SHOULD COURTS OR PARENTS MAKE CHILD-REARING DECISIONS?: MARRIED PARENTS AS A PARADIGM FOR PARENTS WHO LIVE APART

*Robert E. Emery**
*Kimberly C. Emery***

As an introduction to the arguments we make in this Article, we ask the reader to consider the following hypothetical:

> Jeremy Jones, a very involved father, recently received an offer for a promotion in his management position at a large computer company. If he accepts it, the promotion will increase his professional responsibilities and double his annual salary. In addition, the new job will give him more flexibility and allow him to work from home on a regular basis, allowing Jeremy to spend more time with his two children, nine-year-old Jon and five-year-old Isabel. The only potential problem with the promotion is that Jeremy must be willing to relocate from New York to the West Coast. While Jeremy could turn down the new job, his boss has implied that future promotions would be forthcoming rapidly if Jeremy takes this next step up the corporate ladder. Jeremy's boss also hinted that, if Jeremy doesn't take the job, higher ups would interpret this as a signal that Jeremy was content to remain in his current position at his current salary.
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> Jeremy is eager to accept the position. The career opportunity is excellent. The flexibility is perfect for his desire to be an even more involved father. Moreover, he grew up on the West Coast where both sets of the children's grandparents still reside. However, there is one big problem. Jon and Isabel's mother, Justine, is very much opposed to the relocation.

* Professor of Psychology, Director of the Center for Children, Families, and the Law, University of Virginia. B.A. 1974, Brown University; Ph.D. 1982, SUNY at Stony Brook. Preparation of this paper was supported, in part, by Grant Number 1R01HD056354-01 from the National Institute of Child Health and Human Development.

** Assistant Dean for Pro Bono and Public Interest, University of Virginia School of Law. B.A., 1986, Carleton College; JD 1991 University of Virginia School of Law.

> Justine's rationale for opposing the move seems as reasonable as Jeremy's arguments in favor of it. She too is a parent who is very involved with her children's lives, while still maintaining a successful career. Justine agrees that Jeremy shares about half of the responsibility for parenting the children. But unlike Jeremy, she has found a great balance between work and family in her current location. She makes a good living running her own business as a financial planner, a successful practice that took her many years to establish. Her income would nosedive if she moved, and she would have to work much harder than she does now in order to cultivate new clients. While Justine also grew up on the West Coast, she never liked it there. When raving about her current lifestyle, Justine often tells her friends that a continent is almost enough distance between her and her meddlesome parents.
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> Although she thinks that Jeremy is concerned mostly about himself, Justine ultimately is less worried about her own well-being than about how a move might affect the children. She worries that relocating would be disruptive and potentially destructive for them. Jon and Isabel have lived their whole lives in their current hometown. The children both are excellent students in a superior school system. They each have great groups of friends and are generally happy and well-adjusted kids.
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> Jeremy agrees with Justine's assessment of Jon and Isabel, but believes that the children have become overly materialistic, a quality he also sees too much of in their community and, secretly, in their mother. A move would give them exposure to something different, including a new perspective on themselves and their East Coast lifestyle. Moving also would give the children the chance to build important relationships with extended family. Jeremy gets along just fine with Justine's parents, and he and Justine both think that Jeremy's parents are terrific.
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> During a recent argument, Justine told Jeremy that he could move to the West Coast, but she and the children were going stay right where they are. Jeremy countered that Justine could stay put, but the children were going to move with him. The parents' recent dispute ended with a series of threats about legal action.

Relocation cases like this involve some of the most difficult issues in child custody litigation today. As the case begins to convey, relocation issues raise complicated and competing claims

about childrearing, parenting, the co-parenting relationship, and individual liberties. What is critical to the present analysis of this hypothetical, however, is not the merits of Jeremy's case, Justine's case, or even the "best interests" (the prevailing standard for deciding custody disputes) of Jon and Isabel. Instead, the crucial factor is one we deliberately omitted from the hypothetical: Jeremy and Justine are *married*. They are not currently separated, and they have no interest in divorce despite their intense disagreement about Jeremy's potential promotion and the related move to the West Coast.

When couples like Jeremy and Justin have sought legal remedies for their childrearing conflicts, courts have consistently ruled that the public interest and "domestic harmony" are best served by their refusing to decide the dispute. Such conflicts—when they occur between married parents—are, in judicial rulings to date, best left to private means of resolution.[1] As the New York Court of Appeals held in *People ex rel. Sisson v. Sisson*:[2]

> Dispute between parents when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law. The vast majority of matters concerning the upbringing of children must be left to the conscience, patience, and self-restraint of father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children.

Likewise, an Alabama court in Kilgrow v. Kilgrow opined, "Never has the court put itself in the place of the parents and interposed its judgment as to the course which otherwise amicable parents should pursue in discharging their parental duty."3

Although courts have consistently refused to intervene in disputes about parenting between married couples,[4] they routinely decide similar disputes between parents when the parties are *not* living together as husband and wife. This Article examines the legal

1. See Note, *Litigation Between Husband and Wife*, 79 HARV. L. REV. 1650, 1655–59 (1966), for a discussion of nonjusticiability of family related and disputes between married couples. *See also* Kilgrow v. Kilgrow 107 So. 2d 885 (Ala. 1958) (addressing courts' refusal to hear parental disputes about the most appropriate school placement for their children); People *ex rel.* Sisson v. Sisson, 2 N.E.2d 660 (N.Y. 1936) (same).

2. *Sisson*, 2 N.E.2d at 661.

3. *Kilgrow*, 107 So. 2d at 888.

4. *See, e.g.*, *Sisson*, 2 N.E.2d at 661; *see also Kilgrow*, 107 So. 2d at 888 (suggesting that the absence of cases involving child rearing disputes between *married* parents indicates the reluctance of the courts to assume jurisdiction in such cases).

rationale behind the policy of nonjusticiability of childrearing disputes between married couples and then questions why the same rationale has not kept the courts from deciding such disputes between separated, divorced, or never-married parents. We suggest that many disputes about childrearing are not appropriate for judicial resolution regardless of the parents' marital status. The *Sisson* court asserted that judicial intervention exacerbates rather than resolves parental disputes in marriage.[5] We argue that the same concern applies to disputes between many parents who no longer live together. We ask, are married couples being denied a "right" to have their day in court? If not, why does the theory of noninterference not apply to separated parents? Why do courts not hesitate to decide precisely the same sorts of disputes when they occur between separated, divorced, or never-married parents?

We begin by briefly examining why courts have refused to entertain disputes between married parents. We then argue that, to be consistent, courts either need to entertain an entirely new, and potentially prodigious, class of litigation between married parents, or reexamine the broad, public interest justifications behind our legal efforts to attempt to resolve the same sorts of disputes between separated parents. We conclude that allowing separated parents to litigate many types of childrearing disputes actually does more harm than good for precisely the same reasons the courts have refused jurisdiction in cases arising between married parents.

