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Patricia H. Marschall

Margaret J. Gatz

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THE CUSTODY DECISION PROCESS: TOWARD NEW ROLES FOR PARENTS AND THE STATE

PATRICIA H. MARSCHALL* AND MARGARET J. GATZ**

I. INTRODUCTION

A parental agreement on custody controls the fate of children in a vast majority of divorce cases. Legal scholars, however, have generally ignored this parental decision-making process. Instead they have focused solely on the judicial custody decision, with primary emphasis on a search for proper criteria. There has been only an occasional glance at parental decision-making and the role of the participants. This article will attempt to shed light on the low-visibility parental custody decision-making process. Utilizing the results of a questionnaire sent to a representative group of divorced parents who settled custody by agreement, the article will describe and evaluate the weights attached by parents to various criteria traditionally considered by courts in making custody decisions. It will also examine the desirability of extending the scope of parental responsibility for custody decisions by requiring mediation of parental disputes before adjudication will be allowed.

II. THE RIGHT OF PARENTS TO DECIDE THE CUSTODY ISSUE

If parents can agree on custody, the state does not interfere. Although most state statutes vest the divorce court with the duty and power to make a custody determination that will promote the best interests of the child, in practice courts accept parental agreements without question. If they attempted to do otherwise, it is possible that such interference with intimate family relationships would run afoul of the Constitution.¹ However, one Supreme Court case strongly suggests that the state has virtually unlimited power to set aside a parental custody decision. In *Ford v. Ford*² the Court held that a Virginia judgment dismissing a

* B.A., University of Texas, 1953; J.D., University of Texas Law School, 1955; LL.M., Harvard Law School, 1968. Professor of Law, North Carolina Central University School of Law.

** B.A., Southwestern at Memphis, 1966; Ph.D., Duke University, 1972. Assistant Professor of Psychology, University of Maryland.

1. The Supreme Court has frequently recognized the existence of a "private realm of family life which the state cannot enter," *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). See also, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). This decision-making power residing in the family can, of course, be overcome in the event it is seriously misused. Every state has a procedure to terminate the parental rights of a parent determined to be unfit.

2. 371 U.S. 187 (1962).

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custody suit based upon an out of court settlement between parents did not have to be accorded full faith and credit by other states because it had no *res judicata* effect in Virginia. Although technically just a decision on Virginia law the Supreme Court noted approvingly that under that state's law:

The parents cannot make agreements which will bind courts to decide a custody case one way or the other.³

The *Ford* opinion appears to represent a determination that the state has unlimited power to overturn parental custody decisions to prevent a child's best interests from being bargained away and that no deference need be paid to the parents' wishes. But it is difficult to reconcile some of the Court's broad language in *Ford* with other decisions upholding parental rights to make basic decisions about a child's upbringing, education and religious training such as *Meyer v. Nebraska*,⁴ *Pierce v. Society of Sisters*⁵ and *Wisconsin v. Yoder*.⁶ In *Pierce*, the state argued that children's best interests were served by requiring them to attend public schools. However, the Court concluded:

. . . [the compulsory public school attendance law] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.⁷

Meyer, *Pierce*, and *Yoder* all recognize a parent's interest in guiding the upbringing and education of a child to be a form of liberty protected by the due process clause of the fourteenth amendment.⁸

3. *Id.* at 193.

4. 262 U.S. 390 (1923).

5. 268 U.S. 510 (1925).

6. 406 U.S. 205 (1972).

7. 268 U.S. 510 (1925).

8. The fact that the parental interest is protected by the liberty clause of the fourteenth amendment does not mean that parental decision on a child's upbringing may never be overridden by the state. Generally, restrictions on a protected liberty are permissible when the state's interest is compelling and legitimate. In *Pierce*, the Court apparently determined that the state's interest in requiring *public* school attendance was not legitimate because it could not legitimately seek "to standardize its children by forcing them to accept instruction from public teachers only." 268 U.S. 510, 535. The Court further determined that other conceivable state interests at stake were not compelling, noting:

[sic] And there are no peculiar circumstances or present emergencies which demand measures relative to primary education.

Id. at 534. *Pierce* itself implicitly recognized that a parental decision that children not attend *any school* could be overridden by the state. 268 U.S. 510, 534; *Wisconsin v. Yoder*, 406 U.S. 205, 232-33. Both *Pierce* and other cases have recognized that a parental decision on a child's upbringing may be overridden when the state's interest is sufficiently important. *Pierce* and *Meyer v. Nebraska* suggest the state's interest must be legitimate and compelling, 268 U.S. 510, 534; 262 U.S. 390, 401-403 while some other cases appear to apply only the rational relationship test. *Prince v. Massachusetts*, 321 U.S. 158.

However, the Court's approach in *Ford* appears different from either of these: it appears to view the state's power on the custody question as absolute and does not recognize that any fourteenth amendment liberty may be at issue.

Conceivably, *Ford v. Ford* can be reconciled with these cases on the theory that only the *ongoing* family has a protected liberty to be free from state interference with its decisions about children's upbringing and education. The Court's opinion in *Ford* did emphasize the danger of parental custody decisions where:

The estrangement of husband and wife beclouds parental judgment with emotion and prejudice.⁹

Although this narrow reading of *Ford* may adequately distinguish it from *Meyer*, *Pierce* and *Yoder*, it is arguable that the state should have no greater power to override parental decisions because a family is in dissolution. If one accepts Margaret Mead's notion that biological parents should be considered co-parents for life, regardless of divorce,¹⁰ then their relationship for the purpose of raising children should be accorded the same protections given spouses in an on-going marriage.

As a practical matter, parental custody decisions will be supported by courts so long as no family member protests. The litigation in *Ford v. Ford* arose only when a mother changed her mind and chose to challenge her ex-husband's custody of their three children.

III. A DESCRIPTION OF PARENTAL CUSTODY DECISION MAKING

A. *Description of Survey Procedures and Brief Statement of Results*

To gather facts which would be helpful in evaluating the parental custody decision-making process, the authors (with the cooperation of the national Parents Without Partners organization) sent a questionnaire to a representative sample of divorced parents who had settled custody by agreement. In addition to some basic identifying data, the parents were questioned about the weight they had accorded each of fifteen traditional custody criteria (listed in Table 1); whether each criterion was considered because of parental insight, or because of input from an attorney or a mental health professional; whether short-run or long-term considerations were emphasized; and whether in retrospect they felt differently about the relative importance of the various criteria.

