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Preserving Relationships: Ways Attachment Theory Can Inform Custody Decisions

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ABSTRACT

Professor Andrew Cherlin writes in *The Marriage-Go-Round* that "children living with two married parents in the United States have a higher risk of experiencing a family breakup than do children living with two unmarried parents in Sweden."[1] In fact, there is more of an exchange of partners than there is in any other Western country.[2] This is one reason why Cherlin uses the metaphor of a merry-go-round. The high turnover of caregivers takes an emotional toll on children. We see social problems such as early promiscuity, deviant behavior, depression, problems at school, and the list goes on.[3] When families are in a constant state of litigation about custody disputes,[4] the results can be devastating to the healthy functioning of the family.

John Bowlby, (1907–1990) a psychiatrist during the middle of the twentieth century, was interested in the effects of children's separation from their primary caregivers. His ultimate work now described as "attachment theory" discusses the critical role of relationships within the family. Parents are NOT interchangeable. The loss of one parent from the child's life is a separation event that *may* create a basis for the ongoing problems described above as a result of divorce. The purpose of this Article is to explore custody decisions in family courts using attachment theory as described by John Bowlby.[5]

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1. ANDREW J. CHERLIN, THE MARRIAGE GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY 3 (2009).

2. *Id.* at 5.

3. *Id.* at 190.

4. PATRICK PARKINSON, FAMILY LAW AND THE INDISSOLUBILITY OF PARENTHOOD 9–11 (2011).

5. *See* JOHN BOWLBY, ATTACHMENT AND LOSS: VOLUME I ATTACHMENT (Clifford Yorke ed., 2d ed. 1982) [hereinafter BOWLBY, VOLUME I].

BACKGROUND

Bowlby and his student Mary Ainsworth were instrumental in describing consistent behaviors that are observable when children are separated from their caregivers.[6] They argued that we require enduring relationships with those whom we have grown to trust.[7] Our current understanding of these relationships is that when families decide to dissolve, decisions about custody should be made with the understanding that the relationships children develop beginning in childhood are important and have lifelong consequences.[8]

Essentially, Bowlby's work revolved around his argument that losing important relationships (such as a parent) plays a critical role in healthy psychological development. Unresolved loss is typically defined as separating a child from a trusted parent or caregiver regardless of the reason. Some separation events are short; others are long term. Some losses are typically described as a parent who leaves the home after an argument, leaves the child alone while shopping, or is left when a parent is taken to the hospital.[9] Separation events can clearly be any kind of event where the child cannot access the parent when needed.[10]

Our current understanding of these relationships is that when families have decided to dissolve, decisions about custody should be made with the understanding that the relationships children develop beginning in childhood are critical to the healthy functioning of the child throughout the lifespan.[11] The critical factor is how well the parents are able to keep the child's life stable even though they have experienced an important loss.[12] Unresolved loss and grief can result in depression, delinquency, and other socially problematic behaviors.

Bowlby called these important relationships emotional bonds or "attachments." Over time, Bowlby's view of the value of emotional ties in our lives has been supported in study after study. Mary S. Ainsworth, a student of Bowlby, provided a wealth of observations supporting his theory in her seminal book: *Infants in Uganda*.[13] Subsequent research

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6. *See* Jude Cassidy, *The Nature of a Child's Ties*, *in* HANDBOOK OF ATTACHMENT: THEORY, RESEARCH AND CLINICAL APPLICATION (Jude Cassidy & Philip R. Shaver eds., 2d ed. 2008) [hereinafter HANDBOOK OF ATTACHMENT].

7. *See* BOWLBY, VOLUME I, *supra* note 5.

8. *Id.*

9. John C. Wright, Valerie Binney & Peter K. Smith, *Security of Attachment in 8-12-Year-Olds: A Revised Version of the Separation Anxiety Test, Its Psychometric Properties and Clinical Interpretation*, 36 J. CHILD PSYCHOL. & PSYCHIATRY 757 (1995).

10. *See* Cassidy, *supra* note 6.

11. *See* BOWLBY, VOLUME I, *supra* note 5.

12. CHERLIN, *supra* note 1, at 191.

13. MARY D. SALTER AINSWORTH, INFANCY IN UGANDA, INFANT CARE AND THE GROWTH OF LOVE (1967).

conducted in Baltimore, Maryland by Ainsworth provided additional evidence that reinforced the significance of the child's ties to its mother. In fact, Sue Johnson, family and marriage counselor, has described these emotional bonds as the critical factor in a happy marriage.[14]

Bowlby's view of attachment relationships and behavioral systems is a view of human development that is based on the value of a specific event (breaking of important emotional ties) and attempts "to trace the psychological and psychopathological processes that commonly result."[15] So, rather than the common psychological practice of taking the client who is troubled and tracing back through their life, we are looking at common events in childhood that may be problematic for healthy psychological development later. Indeed, Bowlby's view of early attachment having an influence on later development has generated remarkably robust empirical support.[16]

Professor Patrick Parkinson's book *Family Law and the Indissolubility of Parenthood* brings to light an important factor related to custody agreements in divorce cases. He begins his argument with the very powerful statement: "Family law is largely about distributing loss."[17] Parkinson argues that in the division of resources during a divorce, someone determines who gets what in the divorce. If the couple can't decide, then it goes to the court. The entire process is very much about dividing families. In cases of divorce, all parties involved have to accept losing important things, property, stability, and people.[18]

The most important loss Parkinson reports is the loss of access to parents.[19] Making decisions about custody and where the children will live support Bowlby's view in that disrupting parent-child relationships and creating "separation events" (such as occurs with divorce) plays a strong role in the individual's life.[20] There are certainly significant differences related to the needs of children at each stage of life from toddlerhood through adulthood; however, the need for the presence of important people in an individual's life persists throughout his or her lifetime.[21]

First, this Article will provide a brief overview of attachment theory,

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14. SUE JOHNSON, HOLD ME TIGHT: SEVEN CONVERSATIONS FOR A LIFETIME OF LOVE 5–7 (2008).

