

# FOREWORD

## CHILD-CUSTODY DECISIONMAKING

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The most famous article on child-custody law, and one of the most important in family law scholarship altogether, is Robert H. Mnookin's *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, published in *Law and Contemporary Problems* in 1975.<sup>1</sup> In that article, Professor Mnookin analyzed the best-interests-of-the-child standard, which by the 1970s had emerged as the dominant custody decision rule.<sup>2</sup> Although the best-interests standard seemed on its face to be an uncomplicated and straightforward way to put the interests of children first in custody decisionmaking, Professor Mnookin explained its distinctive character and deficiencies as a legal rule.<sup>3</sup> His two core themes were the indeterminacy of the best-interests standard and the differences between private custody disputes and those in which the state seeks to take custody of a child from a parent.<sup>4</sup> The goal of this issue of *Law and Contemporary Problems* is to examine the impact of Professor Mnookin's framework and insights and to analyze developments in legal and social-science research and in practice since his article imposed conceptual order on the field.

Professor Mnookin's custody article is so familiar to scholars in the field that it need not be described in detail, but its most important contributions warrant a brief summary. First, the article explained how child-custody adjudication under the best-interests standard differs from adjudication in other legal contexts.<sup>5</sup> In the standard legal proceeding, judges apply the law by evaluating factual evidence of past acts. In applying the best-interests standard, judges evaluate the parents as persons and make predictions about how each proposed custodial arrangement will affect the child's future welfare. One problem, Mnookin explained, is that current knowledge of human behavior is not

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1. 39 *LAW & CONTEMP. PROBS.* 226 (Summer 1975).

2. *Id.*

3. *Id.* at 255–62.

4. *Id.* at 249–62.

5. *Id.* at 249–55.

adequate to equip courts to make accurate *predictions* about various outcomes.<sup>6</sup> Just as importantly, no social consensus exists about the *values* that should determine which outcomes in fact serve the child's best interests. Mnookin famously described the challenge, "Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself."<sup>7</sup> In the absence of either reliable predictive tools or a social consensus about what is good for children, Mnookin argued, the best-interests standard in fact does not provide meaningful guidance, thereby leaving judges to decide cases in accordance with their own instincts and values.<sup>8</sup>

After exposing the vast indeterminacy of the best-interests standard, Professor Mnookin explored the implications of this analysis in different categories of disputes. He identified two very different judicial functions in the adjudication of child-custody cases—child protection and private dispute resolution—and argued that they must be distinguished and subject to different legal standards.<sup>9</sup> On both pragmatic and philosophical grounds, Mnookin argued that when the state intervenes to remove a child from parental custody, decisions should not be based on the discretionary best-interests standard. Instead he proposed a narrow standard that requires proof by the government of actual harm to the child of continued parental custody.<sup>10</sup>

In the context of private dispute resolution, Professor Mnookin ultimately concluded that no superior alternative to the best-interests standard is available—despite his devastating critique of its indeterminacy.<sup>11</sup> To bring some degree of determinacy to these disputes, he recommended what he called "intermediate rules,"<sup>12</sup> which include a preference for awarding custody to an adult who is the child's psychological parent over one who is a stranger to the child, and a preference for biological or "natural" parents over other adults, so long as the biological parent also has a psychological bond to the child.<sup>13</sup> Although Mnookin acknowledged that his intermediate rules resolve few cases, he concluded that no more determinate general custody rule, based on gender or wealth, for example, is satisfactory. Given the inadequacy of the legal standard, Mnookin advocated for nonjudicial resolution of most custody disputes through negotiation or mediation, dispute-resolution processes that were in its infancy in the mid-1970s.<sup>14</sup>

As the articles in this issue indicate, custody law and practice have evolved over the past forty years; this evolution reflects the significance of Mnookin's

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6. *Id.* at 251–52.

7. *Id.* at 260.

8. *See id.* at 260–61.

9. *Id.* at 262–91.

10. *Id.* at 277–78.

11. *Id.* at 290–91.

