INTRODUCTION

Then the king said, “Bring me a sword.” So they brought a sword for the king. He then gave an order: “Cut the living child in two and give half to one and half to the other.” 1 Kings 3:24–25 (NIV)

In most divorce cases, there is little or no dispute over who should have custody of the children. Since the parents agree on custody and visitation, they simply ask the court to approve the arrangement they work out. In the vast majority of cases, the court will do so.

When there is a dispute, however, it can be intense. Judges, forced into the role of King Solomon, say that child custody is one of the most painful issues they face. “We are asked to play God, a role we are neither trained nor prepared for,” lamented a family law judge. Sometimes the bitterness between parents in custody battles can be extraordinary. In one case, the child tragically died in the midst of his parents’ marital difficulties. This did not stop the rancor. The divorcing parents could not agree on who should control the disposition of their son’s body. In a decision “reminiscent of Solomon,” the judge ruled that if they could not agree on who should bury their son, he would order the body cremated and each given “half the ashes.”

are this rancorous, it does demonstrate the level of hostility that is possible. In this chapter, we will explore the spectrum of child-custody cases, from those in which the parties are in agreement to those in which their disagreement is little short of open warfare.

In our early history, child-custody disputes were rare because the wishes of the father were almost always followed. If he wanted custody upon divorce, the courts gave it to him. A radical change occurred in the early nineteenth century, when the courts began awarding custody based on a determination of the best interests of the child. \(^2\) The new standard, however, was controversial, since the courts often presumed that it was in the best interest of a young child to be placed with the mother. (This presumption was called the tender years presumption.) Critics argued that the effect of the presumption was to replace a father-dominated system with a mother-dominated one. Today, gender-based presumptions have been abolished or declared unconstitutional as a denial of the equal protection of the law. Courts still apply the best-interests-of-the-child standard, but without using presumptions that favor one gender over the other. Nevertheless, mothers continue to be granted custody in the overwhelming majority of cases—about 90 percent. Later, we will examine some of the explanations for this reality when we take a closer look at the tender years presumption and its replacement.

**KINDS OF CUSTODY**

A distinction needs to be made between physical custody and legal custody:

- **Physical custody** (sometimes called **residential custody**) is the right to decide where the child will reside. The phrase also refers to the actual residence of the child. The parent with physical custody is called the **custodial parent** (or sometimes the **residential parent**). The other parent is called the **noncustodial parent**. While the child does not live with a noncustodial parent, the latter often has the right of visitation.

- **Legal custody** is the right to make the major child rearing decisions on health, education, religion, discipline, and general welfare.

If only one parent is granted both kinds of custody, he or she has **sole physical custody** and **sole legal custody**. This phrase is more accurate than the phrase “sole custody.” If you are told that a parent has sole custody, you need to determine whether this includes both physical and legal custody.

If both parents are granted physical and legal custody, they have **joint physical custody** and **joint legal custody**. This phrase is more accurate than the phrase “joint custody” or the more modern phrase “shared parenting.” If you are told that parents have joint custody or that they share the task of parenting, you need to determine whether this includes both physical and legal custody. Joint physical custody means that the child spends alternating, but not necessarily equal, periods of time in the homes of the mother and father. Joint legal custody means that the mother and father must agree on the major child rearing decisions such as where the child will go to school or whether he or she will have a medical operation.

For example:

Ten-year old Helen Teller lives year-round with Grace Teller, her mother. Helen’s father, Peter Teller, lives in a different state, a thousand miles away. Grace and Peter regularly talk on the phone about all the major decisions in Helen’s life. No decision is made unless both agree.

In this example, Grace and Peter have joint legal custody, and Grace has sole physical custody.

When the parents have more than one child, courts try to place all the children with the same parent in order to foster sibling bonding. If this is not possible, the custody arrangement in which siblings are placed with different parents is called split custody.

States do not always use the same terminology for custody. In Texas, for example, the word conservatorship is used in place of custody. The person with primary responsibility for raising the child is called the managing conservator. Also, some states prefer the phrase “parenting plan” or “co-parenting plan” to the phrase “custody arrangement.”

Finally, it should be pointed out that the categories of custody we have been discussing can be somewhat fluid in practice in spite of what was originally agreed upon by the parents or imposed by a court. Suppose, for example, that the father begins to withdraw after having difficulties with the mother in working out their joint physical and joint legal custody arrangement. After a while, the mother may find herself with sole physical and sole legal custody. Or, in a case where the mother begins with sole physical custody, the father’s visitation might become much more extensive than contemplated because of an illness of the mother. In effect, the father finds himself having sole physical custody. Such rearranging may occur without formal changes in the custody clauses of the original separation agreement. And unless child support becomes an issue, the courts may never become aware of these informal adjustments.

We turn now to the custody decision itself—both when the parties are able to reach agreement in their separation agreement and when the custody decision is forced upon them because of their inability to agree.

**SEPARATION AGREEMENT**

**Custody**

In attempting to negotiate the custody term of a separation agreement, the parties must consider many circumstances:

- The kind of custody they want.
- The age and health of the child.
- The age and health of the parents. Which parent is physically and mentally more able to care for the child on a day-to-day basis?
- The parent with whom the child has spent the most time up to now. With whom are the emotional attachments the strongest?
- Which parent must work full-time?
- The availability of backup assistance (e.g., from grandparents or close friends who can help in emergencies).
- The availability of day care facilities.
- How will the major decisions on the child’s welfare be made (e.g., whether to transfer schools, whether to have an operation)? Must one parent consult the other on such matters? Is joint consent ever needed? Is such consent practical?
- The religious upbringing of the child.
- The child’s surname. Can the name be changed if the mother remarries?
- Can the child be moved from the area?
- Who would receive custody if both parents died?
- If disputes arise between the parents concerning custody, how are they to be resolved? Arbitration? Mediation?
- What happens if one parent violates the agreement on custody? For example, the custodial parent interferes with the visitation rights of the noncustodial parent. Can the latter stop paying alimony?
• Mutual respect. Do the parties specifically agree to encourage the child to love both parents?

In the most common custody arrangement used today, the mother receives sole physical and sole legal custody. Parents do not often use joint physical custody because of the disruptive impact on a child of constantly changing households. The arrangement might work if the child is very young, the parents live close to each other, and the parents are relatively well-to-do. In most cases, however, joint physical custody is not practical. Also, if either of the parties ever applies for public assistance, joint physical custody might raise questions about eligibility. For example, under the federal program for Temporary Assistance for Needy Families (TANF), benefits may depend in part on having an eligible child in the home. A parent may have difficulty meeting this requirement if the child spends long alternating periods with the other parent. Joint legal custody, on the other hand, is more common. In approximately 20 percent of separations and divorces, the parents have joint legal custody, with one parent having sole physical custody.3

Some states use a presumption that joint legal custody is in the best interests of the child and should be ordered unless the facts of the case demonstrate that this arrangement would not work. Advocates of joint custody claim that it is psychologically the most healthy alternative for the child. It arguably produces less hostility between parents, less hostility between child and individual parent, less confusion in values for the child, less sexual stereotyping of parental roles (one parent “works,” the other raises the children), less manipulation of the child by one or both parents, less manipulation of one or both parents by the child, etc. Joint custody arrangements also dramatically increase the likelihood that child support will be consistently paid. Critics, however, argue that the decision on joint custody should be approached with great caution, since it will work only in exceptional circumstances. The parents have just separated. In this environment, it is doubtful that they will be able to cooperate in the manner called for by a joint legal custody arrangement. A study of 700 divorce cases in Massachusetts concluded that couples with joint legal custody are more than twice as likely to reopen lawsuits over child care arrangements than couples where only one parent had custody. In addition, it is by no means clear that a child is more likely to be better off when living under a joint custody arrangement. Recent studies have found no difference in a child’s development under joint custody and under more traditional sole custody arrangements.4

The following factors are relevant to a decision on whether joint legal custody will work. Any one of these factors might tip the scale against its feasibility.

• Is each parent fit and mentally stable?
• Do both parents agree to joint legal custody, or is one or both hesitant or opposed?
• Have the parents demonstrated that they are able to communicate at least to the extent necessary to reach shared decisions in the child’s best interests?
• Is joint custody in accord with the child’s wishes, or does the child have strong opposition to such an arrangement?

Unfortunately, parents do not always have the welfare of the child in mind when negotiating the custody term of the separation agreement. For example, a father’s request for joint custody may be no more than a bargaining chip to pressure the mother to agree to a property settlement that favors the father. If she agrees to the property settlement he wants, he will not challenge the sole custody she wants.

4Mary Ann Lamanna and Agnes Riedmann, Marriages and Families 481 (2000).
Visitation

In negotiating visitation rights in a separation agreement, a number of details must be worked out:

- When can the noncustodial parent have the child visit? Alternating weekends? School vacations? Holidays? Which ones? How much advance notice is needed if additional time is desired?
- At what time is the child to be picked up and returned?
- Can the noncustodial parent take the child on long trips? Is the consent of the custodial parent needed?
- Can the custodial parent move out of the area even though this makes visitation more burdensome and costly? Should a clause be inserted that the permission of the noncustodial parent is needed before the child can be moved more than a specified number of miles away?
- Who pays the transportation costs, if any, when the child visits the noncustodial parents?
- Is the noncustodial parent required to be available for visits? Will it be a violation of the separation agreement if he or she does not visit? Or is visitation at the sole discretion of the noncustodial parent?
- When the noncustodial parent decides not to visit at a given time, must he or she notify the custodial parent in advance, or attempt to?
- Do any third parties have visitation rights (e.g., grandparents)?
- If disputes arise between parents on visitation, how are they resolved? Arbitration? Mediation?
- What happens if one of the parties violates the agreement on visitation?
- Does this breach justify nonperformance by the other party of another term of the separation agreement (e.g., alimony payments)?

There are two major choices in selecting visitation times. The parties can simply state in their separation agreement that visitation will be at “reasonable” times to be mutually agreed upon by the parties in the future, with adequate advance notice to be given by the noncustodial parent when he or she wants visitation. Alternatively, the agreement can spell out precise times for visitation. The following article advocates the latter position in cases where both parents have relatively stable work schedules.
Text not available due to copyright restrictions
Negotiating a mutually acceptable custody and visitation plan is not always easy. “For many family law practitioners, the seemingly endless wrangling over days and even hours is one of the most time-consuming but least rewarding parts of custody practice.”\(^5\) Computer programs exist to help parties plan and understand timesharing schedules. This can be particularly helpful in cases where the family has more than one child. Joint custody options in such cases can be complex. Computer programs can generate color-coded calendar graphics to help the parties visualize what is involved.

For an example of such a graphic from a popular computer program, see Exhibit 9.1. Kidmate is designed to help parents plan and visualize custody and visitation options. In this example, the mother and father have joint physical and joint legal custody. There is also an additional caretaker (AC), a boarding school, in the example. Four children are involved: Michael (Mic), Stephanie (Ste), Claire (Cla), and Richard (Ric). The mother and father have been negotiating a possible schedule through their attorneys. The latest proposal under consideration is Proposal Number 3. One of the attorneys then used Kidmate to give the parents a graphic picture of what the schedule would look like for one month, December, under this proposal.

ASSIGNMENT 9.1

Richard and Helen Dowd have been married for six years. They are both financial consultants who work out of their home. They have one child, Kevin, aged four. Recently, they decided to separate. Draft a joint custody agreement for them. Assume that both want to be active in raising Kevin. (See General Instructions for the Agreement-Drafting Assignment in Appendix A.)

CONTESTED CUSTODY: INTRODUCTION

If the parties are able to agree on issues of custody and visitation, they place their agreement in writing, usually in the separation agreement. A court will accept the terms if it finds that they are in the best interests of the child. If, however, the parties cannot agree, the decision will be imposed on them by the court.

In contested custody cases, many courts require the parties to attend parenting classes. (Some states mandate such classes for all divorcing parties with children even if they have reached agreement on the custody issues.) For example, Tarrant County, Texas, requires attendance at a four-hour seminar on how parents can help their children cope with separation and visitation. Using video and role-playing, the seminar emphasizes the emotional harm that fighting parents can continue to inflict on their children.

Most courts have guidelines they distribute to the parties on the effect of divorce on children. Sometimes these guidelines are made part of the court’s custody decree. Before examining how courts make the custody decision in contested cases, we should examine some of these guidelines. The following (written on the assumption that the mother is awarded custody) are used in Wisconsin.