15. BOWLBY, Volume I, *supra* note 5, at 4.

16. Ross Thompson, *Early Attachment and Later Development: Familiar Questions, New Answers*, *in* HANDBOOK OF ATTACHMENT, *supra* note 6, at 348.

17. PARKINSON, *supra* note 4, at 3.

18. *Id.* at 4.

19. *Id.*

20. BOWLBY, VOLUME I, *supra* note 5.

21. Brooke C. Feeney & Joan K. Monin, *An Attachment-Theoretical Perspective on Divorce*, *in* HANDBOOK OF ATTACHMENT, *supra* note 6, at 935.

specifically how attachment theory is related to divorce issues. The discussion will focus on two aspects of attachment theory: first, secure-base or proximity-seeking behaviors and second, multiple attachment relationships.

Secure-base or proximity-seeking behaviors are observed when people are stressed or when they feel unsafe. These feelings happen regardless of age, so, biologically, people strive to be close to others who are interested in caring for and protecting them.[22] For example, a young child wanders off from her mother to explore the store. If the child becomes scared, she will ultimately turn to look at her mother. If her mother displays dissatisfaction with the child, she is expected to return to her mother. If she disregards this cue, you'll see her mother run to shorten the distance so she can ensure the safety of her daughter. In the case of adolescents, they will check with their friends to see if their behavior is supported. If the friend shows any type of disapproval then this is a clear message to the adolescent to either be quiet or move the conversation in a different direction.

Multiple attachment relationships occur when people not only become attached to their primary caregiver, but with other people in their lives who can provide a sense of safety and security.[23]

People develop ties with a number of individuals, so being sensitive to these relationships is important in custody decisions. Of note, it is not necessarily the mother, but rather the individual (or individuals) in one's life who is (are) the most sensitive and responsive to one's needs. Thus, it is not necessarily the amount of time that is spent with one's parents that should be the key indicator, but whether or not clinicians can accurately interpret behavioral cues the child exhibits in the presence of other caregivers. Time available for the child is certainly an important characteristic, but more importantly, it is the parent's ability to sensitively respond to the child that determines attachment security.

This Article will use a select number of cases described by D. Kelly Weisberg and Susan Appleton where attachment theory can be applied.[24] The Article will then apply aspects of the theory that can be used to help make custody decisions using those actual cases. This Article does not intend to provide a legal analysis but rather to use the cases as a springboard to apply attachment theory in real-life situations.

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22. A secure base is considered to be a place where the child can retreat when feeling stressed or need for comfort, usually the mother or another familiar caregiver. Proximity seeking behaviors can be described by how the child refers back to mother (either by looking at her or returning to her arms) in times of danger or distress.

23. Carolee Howes & Susan Speiker, *Attachment Relationships in the Context of Multiple Caregivers*, *in* HANDBOOK OF ATTACHMENT, *supra* note 6, at 317–32.

24. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 799–845 (2d ed. 2002).

Finally, the Article will address some of the limitations of using attachment theory to help guide custody decisions within our current system. Again, the Article will not address the legal implications but considers how to determine attachment figures and to work toward evaluating the quality of those attachments. The Article will also provide some ideas for future directions for policy and research.

I. INTRODUCTION

A. Overview of Attachment Theory

Briefly, attachment theory is based on the view that the bonds we create with others are biologically based and driven by the quality of the context.[25] These bonds are lifelong, intergenerational, and create a model for how we make sense of future relationships. Children become attached to their caregivers regardless of how well the parent is able to meet their emotional needs.[26] However, the *quality* of the attachment is affected by the caregiver's ability to sensitively respond to the child's demands. Thus, children can become attached to abusive parents.[27] Researchers are increasingly identifying the quality of attachment as a set of characteristics known as the "caregiving system,"[28] which is established early in the child's life and then can be traced throughout his or her life, including friendships in school,[29] dating in adolescence, and future life partners.[30] The caregiving system is affected by the caregiver's health, financial resources, culture, priorities, time available to devote to the child, ability to respond to the child with sensitivity, and ability to accurately read the child's needs.[31]

It is difficult to describe the caregiving system, since it is the overall behavior of the caregiver(s) that establishes it. In other words, when interacting with the child, does the caregiver pay attention to the nuances of the clues telegraphing her needs? Can the parent tell the difference between a cry for a clean diaper, for attention, or for play? Thus, it is clear that the system requires at least one person in the child's environment to be able to sensitively respond to the child's signals. Most

25. BOWLBY, VOLUME I, *supra* note 5, at 81.

26. Cassidy, *supra* note 6, at 3.

27. *Id.*

28. Carol George & Judith Solomon, *The Caregiving System: A Behavioral Systems Approach to Parenting*, *in* HANDBOOK OF ATTACHMENT, *supra* note 6, at 833.

