

FEMINISM AND CHILD CUSTODY UNDER CHAPTER TWO OF THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION

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I. INTRODUCTION

The Chief Reporter of the American Law Institute's *Principles of the Law of Family Dissolution* wrote in his introduction; "Children are necessarily at the heart of any set of principles of family law."¹ My favorite chapter of the *Principles* is Chapter Two, entitled "Principles Governing the Allocation of Custodial and Decisionmaking Responsibilities for Children."² As of this writing, Chapter Two holds the distinction of being the only portion to have been adopted by a state legislature.³ While other Chapters had Reporters who were women,⁴ Chapter Two not only had a feminist Reporter,⁵ but the

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1. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS Chief Reporter's Preface at xiii (Tentative Draft No. 3, Part I, 1998) [hereinafter ALI PRINCIPLES 1998].

2. The title of the chapter, which of course does not refer to "child custody," represents a conscious decision to "alternative language more accommodating to a continuum of residential arrangements." ALI PRINCIPLES 1998, *supra* note 1, § 2.03, reporter's notes at 53 (citing state statutes with similar terminology). The Comments to the Section note that "this substitution is intended to avoid the either-or (custody or visitation) alternatives suggested by the more conventional terminology," while "the unified concept of custodial responsibility may help to strengthen the notion that both parents share responsibility for the child, regardless of the proportion of time each spends with the child, and that neither should be a mere "visitor." *Id.* § 2.03 cmts. a-b & d. This paper will further explore the themes of avoiding win-lose situations.

3. W. VA. CODE §§ 48-11-101-604 (Supp. 2000). The Chief Reporter for the ALI *Principles* project privately maintains that this chapter is the most likely to be adopted widely by state legislatures, in part because it is not as integrated with other chapters as are the financial matters of Chapters 3, 4 and 5. Interview with Ira Mark Ellman (Jan. 4, 2001). Chapter 6 on Domestic Partnership probably departs the most from current law since it mandates similar *inter se* allocations of money as currently comes upon divorce of married couples. ALI PRINCIPLES 1998, *supra* note 1. Section 6.05 of the *Principles* provides in part that "Domestic-partnership property should be divided according to the principles set forth for the division of marital property." *Id.* Section 6.06 provides that except as otherwise provided, "(a) a domestic partners is entitled to compensatory payments on the same basis as a spouse under Chapter 5." *Id.* Chapter 7 of the *Principles* (1998) has much in common with the UNIFORM PREMARITAL AGREEMENT ACT, 9B ULA 363 (1998), which has been adopted in some 25 states and the District of Columbia since its appearance in 1979. CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS, AND PERSPECTIVES 415 (2d ed. 2000).

4. Grace Ganz Blumberg was the Reporter for Chapters 3 and 6. ALI PRINCIPLES 1998, *supra* note 1.

“allocation principle” that forms the substantive heart of the Chapter⁶ was also credited to a woman.⁷ It should come as no surprise that feminist principles permeate the Chapter. The plan of this commentary is to first set forth those characteristics that make Chapter Two distinctive, and then to discuss how these characteristics relate to feminist principles. Because this Chapter appeals to so many women, those who influence public policy must be prepared to demonstrate that men’s interests will not be compromised by legislative adoption. My conclusion will offer some suggestions along these lines.

II. THE DISTINCTIVENESS OF CHAPTER TWO

There are at least four ways, excluding terminology, in which Chapter Two differs from standard custody legislation.⁸ First, Chapter Two emphasizes parental agreement.⁹ Second—and what I call the “core”—is the setting of the

5. Katharine T. Bartlett was the Reporter for Chapter 2. ALI PRINCIPLES 1998, *supra* note 1. She is a recognized feminist scholar and has published such books as FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katharine T. Bartlett & Roseann Kennedy, eds., 1991); KATHARINE T. BARTLETT & ANGELA P. HARRIS, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY (2d ed. 1998).

