

WHO KNOWS WHAT IS BEST FOR CHILDREN? HONORING AGREEMENTS AND CONTRACTS BETWEEN PARENTS WHO LIVE APART

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I

INTRODUCTION

Professor Robert Mnookin was prescient in pointing to the conundrum judges would face in applying the “best interests” standard in the absence of a legislative definition of “best.”¹ He called attention to this problem just as gender-neutral laws were undermining the presumption that children of “tender years” are best reared by their mother, unless she is “unfit.”² Even following decades of judicial (and parental) uncertainty, law and society have failed to embrace a clear, enduring, and widely accepted definition of children’s best interests.³ Legislatures continue to experiment with various definitions, but these developments largely reflect tensions between fathers’ rights and mothers’ rights advocates, rather than a clear solution to the indeterminacy problem or a definitive articulation of what might be best for children.⁴

While anticipating one huge problem, Professor Mnookin could not foresee another: the growing number of parents for whom judicial intervention would become relevant, and frequently would be requested, in the decades that followed. Separated, divorced, and never-married (whether cohabiting or not) parents with children under the age of eighteen all are potential candidates for judicial intervention in custody matters.⁵ Today, slightly less than half of all first

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1. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 226–27 (Summer 1975).

2. *Id.* at 235.

3. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2 (2002).

4. See generally Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 LAW & CONTEMP. PROBS., no. 1, 2014 at 69.

5. See Mnookin, *supra* note 1, at 232. Mnookin discussed two different functions that courts can

marriages end within twenty years (48% for women, 44% for men),⁶ and close to half of children are born outside of marriage (40.8% in 2010).⁷ Moreover, only about half of unmarried parents are cohabiting at the time of childbirth,⁸ and cohabiting relationships are even more likely to dissolve than are marriages.⁹

The huge number of separated, divorced, and never-married parents who might, and do, appeal to the courts for resolution of their childrearing disagreements has created a problem and a paradox. The practical problem is that courts are overburdened with custody disputes. In fact, custody disputes are now the most common reason for a legal filing in the United States.¹⁰ Family-court judges decide what is “best” for the children of separated, divorced, and never-married parents, often down to the minutiae of weekly schedules, holidays, schooling, extracurricular activities, and perhaps even appropriate eating and clothing habits. The paradox is that courts in the United States have consistently refused to hear similar disputes between *married* parents, viewing such efforts as contrary to public policy.¹¹

Even without considering the different treatment of married parents, one might wonder, If there were no system currently in place, might legislatures shy away from creating a means for judges to intervene in the intimate decisions made by parents for about half of all American children? Would legislatures be even more reluctant facing the fact that no child-protection issues typically are involved in these parenting disputes? Would present-day lawmaking be influenced by the reality that separation, divorce, cohabitation, and nonmarital

perform in child-custody disputes: *private dispute settlement* involving disputes between adults with conflicting claims to a relationship with a child (commonly referred to as custody disputes) and *child protection* involving judicial enforcement of minimal rules of parental behavior designed to protect and preserve a child's well-being (commonly called abuse and neglect proceedings). *Id.* at 229. The best-interests standard informs both judicial functions; however, the present article focuses only on custody disputes between biological parents, probably the most controversial area of debate about defining children's best interests. *Id.* at 229–30. Although we focus on private custody disputes, we underscore child-protection issues in one, vital way: In many contexts, judicial intervention in private custody disputes should be circumscribed and limited to cases that raise clear child-protection issues. *Id.* at 229.

6. Casey E. Copen et al., U.S. Dep't of Health & Human Servs., *First Marriages in the United States: Data from the 2006–2010 National Survey of Family Growth*, NAT'L HEALTH STAT. REP., Mar. 22, 2012, at 1, 7, available at <http://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf>.

7. Joyce A. Martin et al., U.S. Dep't of Health & Human Servs., *Births: Final data for 2010*, NAT'L VITAL STAT. REP., Aug. 28, 2012, at 1, 8, available at http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_01.pdf.

8. Wendy Sigle-Rushton & Sara McLanahan, *The Living Arrangements of New Unmarried Mothers*, 39 DEMOGRAPHY 415, 415 (2002).

9. See ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* 17 (2009). Although U.S. courts could hear custody disputes between unmarried parents who are cohabiting, such disputes can be expected to be far more frequent between unmarried parents who are living apart or who break up.

10. ANDREW SCHEPARD, *CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES* 38–39 (2004).

11. See Robert E. Emery & Kimberly C. Emery, *Should Courts or Parents Make Child-Rearing Decisions?: Married Parents as a Paradigm for Parents Who Live Apart*, 43 WAKE FOREST L. REV. 365, 367 (2008).

birth are routine demographically and broadly accepted socially? Might legislatures be concerned about venturing into the family lives and parenting decisions of almost half of all American families for both practical reasons (such as concern about overburdening courts) and philosophical reasons (such as equal-protection concerns¹²)?

In part II of this article we explore alternative dispute resolution (ADR) for parents who are disputing various issues concerning child custody. We argue that mediation and other types of ADR offer one of the most hopeful solutions to the problems produced by indeterminacy and demography. As is documented by a growing body of empirical research, encouraging parental self-determination in mediation and other forms of ADR is not only a practical solution to these twin complications; it is perhaps the wisest one.

Yet it is impossible to embark on a discussion of the benefits of parental self-determination without calling attention to the irony that is explored in part III of this article. Noting the benefits of private dispute resolution for separated, divorced, and never-married parents is perhaps little more than a recognition that these families are not so different from married families. As is shown in part III, social, psychological, and legal conceptions of these “alternative” family forms have evolved rapidly. Scholars and practitioners now refer to the “renegotiation” rather than the end of family relationships¹³ and to “coparenting” across households instead of “single” parents.¹⁴ Similarly, contemporary law is increasingly abandoning older terms, such as “custodial” and “noncustodial” parents, together with the concepts they embody, in favor of new terms and concepts, such as “joint custody” and “parenting plans.”¹⁵

All of these changes underscore a vital point. Like married parents, parents who live apart—ideally and in practice—maintain relationships not only with their children but also with each other. Because of this, protecting the coparenting relationship is an important public-policy goal for both married families and for families in which parents live apart, a goal that might trump

12. We envision a time when parents who live apart successfully argue against state intervention in their parenting decisions based on equal-protection arguments. To date, several such cases have been brought, but none have yet proven successful. *See, e.g.,* Matter of Adoption of T.K.J., 931 P.2d 488 (Colo. App. 1996) (holding that an adoption statute did not violate children’s right to equal protection, although the statute treated children differently for purposes of stepparent adoption based on whether the person seeking adoption was married to children’s natural parent); *Neudecker v. Neudecker*, 577 N.E.2d 960 (Ind. 1991) (holding that a statute authorizing the trial court to order either or both parents to pay sums for children’s college education did not violate the noncustodial-support obligor’s equal-protection rights, even though a married parent could unilaterally refuse to pay for college education); *Barnes v. Barnes*, 107 P.3d 560 (Okla. 2005) (holding that a distinction between divorcing parents, who were subject to Parenting Coordinator Act, OKLA. STAT. tit. 43, § 120.3 (Supp. 2003), and married parents or divorcing couples, who were not subject to the Act, was not grounds for an equal-protection challenge to the trial court’s appointment of a parenting coordinator).

13. *See* ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION 18 (2d ed. 2011) [hereinafter EMERY, RENEGOTIATING FAMILY RELATIONSHIPS].

14. *See id.* at 63.

15. *See id.* at 102–03.

well-intentioned efforts by the courts to intervene to protect children's best interests. Perhaps the lesson learned is that courts do best when treating the separated, divorced, or unmarried half of American parents as they do the married half: by staying out of parental disputes.

The present argument stops short of suggesting that courts should entirely surrender their private dispute-settlement function in the child-custody arena. Instead, two modest proposals are made. First, the law should defer to *agreements* between parents who live apart for the same reasons that the judiciary refuses to enter *disagreements* between married parents: respecting parental autonomy and encouraging cooperative coparenting. Second, courts can and should refuse to hear *some* disputes between parents who live apart, as is done for *all* disputes between married parents.