29. Kathryn A. Kerns, *Attachment in Middle Childhood*, *in* HANDBOOK OF ATTACHMENT, *supra* note 6, at 366, 368.

30. Debra Zeifman & Cindy Hazan, *Pair Bonds as Attachments: Re-evaluating the Evidence*, *in* HANDBOOK OF ATTACHMENT, *supra* note 6, at 436–55.

31. *See* George & Solomon, *supra* note 28, at 838–47.

of the existing research supports the concept of the "sensitive and responsive behaviors" of the child's caregiver as the key ingredient for a secure attachment.[32] The system is dependent on the caregiver's ability to respond to the child's needs in a way that helps the child feel comforted and secure. In other words, the caregiver can accurately interpret the child's needs and then respond to the child in a consistent and appropriate way.

An example of the caregiver's sensitivity might be their ability to recognize the child's need for attention. In the case of severely depressed mothers, a child will attempt to solicit the mother's attention only to be rebuffed each time. If this is a new behavior from the mother, the child may be able to draw on previous experience and deal with the temporary deviation from the mother.[33] However, if the mother displays chronic depression and consistently fails to respond to the infant's need for attention, the child may avoid or resist the parent.[34]

Theoretically, this relationship creates a framework for the child as to how the world works.[35] Bowlby called these frameworks "Internal Working Models" (IWM). If the primary caregiver can meet the child's needs in an appropriate way then the child begins to view the world as a responsive place that is safe to explore.[36] The ability of the parent to meet the child's emotional needs is a critical factor when considering custody cases.[37] Separating children from their parents creates some level of anxiety, regardless of the quality of attachment. Depending on the quality of the caregiving system, individuals will handle a separation experience with varying degrees of success. In other words, when the quality of caregiving fits with the child's needs then the child is much more capable of handling separation events without the negative outcomes. By considering the caregiver's ability to respond appropriately to the child when making custody decisions, courts and policy makers can minimize the child's anxiety and future ability to cope successfully with life.[38]

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32. BOWLBY, VOLUME I, *supra* note 5, at *xvi*.

33. Sheree L. Toth et al., *Maternal Depression, Children's Attachment Security and Representational Development: An Organizational Perspective*, 80 CHILD DEV. 192, 204 (2009).

34. Catherine McMahon et al., *Maternal State of Mind Regarding Attachment Predicts Persistence of Postnatal Depression in the Preschool Years*, 107 J. AFFECTIVE DISORDERS 199 (2008).

35. Cassidy, *supra* note 6, at 3; George & Solomon, *supra* note 28, at 833; R. A. Hinde, *Attachment: Some Conceptual and Biological Issues*, *in* PLACE OF ATTACHMENT IN HUMAN BEHAVIOR 60–70 (C. M. Parkes & J. Sevenson-Hinde eds., 1982).

36. This Article will be using sex of the child arbitrarily in order to depict attachment behaviors in *all* children.

37. Shelly A. Riggs & Michael C. Gottlieb, *The Attachment Network in Family Law Matters: A Developmental-Contextual Approach*, 9 J. FORENSIC PSYCHOL. PRAC., 208, 208–36 (2009).

38. Thomas G. O'Connor & Michael Rutter, *Attachment Disorder Behavior Following Early*

B. Proximity and Attachment Theory

Bowlby promoted the view that attachment behaviors included proximity-seeking behaviors. [39] One example of a proximity-seeking behavior is when the child feels stressed; he will seek out his caregiver for a sense of security. The need for safety and security drives the child to seek close proximity with his caregiver.[40] Judy Cashmore and Patrick Parkinson reviewed the literature investigating the quality of caregivers and quality of environment that is necessary for the healthy development of children when dealing with custody and other disruptions of the family unit.[41] Their investigation suggests that there are adverse effects of separation events for infants and young children. Cashmore and Parkinson argue that the entire context of relationships must be considered before making decisions about custody. Even so, it is true that as children grow and gain in language skills, perspective-taking, and emotional regulation, their separation events can be longer without devastating effects; but the child's resilience certainly depends on how the caregiver makes sense of the event and on how sensitive he or she is to the child's own ability to understand what is happening.[42]

Indeed, in cases of divorce, attachment experts Brooke Feeney and Joan Monin report the following:

> [D]ivorce is likely to affect the child's attachment security. The mere fact that parents are living apart may undermine a child's feelings of security, because parental accessibility becomes more tenuous. In fact, Bowlby noted that some children who have experienced loss of or separation from one parent may fear the loss of or separation from the other parent.[43]

A clear factor in this assessment is that data and analysis related to separation events, such as divorce, and how to mitigate those events, are

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Severe Deprivation: Extension and Longitudinal Follow-up, 39 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 703, 703–704 (2000).

39. JOHN BOWLBY, ATTACHMENT AND LOSS: VOLUME III LOSS, SADNESS AND DEPRESSION (1980) [hereinafter BOWLBY, VOLUME III].

40. Jay Belsky & Joan Cassidy, *Attachment: Theory and Evidence*, *in* DEVELOPMENT THROUGH LIFE: A HANDBOOK FOR CLINICIANS 373, 373–402 (Michael Rutter & Dale F. Hay eds., 1994).

41. Judy Cashmore & Patrick Parkinson, *Parenting Arrangements for Young Children: Messages from Research*, 25 AUSTL. J. FAM. L. 236 (2011).