> It may well be suggested that a court of equity ought to interfere to prevent such a direful consequence as divorce or separation, rather than await the disruption of the marital relationship. Our answer to this is that intervention, rather than preventing or healing a disruption, would quite likely serve as the spark to a smoldering fire. A mandatory court decree supporting the position of one parent against the other would hardly be a composing situation for the unsuccessful parent to be confronted with daily. One spouse could scarcely be expected to entertain a tender, affectionate regard for the other spouse who brings him or her under restraint. The judicial mind and conscience is repelled by the thought of disruption of the sacred marital relationship, and usually voices the hope that the breach may somehow be healed by mutual understanding between the parents themselves.[6]

We concur with the *Kilgrow* court and, in addition, argue that the private resolution of childrearing conflicts, regardless of marital

5. *Sisson*, 2 N.E.2d at 661.
6. *Kilgrow*, 107 So. 2d at 889.

status, is generally preferable given the particularly negative impact of adversarial proceedings on separated parents' relationship as *co-parents*. We do *not* suggest that courts decline jurisdiction in all custody disputes when the parties are separated. We do argue, however, that a reexamination of separated parents' purported "right" to litigate their disputes, consideration of children's psychological well-being, and the court's desire to promote private ordering in the domestic context hold important implications for the administration of family courts, high-conflict custody cases, and the use of alternative dispute resolution ("ADR"). We argue, in short, that our legal system should treat parents who live apart more similarly to the way it treats married parents.

I. INTRODUCTION

Although precise national statistics are not available, custody disputes are undoubtedly one of the most common types of litigation in the United States today. Domestic relations cases constitute the largest percentage of litigated disputes, and custody actions comprise the greatest proportion of domestic relations cases.[7] Due to the large number of cases and severely limited judicial resources, which result in backlogged court dockets, various interventions have been developed with the hope of reducing custody litigation, most notably ADR, including such relatively new procedures as mediation, collaborative law, and parenting coordination. ADR has been justified both as a means of resolving conflicts in a way that is healthier for parents and their children and as a means of reducing the immense burden these issues place on the administration of justice. "Advocates promised that mediation and other forms of ADR would achieve the two broad, but not always fully compatible, goals of making dispute resolution both more efficient and increasingly family friendly."[8]

Although not all of the claims or hopes of ADR's most fervent advocates have come to fruition, the empirical evidence generally supports these two broad and practical rationales.[9] Of interest,

7. *See* ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 38–39 (2004).

8. Robert E. Emery, David Sbarra & Tara Glover, *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 22 (2005).

9. *Id.* at 26–29. Generally favorable conclusions are drawn about the potential benefits of ADR in the context of a review of the existing empirical research on mediation as an alternative to the adversary settlement of custody disputes, with a particular focus on the authors' own randomized trial of mediation and adversary settlement. Among the conclusions are that mediation settles a substantial proportion of cases that otherwise would be litigated; that agreements, on average, are reached more quickly in mediation

however, is that ADR advocates and critics of adversarial custody litigation typically have offered *only* practical rationales for their position; seldom have they questioned the underlying theoretical justification for allowing judges to decide disputes between separated parents despite the fact that a common objection to ADR is that it denies the parties the "right" to their day in court.[10] What exactly is the basis for this presumed "right" of separated parents to litigate their childrearing disputes?

Of course, we recognize that state legislatures give disputing parents a right to have their childrearing disputes heard through statutes that give judges discretionary jurisdiction over children's legal and physical child custody—when parents are separated, divorced, and never married.[11] Our concern is with the broader purpose of these statutes and the underlying theory that supports them. For example, in the context of disputes between married parents, courts have raised deep concerns about the judiciary's limited ability to effectively regulate parenting and about the possibility that legal intervention will undermine, rather than promote, parental cooperation. We wonder why these same broad, theoretical concerns do not also make courts reluctant to intervene in disputes between separated, divorced, or never-married parents.

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and subsequent compliance with the terms of the settlements are also higher when compared with disputes resolved through traditional adversary methods; that disputants report greater satisfaction with mediation than with adversary procedures; and that while mental health outcomes may not be improved notably, if at all, by mediation, nonresidential parent-child contact, the quality of parenting, and cooperation in the co-parenting relationship all benefit from mediation relative to adversary dispute resolution procedures. *Id.*; *see also* CONNIE J.A. BECK & BRUCE D. SALES, FAMILY MEDIATION: FACTS, MYTHS, AND FUTURE PROSPECTS 181–82 (2001) (offering a critical appraisal of the state of research on mediation versus adversary procedures and noting, for example, that "programmatic and theory-driven research would help us understand the causes for the inconsistent findings in the mediation literature"). Despite their cautious interpretation of empirical research on mediation, however, Beck and Sales go on to note that "[i]mportant examples of the benefit of sustained, programmatic research come from Emery." BECK & SALES, *supra*, at 182.

10. *See, e.g.*, PENELOPE EILEEN BRYAN, CONSTRUCTIVE DIVORCE: PROCEDURAL JUSTICE AND SOCIOLEGAL REFORM 205 (2006) (noting that "although mediation may honor family privacy, it does so at the expense of substantive fairness and respect for legal rights"). Bryan does not articulate the precise nature of the legal rights that are being ignored by ADR, yet her critique is typical in asserting a presumed "right" of separated parents to have their childrearing disputes heard in court.

11. *See* Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203, 210, 214 n.19 (2004) (discussing the legal regime that currently handles family disputes).

For example, what is the legal theory behind the courts' perceived duty to hear cases where separated, divorced, or never-married parents cannot agree about such issues as whether or not their children should attend some public or private school—or about what their children should wear to school? Our focus is primarily on disputes like these that generally relate to matters of legal custody (or parental decision making), including the three major decisions that are typically designated as shared by parents who have joint legal custody, namely, schooling, religious training, and elective medical care.[12] However, we suggest that the same arguments can and should be applied in the context of disputes about physical custody (or parenting plans). For example, why, in theory, should the judiciary decide the details of children's holiday schedules when separated parents petition a court? Married parents also disagree about how they should spend their holidays, but they have no such legal redress. As our hypothetical illustrates, the same questions also can be raised about the thorny and complex issue of relocation.

