. *Id.* at 520-21.

193. *Id.* at 535-37 (Stewart, J., dissenting).

194. *Id.* at 536-37.

195. *Id.* at 549-50 (White, J., dissenting).

196. *Id.* at 550. According to Justice Stewart, Mrs. Moore's interest could not be equated with the protected aspects of private family life:

The interest that the appellant may have in permanently sharing a single kitchen and a suite

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met by a showing that the ordinance served a valid state interest. Accordingly, the ordinance was, in his view, perfectly constitutional.¹⁹⁷

Although Justice White balanced the liberty interest against the State's interest differently than did the Justices in the plurality, his approach to the question hardly differed from theirs. In *Griswold* and in *Moore*, as in all the other cases the Court has decided involving family rights, a majority of the Justices seems committed to a mode of substantive due process analysis. *Moore* is perhaps the most useful case for our analysis because it clearly extended such protection beyond the traditional intact nuclear family to a related familial group.

The Court treated "family-like" relationships quite differently in two other cases, *United States Department of Agriculture v. Moreno*¹⁹⁸ and *Village of Belle Terre v. Boraas*,¹⁹⁹ suggesting possible boundaries for the constitutional rights protected in *Moore*. In *Moreno*, the Court invalidated a statute denying foodstamps to households consisting of unrelated persons, holding that the use of this classification was not rationally related to preventing fraud, the purported purpose of the statute.²⁰⁰ Using minimal scrutiny equal protection analysis, the Court in *Belle Terre* upheld a zoning ordinance that prohibited more than two unrelated people from living with one another.²⁰¹ The Court stressed, however, that the statute did not prevent an unmarried couple from cohabiting, suggesting that such couples were entitled to protection as a family.²⁰²

One might infer from reading *Moreno* and *Belle Terre* together that the Court will grant some measure of protection to an extended family of related individuals, but with respect to unrelated individuals only cohabiting couples are protected. The post-divorce family of the custodial parent and child certainly comes closer to the traditional nuclear family than either the extended family in *Moore* or the unrelated cohabiting couple which the *Belle Terre* Court suggested may deserve protection. Moreover, the post-divorce family appears to possess the other characteristics that the Court, in *Smith v. Organization of Foster Families for Equality & Reform (OFFER)*,²⁰³ has suggested identify family relationships worthy of constitutional protection.

of contiguous rooms with some of her relatives simply does not rise to that level. To equate this interest with the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition.

Id. at 537 (Stewart, J., dissenting).

197. *Id.* at 550-51.

198. 413 U.S. 528 (1973).

199. 416 U.S. 1 (1974).

200. 413 U.S. at 537-38.

201. 416 U.S. at 7-9.

202. *Id.* at 8.

203. 431 U.S. 816 (1977).

In *Smith v. OFFER*, the Court examined the possible due process liberty interest of another type of "family"—a foster family. Although the Court ultimately avoided determining when government activities affecting foster families implicate constitutionally protected interests,²⁰⁴ the majority opinion provides some clues as to those attributes of a family relationship that would qualify it for constitutional protection. The Court noted that the usual understanding of the term "family" implied the existence of a biological relationship.²⁰⁵ Family ties, however, are not exclusively biological: "[T]he importance of the familial relationship, to the individuals involved and to the society, [also] stems from the emotional attachments that derive from the intimacy of daily association"²⁰⁶ The Court noted that a foster parent and child might develop such emotional ties, but the Court added that this relationship, unlike the one between a natural parent and child, originated in a state-made contract that, by its terms, could be dismantled by the state.²⁰⁷ In the post-divorce family, although the custodial parent acquires status by the assignment of legal custody by the state, the custodial parent's rights derive from the traditional rights belonging to the natural family. The award of legal custody merely confirms rights which the custodial parent has always had; the noncustodial parent loses rights and begins a new legal relationship with the child.

Justice Stewart, rejecting the idea that foster parents might have some protectable liberty interest, pointed out another distinction in his concurrence: Unlike "family life" in a permanent home, the care provided by a foster family was designed to be temporary.²⁰⁸ Although a foster family could provide emotional support and involvement, the relationship between foster parent and child could never compare to the stability of the permanent commitment between a biological parent and child.²⁰⁹

This concept of permanence may also help to explain the holdings in *Moore* and *Belle Terre*. The group of unrelated students in *Belle Terre* who sought to live together may have provided emotional support for one another, but their relationship was transient. In *Moore*, in contrast, the grandmother's relationship with her grandchildren was not only an emotional one, it was also a permanent one.²¹⁰

204. *Id.* at 847. The Court assumed that the foster family was constitutionally protected and decided the case on the narrower ground that New York's procedure for removal of foster children from foster homes safeguarded this protected interest. *Id.* at 849-56.