In part IV of this article we highlight the potential benefits of taking significant steps in the direction of respecting the ability of separated, divorced, and never-married parents to make autonomous, child-focused, and relationship-preserving coparenting decisions. Specifically, we argue that (1) in the absence of child-protection concerns, judicial review of parenting plans should be eliminated for cases in which parents agree; (2) contracts between parents, such as ADR contracts (for example, those imposing mandatory arbitration) or parenting-plan contracts (for example, those mandating plans that evolve over time) should be honored and enforced; and (3) access to the courts can and should be limited whether in the context of promoting ADR (such as mandatory mediation) or reducing repeat litigation (for example, by refusing to hear trivial parenting disputes, or by raising the threshold for a "change of circumstances" needed to justify relitigation). Finally, we conclude that the answer to the question, Who knows what is best for children? is their parents—whether married or unmarried.

II

INDETERMINACY AS ONE RATIONALE FOR MEDIATION

Professor Mnookin stated,

The problems posed by the use of an indeterminate standard, coupled with the difficulties of formulating more precise rules that would dispose of many cases, invite explicit consideration of modes of dispute resolution other than traditional adjudication. Since a primary goal for cases of these sorts should be facilitating private resolutions, mediation is an obvious possibility. A negotiated settlement has considerable advantages over one imposed by a court. The adults seeking custody avoid the cost—both financial and emotional—of an adversary proceeding.¹⁶

Parental self-determination is indeed an important rationale for mediation and other forms of ADR that encourage the private ordering of parents' preferences on issues falling under the umbrella of child custody (for example, time with each parent, major parenting decisions, and perhaps some aspects of practical day-to-day parenting, such as scheduling extracurricular activities).

16. See Mnookin, *supra* note 1, at 287–88.

Not many years after Mnookin offered his argument for mediation, one author of this article highlighted another significant consideration.¹⁷ A solid and growing body of psychological literature increasingly pointed to conflict between parents as a key contributor to the psychological struggles found too often among children from divorced families.¹⁸ Robert Emery asked, If parental conflict is detrimental to children from divorced families, might it be contrary to children's best interests to encourage parents to resolve their disputes through the adversary system? Are the best interests of children better served by diverting parents from court and encouraging them to resolve custody disputes in mediation or in other, nonadversarial forums? In fact, at the same time many judges, lawyers, mental-health professionals, and parents were expressing growing dissatisfaction with traditional legal methods of attempting to settle child-custody disputes.¹⁹ When combined with Professor Mnookin's arguments about indeterminacy,²⁰ mediation seemed to be a promising solution to two major problems posed by child-custody disputes in latter part of the twentieth century.

A. Does Mediation Help Parents Decide?

Mnookin offered mediation as a theoretical solution to the problem of the indeterminacy of the best-interests standard.²¹ His home state at the time, California, soon embarked on a real-world experiment in mediating custody disputes. On January 1, 1981, California became the first state to mandate that all parents must attempt mediation before a court hearing concerning custody issues could be scheduled,²² a law that is still in effect.²³ The experiment was quickly met with success, at least in terms of a reduction in the need for judicial decisionmaking. For example, one early report found that 55% of disputing parents in the Los Angeles County mediation program reached an agreement in mediation.²⁴ A later statewide study of California's program of mandatory mediation found that, in 1388 cases, 46% of couples settled within two weeks of their first mediation appointment, while another 20% of couples scheduled appointments for further mediation.²⁵

17. See generally Robert E. Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 PSYCHOL. BULL. 310 (1982).

18. See *id.* at 313.

19. Robert E. Emery & Melissa M. Wyer, *Divorce Mediation*, 42 AM. PSYCHOLOGIST 472, 473 (1987).

20. *Id.* at 473 (citing Professor Mnookin's arguments prominently).

21. See Mnookin, *supra* note 1, at 287–89.

22. CAL. CIV. CODE § 4607 (West 1981). It is not known whether Mnookin was aware of efforts to mandate mediation at the time of writing the 1975 article, or if perhaps the article and Mnookin himself were an impetus for reform.

23. CAL. FAM. CODE § 3170 (West 2013).

24. Hugh McIsaac, *Court-Connected Mediation*, 21 CONCILIATION CTS. REV., Dec. 1983, at 49, 54 [hereinafter McIsaac, *Court-Connected Mediation*].

25. Charlene E. Depner, Karen V. Cannata & Marlene B. Simon, *Building a Uniform Statistical Reporting System: A Snapshot of California Family Court Services*, 30 FAM. & CONCILIATION CTS.

Although even mandatory mediation leaves many cases unresolved, these settlement rates represent an impressive reduction in the need for judges to decide custody cases. However, one might question whether parents in many of these same cases would have settled anyway after filing for a custody hearing, either with the help of their attorneys or on their own. One might also ask whether the mandatory-mediation law, or perhaps enthusiasm for the new settlement technique, inflated the rates of settlement in California.

Fortunately, experimental research, where families are assigned at random to mediation or continued adversary settlement, has shown that mediation *causes* a substantial reduction in the need for court hearings. For example, a study of families who were recruited at the time of filing (as in California) and randomly assigned to either a relatively brief form of mediation (again like California) or to continued litigation found that (1) a judicial decision was required in 72% of cases randomly assigned to continued litigation (28% settled out of court after filing), while (2) only 11% of subjects randomly assigned to mediation needed a judge to make a final decision (77% settled in mediation, and 11% settled out of court *after* mediation failed to produce an agreement).²⁶ This difference is statistically and substantively significant.²⁷ Moreover, numerous studies of mediation from other states and in other countries similarly show that mediation-settlement rates typically range from 50% to 85%.²⁸ In short, mediation causes a substantial reduction in the need for judges to decide custody cases across a variety of programs, contexts, and jurisdictions.

Undoubtedly, different mediators and styles of mediation produce higher or lower rates of settlement. Perhaps the key factor, one that was debated from the beginning of California's mandatory program, is whether mediation should remain confidential.²⁹ In confidential mediation, if no agreement is reached, mediators neither agree to testify nor can they be compelled to do so in future legal actions. Alternatively, mediation might *not* be confidential such that, if needed, the information obtained during the process could be used to make an informed recommendation to the court.

It is of interest that the Los Angeles area followed the confidential route, while the San Francisco area did not.³⁰ As noted, agreement rates in the Los Angeles mediation program were 55%.³¹ In San Francisco, by contrast, one superior-court judge reported that his caseload dropped from five to fifteen

REV. 185, 197 (1992).

26. Robert E. Emery, Sheila G. Matthews & Melissa M. Wyer, *Child Custody Mediation and Litigation: Further Evidence on the Differing Views of Mothers and Fathers*, 59 J. CONSULTING & CLINICAL PSYCHOL. 410, 412 (1991).

27. *Id.*

28. Joan B. Kelly, *A Decade of Divorce Mediation Research: Some Answers and Questions*, 34 FAM. & CONCILIATION CTS. REV. 373, 375 (1996).

29. See generally Hugh McIsaac, *Confidentiality: An Exploration of Issues*, 8 MEDIATION Q. 57 (1985).

30. *Id.* at 60.

31. See McIsaac, *Court-Connected Mediation*, *supra* note 24, at 54.

cases per day to *five cases in the entire year* following the enactment of mandatory mediation, and just three through November of the next year.³² This marked a virtual elimination of judicial intervention in custody disputes.

What explains this dramatic difference? In mediation that is not confidential, mediators typically reveal what their recommendation will likely be should the process fail, a procedure sometimes referred to as “muscle mediation.” A mediator might say, for example, “You have every right to take this matter to court, but if you do, you should know that I will recommend that the judge order the exact schedule that we have just been discussing. You also should know that judges in this court almost always follow my recommendation, and that the legal process is very expensive and time consuming. So, do you want to rethink your position on the acceptability of this parenting plan?”

Not surprisingly, such speculations “encourage” parents to settle. The present authors are in favor of maintaining the confidentiality of mediation, an approach that highlights parental self-determination and the facilitative role of the mediator.³³ In effect, mediation that is not confidential is a mediation–arbitration (med-arb) process, in which the mediator becomes the arbitrator if mediation fails. As such, mediation that is not confidential presaged future developments in ADR, particularly the use of custody evaluations as settlement procedures and parenting coordination. These two methods are discussed shortly, and it is argued that these and other alternatives can be used if and after confidential mediation does not end in agreement.