In order to ascertain the basic dimensions considered by these parents in making their custody decisions, we examined which sets of items were generally rated similarly by any given parent, using the technique of factor analysis of the ratings of the fifteen criteria.¹¹ Five factors emerged, such that a parent who thought that one item in a factor was important usually also believed that all items encompassed by that factor

9. 371 U.S. 187, 193.

10. See MARGARET MEAD AND RHODA METRAUX, *A WAY OF SEEING* 199-200 (1970).

11. Additional information on the survey and data analysis is contained in Appendix A.

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were important. These five basic underlying dimensions, listed in order of weight accorded them by survey parents, were:

1. A family structure factor, emphasizing keeping the child in the same familiar custodial environment, maintaining the family unit, and keeping the children together;

2. A maternal factor, which indicates that young children absolutely should be with their mother;

3. A child-oriented social-emotional factor, emphasizing that a child should be with the parent with whom he has the closest relationship, the importance of the child's preference, the need of older children for the parent of the same sex, and the importance of having a parent at home during the day;

4. A moral factor, weighted with the importance of continuing a child's religious training, the parent's morals, preference for a two-parent home, and freedom from alcoholism; and

5. A caretaker factor, pertaining to the parent's physical, mental and financial ability to care for a child.

In addition, three individual items—freedom from past or present serious mental illness, alcoholism, and low morals (items 6,8, and 11 in Table 1)—were considered by parents as minimally necessary criteria. In other words, a parent with problems in any of these three areas was deemed to be unfit as a custodian despite other factors in his or her favor; but if there were no serious problems in these areas, the items receded in importance, as indicated by the five factors.

Not all parents rated the factors identically. Fathers who had obtained custody of some or all of their children rated the family structure factor as most important, but, unlike mother-custodians, they rated the child-oriented social-emotional factor as second. Parents responding to the questionnaire who did not have custody rated the caretaking and the family structure factors less highly than did parents who had custody.

The basic conclusion from our study is that the scope of parental responsibility for deciding custody should be extended. Before arriving at this decision we evaluated the factors used by parents in deciding custody and the weight they accorded each factor. A detailed description of this evaluation follows.

B. The Family Structure Factor

As previously indicated, survey parents attached the most significance to the family structure factor—keeping the child in the same familiar custodial environment, keeping the children together, and placing the child in a family unit which appears to have permanence. Was this reasonable?

Given the fact that divorce itself is disruptive to the child, it would seem wise to minimize other changes as much as possible. Attaching the greatest weight to the stability factor, however, creates the possibility that the child may be separated from the parent with whom he has the closest relationship. This may be more disruptive to the child than a change in his physical environment and/or separation from the less close parent and siblings. The results of discontinuity in care vary according to the stage of childhood development at the time of the disruption,¹² but in general both continuity of activities and the reassurance of the love of both parents are important to any child.¹³

C. *The Maternal Factor*

Preference for the mother as custodian was rated by parents as the second most important factor. Although the wisdom of emphasizing this factor is questionable, the fact that parents did so is not surprising. In our society it traditionally has been assumed that the mother is the one who fills the nurturing role and is therefore closest to the children.¹⁴ Thus, stressing the maternal preference as important may in some cases be a shorthand rendition of the child-oriented social-emotional factor.

For young children, there is evidence that any separation from the mother may have profound effects.¹⁵ Consistent mothering is necessary for the child to learn "basic trust," which is prerequisite to the ability to form relationships of trust in the future.¹⁶ This mothering role, although traditionally filled by the biological mother, may, of course, also be filled by the father or by another adult if the parents are unavailable.

It should be noted that several survey respondents commented that the maternal preference factor was crucial in their decision-making because they understand that under existing state law "mothers always get custody of young children." The extent to which this perceived legal bias may have been responsible for the importance accorded to the maternal preference by other respondents is unclear. Undoubtedly some of the respondents who gave heavy weight to a maternal preference simply believe that children belong with mothers as a matter of natural law.

Interestingly, out of eight survey parents who reported a change in custody after the initial decision, seven involved changing the custody

12. JOSEPH GOLDSTEIN, ANNA FREUD, ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD*, 32-35 (1973); Bradbrook, *The Relevance of Psychological and Psychiatric Studies to the Future Development of the Laws Governing the Settlement of Inter-Parental Custody Disputes*, 11 J. FAM. LAW 557, 575-76 (1971).

13. J. LOUISE DESPERT, *CHILDREN OF DIVORCE*, 30-31, 67 (1953).

14. Bradbrook, *supra* note 12 at 662-63.

15. CHRISTOPH M. HEINICKE AND ILSE J. WESTHEIMER, *BRIEF SEPARATIONS* (1965).

16. ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* 247-251 (1963).

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from the mother to the father. Also several survey parents indicated that in the light of hindsight they believed they accorded too much weight to the maternal preference. These survey results suggest that the general societal expectation that the mother will assume custody may blind couples to the realities of their individual situations. As one survey mother stated, "The issue of me not having the children was never brought up."

At the time the maternal preference arose, it was generally assumed that the mother would continue to stay at home and care for the children. Today, it is likely that the single parent, male or female, will have to assume a combination mother/father role. In many cases, by virtue of being more securely established in a business or profession, the father may be able to manage this dual role more easily. Fortunately, there is a recent trend toward more participation by fathers in the rearing of children. Practicing lawyers report a resulting upswing in the number of fathers who request custody.

D. The Social-Emotional Factor

Survey parents ranked the child-oriented social-emotional factor as third in importance, suggesting that a majority of parents may not be educated to the importance of a child's psychological ties. During the last decade writers have stressed the need to determine who is the "psychological parent" to the child, *i.e.*, who has the deepest relationship of trust and affection with the child.¹⁷ If only one of the parents is properly classifiable as a "psychological parent," and the child is not placed in his or her custody, the risk of serious psychological damage is great.

Identifying the "psychological parent" is not easy because there is no litmus paper test for determining the depth of a parent-child relationship. Furthermore it is hard for a parent to perceive and admit that a child is closer to the other parent.