6. ALI PRINCIPLES 1998, *supra* note 1, § 2.09 (sets the “default rule” when parents do not otherwise agree).

7. Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615 (1992) [hereinafter Scott, *Pluralism*]. Professor Scott also writes on themes important to feminist scholars. See, e.g., Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1936, 1940-41, 1951, 1964-64 (2000) [hereinafter Scott, *Social Norms*] though she classifies herself as a liberal as well as a feminist. See Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 UTAH L. REV. 687, 688-89:

I aim to defend liberalism as a framework for shaping family law policy. I argue that communitarian concerns about the direction of family law are valid, but that many of those concerns can be accommodated in a liberal framework. The problem is not the basic principles that shape the liberal framework, but their distorted expression in modern family law. A liberal contractual framework supports binding commitment and fulfillment of responsibility in family relations.

8. All state statutes, regardless of what they require substantively, contain language that sets the child’s “best interests” as most important. Section 2.02(1), unsurprisingly, states that the “primary objective of Chapter 2 is to serve the child’s best interests.” ALI PRINCIPLES 1998, *supra* note 1, § 2.02(1). The differences, then, lie in the procedural and substantive ways that “best interests” is reached. Of course, dissolution of parental relationships rarely advances the interests of the child. PAUL A. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL (1997) (suggesting that children are only better off if their parents had a highly conflictual marriage before divorce, a case that occurs only about 30% of the time). Some writers have suggested a “least detrimental alternative” standard as being closer to matching what actually goes on. See JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973).

9. ALI PRINCIPLES 1998, *supra* note 1, § 2.02(1)(a) suggests that the best interests will be served by facilitating “parental planning and agreement about the child’s custodial arrangements and upbringing.”

Parenting plans and agreement are not new to custody legislation. They represent the rule in Montana, (MONT. CODE ANN. § 40-4-234(1) (1999)), Tennessee, (TENN. CODE ANN. §§ 36-6-401 et seq. (2000)) and Washington, (WASH. REV. CODE ANN. § 26.09.181(1)(West 1997)) and are under consideration in many other states. In fact, parental agreement is reached in the vast majority of divorce cases. The emphasis here is threefold: to place the onus on parents who must do actual planning work on the “common text” of raising their children, to allow continued autonomy of parents even when the state must be involved because of divorce, and to allow escape from judicial discretion. Jane W. Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody*

default rule to an “approximation standard.”¹⁰ Third, Chapter Two enlarges the concept of parenting beyond traditional biological and adoptive parents to include parents by estoppel and de facto parents.¹¹ Finally, although some cases have purported to do so,¹² Chapter Two makes clear that achieving fairness

Reform and the Role of Legal Professionals, 24 U. MICH. J.L. REF. 65 (1990) (studying the Washington legislation).

Any rule, even a bad one, will reduce litigation. Margaret F. Brinig & Michael V. Alexeev, *Trading at Divorce, Preferences, Legal Rules and Transaction Costs*, 8 J. DISP. RESOL. 279 (1993). The hard work required on the parenting plan can conceivably encourage parents to place their children's interests first, albeit fleetingly, at a time when they are most inclined to think of their own interests. It can reduce later litigation since according to the ADR literature, people are more likely to adhere for the long run when they've worked out the contract itself (for example, when they “own” the contract just as students are claimed to “own” the material after good use of the Socratic method). Incidentally, some couples may be deterred from divorcing in the first place as they “consider their children first.” For example, in the early 1990s, faced with the highest divorce rates in recorded history the British Government proposed a “back to basics” philosophy that would lengthen the waiting period for divorce to twelve months, (eighteen months where there were minor children) during which mediation and reflection would take place. Michael D.A. Freeman, *England in the International Year of the Family*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 199 (Andrew Bainham ed., 1994). This no-fault law was finally enacted by Parliament in July of 1996. Because the mediation and counseling provisions add substantial transaction costs and encourage reconciliation, conservatives suggested that the divorce rate should first increase over the next several years, then decrease. See *Don't kill the divorce bill*, NEW STATESMAN AND SOCIETY, 5 (May 31, 1996); see also Margaret F. Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393 (1998). In some jurisdictions, courts may require parents to attend a parenting class or classes. These jurisdictions are listed at ALI PRINCIPLES 1998, *supra* note 1, § 2.08 cmt. a, reporter's notes at 97-98. For examples of such legislation, see CONN. GEN. STAT. ANN. § 46b-69b(b) (1995); FLA. STAT. ANN. § 61.21(2) (1997); IOWA CODE § 598.19A (1996). For some endorsements, see Peter Salem, *Education for Divorcing Parents: A New Direction for Family Courts*, 23 HOFSTRA L. REV. 837 (1995); Katherine M. Kitzman & Robert E. Emery, *Child and Family Coping One Year After Mediated and Litigated Child Custody Dispute*, 8 J. FAM. PSYCH. 150, 156-57 (1994).