B. Is Mediation More Family Friendly?

Before turning to other dispute-resolution methods, evidence pertaining to a second rationale for mediation deserves brief consideration. As noted earlier, mediation was touted not only as a means of resolving the indeterminacy dilemma but also as a more “family friendly” intervention that would reduce or at least not exacerbate family conflict, perhaps to the benefit of individual family members and their ongoing relationships.³⁴

Although not a major focus of the present analysis, many predictions about the potential benefits (or protective effects) of mediation have been supported in empirical research. Most notably, a major study of mediation versus adversary settlement randomly assigned families to the two conditions and followed parents and children over the course of twelve years.³⁵ This study found that (1) parents were more satisfied with mediation than adversary settlement immediately after resolving their disputes, eighteen months later,

32. Donald B. King, *Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law*, CAL. LAW., Jan. 1982, at 40, 41.

33. See EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS*, *supra* note 13, at 143.

34. See Emery & Wyer, *supra* note 19, at 474.

35. See generally Robert E. Emery, Lisa Laumann-Billings, Mary C. Waldron, David A. Sbarra & Peter Dillon, *Child Custody Mediation and Litigation: Custody, Contact, and Co-parenting 12 Years After Initial Dispute Resolution*, 69 J. CONSULTING & CLINICAL PSYCHOL. 323 (2001).

and twelve years later,³⁶ (2) nonresidential parents who mediated maintained significantly and substantially more involvement in their children's lives over the course of their children's entire childhood (that is, at the twelve-year follow-up),³⁷ (3) residential parents rated the quality of nonresidential parents' relationship with their children as significantly better across multiple domains twelve years after dispute settlement in mediation versus through adversary procedures,³⁸ and (4) despite the increased opportunities for parental conflict (because of both parents' continued involvement in their children's lives), twelve years later parents who mediated reported significantly *less* child-related conflict than parents who litigated.³⁹

In regard to conflict, it should be noted that mediation appeared to offer both direct benefits and protective effects.⁴⁰ Specifically, a decrease in parental conflict was found following mediation, while an increase in conflict was found following adversary settlement.⁴¹ Thus, it appears that, on average, mediation can both lead to an improvement in the coparenting relationship, and also prevent any deterioration of this relationship following adversary settlement.

C. A Hierarchy of Dispute-Resolution Alternatives

Mediation can apparently both help families in dispute and lead to settlement of at least half of cases otherwise destined for judicial settlement. However, mediation will not lead to settlement of all parental disagreements. In fact, Professor Mnookin did not expect mediation to resolve all custody disputes.⁴² Professor Mnookin explained, "Even if mediation is successful in some cases, unresolved disputes will remain."⁴³

Yet Professor Mnookin appears to have been overly pessimistic about an ADR procedure he considered but dismissed:

In the application of a broad, person-oriented standard, a more "intimate" form of adjudication or arbitration might be highly desirable. If the disputing parents could agree on the choice of a "judge" and the "judge" knew the family, the custody decision might better reflect an intuitive appreciation of the parties' values, psychology, and goals. The decision might also be more acceptable to the parents.⁴⁴

Focusing on the role of community leaders in resolving disputes in certain small, nonindustrialized cultures, Professor Mnookin went on to say, "[A]lthough a more intimate form of adjudication might be desirable, it is unclear that such a

36. *Id.* at 331.

37. *Id.* at 330.

38. *Id.* at 326.

39. David A. Sbarra & Robert E. Emery, *Deeper Into Divorce: Using Actor-Partner Analyses to Explore Systemic Differences in Co-parenting Conflict Following Custody Dispute Resolution*, 22 J. FAM. PSYCHOL. 144, 150 (2008).

40. *Id.* at 149.

41. *Id.*

42. See Mnookin, *supra* note 1, at 289.

43. *Id.*

44. *Id.*

system could be implemented on a broad scale.”⁴⁵

In fact, a number of new ADR techniques have been developed in recent decades, all offering separated, divorced, and never-married parents a more intimate, less formal, and hopefully more family-friendly forum for attempting to resolve their custody disputes. If the recommendations offered herein were put into practice, this would encourage the development of an even broader range of more personal and personalized dispute-resolution alternatives.

1. Custody Evaluations as a Settlement Technique

In addition to mediation, one new ADR procedure is the use of expert psychological evaluations, not to provide courts with evidence relevant to judicial decisionmaking, but to encourage parents to settle their disputes. A variation on this general method is called “early neutral evaluation,” in which a relatively brief, informal, and inexpensive custody evaluation is conducted by an experienced evaluator early in the parental dispute. The evaluator makes a confidential recommendation to the parents, one that is presumed to reflect what might be concluded following a full-scale evaluation-as-usual.⁴⁶ Thus, early neutral evaluations essentially are a form of nonbinding arbitration, undertaken with the explicit goal of encouraging settlement. In fact, one study found that the procedure led to the full settlement of 51% of cases, and the partial settlement of another 12%.⁴⁷ Only 23% of cases assigned to early neutral evaluation went on to a full custody evaluation.⁴⁸

2. Parenting Coordination

Parenting coordination is a second new dispute-resolution procedure, which explicitly follows a med-arb model.⁴⁹ A parenting coordinator first works with parents in dispute to help them mediate a resolution to their disagreements. If mediation fails to produce an agreement, however, the mediator becomes an arbitrator and orders a binding resolution. As in “muscle mediation,” parenting coordinators might voice their likely decision prior to making a formal ruling to encourage a mediated settlement. Although the mediation phase of the process typically is confidential, parenting coordination is no longer confidential once it moves into arbitration. Unlike muscle mediation, however, the parenting coordinator is explicit about his or her arbitration role from the beginning of the process, and the authority to make decisions is delegated to the parenting coordinator by the parents, the appropriate judge, or both. Parents retain the

45. *Id.*

46. See Jordan L. Santeramo, *Early Neutral Evaluation in Divorce Cases*, 42 FAM. CT. REV. 321, 325 (2004).

47. Yvonne Pearson, *Early Neutral Evaluations: Applications to Custody and Parenting Time Cases in Program Development and Implementation in Hennepin County, Minnesota*, 44 FAM. CT. REV. 672, 673 (2006).

48. *Id.* at 680.

49. See generally Matthew J. Sullivan, *Parenting Coordination: Coming of Age?*, 51 FAM. CT. REV. 56 (2013).

right to appeal a parenting coordinator's decision in court.

Currently, parenting coordination is used primarily to manage high-conflict, repeat-litigation cases.⁵⁰ Parents have already had their day in court, perhaps a great many days. Parents might be ordered into the process or might seek it out voluntarily, signing a contract giving the parenting coordinator decisionmaking authority. Because ultimate authority for deciding child custody rests with judges, it is essential for parenting coordinators to reach an understanding with local judges as to the nature and extent of their decisionmaking authority. Typically, decisions reached in parenting coordination are narrower in scope than those imposed by judges, and limited to deciding issues that require a pressing decision (such as the schedule for an upcoming holiday) rather than broad, far-reaching decisions (such as ordering a change in primary residence).⁵¹

Although currently limited in scope, the parenting coordination process is still evolving. One can easily envision the process becoming broader. For example, parents who are not in high conflict might enter the process voluntarily, perhaps prior to or instead of litigation. Parents might choose to extend the authority of a parenting coordinator, agreeing to ask them to make broad and basic decisions about legal and physical custody, if needed. In one sense, parenting coordinators might become the "wise elders," of a sort, who offer the more intimate form of adjudication that Professor Mnookin contemplated decades ago. In another sense, binding arbitration in the form of parenting coordination, or some variation of that technique, appears to be poised to become a form of ADR used more broadly and more frequently in all kinds of custody matters.

There is, however, one very important obstacle to this forward movement. As is discussed shortly, in most states, parents cannot sign valid contracts committing themselves to binding arbitration for custody matters. The courts' *parens patriae* role in determining children's best interests voids these contracts, a circumstance that, it is argued, undermines parental autonomy, cooperative coparenting, and a valuable form of ADR.