205. *Id.* at 843. Biology was also recognized as an important factor in *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), and *Caban v. Mohammed*, 441 U.S. 380, 388-89 (1979).

206. 431 U.S. at 844.

207. *Id.* at 845-46.

208. *Id.* at 856 (Stewart, J., concurring).

209. *Id.* at 861-63.

210. Justice Powell, in the plurality opinion in *Moore*, noted that the ordinance in *Belle Terre*

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The “private realm of family life” deserves most protection, these cases suggest, where the factors of blood relationship, emotional support, and stability coalesce. These factors are, of course, present in the traditional nuclear family of a formally married couple and their children.²¹¹ But the post-divorce family also exhibits these same factors and otherwise resembles a traditional family except in one obvious respect. The post-divorce family functions like the traditional nuclear family in a number of ways. The custodial parent makes important decisions regarding the child and has responsibility for a myriad of day-to-day caretaking tasks. The state interests that support the respect traditionally accorded to parental freedom in childrearing—to provide warm supportive bonds, to promote diversity, and to ensure that a child receives individualized care—are met after divorce by the post-divorce family.²¹² The Supreme Court has emphasized that “the rights of the parents are a counterpart of the responsibilities they have assumed.”²¹³ Thus, rights of the custodial parent flow from the duties and obligations that parent must fulfill with respect to the child. Moreover, as the Court in *Moore* recognized, for a large segment of society an extended family that includes only grandchildren and grandparents might meet these requirements. If a “family” missing both parents is entitled to protection, a family missing only one parent should also receive protection.

The issue of the extent of protection for a family’s right of self-determination is usually presented and analyzed in the context of a state’s acting to sever permanently the parental rights to a child.²¹⁴ A modification proceeding, of course, does not terminate the custodial parent’s rights. The loss of legal custody and the removal of the child from the post-

permitted cohabitation by all who were related by “blood, adoption, or marriage.” 431 U.S. at 498 (Powell, J., joined by Brennan, Marshall, and Blackmun, JJ.) (quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974)).

211. The Supreme Court has consistently identified marriage as a family relationship entitled to protection, in part because of the perceived permanence of the relationship. In the real world, of course, marriage is somewhat less than a permanent condition.

212. Others have pointed out that the benefits theoretically provided by the nuclear family can be provided by other “families,” see J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *supra* note 2, at 11–13 (discussing children’s needs), and that other “families” may therefore merit constitutional protection, see Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 36–37 (1980) (conditions present in privacy context “apply outside the context of biological parenthood or the family”); see also Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 475–77, 559 (1983) (importance of family in enforcing basic values).

213. *Lehr v. Robertson*, 103 S. Ct. 2985, 2991 (1983). See also *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (“The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).

214. *E.g.*, *Santosky v. Kramer*, 455 U.S. 745, 753–57 (1982) (determining process due natural parents in parental rights termination proceeding).

divorce family do, however, seriously affect the rights of the custodial parent to control the child's upbringing and limit the new post-divorce family's interest in autonomy. To determine the constitutional standard under which this action should be permitted, the rights of the noncustodial parent must be examined.

2. *The Rights of the Noncustodial Parent*

Although the Supreme Court has not addressed the issue of competing parental interests at the time of a custody modification application, several cases suggest that in a situation involving a conflict between them, each parent's interest should be separately assessed and weighed under a substantive due process approach. Despite the loss of legal custody, a right which was shared with his spouse prior to divorce, the noncustodial parent retains some rights pertaining to his child. Surely the noncustodial parent's interest in his relationship with his child does not disappear merely because they no longer live with each other.²¹⁵ He may, for example, be constitutionally entitled, absent a showing that his visits are doing serious damage to the child, to the right of visitation.²¹⁶ But the issue here is not whether the noncustodial parent has any protectable interest in his relationship with his child; rather, it is how his rights relate to those of the custodial parent.