II. THE COURTS' ROLE IN CHILDREARING DISPUTES BETWEEN MARRIED PARENTS

We begin our analysis by examining custody disputes from a perspective that we would urge separated, divorced, and never-married parents to adopt when they are uncertain or disagree about how best to co-parent their children. In circumstances like these, we find it useful to ask how married, two-parent families manage to resolve similar conflicts and parenting concerns. For example, when divorced parents wonder what sort of role their children should play in deciding on the details of a parenting plan, we ask them to consider how parents in married families involve children in similar, major decisions such as moving to a new city. This directive "normalizes" the issue and puts the focus on children's well-being and effective parenting rather than on legal considerations.[13] Unlike

12. Consistent with many scholars and state statutes, we distinguish legal custody (or parental decision-making authority) from physical custody (or the actual time each parent spends with their children). *See generally* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (2002) [hereinafter ALI PRINCIPLES] (providing both an example of the distinction between legal and physical custody and a reflection of a common pattern found across states). The American Law Institute ("ALI") distinguishes "custodial responsibility" (physical custody) from "decision-making responsibility" (legal custody) and defines decision-making responsibility as "authority for making significant life decisions on behalf of the child, including decisions about the child's education, spiritual guidance, and health care." *Id.* § 2.03.

13. Robert E. Emery, *Children's Voices: Listening—and Deciding—Is an*

what can occur when separated parents are debating what parenting plan is best for their children, married parents who are considering a major relocation do not seek legal advocates to represent their children's interests, nor do they employ mental health experts to discern the children's "true" preferences or to decide what is "best" for the children. Instead, married parents involve children in such decisions to the extent they deem appropriate according to the children's ages and the decision at hand. And in the final analysis, the difficult decision is made by the married parents, not by the children or their discovered preferences. We urge, and ultimately expect, separated parents to act in essentially the same way in involving children in their negotiations about a parenting plan.

As discussed above, the courts' approach to resolving these kinds of disputes between married couples is clear: jurisdiction is refused. For example, in *Sisson*, the Court of Appeals of New York ruled it could not "regulate by its processes the internal affairs of the home."[14] This case involved a disagreement between the Sissons about the best type of schooling for their daughter.[15] Because the couple was still married, the court refused to hear a case which, if the Sissons had been divorced, the court likely would have accepted in 1936 and would have certainly heard today.[16] Courts in other states have ruled in a similar manner, denying married parents the right to litigate parenting matters, such as disputes about religion or schooling that would constitute an actionable dispute about legal custody if the parents were separated, divorced, or never married.[17] For example, as the Court of Appeals of Ohio in *Hackett* opined, "[t]he religious training of children is a family matter, subject to change in response to the wishes of the parents or either of them and a disagreement between them on this subject, while living together as husband and wife, is not a justiciable matter."[18]

The holdings in both cases, and especially the clear and strong ruling in *Sisson*,[19] summarize our views about judicial intervention

Adult Responsibility, 45 ARIZ. L. REV. 621, 626 (2003).

14. People *ex rel.* Sisson v. Sisson, 2 N.E.2d 660, 661 (N.Y. 1936).

15. *Id.*

16. *Id.*

17. *See, e.g.*, Kilgrow v. Kilgrow, 107 So. 2d 885 (Ala. 1958) (holding that the court had no jurisdiction to settle a dispute between parents as to what is best for their child's religious upbringing when there is no question concerning custody); Hackett v. Hackett, 150 N.E.2d 431 (Ohio Ct. App. 1958) (refusing to enforce provisions of a separation agreement dealing with the faith in which the child should be raised).

18. *Hackett*, 150 N.E.2d at 433.

19. *Sisson*, 2 N.E.2d at 661.

in legal custody disputes between divorced, separated, or never-married parents. We hold that "no end of difficulties" also arises when courts intervene and tell separated, divorced, and never-married parents "how to bring up their children."[20] The basis of our argument is partly empirical, as alternatives to litigation offer demonstrably better ways for parents who are living apart to resolve their childrearing disputes.[21] However, the strength of our argument rests at least equally on theoretical considerations. Consistent with new ideas about co-parenting while living apart that have evolved over the last several decades,[22] we view separated, divorced, and never-married families as families nevertheless.

Many social scientists who have studied the evolution of our societal views of separated, divorced, and never-married parents over recent decades offer new conceptualizations of these families. The essence of contemporary theory is that these are not "single parent" families, but instead that children in these families still have two parents, albeit parents who no longer live together. Children in these nontraditional families still have two parents, even though contact with one parent may be infrequent.[23]

Not only *can* parents share childrearing decision making even when living apart, but we assert that, as in two-parent married families, they *should be expected to do so*. One measure of parents' success in sharing decision making following a divorce is the greatly

20. *Id.*

21. *See generally* Emery, Sbarra & Glover, *supra* note 8.

22. Because parents who live apart remain connected through their children, they still have a relationship with each other, a co-parenting relationship. We therefore conceptualize separation and divorce not as the end of family relationships, but as time of change that requires family members to *renegotiate* their relationships, including relationships between parents and children and between the co-parents themselves. *See, e.g.*, JAN PRYOR & BRYAN RODGERS, CHILDREN IN CHANGING FAMILIES: LIFE AFTER PARENTAL SEPARATION 5 (2001) (discussing problems with terminology like "single parent family" and why separated families are still families); *see also* ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION 18 (1994) ("It is true, however, that partners who are also parents can never fully divorce. . . . This is true even when exchanges are highly structured, or when contact with one of the parents is very infrequent.").

23. *See generally* Paul Amato, Catherine Myers & Robert Emery, Changes in Nonresident Father-Child Contact over Four Decades (Apr. 4, 2008) (unpublished manuscript, on file with authors). Changes in nonresident father visitation over four decades document the increasing involvement of nonresident fathers with their children over the course of recent decades. For example, they report that, in national samples, the percentage of nonresident fathers increased from 18% in 1976 to 31% in 2002. *Id.* at 17. The percentage of nonresident fathers who had no contact with their children dropped from 37% in 1976 to 29% in 2002. *Id.* at 20.

increased prevalence of joint legal custody, which was virtually unknown thirty years ago but is now the normative arrangement in many states.[24] Other evidence indicates that nonresident parents with joint legal custody do not have more childrearing disputes, but, in fact, pay more child support and have more contact with their children.[25] Studies also have repeatedly shown that adversarial litigation damages the co-parenting relationship between parents living apart,[26] and we suggest that the very *possibility* of legal intervention is likely to undermine the possibility of future parental cooperation.