**Contested**
Disputed; challenged. (If the parties agree on how to resolve an issue, it is an uncontested issue.)
Most courts force parents into mediation to try to construct a workable custody plan they both can support. The mediator is a private counselor or a trained government employee in the family services division of the court who meets with the parents to try to help them reach agreement. The mediator does not force a decision on them. While he or she may ultimately recommend a custody/visitation arrangement to the court, the primary objective of mediation is to pressure the parents to reach their own agreement, which they can take before the judge for approval. On the mediation process, see page 214.

PARENT VS. PARENT

First, we consider the custody decision when the dispute is between the two biological parents who cannot agree on custody. The standard used by the court, as we have seen, is the best interests of the child. The main participants are the mother and her attorney against the father and his attorney. (The parent with all or most of the financial resources will often be ordered to pay the reasonable attorney fees of the other parent if the latter does not have sufficient resources to hire one.) In most states, the court has the power to appoint separate counsel for the child. A guardian ad litem is an individual (often an attorney, although in some states it can be a social worker) who is appointed to represent the interests of a third party—here, the child. This individual will act independently of the attorneys for the parents.

How does the court decide who receives custody? What factors go into the decision? Earlier in this chapter, we presented a list of factors that parties negotiating a separation agreement must consider in arriving at a mutually acceptable custody arrangement. A court will usually consider these same factors in rendering a custody decision when the parties have not been able to reach agreement or in deciding whether to approve a custody arrangement that they have agreed upon. We will examine the factors through the following themes:

- Court discretion
- Stability
- Availability
- Emotional ties
- Legal preferences

mediation
The process of submitting a dispute to a third party (other than a judge) who will help the parties reach their own resolution of the dispute.

guardian ad litem
A special guardian appointed by the court to represent the interests of another.
Chapter Nine

- Morality and lifestyle
- Domestic violence
- Religion
- Race
- Wishes of the child
- Expert witnesses

**Court Discretion**

Of necessity, trial judges are given great discretion in making the custody decision. Unlike determining child support (see chapter 10), there are no formulas the court can use to reach the custody decision. The standard is very broad: the best interests of the child. Inevitably, the judge’s personal views and philosophy of life help shape his or her concept of what is in the best interests of a child (e.g., views on the traditional family, alternate lifestyles, working women, child discipline). Of course, a judge would never admit that he or she is following his or her own personal views and philosophy; judges are supposed to be guided by “the law” and not by their individual biases. In reality, however, they are guided by both.

**Stability**

By far the most important consideration is stability. Courts are inclined to award custody to the parent who will cause the least amount of disruption to the disintegrating life of the child. The loss of a household with two functioning parents is a shattering experience for most children. They will need as much stability as possible in their living arrangement, schooling, religious practice, access to relatives and friends, etc. While their lives will never be the same again, a court will want to know how each parent proposes to maintain maximum stability and continuity in these areas. Each parent should submit to the court a “parenting plan” that will attempt to demonstrate how the parent proposes to meet the needs of the child, the most important of which is the preservation of as much stability as is possible under the circumstances.

**Availability**

Which parent will be available to spend the time required to respond to the day-to-day needs of the child? There is a danger that the child will feel abandoned and responsible for the divorce. To offset this danger, it is important that at least one of the parents be available to the child to provide reassurance and comfort. The court will want to know which parent in the past:

- Took the child to doctor’s appointments
- Met with teachers
- Took the child to church or synagogue
- Helped with homework
- Attended school plays with the child
- Involved the child in athletic activities
- Arranged and attended birthday parties
- Changed diapers
- Stayed up with the sick child during the night

An office representing a parent seeking custody should make sure that he or she is able to answer questions such as the following during a deposition or on the witness stand at trial:

- What is the name of the child's pediatrician?
- When was the last time the child saw the pediatrician and for what reason?
- What is the name of the child's dentist?
• When was the last time the child saw the dentist and for what reason?
• Does the child have nightmares? If so, about what?
• What television programs do you watch with the child?
• What is the name of one of the child’s main teachers? What does this teacher think are the child’s strengths and weaknesses as a student?
• In what subject has the child received his or her best grade and worst grade?
• What are the names of some of the child’s friends at school?
• What are the names of some of the child’s friends at home?

A parent may not be able to answer all of these questions from direct knowledge because he or she is at work most of the day. Yet a responsible parent would be interested enough in the child to find out answers to such questions by talking with the other parent and with the child.

For the future, the court will want to know what plan each parent has to meet the future day-to-day needs. The health, age, and employment responsibilities of each parent are obviously relevant to this plan.

Immediately after the separation, it is common for one of the parents to have temporary custody. Upon filing for divorce, the court may formally order a temporary-custody arrangement (with visitation rights) pending the final court proceeding, which may take place months later. During this interval, the court will inquire into the amount and kind of contact each parent had with the child. Again, the above list of questions becomes important, particularly with respect to the parent who moved out. How much time has this parent spent with the child? Have letters and gifts been sent? What about visits and telephone calls? To what extent has this parent gone out of his or her way to be with the child?

Emotional Ties

Closely related to time availability is the emotional relationship that has developed in the past between a parent and child and the future prospects for this development. Which parent has been sensitive or insensitive to the psychological crisis that the child has experienced and will probably continue to experience because of the divorce? Of particular importance is the extent to which one parent has tried and succeeded in fostering the child’s love for the other parent. A qualification to become a custodial parent is the ability and inclination to cooperate in arranging visitations by the other parent. Hence a major issue will be which parent can separate his or her own needs and lingering bitterness from the need of the child to maintain emotional ties with both parents. (Children who have been pressured by one parent to be hostile toward the other might suffer from what is called the parental alienation syndrome.)

A number of other factors are relevant to the emotional needs of the child:

• The level of education of the parent
• The psychological health of the parent: Has the parent been in therapy for any reason? Has it been helpful? What is the parent’s attitude about seeking such help? Positive? Realistic? Does the parent think that the other parent is the only one who needs help?
• The stability of the parent’s prior work history
• Views on discipline, TV watching, studying, religious activities, cleaning the child’s room, etc.
• How siblings get along in the home
• General home and neighborhood environment: Cramped apartment conditions? Residential area? Easy accessibility to school, friends, and recreational facilities?

Also, does the parent seeking sole custody plan to move from the area? If so, into what kind of environment? How will the proposed move affect the other
parent’s ability to visit the child? Depending upon the circumstances of the case, a court might award custody to a parent on condition that he or she not move out of a designated area without the consent of the other parent.

CASE

Schutz v. Schutz
581 So. 2d 1290 (1991)
Supreme Court of Florida

Background: Following a divorce, custody was eventually given to the mother, Laurel Schutz (the petitioner). When the trial court became concerned that the children had negative feelings toward their father, Richard Schutz (the respondent), it ordered Laurel to do everything in her power to create in the minds of the children a loving feeling toward their father. Laurel objected that this interfered with her First Amendment free speech rights and appealed. The case is now on appeal before the Supreme Court of Florida.

Decision on Appeal: Judgment affirmed. The order did not violate the First Amendment rights of Laurel Schutz.

Opinion of the Court:
Justice KOGAN delivered the opinion of the court.

The petitioner contends [that the order] requires her to affirmatively express feelings and beliefs which she does not have in violation of her first amendment right of free expression. . . . A final judgment dissolving the six-year marriage of petitioner, Laurel Schutz (mother) and respondent, Richard R. Schutz (father) was entered by the trial court on November 13, 1978. Although custody of the parties’ minor children was originally granted to the father, the final judgment was later modified in 1979. Under the modified judgment, the mother was awarded sole custody of the children, and the father was both granted visitation rights and ordered to pay child support.

As noted by the trial court, the ongoing “acrimony and animosity between the adult parties” is clear from the record. The trial court found that in February 1981 the mother moved with the children from Miami to Georgia without notifying the father. After moving, the mother advised the father of their new address and phone number. Although the father and children corresponded after the move, he found an empty house on the three occasions when he traveled to Georgia to visit the children. The father was not notified that after only seven months in Georgia the mother and children had returned to Miami. Four years later in 1985, upon discovering the children’s whereabouts, the father visited the children only to find that they “hated, despised, and feared” him due to his failure to support or visit them. After this visit, numerous motions concerning visitation, custody and support were filed by the parties.

After a final hearing on the motions, the trial court found that “the cause of the blind, brainwashed, bigoted belligerence of the children toward the father grew from the soil nurtured, watered and tilled by the mother.” The court further found that “the mother breached every duty she owed as the custodial parent to the noncustodial parent of instilling love, respect and feeling in the children for their father.” The trial court’s findings are supported by substantial competent evidence.

Based on these findings, the trial court ordered the mother “to do everything in her power to create in the minds of [the children] a loving, caring feeling toward the father . . . [and] to convince the children that it is the mother’s desire that they see their father and love their father.” The court further ordered that breach of the obligation imposed “either in words, actions, demeanor, implication or otherwise” would result in the “severest penalties . . . , including contempt, imprisonment, loss of residential custody or any combination thereof.” . . .

We begin our analysis by noting our agreement with the district courts of appeal that have found a custodial parent has an affirmative obligation to encourage and nurture the relationship between the child and the noncustodial parent. See Gardner v. Gardner, 494 So. 2d 500, 502 (Fla. 4th DCA 1986), appeal dismissed, 504 So. 2d 767 (Fla. 1987); In re Adoption of Braithwaite, 409 So. 2d 1178, 1180 (Fla. 5th DCA 1982). This duty is owed to both the noncustodial parent and the child. This obligation may be met by encouraging the child to interact with the noncustodial parent, taking good faith measures to ensure that the child visit and otherwise have frequent and continuing contact with the noncustodial parent and refraining from doing anything likely to undermine the relationship naturally fostered by such interaction.

Consistent with this obligation, we read the challenged portion of the order at issue to require nothing more of the mother than a good faith effort to take those measures necessary to restore and promote the
frequent and continuing positive interaction (e.g., visitation, phone calls, letters) between the children and their father and to refrain from doing or saying anything likely to defeat that end. There is no requirement that petitioner express opinions that she does not hold, a practice disallowed by the first amendment. Coca-Cola Co. v. Department of Citrus, 406 So. 2d 1079, 1087 (Fla. 1981) (“the state may never force one to adopt or express a particular opinion”) . . . ; see Wooley v. Maynard, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) (states’ interest insufficient to outweigh individual’s first amendment right to avoid being courier of state motto); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642, 63 S. Ct. 1178, 1187, 87 L. Ed. 1628 (1943) (state cannot “prescribe . . . matters of opinion or force citizens to confess by word or act their faith therein”).

Under this construction of the order, any burden on the mother’s first amendment rights is merely “incidental.”** Therefore, the order may be sustained against a first amendment challenge if “it furthers an important or substantial governmental interest . . . and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” United States v. O’Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679, 20 L. Ed. 2d 672 (1968). Accordingly, we must balance the mother’s right of free expression against the state’s parens patriae interest in assuring the well-being of the parties’ minor children. However, as with all matters involving custody of minor children, the interests of the father and of the children, which here happen to parallel those of the state, must also factor into the equation.

In this case, the court, acting on behalf of the state as parens patriae, sought to resolve the dispute between the parties in accordance with the best interests of their children by attempting to restore a meaningful relationship between the children and their father by assuring them unhampered, frequent and continuing contact with him. See § 61.13(2) (b)1, Florida Statues (1985) (the court shall determine all matters relating to custody of minor children in accordance with the best interests of each child and it is the public policy of this state to assure a minor child frequent and continuing contact with both parents after marriage has been dissolved); id. § 61.13(3) (a) (“frequent and continuing contact with the nonresidential parent” is generally consid-

**Frazier v. Frazier, 109 Fla. 164, 172, 147 So. 464, 466 (1933) (noncustodial father is “entitled to have and enjoy [child’s] society for a reasonably sufficient length of time each year to enable him to inculcate in her mind a spirit of love, affection and respect for her father,” if such is not contrary to best interest of child); see Michael H. v. Gerald D., 491 U.S. 110, 109 S. Ct. 2333, 2342, 105 L. Ed. 2d 91 (1989) (parent-child relationship which develops within the unitary family is constitutionally protected); Quilloin v. Walcott, 434 U.S. 246, 254–55, 98 S. Ct. 549, 554–55, 54 L. Ed. 2d 511 (1978) (“the relationship between parent and child is constitutionally protected”).

er to be in best interest of child). In resolving the matter, the court also properly considered the father’s constitutionally protected “inherent right” to a meaningful relationship with his children,** a personal interest which in this case is consistent with the state’s interest in promoting meaningful family relationships. See id. § 61.001(2) (a) (one of the purposes of chapter 61 is to “safeguard meaningful family relationships”).