42. *Id.*

43. Feeney & Monin, *supra* note 21, at 943 (internal citations omitted) (citing Eleanor E. Maccoby et al., *Postdivorce Roles of Mothers and Fathers in the Lives of Their Children*, 7 J. FAM. PSYCHOL. 24, 24–38 (1993); Timothy Page & Inge Bretherton, *Gender Differences in Stories of Violence and Caring by Preschool Children in Post-Divorce Families: Implications for Social Competence*, 20 CHILD & ADOLESCENT SOC. WORK J. 485, 485–508 (2001); BOWLBY, VOLUME III, *supra* note 39).

just beginning to emerge.[44]

Attachment theory offers information that is particularly germane to this topic—the nature of the environment in the child's life. Specifically, each divorce is founded in unique contexts, including the ability of the parent to be available for the child. Divorce is a time when the parents' own emotions are strained and difficult at best. If the parents both work outside the home and also try to monitor their children, their home life is strained, limiting the parents' ability to be flexible and understanding with their children. Unfortunately, during this unusual situation where the parents' skills are minimized, the courts are required to make decisions about the "best interests" of the children.[45] How can we decide what is best when the situation is not ideal?

C. Attachment Is Hierarchical

Parkinson's work describing the need to maintain relationships is especially significant here.[46] Maintaining the parental ties is important for a family to raise children who are able to function well in the world. Further, research is demonstrating more and more that attachment relationships are hierarchical in nature, suggesting that children can develop attachment relationships to many adults in their lives.[47] More than one adult can provide the child with specific skills that support his ability to function:

> [M]ost children are now regularly cared for by more than one adult. Some children who are adopted, and children in foster care, experience multiple attachment relationships not only simultaneously but also sequentially, As research on multiple attachment relationships has become more common, there is little dispute that children form attachment relationships with child care providers, and that child-mother and child-other attachments are independent in antecedents and quality.[48]

Bowlby believed that multiple attachments can be established in the first year of life,[49] and Mary Ainsworth observed fathers as attachment figures

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44. Gurit E. Birnbaum et al., *When Marriage Breaks Up–Does Attachment Style Contribute to Coping and Mental Health?* 14 J. SOC. & PERS. RELATIONSHIPS 643 (1997); Feeney & Monin, *supra* note 21, at 943.

45. Jay Einhorn, *Child Custody in Historical Perspective: Study of Changing Social Perceptions of Divorce and Child Custody in Anglo-American Law,* 4 BEHAV. SCI. & L. 119, 119–35 (1986).

46. PARKINSON, *supra* note 4.

47. Howes & Speiker, *supra* note 23, at 317.

48. *Id.* (citing Lieselotte Ahnert et al., *Security of Children's Relationships with Nonparental Care Providers: A Meta-Analysis*, 74 CHILD DEV. 664, 664–679 (2006)).

49. BOWLBY, VOLUME I, *supra* note 5, at 304.

as well.[50] She states, "[R]esponsiveness to crying and readiness to interact socially are among the most relevant variables."[51] Furthermore, later research has established that multiple caregivers (aunts, uncles, daycare providers, etc.) can provide a secure base.[52] However, research has found that there is a limit to the number of caregivers and that caregivers are not interchangeable.[53] It's not possible to replace a mother's relationship with her child, nor is it possible to replace the father. Thus, the "tender years" assumption seems to be fairly accurate. Children do seem to have a primary attachment figure that is established during infancy and early childhood.[54] The important factor to be considered here is that other caregivers (i.e. fathers) seem to have a unique relationship with the child, particularly if they are sensitive to the child's needs and respond in a qualitatively different way that is just as appropriate.[55]

It is essential to understand that particular people serve particular functions. If the primary attachment figure is not available, the child can be somewhat soothed by secondary caregivers, but it is still unclear what determines the structure of attachment figures. Virginia Colin, author of *Human Attachment* and student of Mary Ainsworth, suggested that there are four primary characteristics that determine which attachment figure will be at the top of the hierarchy: "(1) how much time the child spends in each figure's care, (2) the quality of care each provides, (3) each adult's emotional investment in the child and (4) social cues."[56] These social cues are mostly how the family responds to the child and the separation experience. Cassidy also adds a fifth element: "the repeated presence across time of the figure in the infant's life," stating that "even if each encounter is relatively brief, [it] is likely to be important."[57]

Unfortunately, our understanding of the hierarchies of attachment has yet to be fully developed. Research is fairly sparse in this area. Several researchers have investigated differences in attachment hierarchies through childhood,[58] but several questions remain to be investigated, including how these hierarchies are established and what

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50. AINSWORTH, *supra* note 13.

51. *Id.* at 315.

52. BOWLBY, VOLUME I, *supra* note 5, at 304.

53. Cassidy, *supra* note 6, at 15.

54. Roger Kobak & Stephanie Madsen, *Disruptions in Attachment Bonds: Implications for Theory, Research, and Clinical Intervention*, *in* HANDBOOK OF ATTACHMENT, *supra* note 6, at 26.

55. Marinus H. van Ijzendoorn & Marianne S. De Wolff, *In Search of the Absent Father—Meta-Analyses of Infant-Father Attachment: A Rejoinder to our Discussants*, 68 CHILD DEV. 604 (1997).

56. VIRGINIA L. COLIN, HUMAN ATTACHMENT 194 (1996).

57. Cassidy, *supra* note 6, at 15.

58. *See id.* at 16 for a discussion of future directions.

qualities exist in the caregiver to become part of the attachment hierarchy. Further, when the attachment to the primary caregiver is insecure, what is the quality of the relationship for others in the hierarchy?

