Child Custody Determination: An Analysis Of the Litigation Model, Legal Practices, And Men’s Experiences in the Process

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In both North America and Western Europe, radical changes in divorce laws, with substantial liberalization of the grounds for divorce, have followed the immense increase in divorce rates evident during the past quarter-century (Note 1). With the notion of gender equality as a guiding principle, there has also been a shift from child custody laws overtly based on gender and notions of marital fault, to ones that are theoretically gender-neutral and which de-emphasize fault, with the standard of the “best interests of the child” adopted in principle as the guiding legal doctrine in deciding custody and access arrangements.

Despite the fact that legal statutes do not favor mothers or fathers as potential custodial parents, in practice mothers continue to assume legal custody in the majority of cases cross-nationally, a pattern that has persisted, as Weitzman (1985) points out, through judicial precedence. Child custody awards are made at the discretion of the court and, for the most part, judges’ actions appear to reflect the perception that children’s best interests are served by maternal custody, particularly prior to adolescence; cross-national estimates show that in 75-90% of cases involving children under 16, custody is awarded solely to the mother (Bala, 1987; Furstenberg, Nord, Peterson & Zill, 1983; Lund, 1987). In Canada, Central Registry data indicate that in 1987-88, 72% of custody awards were granted solely to mothers, 15.3% to fathers (Department of Justice, 1990). In the majority of cases, divorced fathers become non-custodial parents, and over 50% of these men eventually become disengaged from their children’s lives, in spite of the existence of mediation services and legal joint custody provisions (Furstenberg et al., 1983; Palmer, 1983; Note 2).

While considering the issue of child custody from a Canadian perspec-

Author’s Note: This article is based on a study funded by the National Welfare Grants Directorate, Health and Welfare Canada.

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tive, this paper reports the results of a cross-national (Canada-Britain) study of non-custodial fathers' experiences as participants in the legal process of child custody determination, which can be linked to a wider body of data focused on the litigation model and legal and judicial practices in this arena. As divorce and child custody outcomes in contemporary Western societies follow similar patterns, and as the findings of this study show almost identical trends within the Canadian and British sub-samples, the conclusions may be more generally applied, and the implications of the study generalized beyond the Canadian scene.

LEGAL RESOLUTION OF CHILD CUSTODY

The legal/judicial mode of child custody resolution may be seen as comprised of three elements: the nature of the litigation model itself, the actual practices of legal practitioners and the courts in regard to issues of custody and access, and the experience of the participants themselves in the process. Many legal scholars have suggested that while the litigation model in itself may be adversarial, developments in divorce law have resulted in procedural changes to the extent that the law as practiced is not adversarial at all but administrative, or mediating. Others argue, however, that although certain developments in divorce law, such as simplified procedures, changes in the pattern of grounds for divorce, and the notion of "no-fault" divorce, have represented a movement away from an adversarial model, an adversarial approach still forms the basis of procedure in matters of custody and access. With the introduction of no-fault divorce, it is argued that child custody is left as the only sphere in which "fault" is still relevant (Ambrose, Harper & Pemberton, 1983; Weitzman, 1985). Further, contested cases involve a prolonged litigation process of filing suits and countersuits and represent "some of the most volatile, hostile, and destructive transactions in court" (Coogler, 1978). In uncontested cases, where judges may simply "rubber-stamp" decisions made prior to the court hearing (an administrative function), the process of negotiation leading to such decisions may be highly adversarial: the use of threats and counter-threats filed by both parties in the form of affidavits and the behavior of legal practitioners (such as preventing spouses from communicating directly with each other and breeding suspicions toward the opposing party) have been associated with marked escalation of conflict (Ambrose et al., 1983; Saposnek, 1983).

In Canada, 80-90% of custody awards are made solely to mothers, but it has been noted that in over 90% of cases it is the family and not the court that determines who will have custody of the children. The great majority of child custody decisions, then, are made out of court; only a relatively
small percentage of parents fail to reach an agreement and are brought to trial. Because in most cases, the court appears to simply ratify the existing arrangements made by the parties, Polikoff (1982) argues that in fact most children remain with their mothers by the mutual consent of the parents: "The final court award, rubber stamping the arrangement of the parties themselves, does not reflect a bias on the part of the court system toward mothers because the court system plays an entirely passive role" (p. 184).

It would appear from this that most fathers are happy to have custody given to their wives because this arrangement best fits the social role of the father, men's lack of skills and relative inexperience in child-care techniques, and the time required for ongoing pursuit of men's occupational commitments. Many investigators (Eekelaar, 1984; Polikoff, 1982) conclude that the 90% rate of uncontested child custody cases reflects a combination of men's desires (or lack of interest in custody) and pressures of role and reality issues, as men are more likely to be employed, have a higher status job and be somewhere in a career progression, and be earning a larger income (Gersick, 1979).