The cases focusing on the rights of unwed fathers suggest how courts might treat a conflict between individual parents outside of the context of the intact nuclear family. *Quilloin v. Walcott*²¹⁷ and *Lehr v. Robertson*²¹⁸ both involved adoptions of an unmarried father's child by the current husband of the child's mother. In *Quilloin* the Supreme Court upheld a Georgia statute that permitted the adoption of the child without the father's consent where the father had never had actual or legal custody, never lived with the child, and "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."²¹⁹ Under these circumstances, the Court held that application of a standard which authorized adoption if it was in the child's best

215. In *Smith v. OFFER*, the Court recognized the liberty interest of natural parents even though their children had been removed from their homes. *Smith v. OFFER*, 431 U.S. at 846-47 (discussing liberty interest of parents who had voluntarily placed their children in foster homes). See also *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting) (postulating substantive parental rights of father of legitimate child: "Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship . . .").

216. See generally Novinson, *Post-Divorce Visitation: Untying the Triangular Knot*, 1983 U. ILL. L. REV. 121 (arguing that, absent parental unfitness, visitation right is constitutionally protected).

217. 434 U.S. 246 (1978).

218. 103 S. Ct. 2985 (1983).

219. 434 U.S. at 256.

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interests did not violate Mr. Quilloin's substantive rights.²²⁰ In *Lehr*, Mr. Lehr sought a right to notice and the opportunity to be heard before his child could be adopted. Like Mr. Quilloin, Mr. Lehr had never had a significant custodial, personal, or financial relationship with his daughter. The Court ruled that the New York adoption procedures at issue adequately protected the opportunity, which he had chosen not to take, to establish a relationship with her.²²¹

Unlike these fathers, a divorced parent seeking a modification of custody might well be a concerned parent who has both a prior and an ongoing relationship with his child. In such a case the protections requested by Mr. Quilloin and Mr. Lehr might be constitutionally required if the issue were the same.²²² That, however, is not the case. By permitting the adoption of the child in *Quilloin* and *Lehr*, the Court upheld the termination of the fathers' parental rights. The denial of a change of custody petition does not terminate the parent-child relationship of the noncustodial parent and his child.

Moreover, in both these cases the Court noted that permitting the adoptions in question would foster the goal of stable family relationships. In *Quilloin*, the Court stated that the result of the adoption would be "to give full recognition to a family unit already in existence"²²³ The family unit in existence after divorce is the post-divorce family of custodial parent and child. This family form, which functions much like a traditional nuclear family, should also be preferred and protected.²²⁴

Read together, *Quilloin* and *Lehr* support the contention of a noncustodial parent that he has some constitutionally protected interest in the

220. *Id.* at 254-55.

221. 103 S. Ct. at 2995-97.

222. *Caban v. Mohammed*, 441 U.S. 380 (1979), involved competing claims between a mother and father whose children were born out of wedlock. The mother and the father each married other people, and the two new families both applied to adopt the children. The applicable adoption statute required the consent of the mother for the adoption, but not of the father. The Court declared the statute unconstitutional, stating that the state could not rely upon a statute favoring the mother "in all circumstances." *Id.* at 394. Although the Court had no occasion to weigh the interests of the parents against each other, it is noteworthy that the Court identified Mr. Caban as a father whose "relationship with his children [was] fully comparable to that of the mother." *Id.* at 389. In reaching this conclusion, the Court relied on the fact that Mr. Caban had lived with his children for several years and had participated in their upbringing.

223. 434 U.S. at 255.

224. In *Caban v. Mohammed*, Justice Stevens stated that the protection for the "private realm of family life," 441 U.S. at 414 n.27 (Stevens, J., dissenting, joined by Burger, C.J. and Rehnquist, J.) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)) (emphasis added by Justice Stevens), did not extend to the two unwed parents and their children "because whatever family life once surrounded . . . [them] has long since dissolved through no fault of the State's." *Id.* Instead, "it is the State, rather than appellant, that may rely in this case on the importance of the family insofar as it is the State that is attempting to foster the establishment and privacy of new and legitimate adoptive families." *Id.*

child after divorce.²²⁵ But these cases shed little additional light upon what showing, if any, the Constitution requires when a noncustodial parent seeks to win custody on the ground that circumstances have so changed that the noncustodial parent could do “better” for the child than the custodial parent is doing. The cases suggest only that the virtually standardless traditional custody modification test would be judged under the virtually standardless substantive due process test of constitutional propriety. At this point, the analysis must proceed on uncharted seas, and the challenge is to do so with as principled a compass as possible.