In addition to concerns about the direct damage adversarial procedures can do to the co-parenting relationship, we worry about the indirect effects of the assumption that parental authority is weakened, lost, or abdicated upon separation, divorce, or bearing a child outside of marriage. Given the very high prevalence of divorce, nonmarital childbearing, and cohabitation in the United States today,[27] almost half of American children will live a portion or all of their childhoods in one or more of these alternative family structures. Well more than half of children will live in these alternative families among particular racial, ethnic, and socioeconomic groups.[28] Our society, and our legal system, needs a

24. Marygold S. Melli et al., *Child Custody in a Changing World: A Study of Postdivorce Arrangements in Wisconsin*, 1997 U. ILL. L. REV. 773, 778 (documenting the increase in joint legal custody in Wisconsin from 18% of final divorce judgments in 1980 to 81% in 1992). Shared physical custody also increased during the same time period, but not nearly as dramatically, from 2.2% in 1980 to 14.2% in 1992. *Id.* at 779.

25. *See* Chien-Chung Huang et al., *Child Support Enforcement, Joint Legal Custody, and Parental Involvement*, 77 SOC. SERV. REV. 255, 267–69 (2003); Judith A. Seltzer, *Legal Custody Arrangements and Children's Economic Welfar*e, 96 AM. J. SOC. 895, 915 (1991).

26. *See* Emery, Sbarra & Glover, *supra* note 8.

27. MATTHEW D. BRAMLETT & WILLIAM D. MOSHER, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., FIRST MARRIAGE DISSOLUTION, DIVORCE, AND REMARRIAGE: UNITED STATES 5 (2001) (reporting that approximately half of all first marriages of U.S. women aged 15–44 years in 1995 were disrupted within 20 years of marriage); *see also* JOYCE A. MARTIN ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, BIRTHS: FINAL DATA FOR 2005, at 10 (2007) (reporting that in 2005, 36.9% of all births in the United States were to unmarried women); Larry Bumpas & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29, 34 (2000) (reporting that the percentage of children born outside of marriage but into cohabiting relationships in the U.S. increased from 29% to 39% between 1980–84 and 1990–94).

28. *See* BRAMLETT & MOSHER, *supra* note 27, at 6 (reporting that for 1995, 63% of the first marriages of non-Hispanic black women disrupt within the first 20 years of marriage); MARTIN ET AL., *supra* note 27, at 12 (noting that in 2005,

fresh conceptualization of family and parental responsibility, and a reconceptualization of the goals of judicial intervention, when "alternative" families are no longer the exception but the rule.

Before proceeding, we should offer a disclaimer of sorts. While in some (unknown and unpredictable) individual cases, a wise judicial decision likely would lead to a more just or emotionally healthy outcome for parents or children in separated families, or in married families, our concern is that, on average, judicial intervention would (in the case of married families) and does (in the case of separated families) do more harm than good. Moreover, the weight of the empirical evidence makes clear that neither social scientists, nor mental health professionals, nor judges have a crystal ball and can reliably predict what will be best for children in individual cases.

> Sadly, we find that (a) tests specifically developed to assess questions relevant to custody are completely inadequate on scientific grounds; (b) the claims of some anointed experts about their favorite constructs (e.g., "parent alienation syndrome") are equally hollow when subjected to scientific scrutiny; (c) evaluators should question the use even of well-established psychological measures (e.g., measures of intelligence, personality, psychopathology, and academic achievement) because of their often limited relevance to the questions before the court; and (d) little empirical data exist regarding other important and controversial issues . . . .[29]

Returning to our basic concern, consider what could happen if the hypothetical Jeremy and Justine were given their day in court. How would the relationship between Jeremy and Justine change if their parenting dispute was allowed to become *Jones v. Jones*? Would they act the same as married parents currently do in a legal regime that denies their "right" to a day in court? Hopefully, they would. Hopefully, Jeremy and Justine would still be able to weigh the pros and cons of the move for each other, and for the children, and ultimately reach an acceptable if imperfect compromise. Yet, we suspect that this couple's willingness to find an amicable solution

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69.9% of children born to non-Hispanic black women were born outside of marriage).

29. Robert E. Emery, Randy K. Otto & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCHOL. SCI. PUB. INT. 1 (2005); *see also* Firestone & Weinstein, *supra* note 11, at 206 (discussing inadequate training of decision makers in custody cases and how this forces judges, attorneys, and other professionals involved in the process to rely on their own biases and intuition to resolve the issues).

would be compromised if litigation were an option.[30] A trial would cost time, money, and emotional energy; it would involve their children in an increasingly bitter parental conflict while likely offering no solution superior to one they could have arrived at on their own. Moreover, it is easy to envision an endless battle of the sexes being played out under this new category of "marital custody" litigation. Parenting roles, especially those responsibilities that often are allocated according to gender, could be reinforced or altered by judicial fiat. Judges surely would be called upon to decide not only relocation issues, but more mundane parenting concerns such as who should put the children to bed (and how often), who should be in charge of homework, who takes charge during the children's sports activities, and whether the children should be allowed to eat "junk" food. While such suggestions may seem ludicrous, sadly, these are exactly the sorts of practically trivial but emotionally charged issues that a significant minority of separated parents bring to court and that judges decide for them. High-conflict, repeat litigation cases are especially likely to petition for judicial resolution of some detail of everyday parenting.[31]

Assuming further that future "marital custody" decisions would be decided according to what is determined to be in the children's future best interests, and lacking a clear legal definition of best interests,[32] judges could be expected to turn to mental health

30. *See* Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 180–82 (2004) (discussing the crisis in family legal services and the negative impact of adversarial litigation on families).

31. *See generally* SUSAN M. BOYAN & ANN MARIE TERMINI, THE PSYCHOTHERAPIST AS PARENT COORDINATOR IN HIGH-CONFLICT DIVORCE (2004). A new form of ADR called "parenting coordination" has been developed to help high-conflict families resolve precisely these kinds of repeated, everyday disputes. *See* Christine A. Coates et al., *Parenting Coordination for High-Conflict Families*, 42 FAM. CT. REV. 246 (2004). Parenting coordinators first attempt to mediate parenting disputes, but they have the authority to decide them if parents cannot agree. *Id.* at 247. A major controversy about parenting coordination is how much judicial authority a parenting coordinator can exercise. *Id.* at 248. Our question is: Why should judges have the authority or responsibility for making these kinds of decisions? The court has wisely avoided entering such disputes between married parents. Do we have good empirical or theoretical reasons to expect the courts to do more good than harm when they entertain the same types of disputes between parents living apart?

32. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 260 (1975). Mnookin summarizes the dilemma presented by the best interests standard as follows:

> Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge be

professionals to guide them in the assessment process. The resulting "marital custody" investigations, in turn, would be likely to raise a host of additional questions. Should each side hire their own mental health professional, or should a neutral evaluator be appointed by the court? How objective are the various experts, and are their judgments empirically based?[33] What are the children's wishes? Should a judge ask children about their preferences directly in open court, or perhaps *in camera*, or should mental health professionals use their clinical skills to discern children's "true" wishes about their married parents' disputes about relocation, bedtime stories, and junk food? What about the role of the attorney? Can a lawyer counsel a client to compromise with her husband or his wife, or is this contrary to the attorney's legal obligation of vigorous representation? Should negotiations with the opposing side take place in a collaborative or an adversarial atmosphere? Would such collaborative procedures be ethical?