There is no question that the state’s interest in restoring a meaningful relationship between the parties’ children and their father, thereby promoting the best interests of the children, is at the very least substantial. Likewise, any restriction placed on the mother’s freedom of expression is essential to the furtherance of the state’s interests because affirmative measures taken by the mother to encourage meaningful interaction between the children and their father would be for naught if she were allowed to contradict those measures by word or deed.

Moreover, as evinced by this record, the mother as custodial parent has the ability to undermine the association to which both the father and the parties’ children are entitled. Frazier v. Frazier, 109 Fla. 164, 169, 147 So. 464, 466 (1933) (recognizing a noncustodial parent’s “inherent right” to “enjoy the society and association of [his or her] offspring, with reasonable opportunity to impress upon them a father’s or a mother’s love and affection in their upbringing”); § 61.13(2) (b)1 (minor child is assured frequent and continuing contact with both parents). Therefore, not only is the incidental burden placed on her right of free expression essential to the furtherance of the state’s interests as expressed in chapter 61, but also it is necessary to protect the rights of the children and their father to the meaningful relationship that the order seeks to restore.

Accordingly, construing the order as we do, we find no abuse of discretion by the trial court, nor impermissible burden on the petitioner’s first amendment rights. . . . [T]he result reached is approved.

It is so ordered.

*The burden is “incidental” because the state interests which are furthered by the order are “unrelated to the suppression of free expression.” United States v. O’Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679, 20 L. Ed. 2d 672 (1968).
a. The mother was ordered to “promote the frequent and continuing positive interaction” between the children and the father. Wouldn’t this promotion constitute an expression of opinion by the mother? If so, isn’t she being required to “express opinions that she does not hold,” which the court said would violate the First Amendment?

b. Would the court have reached the same result if the mother was ordered to tell the children every day “Your father is a good man”?

c. Keeping in mind that the mother continues to be bitter about the father, give five examples of things she could say about the father to the children that would promote positive feelings about him without constituting opinions that she does not hold.

d. Would the mother violate the order if she refused to ever mention the father in the presence of the children?

e. What are the father’s options if, a year after this case, he concludes that the children “still hate me”?

Legal Preferences

As indicated earlier, at one time many courts presumed that it was in the best interests of a young child to be with its mother rather than its father. This tender years presumption was justified on the basis of biological dependence, socialization patterns, and tradition. “There is but a twilight zone between a mother’s love and the atmosphere of heaven, and all things being equal, no child should be deprived of that maternal influence.” A very strong case had to be made against the mother to overcome the presumption (e.g., proof that she was unfit).

Today the presumption no longer exists—at least formally. Fathers successfully argued that this gender-based presumption is an unconstitutional violation of the equal protection of the law. Male anger and frustration over the presumption were main reasons for the growth of the men’s rights movement. As a result, more fathers today are granted custody. Yet this is so in relatively few cases even though the number of father-only households has increased from 900,000 in 1970 to 2,200,000 in 2000. Mothers continue to be granted custody approximately 90 percent of the time. The cases in which fathers tend to be successful are those in which they are seeking custody of an older male child. At one time, courts established a presumption that it was in the best interests of an older boy to be with his father. This gender-based presumption, however, is as constitutionally suspect as the tender years presumption. No court today would openly acknowledge that it is using a pro-father presumption when the custody of an older male is in dispute.

A number of reasons account for the high percentage of cases in which the mother is granted custody. Perhaps the primary reason is the fact that many fathers simply do not ask for custody. Becoming a full-time, at-home parent does not fit into the life plan of large numbers of men, particularly if it means significant interference with their occupation. Arguably, another major reason is that fathers are still handicapped by the tender years presumption in spite of its formal abolition. Most of the judges now sitting on the bench grew up with full-time moms at home. Some experts feel it is difficult for these judges to accept the notion of giving sole custody to working fathers. But new judges are on the way. It “will take a generation of judges who are brought up by, or married to career women” before there is more sympathy for granting custody to working parents—particularly fathers.

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6Tuter v. Tuter, 120 S.W.2d 203, 205 (Mo. App. 1938).
In place of the tender years presumption, many courts have substituted a primary caregiver presumption, by which the court presumes that custody should go to the parent who has been the primary person taking care of the child over the years. This, of course, means that the mother continues to receive sole custody in most cases, since she is usually the one who stays home to care for the child. Even when both the mother and the father work outside the home, the mother is more likely to be awarded custody as the primary caregiver or caretaker. Some, therefore, have argued that this presumption is another disguise for the tender years presumption.

A less controversial presumption is that brothers and sisters are best kept together with the same parent whenever possible. (In effect, this was a presumption that split custody was not in the best interests of the children.) Finally, courts widely accept the idea that the preference of older, more mature children as to their own custody should be given great, though not necessarily controlling, weight.

Morality and Lifestyle

Just as marital fault or misconduct should not be a factor in deciding whether to grant a divorce (see chapter 7), it should not determine who receives custody—unless the fault affects the child. According to one court:

A judge should not base his decision upon [a] disapproval of the morals or other personal characteristics of a parent that do not harm the child. . . . We do not mean to suggest that a person’s associational or even sexual conduct may not be relevant in deciding a custody dispute where there is compelling evidence that such conduct has a significant bearing upon the welfare of the children.8

Assume that Bill and Mary are married with one child, Alice. After Mary and Bill separate, Mary and Alice move into an apartment where Mary begins living with her boyfriend. In the divorce proceeding, Bill argues that he should have sole custody because Mary is living in “illicit cohabitation” with her boyfriend. This argument will lose unless Bill can show that Mary’s relationship with her boyfriend is having a detrimental effect on Alice. An example would be evidence that Alice is becoming emotionally upset because of the boyfriend’s presence in the home and that this is negatively affecting her schoolwork. If the relationship is not affecting Alice, the presence of the boyfriend will not be relevant to the determination of custody despite Bill’s plea that his daughter should not be exposed to the “sin and immorality” of Mary’s conduct.

This result should also apply if the parent seeking custody has a homosexual partner in the home. A court will want to know if the couple is discreet in the expression of their mutual affection. If sexuality is flaunted, whether heterosexual or homosexual, a court is likely to conclude that a child will be adversely affected. Courts have granted custody to a gay parent when all of the factors point to a healthy home environment for the child and there is no evidence that the homosexuality will have an adverse impact on the child. At one time, there was fear that a parent’s homosexuality would cause the child to be homosexual. Many studies have rejected this conclusion, particularly since a child’s sexual preference is developed during its infancy and very early years. This is usually well before the homosexual parent seeks custody. It must be acknowledged, however, that a gay parent has a substantial uphill battle in gaining custody (or in keeping custody if the homosexuality is revealed only after the parent has been awarded custody). Gay parents have been most successful in winning custody when the heterosexual parent is either no longer available

or demonstrably unfit. In such cases, the homosexual parent wins by default unless his or her conduct is so offensive that the court will grant custody to neither biological parent.

**Domestic Violence**

A court is obviously unlikely to grant custody to a parent who has a history of child abuse—physical, emotional, or sexual. (Later, in the *Allen* case, we will examine the impact of an allegation of sexual abuse of a child.) What about domestic violence between the parents? Most courts take the position that a parent who commits spousal abuse is not necessarily an unfit parent. The court will want to know what effect the abuse has had on the child. Evidence of spousal abuse could be damaging if it was consistently committed in front of the child or if the anger and violence seriously disturbed the child’s ability to function normally. It is possible, however, for the offending parent to show that the abuse has been isolated and has not affected the home environment of the child. It may also help if this parent can show that he or she is seeking psychological counseling for anger control.

**Religion**

Under our Constitution, a court cannot favor one religion over another or prefer organized religion over less orthodox forms of religious beliefs. To do so could amount to an unconstitutional “establishment” of religion. The state must remain neutral. In the law of custody, the question is what effect the practice of religion is likely to have on the child, not which religion is preferable or correct according to the judge’s personal standards, or according to the standards of the majority in the community, or according to “respectable” minorities in the community. The court will want to know what religion, if any, the child has practiced to date. Continuity is highly desirable. Also, will the practice of a particular religion tend to take the child away from other activities? For example, will the child be asked to spend long hours in door-to-door selling of religious literature and hence be unable to attend regular school? If so, the court will be reluctant to award custody to the parent who would require this of the child.

When Helen married John, she converted from Catholicism to his religion, Judaism. Neither Helen nor John was a very religious person, however. To a moderate extent, their two children were raised in the Jewish faith. The couple divorced when the children were ages four and five. Because of John’s job, he could not be the sole custodian of the children. Hence he agreed that Helen receive sole custody. But he asked the court to order Helen to continue raising the children in the Jewish faith.

**ASSIGNMENT 9.3**

When Helen married John, she converted from Catholicism to his religion, Judaism. Neither Helen nor John was a very religious person, however. To a moderate extent, their two children were raised in the Jewish faith. The couple divorced when the children were ages four and five. Because of John’s job, he could not be the sole custodian of the children. Hence he agreed that Helen receive sole custody. But he asked the court to order Helen to continue raising the children in the Jewish faith.

a. Under what circumstances do you think a court can grant this request, so that, in effect, John will be granted *spiritual custody* of the children even though physical custody and legal custody (in all matters except religion) will be granted to Helen? (See General instructions for the Legal-Analysis Assignment in Appendix A.)

b. Suppose that Helen returns to her original religion and starts taking the children to Catholic mass. What options does John have in your state? (See General Instructions for the State-Code Assignment in Appendix A.)

**Race**

A child’s ethnic and cultural heritage is important. Suppose, for example, that a child has been raised in the Mexican American community. If possible, a
court will want to grant custody to the parent who will help the child maintain his or her contacts with this community. Race, however, cannot be the sole factor that determines custody. Assume, for example, that a divorced white parent
asks a court for custody because the other parent has married a black person. A court cannot grant custody for this reason. It would be an unconstitutional denial of the equal protection of the law.9

Wishes of the Child

Older children are almost always asked where they would want to live. Courts are understandably reluctant, however, to ask young children to take sides in custody disputes. If this becomes common practice, there would be an incentive for both parents to pressure the child to express preferences. If, however, the court is convinced that the child is mature enough to state a rational preference and that doing so would not harm the child, evidence of such a preference will be admissible. Great caution must be used in questioning the child. The judge may decide to speak to the child outside the formal courtroom (with the attorneys but not the parents present), or the judge may allow a professional (e.g., child psychologist, social worker) to interview the child at home.

Expert Witnesses

Psychologists, psychiatrists, social workers, and other experts can be called as expert witnesses by either parent to testify on the child’s home environment and emotional development, the mental stability of the parents, the suitability of various custody plans, etc. Either parent, or the guardian ad litem for the child, can make a motion that the court order a custody evaluation by an expert. An example of a custody-evaluation report by such an expert is provided in Exhibit 9.2.

ASSIGNMENT 9.4

a. What standards exist in your state to guide the judge on the decision to grant custody when the dispute is between the two biological parents? (See General Instructions for the State-Code Assignment in Appendix A.)

b. Find an opinion written by a court in your state in which the court granted custody to one of the parents following a divorce or legal separation. Pick an opinion in which both parents sought sole custody. State the factors that the court used in making this decision. Why did the judge decide not to give custody to the other parent? Do you agree with the judge's decision on the custody issue? Are there other facts about the case that you would like to know, but were not provided in the opinion? Do you think the investigators for each side did a good job of gathering all the facts? (See General Instructions for the Court-Opinion Assignment in Appendix A.)

COURT DECISION ON VISITATION

Introduction

Courts want to preserve as much of the child’s relationship with both parents as possible. Hence visitation rights are almost always granted to the non-custodial parent even if they must be exercised in the presence of third parties (see the discussion of supervised visitation below). Failing to grant such rights would be a step in the direction of terminating the parental rights of that parent (see chapter 15). Moreover, as indicated earlier, one of the criteria that a court will use in awarding sole custody to a parent is whether the latter will cooperate in the exercise of visitation rights by the other parent. Custodial parents who fail to provide such cooperation are sometimes dealt with harshly by
the court (e.g., transferring custody to the other parent, issuing contempt orders). It is never permissible, however, for the noncustodial parent to terminate child-support payments in retaliation for the custodial parent’s violation of visitation rights.

Whenever possible, the court will favor frequent and regular visitation by the noncustodial parent (e.g., every other weekend, alternating holidays, substantial summer vacation time). When the custody battle is between two relatively fit parents, the court is even more inclined to grant greater visitation rights to the loser.