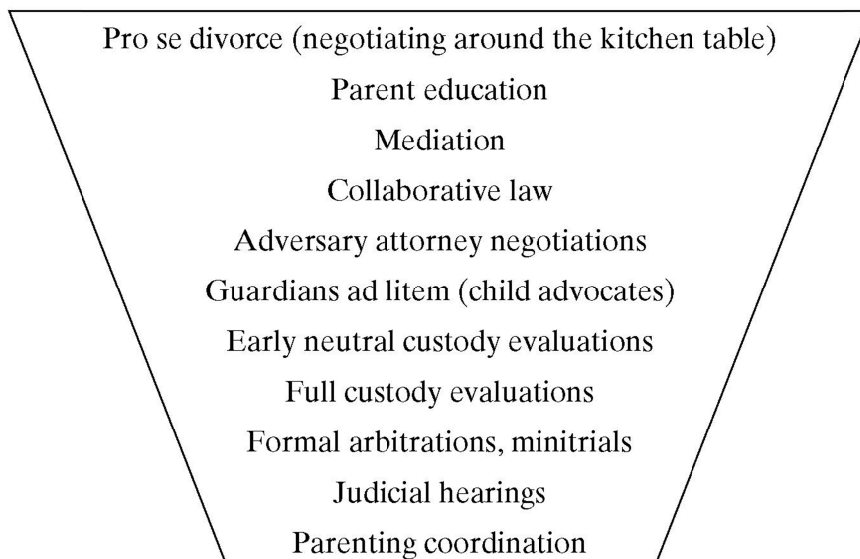
3. A Dispute-Resolution Funnel

Encouraging parents to make their own decisions through multiple forms of dispute resolution is one extensive and still growing solution to the problems posed by (1) the indeterminacy of the best-interests standard, (2) the explosion in separation, divorce, and nonmarital childbearing, and (3) the perceived and demonstrated benefits of more family friendly, less adversarial dispute-resolution techniques. A range of dispute-resolution alternatives have been created that can be visualized to form the shape of a funnel. Procedures nearer the wider top of the funnel are used more commonly and are generally more informal, less adversarial, and involve greater autonomy in parental

50. See Christine A. Coates, Robin Deutsch, Hugh Starnes, Matthew J. Sullivan & Bea Lisa Sydlík, *Parenting Coordination for High-Conflict Families*, 42 FAM. CT. REV. 246, 246-47 (2004).

51. See *id.* at 248-49.

decisionmaking. Procedures nearer the narrow bottom of the funnel are used less frequently and are generally more formal, more adversarial, and more restrictive of parental autonomy.



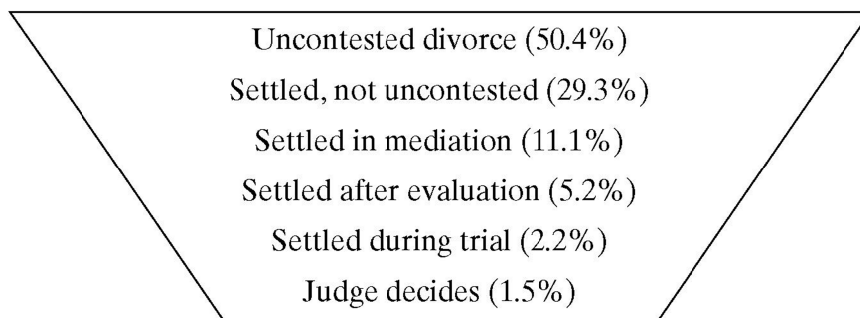
This visual representation can be refined by imagining the funnel as a series of sand screens. A dispute-resolution system could be created in which parents must pass through each successive “screen” before they have access to the one below. Each method of dispute resolution thus filters out successively “coarser” (less difficult and conflicted) cases, such that only a relative few challenging cases remain for those processes at the narrow end of the funnel, notably, adjudication and parenting coordination. Such a system would greatly reduce a judge’s role as an arbiter of custody disputes. Instead, judges would become essential advocates for ADR, administrators in overseeing parents’ passage through multiple ADR efforts, and arm twisters in encouraging parents, and attorneys, to reach a settlement out of court.⁵²

The dispute-resolution funnel includes both new forms of ADR and older, informal methods, notably parental decisionmaking “around the kitchen table” and settlements resulting from attorney negotiations, including collaborative law.⁵³ In fact, in his collaboration with psychologist Eleanor Maccoby, Professor

52. See Leonard Edwards, *Comments on the Miller Commission Report: A California Perspective*, 27 PACE L. REV. 627 (2007).

53. See generally Elizabeth Strickland, *Putting “Counselor” Back in the Lawyer’s Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979, 983–86 (2006) (describing generally how the collaborative-law process works). Collaborative lawyers and their clients sign contracts agreeing that the attorneys will not represent their clients if a case should go to trial. This encourages settlement and is perhaps the key to the collaborative-law process, which might also include other conditions such as agreeing to an open sharing of evidence and negotiating in good faith.

Mnookin empirically demonstrated the value of a system that looks much like the dispute-resolution funnel.⁵⁴ In their study of courts in two California counties, Maccoby and Mnookin found that informal dispute-resolution alternatives “filtered out” so many conflicts that only 1.5% of their sample of 933 custody cases required a judge to make a final ruling.⁵⁵ Although they portrayed their findings in the form of a conflict pyramid with greater conflicts at the top, the pyramid can be inverted to look like a funnel.⁵⁶



Clearly, the various methods of dispute resolution reduce the need for judicial decisionmaking.

Part of the reason for embracing various custody dispute-resolution alternatives is practical. Judges are overwhelmed with the relatively small percentage of cases that come in front of them, let alone the far larger number that they *might* be asked to decide if not for other dispute-resolution methods.

Yet, there is also a philosophical shift represented in the embrace of ADR and parental self-determination. Concerns about the best-interests standard might be farther reaching than vague law. Couples today increasingly are questioning the need for social and legal regulation of their relationships, as indicated by the demographics cited earlier and by the oft heard phrase, “marriage is just a piece of paper.” A corollary to doubting the relevance of law in relationship formation is questioning the legal regulation of relationship dissolution. Philosophically, the emphasis on ADR raises the question of whether or how much the law *should* be involved in the break-up of intimate and coparenting relationships. Perhaps the legal system should not get involved in (some) conflicts between parents who live apart, maybe even when parents ask them to do so. Ironically, this would mean that the legal system would treat separated, divorced, and never-married parents more like married parents.

54. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 137 (1992).

55. *Id.*

56. *Id.*

III

SHOULD COURTS REFUSE TO DECIDE CUSTODY CONFLICTS?

In *People ex rel. Sisson v. Sisson* the New York Court of Appeals issued what would appear to be a compelling and concise philosophical rationale for mediation and other forms of ADR in child-custody conflicts.

Dispute between parents when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law. The vast majority of matters concerning the upbringing of children must be left to the conscience, patience, and self-restraint of father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children.⁵⁷

In *Kilgrow v. Kilgrow*, an Alabama court similarly opined, “Never has the court put itself in the place of the parents and interposed its judgment as to the course which otherwise amicable parents should pursue in discharging their parental duty.”⁵⁸

A. Courts Refuse to Hear Disputes Between Married Parents

The *Sisson* ruling dates to 1936.⁵⁹ The *Kilgrow* ruling was issued in 1958.⁶⁰ Both cases involve deep divides between parents about the most appropriate schooling—the “best” schooling—for their children. Both courts refused to hear the disputes as matter of public policy, not because of the topic or because of a philosophical preference for alternate dispute resolution, but rather because the Sissons and the Kilgrows were married.

American courts have consistently refused to enter disputes between married parents, because “no end of difficulties would arise” if they did so. Courts in various states have determined that refusing to hear such disputes, even if a decision might prove helpful in the individual case, ultimately promotes the broader, more important policy goals of (1) respecting the autonomy of married parents to make decisions about their children, and (2) protecting the benefits of cooperation in the marital relationship from the intrusion of litigation.⁶¹ Yet courts in the United States routinely and repeatedly enter the exact same disputes when they occur between parents who are separated, divorced, or never married. Is one category of parents really that different from the other?

B. Separated, Divorced, and Never-Married Families *Are* Families

Socially and psychologically, parents who lived apart were probably quite different from married parents⁶² in 1936 or 1958, the dates of the *Sisson* and

57. 2 N.E.2d 660, 661 (N.Y. 1936).

58. 107 So. 2d 885, 888 (Ala. 1958).

59. *Sisson*, 2 N.E.2d 660.

60. *Kilgrow*, 107 So. 2d 885.

