

DEMOGRAPHICS OF FAMILY STRUCTURE, CUSTODY DISPUTES, AND CUSTODY ARRANGEMENTS

The structure of American families changed dramatically in the latter part of the 20th century. As indicated in Figure 1, divorce rates trended upward in the United States throughout the 1900s and, following a rapid rise in the late 1960s, peaked in 1981 before turning downward (Bramlett & Mosher, 2002).

Other key elements of the demographic story include an average risk of divorce of somewhat less than 50%, higher divorce rates for African Americans, lower rates for Asian Americans, and the declining risk for divorce as a function of years in marriage (Bramlett & Mosher, 2001; see Fig. 2). About 60% of divorces involve children (Clarke, 1995), and about half take place in the first 7 years of marriage (see Fig. 2), so that children are likely to be young when marriages end and custody is disputed (Furstenberg, Peterson, Nord, & Zill, 1983). As we discuss later, special concerns arise about custody for infants, toddlers, and, to a lesser extent, preschoolers.

Unmarried Parents

Over 40% of children born to married parents are expected to experience the divorce of their parents (Bumpass, 1984; U.S. Bureau of the Census, 1992), and the qualification "born to married parents" is an important one. In 2002, 34% of all children in the United States were born outside of marriage (Martin et al., 2003). In fact, the apparent decline in divorce since 1981 may be attributable to at-risk individuals and couples self-selecting out of legal marriage and childbearing. Rapid increases in nonmarital childbirth did not stabilize until about 1990, and cohabitation (which is more difficult to track) apparently is continuing to increase in frequency.

The best estimates suggest that about half of children born outside of marriage actually are born to unmarried but cohabiting parents (Sigle-Rushton & McLanahan, 2002), and cohab-

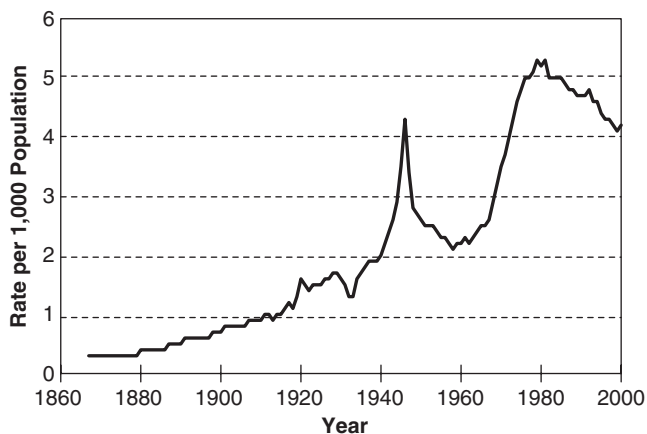


Fig. 1. Annual U.S. divorce rates from 1867 to 2000 (based on Bramlett & Mosher, 2002, and Emery, 1999b).

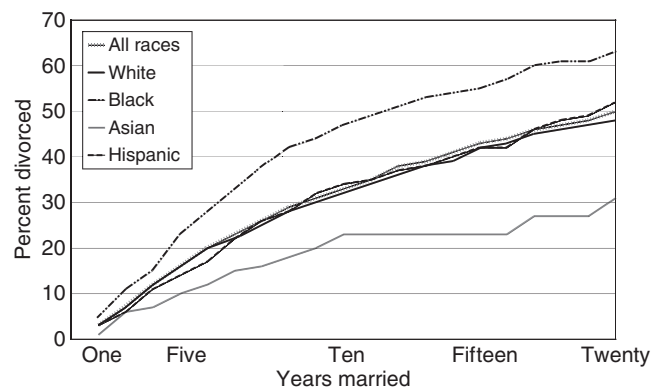


Fig. 2. Risk of divorce over the first 20 years of marriage, by ethnicity (based on Bramlett & Mosher, 2001).

iting unions are more likely to dissolve than legal marriages are. Forty-nine percent of cohabiting relationships end within 5 years, whereas 20% of first marriages dissolve within 5 years (Bramlett & Mosher, 2002). Although we know of no data regarding how many disrupted cohabitations involve parents and their biological children, the disruption of relationships between unmarried parents clearly is an important and growing area for research on child custody disputes.

Child Custody Disputes

There is no good national data on how many custody disputes arise when divorcing, cohabiting, or unmarried parents part or on how many such disputes erupt years after the break-up (which may be a more common circumstance). What is clear is that courts are overwhelmed by the huge number of families separating, divorcing, and disputing custody. In 1995, domestic-relations disputes, which include but are not limited to child custody litigation, accounted for one quarter of all legal filings, making this the largest category of court action (Ostrom & Kauder, 1996). Other evidence indicates that custody disputes form the largest percentage of domestic-relations cases (Schepard, 2004).

