

turn the tables on John. Secretly, she also hoped for vindication not only for all of her actions since her separation but also for the choices, mistakes, and sacrifices she had made in marriage. Enraged and not wanting to waste a moment—and with Isabella listening in—Jane telephoned her lawyer at his home and tried to tell him about what happened and about her outrage. But he was abrupt with Jane and suggested that she instead come by his office on Monday morning. There was nothing to be done on a Saturday night.

To Jane's surprise, her lawyer did not launch into a case against John, even when she finally related all of the details in his office. He listened patiently, but told Jane he needed to give her a "reality check" about what the courts could and could not do. He talked about the cost of extending the litigation process, delays in hearing dates, legal counter-tactics like bringing up any and all of her vulnerabilities as a parent and as a person (and her husband certainly knew her weak spots), and how children can get caught in the middle of such contests. He pointed out that no court was going to deny John all of his rights as a father, so she was going to have to deal with him one way or another. He also noted that local court rules mandated that parents attempt mediation before a custody hearing could be held.

Jane's lawyer told her that he wanted her to try mediation to see if she and John might work out at least some issues about their children without going to court. He described how mediation works and offered that, even if it failed, her effort would look good if the case did go to court. Jane's lawyer eventually told her that he had, in fact, already spoken with John's lawyer and that she agreed that they should try mediation. John's lawyer had promised she would convince John to try it. After raising a number of objections to the idea, Jane eventually accepted her lawyer's advice—but only with great reluctance and trepidation.

Research shows what the Deer-Does' lawyers intuitively recognized: The process of change, the quality of family relationships, and the management of conflict are more important to children's psychological adjustment to divorce than are the structure of custody arrangements or, indeed, the structure of the family (Ahrns, 1998; Amato & Booth, 1997; Buchanan et al., 1996; Emery, 1999b; Hetherington & Kelly, 2002). This conclusion creates a problem for lawyers in traditional practice, however, because the adversary system on which our legal procedures are based can exacerbate rather than help to contain parental conflict and can further undermine rather than promote coordinated coparenting. The dilemma for lawyers and other professionals who work with custody disputes is particularly vexing under the regime of the vague children's-best-interests standard. We briefly evaluate this custody standard in historical context before turning to our specific recommendations for reform.

CHILDREN'S BEST INTERESTS: A STANDARD WITH NO STANDARDS

In theory, the "best interests of the child" standard gives judges the flexibility to craft custody decisions that are uniquely appropriate for each individual family. In practice, however, the standard has been widely criticized because it (a) encourages

litigation by making judges' decisions unpredictable; (b) increases acrimony, because virtually any evidence that makes one parent look bad may be deemed relevant (recall the morality statutes found in some state laws); (c) increases the potential for bias in the exercise of judicial discretion; and (d) limits appellate review, because the guidelines governing judicial decision making are unclear (Garrison, 1996; Mnookin, 1975). In fact, the problems with the best-interests standard have led at least one distinguished legal commentator to propose a fair and simple alternative: Flip a coin (Chambers, 1984). This flip suggestion highlights the extent of the problems that lay hidden underneath the best-interests standard's superficial appeal.

Historical Perspective

Until the middle of the 19th century, custody laws were perfectly clear: Fathers were automatically granted custody of their children, who were viewed, like a wife, as a man's property (Wyer, Gaylord, & Grove, 1987). Laws began to change in the late 1800s with the emergence of the "tender years" doctrine, which held that mothers are uniquely suited to rear children (*Ex Parte Devine*, 1981; Lyman & Roberts, 1985; Mason, 1994; Wyer et al., 1987). The tender-years doctrine came to control custody decision making during much of the 20th century, but in the 1970s the presumption was challenged as sexist (Hall, Pulver, & Cooley, 1996; Mason, 1994). The subsequent decline of the tender-years presumption left courts without clear guidance in following the best-interests standard, a principle that had been in place since the beginning of the 20th century (Mnookin, 1975). For decades, children were automatically placed with their mothers in their best interests (unless the mother was "unfit"), but the desire to avoid sexism left courts without a dominant guiding principle.

As we noted earlier, some states today list factors that they deem relevant to children's best interests, at least in general terms, but the ultimate goal is never defined (Mnookin, 1975). This presents judges with an impossible practical, legal, and ethical dilemma. As noted family law professor Robert Mnookin (1975) put it:

Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge be primarily concerned with the child's happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic "productivity" of the child when he grows up? Are the primary values of life in warm interpersonal relationships, or in discipline and self-sacrifice? Is stability and security for a child more desirable than intellectual stimulation? These questions could be elaborated endlessly. And yet, where is the judge to look for the set of values that should inform the choice of what is best for the child? (pp. 260–261)

Custody Evaluations: A Solution to Judges' Dilemma?