A closer scrutiny of contested cases of child custody, however, provides an alternative explanation for the relatively low levels of legally disputed cases. Courts continue to grant maternal custody and care and control of children to mothers in the majority of contested cases; for those custody disputes that do reach court, there appears to be an assumption within the legal system that the salient issue in determining "the best interests of the child" is the tolerable fitness of the mother. A recent Statistics Canada report indicates that mothers obtain custody in 85% of both contested and uncontested cases (Bala, 1987). A recent evaluation of Canada's new Divorce Act (Department of Justice, 1990) found, in an analysis of 1988 court file data, where there was a trial, custody was awarded to mothers in 77% of cases and to fathers in only 8.6%—as compared to Central Registry data indicating that custody is awarded to mothers in 72% of all cases (contested and non-contested), and to fathers in 15%. Men thus appear to be less likely to be awarded sole custody by taking the matter to court than by settling in some other manner. The Evaluation report concluded, "Where fathers were granted sole custody, this was almost invariably because the mother did not want or could not cope with the custody of the children rather than the outcome of contested custody" and "there has been no appreciable or consistent change in the basic patterns of awarding sole custody since at least the early 1970's ... [although] what does seem to have changed since the 1970's is that in the late 1980's, men are less likely to receive sole custody when they request it or it is disputed than was previously the case" (p. 134, emphasis added).

Although judges themselves decide custody in only a minority of cus-
tody and divorce hearings, the decisions they make affect a much larger proportion of the "agreements" made out of court. Contested cases define legal norms; the repercussions of contested cases of child custody go well beyond the cases themselves, insofar as they serve as a baseline for the legal determination of all cases of custody disagreements, including the balance of uncontested cases: they collectively form the basis of a body of law upon which others are advised (Lowe, 1982). Those men who actually file for custody and force a court decision may not be representative of all the men who want custody of their children: the actual percentage of fathers who want custody is likely to be much higher than the number of men who take their cases to court. Thus Weitzman (1985), in her sample of recently divorced couples in California, found that 57% of divorced fathers reported that they wanted custody of their children after divorce, an astonishing figure in light of the fact that only 13% actually requested custody on the divorce petition. In Canada, 64% of divorce cases involving children start out as contested on the issue of custody; only 3% are brought to trial (Department of Justice, 1990).

Given the apparent maternal preference in contested cases, it has been argued that the courts simply ratify the status quo in terms of de facto custody arrangements; that is, the major factor taken into account by the courts in determining child custody is the avoidance of disruption of the child's present residence (Eekalaar & Clive, 1977), and mothers are granted custody because their children are already in their care and control. The courts stress continuity of care. The parent who has care for a significant period of time following marital separation is likely to retain custody; maintenance of the status quo is paramount (Kronby, 1984).

There appear to be serious flaws, however, in the "status quo" position as well. First, the general advice of legal practitioners to parents who want custody of their children after divorce is to keep the children, from the point of separation, away from the spouse (Ambrose et al., 1983; Kronby, 1984), so that a history of "continuity" can commence. Vying for control over the child at the earliest stage of divorce thus becomes essential, and the parent who has maneuvered the child into his or her possession at the time of the custody or divorce hearing will have a strong advantage (Folberg, 1981). A parent may try to obtain the actual custody of a child by undesirable means before a court hearing in order to establish the status quo (Richards, 1982). The parent who has actual custody of the child may attempt to delay the custody hearing so that the period of this custody is as long as possible (Maidment, 1984). Further, post-divorce status quo legal determinations take no account of pre-divorce parent-child relationships (and parents' previous involvement with and attachment to their children), only the pattern established immediately after divorce.
The "status quo" argument fails entirely in light of further evidence: as when children are living with their mothers at the time of the interim custody or divorce hearing it is extremely rare for the courts to upset the status quo, but when they are living with their fathers the status quo is not such a potent force (Search, 1983). According to Lowe (1982), the "mother-factor" generally outweighs the status quo consideration: courts are more likely to disturb the status quo when children are living with their father.

A variant of the "status quo" argument asserts that by awarding sole maternal custody, courts are simply upholding a primary caretaker presumption based on the traditional role of mother as the sole or primary caretaker of children, particularly during their early years. The "mother as sole caretaker" position does not always, however, reflect reality; there is in fact a heterogeneity of "mothering" as well as "fathering" roles within families. Further, despite being exposed to generally lower levels of paternal involvement, children form strong attachment bonds with both parents, and fathers are extremely salient individuals in their children's lives and development (Lamb, 1981; Rutter, 1972). Upon divorce, this is reflected in children's persistent yearning for their absent fathers (Hetherington et al., 1978; Wallerstein & Kelly, 1980); the most salient factor in children's positive post-divorce adjustment is the maintenance of ongoing and meaningful relationships with both parents, beyond the boundaries of traditional sole custody and access arrangements (Hetherington et al., 1978; Lund, 1987; Wallerstein & Kelly, 1980). In continuing to subscribe to the notion that it is psychologically important that children be in the exclusive care of one parent after divorce, the courts are overlooking important new knowledge about children of divorce and their developmental needs.