Survey parents quite properly looked at the child's preference as a significant indication of which relationship is more meaningful to the child. In ideal circumstances it is probably true that an older child is the best judge of the quality of the parent-child relationships involved; however, it has been pointed out that children may select custodians for the wrong reasons, such as attempting to reach the more withdrawn parent by selecting him or her, or because of a fear of being punished

17. Goldstein, Freud, Solnit, *supra* note 12 at 17-20; Watson, *The Children of Armageddon; Problems of Custody following Divorce*, 21 SYR. L. REV. 55, 68-69 (1969); Note, *The Alternatives to "Parent Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 160 (1963).

for choosing the other parent.¹⁸ Teenagers are especially prone to manipulate one parent against the other in a custody contest.¹⁹

It is often assumed that an older child should be placed with the parent of the same sex for the purpose of providing a sex role model. While this is important, other aspects of the parent-child relationship should also be considered and may be even more important. Happily, the use of behavioral experts by courts to assess parent-child relationships tends to be increasing.²⁰

E. *The Moral Factor*

The moral factor was ranked as fourth of the five factors in importance. Adultery is often a component of the divorce situation, and, where a party is involved with a third person, name-calling and accusations of being an unfit parent are frequent. The recent judicial trend, however, is away from punishing an adulterous parent by depriving him or her of custody and toward an evaluation of whether the parental conduct had an actual detrimental effect on the child.²¹ For example, psychological harm might occur to the child if the adulterous activities cause excessive absence from the home or if the child has knowledge of the conduct.²²

Preference for a two-parent home, which was part of the moral factor, has considerable psychological evidence in its favor. Many problems in sex-role identification have been traced to the absence of one or the other parent. It "require[s] the stimulation of both parents for the unfolding of all the complexities of the oedipal organization."²³ Further, as Goldstein, Freud and Solnit point out, "the child in a one-parent home is deprived of the benefits of a relationship with two adults who have an intimate relationship with each other."²⁴ It is, on the other hand, a mistake to keep a bad marriage together for the sake of the

18. Note, 37 U. COL. L. REV. 420, 421-422 (1965).

19. G. Lindenbauer, *Will Your Marriage Make or Break Your Child?*, J. EMOTIONAL EDUCATION 8, 139-142 (1968).

20. Foster and Freed, *Child Custody (Part II)*, 39 N.Y.U.L. REV. 615, 616 (1964).

21. See Bergman, *Custody Awards: Standards Used Where the Mother Has Been Guilty of Adultery or Alcoholism*, 2 FAM. L.Q. 384 (1968). A father's adultery is rarely mentioned in appellate decisions, thus indicating the existence of an unfair double-standard in regard to this criterion.

22. *Id.* at 403. However, the wisdom of attempting to conceal a long-term affair from an older child is questionable. A class of junior high school students, with whom one of the authors discussed custody, suggested that parental dishonesty, or even lack of candor, would destroy trust in the parent and thus be more detrimental than knowledge of the affair. The young people, however, felt that promiscuity on the part of a parent would be confusing to the child and should be avoided. In the case of a compulsively promiscuous parent, the students felt that his or her activities should be concealed from the child.

23. PETER B. NEWBAUER, *THE ONE-PARENT CHILD AND HIS OEDIPAL DEVELOPMENT, THE PSYCOANALYTIC STUDY OF THE CHILD* 15, 308 (1960).

24. Goldstein, Freud, and Solnit, *supra* note 12 at 16.

children. "[A] clinical observer finds the same patterns of emotional disturbance in children of parents *who do not divorce*, although they have failed at marriage, as in children of divorced parents *who have not made their peace with divorce*."²⁵ Further, in some cases a one-parent home may be easier for a child to cope with than adjusting to a new step-parent.²⁶ Thus, many circumstances may mitigate against placing too much emphasis on the two-parent criterion.

F. *The Caretaker Factor*

Survey parents attached the least significance to the caretaker factor. A parent's ability to provide material advantages for the child is correctly perceived as relatively unimportant, especially in light of the availability of child support. However, as has been mentioned, one minimal necessary criterion emerged from the caretaker factor: absence of serious past or present mental illness of the custodial parent. In the few survey families where this criterion was present, it assumed overriding importance. The parents' reluctance to entrust the care of children to one presently experiencing serious mental illness seems justified. As Malmquist points out, "one of the factors in a psychotic parent that appears most damaging is the unpredictability which their chaotic emotionality presents to the child."²⁷ A caveat should be noted: accuracy in diagnosis and prognosis of mental illness is difficult if not impossible, to achieve.²⁸ Also it is questionable whether past serious mental illness should be considered as disqualifying one for custodianship. Guidance from qualified court personnel could help parents overcome unreal fears about mental illness.

G. *Effect of Hindsight on Parents' Views*

Parents were asked at the end of the questionnaire whether, with hindsight, they might evaluate any differently the importance of the fifteen criteria for deciding custody. The majority responded that they would not change their ratings. However, the child's preference was mentioned by several as more important than they originally deemed it. The criterion most frequently downrated with the benefit of hindsight was "parents' morals", followed by "young children should be with mother." These changes mentioned by the survey parents are consistent with the critique of parental criteria presented above.

25. Despert, *supra* note 13 at 23-24.

26. See Note, *Divided Custody of Children After Their Parents' Divorce*, 8 J. FAM. L. 58, 61 (1968).

27. Malmquist, *The Role of Parental Mental Illness in Custody Proceedings*, 2 FAM. L.Q. 360, 374 (1968).

28. See generally THOMAS S. SZASZ, *THE MYTH OF MENTAL ILLNESS* (1974).

H. Short-term vs. Long-term Considerations

The survey parents were asked whether in deciding custody they concentrated on short-run considerations or whether they attempted to predict the long-term best interest of the children. A substantial majority responded that they tried to predict long-run best interest. This is not surprising, in light of the fact that the family structure factor, emphasizing stability of the child's environment was chosen as the most crucial factor in custody decisions.

If feasible, taking the long view would be the better approach. However, it is doubtful whether parental long-range predictions are accurate. Goldstein, Freud and Solnit state that:

No one—and psychoanalysis created no exception—can forecast just what experiences, what events, what changes a child, or for that matter his adult custodian, will actually encounter. Nor can anyone predict in detail how the unfolding development of a child and his family will be reflected in the long run in the child's personality and character formation. Thus the law will not act in the child's interests but merely add to the uncertainties if it tries to do the impossible—guess the future and impose on the custodian special conditions for the child's care. . . . In the long run, the child's chances will be better if the law is less pretentious and ambitious in its aim, that is, if it confines itself to the avoidance of harm and acts in accord with a few, even if modest, generally applicable short-term predictions.²⁹

This advice, although directed toward the courts, seems equally applicable to parental custody decision-making.

I. In-input from Attorneys & Mental Health Professionals

With reference to each criterion mentioned in the survey, parents were asked to indicate whether its consideration had been suggested by a lawyer and/or a mental health professional. Seventy-one percent of the survey respondents reported no input from either their attorney or a mental health professional concerning the criteria on which they should base their custody decision. To the extent that there was professional input, mental health professionals suggested four criteria, (mental illness, same familiar custodial environment, parents' morals, keeping children together), and lawyers suggested three (same familiar custodial environment, young children should be with mother, and an additional criterion which four fathers wrote in, "fathers cannot be awarded custody under present-day court practices").