An essential component of successful visitation in most cases is physical proximity between the child and the noncustodial parent. A great deal of litigation has centered on the right of the custodial parent to move the child substantial distances away. Some courts flatly forbid such moving. A few states have statutes that cover this problem. For example:

The custodial parent shall not move the residence of the child to another state except upon order of the court or with the consent of the noncustodial parent, when the noncustodial parent has been given visitation rights by the decree.10

In extreme cases, the court might order the custodial parent to post a bond to secure compliance with the visitation rights of the noncustodial parent.

**Third-Party Visitation**

Another issue that is occasionally litigated is whether third parties can be given rights of visitation (e.g., grandparents, former stepparents). Factors considered by the court in deciding this question include:

- The language of the statute in the state that governs who can visit. A court will want to know if it has statutory power to grant visitation rights to third parties.
- Whether the child has lived with the third party for a substantial period of time in the past or has otherwise formed close emotional ties with the third party.

If a court has the power to grant visitation rights to someone other than biological parents the standard the court will use in deciding whether to exercise this power is the best interests of the child.

The visitation rights of third parties, however, cannot substantially interfere with the primary right of fit custodial parents to raise their children. Some third-party visitation statutes go too far. At one time, for example, Washington state had a statute that allowed “[a]ny person” “at any time” to petition the court for visitation, which could be granted if the court felt it would be in the best interests of child. The statute gave no special consideration or weight to the opinion of the parents on whether third-party visitation should be allowed. When a parent opposed such visitation, for example, the statute did not say that the third party had to overcome a presumption that the parent’s opposition was valid. The statute gave no such presumption of validity to the parent’s views.

This statute was called “breathtakingly broad” and declared unconstitutional by the United States Supreme Court in the case of *Troxel v. Granville.*11 Tommie Granville and Brad Troxel were the unmarried parents of Isabelle and Natalie Troxel. After the parents separated, Brad lived with his parents, Jenifer and Gary Troxel, the girls’ paternal grandparents. Brad regularly brought his daughters to his parents’ home for weekend visits. When Brad committed suicide, the grandparents continued to see the girls on a regular

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10Minnesota Statutes Annotated § 518.175(3).
basis. Tommie Granville, however, informed the Troxels that she wished to limit their visitation with her daughters to one short visit per month. The grandparents used the Washington state statute to petition to the court for two weekends of overnight visitation per month and two weeks each summer. Over the objection of Granville, the court granted them one weekend per month, one week during the summer, and four hours on both of the grandparents’ birthdays. Granville’s appeal eventually reached the United States Supreme Court.

The Court began its analysis by acknowledging the changing reality of family life in America:

The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. While many children may have two married parents and grandparents who visit regularly, many other children are raised in single-parent households. In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States. U.S. Dept. of Commerce, Bureau of Census, Current Population Reports, 1997 Population Profile of the United States 27 (1998). Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. In many cases, grandparents play an important role. For example, in 1998, approximately 4 million children—or 5.6 percent of all children under age 18—lived in the household of their grandparents. U.S. Dept. of Commerce, Bureau of Census, Current Population Reports, Marital Status and Living Arrangements: March 1998 (Update), p. i (1998).12

The Court specified that if a fit parent is present in the home, his or her right to raise a child is entitled to constitutional protection. The due process clause of the Fourteenth Amendment to the United States Constitution gives parents the fundamental right to make decisions concerning the care, custody, and control of their children:

The Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” We have long recognized that the Amendment’s Due Process Clause . . . “guarantees more than fair process.” Washington v. Glucksberg, 521 U.S. 702, 719, 117 S. Ct. 2258 (1997). The Clause also includes a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests.” Id., at 720, 117 S. Ct. 2258. . . . The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in Meyer v. Nebraska, 262 U.S. 390, 399, 401, 43 S. Ct. 625 (1923), we held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.” Two years later, in Pierce v. Society of Sisters, 268 U.S. 510, 534–535, 45 S. Ct. 571 (1925), we again held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.”13

There was no indication in this case that Granville was an unfit parent. When fit parents make a decision in raising their child, they are entitled to a presumption that the decision is in the child’s best interests. The presumption means that the decision controls unless someone proves that the decision is not in the best interests of the child. It is not enough to show that another decision is a good idea.

Granville was not given the benefit of this presumption. Her opposition to the grandparents’ request was given no “special weight.” The judge simply dis-
agreed with her on whether more extensive visitation with the paternal grandparents was in the best interests of the children. This troubled the United States Supreme Court:

So long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children. . . . [T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a “better” decision could be made.14

While the Court ruled that a fit parent must be given the presumption of correctness, the Court did not clarify what kind of evidence would overcome this presumption. The Court left this question for another day. Hence, while we do not know the precise scope of the constitutional right of parents to raise their children, we do know that the Court will take a dim view of any effort by the state to interfere with the child rearing decisions of a fit parent.

Supervised Visitation

Finally, we need to consider supervised visitation—visitation of a child in the presence of a third party, someone other than the custodial parent. In some cases, a custodial parent will ask the court to deny all visitation rights to the other parent because of a fear that the child might be taken out of the state or country or might be physically or emotionally harmed by unrestricted visitation. As indicated, courts are very reluctant to deny all visitation rights to a parent. If the court is convinced that unrestricted visitation would not be in the best interests of the child, supervised visitation is a possible alternative. When used, the custodial parent usually takes the child to a facility that is equipped to monitor visitation in a safe environment. The facility might be a government agency or, more commonly, a private nonprofit group (e.g., a unit of the YWCA) that charges a fee for its services. After the custodial parent drops off the child and leaves, the noncustodial parent has a visit of several hours (as designated by the court order) in rooms available in the facility. The custodial parent then returns to pick up the child. Supervised visitation can also occur in less formal settings such as the home of a relative that both parents trust. It is more common, however, for supervised visitation to occur at a facility that is professionally organized to offer such visitation.

ASSIGNMENT 9.5

Flora Smith and Harry Smith have one child, ten-year-old Mary Smith. Flora and Harry are separated. Flora wants supervised visitation of Mary by Harry Smith because he often misses child-support payments and has a girlfriend who is an alcoholic. Flora is afraid that if Harry takes Mary to his home, she will be exposed to drinking. How should the court rule? (See General Instructions for the Legal-Analysis Assignment in Appendix A.)

THE NEW “TERROR WEAPON”

I had to face the fact that for one year [during the exercise of unsupervised visitation rights by the father], I sent my child off to her rapist.15

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14Id. at 68, 72–73, 120 S. Ct. at 2061, 2063–64.
For many parents engaged in seriously contested child custody disputes, false allegations of child abuse have become an effective weapon for achieving an advantage in court.16

In alarming numbers, parents are being accused of sexually abusing their children, usually during visitation. The issue can also arise during an initial custody proceeding where one parent claims that the other committed sex abuse during the marriage, and hence should not be granted custody, or should not be granted visitation rights in unsupervised settings.

The level of bitterness generated by this accusation is incredibly high. It is the equivalent of a declaration of total war between the parties. The chances of reaching a settlement or of mediating the custody dispute—or anything else that is contested—often vanish the moment the accusation is made. Protracted and costly litigation is all but inevitable.

Nor does litigation always resolve the matter. Assume that a mother with sole custody is turned down when she asks a court to terminate the father’s right to visit the child because of an allegation of child abuse. The court finds the evidence of abuse to be insufficient and orders a continuation of visitation. Unable to accept this result, the mother goes underground out of desperation and a total loss of faith in the legal system. She flees with the child, or she turns the child over to sympathetic third parties who agree to keep the child hidden from the authorities. The child might be moved from one “safe house” to another to avoid detection. This underground network consists of a core of dedicated women who at one time were in a similar predicament or who are former child-abuse victims themselves.

If the mother remains behind, she is hauled back into court. If she refuses to obey an order to produce the child, she faces an array of possible sanctions, including imprisonment for civil contempt or even prosecution for criminal kidnapping. Unfortunately, the media have an excessive interest in cases of this kind. Once reporters and cameras become involved, a circus atmosphere tends to develop.

Attorneys can find themselves in delicate situations. The first question they face is whether to take the case. When an alleged child abuser—usually the father—seeks representation, the attorney understands the father’s need for a vigorous defense. What if he didn’t do it? Yet attorneys tend to place cases of this kind in a different category. Many need to believe in his innocence before they will take the case. According to a prominent matrimonial attorney, “I have a higher duty to make sure some wacko doesn’t get custody of his child.” Before proceeding, therefore, the attorney might ask him to:

- Take a lie detector test
- Take the Minnesota Multiphasic Personality Inventory Test (MMPI), which may reveal whether someone has a propensity to lie and is the kind of person who statistically is likely to be a child abuser
- Be evaluated by a knowledgeable psychologist or psychiatrist

Some attorneys have even insisted that the father undergo hypnosis as a further aid in trying to assess the truth of the allegation.

Attorneys representing the mother face similar concerns. Is she telling the truth? Is she exaggerating, knowingly or otherwise? Is she trying to seek some other strategic advantage from the father, e.g., more financial support, custody blackmail? What advice should the attorney give her when she first reveals the charge of sexual abuse, particularly when the evidence of abuse is not overwhelming? Should she be advised to go public with the charge? As indicated, the consequences of doing so—and of not doing so—can be enormous. Bitter litigation is almost assured. What if the attorney talks her out of going

public with the charge in order to settle the case through negotiation, “and a month or two later something terrible happens”? Faced, therefore, with a need to know if the accusation is true, the attorney may ask her to take a polygraph test or an MMPI test, or to undergo an independent evaluation by a psychologist or psychiatrist.

Other attorneys disagree with this approach. They do not think that clients should be subject to such distrust by their own attorney. And they fail to see much value in some of the devices used to assess the truth. Some typical comments from such attorneys are that professionals “trained in sexual abuse are wrong very often”; “Frankly, I trust my horse sense more than I trust psychiatrists”; and “There is no research that says the polygraph or MMPI is of any use.”

Of course, attorneys for both sides will have to interview the child. This can be a very delicate task. There is a danger of emotional damage every time the child is forced to focus on the events in question. Even though children are generally truthful, many are susceptible to suggestion and manipulation. Very often the charge is made that the child has been “brainwashed” into believing that abuse did or did not occur. Clearly, the child needs protection. A separate attorney (guardian ad litem) is usually appointed by the court to represent the child in the litigation. Guidelines may exist in the state on who can interview the child and in what setting. Trained child counselors are commonly used. Using special, anatomically correct dolls, the counselor will ask the child to describe what happened. These interviews are usually videotaped. When the time comes for a court hearing, the judge will often interview the child outside the courtroom (e.g., in the judge’s chambers without either parent present).

Assignment 9.6

Diane and George are the parents of Mary. When the child is two years old, the parents divorce. The decree awards Diane sole custody with visitation rights to George (on alternating weekends). Diane soon suspects that George is sexually abusing Mary during the visits. Answer the following questions for your state. (See General Instructions for the State-Code Assignment and General Instructions for the Court-Opinion Assignment in Appendix A.)

a. What options does Diane have?
b. Under what circumstances can the child be interviewed about the alleged molestation? Are there any restrictions on such interviews?
c. Can Diane be jailed for contempt of court if she refuses to obey an order to disclose Mary’s location following a court decision that there was no sexual abuse by George? If so, for how long? Indefinitely?

The Allen Case

Allen v. Farrow


Supreme Court, Appellate Division, New York

**Background:** Woody Allen is an internationally famous director and actor. His custody case generated widespread publicity. When it was over, Allen commented, “I was on the cover of every magazine, and magazines all over the world. I couldn’t believe the amount of interest.” His opponent in the case was Mia Farrow, an actress who starred in thirteen of his movies. Allen had a romantic relationship with Farrow. She was formerly married to singer Frank Sinatra and conductor...
Chapter Nine

Allen v. Farrow—Continued

The parties' respective arguments are very clear. The petitioner maintains that he was forced to commence this proceeding in order to preserve his parental rights to the three infant children, because the respondent commenced and continues to engage in a campaign to alienate him from his children and to ultimately defeat his legal rights to them. The petitioner contends, inter alia, that the respondent seeks to accomplish her goals primarily through manipulation of the children's perceptions of him. He wishes to obtain custody, ostensibly to counteract the detrimental psychological effects the respondent's actions have had on his children, and to provide them with a more stable atmosphere in which to develop. Mr. Allen specifically denies the allegations that he sexually abused Dylan and characterizes them as part of Ms. Farrow's extreme overreaction to his admitted relationship with Ms. [Soon-Yi] Previn.