12. *Id.* at 282.

13. *Id.* at 282–87.

14. *Id.* at 288–89.

early work and its enduring influence. Both substantively and procedurally, law and policy have internalized the differences between the child-protection and private-dispute-resolution functions. In the child-protection context, standards for intervening into families to protect children have tightened, both statutorily at the state and federal level, and as a matter of constitutional doctrine. Less change is evident in the private-custody context. However, scholars have proposed, and some legislatures have experimented with, alternatives to the best-interests standard that are motivated, in part at least, by Professor Mnookin's indeterminacy critique. In addition, methods of alternative dispute resolution (ADR) to resolve custody disputes have expanded dramatically and other reforms to enhance parental agreement, such as parenting-plan requirements, demonstrate the acceptance of Professor Mnookin's confidence, as a general matter, in the superiority of private ordering over adjudication.

The issue of *Law and Contemporary Problems* brings together leading legal scholars and social scientists who study child custody in both the private-dispute-resolution and child-welfare contexts. The variety of their contributions reflect the enduring relevance of Professor Mnookin's work. Professor Emily Buss carefully traces the substantial evolution of constitutional law relating to child custody, concluding that the increasing recognition of parental rights over the years has been responsive to some of Mnookin's concern for the indeterminacy of the best-interests standard.<sup>15</sup> Carefully distinguishing the principle that the law should serve the best interests of children from the best-interests implementation rule—a distinction accepted by Professor Mnookin and by all the participants in this issue—Buss argues that the respect for the rights of parents mandated by the Constitution provides the best doctrinal foundation for serving the children's interests in both the child welfare and private dispute contexts.<sup>16</sup>

Working within those constitutional limits, Professor Katharine T. Bartlett and Professors Elizabeth S. Scott and Robert E. Emery challenge Professor Mnookin's reluctant conclusion that, for resolving private custody disputes, no better alternative to the best-interests standard is available.<sup>17</sup> They argue on behalf of a custody rule that uses the proportion of time each parent spent caring for the child when the parents lived together as a more determinate guide for allocating the amount of each parent's caretaking responsibility when the parents separate. The "approximation standard," initially proposed by Professor Scott in 1992 and adopted by the American Law Institute in 2002 as the "past caretaking standard," provides a fact-based focus for custody

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15. Emily Buss, *An Off-Label Use of Parental Rights? The Unanticipated Doctrinal Antidote for Professor Mnookin's Diagnosis*, 77 LAW & CONTEMP. PROBS., no. 1, 2014 at 1.

16. *Id.* at 1–2, 28.

17. Katharine T. Bartlett, *Prioritizing Past Caretaking in Child-Custody Decisionmaking*, 77 LAW & CONTEMP. PROBS., no. 1, 2014 at 29; 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.

adjudication that is more predictable and objective than the best-interests standard, thus alleviating the many difficulties with the standard that Professor Mnookin outlines.<sup>18</sup>

In her comprehensive study of the impact of the ALI proposal, Professor Bartlett finds that although few jurisdictions have adopted the ALI standard *per se*, past caretaking has become increasingly important in custody decisions rules since the new standard was proposed.<sup>19</sup> Still, based on her examination of the relationship between the decision rule of a jurisdiction and the predictability of its case law, Bartlett argues that unless past caretaking is given greater priority than most states give it, indeterminacy and subjectivity will continue to be major problems in custody adjudication.<sup>20</sup>

Given the deficiencies of the best-interests standard as explained by Professor Mnookin and other scholars, Elizabeth Scott and Robert Emery probe its puzzling persistence as the dominant legal rule.<sup>21</sup> Scott and Emery argue that the endurance of the best-interests standard is the product of two interrelated factors. First, advocates for mothers and fathers have been embroiled in a gender war over custody law that has played out in legislatures and courts for decades.<sup>22</sup> The legislative battle has focused primarily on joint custody, which women's groups have vigorously opposed, and on protections from domestic violence, which the same groups have made a high priority.<sup>23</sup> Fathers' advocates, in turn, have promoted judicial recognition of a controversial phenomenon they call the "parental alienation syndrome," which mothers groups have attempted to refute.<sup>24</sup> The upshot, Scott and Emery argue, has been a political-economy deadlock that has left the best-interests standard entrenched as the dominant custody rule.<sup>25</sup>