61. See Emery & Emery, *supra* note 11, at 388.

62. Of course, views of marriage are evolving too. For example, marriage increasingly has become a relational contract as opposed to a status, a reconceptualization that also shrinks differences between married parents and parents living apart. See Elizabeth S. Scott & Robert E. Scott, *Marriage as a*

Kilgrow rulings. Unwed motherhood, separation, and divorce were certainly viewed as troubled and troubling arrangements during those times. Today, however, separated, divorced, cohabiting, and never-married parents are not so different from married parents in terms of demographics, selection into their family status,⁶³ or social expectations for their parenting and coparenting relationships.

The “new normal” of separation, divorce, cohabitation, and nonmarital childbearing is reflected in the sweeping demographic changes in American families over the last several decades, as documented earlier. Changing views of what makes a family also are reflected in social-science scholarship. Two overriding themes are that (1) separated, divorced, and never-married families *are* families, families where relationships extend across households and (2) because children’s relationships with *both* of their parents are important psychologically, socially, and economically, the parents’ ongoing coparenting relationship is a key to the children’s and the family’s healthy adjustment.

For example, in 1980 Constance Ahrons wrote the following about what she called the “binuclear family”:

To separate their spousal from their parental roles, divorcing spouses need to establish new rules that will redefine their continuing relationship. . . . Each parent needs to establish an independent relationship with the child; the process of continuing parent-child relationships, however, also requires that former spouses continue to be interdependent. Within this continued interdependency, new rules and behavior developed by former spouses toward one another can be expected to have repercussions for all family members.⁶⁴

Echoing these themes, in 1994, Robert Emery wrote in *Renegotiating Family Relationships*,

Parents do not divorce their children, and because of this, they can never completely divorce each other. Children form a continuing tie between former spouses, who remain parents throughout their lives. Thus, former partners must disentangle their continuing role as parents from the past role as spouses . . . In many cases, the key to the successful renegotiation of all family relationships following separation and divorce lies in redefining the boundary of intimacy between the former partners.⁶⁵

The titles of self-help books written for parents who live apart also reflect the idea that, in families that extend across households, children can maintain valuable relationships with both of their parents, and this makes former partners’ coparenting relationship a critical, ongoing influence on children’s

Relational Contract, 84 VA. L. REV. 1225, 1333 (1998).

63. When these alternative family forms were rarer, personal and relationship problems very likely formed the basis for a greater number of separations, divorces, or nonmarital births than such problems do today, when about half of the population is familiar with one of these family experiences. One indicator of this historical change is U.S. Presidents. Ronald Reagan was the first U.S. President who had been divorced, while Bill Clinton and Barack Obama were both products of “broken homes.” BILL CLINTON, *MY LIFE* 4–5 (2004); BARACK OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* 5 (Three Rivers Press 2004) (1995); RONALD REAGAN, *AN AMERICAN LIFE* 92 (1990).

64. Constance Ahrons, *Redefining the Divorced Family: A Conceptual Framework for Post Divorce Family Systems Reorganization*, 25 SOC. WORK 437, 437–38 (1980).

65. See EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS*, *supra* note 13, at 33.

well-being. Some examples of titles include *Mom's House, Dad's House; Ex-Etiquette for Parents*; and *The Good Divorce*. Even the popular children's character, Barney, has a song about how families are not defined by marriage or households:

A family is people and
A family is love,
That's a family.
They come in all different sizes
and different kinds,
But mine is just right for me,⁶⁶
Yeah, mine is right for me.

The song continues with examples of different family forms including a nuclear family, a girl whose parents live apart, and a boy who lives with his grandmother.⁶⁷

C. Changing Legal Terms and Views

New views of separated, divorced, and never-married parents are reflected in the legal system's embrace of ADR, as previously discussed, and also in changing legal terminology. The most prominent example of new legal terms and the evolving views reflected therein is the concept of joint custody, introduced for the first time in 1957 in North Carolina.⁶⁸ Joint *legal* custody involves shared parental decisionmaking, while joint *physical* custody is shared time (often defined as a minimum of 25%–35% of the children's time with each parent). Joint custody was embraced rapidly in the 1980s and 1990s. This trend has been empirically documented in the state of Wisconsin, where social scientists collected perhaps the best available data on the topic. In 1980, 18% of a representative sample of Wisconsin divorce agreements indicated that families shared joint legal custody; by 2001, the proportion increased to 87%.⁶⁹ In 1980, fewer than 3% of families in the same study shared joint physical custody, but by 2001, 32% of families had joint physical custody specified in their agreements.⁷⁰

Legal terms have changed in other ways. The overriding trend has been to replace the terms “custody” and “visitation,” which reflect the view that when parents live apart children have only one primary or “real” parent. Like joint custody, these new legal terms are more “family friendly,” and reflect the basic idea that parents are still parents and families are still families when parents live apart. In its detailed agenda for legal reform, the American Law Institute (ALI) embraced many new terms, for example, replacing “custody agreement” with

66. See *Barney & Friends: My Family's Just Right for Me* (PBS television Broadcast Apr. 7, 1992).

67. *Id.*

68. Jay Folberg, *Custody Overview*, in *JOINT CUSTODY AND SHARED PARENTING* 5 (Jay Folberg ed., 1984).

69. Lawrence M. Berger et al., *The Stability of Shared Child Physical Placements in Recent Cohorts of Divorced Wisconsin Families* 5–6 (Inst. for Research on Poverty, Discussion Paper No. 1329-07, 2007), available at <http://www.irlp.wisc.edu/publications/dps/pdfs/dp132907.pdf>.

70. *Id.*

“parenting plan.” The ALI similarly dropped the terms “custody,” and “visitation,” focusing instead on “custodial responsibility” for allocating time and “decision-making responsibility” for allocating parental authority.⁷¹

D. Coming Between Parents and Children

There is one more critical complication that results from judicial intervention in disputes between separated, divorced, and never-married parents. In becoming involved in custody conflicts, the courts not only interpose themselves in the relationship between parents, but also enter the relationship between each parent and his or her children. This is because of the court's *parens patriae* duty to protect children and make decisions in *their* best interests, not their parents' interests.

In refusing to enter disputes between married parents, the law assumes that the interests of married parents and children are aligned, except in cases of abuse or neglect. In entering disputes between separated, divorced, and never-married parents, the courts implicitly makes the assumption, under their *parens patriae* duty, that the interests of this category of parents are not aligned with those of their children. This implicit assumption is revealed in judicial authority to overturn *agreements* between parents who live apart, even when those agreements are merely filed with some other legal objective in mind, for example, obtaining a divorce.⁷²

Even though judges routinely “rubber stamp” parenting plans produced by agreement, a number of problems are created by the courts' *parens patriae* duty and its resulting authority to overrule parental agreements, as is explored shortly.

E. Treating Parents Who Live Apart More Like Married Parents

Contemporary social and legal views of parents who live apart seek to promote and respect *both* parents' relationships with their children. In so doing, these views also recognize the value of cooperation in the ongoing, coparenting relationship. Thus, the logic of judicial rulings justifying the courts' refusal to enter childrearing conflicts between *married* parents increasingly applies to separated, divorced, and unmarried parents too. If parents who live apart have a relationship that is not so different from that of married parents, one wonders, is the wisdom of legal rulings about married parents also applicable to the problems created when the law attempts to insert itself in decisions made by parents who live apart?⁷³

71. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (2002).

72. See generally Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Agreements*, 65 OHIO ST. L.J. 615 (2004).

73. Some commentators have argued that Supreme Court decisions indicate that separated, divorced, and never-married parents, like married parents, have a fundamental, constitutional right to make parenting decisions. See *id.* at 644. This argument would seem to raise equal-protection issues about the state's involvement in one category of parental decisions but not the other. Although

There is a need for explicit legal recognition of the importance of limiting conflict and promoting coparenting cooperation between parents who live apart. For reasons elaborated upon below, two modest but important steps in this direction are to (1) accept agreements between parents who live apart as being in children's best interests—to the exclusion of all other best-interests considerations—and (2) refuse to hear some disputes between parents who live apart.