III. TOWARD LIMITING JUDICIAL INTERVENTION IN DISPUTES BETWEEN PARENTS LIVING APART

Our primary goal is to raise the question of why, in broad theoretical terms, American courts routinely intervene in disputes between parents living apart, while at the same time they refuse to hear similar, sometimes identical, disputes between parents who are married. Much as we urge separated parents to consider how married parents manage the various challenges involved in rearing children, we urge judges and policy makers to reconsider the theoretical rationale for treating separated parents differently from married parents—and to consider treating the two categories of parents more similarly. Denying parents who live apart the "right" to their day in court—as these "rights" are denied to married parents—could encourage separated parents (who, due to the necessities of co-parenting, cannot avoid having an ongoing relationship with each other) to find ways to embrace their parental responsibility, do a better job of cooperating in co-parenting, limit the enactment of old conflicts in the legal arena, and, in so doing,

> primarily concerned with the child's happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic 'productivity' of the child when he grows up? Are the primary values of life in warm interpersonal relationships, or in discipline and self-sacrifice? Is stability and security for a child more desirable than intellectual stimulation? These questions could be elaborated endlessly. And yet, where is the judge to look for the set of values that should inform the choice of what is best for the child?

Id. (citation omitted).

33. *See* Emery, Otto & O'Donohue, *supra* note 29.

ultimately serve children's best interests.[34] Empirical evidence comparing the outcomes of mediated and litigated child custody disputes is consistent with this theoretical position.[35]

We do not argue, however, that courts should immediately and completely abandon their supervision of all contested custody disputes. For example, our argument does not turn on whether or not courts should entertain relocation disputes between separated parents. Rather, our goal is to encourage new (or continued) movement in the direction of policies that not only encourage but expect increased parental self-determination in disputes between parents who live apart, that is, policies that treat separated families more like married families. Some examples of the types of reform that are consistent with our general position on the appropriate resolution of parental disputes are discussed in the following sections.

IV. ELIMINATE JUDICIAL REVIEW OF CONSENT AGREEMENTS

In most jurisdictions, judges have the authority to review consent agreements between separated, divorced, and never-married parents regarding their legal and physical custody settlements. The theoretical rationale for granting this judicial authority to review consent agreements, and possibly supersede parental decision making, is that the court is obligated to protect children's interests over and above any agreement or contract between the parents.[36] Although the power to overturn parental agreements perhaps is a logical extension of the judiciary's obligation to protect children's interests, the obligation itself rests on assumptions that are tenuous or dubious.

The first assumption is that judges, who are already overburdened with dockets crowded with contested custody disputes, have the time to review and investigate the consent agreements that are reached in ninety percent or more of divorces.[37] A second and even more dubious assumption is that, given sufficient time to review them, judges are somehow able to distinguish consent agreements that are in children's best interests from those that are not. Leaving issues of administration and judicial guesswork aside,

34. *See generally* ROBERT E. EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT (2d ed. 1999). Extensive psychological research demonstrates that effective parenting, co-parenting, and limited parental conflict are, by far, the strongest predictors to children's successful psychological functioning in divorced (and married) families. *See id.*

35. *See* Emery, Sbarra & Grover, *supra* note 8.

36. *See* ALI PRINCIPLES, *supra* note 12, § 2.06.

37. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 137 (1992).

the most basic and the most troublesome assumption that accompanies judicial review is the implicit or explicit view that judges somehow are in a better position than separated parents to determine what is "best" for children. As we have discussed elsewhere, based on detailed review of the science and practice of custody evaluations, no technology exists that allows mental health (or legal) experts to reliably predict future outcomes for children in custody disputes.[38] Moreover, even if such predictions were possible, we strongly agree with Mnookin[39] that determining what is best for children is, at best, a value judgment. We hold further that parents, including separated, divorced, and never-married parents, can and should exclusively decide what they deem to be best for their own children, absent issues of abuse or neglect.

To aid consideration of this policy, let us return to our basis of comparison: married parents. Should judges have the authority to overturn parenting agreements reached formally (or informally) between married parents? Married parents do make many bad parenting decisions. Married parents and their children sometimes live according to schedules (a parenting plan?) that are overly busy, chaotic, or otherwise not "best" for children. Married parents also can make questionable decisions about children's schooling, religious training, or elective medical care. While we do not condone bad parenting, most do not envision a role for courts in deciding whether married parents should or should not get braces for their children's teeth, choose a conventional or more liberal religious upbringing, send their children to public or private school, or take a job that allows for a more predictable work schedule than one's current employment.

Although many judges, wisely in our view, routinely decline to exercise their discretion to overturn parental consent agreements,[40] for practical and theoretical reasons, explicitly requiring courts to accept parenting plans submitted as consent agreements would have clear benefits, including: lessening the administrative burden on judges (perhaps especially new judges), conveying a greater respect for parents who do reach agreement, and helping to set the expectation that parents *should* exercise their traditional authority and responsibility for childrearing even when parenting apart. This straightforward and modest recommendation requiring judicial deference toward parental agreements is a part of the ALI's

38. *See* Emery, Otto & O'Donohue, *supra* note 29.

39. MACCOBY & MNOOKIN, *supra* note 37, at 137.

40. We note anecdotally, however, that we recently were queried by a well-intentioned judge as to how to distinguish "good" from "bad" joint physical custody consent agreements so that the latter could be overturned.

extensive recommendations for changes in custody law.[41]

V. A PRESUMPTION OF JOINT LEGAL CUSTODY

Our second specific recommendation is that joint legal custody should become a rebuttable presumption for child-rearing arrangements after separation and divorce. There is clear evidence that joint legal custody has become normative in many states and leads to increased parental cooperation and postseparation involvement with children,[42] while at the same time decreasing parental conflict. In addition, a presumption of sharing joint legal custody would bolster the expectation that courts treat separated parents more like married parents. Both parents have an equal right to make decisions about their children in marriage, and courts have consistently refused to intervene in the childrearing decision process between married parents. We see no compelling reason why one parent should *lose* this parental authority and responsibility upon separation.

While endorsing such a rebuttable presumption of joint legal custody, we stress that we would limit this shared parental authority to major decisions regarding education, religion, and elective medical care. As clearly noted in our guide for parents living apart, even parents who share joint legal custody need to respect each other's autonomy to make day-to-day parenting decisions.[43]

VI. LIMIT THE NATURE AND FREQUENCY OF HEARING DISPUTES IN REPEAT LITIGATION CASES

"High-conflict divorces"[44] are a very difficult category of custody disputes—one that courts are struggling with, often through special programs such as parenting coordination and quasi-therapeutic dispute resolution procedures.[45] Parenting coordination, for

41. *See* ALI PRINCIPLES, *supra* note 12, § 2.06.