D. Attachment Relationships are Lifelong

Attachment relationships establish a bond that can help to explain lifelong emotional ties. The quality of the first ties we develop plays a role in the expectations for all future relationships. Bowlby defined these ties as "Internal Working Models."[59] Attachment theory is a broad, integrated theory of close relationships and normal growth within such relationships, including a clear outline of basic human needs and emotional processes from the cradle to the grave. "We need emotional attachments with a few *irreplaceable* others to be physically and mentally healthy—to survive."[60]

Feeney and Monin, as well as Bretherton and Munholland, report that "attachment bonds" are strong and persistent ties but only for specific people. [61] These people are generally the ones who have been able to be supportive and available when the circumstances of the environment require it. As much of the theory of attachment relates to divorce, we have not yet developed a research base for the lifespan as extensive as what we have learned about children.[62] It is clear, though, that individuals who are securely attached in childhood tend to create strong and persistent bonds in adulthood.[63] Researchers are learning that adults who are securely attached in childhood tend to have securely attached relationships in adulthood.[64] Based on this information, I believe these people are better able to choose partners who can provide a safe haven and may be less likely to divorce in the first place.[65]

When the courts are trying to decide custody in high conflict divorce cases, simple rules guiding custody decisions, such as the "tender years"

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[59] Inge Bretherton & Kristine A. Munholland, *Internal Working Models in Attachment Relationships: Elaborating a Central Construct in Attachment Theory Ch. 5, in* HANDBOOK OF ATTACHMENT, *supra* note 6, at 104.

60. JOHNSON, *supra* note 14, at 15. (emphasis added).

61. *See* Feeney & Monin, *supra* note 21, at 934; Bretherton & Munholland, *supra* note 59, at 104.

62. Feeney & Monin *supra* note 21, at 949.

63. Mary Main & Ruth Goldwyn, *Predicting Rejection of Her Infant from Mother's Representation of Her Own Experience: Implications for the Abused-Abusing Intergenerational Cycle*, 8 INT'L J. CHILD ABUSE & NEGLECT 203, 203 -17 (1984).

64. Feeney & Monin, *supra* note 21, at 935.

65. JOHN BOWLBY, THE MAKING AND BREAKING OF AFFECTIONAL BONDS (1979); *see also* Feeney & Monin, *supra* note 21, at 935.

presumption or "best interests" presumption,[66] seem to be insufficient guidelines to determine custody. Indeed, in reviewing the custody issues cited by Weisberg and Appleton[67] it becomes clear that the judge's job is a difficult one, often requiring a decision based on insufficient information and generally leading to the use of stereotypes or pre-conceived notions. Why not use a broader theory to guide and direct those decisions that will support the long-term mental health of the family? In other words, if we focus on supporting healthy attachments to others during the custody decision-making process, would we be able to better support children coming from a divorced family to be able to develop a more healthy relationship in their own lives? If we were to take this view of a secure attachment following generation to generation, would we be able to see a reduction in divorce in the long run? Feeney and Monin argue that there is a substantial body of work supporting the view that children from parents who cannot provide stability and security are more likely to "report jealousy and fears of abandonment in their love relationships."[68]

II. SAMPLE CASES AND ANALYSIS

To analyze cases of custody decisions, this Article uses selected cases from the text *Modern Family Law: Cases and Materials*, by Kelly Weisberg and Susan Appleton.[69] This seems to be a simple beginning to help describe how attachment theory can serve the legal field. Attachment theory and research demonstrate a comprehensive framework that may guide and give meaning to professionals who are helping to resolve problems with custody battles in divorce cases.

Two specific characteristics of attachment theory can be used to provide more meaning and guidance for the courts.[70] The first aspect of attachment theory applicable to these cases is the secure-base and proximity-seeking behaviors and the second is that children seem to develop an attachment with multiple caregivers. When this is the case, there seems to be a hierarchy of caregivers that the child is able to use for security.[71]

66. WEISBERG & APPLETON, *supra* note 24, at 799–810.
67. *Id.* at 799–845.
68. Feeney & Monin, *supra* note 21, at 936.
69. *Id.*
70. *Id.*
71. Howes & Speiker, *supra* note 23, at 317.

A. Security and Multiple Attachments in Custody Agreements

One of the primary characteristics of attachment theory, as discussed above, is the need for security.[72] To the extent that divorce reduces availability, accessibility, and responsiveness from caregivers, the child is going to experience the effects of divorce with "varying degrees of intensity."[73] The parents' ability to moderate the effects of the separation tends to be a mediating factor in the quality of attachment and healthy outcomes. In the event the context of the divorce reduces the ability of the parents to mediate that conflict, the child's feelings of safety and security will be affected.

1. Focus on the security of the child

One of the more prominent outcomes of the current system of presuming "best interests" is that it often requires parents to take an adversarial role to assert the unfitness of the other parent in order to gain custody.[74] This stance in and of itself is a threat to the child's sense of security since the goal of one or both parents would be to discredit the other. Because the court system is highly adversarial in nature, it makes decisions related to custody maladaptive for children.