IV

TOWARD LIMITING JUDICIAL INTERVENTION IN DISPUTES BETWEEN PARENTS LIVING APART

Although we argue that separated, divorced, and never-married parents should be treated more like married parents, we do recognize that American courts are not about to refuse to hear any and all child-custody disputes, nor are legislatures likely to restrict judicial authority to hear these cases. Yet it is more than a thought experiment to raise the question, Why do American courts routinely intervene in disputes between parents living apart, while refusing to hear similar disputes between parents who are married? What theory underlies this posture? What are the potential risks and benefits of intervention? Why are courts so interventionist in divorce-custody cases, while they are comparatively “hands off” in child-protection cases? Judges and policy makers might reconsider the theoretical rationale for treating separated parents differently from married parents—and as result might want to consider treating the two categories of parents more similarly.

A reconsideration of these broad issues underscores the timeliness and modesty of smaller steps in the direction of treating parents who live apart more like married parents. One small yet important step would be for the law to recognize the importance of the coparenting relationship, as it does the marital relationship, by presuming that a parenting arrangement laid out in an agreement between parents who live apart is in the best interests of their children—and declining to look at other best-interest factors in the presence of such an agreement.⁷⁴ Courts would still retain jurisdiction over custody disputes,

sympathetic to the constitutional argument, the present analysis is more circumscribed and based on evolving views of the need for cooperation between coparents who live apart.

74. Vermont law indicates that parental agreements are presumed to be in children's best interests. VT. STAT. ANN. tit. 15, § 666 (2012). West Virginia is more stringent: West Virginia law provides that “[i]f the parents agree to one or more provisions of a parenting plan, the court shall so order.” W. VA. CODE § 48-9-201(a) (2009). More broadly, the ALI offered a similar proposal: “(1) The court should order provisions of a parenting plan agreed to by the parents, unless the agreement (a) is not knowing or voluntary, or (b) would be harmful to the child.” PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.06 (2002). The ALI proposal was based on considerations more practical than the theoretical ones outlined here:

The law in most jurisdictions grants courts, as part of their *parens patriae* authority, the authority to review a private agreement at divorce to determine whether it serves the child's interests. This section takes a more deferential view toward an agreement parents make about their children, requiring the court to adopt an agreement to which the parents have agreed at

and the best-interests standard would remain the prevailing standard for deciding child custody. Issues that might involve child abuse or neglect would not be subject to the presumption in favor of parental agreement, as is the case for married families. However, the law would embrace a rebuttable presumption (or perhaps even a deferentially irrebuttable one)⁷⁵ that parental agreement is the first and overriding consideration in children's best interests for separated, divorced, or never-married parents. If parents agree, other best-interests factors are not considered and cannot trump parental agreement.

A second modest step would be for the law to limit court access for parents who live apart based on the nature or frequency of their disputes. Based on the same public-policy considerations as apply to married parents, courts might limit repeat litigation by raising the bar for a change of circumstances. Courts could also refuse to hear more minor parental disputes, for example, about extracurricular activities or day-to-day parenting decisions. However, parents who live apart would still retain access to courts to resolve the broader issues encompassed in physical and legal custody.

Much like *Sisson*, these proposed reforms would embrace the philosophy articulated for married parents that "[t]he vast majority of matters concerning the upbringing of children must be left to the conscience, patience, and self-restraint of father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children."⁷⁶ Unlike *Sisson*, however, the embrace of this philosophy would apply to *agreements* between parents who live apart, while it currently applies to *disagreements* between parents who are married.

These reforms, although modest, could have numerous and far reaching practical benefits. Several specific direct and potential consequences of these changes in custody law are detailed in the following subparts.

A. Elimination of Judicial Review of Consent Agreements

In most jurisdictions, judges have the authority to review consent agreements between separated, divorced, and never-married parents regarding their legal- and physical-custody settlements.⁷⁷ The theoretical rationale for this judicial authority is that the court is obligated to protect children's interests

the time of hearing, except when the agreement is not knowing or voluntary or when it would harm the child.

Id.

75. In deference to agreements in which each parent has informed knowledge and neither is coerced into agreement, West Virginia honors knowing and voluntary parental agreements as long as they are not harmful to the child. W. VA. CODE § 48-9-201 (West 2009). Other states require judges to defer to more limited parental agreements. For example, Oregon does not allow judges to order sole custody when parents agree to joint custody. OR. REV. STAT. § 107.169 (2013).

76. *People ex rel. Sisson v. Sisson*, 2 N.E.2d 660, 661 (N.Y. 1936). Some commentators might also make the constitutional argument that parents, whether married or not, have a fundamental right to make decisions, good and bad, about their own children. See Jellum, *supra* note 72, at 664.

77. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.06 (2002).

over and above any agreement between the parents.⁷⁸ Although the power to overturn parental agreements is a logical extension of the judiciary's obligation to protect children's interests, the obligation itself rests on the very assumption Mnookin questioned: that judges are able to discern what is "best" for children, at least better than their parents can, even in the absence of clear legal guidelines defining "best."⁷⁹

The fact that the parents are in dispute is another, broad justification for judicial intervention in custody disputes between parents who live apart.⁸⁰ Yet there is no dispute when parents agree on custody, but judicial supervision remains in place. On what grounds is such supervision justified? How can the judiciary intervene in the decisions *agreed to* by parents who live apart, while it simultaneously refuses to enter *disputes* about children between parents who are married? Recall the *Kilgrow* finding, "Never has the court put itself in the place of the parents and interposed its judgment as to the course which otherwise amicable parents should pursue in discharging their parental duty."⁸¹ Does the law perhaps assume that, like status offenders, children whose parents live apart are vulnerable and in need of supervision under the courts' *parens patriae* mandate? If not, why do courts retain authority to determine children's best interests even when parents have not asked for this guidance?

Many judges wisely and routinely decline to exercise their discretion to overturn parental agreements. However, explicitly requiring courts to automatically accept plans agreed upon by the parents would have many benefits, including placing less administrative burden on judges, conveying a greater respect for parents who do reach agreement, and helping to set the expectation that parents *should* exercise their traditional authority and responsibility for childrearing, even when parenting apart. The recommendation to require judicial deference to parental agreements is a part of the ALI's extensive recommendations for changes in custody law, one the ALI embraced on practical grounds.⁸² However, the straightforward policy also would open the door for more basic philosophical reforms.

B. Strong Encouragement of Alternative Dispute Resolution

ADR would be strengthened if the law treated agreement between parents who live apart as triggering a presumption that would override all other best-interests considerations. As a philosophical statement, the new standard would encourage the previously discussed range of dispute-resolution efforts, which are designed to promote parental agreement. Mediation, even mandatory

78. See generally *id.*

79. See Mnookin, *supra* note 1, at 260–61.

80. See *id.* at 232.

81. See *Kilgrow v. Kilgrow*, 107 So. 2d 885, 888 (Ala. 1958).

82. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.06 (2002) ("The approach to parental agreements taken in these Principles assumes that courts have neither the time nor the resources to give meaningful review to all parental agreements.").

mediation,⁸³ would become not only an uncontroversial method of dispute resolution but perhaps a favored method that would earn its categorization as a form of *primary*—not alternative—dispute resolution.⁸⁴

The embrace of parental agreement as the overriding best-interests consideration would also serve the very useful purpose of signaling to parents in emotionally difficult circumstances that the law seeks their ongoing cooperation as its primary consideration, and therefore, so must they. Encouraging a more “friendly” coparenting relationship should also motivate more parents to voluntarily consider options like joint physical custody, an arrangement that promotes children’s psychological well-being in cooperative but not in high-conflict circumstances.⁸⁵ In addition, the overriding emphasis on parental agreement should push attorneys toward reaching negotiated settlements, support and embrace collaborative law, and give judges a clear justification for strongly discouraging litigation in both represented and pro se cases. Finally, if the embrace of parental agreement is interpreted as requiring that parental contracts be honored and enforced, as we intend in the present argument, this would support the development of a range of new, creative dispute-resolution methods and techniques.

C. Honoring and Enforcement of Parents’ Contracts

1. Contracting for Arbitration

If the judiciary no longer had the authority to oversee and potentially overturn parental agreements, this would clear the way for parents to enforce their custody-related contracts. (Such contracts are currently unenforceable, at least in theory, in most states.)⁸⁶ For example, parenting coordination and other dispute-resolution procedures that involve arbitration would benefit from recognition of the parents’ right to make enforceable contracts about the arbitrator’s authority.⁸⁷ Today, parenting coordinators and other arbitrators get

83. All that is mandatory in mandatory mediation is attending one, educational session, perhaps separately from the other coparent under certain circumstances (such as intimate partner violence). See EMERY, RENEGOTIATING FAMILY RELATIONSHIPS, *supra* note 13, at 138–39.