42. *See* Huang et al., *supra* note 25; Seltzer, *supra* note 25.

43. *See* ROBERT E. EMERY, THE TRUTH ABOUT CHILDREN AND DIVORCE: DEALING WITH THE EMOTIONS SO YOU AND YOUR CHILDREN CAN THRIVE 174–75 (2006).

44. Of course, high-conflict parenting disputes are not limited to divorce. Separated and never-married parents also can be, and often are, among the high-conflict cases. The difference is that the courts have an interest in controlling the dispute resolution process within the context of divorce. *See, e.g.*, Barnes v. Barnes, 107 P.3d 560 (Okla. 2005) (dismissing a constitutional challenge to the state's parenting coordinator act by holding that the fact that the act did not apply to married parents did not violate the equal protection clause because of the legitimate state interest in the divorce process).

45. For an example of an early and innovative intervention with high-

example, follows a model of mediation-arbitration. The parenting coordinator, who is usually a mental health professional, first attempts to mediate whatever parental dispute is being contested by the high-conflict couple.[46] The unique aspect of this approach, however, is that the parenting coordinator is given quasi-judicial authority to make relatively minor "custody" decisions, for example, decisions about the details of a disputed holiday schedule or when and how often one parent can telephone the children while they are at the other parent's home.[47] Courts are particularly willing and eager to embrace ADR in such high-conflict cases, because these typically are repeat litigation cases. Parents in high-conflict custody cases usually *have* had their day in court. In fact, these parents are in court repeatedly, making extensive demands on the resources of judges and other court personnel, while quite obviously playing out individual or relationship dysfunction in the legal arena.[48]

We are strong supporters of parenting coordination and other methods of ADR, as we have noted and discuss further below. Our present concern is not ADR, however, but why and whether courts should hear the sort of interpersonal disputes that are typically brought before them by high-conflict couples. As recently noted by several leading proponents of parenting coordination, the parents' relationship is undoubtedly high conflict, but typically the disputes they bring before the court are substantively trivial. In describing their past experiences, these experts noted, "Most of the disputes were minor, generated by one or both parents' need to control, punish, or obstruct the access of the other, such as one-time changes in the timeshare schedule, telephone access, vacation planning, and decisions about the children's afterschool activities, health care, child care, and child-rearing practices."[49]

While the substance of their parenting disputes may be minor, high-conflict cases place a major burden on courts. Estimates

conflict custody cases that combines therapeutic considerations and dispute resolution efforts, see generally JANET R. JOHNSTON & LINDA E.G. CAMPBELL, IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT (1988).

46. Coates et al., *supra* note 31, at 247.

47. *Id.*

48. *Id.*

49. *Id.*; *see also* Dana Prescott, *When Co-Parenting Falters: Parenting Coordinators, Parents-in-Conflict, and the Delegation of Judicial Authority*, ME. B.J., Fall 2005, at 240 ("[T]he appointment of a PC usually represents the culmination of many failed efforts at collaborative forms of dispute resolution. Simply stated, imposition of a PC means the delegation of the court's constitutional and statutory authority to another professional, with the resulting diminution of parental autonomy.").

indicate that the prevalence of high-conflict cases is about one in ten, and because most parents settle disputes outside of courts, while high-conflict cases are likely to be repeat litigators, most of the cases judges are asked to decide are likely to be high-conflict ones.[50] Undoubtedly, parents in high-conflict cases are troubled; many mental health experts believe that personality disorders are rampant among these disputants.[51] Also, sadly and without doubt, the children of high-conflict couples suffer as a result of their parents intense and chronic disputes. But unless harm to children rises to the level of abuse or neglect, we see no broad justification for judicial intervention in high-conflict separated families apart from high-conflict married families.

High-conflict families need help, but our question is whether hearing their disputes is helpful to them, their children, or the administration of justice. The fact that mental health professionals find personality disorders extremely difficult if not impossible to treat,[52] together with the pattern of repeat litigation, makes us extremely dubious about the adversarial system's ability to effectively resolve high-conflict cases. Empirical issues like these

50. Coates et al. estimate that between 8% and 12% of divorcing parents are high-conflict cases. Coates et al., *supra* note 31, at 246–47. Johnston describes 10% of divorcing families as exhibiting "substantial" legal conflict, while 15% showed "intense" legal conflict. Janet R. Johnston, *High-Conflict Divorce*, FUTURE CHILD., Spring 1994, at 165, 167, *available at* http://www.futureofchildren.org/pubs-info2825/pubs-info_show.htm?doc_id=75515. This substantial percentage constitutes a far greater proportion of the disputed custody cases heard by judges for two key reasons. First, as Maccoby and Mnookin found, 90% or more of divorcing parents resolve their disputes outside of court. MACCOBY & MNOOKIN, *supra* note 37, at 137. Most of these contested cases, by definition, are high-conflict divorces. *Id*. at 139. Second, high-conflict cases, again by definition, are likely to relitigate their disputes repeatedly. Thus, we can safely assume that the majority of cases heard by judges are high conflict.

51. Johnston, *supra* note 50, at 169 ("Using ratings from the third edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM III), two-thirds of the 160 parents in the first clinical study of high-conflict divorce . . . were diagnosed as having personality disorders and one-fourth as having traits of the same.").

52. Marsha N. Linehan et al., *Dialectical Behavior Therapy for Borderline Personality Disorder*, *in* CLINICAL HANDBOOK OF PSYCHOLOGICAL DISORDERS 470, 470 (David H. Barlow ed., 3d ed. 2001). In the context of introducing one of the few promising and empirically tested treatments for personality disorders, "dialectical behavior therapy," an intensive and lengthy treatment, these authors note, "Clinicians generally agree that clients with a diagnosis of borderline personality disorder (BPD) are challenging and difficult to treat. Indeed, the treatment of such individuals is something that many practitioners approach with trepidation and concern." *Id.*

aside, we again wonder theoretically *why* courts are entertaining these substantively superficial (but emotionally intense) disputes between parents who live apart when courts clearly would reject playing any part in the minor parenting disputes (or emotionally intense disputes) between married parents. Yes, children are being hurt, and something should be done to try to help these families, but courts do not insert themselves in married families unless the parental conflict rises to the level of child or spousal abuse. We urge courts to take the same position in high-conflict disputes between separated, divorced, or never-married parents. As an alternative means of serving the policy goal of helping high-conflict separated, and intact, families, courts or mental health agencies could, and perhaps should, offer these families informal dispute resolution or therapeutic services.