THE STUDY

This study seeks to explore the issue of child custody and related legal aspects of divorce from the perspective of non-custodial fathers themselves, to examine how fathers experience the process of legal resolution of child custody. Are developments in divorce law and practice being experienced by fathers as facilitating their positive adaptation to divorce, or as highly adversarial, polarizing the former spouses? Do fathers perceive a shift toward gender neutrality in the legal system with respect to child custody determination, or do they perceive a maternal preference in custody awards? Does such a perception influence their subsequent action (or inaction) in regard to child custody?

While uncritical reliance on self-report data can pose serious difficulties, a case may be made for the value and validity of such exploratory
“father-centered” research. To study non-custodial fatherhood necessitates a focus on non-custodial fathers’ self-reports of the events surrounding their divorce and a perception of these reports as valid for their own sake, particularly in light of the lacuna in existing divorce outcome research focused on fathers.

**The Sample**

The study employed a survey method using a structured interview format, with a sample of 80 non-custodial divorced fathers, half of whom had ongoing and regular contact with their children and half of whom no longer had contact, half of whom resided in Canada (Metro Toronto) and half in Britain (Edinburgh).

To control for variation in the sample, fathers had to meet the following eligibility criteria: the final parental separation had occurred no more than 5 years before; there were no more than 2 children in the family; the (older) child was under 16 years of age (at interview); and the father had neither physical nor legal custody of the child(ren) of the marriage (in each case the children lived with their mothers, who retained physical and in most cases legal custody). An attempt was made to access court records to generate the sample, which was successful in Canada but not in Britain, where a variety of other sampling sources were used because access to divorce court records, after prolonged negotiation, was denied. In Canada, a total of 288 names were randomly drawn from court records by means of a stratified sampling approach; telephone contact was successful with 132 of these fathers. Of these, the first 40 who met eligibility criteria and agreed to participate were interviewed. A combination of newspaper advertising and referrals from legal and social work practitioners and divorce-related self-help programs was used to generate the British sample; the first 40 fathers who expressed interest and met eligibility requirements were interviewed.

**Data Collection and Analysis**

The source of the data was a structured interview conducted by the author individually with each father, proceeding from an initial focus on demographic data and family history to a more detailed examination of various legal and psychological aspects of fathers’ divorce and post-divorce experiences. Data regarding the legal aspects of the divorce included a focus on the nature of the custody, access and financial determinations, how these determinations were made, and the nature of fathers’ experiences with the
legal system, as well as with any other sources of help sought. The inter-
views lasted on the average between two and two and one-half hours, the
shortest being one hour, the longest three hours.

The questionnaire was comprised of 98 items; altogether, 266 variables
were generated for data analysis. SPSS was employed in the analysis, using
a mix of statistical tests.

LIMITATIONS OF THE STUDY

Data were obtained from the perspective of non-custodial fathers only;
mothers and children were not interviewed to corroborate this information.
There is, however, a considerable body of literature concerning the impact
of divorce on mothers and children, and fathers' views and interpretations of
the events surrounding divorce represent a significant lacuna in the research.
The retrospective nature of the study is also an important limitation, and the
degree of representativeness of the data may be questioned in light of the
self-selected nature of the British sample. As an exploratory endeavor,
however, the research was able to generate detailed data from 80 non-custo-
dial fathers; in most cases, the respondents were able to recall their pre-
divorce relationships with their children, significant events during the
divorce process, and the post-divorce process in vivid detail. Some of the
fathers represented the problem-oriented pole, while others were positive
about the post-divorce changes in their lives; some were looking for a nor-
malization of their experiences, while others were looking to give vent to
their feelings. All of these motivations were present in the sample and were
fairly evenly distributed, and any biases occurring as a result of the self-
selected nature of the sample and self-report and retrospective nature of the
study appear to be varied rather than singular. In addition, both the Cana-
dian and British samples represented a wide spectrum of non-custodial
fathers occupationallly, socioeconomically, and ethnoculturally, with a range
of pre- and post-divorce experiences.

CHARACTERISTICS OF THE SAMPLE

The 80 fathers spanned a range of income, occupational, and educational
categories, and represented a diversity of racial and ethnocultural groups in
both locales. The mean age of the respondents was 39, ranging from 24 to
56. The former marriage was the first for 69 of the men; 11 had been previ-
ously married. The mean length of the marriage to separation was 8 years,
ranging from 4 months to 24 years. Of the 80 separated fathers, 39 were
legally divorced; 9 had remarried since the divorce. The mean length of the separation at the time of the interview was 3 years, ranging from 3 months to 7 years. For the 39 fathers who were legally divorced, the mean length of the divorce at the time of the interview was 2 years, ranging from 1 month to 6 years. For the 9 fathers who were remarried, the mean length of the remarriage was 2 years, ranging from 1 month to 5 years.