The case of *Palmore v. Sidoti* addresses the issue of race in a custody review.[75] The mother was given custody of her three-year-old daughter.[76] A year later, the father filed for custody because the mother remarried a man of a different race.[77] The lower court decided to award custody to the father, anticipating future problems when the child enters school and the social stigma that may ensue.[78] This decision was overturned by the U.S. Supreme Court which held that despite the possibility the child may experience social stigmatization growing up in a mixed-race family, the "reality of private biases and possible injury they might inflict were impermissible considerations under equal protection clause for divesting natural mother of custody of her infant child because of her remarriage to person of different race."[79] Therefore, the Fourteenth Amendment does not permit the potential effects of racism to be a determining factor in

72. *See* text accompanying note 22.
73. Feency & Monin, *supra* note 21, at 942–43.
74. WEISBERG & APPLETON, *supra* note 24, at 808.
75. Palmore v. Sidoti, 466 U.S. 429 (1984).
76. *Id.* at 430.
77. *Id.*
78. *Id.* at 431.
79. *Id.* at 429.

custody decisions.[80]

It appears that if evaluating the case using an attachment perspective, a court could reach the same result as the lower court in *Palmore* without running afoul of the Fourteenth Amendment. For example, our understanding of a secure base is the primary caregiver's ability to sensitively respond to his or her child's needs. It is possible that the mother's subsequent relationship and remarriage may have put the child in jeopardy by introducing an unrelated male into the home.[81] Further, the mother was not married to the man when he first lived with them, thus exposing her daughter to a male who had no commitment to the family.[82] The fact that the mother was investing emotional energy in a new relationship also indicates that the attention normally applied to her daughter may have been diminished. This would certainly affect the security of the child.

Does this argument make the mother an inappropriate candidate for custody? Not necessarily; however, if the mother, father, and stepfather are all suitable candidates, then why not continue joint custody if the child has developed multiple attachments to all three?[83] As the child ages, the parents can make alternative arrangements, but more people helping in her early life creates more stability than shuffling the child from the mother's and then the father's home. Thus, a better alternative might be to choose the parent whose home shows the most stability for primary custody, but allow plenty of time for the child to be involved in relationships with other caregivers who feel attached to the child to spend time maintaining those early relationships.

Another case discussed in *Modern Family Law,*[84] *Sagar v. Sagar,*[85] related to the issue of religion, presents an argument related to decisions on the basis of religious practices. The issue in *Sagar* is not necessarily an issue of custody, but rather, an issue of the choices a father has the right to make when he disagrees with his former wife on certain child rearing issues.[86] The couple separated when their daughter was about five months old.[87] The custody agreement at the time was that they shared custody, and at the time of separation the couple agreed on many things related to the daughter's religious upbringing.[88]

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80. *Id.*

81. *Id.* at 430.

82. *Id.*

83. *See* Cashmore & Parkinson, *supra* note 41, for a discussion about joint custody issues for young children.

84. WEISBERG & APPLETON, *supra* note 24, at 799–845.

85. Sagar v. Sagar, 781 N.E.2d 54 (Mass. App. Ct. 2003).

86. *Id.*

87. *Id.* at 57.

88. *Id.* at 54, 57.

During the divorce proceedings, the father moved for permission to perform a religious ceremony on the child.[89] The mother experienced a great deal of controlling behavior from the father and domestic violence in the home while they were married.[90] The lower court judge found that the father was not necessarily arguing for religious freedom, but rather, control over the mother and child.[91] This decision was affirmed on appeal.[92]

From an attachment perspective it would appear the judge made the right decision. However, the shared custody of the child was a mistake. If the child is exposed to violence in the home, the exposure may create a fear of separation for the child.[93] This is particularly so when one of the parents' lives are at stake. Further, parents who experience fear of violence may experience a diminished capability to respond to the child in an appropriate and sensitive way.[94] This is not to say that the father should have no rights when it comes to his daughter, but he should not be allowed unrestricted visitation if it endangers the health of the mother and the atmosphere in the home.

Another case that is similar in nature is *Peters-Reimers v. Reimers*.[95] The mother experienced multiple episodes of abuse and documented that the father did not provide adequate supervision, resulting in an injury to the child.[96] In this case, the court found in favor of the mother, limiting the father's visitation to only supervised visits.[97]

Once again, the findings of the court correspond well to an attachment perspective. In this case, the decision of the court was appropriate to protect the safety and security of the child. However, concerns about documenting the quality of the relationships arise. Weisberg and Appleton suggest that there should be adequate documentation involving the parent/child behaviors and question whether or not these findings are adequate. An attachment approach can

89. *Id.* at 56.

90. *Id.* at 57.

91. *Id.* at 58 ("[The judge] found that 'the husband's reasons for his insistence on having the Chudakarana are not purely religious[,] [but] an issue of control.'") (second and third alterations in original).

92. *Id.* at 61.

93. Patrick T. Davies & E. Mark Cummings, *Exploring Children's Emotional Security as a Mediator of the Link Between Marital Relations and Child Adjustment*, 69 CHILD DEV. 124, 124-39 (1998); Patrick T. Davies & E. Mark Cummings, *Marital Conflict and Child Adjustment: An Emotional Security Hypothesis*, 116 PSYCHOL. BULL. 387, 387-411 (1994).

94. Cassidy, *supra* note 6, at 6; Hinde, *supra* note 35; George & Solomon, *supra* note 28, at 848.

95. Peters-Riemers v. Riemers, 644 N.W.2d. 197 (N.D. 2002).

96. *Id.* at 204.