Our goal, then, is once again to treat separated parents like married parents by "denying" them their "right" to their day in court. We suggest three specific ways of doing so. First, courts should not hear any parental dispute unless it rises to a level such that it involves legal custody, namely, whether parents should have joint or sole authority to make decisions about schooling, religious training, or elective medical care. Not only should courts refuse to enter disputes about mundane, day-to-day parenting, but judges also should not rule on *specific* disputes that involve legal custody; for example, whether a child should or should not attend a particular school. Rather, courts should decide only whether parents must make these kinds of decisions jointly or whether one parent will have the sole authority to make such decisions on their own.[53] The court then would leave the actual decision itself for one or both parents to make.

To our surprise, legislation currently does not explicitly restrict court access based on the nature of a parental dispute. Apparently, any dispute, no matter how minor, is sufficient to justify legal intervention, provided that one parent petitions for a hearing and the dispute is between parents who are not living together as husband and wife. Yet, legal experts clearly recognize the necessity of distinguishing conflicts about legal custody, which are viewed as a potentially legitimate source of litigation, from mundane parenting disagreements, which are not. For example, in their recommendations for reforming statutory definitions of legal

53. In our view, if a legal custody dispute is contested in court, this strongly tilts the decision in favor of sole over joint legal custody. *See* EMERY, *supra* note 34, at 120 ("Because judicial decisions must be rendered only when parents cannot agree, a preference for awarding joint physical custody in contested cases may be targeting the right solution at the wrong group of parents . . . .").

custody, the ALI states: "Unless otherwise provided or agreed by the parents, a parent should have sole responsibility for day-to-day decisions for the child while the child is in that parent's custodial care and control, including emergency decisions affecting the health and safety of the child."[54] What the ALI proposal lacks is an enforcement mechanism, or rather a clear statement that disputes about day-to-day parenting matters are *not* actionable. High-conflict cases make it clear that a bright line is needed about what parenting matters courts will and will not hear.

Our second recommendation for restricting access to courts in high-conflict cases is to set time limits that must expire before a custody matter can be reheard, a proposal embraced in several states, but not by the ALI.[55] We assume that these rather arbitrary time periods were set with the intent of addressing the problems created by repeat litigation and high-conflict cases, and for this reason, we recommend adopting a policy where a legal or physical custody disposition will be considered for modification within a period of two years only if stringent criteria are met. While such a policy does not treat parents who live apart exactly like married parents, it is a desirable movement in that direction by limiting their access to court.

Our third recommendation is to more clearly define the most commonly used criterion for reopening a custody matter, a "change of circumstances." A change of circumstances commonly is defined as having occurred when events happen after a decree has been entered that were unanticipated by parties.[56] The ambiguity of this standard gives high-conflict couples, and other potential disputants, many opportunities to make a claim of changed circumstances, and the ambiguity also invites legal conflict in rebutting such claims. In an attempt to craft a standard that is somewhat less encouraging of claims of a change in circumstances, the ALI suggests more specific events that should *not* constitute a change of circumstances, for example, a parent's remarriage or cohabitation.[57] This is a step in the right direction, but falls short when judged by our guiding principle: what change of circumstances in a married family, other than child abuse or neglect, would be sufficient to justify judicial

54. ALI PRINCIPLES, *supra* note 12, § 2.08.

55. As reviewed in the ALI PRINCIPLES, several statutes restrict modification of a custody order within a given time period, for example, two years, unless stringent criteria are met that justify reopening the case. *Id*. § 2.15.

56. For a discussion of this definition of a change of circumstances, see *id.*, and for a more general discussion both of current law and recommendations for change, see *id.* § 2.15.

57. *Id.*

intervention? We cannot think of any such circumstance, including Jeremy and Justine's difficult relocation dispute, although we would welcome a definition of a change in circumstances that included relocation—as long as the standard was explicit. We believe, however, that our first two proposals—to limit claims to disputes about legal or physical custody and to strongly discourage relitigation for a period of two years following settlement—would have a much greater impact in discouraging high-conflict couples from using the courts as a forum to vindicate themselves or to punish their former partner.

In closing our discussion of implementing policies to discourage parents from repeat litigation about childrearing conflicts, we should be clear that we are *not* suggesting that parents who live apart must forever live according to whatever parenting plan they initially agreed to. Actually, we are on record as advocating the opposite. In a recent book written for parents, one of us (R.E.) urged parents to view their parenting plan as a "living agreement," one that they will revisit and revise as their children grow and develop and as the parents' own circumstances change.[58] In our twelve-year follow-up study of our randomized trial of mediation and litigation, in fact, parents who mediated made more changes in their parenting plan than those who reached settlements in the adversary system.[59] Importantly, parents made only about one and a half changes, on average, over the course of twelve years, and the parents typically worked out the arrangements informally between themselves or with the help of a neutral third party.[60] Such changes are similar to those made in married families—for example, relocating once or twice to a new home or new city during their children's childhood based on the parents' mutual agreement to make the change. In any case, our point is not to oppose a degree of flexibility in a parenting plan, but rather to discourage parents from using the courts to make parental decisions.

VII. STRONGLY ENCOURAGE ALTERNATIVE DISPUTE RESOLUTION

Our final set of recommendations stemming from our desire to treat separated parents more like married parents concerns the use

58. EMERY, *supra* note 43, at 165–68 (remarking that married parents should be expected to decide, when their children are very young, precisely where they will attend college, a practical illustration of parenting apart in a way analogous to parenting together).

59. Robert E. Emery et al., *Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years After Initial Dispute Resolution*, 69 J. CONSULTING & CLINICAL PSYCHOL. 323, 326 (2001).

60. *Id.*

of alternative forms of dispute resolution. As we have noted, many forms of ADR have been developed in an attempt to help separated, divorced, and never-married parents to reach settlement about child custody and financial matters, including ongoing concerns about parenting and co-parenting. We very much support such efforts because they offer alternatives that are less adversarial, give parents the opportunity to be fully involved in making decisions about their own children and their own lives, and offer a much needed forum for resolving disputes. We also believe that, in so doing, ADR programs serve the broader public interest and, as such, are worthy of public support, for example, as court-connected services. At first blush, this stance may appear to be inconsistent with the central argument we have developed, yet it is not. We would justify public support for such programs based on the broad goal of encouraging and supporting positive family relationships, not upon the court's obligation to intervene in disputes between separated parents. Such a policy would be consistent with our goal of treating separated parents more like married parents and would share a social policy justification with efforts such as those designed to promote and strengthen marriage.[61]

Our general position holds specific implications for each of the three major forms of ADR that currently are being promoted for addressing childrearing and other disputes between parents living apart: mediation, parenting coordination, and collaborative law. One controversy about mediation is whether the process interferes with parents' "right" to have their parenting disputes heard in court,[62] but no rights are being denied if, like married parents, separated parents have no right to take their parenting disputes to court, or at least a limited right. Recognition that separated parents have no inherent right to have judges decide their parenting differences also would undercut an objection to mandated mediation, as has existed in California since 1981 and has been implemented in many other states and local jurisdictions.[63] Such programs do not obligate parents to reach a settlement in mediation. What mandatory mediation does typically require is a good faith effort, often defined simply as attendance at one educational session about ADR, and even these programs grant exceptions, for example, in

61. *See generally Marriage and Child Wellbeing*, FUTURE CHILD., Fall 2005, at 3, 3–175.