In 54 (68%) of the 80 cases, the wife initiated the separation, the husband did so in 18 (23%) cases, and there was a mutual decision in 8 (10%). In 58 of the 62 wife- or mutually-initiated separations, the respondent indicated that he had not wanted the separation to occur. In 28 (72%) of the 39 legal divorces, the wife was the petitioner, the husband in 11 (28%). In half of the divorces where the wife was the petitioner, the respondent indicated that he wanted the divorce, in contrast to the overwhelming number of men who had not wanted the separation to occur when their wives had been the initiators.

The 80 fathers had a total of 128 children of the former marriage, ranging in age from one to 15 years (at interview), with a fairly equal distribution for each year of age. Thirty-two of the fathers had 1 child and 48 had 2 children: of the 80 older or only children, 42 (52%) were female and 38 (48%) were male; of the 48 younger children, 25 (52%) were female and 23 (48%) were male.

RESULTS

ADVERSARIAL NATURE OF LEGAL PROCESSES

A highly significant component of divorcing spouses’ experiences during and after divorce relates to their contact with legal practitioners and the legal system; this contact usually begins early in the divorce process. Seventy-five of the 80 fathers in the study had at least consulted a lawyer, as had 77 of their wives.

Fathers expressed a high level of dissatisfaction with the behavior of legal practitioners and the legal process in general. The 75 fathers who had consulted a lawyer were asked whether and how legal practitioners had helped or hindered their subsequent relationship with their children. A high proportion (69%, or 52 of 75) felt that legal practitioners had a negative impact on the subsequent father-child relationship; only 12% felt that lawyers had helped; while 5% stated that they had both helped and hindered and 13% (10) indicated that they had no effect (Note 3).

Those indicating that legal practitioners had hindered their subsequent relationship with their children cited a number of negative effects (see Table 1).
TABLE 1

Perceived Negative Effects of Legal Practitioners on Father-Child Relationship

<table>
<thead>
<tr>
<th>Effects*</th>
<th>Number of Times Mentioned</th>
</tr>
</thead>
<tbody>
<tr>
<td>Used an adversial approach, polarizing the spouses</td>
<td>31</td>
</tr>
<tr>
<td>Was not sensitive to emotional needs of family members</td>
<td>19</td>
</tr>
<tr>
<td>Showed legal incompetence or gave unhelpful advice</td>
<td>15</td>
</tr>
<tr>
<td>Actively discouraged (paternal or joint) custody</td>
<td>10</td>
</tr>
<tr>
<td>Showed bias toward mother</td>
<td>10</td>
</tr>
<tr>
<td>Destroyed father-child relationship</td>
<td>9</td>
</tr>
<tr>
<td>Seemed only concerned about their own financial gain</td>
<td>7</td>
</tr>
<tr>
<td>Were very slow with many delays</td>
<td>7</td>
</tr>
<tr>
<td>Placed emphasis on financial aspects of divorce,</td>
<td>4</td>
</tr>
<tr>
<td>rather than custody and access</td>
<td></td>
</tr>
</tbody>
</table>

*Post-coded categories.

Ambrose (et al., 1983), in their British study of divorced fathers, identified a potential double-bind situation in which lawyers may find themselves: on the one hand, legal practitioners are seen by fathers as enhancing or creating an adversarial climate between divorcing spouses in their use of an entirely partisan and often provocative approach and, on the other, they are perceived as not being forceful or aggressive enough in "fighting" for fathers' rights. On both counts, fathers rate their legal practitioners as "unhelpful." This study's results, however, suggest that lawyers are rarely perceived as unhelpful on the basis of lack of aggressiveness; fathers' predominant concern was in fact the damaging effects of what they perceived to be a strongly adversarial stance on the part of their lawyers: 31 fathers felt that this aspect had hindered their subsequent relationship with their
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children by polarizing the spouses, and a further 19 stressed the fact of a lack of awareness about, or sensitivity to, the emotional aspects of divorce on the part of their lawyers.

Many fathers perceived their lawyers as not only *exacerbating* an already-existing adversarial climate between the parents, but as in fact often *creating* such an atmosphere. More fathers had described the atmosphere at the point of separation—before legal consultation—as relatively calm than as turbulent (although disagreements between spouses existed on various issues; see: Note 4). This atmosphere seemed to change dramatically after legal contact. In this context, fathers spoke of “manipulative” legal practices designed to provoke conflict, including instructions to quit communicating with the former spouse, and the intimidating and destructive nature of affidavits and other written communications prepared by legal practitioners on both sides in the initial stages of the legal process. In fathers’ own words, such practices result in the development of “distorted perceptions” of the former spouses toward each other.

The reported level of conflict between the spouses at the time of separation, before any significant legal involvement, was compared with the post-divorce level of friendliness between the former spouses, after legal processes had made their major impact. No correlation was found between the level of inter-spousal conflict at the time of the separation and the nature of ex-spouses’ post-divorce relationship. That is, the level of spousal conflict post-divorce was not predicted by the level of conflict between spouses at the time of separation—suggesting the presence of mediating factors operating in the interim period that influence the nature of the subsequent relationship.