The respondent maintains that the petitioner has shown no genuine parental interest in, nor any regard for, the children's welfare and that any interest he has shown has been inappropriate and even harmful. Respondent cites the fact that the petitioner has commenced and maintained an intimate sexual relationship with her daughter Soon-Yi Previn, which he has refused to curtail, despite the obvious ill effects it has had on all of the children and the especially profound effect it has had on Moses. It is also contended that petitioner has at best, an inappropriately intense interest in, and at worst, an abusive relationship with, the children's welfare and that any interest he has shown has been inappropriate and even harmful. Respondent contends that the petitioner represents an emotional threat and has on at least one occasion threatened physical harm. Respondent contends that the petitioner's only motive in commencing this proceeding was to retaliate against the allegations of child sexual abuse made against him by Ms. Farrow.

Certain salient facts concerning both Mr. Allen's and Ms. Farrow's relationships to their children and to each other are not disputed. Review of these facts in an objective manner and the conclusions that flow from them, demonstrate that the determination of the [trial] court as to both custody and visitation is amply supported by the record before this Court.

From the inception of Mr. Allen's relationship with Ms. Farrow in 1980, until a few months after the adoption of Dylan O'Sullivan Farrow on June 11, 1985, Mr. Allen wanted nothing to do with Ms. Farrow's children. Although Mr. Allen and Ms. Farrow attempted for approximately six months to have a
child of their own, Mr. Allen did so apparently only after Ms. Farrow promised to assume full responsibility for the child. Following the adoption however, Mr. Allen became interested in developing a relationship with the newly adopted Dylan. While previously he rarely spent time in the respondent's apartment, after the adoption of Dylan he went to the respondent's Manhattan apartment more often, visited Ms. Farrow's Connecticut home and even accompanied the Farrow family on vacations to Europe. Allen also developed a relationship with Moses Farrow, who had been adopted by the respondent in 1980 and was seven years old at the time of Dylan's adoption. However, Allen remained distant from Farrow's other six children.

In 1986 Ms. Farrow expressed a desire to adopt another child. Mr. Allen, while not enthusiastic at the prospect of the adoption of Dylan in 1985, was much more amenable to the idea in 1986. Before the adoption could be completed Ms. Farrow became pregnant with the parties' son Satchel. While the petitioner testified that he was happy at the idea of becoming a father, the record supports the finding that Mr. Allen showed little or no interest in the pregnancy. It is not disputed that Ms. Farrow began to withdraw from Mr. Allen during the pregnancy and that afterwards she did not wish Satchel to become attached to Mr. Allen.

According to Mr. Allen, Ms. Farrow became inordinately attached to the newborn Satchel to the exclusion of the other children. He viewed this as especially harmful to Dylan and began spending more time with her, ostensibly to make up for the lack of attention shown her by Ms. Farrow after the birth of Satchel. Mr. Allen maintains that his interest in and affection for Dylan always has been paternal in nature and never sexual. The various psychiatric experts who testified or otherwise provided reports did not conclude that Allen's behavior toward Dylan prior to August of 1992 was explicitly sexual in nature. However, the clear consensus was that his interest in Dylan was abnormally intense in that he made inordinate demands on her time and focused on her to the exclusion of Satchel and Moses even when they were present.

The record demonstrates that Ms. Farrow expressed concern to Allen about his relationship with Dylan, and that Allen expressed his concern to Ms. Farrow about her relationship with Satchel. In 1990 both Dylan and Satchel were evaluated by clinical psychologists. Dr. Coates began treatment of Satchel in 1990. In April of 1991 Dylan was referred to Dr. Schultz, a clinical psychologist specializing in the treatment of young children with serious emotional problems.

In 1990 at about the same time that the parties were growing distant from each other and expressing their concerns about the other's relationship with their youngest children, Mr. Allen began acknowledging Farrow's daughter Soon-Yi Previn. Previously he treated Ms. Previn in the same way he treated Ms. Farrow's other children from her prior marriage, rarely even speaking to them. In September of 1991 Ms. Previn began to attend Drew College in New Jersey. In December 1991 two events coincided. Mr. Allen's adoptions of Dylan and Moses were finalized and Mr. Allen began his sexual relationship with their sister Soon-Yi Previn.

In January of 1992, Mr. Allen took the photographs of Ms. Previn, which were discovered on the mantelpiece in his apartment by Ms. Farrow and were introduced into evidence at the [trial court] proceeding. Mr. Allen in his trial testimony stated that he took the photos at Ms. Previn's suggestion and that he considered them erotic and not pornographic. We have viewed the photographs and do not share Mr. Allen's characterization of them. We find the fact that Mr. Allen took them at a time when he was formally assuming a legal responsibility for two of Ms. Previn's siblings to be totally unacceptable. The distinction Mr. Allen makes between Ms. Farrow's [older adopted children] and Dylan, Satchel and Moses is lost on this Court. The children themselves do not draw the same distinction that Mr. Allen does. This is sadly demonstrated by the profound effect his relationship with Ms. Previn has had on the entire family.

Allen's testimony that the photographs of Ms. Previn "... were taken, as I said before, between two consenting adults wanting to do this ..." demonstrates a chosen ignorance of his and Ms. Previn's relationships to Ms. Farrow, his three children and Ms. Previn's other siblings. His continuation of the relationship, viewed in the best possible light, shows a distinct absence of judgment. It demonstrates to this Court Mr. Allen's tendency to place inappropriate emphasis on his own wants and needs and to minimize and even ignore those of his children. At the very minimum, it demonstrates an absence of any parenting skills.

We recognize Mr. Allen's acknowledgment of the pain his relationship with Ms. Previn has caused the family. We also note his testimony that he tried to insulate the rest of the family from the "dispute" that resulted, and tried to "de-escalate the situation" by attempting to " placate" Ms. Farrow. It is true that Ms. Farrow's failure to conceal her feelings from the rest of the family and the acting out of her feelings of betrayal and anger toward Mr. Allen enhanced

continued
the effect of the situation on the rest of her family. We note though that the reasons for her behavior, however prolonged and extreme, are clearly visible in the record. On the other hand the record contains no acceptable explanation for Allen’s commencement of the sexual relationship with Ms. Previn at the time he was adopting Moses, or for the continuation of that relationship at the time he was supposedly experiencing the joys of fatherhood.

While the petitioner’s testimony regarding his attempts to de-escalate the dispute and to insulate the family from it, displays a measure of concern for his three children, it is clear that he should have realized the inevitable consequences of his actions well before his relationship with Ms. Previn became intimate. Allen’s various inconsistent statements to Farrow of his intentions regarding Ms. Previn and his attempt to have Dr. Schultz explain the relationship to Dylan in such a manner as to exonerate himself from any wrong doing, make it difficult for this Court to find that his expressed concern for the welfare of the family is genuine.

As we noted above, Mr. Allen maintains that Ms. Farrow’s allegations concerning the sexual abuse of Dylan were fabricated by Ms. Farrow both as a result of her rage over his relationship with Ms. Previn and as part of her continued plan to alienate him from his children. However, our review of the record militates against a finding that Ms. Farrow fabricated the allegations without any basis. . . . [There is evidence to] suggest that the abuse did occur. While the evidence in support of the allegations remains inconclusive, it is clear that the investigation of the charges in and of itself could not have left Dylan unaffected.

Any determination of issues of child custody or visitation must serve the best interests of the child and that which will best promote the child’s welfare (Domestic Relations Law § 70; Eschbach v. Eschbach, 56 N.Y.2d 167, 171). . . . It was noted by the [trial] court that the psychiatric experts agreed that Mr. Allen may be able to fulfill a positive role in Dylan’s therapy. We note specifically the opinion of Dr. Brodzinsky, the impartial expert called by both parties, who concluded that contact with Mr. Allen is necessary to Dylan’s future development, but that initially any such visitation should be conducted in a therapeutic context. The [trial] court structured that visitation accordingly and provided that a further review of Allen’s visitation with Dylan would be considered after an evaluation of Dylan’s progress.

Although the investigation of the abuse allegations have not resulted in a conclusive finding, all of the evidence received at trial supports the determination as to custody and visitation with respect to this child. There would be no beneficial purpose served in disturbing the custody arrangement. Moreover, even if the abuse did not occur, it is evident that there are issues concerning Mr. Allen’s inappropriately intense relationship with this child that can be resolved only in a therapeutic setting. At the very least, the process of investigation itself has left the relationship between Mr. Allen and Dylan severely damaged. The consensus is that both Mr. Allen and Ms. Farrow need to be involved in the recovery process. The provision for further review of the visitation arrangement embodied in the trial court’s decision adequately protects the petitioner’s rights and interests at this time.

With respect to Satchel, the [trial] court denied the petitioner’s request for unsupervised visitation. While the court stated that it was not concerned for Satchel’s physical safety, it was concerned by Mr. Allen’s “demonstrated inability to understand the impact that his words and deeds have upon the emotional well being of the children”. We agree. The record supports the conclusion that Mr. Allen may, if unsupervised, influence Satchel inappropriately, and disregard the impact exposure to Mr. Allen’s relationship with Satchel’s sister, Ms. Previn, would have on the child. His failure to understand the effect of such exposure upon Satchel as well as upon his other children is evidenced by his statement on direct examination in which he stated:

If you ask me personally, I would say the children, the children adore Soon Yi, they adore me, they would be delighted, if you asked me this personally, I would say they would be delighted and have fun with us, being taken places with us. But, I don’t want to give you my amateur opinion on that. That’s how I feel. And I know it counts for very little.

The record indicates that Ms. Previn when not at college spends most of her time with Mr. Allen. Contact between Ms. Previn and her siblings in the context of the relationship with Mr. Allen would be virtually unavoidable even if Mr. Allen chose to insulate his children from the relationship. Expert medical testimony indicated that it would be harmful for Ms. Previn not to be reintegrated into the family. However, the inquiry here concerns the best interests of Dylan, Moses and Satchel. Their best interests would be clearly be served by contact with their sister Soon-Yi, personally and not in Mr. Allen’s presence. Seeing
both Ms. Previn and Mr. Allen together in the unsupervised context envisioned by Mr. Allen would, at this early stage, certainly be detrimental to the best interests of the children. It has been held that the desires of the child are to be considered, but that it must be kept in mind that those desires can be manipulated (Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 94). In considering the custody and visitation decision concerning Moses, who is now a teenager, we cannot ignore his expressed desires. The record shows that he had a beneficial relationship with the petitioner prior to the events of December 1991. However, that relationship has been gravely damaged. While Moses’ feelings were certainly affected by his mother’s obvious pain and anger, we concluded that it would not be in Moses’ best interests to be compelled to see Mr. Allen, if he does not wish to.

Therefore, we hold that in view of the totality of the circumstances, the best interests of these children would be served by remaining together in the custody of Ms. Farrow, with the parties abiding by the visitation schedule established by the trial court.

With respect to the award of counsel fees we note that the record demonstrates that Mr. Allen’s resources far outpace those of Ms. Farrow. Additionally, we note the relative lack of merit of Mr. Allen’s position in commencing this proceeding for custody. It became apparent, during oral argument, that there was serious doubt that Mr. Allen truly desired custody. It has been held that “in exercising its discretionary power to award counsel fees, a court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties’ positions” (DeCabrera v. Cabrera-Rosete, 70 N.Y.2d 879, 881). We find no abuse of discretion in the court’s award of counsel fees in this case.

Accordingly, the judgment [below] . . . , which, inter alia, denied the petitioner Woody Allen’s request for custody of Moses Amadeus Farrow, Dylan O’Sullivan Farrow, and Satchel Farrow, set forth the terms of visitation between the petitioner and his children and awarded Ms. Farrow counsel fees, is affirmed in all respects, without costs.

CARRO, Justice (dissenting in part).

I agree with the majority’s conclusions, except for the affirmance of the order of visitation with respect to Mr. Allen’s son Satchel, which I find unduly restrictive.

There is strong evidence in the record from neutral observers that Mr. Allen and Satchel basically have a warm and loving father-son relationship, but that their relationship is in jeopardy, in large measure because Mr. Allen is being estranged and alienated from his son by the current custody and visitation arrangement. Frances Greenberg and Virginia Lehman, two independent social workers employed to oversee visitation with Satchel, testified how “Mr. Allen would welcome Satchel by hugging him, telling him how much he loved him, and how much he missed him.” Also described by both supervisors “was a kind of sequence that Mr. Allen might say, I love you as much as the universe.” Sadly, there was also testimony from those witnesses that Satchel had told Mr. Allen: “I like you, but I am not supposed to love you;” that when Mr. Allen asked Satchel if he would send him a postcard from a planned trip to California with Ms. Farrow, Satchel said “I can’t [because] Mommy won’t let me;” and on one occasion when Satchel indicated that he wanted to stay with Mr. Allen longer than the allotted two-hour visit, “Satchel did say he could not stay longer, that his mother had told him that two hours was sufficient.” Perhaps most distressing, Satchel “indicated to Mr. Allen that he was seeing a doctor that was going to help him not to see Mr. Allen anymore, and he indicated that he was supposed to be seeing this doctor perhaps eight or ten times, at the end of which he would no longer have to see Mr. Allen.”