The fact that only thirteen percent of the survey parents received any help from their attorney in deciding custody between themselves sug-

29. Goldstein, Freud and Solnit, *supra* note 12 at 51-2.

gests an almost total abdication by attorneys of their counseling role in this sensitive and crucial area. While the development of the court-attached custody mediator, discussed at length in a subsequent section of this article, would provide help for those parents who find it difficult to agree on custody, it seems that an important additional remedy would be to increase emphasis on counseling in the law school curriculum and in continuing legal education.

J. Conclusions

Parents involved in making custody decisions confront several problems. Not only are parents adversely affected by a lack of input from attorneys and mental health professionals concerning the needs of children, they also are hampered by outmoded rules of thumb such as the preference favoring the mother as custodian for children of tender years. In addition, parents must make the custody decision during a period of stress. Despite these problems, parents have established generally reasonable criteria for making the custody decision.

IV. A COMPARISON OF PARENTAL CUSTODY DECISION MAKING AND JUDICIAL CUSTODY DECISION MAKING

A. Criteria

The survey results indicate that parents differ little from the courts in the weights attached to the various criteria involved in custody decision-making.³⁰ Freedom from alcoholism or serious mental illness is regarded as a minimally necessary criterion by both parents³¹ and courts.³²

Parents probably put more emphasis on the family structure factor than do the courts. However, courts often have endeavored to keep siblings together.³³ Likewise courts have stressed the need for continuity of custodial care and stability in the custodial environment.³⁴

30. Unfortunately, no studies exist concerning the weights attached by trial courts to the various criteria. Our conclusions are based on reading appellate opinions and on one author's eight years of practice in the field of domestic relations.

31. See Section III(A) *supra*.

32. *E.g.*, *Colonbo v. Colonbo*, 71 Cal. App. 2d 577, 162 P.2d 995, Cal. Rptr. (1945) (custody denied parent who suffered frequent hospitalizations for mental illness); *Usery v. Usery*, 229 Ore. 196, 367 P.2d 449 (1961) (custody denied to mother who admitted frequent drinking.).

33. *Baker v. Baker*, 475 S.W.2d 130 (Mo. Ct. App. 1971).

34. All of the cases found which stress continuity involve requests for modification of custody. *E.g.*, *Hutchinson v. Hutchinson*, 220 So. 2d 438 (Fla. Ct. App. 1969), *cert. denied*, 229 So. 2d 869 (1969); *Matter of Berlin v. Berlin*, 21 N.Y.2d 371 (1967); *Chapsky v. Wood*, 26 Kan. 650, 40 Am. Rep. 321 (1881). However, continuity of care could be a factor in the original custody decision if the parents had been separated for any length of time and the children primarily had been in the actual custody of one parent. Continuity in environment could be important to the initial decision if one parent

It seems that parents currently are granting even more weight to the maternal factor than are courts. Both legislatures and courts have begun to question the wisdom of a strong maternal preference. In response to a call for equal treatment of parents, several legislatures have passed statutes indicating that the court shall not prefer one parent over the other on the basis of sex.³⁵ Some courts, even without legislative prodding, are moving toward a more egalitarian view. Recent cases reflect that a father's chance of getting custody is increasing.³⁶ As previously noted, a partial explanation for the great weight attached to the maternal factor by survey parents lies in laymen's misconceptions about the existence or the strength of the maternal preference in their jurisdictions.³⁷ As knowledge of legislative and judicial deemphasis of this factor spreads, parents can be expected to accord it less weight.

Both courts and parents have accorded moderate weight to the child-oriented social-emotional factor. The most important individual criterion included in this factor is placing the child with the parent to whom he feels closest. This involves a difficult judgment, but it is one that must be made if the court is to protect the psychological welfare of the child.³⁸

Courts, like parents, frequently have attempted to determine which parent will meet the older child's social and emotional needs by asking him who he would prefer as his custodian.³⁹ Furthermore, both parents

planned to move, thus forcing the child to make new friends and attend a new school while trying to cope with the other stresses engendered by the divorce.

Continuity of care is stressed as a crucial factor in the Michigan Child Custody Act of 1970 which requires clear and convincing evidence that a change is in the child's best interest before entering a new order or modification order overturning an established custodial environment. Mich. C.L.A. 722.27 (Supp. 1975-1976).

35. *E.g.*, § 247.24(3) WISC. STAT. ANN. (1971); § 61.13(2) FLA. STAT. ANN. (1971).

36. Podell, Peck and First, *Custody—To Which Parent?*, 56 MARQ. L. REV. 51, 54-6 (1972).

37. See Section III(C) *supra*.

38. Bradbrook, *The Role of Judicial Discretion in Child Custody Adjudication in Ontario*, 21 U. TORONTO L.J. 402, 403-04 (1971). Depth of the parent-child relationship was crucial in *Hammett v. Hammett*, 239 So. 2d 778 (Ct. Civ. App. Ala. 1970). The mother had been given custody of three children aged 11 through 14. The retired father had been staying at home with the children and caring for them. The appellate court reversed, noting the children were more dependent on the father and wanted to be with him.

39. Attaching weight to an older child's preference is sometimes a common law rule, *e.g.*, *Elmore v. Elmore*, 4 N.C. App. 192, 166 S.E.2d 506 (1969), and sometimes a statutory mandate, TIT. 31, § 571-46(3) HAWAII REV. STAT. (1970). In Ohio, a child fourteen or over has an absolute right to select his custodian provided that parent is fit. § 3109.04 OHIO REV. CODE ANN. (1972). Although it is helpful for the judge to know the child's views, it may be harmful to force the child to choose between his parents. "Since all children have many mixed feelings about their parents, to place the burden of choosing upon them is to lead them into deeper difficulty with their uncertainty and ambivalence." Watson, Book Review, 43 U. CINN. L. REV. 455 (1974).

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and courts frequently indicate an awareness of the teenagers need for a same-sexed parental role model.⁴⁰

In conclusion, it appears that parents and courts tend to attach similar weights to the various criteria involved in the custody decision. Both need to place more emphasis on the child-oriented social-emotional factor, and both undoubtedly have been deterred from doing so by the judgmental difficulties involved.

B. Process

The process of parental custody decision making is clearly less harmful to children than the judicial process. First, although the parents are divorcing, their ability to work out a suitable custody arrangement for their children will assure the children of a continuing "co-parenthood," by demonstrating to the child that both parents care about him and that they are capable of planning together for his future. The sense of helplessness that children experience in the face of divorce can only be exacerbated by the parents' inability to solve the custody problem.