There was also no association between the level of conflict between the spouses at the time of separation and subsequent father-child contact: conflict between the spouses *upon separation* did not necessarily lead to paternal disengagement from children after divorce. The relationship between the level of conflict between the parents *after divorce* and father-child contact, however, was highly significant; while 39 of 40 disengaged fathers assessed their post-divorce relationship with their former spouses as “unfriendly” or “non-existent,” only 14 of the 40 fathers remaining in contact with their children did so; 26 of the contact fathers described the post-divorce contact between the ex-spouses concerning their children as “friendly” or “middling” (p < .001). That post-divorce but not pre-separation paternal conflict is associated with non-custodial fathers’ disengagement from their children suggests that mediating factors are at work during the initial period of divorce to produce a level of parental conflict strong enough to result in access difficulties for non-custodial fathers, followed by eventual loss of contact.
Significantly, most disengaged fathers described their ex-wives as having believed in a father’s ability to be an effective parent, as having confidence in and generally agreeing with the fathers’ child rearing practices during the marriage. Disagreements over child-related matters within the marriage were reported as relatively rare. The fact that the great majority of divorces involve two capable and loving parents could be used as the basis for developing positive co-parental relationships after divorce; in contrast, within the legal process, former spouses are oriented toward devaluing the relative contribution of the other, and custodial parents toward acting as if non-custodial parent contact is not important for the children. “Distorted perceptions” of the former spouse appear to be a frequent result of a legal mode of custody and access resolution. Up to the time of legal negotiations, each parent has viewed the other as necessary to the children’s lives; the adversarial stance adopted during legal negotiations contributes to a dramatic shift in this perception.

Mediation and joint custody/shared parenting after divorce have both been associated with less conflictual and more positive post-divorce outcomes for family members (Folberg, 1981; Irving et al., 1984). Fathers were asked whether they had been aware of the existence of these options at the time of initial legal consultation. Fifty-seven (71%) had not been aware, which suggests that lawyers are generally not informing their male clients of this option, or doing it in such a way as to leave little imprint on the minds of divorcing fathers. Forty-two of the 57 fathers previously not aware of mediation indicated that it probably would have had a positive impact on their subsequent relationship with their children had they made use of it. Forty-nine (61%) had not been aware of joint custody or shared parenting as a legal option upon separation; 88% of these would have tried to pursue such an arrangement if they had known about it. An astounding 95% (71 of 75) of fathers who had consulted a lawyer indicated that their lawyer had not discussed the option of joint custody with them, giving credence to the assertion of Felner (et al., 1985) that, “legal professionals see joint custody as neither the most desirable nor the most appropriate custody arrangement in most cases and they question the ability or motivation of divorcing couples to co-operate to the extent necessary for joint custody to be viable” (p. 27).

**Discrepancy Between Fathers’ Stated Desires and Legal Custody Outcomes**

Whereas only 15 fathers (10 from Canada and 5 from Britain) formally contested the issue of custody in court, 63 (or 79%) expressed a desire for at
least partial physical custody of their children at the point of separation (Note 5). Where a legal determination of maternal custody had been made, fathers were also asked what legal custody arrangement they had actually wanted: 28% indicated paternal custody and 46% joint custody, a total of 74%. Only 23% had wanted and were in true agreement with the legal determination of sole maternal custody, in sharp contrast to assertions that the judicial system merely ratifies previous “agreements” between the parties.

Not surprisingly, in light of the small number of fathers actually agreeing with maternal custody (in terms of their stated desires regarding post-divorce arrangements), the majority (79%, or 51 of 65) of fathers initially disagreeing with maternal custody were dissatisfied with the final custody determination. Fathers were asked for the main reasons for their dissatisfaction and the most frequently identified are presented in Table 2.

**Table 2**

**Reasons for Dissatisfaction**

**With Legal Maternal Custody Arrangement**

<table>
<thead>
<tr>
<th>Reason*</th>
<th>Number of Times Mentioned</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wanted paternal or joint custody</td>
<td>19</td>
</tr>
<tr>
<td>Found sole maternal custody resulted in <em>no</em> paternal contact with children</td>
<td>16</td>
</tr>
<tr>
<td>Found sole maternal custody allowed ex-wife to cut off contact between father and children</td>
<td>14</td>
</tr>
<tr>
<td>Believed sole custody not in children’s best interest/welfare of children compromised</td>
<td>12</td>
</tr>
<tr>
<td>Believed sole maternal custody resulted in <em>not enough</em> paternal contact with children</td>
<td>9</td>
</tr>
<tr>
<td>Felt absence of legal rights in children’s lives</td>
<td>9</td>
</tr>
</tbody>
</table>

*Post-coded categories. A maximum of two reasons per respondent were coded.
After divorce, fathers identified a number of factors contributing to their dissatisfaction with a legal maternal custody arrangement. Foremost among these was the view that a legal ratification of maternal custody contributed to fathers’ subsequent loss of contact with their children; many spoke in terms of the legal system removing custody from one parent, rather than granting it to the other. Many indicated that a legal ratification of maternal custody, combined with the adversarial nature of legal processes that markedly heightened inter-spousal conflict, contributed to an erosion and eventual denial of access by the former spouse (Note 6).