Second, courts routinely rely on mental-health professionals to assist them in applying the best-interests standard, a practice that likely has allayed concern about the standard's indeterminacy.<sup>26</sup> The problem, Scott and Emery argue (with agreement from a number of the other symposium participants), is that the child's best interests are not a matter as to which mental-health professionals have the answers.<sup>27</sup> The authors suggest that exposing the illusion that psychological experts can overcome the problems inherent in best-interests determinations is an important step toward reform and better custody decisionmaking.<sup>28</sup>

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18. Scott & Emery, *supra* note 17, at 71–72.

19. Bartlett, *supra* note 17, at 38.

20. *Id.*

21. Scott & Emery, *supra* note 17, at 70.

22. *Id.*

23. *Id.*

24. *Id.* at 88–91.

25. *Id.* at 76.

26. *Id.* at 71.

27. *Id.*

28. *Id.* at 91–100.

Whether and to what extent more determinate legal standards can effectively steer parents toward particular custodial arrangements is the subject of an article by Bruce Smyth, Richard Chisholm, Bryan Rodgers, and Vu Son, which is based on extensive research on the impact of Australian reforms designed to encourage and support shared parenting.<sup>29</sup> This empirically rich article finds that, notwithstanding these reforms, shared parenting (defined as involving children spending at least thirty percent of their time with each parent<sup>30</sup>) has plateaued, both among couples negotiating shared-time arrangements (twenty percent or less<sup>31</sup>) and among shared-time arrangements ordered by judges (ten percent or less<sup>32</sup>). Smyth and his colleagues also find that the level of conflict in separated families in Australia has declined, which they attribute not to the legal changes favoring shared custody but rather to the child-sensitive dispute-resolution processes established in Australia and to the greater support that courts and community-based services offer to families negotiating their own agreements outside the formal litigation process.<sup>33</sup>

Kimberley C. Emery and Robert E. Emery explore further the role of mediation and other forms of ADR in the custody context, expanding on Professor Mnookin's proposal that most private custody disputes should be resolved outside of court.<sup>34</sup> Emery and Emery describe a substantial body of research indicating the benefits both to parents and children of ADR, including the newer forms such as arbitration, custody evaluation and the use of parental coordinators, all of which can assist parents to reach agreement out of court.<sup>35</sup> More provocatively perhaps, they argue that separated and divorced parents and their children are similar in their relationships to families based on marriage, and that courts should be just as disinclined to intervene in the disputes of parents living apart as they are to resolve the disputes of married couples.<sup>36</sup> They would limit access of parents to litigation and encourage them to use ADR to make and enforce their agreements.<sup>37</sup>

Jana B. Singer connects some of the legal scholarship and reforms motivated by Professor Mnookin's work relating to substantive custody standards to the scholarship and reforms relating to his recommendations for procedural

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29. Bruce Smyth, Richard Chisholm, Bryan Rodgers & Vu Son, *Legislating for Shared-Time Parenting After Parental Separation: Insights from Australia?*, 77 LAW & CONTEMP. PROBS., no. 1, 2014 at 109.

30. *Id.* at 127.

31. *Id.* at 137 fig.5.

32. *Id.* at 136 & fig.4.

33. *Id.* at 145.

34. Kimberley C. Emery & Robert E. Emery, *Who Knows What Is Best for Children? Honoring Agreements and Contracts Between Parents Who Live Apart*, 77 LAW & CONTEMP. PROBS., no. 1, 2014 at 151.

35. *Id.* at 154–62.

36. *Id.* at 163–67.