10. The standard is set forth primarily in ALI PRINCIPLES 1998, *supra* note 1, § 2.09. However, section 2.02(b) foreshadows the standard, maintaining that the child's best interests will be served by facilitating “continuity of existing parent-child attachments.” *Id.* §2.02(b).

11. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.03(b) and (c)(Tentative Draft No. 4, 2000) [hereinafter ALI PRINCIPLES 2000]. I have discussed these definitions at some length in Margaret F. Brinig, *Troxel and the Limits of Community*, RUTG. L.J. (forthcoming 2001). To the extent that many nontraditional families are female-headed, broadening the definition of “parent” is also woman-friendly idea. But some beneficiaries of this extension will be men, such as stepparents and “fathers by estoppel.” See ALI PRINCIPLES 1998, *supra* note 1, § 2.04, reporter's notes at 61.

12. ALI PRINCIPLES 1998, *supra* note 1, § 2.02 cmt. b; see also *McCreery v. McCreery*, 237 S.E.2d 167 (Va. 1977); *Dyer v. Howell*, 184 S.E.2d 789 (Va. 1971). However, the Supreme Court case of *May v. Anderson* refers to custody as a personal right no less important than property rights, which might be thought of as promoting a “parent first” attitude. 345 U.S. 528 (1953); see also Judith T. Younger, *Marriage, Divorce, and the Family: A Cautionary Tale*, 21 HOFSTRA L. REV. 1367, 1380 (1993); Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553, 1559 (1984); Amitai Etzioni, *Give Couples Tools To Make Marriages Last*, USA TODAY, Nov. 18, 1996, at 25A. For a debate about the wisdom of keeping troubled marriages together, see Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9 (1990), and Linda J. Lacey, *Mandatory Marriage “For the Sake of the Children”*: A Feminist Reply to Elizabeth Scott, 66 TUL. L. REV. 1435, 1440-42 (1990); see also Katherine T. Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547 (1998).

between the parents is an objective secondary to serving the child's best interests.¹³

III. RELATING CHAPTER TWO TO THEMES OF FEMINIST THOUGHT

Chapter Two strikes the reader as very nuanced. In contrast to such rules as the "innocent parent rule,"¹⁴ the "maternal preference rule"¹⁵ or the "primary caretaker presumption,"¹⁶ no parent becomes a sole custodian; no one is relegated to visitation.¹⁷ Unlike Chapter Three, which can be difficult to understand and its calculations difficult to implement,¹⁸ the ideas are familiar ones.¹⁹ However, the idea that neither parent should emerge as a victor following a custody determination presents a major change.²⁰ Though fairness takes a secondary role, in fact for most families, approximating the caretaking each did before presents less of a change (and therefore a feeling that one has

13. ALI PRINCIPLES 1998, *supra* note 1, § 2.02(2) ("A secondary objective of Chapter 2 is to achieve fairness between the parents.").

14. *Mullen v. Mullen*, 49 S.E.2d 349 (Va. 1948); *Owens v. Owens*, 31 S.E.2d 72, 74 (Va. 1898); Jamil Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038 (1979); see also Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 234 (1975).