The legal advice given fathers in relation to custody and access was examined, and the level of lawyers’ encouragement of paternal or joint custody and paternal access measured. Fathers who had consulted a lawyer were asked about the nature of their legal practitioners’ advice vis-a-vis child custody and (more directly) if their lawyers had encouraged or discouraged them in seeking custody (see Figure 1).

**FIGURE 1**

Legal Practitioners’ Advice Regarding (Parental or Joint) Custody

<table>
<thead>
<tr>
<th>Advice Given</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discouraged Custody</td>
<td>55%</td>
</tr>
<tr>
<td>Gave no advice</td>
<td>24%</td>
</tr>
<tr>
<td>Agreed with encouraged custody</td>
<td>12%</td>
</tr>
<tr>
<td>Encouraged access only</td>
<td>7%</td>
</tr>
<tr>
<td>Agreed reluctantly (chances poor)</td>
<td>3%</td>
</tr>
</tbody>
</table>
In 55% of cases, legal practitioners actively discouraged fathers from pursuing custody; in these cases, it is assumed that many fathers themselves had broached the subject. A significant proportion of lawyers, however, gave no advice or neither encouraged nor discouraged custody, perhaps because the father himself may not have raised the issue. Of the nine legal practitioners who had encouraged custody, seven suggested pursuing it through court action, one through legal negotiation, and one through negotiation between the parents themselves.

The majority of fathers indicated that their lawyers had actively dissuaded them from seeking custody by providing them with a basic knowledge of the law and legal processes, helping them to decide what and what not to ask for, and shaping expectations of what they would get. If the expectation was that the best fathers could hope for was regular access, this is what they felt compelled to accept. Although the majority of fathers were not hopeful or even aware of any possibility of legal paternal or joint custody in the initial stages of the divorce, a significant proportion indicated that they had broached the subject of paternal or shared physical custody with their lawyers. The advice they received was experienced as highly discouraging, with legal practitioners presenting (sole) maternal custody and (limited) paternal access as the only available and appropriate legal option.

On the basis of fathers’ reports and current research evidence on lawyers’ attitudes toward custodial alternatives (Felner et al., 1985), legal practitioners appear to be important mediators between what fathers desire at the time of divorce and what they finally obtain. In providing fathers with a basic knowledge of legal processes and (often realistically) informing them that their chances of obtaining (paternal or joint) custody through the courts are minimal, legal practitioners effectively transform fathers’ aspirations regarding custody. Contested custody cases, which continue to result in maternal custody determinations in most cases, form the basis of a body of law upon which fathers (and mothers) are advised by their lawyers; on occasion, if a father chooses not to follow his lawyer’s advice of not challenging judicial precedent, his lawyer may simply refuse to proceed on his behalf. Fathers thus may be caught in a vicious cycle: legal practitioners perpetuate legal inaction vis-a-vis sole maternal custody because of an assumption of judicial prejudice, which becomes a self-fulfilling prophecy and creates continued inequities of its own.

That legal practitioners transform fathers’ aspirations regarding custody (on the basis of what would happen in court if custody were contested) appears to contradict fathers’ depictions of legal practitioners’ adversarial practices and the inherently adversarial nature of the judicial system: if lawyers were truly adversarial, they would consistently advise fathers to legally contest the issue of custody. A prolonged legal conflict, however,
does not necessarily entail contested custody; in a large number of instances, fathers reported that access increasingly became the main issue of legal contention between the parties. The legal practices of lawyers in their "negotiations" over access (and the financial aspects of the divorce) were described as highly adversarial and as intensifying conflict, particularly in the manner that affidavits and other written communications were used, and in the discouragement of direct communication between the parents.

Legal practitioners' advice and encouragement regarding paternal access was markedly different to that given regarding custody (see Figure 2).

**Figure 2**

Legal Practitioners' Advice Regarding Paternal Access

The majority of legal practitioners actively encouraged fathers to pursue access; of the 42 who encouraged it, 18 suggested some form of court action, 10 legal negotiation, 9 negotiation between the parents themselves, 4 some combination of these means, and 1 that the father simply continue to visit on a regular basis. It is interesting to note, however, that while very few legal practitioners discouraged access, nine fathers indicated that their lawyers had advised against too much access or discouraged residential
access. There was also a substantial percentage of legal practitioners giving no advice regarding access (23%).

In sum, while 79% of fathers expressed a desire for at least partial physical custody of their children, most did not legally contest the issue; the active discouragement of their lawyers and a prevailing perception of a judicial system operating as if there is a maternal presumption were critical factors in fathers’ decisions not to contest. Fathers also cited a number of other (secondary) factors, primarily related to the destructive nature of the adversarial process, including their aversion to use means by which their children would be “caught in the middle” and their belief that their children had experienced sufficient trauma without the added disruption of a prolonged custody battle, which could only be harmful to their well-being. Many were reluctant to assume a “fighting” posture toward their ex-wives; some still held the hope of an eventual reconciliation and feared that a custody dispute would jeopardize such a possibility.