3. *Toward an Analysis of the Competing Interests*

The issue at hand arises in one of two situations: either the parents have agreed initially on a custodial arrangement, or the court has decided the matter after the parents could not agree. Only in the second situation has the state already intruded into the family’s own private ordering of itself prior to an application for custody modification.²²⁶

In the case of a consensual initial custody decision, governmental intrusion cannot be justified, absent a showing that the private arrangement is affirmatively harming the child. We do not allow governmental intrusion into the pre-divorce family without such a showing. Once the initial custody decision has been made, a new family unit exists; rights and obligations have shifted. Merely because the parent who chose to surrender custody subsequently comes to believe that the child could be doing “better” with him is no reason for the government to invade the private choice the family itself previously made. Government intervention would simply not be proper: Absent proof that the private choice is affirmatively damaging the child, the state is neither empowered nor competent to reorder the choice made by the family. Such choices are committed in our system to the family.²²⁷ Whether one invokes the First Amendment, as Justice Douglas would,²²⁸ or the Ninth, with Justice Goldberg,²²⁹ the proposition is indisputable: The state’s power to remove a child from a post-divorce, single-parent family should be no greater than the state’s power to remove a child from a pre-divorce two-parent family—the state can remove the child only upon a showing that the child is seriously endangered.

Although the analysis becomes slightly more difficult when the initial

225. For other cases that support this position, see *Caban v. Mohammed*, 441 U.S. 380, 389 (1979); *Smith v. OFFER*, 431 U.S. 816, 845–46 (1977); *Stanley v. Illinois*, 405 U.S. 645, 647–49 (1972).

226. Theoretically, there is a third possibility—the court may have overridden the decision made by the parents themselves. The courts, however, rarely exercise this power. See *supra* note 82.

227. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

228. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

229. *Id.* at 493–99 (Goldberg, J., concurring).

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custody decision was not a private agreement, there are good reasons why the same result should obtain. The state should not be able to remove the child from the custodial parent on the sole ground that, upon reconsideration of its initial decision, the state finds that the other parent would be a “better” custodian.

First, the justification for the state’s initial intrusion—that the parents could not agree on custody—no longer applies. No decision is being thrust upon the courts; custody has already been allocated, and the matter between the two parents no longer stands in equilibrium. The state may not, simply because a divorce once took place, rely upon a “shattered family” rationale forever to justify its intervention and continuing jurisdiction over the new family unit.

Furthermore, as noted at the outset, about one-third of this nation’s children will, during their minority, experience the divorce of their parents.²³⁰ The implications of a rule that authorizes the state to have continuing jurisdiction over such a large number of children based on a changed circumstances or best interests standard are Orwellian. Under the traditional standard of custody modification, the behavior of the custodial parent is examined under a microscope, with the noncustodial parent and the family court in the role of Big Brother. Has she nurtured her child sufficiently in a manner acceptable to the court? Has she done anything else that in the court’s eye constitutes less than acceptable parenting? Has she, as in the *Friederwitzer* case, done enough to inculcate the “proper” religious beliefs? Any rule of law that puts the government in a position to oversee the most private of matters and sensitive of interests raises serious constitutional questions.

* * *

It has been suggested here that the traditional modification standard cannot withstand constitutional scrutiny, at least where the courts are asked to overturn a consensual custody decision simply in order to “help” the child do better than the child is doing in the privately reordered post-divorce family. But while private choices should be entitled to *more* weight than decisions made by the court, the courts at present are giving *less* weight in modification proceedings to consensual initial decrees.²³¹

This analysis suggests that only a strict modification standard can pass constitutional muster. A custodial parent should lose custody only when there is actual or imminent risk of serious harm to the child and the potential detriment to the child caused by remaining in the family outweighs

230. See *supra* note 1.

231. See *supra* Part I. See generally Sharp, *supra* note 3 (arguing for equal standard of proof for modification of agreement-based and litigated custody decrees).

the harms and disruptions that a change in custody would cause. The best interests and change of circumstances standards, permitting "no-fault" intervention in the post-divorce family, fail to provide adequate constitutional protection to the custodial parent.

CONCLUSION

The crisis of custody decisionmaking is upon us. In proposing that custody decrees should be subject to modification only under very limited circumstances, this Article argues for one change in a system that as a whole may require many changes. Indeed, the more stringent modification standard argued for here may itself generate pressures on other parts of the system and thereby require further adjustments in order to effect the goal of resolving custody disputes justly and efficiently.

For example, a change in the modification standard would likely have implications for the initial custody decision and the way participants perceive it. The more difficult it is to modify initial custody decisions, the greater their significance. An amorphous modification standard encourages parties to accept an initial decision to which they are not permanently committed. Under a more exacting standard for modification, the parties might give more thought and attention to the initial decision. That alone might be beneficial; additional consideration generally makes for a better decision.