37. *Id.* at 167–75.

reforms.<sup>38</sup> She reaches two conclusions about the connections between the two. First, she maintains that the open-ended, indeterminate best-interests standard was itself partially responsible for some of the shift from adversarial to nonadversarial dispute resolution.<sup>39</sup> Because the results of formal litigation were uncertain, she argues that parents turned toward dispute-resolution methods that were more interactive and collaborative.<sup>40</sup> Second, she argues that the shift to nonadversarial dispute resolution, in turn, “de-legalized” or de-emphasized the custody standards themselves.<sup>41</sup> If parents were to work things out themselves, she explains, they could focus more on planning and accommodation, rather than decision rules.<sup>42</sup>

The vast expansion of ADR options is only one of the transformations affecting the legal and social landscape over the past four decades. This period has also seen monumental shifts in reproductive technologies, nonmarital family units, and gay and lesbian parenting. Nancy D. Polikoff reviews how the law has evolved in response to these changes.<sup>43</sup> Professor Polikoff argues that the dichotomy Mnookin assumed between “natural parents” and “third parties” has become obsolete, particularly with respect to gay and lesbian parents.<sup>44</sup> Using cases involving lesbian mothers as her primary focus, she meticulously demonstrates how this dichotomy is being replaced by a more functional definition of parent, and she argues that individuals who meet this definition should be viewed the same as “natural parents,” with all of the same rights and responsibilities.<sup>45</sup>

The articles in this issue give the greatest amount of attention to private child-custody disputes, but the issue also recognizes Professor Mnookin’s significant contributions in the child welfare context. As noted above, Emily Buss tracks developments in the constitutional law that impose the kinds of restraints on state interference in families that Professor Mnookin argued were necessary.<sup>46</sup> Clare Huntington also notes the profound influence of Professor Mnookin’s work in the child-welfare context.<sup>47</sup> She argues, however, that despite the legal reforms that have occurred in the last forty years—many of them embracing Mnookin’s proposals for more determinate standards—most of

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38. Jana B. Singer, *Bargaining in the Shadow of the Best-Interests Standard: The Close Connection Between Substance and Process in Resolving Divorce-Related Parenting Disputes*, 77 LAW & CONTEMP. PROBS., no. 1, 2014 at 177.

39. *Id.* at 178–85.

40. *Id.* at 179–82.

41. *Id.* at 186–93.

42. *Id.* at 186–90.

43. 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.

44. *Id.* at 195–96.

45. *Id.* at 197–204.

46. Buss, *supra* note 15.

47. Clare Huntington, *The Child-Welfare System and the Limits of Determinacy*, 77 LAW & CONTEMP. PROBS., no. 1, 2014 at 221.

the same systemic problems that he noted forty years ago remain.<sup>48</sup> Professor Huntington emphasizes two specific problems. First, the states and the federal government have not invested sufficient resources to develop the programs that would actually prevent the need for out-of-home placements.<sup>49</sup> Second, although more determinate standards of the sort recommended by Professor Mnookin have moved children out of foster care more quickly, the shorter time frames mean that fewer parents are able to do what is required of them for the return of their children.<sup>50</sup> Given the shortage of permanent alternatives, what this means is that many children never find a permanent home.<sup>51</sup> Professor Huntington's analysis suggests that the solution is not new or better legal standards, but rather a greater commitment of public resources to prevent the necessity of removing children from their parents in the first place.<sup>52</sup>

As this issue of *Law and Contemporary Problems* demonstrates, the contributions of Professor Mnookin's analysis of the best-interests standard, and of child custody-dispute resolution, have been remarkably enduring. Although the legal and social landscape has shifted in astounding and unpredictable ways, Professor Mnookin's work remains the reference point in custody law scholarship and policy discussions—no less today, than over the forty years since *Law and Contemporary Problems* first published his work. The special editors, authors, and extraordinarily conscientious and capable editors of *Law and Contemporary Problems* are proud to have been a part of the evaluation of this impressive legacy.

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48. *Id.* at 222–23.

49. *Id.* at 231–38.

50. *Id.* at 238–41.

51. *Id.*

52. *Id.* at 245–48.