DISCUSSION AND IMPLICATIONS

ALTERNATIVE CHILD CUSTODY OPTIONS

The state has a strong interest in the ways in which parents treat their economic relationship, and the law functions to maintain appropriate work and family role behaviors. When divorce occurs, the judicial system has a central role to play in limiting child custody and access options, sanctioning and legitimizing traditional structures and relationships, and perpetuating a gender-based division of roles in the post-divorce family. The “motherhood” and “fatherhood” mandates are clear: the father remains responsible for children’s economic support, the mother for their care. Thus we see a consistent pattern of decisions that both justify and reinforce a maternal presumption; this judicially-constructed preference has operated as effectively as a statutory directive (Foote, 1988; Weitzman, 1985).

To the courts, there are clear advantages of a maternal preference in child custody determination. Maternal preference provides stability and certainty in the decision-making process, in a domain that is emotionally charged, and provides for uniformity in judges’ decisions. It is seen to “fit” with established social norms and expectations. It reduces litigation in custody disputes, as fathers are much less likely to contest the issue of custody (Shnit, 1992).

Child development and divorce outcome literature, however, has shown a marked shift from perceiving the maternal relationship as of primary
importance in children’s growth and development, to emphasizing the pri-
macy of children maintaining meaningful and active relationships with both
parents after divorce. This shift prompts an urgent call for reexamination of
the validity of maternal preference in child custody determination. Maternal
preference is now seen to run counter to what we know about the best inter-
ests of children in divorce.

The widespread disengagement of non-custodial fathers from the lives
of their children after divorce, including those highly involved with and
attached to their children during the marriage (Kruk, 1992), is largely the
result of a custodial arrangement which they perceive as “disqualifying”
them as parents: these fathers find that meaningful, regular, and frequent
parenting is not possible within the bounds of sole maternal custody and
limited paternal access; the very concept of “access” connotes for many
fathers a de facto cessation of their parenting role. Contrary to existing
assumptions, fathers want at least partial physical custody of their children;
many of the fathers in this study considered shared parenting with their for-
mer spouses as the only custodial arrangement that would allow them to
continue a meaningful relationship with their children after divorce, in
which they could retain a semblance of “real fatherhood,” as opposed to the
avuncular nature of the “visiting” relationship. Most of the fathers who had
lost all contact with their children suggested that a joint custody arrange-
ment would have allowed them to continue their parenting responsibilities
after divorce.

If we accept research evidence that the key factor in a positive outcome
for most children of divorce is the continued involvement of both parents in
child rearing (Hess & Camara, 1979; Lund, 1987; Wallerstein & Kelly,
1980), the appropriateness of sole custody determinations is called into
question, and the desirability of joint custody as an alternative arrangement
warrants serious consideration. In cases where both parents possess ade-
quate parenting abilities, have been salient individuals in their children’s
lives, and wish to maintain their parenting responsibilities in an active man-
ner following divorce, a joint custody arrangement may potentially have the
most positive long-term benefits for all family members.

An important debate in the divorce literature relates to the definition of
and exact time apportionment involved in joint custody. In some instances,
the key feature of joint custody is seen to be that of allowing both parents to
retain legal authority for major decisions affecting their children; in other
instances, it is defined as both parents retaining not only legal but also phys-
ical custody and jointly contributing to the day-to-day care of their children.
An important concern of some divorce scholars is that joint legal custody
may empower fathers, giving them control over their children (and ex-
wives) without any responsibility for child care on their part (Fineman,
1988); in these instances, joint custody in fact resembles sole maternal custody in terms of day-to-day care of children, and the social role and functions of mothers are maintained in practice, but their legal rights and control over their children’s lives are partly removed. While joint legal custody has been shown to permit and facilitate joint physical custody, the potential for abuse and inequity exists in those cases where parental rights are granted without any requirement for the assumption of active child care responsibility.

“Joint custody” should encompass both shared physical caretaking (the actual day-to-day care of children) and equal authority regarding children’s education, medical care, and religious upbringing. While this does not necessarily mean a precise apportioning of a child’s time on an equal or “fifty-fifty” basis, and while flexibility based on children’s and parents’ needs is important, the concept does entail the notion of two actively involved parents having regular and frequent physical contact and caring for their children within a daily routine in separate households.

ALTERNATIVES TO LITIGATION

The majority of fathers in this study described the legal system as exacerbating or creating conflict between the former spouses, setting a tone for the post-divorce relationship which did not bode well for fathers’ future contact with their children. They felt that a more “conciliatory” approach, bringing both parents together to negotiate custody and access arrangements, would have produced more beneficial results for themselves and their children.