Furthermore, if the child is old enough to testify, subjecting him to a formal courtroom procedure in which he is asked to state, either in open court or in chambers, which parent he prefers as custodian, may be quite traumatic. We therefore suggest that the state, rather than usurping a parental function, should facilitate parental negotiation by taking on a mediator role and offering the parents a process through which they can learn to function effectively as co-parents.⁴¹

V. TOWARD NEW ROLES FOR PARENTS AND THE STATE

A. The Need for Reform

The foregoing sections of this article have argued there are shortcomings with both parental and judicial decision making on custody matters.

40. See Section III(E) *supra*; Zimmerman v. Zimmerman, 446 S.W.2d 503 (Mo. App. 1969).

41. Standards for custody decisions, like abortion decisions, cannot be promulgated effectively by legislatures. As Tribe points out, in the recent abortion decisions, the Supreme Court rather than choosing between abortion and continued pregnancy was "choosing among alternative allocations of decision-making authority" (Tribe, *The Supreme Court, 1972 Term, Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 10-15 (1973)). The custody decision, like the abortion decision, is best made by those who will have to live with it, and the way in which they communicate the decision to the child may be more important to the child than the wisdom of the decision. Furthermore, the process of adjudication is ill suited to the resolution of custody disputes. Problems where the resolution of one issue has implications for the other issues, thus precluding the consideration of one issue in isolation, are termed "polycentric" by Professor Fuller (Fuller, *Adjudication and the Rule of Law*, 1960 PROC. AM. SOC'Y INT'L L. 1, 3-5). Polycentric problems are better solved through a process of negotiation and contract (*Id.* at 5; Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COL. L. REV. 1533, 1538 (1973)).

The survey data discussed indicates that parents place primary importance on the family structure factor and probably accord insufficient weight to the social-emotional factor. The data also suggests that parents too frequently assume that mothers generally should have custody. The survey also demonstrates that parents receive very little advice and counseling on custody issues from either attorneys or mental health professionals.

Courts appear to make decisions on the same basic criteria as the survey parents and thus make many of the same mistakes. For example, courts, as well as parents, probably accord greater weight to the family structure factor than to the social-emotional factor. Aside from the substance of the decisions reached by courts, the process of deciding custody issues by court trial can often be a combative, disruptive experience for children and parents alike.

Essentially what is needed is a non-combative custody decision-making process that encourages parents to work out custody problems creatively and to give primary attention to the social-emotional factor of a child's welfare. The creation of a state sponsored mediation process would be a logical method of offering such encouragement. Such an approach would help protect the parents' basic right to guide the upbringing of their children rather than turning important parts of parental decision making over to the courts.

B. Custody Mediation

At the outset it should be remembered that a mediator, unlike an arbitrator, has no power to make a decision. His function is to facilitate decision making by others.

The court custody mediation process should begin automatically whenever a petition for divorce is filed where the parties have minor children. At the initial meeting the mediator should discuss with both of the parties the various factors which should be considered in determining "best interest," with prime stress on the social-emotional factor. If the child involved is old enough to form an intelligent preference, the mediator should request a conference with the child and should encourage the parents to give serious consideration to the child's feelings about custody. The mediator should schedule at least one separate conference with each parent. The purpose of these meetings would be to probe for any feelings of information which the person might be reluctant to disclose in front of the other party. At this stage the mediator can reinforce constructive attitudes held by a party and can attempt to deflate unreasonable positions.

After the initial conferences, the parties should be notified that they have a short period of time, such as thirty days, in which to reach and

file a custody agreement with the court. If they cannot reach an agreement within that time, an intensive thirty-day mediation period should follow. The need for rather stringent time limitations stems from the child's need for as much certainty as possible in the uncertain and frightening atmosphere created by the parents' separation. Furthermore, the child's need for continuity of care necessitates that he initially be placed with the parent who will assume permanent custody at the time of the divorce.⁴² The statute establishing the custody mediator should provide that in the event that one parent refuses to participate in the mediation process, it will be presumed that it is in the child's best interest to be placed in the custody of the other parent.

To avoid any tendency toward adversariness, the custody mediation statute should specify that attorneys for the parties shall not be present during mediation. The attorneys, of course, could advise their clients on points of law at any time. The mediator would not attempt to give legal advice to either party. Once the parties reach an agreement on custody, their attorneys would be responsible for drafting the agreement and submitting it to the court. The mediator could prepare a memorandum of the agreement to aid the attorneys in their drafting. In order to litigate the custody issue a plaintiff would have to allege mediation compliance and exhaustion.

The mediation process is ideally suited to resolve custody conflicts. If the parents are to function throughout the child's minority as co-parents, it is necessary that they reach some basic agreement about the needs of the child and how those needs can best be met.⁴³ Several of the characteristics of a collective bargaining situation which render it amenable to mediation⁴⁴ are also present in a custody dispute. First, the dispute is between two parties. Second, the two parties are locked into an interdependent relationship which exerts a strong pressure toward reaching an agreement. Third, the parties are attempting to structure a situation in which they can function effectively in the future.

Fuller stresses that the central quality of mediation is "its capacity to reorient the parties toward each other, not by imposing rules on them but by helping them to achieve a new and shared perception of their

42. For an excellent discussion of "the child's sense-of-time" and the need for accelerated custody proceedings, see Joseph Goldstein, Anna Freud & Albert J. Solnit, *supra* note 12 at 40-9.

43. Fuller suggests that mediation is "directed toward bringing about a more harmonious relationship between the parties, whether this be achieved through explicit agreement, through a reciprocal acceptance of the 'social norms' relevant to their relationship, or simply because the parties have been helped to a new and more perceptive understanding of one another's problems" (Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971)). He notes that the mediation process can be helpful even in the termination of a business or marriage relationship.

44. *Id.* at 309-12.

relationship, a perception that will redirect their attitudes and dispositions toward one another."⁴⁵ Judicial custody decision-making does not achieve such a reorientation of the parties, but rather further polarizes their views and increases their animosity, rendering further disputes between the parents likely.