84. Mediation is designated as a form of primary dispute resolution in Australia, where nationwide mediation is a mandated first step prior to a court hearing. Bruce Smyth, Richard Chisholm, Bryan Rodgers & Vu Son, *Legislation for Shared-Time Parenting After Parental Separation: Insights from Australia?*, 77 LAW & CONTEMP. PROBS., no. 1, 2014 at 109, 116–22.

85. See EMERY, RENEGOTIATING FAMILY RELATIONSHIPS, *supra* note 13, at 113–15.

86. See Jellum, *supra* note 72. Courts in New Jersey recently have upheld the rights of divorced parents to contract for the appointment of an arbiter for their custody disputes. Christina Fox, *Contracting for Arbitration in Custody Disputes: Parental Autonomy vs. State Responsibility*, 12 CARDOZO J. CONFLICT RESOL. 547, 547 (2011). However, nearby New York follows the more typical model that parents do not have that authority, because the agreement might not be in the child’s best interests. See *id.* at 550. Of course, a legislative presumption or deference that parental agreement overrides all other best-interests considerations would greatly strengthen and clarify the legitimacy of parental-custody contracts.

87. In fact, the state of Pennsylvania recently eliminated the practice of parenting coordination, indicating that only judges have the authority to make decisions in child-custody cases. See PA. R. CIV. P. 1915.11-1 (2013).

their limited authority to make decisions as an extension of judicial overview of custody matters. In fact, the legitimacy of the delegation of authority is questionable, especially in the majority of states that have no clear statutory guidelines on the matter.⁸⁸ Similarly, the finality of the parenting coordinator's decision also can be called into question under current best-interests considerations. Yet, if the law honored and enforced parental contracts, this would allow parents to delegate partial or full, one-time or ongoing authority to their parenting coordinator. In short, allowing parents who live apart to agree to delegate authority about their coparenting conflicts to a third party would make parenting coordination simpler, clearer, and stronger while encouraging the development of new forms of ADR.

Parental coordination is a widely embraced, growing practice that would become much more firmly grounded and established by honoring agreements made between separated, divorced, and never-married parents as the overriding best-interests consideration. However, the potential benefits might extend well beyond this single ADR procedure. As noted, parenting coordinators are typically appointed only in repeat-litigation cases today. If their contracts were enforceable, however, parents who live apart might employ the services of a parenting coordinator early in their disputes, in order to reduce conflict quickly, or at any other stage of the dispute-resolution process. Parents also might agree to give decisionmaking authority to another figure such as a therapist, a trusted relative, or a retired judge who might serve in an arbitration role on a one-time or ongoing basis, a process that, in some cases, might embody the "wise elder" approach the Professor Mnookin considered but rejected.⁸⁹ In still other circumstances, couples might sign prenuptial or prenatal contracts outlining future dispute-resolution procedures and perhaps detailing future parenting plans in the event of a rupture in their relationship. Most broadly, concerns that the alternative dispute resolution of child-custody disputes undermines parents' rights to a custody hearing would be allayed by a philosophy and specific accompanying rules indicating that parents know what is best for their own children, whether they are married or living apart.

2. Evolving Parenting Plans

Although few parents are likely to sign prenuptial or prenatal agreements, parents might well choose to make other, binding commitments to alter custody arrangements in the future if courts honored and enforced such contracts.⁹⁰

88. See Joi T. Montiel, *Is Parental Authority a Usurpation of Judicial Authority? Harmonizing Authority for, Benefits of, and Limitations on this Legal-Psychological Hybrid*, 7 TENN. J.L. & POL'Y 364, 370 (2011).

89. See Mnookin, *supra* note 1, at 289. In fact, at least one detailed proposal for allowing parents to contract to appoint friends or mental-health experts as arbiters in their custody conflicts was proposed contemporaneously with Professor Mnookin's more fanciful suggestions. See Janet Maleson Spencer & Joseph P. Zammit, *Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911, 934.

90. Although not the primary focus of the present article, one can envision extending the enforceability of parenting contracts to include nonbiological parents. One example is same-sex

Consider the thorny problem of deciding upon a parenting plan for infants. Many parents who live apart appear to be comfortable having an infant spend substantially more time with one parent, often a breastfeeding mother, an arrangement that protects the security of the psychologically critical parent–infant attachment.⁹¹ This plan might only be acceptable, however, if the child will gradually spend more and more time with the other parent, typically the father, as is developmentally appropriate, perhaps evolving into fifty–fifty joint physical custody by preschool or school age.⁹² The problem is that a father (or mother) who agrees to substantially less time during infancy takes a considerable legal risk, because under current best-interests interpretations, a parental agreement to increase time in the future is unenforceable.⁹³ Parents cannot make such contracts, because judges, not parents, hold the ultimate authority for determining children’s best interests.

Thus, a deferential parent who is willing, perhaps eager, to agree to a cooperative and developmentally sensitive parenting plan that limits his time now but increases it later would be wisely advised (from a legal perspective) to fight for as much time as possible now, so as not to compromise his standing later.⁹⁴ Otherwise, his legal argument for more time will be weakened by a prolonged period of relatively low contact. A valid agreement to increase contact would legally protect parents and allow them to construct evolving parenting plans that are adaptive from the perspective of child development.

The same argument applies to other circumstances and potential contracts. For example, parents who live apart might plan to coordinate a move to a distant location, but circumstances might dictate that it makes practical sense for one parent to move first (with or without the children). Under current best-

parents, particularly parents in states that do not allow them to marry or perhaps will not allow same-sex parents to adopt a child together. As an imperfect alternative, these and other “social” parents might sign parenting contracts that detail agreements about their present and future roles in childrearing. Similar contracts might also be signed in open adoptions, in which a birth parent plans to maintain an ongoing relationship with her child despite surrendering her rights in adoption. Such circumstances raise critical questions that are beyond present considerations, such as, Who is a parent? How many parents can a child have? Despite such unanswered questions, recognition of the validity of parenting contracts has the potential to encourage committed, cooperative parenting in families with parents that are separated, divorced, or never married. See Nancy D. Polikoff, *From Third Parties to Parents: The Case of Lesbian Couples and Their Children*, 77 LAW & CONTEMP. PROBS. no. 1, 2014 at 195.

91. See Samantha L. Tornello, Robert Emery, Jenna Rowen, Daniel Potter, Bailey Ocker & Yishan Xu, *Overnight Custody Arrangements, Attachment, and Adjustment Among Very Young Children*, 75 J. MARRIAGE & FAM. 871, 878–79 (2013).

92. Evolving, developmentally based parenting plans are increasingly recommended by psychological experts and are being adopted administratively as preferred standards by various courts. See, e.g., ROBERT EMERY, *THE TRUTH ABOUT CHILDREN* 178 (2004); see also IND. PARENTING TIME GUIDELINES § 1 (2013).

93. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.06 (2002).

94. Not only would a deferential father be well-advised not to give up time with his infant, but, for strategic (not just psychological) reasons, a breastfeeding mother would be equally well-advised to seek as much time as possible, given the court’s possible sympathy for her and her infant. The result, of course, is likely to be a difficult custody battle that serves no one’s interests.

interests interpretation, the contract might be held to be invalid, giving a strategic advantage to a parent who retains (presumably temporary) physical custody of the children but then chooses to abrogate the agreement.

Honoring and enforcing parental agreements would also undercut other forms of strategic maneuvering. For example, a parent might agree to remain in geographic proximity of the other parent in exchange for receiving more time with the children. Because that contract is invalid—presumably invalid in the children’s best interests—the parent who has more time with the children might have an advantage in seeking to make a geographic move with the children at some later point in time. He or she might well have achieved a legal advantage by strategically “agreeing” not to move.

D. Limiting Access to Litigation

A philosophy of treating parents who live apart more like married parents also could be used to justify restricting access to court in *some* circumstances in which separated, divorced, or never-married parents disagree, as is done in *all* situations in which spouses disagree about parenting. In particular, courts might want to restrict litigation in high-conflict divorces, cases that consume a disproportionate amount of court time. Although “high conflict” can be difficult to define, two examples in which limited access to litigation should benefit courts and parents are (1) trivial disputes and (2) repeat litigation.