This additional pressure on the initial decision might also result in more initial litigation. Given the uncertainty of the best interests standard, going to court to settle a custody dispute is quite risky. That risk may not be worth taking if it is relatively easy to change the decision later. Under a stricter standard, if the court's decision will be difficult to modify, the risk analysis changes considerably. The parties will realize they must litigate initially or hold their peace.

It is likely, however, that the vast majority of custody disputes will continue to be settled without judicial determination even if the standard for modification is greatly tightened. An increased focus on the initial decision, rather than producing litigation, should encourage the use of mechanisms that increase the likelihood that the decision reached will be a compromise—a workable solution that gives something to both parties.²³²

232. As Mnookin and Kornhauser point out, the compromise reached may not be a better balance of the parents' interests in the child's custody and welfare. Instead, one party is likely to sell out his or her interests in the child's custody in exchange for relief from monetary support obligations. See Mnookin & Kornhauser, *supra* note 9, at 963-66. The point here is not that a consensual resolution will result in a wise collective judgment by both parents as to what custodial relationship is in their own best interests and the child's, but that the agreement, once reached, should be respected.

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Although the results are by no means in, there is some evidence that mediation²³³ and joint custodial arrangements²³⁴ often are more satisfactory for some parents and children than sole custody. The modification standard proposed here should help parents to move consensually in that direction.

As for those disputes that are presented to the courts, the trial judge's power and responsibility will increase. Currently, judges make their decisions knowing that if circumstances and the interests of the child change, custody can also be changed. If this possibility of modification is limited, more attention will have to be paid to what judges do in the first instance. For example, the decisions of the trial courts should be subject to appellate review requiring that trial courts state reasons that meet statutory requirements.²³⁵

But rather than guess at what may or may not happen if the custody modification standard is altered, empirical research should be done on these very questions, and others identified earlier. For example, what has been the experience in those, still quite few, states in which the UMDA standard is applied? Much useful work remains to be done before we can answer all of our questions related to custody modification with confidence.

One thing, however, can be said with some certainty. Mrs. Smith, the hypothetical parent discussed in the Introduction to this Article, would not lose custody of her children if the standard urged here were applied. In

233. For the results of an empirical study relating to mediation, see Pearson, *Child Custody: Why Not Let the Parents Decide?*, JUDGES' J., Winter, 1981, at 4. There has also been commentary on the theoretical benefits of mediation. See, e.g., Meroney, *Mediation and Arbitration of Separation and Divorce Agreements*, 15 WAKE FOREST L. REV. 467 (1979); Spencer & Zammit, *Mediation-Arbitration: A Proposal for Private Resolution of Disputes between Divorced or Separated Parents*, 1976 DUKE L.J. 911; Winks, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 19 J. FAM. L. 615 (1981); Note, *Non-Judicial Resolution of Custody and Visitation Disputes*, 12 U.C.D. L. REV. 582 (1979).

234. For studies whose results lend empirical support to theoretical assumptions about joint custody as a viable custody arrangement, see D. LUEPNITZ, *supra* note 139; Ahrons, *Joint Custody Arrangements in the Postdivorce Family*, 3 J. DIVORCE 189 (1980); Ilfeld, *supra* note 182; Watson, *Custody Alternatives: Defining the Best Interests of the Children*, 30 FAM. REL. 474 (1981). Cf. Steinman, *The Experience of Children in a Joint-Custody Arrangement: A Report of a Study*, 51 AM. J. ORTHOPSYCHIATRY 403 (1981) (while joint custody requires considerable effort by parents and children, available data suggest it may be beneficial to many but not all parents and children). But see Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 242 (1982) (statutorily mandated joint custody presumptions do not encourage joint child rearing; women continue to do primary or almost sole parenting).

235. See, e.g., *In re Marriage of Jaramillo*, 37 Colo. App. 171, 543 P.2d 1281, 1282 (1975) ("[T]here must be some indication in the record that the trial court considered such of those [statutory] factors as were pertinent, and the findings thereon must be sufficient to enable this court to determine on what ground the trial court reached its decision . . ."); *Giordano v. Giordano*, 93 A.D.2d 310, 312, 463 N.Y.S.2d 97, 98-99 (N.Y. App. Div. 1983) ("[E]ffective appellate review in this case requires remittal to Family Court for the purpose of rendering a decision stating the facts deemed essential, as required by CPLR § 4213 (subd. [b]).") (citation omitted).

the long run, that result is a happy one—or perhaps more correctly, the least unhappy one—for all members of the post-divorce family.