In contrast to what apparently is being expressed by Ms. Farrow about Mr. Allen to Satchel, Mr. Allen has been reported to say only positive things to Satchel about Ms. Farrow, and conveys only loving regards to Moses and Dylan through Satchel. Thus I find little evidence in the record to support the majority’s conclusion that “Mr. Allen may, if unsupervised, influence Satchel inappropriately, and disregard the impact exposure to Mr. Allen’s relationship with Satchel’s sister, Ms. Previn, would have on the child.”

The majority’s quotation of Mr. Allen’s testimony with respect to Soon-Yi in support of its conclusion respecting visitation should be viewed in the context of Dr. David Brodzinsky’s testimony. Dr. Brodzinsky is an expert in adoption with considerable experience in court-related evaluations of custody and visitation disputes. . . . It was his clinical judgment that Mr. Allen had more awareness of the consequences of his actions than he was able to articulate in the adversarial process, and he was optimistic about Mr. Allen’s ability to accept his share of responsibility for what had taken place in light of his love for his children, his capacity for perspective-taking and empathy, and his motivation and openness toward the ongoing therapeutic process. In

continued
a. Was Allen denied custody because of his immoral behavior?
b. (i) For Allen, prepare a list of factual allegations that support his position that he should be given custody rather than Farrow. (ii) For Farrow, prepare a list of factual allegations that support her position that she should be given custody rather than Allen. (iii) In class, be prepared to be called upon to debate who should have custody.
c. Is it relevant that Allen married Soon-Yi soon after the case?
d. What responsibility, if any, did the court assign to the behavior of Mia Farrow? Did she help cause Allen’s deterioration with the children?
e. If Allen is correct that Farrow has poisoned his relationship with the children, wouldn’t keeping him away from them reward her efforts?
f. The court said Allen agreed to have a biological child “apparently only after Ms. Farrow promised to assume full responsibility for the child.” If Farrow did make this promise, what legal effect do you think it would have? For example, would it affect Allen’s duty of child support?
g. The dissent says that in the “clinical judgment” of Dr. Brodzinsky, an adoption expert, “Allen had more awareness of the consequences of his actions than he was able to articulate in the adversarial process.” What do you think Brodzinsky meant? Do you think a courtroom is the best place to resolve disputed custody cases? Is there an alternative?

**BIOLOGICAL PARENT VS. PSYCHOLOGICAL PARENT**

Thus far our main focus has been the custody dispute where the main combatants are the two biological parents. Suppose, however, that the dispute is between one biological parent and a third party such as a:

- Grandparent
- Other relative
- Former lover/stepparent (who never adopted the child)
- Foster parent (who is temporarily caring for the child at the request of the state)
- Neighbor
- Friend
Assume that the other biological parent is out of the picture because he or she has died, has disappeared, or does not care. The third party is usually someone with whom the child has established close emotional ties. Frequently, the child has lived with the third party for a substantial period of time. This may have occurred for a number of reasons:

- The biological parent was ill, out of the state, out of work, etc.
- The biological parent was in prison.
- The state asked the third party to care for the child temporarily as a foster parent (see chapter 14).
- The child could not stay at home because of marital difficulties between the biological parents.
- The biological parent was in school for substantial periods of time.
- The biological parent once considered giving the child up for adoption.

Third parties who have formed such emotional ties with a child are referred to as psychological parents.¹⁹

There are two main schools of thought among courts when the custody dispute is between a biological parent and a psychological parent:

1. It is in the best interests of the child to be placed with its biological parent (this is a strong presumption).
2. It is in the best interests of the child to be placed with the adult who will provide the most wholesome, stable environment.

The emphasis of the first approach is on parental rights: unless you can show that the biological parent is unfit, he or she has the right to custody. The emphasis of the second approach is on the child’s needs. Most states follow the first approach. In these states, the question is not whether the biological parent or the psychological parent can provide the best home for the child. The question is whether it is clear that placement with the biological parent would be harmful to the child. While the child may suffer some damage if his or her relationship with the psychological parent is severed, this does not necessarily overcome the biological parent’s overriding right to have the child. The law is very reluctant to take children away from their natural parents because of a determination that someone else could do a better job raising them.

In practice, courts sometimes tend to blur the two approaches listed above. While maintaining allegiance to the doctrine of parental rights, the court might still undertake a comparison between the benefits to the child of living with the biological parent and the benefits of living with the psychological parent. When the benefits to be derived from the latter are overwhelming, the court might be more inclined to find unfitness in the biological parent or to conclude that giving custody to the biological parent would be detrimental to the child. The interpretation of the evidence can be very subjective. There is often enough data to support any conclusion the court wants to reach. A person’s mistakes in raising children can be viewed either as an inability to be a competent parent or as an inevitable component of the nearly impossible job of parenting in today’s society.

ASSIGNMENT 9.8

a. Are there any statutes in your state on how the court is to resolve a custody dispute between a biological parent and a psychological parent? If so, what do they say? (See General Instructions for the State-Code Assignment in Appendix A.)

b. Find an opinion written by a court in your state in which the dispute was between a biological parent and a psychological parent. Who won? Why? What standards did the judge apply? Were there other facts about the case that you wish the court had provided? If so, what facts and why would you want them? (See General Instructions for the Court-Opinion Assignment in Appendix A.)

c. Make up a fact situation involving a custody dispute between a biological parent and a psychological parent. Make it a close case. Include facts that would strongly favor each side. Now write a memorandum in which you discuss the law that would apply in your state to your case. Assume that you are working for the office that represents the psychological parent. (See General Instructions for the Legal-Analysis Assignment in Appendix A.)

**CHANGING THE CHILD’S SURNAME**

Once the court decides who receives custody, the custodial parent might request that the surname of the child be changed. For example, a mother might ask that the child’s surname be changed to her maiden name or to a hyphenated surname that combines the father’s surname and her maiden name. This change-of-name request might also be made at a later time in a separate proceeding. Assume that since birth the child has had the surname of the noncustodial parent. The court must determine whether the change is in the best interests of the child. The following excerpt from a court opinion explains the factors that most courts would consider in applying this standard:

> We first note that neither parent has a superior right to determine the initial surname their child shall bear. . . . However, once a surname has been selected for the child, be it the maternal, paternal, or some combination of the child’s parents’ surnames, a change in the child’s surname should be granted only when the change promotes the child’s best interests. In determining the child’s best interests, the trial court may consider, but its consideration is not limited to, the following factors: the child’s preference; . . . the effect of the change of the child’s surname on the preservation and the development of the child’s relationship with each parent; the length of time the child has borne a given name; the degree of community respect associated with the present and the proposed surname; and the difficulties, harassment or embarrassment, that the child may experience from bearing the present or the proposed surname.20

The court stressed what when the noncustodial parent objects to the change, the evidence that the change is in the best interests of the child should be “clear and compelling.”

**MODIFICATION OF THE CUSTODY ORDER BY THE STATE THAT ISSUED THE ORDER**

In this section, we consider the modification of a custody order by the same state that issued the order. Assume that the court has jurisdiction to issue and modify custody orders. (We will focus on jurisdiction in the next section when we examine child snatching and special interstate problems.) While our discussion will focus on the two biological parents, the same principles apply no matter who is given custody by the original order.

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20In re Saxton, 309 N.W.2d 298, 301 (Minn. 1981).
Two reasons justify a court in modifying its own custody order:

- There has been a significant change in circumstances since the original order, or
- Relevant facts were not made available to the court at the time of its original order.

In either situation, new facts are now before the court. The question becomes whether it is in the best interests of the child for the court to change its mind and award custody to the other parent. Given the disruption of such a change, the answer is no unless the new facts *substantially* alter the court’s perception of the child’s welfare. For example:

- The custodial parent has been neglecting or abusing the child.
- The custodial parent has moved from the area, contrary to the court’s order, thus making visitation extremely difficult or impossible.
- The custodial parent has adopted an unorthodox lifestyle that has negatively affected the child’s physical or moral development (or there is a danger that this lifestyle will have this effect).

It is not enough that the custodial parent has experienced hard times such as sickness or loss of a part-time job since the original order. Nor is it enough to show that mistakes have been made in raising the children. To justify a modification, the adverse circumstances or mistakes must be (1) ongoing, (2) relatively permanent, (3) serious, and (4) detrimental to the children. For an argument by a noncustodial parent on why custody should be changed, see the affidavit in support of a motion to modify custody in Exhibit 9.3.
a. Are there any statutes in your state specifying the conditions for modifying a custody order that was issued within your state? If so, what are they? (See General Instructions for the State-Code Assignment in Appendix A.)

b. Find an opinion in which a custody order issued in your state was modified by a court in your state. What was the modification? Why was it ordered? What standards did the court use? Were there other factors about the case that you would have liked to have had? If so, what facts and why would you want to know about them? (See General Instructions for the Court-Opinion Assignment in Appendix A.)

c. Make up a fact situation involving a case in which sole custody was granted to one parent, but the other parent is now seeking a modification. Make it a close case. Include facts that support a modification and facts that support a continuation of the status quo. Now write a memorandum in which you discuss the law that would apply in your state to your case. Assume that you are working for the office that represents the party who wants to prevent the other side from modifying the order. (See General Instructions for the Legal-Analysis Assignment in Appendix A.)

d. Read Exhibit 9.3 containing an affidavit in support of a motion to modify a custody decree. Do you think the court should reconsider the custody order as requested? What further facts, if any, would you like to have? (See General Instructions for the Investigation-Strategy Assignment in Appendix A.)

JURISDICTIONAL PROBLEMS AND CHILD SNATCHING

We have been discussing the modification of a child-custody order by the state that issued the order. Suppose, however, that a party tries to have the order modified by another state. Consider the following sequence:
Dan and Ellen are divorced in New York where they live. Ellen receives custody of their child. Dan moves to Delaware. During a visit of the child in Delaware, Dan petitions a Delaware court for a modification of the New York custody order. Ellen does not appear in the Delaware proceeding. Dan tells the Delaware court a horror story about the child’s life with Ellen in New York. The Delaware court modifies the New York order on the basis of changed circumstances, awarding custody to Dan.

Or worse:

Dan and Ellen’s child is playing in the yard of a New York school. Dan takes the child from the yard and goes to Delaware without telling Ellen. Dan petitions a Delaware court for a modification of the New York custody order. If he loses, he tries again in Florida. If he loses, he tries again in another state until he finds a court that will grant him custody.

The latter situation involves what has been commonly called child snatching. The parent “grabs” the child and then “shops” for a favorable forum (forum shopping). For years, the problem reached epidemic proportions.

Courts are caught in a dilemma. When a custody order is made, it is not a final determination by the court. Custody orders are always modifiable on the basis of changed circumstances that affect the welfare of the child. This rule is designed to help the child by making the court always available to protect the child. Under the traditional rule, if an order is not final, it is not entitled to full faith and credit by another state (i.e., another state is not required to abide by it). Hence other states are free to reexamine the case to determine whether new circumstances warrant a modification. To maintain flexibility, states require very little to trigger their jurisdiction to hear a custody case (e.g., the domicile or mere presence of the child in the state along with one of the parents). The result is chaos: scandalous child snatching and unseemly forum shopping.

The question, therefore, is how to cut down or eliminate child snatching and forum shopping without taking away the flexibility that courts need to act in the best interests of the child. One solution is to enact uniform statutes in every state that would clarify what can and cannot be done when a child is taken across state lines. State legislatures, however, tend to be protective of their independence and often resist the enactment of uniform legislation. This resistance changed relatively quickly after a top-rated television program (60 Minutes) gave dramatic exposure to the problem of child snatching and forum shopping. The publicity helped enact a state uniform law and a federal kidnapping law:

- The Uniform Child Custody Jurisdiction and Enforcement Act
- The Parental Kidnapping Prevention Act

**Uniform Child Custody Jurisdiction and Enforcement Act**

The Uniform Child Custody Jurisdiction and Enforcement Act (UCJEA) is designed to avoid jurisdictional competition and conflict among state courts that can arise when parents shift children from state to state in search of a favorable custody decision. The UCJEA is a revision of the Uniform Child Custody Jurisdiction Act (UCCJA), which was an earlier attempt to remedy the problem. Eventually, every state is expected to adopt the UCJEA.