62. *See* BRYAN, *supra* note 10; *see also* Firestone & Weinstein, *supra* note 11, at 204 (arguing that the focus on the "rights" of parents in custody and parenting disputes often fails to take into account parents' responsibility to their children).

63. CAL. CIV. CODE § 4607 (West 1981).

cases of serious domestic violence.[64]

Our analysis also holds implications for parenting coordination, a rapidly growing area of ADR in high-conflict cases, where a mental health professional first attempts to mediate parenting disputes but becomes an arbiter who exercises quasi-judicial authority and makes a (relatively minor) decision for parents if they fail to reach agreement. One important and often controversial issue about parenting coordination is what decisions the parenting coordinator can make as an arbiter, if necessary, and what decisions must be left to judicial authority. Our recommended limitations on the nature of disputes that legitimately can or cannot trigger judicial involvement should help greatly to identify the boundaries of the parenting coordinator's authority, since most of the disputes raised by high-conflict couples fall short of our recommended threshold for triggering judicial review.[65] Parenting coordinators are not exercising quasi-judicial authority if the matters they decide are outside of the scope of judicial intervention. As an alternative, parents who want to work with a parenting coordinator could contract to any specific terms of authority for the parenting coordinator in the mediation-arbitration procedure.

Finally, our analysis holds implications for collaborative law, a relatively new movement to reshape attorney negotiations in divorce and custody cases. Collaborative lawyers receive training in principled negotiation, and, most importantly, they contract with their clients that they will *no longer represent them* if they fail to negotiate a settlement out of court and the client chooses to proceed with litigation. After the parties have signed the contract committing to the collaborative process, four-way meetings between both parties and their attorneys are used to share information, discuss options, offer solutions, and eventually arrive at a mutually acceptable agreement.[66] In essence, the parties in the collaborative

64. Ann. L. Milne, *Mediation and Domestic Abuse*, *in* DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 304, 314 (Jay Folberg et al. eds., 2004) ("When mediation is mandated, the mandate should refer to the requirement to offer the service, not to accept it. Mediation should be voluntary for all participants and especially for victims and batterers. Assuming they are making an informed decision and have had an opportunity to learn what mediation is and how it works, clients should be free to refuse to participate in mediation. Furthermore, clients should be free to withdraw from a mediation process at any point in time.").

65. *See* Coates et al., *supra* note 31.

66. *See generally* Elizabeth Strickland, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979, 983–86 (2006) (describing generally how the collaborative law process works).

process contract to resolve their conflicts privately and without court involvement. Ethical questions have been raised about the practice of collaborative divorce, especially as to whether the process compromises the attorney's ethical obligation of vigorous representation. We will not delve into the details of various ethical considerations, but instead simply note that if a parenting dispute is not actionable, there is no vigorous representation dilemma. Rather, the approach may instead be viewed as a part of the attorney's obligation to counsel and advise.[67] The collaborative process promotes parental responsibility and autonomy as parents retain control, unlike in litigated disputes, over the outcome of their negotiations.[68] In addition, the process requires quality communication between the parties which can result in much more successful co-parenting in the future.[69] Furthermore, the collaborative process focuses not on the legal rights of the parties but on finding creative solutions that maximize the interests of both the children and their parents, which is ultimately beneficial to the children's emotional stability.[70] Finally, collaborative law, like other forms of ADR, can reduce the backlog in the family courts and reduce the strain on the administration of justice since it is a process that occurs outside of the courthouse.[71]

VIII. CONCLUSION

Our recommendations for easing judicial review and administration of custody disputes, limiting court access in high-

67. *Id.* at 1011–12 (noting that the preamble to the ABA Model Rules of Professional Conduct acknowledges the multiple functions of a lawyer including advisor, advocate, negotiator, and evaluator).

68. Carrie D. Helmcamp, *Collaborative Family Law: A Means to a Less Destructive Divorce*, 70 TEX. B.J. 196, 196–97 (2007); *see also* Firestone & Weinstein, *supra* note 11, at 211 ("A process in which parents can fully participate and begin to take responsibility for the decisions that will reshape their lives does not occur when families must rely on judicial decision making. Although it may be true for child protective cases, divorce is not in and of itself a reason for the state to direct the lives of parents and children.").

69. *See* Helmcamp, *supra* note 68, at 196–97; *see also* Firestone & Weinstein, *supra* note 11, at 204 (arguing that the adversarial process promotes controversy and does nothing to promote healing or healthy communication in the future).

70. *See* Firestone & Weinstein, *supra* note 11, at 209 (suggesting the need for an emphasis on interest-based approaches to resolving custody and parenting disputes with the goal of increasing collaboration).

71. Strickland, *supra* note 66, at 997 ("Additionally, because collaborative law takes place outside the court setting, it has the potential to alleviate the strain on judicial resources associated with traditional court-obtained divorces.").

conflict cases, and promoting ADR are, in our view, modest, and frankly, not terribly original. The clear trend in family law over recent decades has been in the direction we advocate. While our recommendations may not be novel, our rationale for making these changes is. We base our positions in the general and surprisingly unexamined goal of treating separated families more like married families. This theoretical position, and our related call for reexamining the basis of our current legal regime in the custody arena, offers a new way of conceptualizing custody disputes, parenting, and co-parenting in all kinds of families, and the goals, practice, and effects of law and policy. As such, the modest reforms outlined here could, based on our unique rationale, lead to much more dramatic changes in the future, perhaps including an entirely new approach to helping *all* parents in dispute to resolve their differences in a manner that minimizes legal intervention and promotes parental cooperation and self-determination. If such a basic change in family law does *not* occur, the future may witness the opposite effect, one equivalent to allowing today's courts to enter and decide disputes between married parents. As more and more children are born into families that separate, divorce, cohabit, or never live together, our family courts, by default, gain jurisdiction over what traditionally has been viewed as the internal affairs of the family.