The functions of a court custody mediator would be similar to those of a labor mediator. He would facilitate the procedure by arranging meetings between the parents, proposing the sequence of issues to be discussed, creating deadlines for the parties, keeping channels of communications open, and suggesting a variety of possible solutions.⁴⁶

A major substantive function of the court custody mediator would be to deflate the extreme position of the parties. This is something that can best be accomplished by a totally impartial mediator through a series of separate meetings with the parties. The mediator would also try to ascertain the priorities of the parties, offer constructive suggestions to the parties, and at least in some cases, would recommend a settlement. An extremely important function of the court custody mediator would be to assess the emotional and financial costs of a custody trial and communicate these facts to the parties.⁴⁷

A unique function of the custody mediator would be that of educator. Many parents have had little or no formal training in child psychology. The mediator could furnish them with reading materials and discuss with them the basic principles which should guide their decision.

As an observer of the parental custody decision process, the mediator through compliments could reinforce desirable attitudes and efforts on the part of the parties. The approval of an impartial observer could be very helpful where one or both parents are feeling rejected and inadequate.

The professional qualifications of a custody mediator should include either a masters degree in social work or a Ph.D. in psychology. A brief training program should be conducted to acquaint the person with the particular techniques of mediation. This program could be conducted by any professional mediator.

The statute establishing the custody mediation process should state that all parental communications with the mediator are privileged and cannot be testified to in court. Nor can the mediator be called as a witness in the custody litigation if the mediation process fails. The mediator is not a decision maker, but a facilitator of parental decision making.

45. *Id.* at 325.

46. See WILLIAM E. SIMKIN, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING*, 77-98 (1971).

47. See *id.* at 99-106.

Admittedly, compulsory mediation for all custody decisions would be costly. Because most parents lack sufficient education concerning the psychological needs of their children, mediation in every case would serve a valuable function. At the very least it should be provided in cases where parents cannot reach an early amicable decision.

It is possible that court custody mediators could make the process more rational by teaching parents to construct decision trees. Such an exercise might reduce the level of emotional tension and clarify areas of disagreement. A detailed examination of the use of decision trees is beyond the scope of this article. However, a brief description of the process and an example of its use will be given.

Raiffa suggests a basic four-step method for the use of decision trees: 1) chart the possible consequences on a decision-flow diagram (decision tree); 2) assign values to the different consequences; 3) assign probabilities to each of the chance branches; and 4) determine the best strategy after calculating the value of each branch.⁴⁸

To demonstrate how this methodology could be applied to a custody problem, assume a situation involving a male child fourteen years of age. His mother has not worked and has spent significantly more time with her son than has the father. The boy is close to both parents, but says that he would rather live with his father. The mother will stay in the family home and plans to take a part-time job to supplement the alimony payments. The father is being transferred to another city 200 miles away. A decision tree constructed by one of the parents might appear as in Figure 1.

The results from this decision tree indicate that the mother should receive custody of the son. The other parent might reach a different result if he or she perceived the facts differently or assigned different values to the various factors. Reducing the decision-making process to paper, however, would at least pinpoint the areas in which the parents disagreed over facts or values and might open the door to compromise. For example, in the hypothetical case, the parents might agree that the son should remain with the mother for one year until he finishes junior high school. Then if he still wants to live with the father, he would be allowed to do so.

VI. CONCLUSION

A new process should be devised which will encourage parents to accept the responsibility for making custody decisions. The adoption of a court custody mediator system would best facilitate this objective.