Two important questions are covered in the UCJEA:

- When does a court in the state have the power or jurisdiction to make the initial decision on child custody?
- When will a court modify a custody order of another state?
Chapter Nine

Jurisdiction to Make the Initial Child-Custody Decision

Under the UCCJEA, mere physical presence of the child in the state is not sufficient to give the state jurisdiction to enter an initial custody order. Nor is the mere physical presence of a parent sufficient. There are three major foundations for custody jurisdiction under the UCCJEA:

- Home state custody jurisdiction
- Significant connection/substantial evidence (sc/se) custody jurisdiction
- Temporary emergency custody jurisdiction

Home state custody jurisdiction is the most important and has ultimate priority. It is based on where the child has lived for the last six months with a parent before the custody case began. For a summary of the three categories of child custody jurisdiction under the UCCJEA, see Exhibit 9.4.

Exhibit 9.4  Jurisdiction to Make an Initial Custody Decision under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

1. Home state custody jurisdiction
   - This state is the home state of the child. A home state is the state in which the child has lived with a parent* for at least six consecutive months immediately before the custody case is commenced in court. If the child is less than six months old, the home state is the state where the child has lived since birth. (Temporary absences count as part of the six months or as part of the time since birth.) Or
   - This state was the home state of the child within six months before the custody case was begun and the child is now absent from the state, but a parent continues to live in this state.

2. Significant connection/substantial evidence (sc/se) custody jurisdiction
   - No other state is the home state of the child (or if another state is the home state, it has declined to exercise the custody jurisdiction that it has). And
   - The child and at least one parent have a significant connection with this state other than mere presence in this state. And
   - There is substantial evidence in this state concerning the child's care, protection, training, and personal relationships.

3. Temporary emergency custody jurisdiction
   - The child is present in the state. And
   - The child has been abandoned or there is an emergency requiring protection of the child because the child, a sibling, or a parent is being mistreated or abused or threatened with mistreatment or abuse (domestic violence).
   - Note: Temporary emergency custody jurisdiction can be exercised by a state that does not have home state or sc/se jurisdiction. The need to protect the child takes precedence. But the custody order made by a court with temporary emergency jurisdiction will remain in effect only until a state with home state or sc/se jurisdiction intervenes. Hence temporary emergency jurisdiction has a lower priority than home state jurisdiction or sc/se jurisdiction.

Assume that a court has jurisdiction to make the initial custody decision because it is the home state or the state with sc/se. Nevertheless, this court may decline to exercise this jurisdiction because it determines that it is an inconvenient forum. The state may determine that another state is a more convenient forum and defer to it. How does a state decide whether it is an inconvenient forum? There is no rigid formula. It will consider a number of factors. Assume, for example, that Oregon has home state jurisdiction, but that one of the parents is asking a Tennessee court to make the initial custody decision.

*Or anyone acting as a parent.
Here are some of the factors an Oregon court will consider in determining whether Tennessee is a more convenient forum for the parties to litigate the custody matter:

- **Domestic violence.** If domestic violence has been committed or threatened in Tennessee, an Oregon court might decide that Tennessee is in the best position to protect the parties. If so, Tennessee would be the most convenient state to make the custody decision.

- **Length of time the child has been outside the state.** If the child has spent more of its life in Tennessee than in Oregon, an Oregon court might decide that Tennessee is the most convenient state to make the custody decision.

- **Relative financial circumstances of the parties.** If litigating the custody case in Oregon would impose extreme financial burdens on the party in Tennessee and if the party in Oregon would have the financial resources to litigate in Tennessee, then an Oregon court might decide that Tennessee would be the most convenient forum to make the custody decision.

- **Nature and location of the evidence.** If the important evidence needed to resolve the custody matter (including the testimony of the child) is in Tennessee, then an Oregon court might decide that Tennessee would be the most convenient forum to make the custody decision.

The decision is discretionary with Oregon. In our example, it has home state custody jurisdiction and has the right to exercise it. The UCCJEA encourages, but does not require, such a state to relinquish its jurisdiction if it decides that another state would be a more convenient place—forum—to render the custody decision.

**a.** Fred and Jane were married in Iowa on January 1, 2000. On March 13, 2000, they had a child, Bob. From the first day of their marriage, however, they began having marital difficulties. On July 4, 2000, Fred moved to California. Bob continued to live with his mother in Iowa. By mutual agreement, Fred can occasionally take the child to California for visits. After a scheduled one-day visit on November 5, 2000, Fred decides not to return the child. He keeps Bob until November 1, 2001, when he returns him to Jane. Fred then joins the Army. When he returns on October 6, 2003, he discovers that Jane has been beating Bob.

Assume that both Iowa and California have enacted the UCCJEA. Which state would have jurisdiction to determine the custody of Bob on the following dates:

- April 4, 2000
- November 6, 2000
- January 1, 2001
- December 1, 2001
- October 6, 2003

See General Instructions for the Legal-Analysis Assignment in Appendix A.

**b.** Interview Fred. See General Instructions for the Interviewing Assignment in Appendix A.

**Jurisdiction to Modify a Custody Order of Another State**

Thus far we have examined the jurisdiction of a state to make an initial custody order. We have addressed the questions of when a court has jurisdiction to decide the custody question for the first time, and if more than one state is involved, which is the most convenient forum. We now turn to the question,
exclusive, continuing jurisdiction
The authority of a court, obtained by compliance with the UCCJEA, to make all initial and modifying custody decisions in a case to the exclusion of courts in any other state.

When does one state have jurisdiction to modify a custody order of another state?

The guiding principle is that once a court has made an initial custody order under the UCCJEA, that court has exclusive, continuing jurisdiction (ecj) over the case. Continuing means that the case is kept open; exclusive means that no other court has authority to act in the case. Hence a court in State X cannot modify a child custody order issued in State Y if State Y has ecj because of compliance with the UCCJEA.

Another state can modify State Y’s order only if State Y loses its ecj. There are two circumstances under which a state can lose its ecj:

- First, when the child and its parents no longer reside in the state (“parent” under the UCCJEA always includes anyone acting as a parent);
- Second, when the court with ecj determines that the child and parents do not have a significant connection to the state and that substantial evidence is no longer available in the state concerning the child’s care, protection, training, and personal relationships.

Suppose, for example, that Connecticut issues an initial custody order and has ecj. The dissatisfied parent then takes the child to Maine. Can a Maine court modify the Connecticut order? Not if one of the parents remains in Connecticut. The dissatisfied parent would have to go back to Connecticut to ask the Connecticut court to modify its order or to ask the Connecticut court to declare that the child and parents do not have a significant connection to Connecticut and that substantial evidence on the child’s welfare is no longer available in Connecticut.

An exception exists when there is an emergency, but only on a temporary basis. A state court with temporary emergency custody jurisdiction (see Exhibit 9.4) can modify the custody decision of any other court if the child is present in the state and has been abandoned or if there is an emergency requiring protection of the child because the child, a sibling, or a parent is being mistreated or abused or threatened with mistreatment or abuse (domestic violence). If a Maine court concluded that it had temporary emergency jurisdiction because of abandonment or violence in Maine, the Maine court could issue a custody order that would have the effect of modifying the Connecticut order. (A Maine court, for example, might issue a protective or restraining order keeping a violent parent away from the child until a further hearing is held.) As indicated in Exhibit 9.4, however, temporary emergency jurisdiction is temporary. A court with home state or sc/se jurisdiction—Connecticut in our example—can step in and change (modify) the temporary emergency custody order of Maine.

There is another circumstance in which Connecticut might yield to Maine. As we saw earlier, a state with proper custody jurisdiction under the UCCJEA can always make a determination that another state is a more convenient forum and thereby relinquish its jurisdiction. If Connecticut decides that it is an inconvenient forum and that Maine is a more convenient forum, Maine would thereby obtain full jurisdiction to act in the case.

When a parent has dirty hands, a court might decline to exercise its jurisdiction if doing so would not harm the child. Suppose, for example, that a parent engages in blatant forum shopping by moving a child from state to state for the sole purpose of trying to find a friendly court. In the unlikely event that this parent eventually finds a court that has jurisdiction under the UCCJEA, this court can decline to take the case because of the parent’s dirty hands. But the court will make such a decision only if it determines that the refusal to take the case would not harm the child.
a. Ted and Ursula Jackson have one child, Sam. Sam was born on March 13, 2000, in State A, where everyone has lived since the beginning of 2000. Upon discovering that Ted is having an affair with an office worker, Ursula on May 1, 2000, takes Sam to State B, where her parents live. On May 1, 2000, could Ted go to a court in State A to obtain a custody order? Could Ursula obtain one in State B on May 1, 2000?

b. Assume that Ursula eventually obtains a custody order in State B. Assume further that State B had proper jurisdiction to issue this order. Under what circumstances, if any, could Ted obtain a modification of this order in a court in State A?

(See General Instructions for the Legal-Analysis Assignment in Appendix A.)

a. Find a court opinion in your state in which your state refused to modify the custody order of another state. Why did it refuse?

b. Find a court opinion of your state in which your state modified the custody order of another state. Why did it do so? (See General Instructions for the Court-Opinion Assignment in Appendix A.)

c. Is the opinion you discussed in part (a) consistent with the opinion you discussed in part (b)?

Parental Kidnaping Prevention Act

Thus far we have been talking about state laws on child custody jurisdiction. There is also a federal statute designed to combat child snatching and forum shopping: the Parental Kidnaping Prevention Act (PKPA). Congress was concerned that the lack of nationwide consistency in state custody laws contributed to a tendency of parties “to frequently resort to the seizure, restraint, concealment, and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, obtaining of conflicting orders by the courts, . . . and interstate travel and communication that is so expensive and time consuming.” To help combat this problem, Congress enacted the PKPA. As indicated earlier, all states are eventually expected to adopt the UCCJEA. When they do, there will not be as great a need for the PKPA, since the UCCJEA (unlike its predecessor, the UCCJA) establishes clear guidelines on when a state can issue or modify a child-custody order. Until the UCCJEA is adopted everywhere, however, the PKPA can help reduce child snatching and forum shopping.

The PKPA addresses the question of when one state must enforce (without modification) the custody decree of another state. Phrased another way, when must one state give full faith and credit to the custody decree of another state? First, the state that rendered the custody decree must have had jurisdiction according to its own laws. Additionally, one of the following conditions must be met as of the time the state rendered its custody decree:

(A) such state (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child’s home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the
child and at least one contestant, have a significant connection with such State
other than mere physical presence in such State, and (II) there is available in
such State substantial evidence concerning the child’s present or future care,
protection, training, and personal relationships;
(C) the child is physically present in such State and (i) the child has been
abandoned, or (ii) it is necessary in an emergency to protect the child because
he has been subjected to or threatened with mistreatment or abuse;
(D)(i) it appears that no other State would have jurisdiction under
subparagraph (A), (B), (C), or (E), or another State has declined to exercise
jurisdiction on the ground that the State whose jurisdiction is in issue is the
more appropriate forum to determine the custody of the child, and (ii) it is in
the best interest of the child that such court assume jurisdiction; or
(E) the court has continuing jurisdiction. . . .

In these circumstances, the custody order shall be given full faith and credit by
another state. Another state “shall not modify” it. Once a court has proper ju-
risdiction to render a custody decree, this jurisdiction continues so long as this
state remains the residence of the child or of any party claiming a right to cus-
tody.

Congress also made available to the states the Federal Parent Locator Ser-
vice, which will help to locate an absent parent or child for the purpose of en-
forcing laws on the unlawful taking or restraint of a child or for the purpose of
making or enforcing a child-custody determination. Previously, this service
has been used mainly in child-support cases (see chapter 10).

Finally, the PKPA expressly declared the intent of Congress that the fed-
eral Fugitive Felon Act applies to state felony cases involving parental kidnap-
ing and interstate or international flight to avoid prosecution. The state prose-
cutor may formally present a request to the local U.S. Attorney for a federal
unlawful flight to avoid prosecution (UFAP) warrant.

ASSIGNMENT 9.13

Is it a crime for a parent in your state to take his or her child from the other
parent without the consent of the latter? Check the statutes and cases of your
state. (See General Instructions for the State-Code Assignment and General In-
structions for the Court-Opinion Assignment in Appendix A.)