Child Custody Decisions

The best evidence on how child custody is decided in the context of divorce comes from Maccoby and Mnookin's (1992) study of 1,124 families with children in which the parents filed for divorce in two California counties in the middle 1980s. As illustrated in Figure 3, most of these cases were settled outside of court, as over three quarters of custody arrangements were negotiated either by the parents themselves or through their lawyers. Since 1981, California law has mandated that mediation be attempted before a custody hearing can be held before a judge; an additional 11% of the cases were settled in mediation, while 5% of the cases went the next step up in the hierarchy of legal conflict—a custody evaluation—before reaching a settlement. Only 4% of cases went to

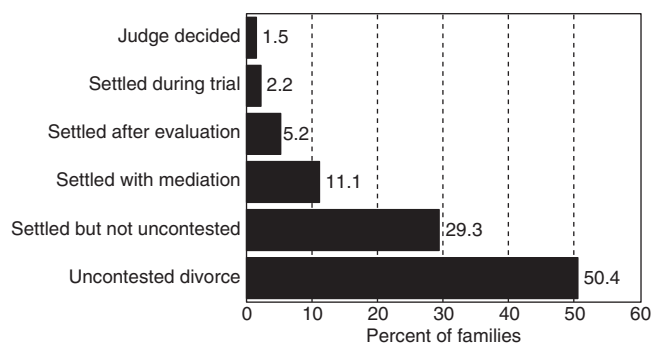


Fig. 3. Percent of 1,124 families in two California counties settling divorce custody using various methods, during the mid-1980s (based on Maccoby & Mnookin, 1992, p. 137).

trial, and most of these were settled during the trial process. A judge decided less than 2% of the cases (Maccoby & Mnookin, 1992).

The generality of these findings is limited by the two-county sampling, as well as by rapidly changing laws and societal expectations. Still, the data highlight several patterns observed across the United States and much of the industrialized world (Emery, 1999b; Pryor & Rodgers, 2001). First, many parents experience at least a mild degree of conflict surrounding child custody, and conflict is substantial in a significant subset of cases. Combining legal indicators and self-reported conflict measures, Maccoby and Mnookin (1992) estimated that 51% of divorces involved negligible conflict over issues related to custody, while 24% had mild conflict, 10% substantial conflict, and 15% intense conflict. Second, as is the case with other litigation, most custody disputes are decided outside of the courtroom. Third, alternative dispute resolution methods such as mediation increasingly are used, often successfully, in an attempt to settle disputed cases. Fourth, mental health professionals often are involved in child custody conflicts as mediators, custody evaluators, or therapists (although the last role is not reflected in these data).

The importance of each of these patterns is multiplied by high rates of separation and divorce, custody disputes between cohabiting and never-married parents, and the potential for conflict throughout the duration of the children's childhood. This means that (a) even if they represent a minority of cases, large numbers of children are exposed to substantial or intense parental and legal conflict in the midst of their parents' separation; (b) judges face the prospect of spending a great deal of their time hearing custody cases; (c) alternative dispute resolution and custody evaluations have become important parts of the process; and (d) mental health professionals are becoming increasingly involved in the child custody arena in a variety of ways.

Child Custody Arrangements Following Separation and Divorce

Although laws, definitions, and terms vary from state to state, most of the key aspects of child custody arrangements are captured by the following concepts:

- *Legal custody* refers to parental authority or decision making. In cases of *sole legal custody*, one parent has the right to make major decisions about the children's lives, especially schooling, elective medical care, and religious training. When *joint legal custody* is in effect, both parents share these major decisions, while each parent makes day-to-day decisions autonomously when the children are with her or him. In some cases, the court will assign more specific decision making over day-to-day matters to one or both parents.
- *Physical custody* refers to the time children actually spend with their parents. In cases of *primary physical custody*, the children spend the majority of their time with one parent and generally "visit" (a term many find pejorative) with the "nonresidential parent" on some agreed-to schedule (e.g., one evening during the week and every other weekend). In cases of *joint physical custody*, children spend close to equal amounts of time with both parents. Although there is no uniform definition of joint physical custody, many consider it to be a minimum of an average of two overnights per week (Maccoby & Mnookin, 1992). This definition is consistent with child-support laws in 28 states that lower support obligations for joint physical custody arrangements and often define joint physical custody at about 100 overnights per year (Elrod & Spector, 2004).
- *Split custody* refers to circumstances in which each parent has sole physical custody of at least one child—that is, when siblings are split up between their parents.

Single Mothers and Single Fathers

The United States Census Bureau generally does not track joint physical custody, but instead lists children as living with two married parents, a single mother, a single father, or in some other arrangement. In 2002, of all children living with a single parent, just over 82% lived with a single mother while approximately 18% lived with a single father (Fields, 2003). This percentage of children living with a single father represents an increase over the historical level of about 10% (Meyer & Garasky, 1993). Interpretation of these census data, however, is clouded by several factors including (a) remarriage, as children who live with remarried parents are counted as living in a two-parent household; (b) cohabitation, as many "single" parents live with a partner, including 11% of single mothers and 33% of single fathers in 2002 (Fields, 2003); and (c) reason for single-parent status, as the category includes separated, divorced, never-married, and widowed parents. Another limitation is that joint physical (or legal) custody is not routinely documented.