1. Trivial Disputes

Leading professionals in parenting coordination have noted that parenting disputes in high-conflict, repeat-litigation cases typically are substantively trivial. “Most of the disputes were minor, generated by one or both parents’ need to control, punish, or obstruct the access of the other, such as one-time changes in the timeshare schedule, telephone access, vacation planning, and decisions about the children’s afterschool activities, health care, child care, and child-rearing practices.”⁹⁵ Such observations make it clear that virtually any dispute, no matter how small, can be sufficient to initiate legal action, requiring judicial intervention and ultimately a best-interests decision. The absurdity of this circumstance is underscored by the unending potential for new, equally trivial disputes.

Many experts recognize the necessity of distinguishing substantial conflicts about legal custody, which can be a legitimate reason for litigation, from mundane parenting disagreements, which are not. For example, in their recommendations for reforming statutory definitions of legal custody, the ALI states, “Unless otherwise provided or agreed by the parents, a parent should

95. See Coates et al., *supra* note 50, at 247; see also Dana Prescott, *When Co-Parenting Falters: Parenting Coordinators, Parents-in-Conflict, and the Delegation of Judicial Authority*, 20 ME. B.J. 240, 240 (2005) (“[T]he appointment of a [parenting coordinator] usually represents the culmination of many failed effort at collaborative forms of dispute resolution. Simply stated, imposition of a [parenting coordinator] means the delegation of the court’s constitutional and statutory authority to another professional, with the resulting diminution of parental autonomy.”).

have sole responsibility for day-to-day decisions for the children while the child is in that parent's custodial care and control, including emergency decisions affecting the health and safety of the child."⁹⁶ What the ALI proposal lacks is a clear statement that disputes about day-to-day parenting matters are *not* actionable. A bright line is needed about what parenting matters courts will and will not hear. For example, courts might address only issues formally designated as determining legal custody, typically education, religious upbringing, and elective medical care, but refuse to hear disputes about more minor issues such as extracurricular activities.

The present concern is not to define where a legislature, jurisdiction, or judge might draw a line. Rather, the point is to suggest that such limits appear to be not only acceptable but also wise when one weighs the potential risks and benefits of intervention in light of the philosophical considerations raised here. Although a great many judges certainly must have refused to hear cases involving repeat, trivial litigation, surprisingly, no state legislation currently appears to explicitly restrict access to court based on this criterion. No dispute is too minor to form the basis of a custody dispute.

2. Repeat Litigation

Although it does not restrict custody hearings based on the trivial nature of a dispute, the state of Wisconsin discourages repeat litigation by limiting access to court in the first two years following a judicial order. Legislation passed in 1987 to limit substantial modification of legal-custody and physical-placement mandated that

a court may not modify . . . orders before 2 years after the initial order is entered . . . unless a party seeking the modification . . . shows by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child."⁹⁷

This statute essentially raises the bar for the change of circumstances needed to justify reopening a case from the typical, general best-interests considerations⁹⁸ to much more restrictive child-protection grounds. The law has had the intended effect of limiting litigation, as research demonstrates that notably few custody orders are modified in Wisconsin compared to other U.S. states and other English-speaking countries.⁹⁹ Whether Wisconsin's law restricting access to relitigation has benefited parenting, coparenting, and individual well-being in separated, divorced, and never-married families is a

96. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.09 (2002).

97. WIS. STAT. § 767.325 (1989) (amended 2005). The act was amended in 2005 to replace "initial order" with "final judgment," with an indication that "[n]o substantive change in current law is intended." WIS. STAT. § 767.451 (2013). The continuity in the law indicates that the restriction has not been effectively challenged and has remained in force for twenty-five years. *Id.*

98. After two years, Wisconsin law reverts to traditional and vague "change of circumstances" criteria for modification. *Id.*

99. Bruce Smyth & Laurie Maloney, *Changes in Patterns of Post-Separation Parenting Over Time: A Brief Review*, 14 J. FAM. STUD. 7, 13 (2008).

theoretical question that has yet to be tested empirically. Yet the restriction appears to be based on the same theory applied to married families that (repeat) family litigation not only clogs courts but also interferes with parents, parenting, and valued cooperation between parents who live apart. Although such restrictions are not widespread, Wisconsin is not the only jurisdiction to impose them on relitigation.¹⁰⁰

V

CONCLUSION

Professor Mnookin anticipated profound problems in deciding child custody under the best-interests standard in the absence of a broadly accepted legal or social definition of “best.”¹⁰¹ The problems with the indeterminate standard for courts and for American families have multiplied in the decades following Mnookin’s keen observations, with a demographic explosion in separation, divorce, cohabitation, and nonmarital childbearing.

Mnookin suggested that a logical answer to the dilemma of indeterminacy was to encourage parents to resolve their own custody conflicts cooperatively in mediation and other forms of ADR.¹⁰² Empirical evidence gathered over the last several decades indicates that mediation is not only effective in resolving a large percentage of custody disputes otherwise headed for court, but also more family friendly, promoting better relationships between parents and children and between former partners who remain parents. Indeed, a hierarchy of dispute-resolution techniques has been developed in recent years, so today only the most intense conflicts are funneled into a contested custody hearing.

Although innovative in many respects, the discovery of the benefits of ADR essentially is an ironic rediscovery of a principle long applied to *married* parents: “No end of difficulties would arise should judges try to tell parents how to bring up their children.”¹⁰³ As in married families, contemporary social, psychological, and legal models of separated, divorced, and never-married families underscore that effective parenting is greatly influenced by conflict or cooperation in the coparenting relationship between parents living apart. Much like the relationship between married parents, the relationship between parents who live apart is critical to their children’s well-being.

These observations lead one to contemplate a fundamental shift, questioning justifications for the state automatically inserting itself between parents who live apart—and thereby coming between parents and children as well, due to the courts’ *parens patriae* duties. What philosophy underlies the state’s potential intrusion into the half of American families where parents live

100. For state statutes similarly limiting relitigation, see ARIZ. REV. STAT. ANN. § 25-411 (2007), COLO. REV. STAT. § 14-10-131 (2013), 750 ILL. COMP. STAT. 5/601 (2009), KY. REV. STAT. § 403.340 (2006), and MINN. STAT. § 518.18 (2006).

101. See Mnookin, *supra* note 1, at 262.

102. See Mnookin, *supra* note 1, at 287–88.

103. *People ex rel. Sisson v. Sisson*, 2 N.E.2d 660, 661 (N.Y. 1936).

apart when U.S. courts clearly and consistently refuse to enter childrearing disputes between married parents?

Although we raise broad philosophical questions about the grounds for legal intervention, we do not advocate for wholesale abandonment of judicial oversight in custody disputes, but instead offer two specific and modest proposals for reform.

First, it is argued that *agreements* between parents who live apart should be treated with the same “hands off” deference as are *disagreements* between parents who are married. Specifically, we argue that parental agreements should be presumed to delineate children’s best interests, overriding all other best-interests considerations. This step would (1) eliminate judicial review of parental agreements, (2) provide a strong philosophical justification for ADR, and (3) allow parents to sign enforceable contracts to resolve custody disputes in arbitration (including but not limited to parenting coordination) as well as to commit to parenting plans that evolve over time (for example, a plan might specify parenting time that changes from infancy into toddlerhood and the preschool years).

Second, we argue against treating parents who live apart like married parents by denying access to court for *all* parenting disputes. Instead, it suggests that courts can and should limit court access for *some* disputes between parents who live apart. In particular, (1) some parenting conflicts are so trivial so as not to justify legal intervention, and (2) some parents are in such high conflict that the bar for the “change in circumstances” justifying relitigation should be raised from general best-interests considerations to very specific child-protection concerns.

Although modest, these proposals could have important practical and philosophical benefits. Practically, litigation should be reduced as ADR grows along with the courts’ authority to encourage ADR and restrict litigation. Philosophically, these steps would tell professionals, and most importantly, parents, that even parents who live apart benefit from finding ways to work together cooperatively in their children’s best interests.

Who knows what’s best for children? In theory and in practice, the answer is their parents, whether married or living apart.