97. *Id.* at 200.

help in this type of situation.[98] By using some measure of attachment or behavioral observation of the relationship, a professional may be able to tell the quality of the parent/child relationship.[99] This finding would reduce the need for an adversarial approach to the custody discussions. This would be especially beneficial since creating additional conflict in the relationship puts the quality of the child's attachment to his/her caregivers in jeopardy,[100] It is clear, however, that if the parents are functioning in the best interests of the child, then their interpretation of the adversarial nature of the event can be mitigated by the stories and narrative they tell their child.[101] Part of the problem, then, is that when a committed relationship is dissolving the parent is less able to function as the mediator. This is where attachment research is particularly helpful. By using Bowlby's view that the early relationships we establish with our caregivers are important to later healthy functioning,[102] the courts may be able to help the child to ride the storm of divorce in a more functional way. When secure mothers support healthy relationships with others, then we see where the context of multiple caregivers can be an asset in divorce and custody decisions. However, Rutter does offer some caution here.[103] It's not about whether or not the child has established a secure attachment or is bonded to their mother as much as it is the fact that ongoing relationships with attachment figures need to be preserved. Sometimes, the relationships can be preserved by looking at multiple attachment relationships.

2. *Attachment to multiple caregivers*

The research on attachment to multiple caregivers is just beginning to emerge.[104] Anecdotal observations show that children seem to know which caregiver to go to depending on the type of stress. Rutter calls this "selective attachments" and says that for custody decisions, all of these security-providing attachments to specific caregivers should be taken into account when making judgments about childcare.[105]

For example, this author personally witnessed a five-year-old tearfully ask for his other five-year-old cousin after the wedding ceremony at the remarriage of his mother. The boy's mother, father, and

98. WEISBERG & APPLETON, *supra* note 24, at 760.
99. Bretherton & Munholland, *supra* note 59; Rutter, *supra* note 11.
100. Feeney & Monin, *supra* note 21, at 944.
101. *Id.*
102. Rutter, *supra* note 11, at 959.
103. *Id.* at 961.
104. *Id.* at 959.
105. Rutter, *supra* note 11, at 967.

stepfather were all there, but the child needed the five-year-old cousin to hug him. They had grown up together and lived in close proximity, often being cared for by each other's mother. At a time of stress in his life (the remarriage of his mother), the cousin walked up and just held his cousin while he cried. The fact that the cousin knew exactly what to do at that time causes researchers to wonder a great deal about *how* he knew exactly what to do for his cousin; this anecdote also brings up some important questions about how children, adults, caregivers, and other individuals can each play a role in helping children feel safe.

The above example can provide a great opportunity to investigate how multiple attachments can support children during a divorce and possible remarriage of the adults in the children's lives. If there is so much chaos in the home that the child is unable to develop a secure attachment with one or both parents, then a possible remedy might include providing parents educational opportunities to learn how to support children's emotional development. In either case, supporting secure attachment relationships when deciding custody cases should be the standard.

For example, in *Bell v. Bell*, a divorced couple seemed to cooperate fairly well with each other until they disagreed on childcare.[106] The parents functioned fairly well on behalf of the child.[107] There was no report of the child having problems with the shared custody arrangement; however, a Custody Investigator recommended that the mother have primary custody and the father have visitation.[108] This outcome would go against an understanding of multiple attachments. Why create a problem with the custody agreements? Can the child not have shared custody with both parents? This case involves the problem of understanding the differences between joint *legal* custody as well as joint *physical* custody.[109] Further, one of the benefits of recognizing multiple attachments is that when one parent can't provide the secure base for whatever reason, the other parent can step in and maintain stability for the child. Ignoring that relationship provides an opportunity for the child to experience separation anxiety.[110] Training in attachment theory would help to support the family relationships rather than undermine them. Utah is currently looking at ways to create a training standard for

106. Bell v. Bell, 794 P.2d. 97 (Alaska 1990).

107. *Id.* at 97–98.

108. *Id.* at 98.

109. *See id.*

110. Separation anxiety is described by Bowlby as a response a child will demonstrate when removed from their caregiver by strangers. Upon reunion, the child demonstrates some level of anxiety that the mother will be taken from them again, possibly resulting in psychoneurosis or other types of emotional disturbance. BOWLBY, Volume I, *supra* note 5, at 3.

Custody Investigators;[111] however, there are problems with this idea. It would require a significant amount of training to help someone with an undergraduate degree to be competent enough to evaluate the child's ability to create and maintain securely attached relationships.[112] It is not about whether or not the "bond" exists, but the QUALITY of that bond. It is not a dichotomous option, making the assessments of quality very difficult to determine.[113]

Because researchers have not yet developed a reliable and valid measure of hierarchical relationships, understanding of the possible hierarchy that exists in this case is difficult to assess. On the other hand, a trained observer may be able to provide a reasonable evaluation of the relationships and the quality of the relationships in this case.

III. SUMMARY

Decision-makers (including the courts) would benefit from employing an attachment perspective when deciding custody cases. Since the divorce process in general and custody issues specifically are such a contentious way to dissolve a partnership, some attachment experts and others have suggested that the likelihood of permanent damage to the important emotional ties required for a healthy attachment is very high.[114] This Article discussed several cases where an attachment perspective might have better served to protect the children in custody decisions, specifically, the need to preserve the important relationships in the child's life. This assumes that a "secure base" or stability of the home or existing relationships could be considered as a presumption in custody arrangements rather than some of the current presumptions of "tender years" and "best interests."[115]

This Article also provides a brief overview of attachment theory and cites some of the research supporting the theory. This Article is not intended to be exhaustive in the discussion, nor could it be so given the depth and breadth of the current research base.[116] It highlights two of the most salient aspects of attachment theory as it relates to custody agreements: protecting the secure base and recognizing that children create attachments to more than one member of the family.