Joint Custody

Joint custody (a term that confounds legal and physical custody) has been a much-discussed and much-debated coparenting arrangement since the 1980s (Folberg, 1991). Later, we discuss evidence about the well-being of children living in joint custody. Our present task is to estimate its prevalence.

We know of three national estimates of the frequency of joint custody (Child Trends, 2002; Clarke, 1995; Donnelly & Finkelhor, 1993), the best coming from special supplemental 1998 United States Census data (and also 1994 and 1996 data that provide essentially the same results). In this analysis, 65% of mothers had sole physical and legal custody, 10% had sole physical and joint legal custody, 11% of fathers had sole physical custody (with either joint or sole legal custody), 9% of parents had joint physical and legal custody, and 5% had split custody or some other arrangement (Child Trends, 2002). Thus, about 75% of children not living with both parents lived primarily with their mothers, approximately 10% lived primarily with their fathers, about 10% lived in joint physical custody, and another 5% lived either in split custody or in some other arrangement. Although some people argue that joint physical custody is becoming far more common, no trends for increased prevalence between 1994 and 1998 were found in the census data (Child Trends, 2002).

Historical Trend Evidence and Joint Custody

Historical data from Wisconsin demonstrate the importance of distinguishing legal custody and physical custody, and also make us suspect that joint legal custody is becoming considerably more common than suggested by the census estimates. A review of 9,500 Wisconsin divorce settlements between 1980 and 1992 revealed that sole physical custody to fathers remained stable during these years while sole physical custody to mothers declined (see Fig. 4). Joint physical custody rose from 2% to 14% of the Wisconsin cases, while joint legal custody increased from 18% to 81% (Melli, Brown, & Cancian, 1997). Our experience leads us to believe that this dramatic increase in joint legal custody and more modest increase in joint physical custody have also occurred in many other states. Estimates from 1990 data gathered by the National Center for Health Statistics (Clarke, 1995) also support this suggestion, as different states reported widely varying rates of joint custody (legal and physical custody were not distinguished)—for example, 4% percent in Nebraska compared with 44% in geographically and politically similar Kansas.

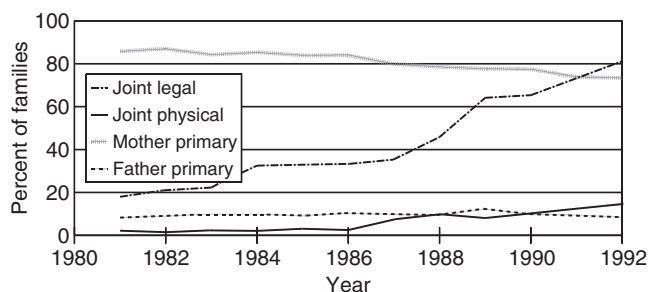


Fig. 4. Percentage of custody arrangements in Wisconsin divorces from 1980 to 1992 (data were collected across calendar years; thus 1982 refers to 1981–82, etc.; based on Melli, Brown, & Cancian, 1997).

Changes in Custody Arrangements

Custody arrangements change over time, and legal agreements often do not correspond to de facto residence. The best evidence on these points also comes from Maccoby and Mnookin's (1992) longitudinal study. For 783 cases where complete data were obtained during the 3-year study, initial legal agreements designated the following custody arrangements in the two California counties: 66% sole mother custody, 9% sole father custody, 21% joint physical custody, and 4% split custody. Shortly after the divorce decree was filed, however, only 52% of the cases with designated joint physical custody actually had a *de facto* joint physical custody. Among the 48% of the joint physical cases in which the living situation was not consistent with the legal agreement, most involved sole mother physical custody. Of cases with designated mother custody, 87% followed that arrangement in practice, as did 82% of father custody agreements, but only 35% of split-custody agreements actually conformed to that arrangement.

Three years later, only 45% of legally designated joint physical custody cases actually conformed to that arrangement, compared to 85% of cases with designated mother custody, 71% of cases of father custody, and 34% of split custody awards (Maccoby & Mnookin, 1992). The absolute percentages of the four types of custody arrangements 3 years after the divorce decree were similar to the initial arrangements, but the longitudinal analysis demonstrated that many families shifted out of their original custody arrangements and into new ones.

CUSTODY LAW AND CHILD CUSTODY EVALUATIONS IN PRACTICE

Later, we consider broad conceptual issues related to child custody law and custody evaluations. We begin, however, with a brief overview of the current legal landscape and a minimal critique.

The "Best Interests of the Child" Standard

Each state legislature in the United States controls its own child custody law, and laws can vary considerably from state to state. Still, every state law indicates that custody decisions are to be made according to "best interests of the child" standard, the principle that judicial determinations should be based on each child's unique future best interests (Elrod & Spector, 2004). Many mental health professionals applaud this "best interests of the child" standard as being responsive to individual children and families. We differ. Individualized decision making is appealing on the surface, but we are deeply concerned that a standard vague enough to be interpreted differently for each family that comes before the court (a) encourages parents to enter into custody disputes (thereby increasing parental conflict), because the outcome of a court hearing is difficult to