15. See, e.g., *J.B. v. A.B.*, 242 S.E.2d 248, 253 (W. Va. 1978).

From a strictly biological perspective, children of the suckling age are necessarily accustomed to close, physical ties with their mothers, and young children, technically weaned, are accustomed to the warmth, softness, and physical affection of the female parent. The welfare of the child seems to require that if at all possible we avoid subjecting children to the trauma of being wrenched away from their mothers, upon whom they have naturally both an emotional and physical dependency. While a child is usually emotionally dependent upon his father, he seldom has the same physical dependency which he has upon his mother.

16. *Pikula v. Pikula*, 374 N.W.2d 705 (Minn. 1985); *Brooks v. Brooks*, 466 A.2d 152 (Pa. Super. 1983); *Commonwealth ex rel. Jordan v. Jordan*, 448 A.2d 1113 (Pa. Super. Ct. 1982); *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). For a discussion of why it was unsuccessful in Minnesota, see Gary Crippen, *Stumbling Beyond the Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427 (1990).

17. See, e.g., Robert E. Fay, M.D., *The Disenfranchised Father*, 36 ADV. IN PEDIA. 407 (1989); see also Jerry McCant, *The Cultural Contradiction of Fathers as Nonparents*, 21 FAM. L.Q. 127 (1987). See generally John S. Murray, *Improving Parent-Child Relationships Within the Divorced Family: A Call for Legal Reform*, 19 U. MICH. J.L. REFORM 563 (1986) (for an early justification of the replication or approximation principle).

18. SCHNEIDER & BRINIG, *supra* note 3, at 1160, question 1.

19. As Elizabeth Scott notes, approximation standards do not require a quality judgment but only a quantitative one. Scott, *Pluralism*, *supra* note 7, at 637.

20. Katharine T. Bartlett, *Child Custody In The 21st Century: How The American Law Institute Proposes To Achieve Predictability And Still Protect The Individual Child's Best Interests*, 35 WILLIAMETTE L. REV. 467, 480 (1999) notes:

In effect, it amounts to a primary caretaker presumption when one parent has been exercising a substantial majority of the past caretaking, and it amounts to a joint custody presumption when past caretaking has been shared equally in the past. It responds to all variations and combinations of past caretaking patterns between those two poles, declining to impose some average, idealized family form on all families and instead favoring solutions that roughly approximate the caretaking shares each parent assumed before the divorce or before the custody issue arose.

lost and the other won) than does the equal division²¹ mandated by many “joint custody” awards.²²

Perhaps more controversial from a feminist perspective,²³ section 2.02²⁴ declares that child welfare, or “the child’s best interests”²⁵ takes precedence over the “secondary objective”²⁶ of “achieving fairness between the parents.” The comments to the section remark “when a family breaks up, children are usually the most vulnerable parties and thus most in need of the law’s protection.”²⁷ The comments go on to note, “Without confidence in the basic fairness of the rules, parents are more likely to engage in strategic,²⁸ resentful or uncooperative behavior, from which children may suffer.”²⁹ Though many women identify

21. CAL. FAM. CODE § 3080 (1994) (when parents agree); FLA. STAT. ANN. § 61.13(3)(a)(1997); MICH. COMP. LAWS ANN. § 722.26a(1) (1991)(findings required if joint custody not awarded). For some case examples, see *Beck v. Beck*, 432 A.2d 63 (N.J. 1981); *Murray v. Murray*, 2000 WL 827960 (Tenn. App. 2000).

22. Scott Altman, *Should Child Custody Rules Be Fair*, 35 U. LOUISVILLE J. FAM. L. 325, 353 (1996); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1595-96 (1991).

23. Martha Fineman presented a Feminist Theory Workshop at Cornell University in 1998 entitled *Uncomfortable Conversations* and brought together scholars interested in child welfare and women’s rights. The call for papers, on file with the author, put it as follows: “The first of these uncomfortable conversations is going to be between “advocates for children” and “advocates for mothers” (or “parents” for those of you who insist on gender neutrality).” Martha Fineman, *Call for Papers*, UNCOMFORTABLE CONVERSATIONS (1998).

24. ALI PRINCIPLES 1998, *supra* note 1, § 2.02(2).

25. *Id.* § 2.02(1) (“The primary objective. . .”).

26. *Id.* § 2.02(2).