48. H. RAIFFA, *DECISION ANALYSIS* 129 (1968).

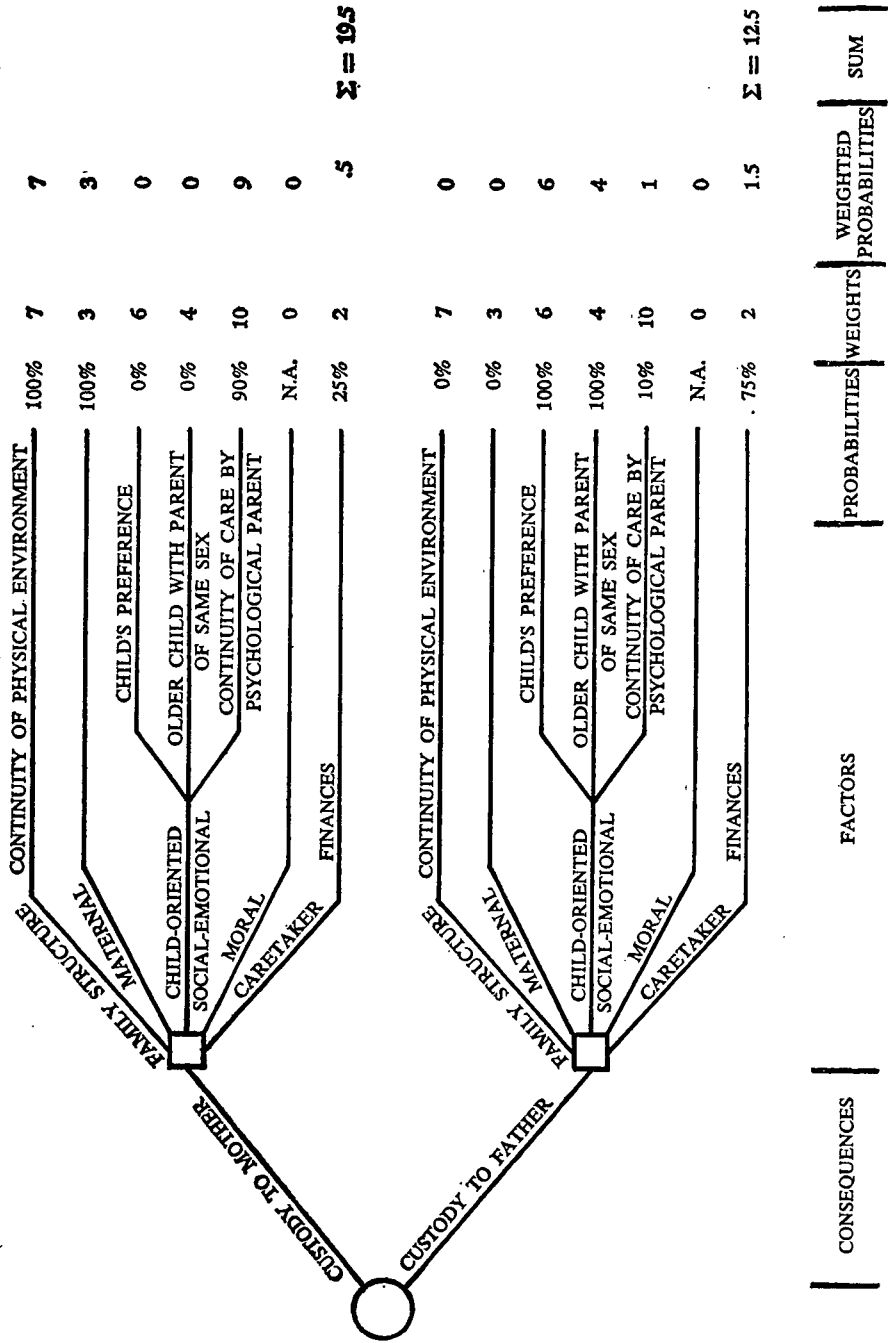


FIG. 1 DECISION TREE, SHOWING FACORS IN A PARENTAL CUSTODY DECISION

In cases where the parents are unable to agree on custody, the child would be protected from long periods of uncertainty about his future by requiring mediation shortly after a suit for divorce is filed. The mediator would educate the parents concerning the psychological needs of the child, but the assignment of weights to various factors in the custody decision would be left up to the parents. In the mediation process the parents would, in effect, be negotiating a mutually acceptable definition of the situation, including an assessment of the child's needs and of each parent's ability to meet those needs. By helping the divorcing parties learn to function effectively as co-parents, the state would maximize the possibility of a wise initial custody decision. Divorced couples who have learned to consider themselves co-parents for life would also be more likely amicably to resolve future problems to custody, visitation and education of the children without judicial intervention.

APPENDIX A—Description of the Survey Statistical Analyses

Eighteen chapters of *Parents Without Partners*, systematically selected to cover different parts of the country including rural as well as metropolitan areas, participated. Members filled out anonymous questionnaires pertaining to how they settled custody. In all, 76 people responded, 48 females and 28 males. Of the 76 respondents, 57 were from families in which the mother obtained custody of all the children, while 19 were from families in which the father had custody of at least some children. The religious breakdown of the same was as follows: 24% Catholic, 50% Protestant, 7% Jewish, 2% Buddhist, 17% who stated no religious preference.

The educational levels of the participants were as follows: 5% went no further than 8th grade, another 41% went no further than high school, 41% attended one to four years of college, and 12% went to graduate or professional school. Fifty per cent of the respondents had been divorced for three years or less. At the time that custody was decided, the average age of the parents was 34, the age range was 21 to 55. The average number of children in each family was 2.50. The average age of the children was 8; the age range was prenatal to legal majority.

Forty-eight percent of the children were male. There was a tendency (p.10)⁴⁹ for fathers to have custody of older children and of proportionately more male children. Custody settlements occurred in twenty-one different jurisdictions.

49. The statistical probability notation (p.10) indicates that the odds were greater than 90% that fathers did indeed have custody of older children and of proportionately more male children, and that the odds were less than 10% that there were no differences in age and/or sex of children in the custody of their fathers or their mothers.

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Participating parents rated fifteen criteria shown in Table I on the following scale:

1	2	3	4	5
factor not applicable to my situation	unimportant	moderately important	very important	crucial (out weighs all other factors)

A factor analysis of the fifteen custody criteria was carried out.⁵⁰ The factor matrix is shown in Table 2.

Hotelling's T² analysis⁵¹ of the factor scores demonstrated that there were significant differences in the extent to which each of these five factors was considered crucial to deciding custody (F=18.25; df=4.72; p .001). In general, the family structure factor was regarded as the most important. For mothers who obtained custody (multivariate F=3.39; df=4.53; p .001), both family structure and maternal values were of primary importance; while families in which the father obtained custody (multivariate F=3.39; df=4.15; p .036) rated family structure and the child-oriented social-emotional factor as the most important (See Table 3 for univariate F tests and Table 4 for mean scores on each factor).

In an effort further to understand the divergence between fathers and mothers, the data were inspected in more detail, looking at mean factor scores for each of four groups of subjects: mothers who answered the questionnaire who had custody, mothers who answered the questionnaire where the father had custody, fathers who answered the questionnaire who had custody, and fathers who answered the questionnaire where the mother had custody (See Table 5).

With the maternal factor, it was most strongly believed that a mother should have custody of young children in those cases in which the mother did indeed obtain custody.

With the maternal factor, whether the father or the mother had custody determined its importance; in other words, the notion that a mother should have custody of young children was deemed most important in cases in which the mother did indeed obtain custody.

The caretaking factor and the family structure factor presented another picture: both were most highly rated by father respondents who also had custody and second most highly rated by mother respondents who also had

50. According to Guertin and Bailey, "factor analysis is a formal decision making process to explicate subsets of co-varying variables." (W. H. GUERTIN AND J.P. BAILEY, INTRODUCTION TO MODERN FACTOR ANALYSIS 1 (1970)). In other words, the question being answered is: if a person feels that criterion # 12 is important, what other criteria is he apt to rate as important. Then, if a group of criteria are rated similarly by most people, this group of criteria is called a factor. Factor analysis is a systematic mathematical procedure for extracting factors from sets of ratings.

51. J.E. OVERALL AND C.J. KLETT, APPLIED MULTIVARIATE ANALYSIS, 310-13 (1972). A T statistic tests whether different scores are equal. The test is evaluated using an F distribution to see whether there are systematic differences. A large F suggests that a pattern of systematic differences may exist. The level of statistical significance (p) of an F statistic is also dependent on the number of degrees of freedom (df), which is determined from the number of variables and the number of subjects.

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custody. Respondents who did *not* obtain custody rated these two factors much less highly. Further, fathers generally tended to rate caretaking ability as more important than mothers rated it (p . 20).

Finally, the pattern for the child-oriented social-emotional factor was the reverse of that above. Respondents who did *not* obtain custody rated this factor higher than did respondents with custody. Fathers were slightly higher than mothers.

In one other analysis, a discriminant function⁵² was calculated using the fifteen individual items. Father and mother custody were found to be able to be significantly discriminated using the combination of individual variables shown in Table 6 ($F=2.42$; $df=5.70$; $p .05$).

TABLE 1

Criteria Which May be Considered in Deciding Who Will Have Custody of Children

1. Young children should be with mother
2. Older child should be with parent of same sex
3. Child should be with parent who has closest relationship with him
4. Parent home during day
5. Parents' financial resources to care for child
6. Past or present serious mental illness of a parent
7. Parents' physical health
8. Alcoholism on part of a parent
9. Keeping child in same familiar custodial environment
10. Continuing child's religious training
11. Parents' morals
12. Preference for two-parent home
13. Keeping children together
14. Preference of child
15. Permanence of family unit.