Without clear guidance from the law, judges have turned to mental health professionals and custody evaluations for help in

discerning children's best interests (Feller, Davidson, Hardin, & Horowitz, 1992; Mnookin, 1975; Shuman, 2002; Wald, 1976). By doing so, the courts have implicitly embraced the value that children's psychological well-being—their happiness—comes first and foremost on the list of their best interests. Alternative experts the courts instead might employ include accountants who have evaluated each parent's ability to provide for their children economically, educators who can comment on the parents' relative commitment to promoting success in school, religious leaders or philosophers who have assessed the quality of each parent's moral values and training, or perhaps dieticians who have evaluated each parent's preference for healthy versus convenience food. These suggestions may seem outrageous, but so is the idea that custody should be awarded to a parent who has an edge over another parent in promoting children's psychological well-being, particularly when the construct is ill defined or undefined.

We appreciate the terrible dilemma that the vague best-interests standard creates for judges, custody evaluators, and, of course, parents and children. We also believe that a mental health professional or other neutral third party or parties may be in a better position than a judge bound by rules of legal procedure to make recommendations about custody. However, we believe it is legally, morally, and scientifically wrong to make custody evaluators de facto decision makers in custody cases, which is often what happens because judges often accept evaluators' recommendations. As law professor Daniel Shuman (2002) recently summarized, "the role of mental health professionals in custody litigation is being transformed from expert as expert to expert as judge" (p. 160). Shuman went on to point out:

If society wishes to use mental health practitioners as experts in child custody cases, the law and science demand rigorous threshold scrutiny of their methods and procedures so that courts are informed consumers of this evidence. If society wishes to use mental health practitioners as judges in child custody cases, then social policy demands a public debate and legislative approval of this change . . . (p. 162)

We agree. Establishing panels of mental health professionals who would decide custody disputes would be a major procedural change in the law, perhaps an important one. However, we believe that there are simpler and likely more effective changes in policy that would improve custody decision making for children and divorcing families and simultaneously solve many of the problems faced by custody evaluators, lawyers, judges, and other professionals who now work with custody disputes. Our recommendations include (a) promoting parental self-determination through alternative dispute resolution and other means, (b) working to develop and implement clear custody standards, and (c) altering the practice of current custody evaluations under the best-interests standard.

RECOMMENDATION 1: ENCOURAGE ALTERNATIVE DISPUTE RESOLUTION AND PRIVATE SETTLEMENT

We believe that the best solutions to the problems posed by child custody disputes and unscientific custody evaluations involve changing the system of dispute resolution in ways that encourage parents to reach their own decisions about rearing their children following a separation (Emery, 1999b, 2004). Obviously, there will be fewer custody evaluations, and fewer cases that judges must decide, if more parents resolve their differences by deciding custody arrangements on their own. We also believe that encouraging private settlement is the best way to promote children's mental health in separation and divorce. If the research-based goals are to contain parental conflict, encourage cooperative coparenting, support both parents' authoritative relationships with the children, and preserve economic resources, then it seems reasonable to steer clear of something called "the adversary system," the method of dispute resolution embraced by the American system of justice (Emery & Wyer, 1987b). "Going to war" is not the way to promote peace, certainly not in a divorced family.

Over the last two decades, many legal and mental health professionals, and many divorced parents, have come to this same conclusion. As an alternative, they urge separated parents to determine their own children's best interests by grappling with and working out the difficult issues of residence and childrearing themselves. One important reason to do this from the outset of a separation is that parents ultimately must deal with custody decisions, parenting, and each other on their own. If a degree of cooperation in coparenting is the ultimate goal for promoting children's best interests, then it seems reasonable to hypothesize that a more cooperative approach like mediation, for example, will help parents achieve this outcome better than adversarial negotiations or litigation in the courtroom will.

More cooperative approaches to dispute settlement—those in which parents exercise a greater degree of control over both the process and the outcome than they do in the adversary system—include a range of options such as (a) *pro se* divorce, in which parents manage all legal matters on their own without the use of lawyers; (b) divorce education, usually involving court-mandated classes on parenting in divorce that encourage cooperative coparenting, even during settlement negotiations; (c) more informal, cooperative negotiations between parents and their attorneys, an approach that includes but is not limited to *collaborative law*, a new option invented by family lawyers in which both attorneys agree to represent their clients only so long as they negotiate in good faith and settle their disputes outside of court (Tesler, 2001); (d) family therapy and parent training, which, while not focused on resolving custody disputes, do focus on the importance of authoritative parenting and cooperation in coparenting for separated and divorced parents (Martinez & Forgatch, 2001; Wolchik et al., 2000); (e) divorce mediation, the most firmly established of the new approaches, in which parents