27. *Id.* § 2.02 cmt. b. If we depoliticize this statement, it could reflect the same justification given for awarding children of divorcing parents college educations while those of intact families are entitled to none. See *In re Marriage of Crocker*, 971 P.2d 469, 475-76 (Or. App. 1998); *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1389-90 (Ill. 1978). Alternatively, this preference for “child interests” may be what economists call a “Kaldor-Hicks” adjustment since children are affected by their parents’ activities. See MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 126-27 (2000).

28. I will take up this theme shortly. Feminists argue that the “joint custody” standard encourages strategic behavior because it does not reward past behavior and therefore requires women to trade financial resources for the share of child time they would receive if the allocation were fair. Grillo, *supra* note 22, at 1595-96. This concern is related to the strategic behavior anticipated by Robert H. Mnookin and Lewis Kornhauser in *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). When the outcome of litigation is uncertain, the parent who will be penalized is the one with the greatest risk aversion. Mnookin and Kornhauser claim that women are more risk averse, especially regarding the loss of their children, so their husbands can exploit this reluctance to litigate and can thus extract a bigger share of the couple’s finances. These concerns prompted the primary caretaker presumption in the first place. *Garska v. McCoy*, 278 S.E.2d 357, 362-63 (W. Va. 1981); Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL’Y REV. 168, 177-78 (1984). The “best interests” test differs though, because on its face it seems fair. See Elizabeth S. Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 478 (1984); see also Robert Cochran, *The Search for Guidance in Determining the Best Interests of the Child at Divorce: Reconciling the Primary Caretaker and Joint Custody Preferences*, 20 U. RICH. L. REV. 1, 11-12 (1985). Other authors demonstrating concern about strategic behavior in child custody cases include Martha Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 760-61 (1988), and Bartlett, *supra* note 20, at 470.

29. ALI PRINCIPLES 1998, *supra* note 1, § 2.02 cmt. b.

with their children's interests (perhaps more than men do),³⁰ they are less likely to do so at divorce when they act under stress³¹ and are generally engaged in reclassifying property thought of as "ours" to "mine."³² The Comments claim that courts frequently choose "child interests" over parents³³ (and sometimes, to their credit, they do),³⁴ but many cases and procedures seem not to.³⁵ The language of the *Principles* should help put this conflict to rest. Specific sections, such as section 2.08(b), which suggests that courts inform the parties about "the impact of family dissolution on children and how the needs of children facing family dissolution can best be addressed,"³⁶ should go far to alleviating this concern.

30. VICTOR FUCHS, *WOMEN'S QUEST FOR ECONOMIC EMPLOYMENT* 60 (1988). See also Scott, *Social Norms*, *supra* note 7, at 1951 ("Some feminists exalt the maternal role as central to women's identity, and for many women, child rearing is very rewarding.").

31. This justifies state intrusion in the first place. See Brinig, *Troxel*, *supra* note 11 (the state should become involved only when parents are less apt to make decisions that are in the interests of children).

32. Though many women report divorce as a cathartic experience, the catharsis itself is painful, especially when the financial parts of the process seem (or actually are) unfair. Mnookin & Kornhauser, *supra* note 28.

33. ALI PRINCIPLES 1998, *supra* note 1, § 2.02(b), reporter's notes at 30.

34. See, e.g., *McCreery v. McCreery*, 237 S.E.2d 167, 168 (Va. 1977) (the right of a parent to custody of its minor child is subordinate to the right of a child to a custodial care of a parent).

35. *May v. Anderson*, 345 U.S. 528, 533-34 (1953) (a custody decree concerns personal rights (of the parents) at least as important as the property rights that undoubtedly require personal jurisdiction); *Bailey v. Bailey*, 200 S.E. 622, 623 (Va. 1939); see Teacher's Manual to SCHNEIDER & BRINIG, *supra* note 3, at 3157-58, for a discussion of procedural protections in termination cases. For arguments that parental interests ought to be considered, especially since they are so often in line with the child's, see Scott Altman, *Should Child Custody Rules Be Fair*, 35 J. FAM. L. 325, 353 (1996-97); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 16-21 (1987) (arguing that it is unjust to parents to always put the child's interests ahead of parent's interests); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 499 (1984) ("adult interests need not be ignored as a matter of first principle and probably should not be as a matter of sensible policy so long as they can be kept subordinate to the interests of children").