CHILDREN ABROAD: SPECIAL PROBLEMS

The following material deals with child abduction over international bor-
ders. As we have seen, parental kidnapping within the United States can lead to
complex jurisdictional problems. These problems multiply when the child is
taken out of the country.

International Parental Child Abduction
United States Department of State
Office of Children’s Issues (1997)

Introduction

When a U.S. citizen child is abducted abroad, the U.S. State Department’s Office of Children’s Issues
(CI) works with U.S. embassies and consulates abroad to assist the child and left-behind parent in a number
of ways. Since the late 1970’s, we have been contacted in the cases of approximately 11,000 American
children who were either abducted from the United States or prevented from returning to the United States by
one of their parents. Despite the fact that children are taken across international borders, child custody
disputes remain fundamentally private legal matters

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between the parents involved, over which the Department of State has no jurisdiction. If a child custody dispute cannot be settled amicably between the parties, it often must be resolved by judicial proceedings in the country where the child is located. You, as the deprived parent, must direct the search and recovery operation yourself.

Cross-Cultural Marriages: Should You or Your Child Visit the Country of the Other Parent?

Many cases of international parental child abduction are actually cases in which the child traveled to a foreign country with the approval of both parents but was later prevented from returning to the United States. While these cases are not abductions, wrongful retainments, they are just as troubling to a child. Sometimes the marriage is neither broken nor troubled, but the foreign parent, upon returning to his or her country of origin, decides not to return to the U.S. or to allow the child to do so. A person who has assimilated a second culture may find a return to his or her roots traumatic and may feel a pull to shift loyalties back to the original culture. A person’s personality may change when he or she returns to the place where he or she grew up. In some traditional societies, children must have their father’s permission and a woman must have her husband’s permission to travel. If you are a woman, to prevent your own or your child’s detention abroad, find out about the laws and traditions of the country you plan to visit or to allow your child to visit, and consider carefully the effect that a return to his roots might have on your husband.

Precautions That Any Vulnerable Parent Should Take

In international parental child abduction, an ounce of prevention is worth a pound of cure. Be alert to the possibility and be prepared—keep a list of the addresses and telephone numbers of the other parent’s relatives, friends, and business associates both here and abroad. Keep a record of important information on the other parent, including these numbers: passport, social security, bank account, driver’s license, and auto license. In addition, keep a written description of your child, including hair and eye color, height, weight, and any special physical characteristics. Take color photographs of your child every six months. If your child should be abducted, this information could be vital in locating your child. The National Center for Missing and Exploited Children (NCMEC, 1-800-843-5678) suggests that you teach your child to use the telephone; practice making collect calls; and instruct him or her to call home immediately if anything unusual happens. If you feel your child is vulnerable to abduction, get professional counseling. Do not merely tell a friend or relative about your fears.

The Importance of a Custody Decree

Under the laws of many American states and many foreign countries, if there is no decree of custody prior to an abduction, both parents are considered to have equal legal custody of their child. If you are contemplating divorce or separation, or are divorced or separated, or even if you were never legally married to the other parent, obtain a decree of sole custody or a decree that prohibits the travel of your child without your permission or that of the court as soon as possible. If you have or would prefer to have a joint custody decree, make certain that it prohibits your child from traveling abroad without your permission or that of the court. Obtain several certified copies of your custody decree from the court that issued it. Give a copy to your child’s school and advise school personnel to whom your child may be released.

U.S. Passports

From the Department of State, you may learn whether your child has been issued a U.S. passport. You may also ask that your child’s name be entered into the State Department’s passport name check system. This will enable the Department to notify you or your attorney if an application for a U.S. passport for the child is received anywhere in the United States or at any U.S. embassy or consulate abroad. If you have a court order that either grants you sole custody or prohibits your child from traveling without your permission or the permission of the court, the Department may also refuse to issue a U.S. passport for your child. The Department may not, however, revoke a passport that has already been issued to the child.

Foreign Passports—The Problem of Dual Nationality

Many U.S. citizen children who fall victim to international parental abduction possess dual nationality. While the Department of State will make every effort to avoid issuing a U.S. passport if the custodial parent has provided a custody decree, the Department cannot prevent embassies and consulates of other countries in the United States from issuing their passports to children who are also their nationals. You can, however, ask a foreign embassy or consulate not to issue a passport to your child. Send the embassy or consulate a written request, along with certified complete copies of any court orders addressing custody or the overseas travel of your child that you have. In your continued
letter, inform them that you are sending a copy of this request to the U.S. Department of State. If your child is only a U.S. citizen, you can request that no visa for that country be issued in his or her U.S. passport. No international law requires compliance with such requests, but some countries may comply voluntarily.

International Parental Kidnapping Crime Act

The IPKCA makes it a Federal offense to remove a child from the United States or retain a child (who has been in the United States) outside the United States with intent to obstruct the exercise of parental rights (custody or visitation). The FBI is responsible for investigating the IPKCA. Once a warrant has been issued for the abductor’s arrest, you can ask local law enforcement authorities or the FBI to enter the abductor’s name in the “wanted persons” section of the National Crime Information Center (NCIC) computer and the INTERPOL system.

Contact the National Center for Missing and Exploited Children (NCMEC)

With the searching parent’s permission, the child’s photograph and description may be circulated to the media in the country to which you believe the child may have been taken. At the same time that you report your child missing, you should contact a lawyer to obtain a custody decree if you do not already have one. In many states, a parent can obtain a temporary custody decree if the other parent has taken their child.

What the State Department Can Do:

- assist parents in contacting local officials in foreign countries or contact them on the parent’s behalf;
- provide information concerning the need for use of federal warrants against an abducting parent, passport revocation, and extradition from a foreign country to effect return of a child to the U.S.; and
- alert foreign authorities to any evidence of child abuse or neglect.

What the State Department Cannot Do:

- intervene in private legal matters between the parents;
- enforce an American custody agreement overseas (U.S. custody decrees are not automatically enforceable outside of U.S. boundaries);
- force another country to decide a custody case or enforce its laws in a particular way;
- assist the left-behind parent in violating foreign laws or reabduction of a child to the United States;
- pay legal or other expenses;
- act as a lawyer or represent parents in court;
- translate documents

The Hague Convention

The most difficult and frustrating element for most parents whose child has been abducted abroad is that U.S. laws and court orders are not usually recognized in the foreign country and therefore are not directly enforceable abroad. Each sovereign country has jurisdiction within its own territory and over persons present within its borders, and no country can force another to decide cases or enforce laws within its confines in a particular way.

The Hague Convention on the Civil Aspects of International Child Abduction is a treaty that seeks to deter international child abduction. It applies to abductions or wrongful retentions between party countries. As of January 1, 1997, the Convention is in effect between the United States and Argentina, Australia, Austria, Bahamas, Belize, Bosnia-Herzegovina, Burkina Faso, Canada, Chile, Colombia, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Finland, former Yugoslav Republic of Macedonia, France, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Luxembourg, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Romania, St. Kitts & Nevis, Slovenia, Spain, Sweden, Switzerland, United Kingdom, Venezuela, and Zimbabwe.
What Is Covered by the Convention

The Hague Convention is a private civil legal mechanism available to parents seeking the return of, or access to, their child. As a private civil law mechanism, the parents, not the governments, are parties to the legal action. The countries that are parties to the Convention have agreed that, subject to certain limited exceptions and conditions outlined below, a child who is habitually resident in one country that is a party to the Convention and who is removed to or retained in another country that is party to the Convention in breach of the left-behind parent’s custody rights shall be promptly returned to the country of habitual residence. The Convention also provides a means for helping parents to exercise visitation rights abroad. There is a treaty obligation to return an abducted child below the age of 16 if application is made within one year from the date of the wrongful removal or retention, unless one of the exceptions to return applies. After one year, the court may still be obligated to order the child returned unless the person resisting return demonstrates that the child is settled in the new environment. A court may refuse to order a child returned if there is a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation in his or her country of habitual residence. A court may also decline to return the child if the child objects to being returned and has reached an age and degree of maturity at which the court can take account of the child’s views. Finally, the return of the child may be refused if the return would violate the fundamental principles of human rights and freedoms of the country where the child is being held. These exceptions have been interpreted narrowly by courts in the United States and by some other countries party to the Convention.

Where to Go for Assistance

Office of Children’s Issues (CI)
Overseas Citizens Services
Department of State
2201 C Street, N.W., Room 4817
Washington, D.C. 20520-4818
202-736-7000
http://travel.state.gov
http://travel.state.gov/int’lchildabduction.html
National Center for Missing and Exploited Children (NCMEC)
[See Appendix I for the address and World Wide Web site.]

Summary

Legal custody and physical custody can be given to one parent or to both parents. In negotiating custody and visitation terms of a separation agreement, many factors need to be considered, such as the age and health of the parents and child, the emotional attachments of the child, the work schedules of the parents, etc. If negotiations fail and the parties cannot agree, litigation is necessary. This can be a stressful experience, not only for the parents but also for the person caught in the middle—the child.

The court has considerable discretion in resolving a custody battle between two biological parents according to the standard of the best interests of the child. It will consider a number of relevant factors such as stability in the child’s life, availability to respond to the child’s day-to-day needs, emotional ties that have already developed, etc. At one time, courts applied evidentiary guidelines such as the presumption that a child of tender years is better off with his or her mother. Today courts reject gender-based presumptions, although fathers continue to complain that the mother is still given an undue preference.

The moral values and lifestyles of the parent seeking custody are generally not considered by the court unless they affect the welfare of the child. Domestic violence that affects the child’s welfare is also a factor. If the parents practice different religions, the court cannot prefer one religion over another, but can consider what effect the practice of a particular religion will have on the child. To the extent possible, the court will try to maintain continuity in the child’s cultural development. The custody decision cannot be based on race. If the child is old enough to express a preference, it will be considered. Often the court will also consider the testimony of expert witnesses.
The court will generally favor liberal visitation rights for the noncustodial parent. Occasionally, such rights will be granted to individuals other than biological parents (e.g., grandparents), if doing so does not interfere with the constitutional right of a fit parent to make child rearing decisions. One of the most distressing issues in this area is the charge by the custodial parent that the child has been sexually molested during visitation. Such an allegation may lead to a denial of visitation or to visitation only when supervised by another adult, usually a professional.

When the custody battle is between a biological parent and a nonparent (often called a psychological parent), the biological parent usually wins unless he or she can be shown to be unfit. If the parents disagree on whether the child’s surname should be changed, the court will resolve the issue on the basis of whether the change is in the best interests of the child.

Occasionally, it is in the best interests of the child for a court to modify an earlier custody decision because of changed circumstances. Frantic parents will sometimes engage in child snatching and forum shopping in order to find a court that will make a modification order. To cut down on this practice, two important laws have been enacted: the state Uniform Child Custody Jurisdiction and Enforcement Act and the federal Parental Kidnapping Prevention Act. The primary tool used by these statutes to cut down on forum shopping is to give priority to the child’s home state among possible competing states that could be asked to issue or modify a custody decision. When the child has been taken to a foreign country, the aid of the Hague Convention on Child Abduction might be enlisted.

**KEY CHAPTER TERMINOLOGY**

- best interests of the child
- tender years presumption
- physical custody
- custodial parent
- legal custody
- joint physical custody
- joint legal custody
- split custody
- contested
- mediation
- guardian ad litem
- parental alienation syndrome
- primary caregiver presumption
- supervised visitation
- Minnesota Multiphasic Personality Index Test (MMPI)
- psychological parent
- forum shopping
- Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)
- home state
- inconvenient forum
- exclusive, continuing jurisdiction
- dirty hands
- Parental Kidnapping Prevention Act (PKPA)

**ETHICS IN PRACTICE**

You are a paralegal working at the law office of Harris and Harris, which represents William Norton in a custody dispute with his wife, Irene Norton. Irene is represented by Davis & Davis. Your supervisor asks you to prepare some interrogatories to be sent to Irene about her employment. You are not sure whether to include questions about her pension plan. Before you write any pension questions, you call Irene and ask her if she has a pension plan at her work. She is very cooperative, telling you that she does not have a pension. You then go back to drafting the interrogatories. Any ethical problems?
ON THE NET: MORE ON CHILD CUSTODY

Professional Academy of Custody Evaluators (PACE)
http://www.pace-custody.org/home.html

Kidmate (joint custody software)
http://www.kidmate.com

Win Child Custody (how to win or defend custody cases)
http://www.winchildcustody.com

Kidshare (software tool for negotiating child custody)
http://www.kidshare.com

Abuse-Excuse (unfounded claims of child abuse)
http://www.abuse-excuse.com

DadsDivorce
http://www.dadsdivorce.com