Using several cases to illustrate the advantages, this Article suggests

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111. Interview with Tim Cosgrove, Representative, Utah State Legislature, in the Salt Lake City Capital Bldg., Utah (Feb. 2008).

112. Rutter, *supra* note 11, at 967.

113. *Id.* at 969.

114. Feeney & Monin, *supra* note 21, at 935.

115. Rutter, *supra* note 11, at 968.

116. *See* HANDBOOK OF ATTACHMENT, *supra* note 6.

that using attachment theory, particularly as evidence to support it grows, may be a more reasonable way to evaluate custody decisions. Clearly, an issue that needs to be discussed is the problem of developing attachments to people who are not safe. Evidence suggests that all children are attached.[117] They may not have a "secure attachment" as described by Ainsworth et al.,[118] but they are clearly attached to some degree. Many questions still need to be answered, not the least of which include cost. Should education about what children need be required? What are ways to encourage developing a secure attachment in cases where the parents are unprepared to do so?

A possible future direction would consist of experts in attachment theory and lawmakers joining forces and working toward policies that both favor an understanding of the importance of relationships and also encourage attachment experts to refine and develop tools such as standardized observation techniques, projective measures, and training tools to help caseworkers recognize healthy attachment behaviors as well as sensitive responses on the part of the caregivers. In particular, measures should be put in place to evaluate the many caregivers to whom children can become attached. When developing a custody policy for children, it is important to recognize all the individuals in the child's life and make sure those individuals are considered in the custody arrangements.[119]

IV. LIMITATIONS

Although the base of research on attachment and relationships is relatively new, the theoretical perspective does provide ample evidence to begin developing some good ideas about child custody. Caution must be used when making final decisions. This is a theory in process. Good judgment must always prevail. Some of the assumptions provided about the parents are only based on possibilities; this Author has no way of determining actual behavior in any of the cases analyzed.

In addition, even though many of the analyses include theoretical perspectives and a growing research base supporting the theory, the methods of testing security of attachment would be difficult to employ with much reliability on a national or statewide basis. Current interpretation of test results requires expert training and interpretation. A simple test that someone unfamiliar with the theory could administer

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117. Bretherton & Munholland, *supra* note 59, at 113.

118. Mary D. Salter Ainsworth et al., *Individual Differences in Strange-Situation Behavior of One-Year-Olds*, *in* THE ORIGINS OF HUMAN SOCIAL RELATIONS 17–57 (H. Rudolph Schaffer ed., 1971).

119. Rutter, *supra* note 11, at 958, 967–68.

would be difficult to interpret reliably.

Measurement instruments are beginning to be developed that appear to be reliable and valid; however, not every aspect of attachment discussed in this Article has a valid way to be measured at every stage of the developmental process. A good example of this limitation is the concept of attachment hierarchies, or multiple attachments. Observers can see how children behave with multiple caregivers in the room. One big advantage of measures of attachment theory over other psychometric measures is that it deals with observable behaviors rather than internal constructs. For that reason, researchers are able to see some of the proximity-seeking and secure-base behavior. A fair amount of evidence also supports mothers' ability to evaluate attachment behaviors using the Q-Sort.[120] There is a growing body of evidence supporting the Strange-Situation[121] and other measures evaluating school aged children,[122] adolescents,[123] and the Adult Attachment Interview (AAI) designed to evaluate adult attachment behaviors.[124]

Finally, providing the necessary training and access to experts in attachment theory and measurement would be incredibly expensive. At the moment, the political culture is focusing on cutting expenses and dropping social programs in order to balance the budget. Would citizens be willing to provide expert assessment related to attachment variables for families who are choosing to split? Currently, the incredible costs associated with divorce may help to make the case for the additional expense,[125] but when the state budgets are being cut, it would be difficult to justify the cost associated with trained professionals attending to disputes over custody in the event of a divorce unless there was a considerable argument for the costs of revisiting custody arrangements.

Though this Article is in support of Patrick Parkinson's argument about the lasting value of relationships, hopefully our society may begin to move in a more focused and thoughtful way to maintain healthy relationships, even in the face of divorce and loss. Who knows? If society consciously reinforces attachment relationships and makes

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120. *See* Brian E. Vaughn & Everett Waters, *Attachment Behavior at Home and in the Laboratory: Q-Sort Observations and Strange Situation Classifications of One-Year Olds*, 61 CHILD DEV. 1965 (1990).

121. Ainsworth et al., *supra* note 118; O'Connor & Rutter, *supra* note 38.

122. Kathryn A. Kerns et al., *Peer Relationships and Preadolescents' Perceptions of Security in the Child-Mother Relationship*, 32 DEVELOPMENTAL PSYCHOL. 457 (1996).

123. Wright et al., *supra* note 9.

124. For an explanation of the Adult Attachment Interview, *see* Erik Hesse, *The Adult Attachment Interview: Protocol, Method of Analysis, and Empirical Studies*, *in* HANDBOOK OF ATTACHMENT, *supra* note 6. For implications for the abused-abusing intergenerational cycle, *see* Main & Goldwyn, *supra* note 63, at 203–17.

125. *See* LORIE FOWLKE, THINKING DIVORCE? THINK AGAIN! (2003).

positive efforts to encourage more children to be securely attached to *both* parents, maybe the rate of divorce will be reduced in the future through the establishment of more secure relationships and skills to manage communication before the relationship is dissolved.