Their views complement current research on the impact of divorce on children. As a critical variable affecting the adjustment of children after divorce is the extent of continued involvement by both parents in child-rearing, so it has been found that divorces having the least detrimental effect on the development of children are those in which the parents are able to cooperate in their continuing parental roles (Wallerstein & Kelly, 1980). If parental cooperation can be freed from the marital tension that may have adversely affected the children within the marriage, then the divorce may present a positive developmental influence. Rarely, however, is this an outcome of a legal mode of custody and access determination.

If indeed the legal system exacerbates or creates conflict between the spouses after divorce, and if we accept research evidence stressing the importance of parental co-operation after divorce for children’s ongoing development and emotional well-being (Wallerstein & Kelly, 1980), then the disadvantages of legal determination of child custody and access and the need for alternative mechanisms are clear. Mediation and related counsel-
ing services may provide an effective alternative to a legal and judicial means of resolving issues of child custody and access for the majority of divorcing families.

In recognition of the fact that the positive post-divorce adjustment of children is associated with ongoing meaningful contact with both parents, and that from children's perspective, traditional sole custody arrangements with limited access to the non-custodial parent are woefully inadequate (Wallerstein & Kelly, 1980), a basic assumption of mediation should be that termination of a marriage necessitates a restructuring of family life that enables children to have a meaningful and active relationship with both parents. In light of the fact that over 50% of non-custodial fathers disengage from their children's lives after divorce despite fathers' desire for at least partial physical custody after divorce (Furstenberg et al., 1983; Kruk, 1992), the supportive maintenance of the father-child relationship in particular should be an important goal of mediation. Specifically, mediation should facilitate the exploration of joint custody as a viable custodial arrangement; if mediation does not exercise its educative function, stressing the necessity of regular and frequent post-divorce contact of both parents with their children, detailing the range of custody and access options open to families, and, where appropriate, actively facilitating and working through the logistics of a shared parenting arrangement, it fails to live up to its true potential. Mediation should not be simply a means of settling disputes, but a system of facilitating optimal post-divorce living arrangements for all family members.

CONCLUSION

Fathers' perceptions of a maternal bias within the judicial system in relation to child custody determination, and their experience of a fundamentally adversarial process of legal resolution of this issue, appear to be widespread. Fathers' primary concern upon divorce is the maintenance of a meaningful post-divorce relationship with their children, going beyond traditional access arrangements and involving at least partial physical custody; they attribute the discouragement and adversarial approach of legal practitioners and the legal system as primarily responsible for their failure to obtain such an arrangement. The patterns were observed in equal degree in this study's Canadian and British samples.

While changes in divorce laws have reduced the adversarial nature of divorce generally, child custody remains an arena characterized by conflict, where gender equality continues to be an overriding concern. While legal statutes do not favor mothers or fathers as potential custodial parents, in
practice mothers continue to assume legal custody in the majority of cases cross-nationally; maternal preference in child custody determination continues through judicial precedence. Fathers thus feel themselves to be disadvantaged judicially, legislatively, and culturally, and their adaptation to the consequences of divorce continue to be highly problematic.

Current debates about the nature of the legal model and the practices of legal practitioners and the judiciary in the process of child custody determination have tended to overlook the experiences of the major participants in the process. The perspective of non-custodial divorced fathers in particular is largely missing in the divorce literature; the results of this study suggest that their perceptions do in fact correspond to existing data on child custody outcomes in divorce.

NOTES

1. In the United States and Canada, about one marriage in three currently ends in divorce, with 60% of divorces involving children under 16; the total number of children affected by divorce has more than tripled since 1960. Although projections vary and there is evidence of a leveling off in divorce rates, it is estimated that between 30 to 50% of children will, at some point before their sixteenth birthday, find their parents separating (Bala, 1987; Furstenberg et al., 1983). These statistics pertain not only to North America, but also to Western European and Australian jurisdictions (Ambrose, Harper, & Pemberton, 1983; Jordan, 1985).

2. Central Registry statistics indicate that legal joint custody awards comprise 11.6% of all custody awards in Canada. It is rare, however, for joint physical custody orders to be made over the objection of one of the parties; joint physical custody awards are generally made only when both parties agree to the arrangement (Department of Justice, 1990).

3. I am not presuming here to judge whether the intervention of lawyers was legally appropriate, accurate, or helpful; rather, I wish to demonstrate how their help or advice was perceived and evaluated by their clients.

4. Only 49%, however, identified custody as an issue of overt contention between their wives and themselves at the point of separation, before legal involvement.

5. Fathers were asked, "At the time of the separation, did you want your child(ren) to live with you at least part of the time?", thus referring to physical care and control and including a "part-time" (or shared parenting)
alternative.

6. The disengagement of noncustodial fathers from the lives of their children is a highly complex phenomenon; while the legal system may be an important factor in the disengagement process, fathers' attribution of responsibility for their loss of contact onto the legal system and their former spouses largely ignores their own role in the process (Kruk, 1992).

REFERENCES


Shnit, D. (1992). Tender years: Legal guideline or obstacle in solving cus-
tody disputes? Paper presented at the 6th International Congress on Family Therapy, April, Jerusalem.