TABLE 2

Factors In Deciding Child Custody^a

CRITERIA	I Caretaker Factor (parent's ability to care for a child)	II Child- oriented Social- emotional Factor	III Religious Factor	IV Family Structure Factor	V Maternal Factor
1. Young children should be with mother	.06523	.03646	.09058	.02566	.94546

52. A discriminant function calculates a weighted combination of variables which maximally distinguishes between the members of two groups. This weighted combination of variables yields a composite score which can later be used to classify additional persons according to which group they are more likely to belong to. See Overall and Klett, *supra* note 51 at 243-75.

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2. Older children should be with parent of the same sex	.10963	.80368	.16520	.16041	.00687
3. Child should be with parent who has closest relationship with him	.16131	.65719	.00992	.28854	.17391
4. Parent home during day	.43180	.50246	.40337	-.11229	.16732
5. Parents financial resources to care for child	.66790	.36367	.20553	.25120	.01854
6. Past or present serious mental illness of a parent	.92208	-.03677	.00553	.11502	.02235
7. Parents' physical health	.67536	.28446	.40353	-.13369	.11206
8. Alcoholism on part of a parent	.51886	-.06027	.54342	.20204	.04198
9. Keeping child in same familiar custodial environment	.09113	.16123	.13743	.78441	.09883
10. Continuing child's religious training	.09920	.23952	.82249	.24119	.11005
11. Parent's morals	.13120	.13025	.80548	.15332	.01381
12. Preference for two-parent home	.44498	.43141	.59860	.09355	-.06863
13. Keeping children together	-.02650	.06951	.12694	.82770	-.01489
14. Preference of child	-.07445	.62672	.36182	.18782	-.30435
15. Permanence of family unit	.26041	.34986	.18513	.70049	-.12489

a. This matrix of factor loadings was obtained using principal components analysis routine, with varimax rotation, from the FACTOR program in the Statistical Package for the Social Sciences (SPSS).

TABLE 3
UNIVARIATE F TESTS

	All (df=1,75)		MOTHER CUSTODY (df=1,56)		FATHER CUSTODY (df=1,18)	
	F=	p≤	F=	p≤	F=	p≤
Family Structure vs. Maternal	6.35	.014	1.39	.244	8.48	.009
Family Structure vs. Child-Oriented Social-Emotional	34.45	.001	32.31	.001	4.38	.051
Maternal vs. Child-Oriented Social-Emotional	8.41	.005	15.76	.001	1.23	.281
Family Structure vs. Religious	34.86	.001	31.84	.001	5.96	.025

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Child-Oriented Social-Emotional vs. Religious	.08	.778	.04	.851	1.17	.293
Maternal vs. Religious	9.35	.008	10.94	.002	.02	.893
Religious vs. Caretaking Capacity	2.47	.120	2.19	.144	.31	.582
Maternal vs. Caretaking Capacity	107.93	.001	25.33	.001	.30	.592
Child-Oriented Social-Emotional vs. Caretaking Capacity	3.68	.059	2.11	.152	1.54	.231
Family Structure vs. Caretaking Capacity	58.78	.001	43.50	.001	14.48	.001

TABLE 4
MEAN FACTOR SCORES ^a

A. all subjects (N=76)		B. mother obtained custody (N=57)	
Family Structure	2.84	Family Structure	2.81
Maternal	2.17	Maternal	2.47
Child-Oriented Social-Emotional	1.44	Child-Oriented Social-Emotional	1.34
Religious	1.37	Religious	1.39
Caretaking Capacity	.98	Caretaking Capacity	.96
C. father obtained custody (N=19)			
Family Structure	2.93		
Child-Oriented Social-Emotional	1.75		
Religious	1.31		
Maternal	1.27		
Caretaking Capacity	1.03		

a. Horizontal lines indicate which mean scores are significantly different.

TABLE 5
MOTHER VS. FATHER, RESPONDENT VS. CUSTODY

A. CARETAKING FACTOR			
	mean	st dev	n=
Father Respondent/Father Custody	1.67	1.60	11
Mother Respondent/Mother Custody	1.11	1.55	40
Father Respondent/Mother Custody	.62	1.04	17
Mother Respondent/Father Custody	.15	1.27	8
Custody: father	1.03	1.63	19
mother	.96	1.43	57
Respondent: father	1.03	1.36	28
mother	.95	1.54	48
F _{cust} = .01 df = 1,72 n.s.			
F _{resp} = 1.74 df = 1,72 n.s.			
F _{cust x resp} = 6.52 df = 1,72 p < .05.			
B. CHILD-ORIENTED SOCIAL-EMOTIONAL FACTOR			
	mean	st dev	n=
Mother Respondent/Father Custody	2.58	1.47	8
Father Respondent/Mother Custody	1.71	1.25	17
Mother Respondent/Mother Custody	1.18	1.37	40
Father Respondent/Father Custody	1.14	1.16	11

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Custody: father	1.75	1.45	19
mother	1.34	1.35	57
Respondent: father	1.49	1.23	28
mother	1.41	1.47	48
F cust = 1.32	df = 1,72	n.s.	
F resp = 1.54	df = 1,72	n.s.	
F cust x resp = 7.34	df = 1,72	p<.01	

C. FAMILY STRUCTURE FACTOR

	mean	st dev	n=
Father Respondent/Father Custody	3.18	1.56	11
Mother Respondent/Mother Custody	3.07	1.49	40
Mother Respondent/Father Custody	2.58	2.21	8
Father Respondent/Mother Custody	2.21	1.54	17
Custody: father	2.93	1.83	19
mother	2.81	1.54	57
Respondent: father	2.59	1.59	28
mother	2.99	1.61	48
F cust = .31	df = 1, 72	n.s.	
F resp = .09	df = 1, 72	n.s.	
F cust x resp = 2.79	df = 1, 72	p<.10	

D. MATERNAL FACTOR

	mean	st dev	n=
Mother Respondent/Mother Custody	2.68	1.71	40
Father Respondent/Mother Custody	1.99	1.70	17
Mother Respondent/Father Custody	1.31	1.25	8
Father Respondent/Father Custody	1.24	1.15	11
Custody: father	1.27	1.16	19
mother	2.47	1.72	57
Respondent: father	1.69	1.53	28
mother	2.45	1.71	48
F cust = 5.82	df = 1, 72	p<.05	
F resp = .76	df = 1, 72	n.s.	
F cust x resp = .49	df = 1, 72	n.s.	

TABLE 6

MOTHER VS. FATHER CUSTODY DISCRIMINANT

Variable	FUNCTION	
	Mother	Father
1. Young children should be with mother	.977	.475
2. Older child should be with parent of same sex	.706	1.126
10. Continuing child's religious training	-.108	.260
11. Parents' morals	.625	.402
4. Parent at home during the day	.350	.141
Constant	-3.653	-3.084