For arguments that the law too often protects parental rights against the rights of children, see generally Mary Ann Mason, *The Custody Wars: Why Children are Losing the Legal Battle and What We Can Do About It* (1999); Mary Ann Mason, *From Father's Property to Children's Rights: the History of Child Custody in the United States* (1994); Brinig & Buckley, *supra* note 9; Janet Leach Richards, *Redefining Parenthood: Parental Rights Versus Child Rights*, 40 Wayne L. Rev. 1227 (1994); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 Cardozo L. Rev. 1747 (1993); Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 Wm. & Mary L. Rev. 995 (1992); Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 Tex. L. Rev. 687 (1985).

36. ALI PRINCIPLES 1998, *supra* note 1, § 2.08 cmt. a, reporter's notes at 97. About 15 jurisdictions require parents to attend a class or classes to teach them how to assist their children in getting through the divorce process, or other form of counseling. See, e.g., CONN. GEN. STAT. ANN. § 46b-69b(b) (West 1994); FLA. STAT. ANN. § 61.21(2) (West 1994); ILL. COMP. STAT. ANN. 5/404(a)-750 (West 1999); IOWA CODE § 598.19A (1996). See generally Lynne M. Kenney & Diana Vigil, *A Lawyer's Guide to Therapeutic Interventions in Domestic Relations Court*, 28 ARIZ. ST. L.J. 629 (1996); Peter Salem, *Education for Divorcing Parents: A New Direction for Family Courts*, 23 HOFSTRA L. REV. 837 (1995); Katherine M. Kitzman & Robert E. Emery, *Child and Family Coping One Year After Mediated and Litigated Child Custody Dispute*, 8 J. FAM. PSYCHOL. 150 (1994). There are even some suggestions that such programs may convince some parents not to divorce when they otherwise would. See, e.g., William Doherty, *How Therapists Harm Marriages and What We Can Do About It*, J. OF COUPLES

The third way in which Chapter Two reflects feminist principles is through its delicate balance between a preference for agreements (allowing significant autonomy for parents and their lawyers)³⁷ without mandating mediation³⁸ or another form of alternative dispute resolution that some feminists find troubling.³⁹ Agreements are not only likely to be more successful over the long run,⁴⁰ but also promote consensus between the parties⁴¹ and discourage litigation.⁴² Of course the more often the parties agree and settle their dispute, the less often courts will hear family law cases. The discretion and arbitrariness of judges has less scope for operation.⁴³ In fact, the entire *Principles'* focus on

THERAPY (2000); William J. Doherty, *I'm O.K., You're O.K., But What About The Kids?*, 17 THE FAM. THERAPY NETWORKER 46 (Sept./Oct. 1993).

37. In Brinig, *supra* note 11, I argue that autonomy is necessary to promote "efficient" families—ones in which children can flourish. See also Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995) (arguing that parental powers are given in advance to provide appropriate incentives to otherwise uncompensated parents).

38. ALI PRINCIPLES 1998, *supra* note 1, § 2.08 suggests in subsection 1(d) that that courts supply parents information about "mediation or other non-judicial procedures designated to help them achieve an agreement," but cautions in subsection (2) that the court should not order services requiring a parent to have face-to-face meetings with the other parent. Such face-to-face meetings are common in family mediation, although mediators may also use "shuttle diplomacy" plus private meetings if the parties so request. To meet the strongest objections against mediation, subsection (3) suggests that a mediator "should not conduct a mediation, even [with] parental consent, without first screening for domestic abuse." In cases where there is credible evidence of domestic abuse, the mediator should take steps to ensure the victim's voluntary consent to mediate and to the agreement reached, and to protect the victim's safety.

39. See, e.g., Grillo, *supra* note 22, at 1547; Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431, 435 (1985). See also Penelope E. Bryan, *Killing Us Softly: Divorce Mediation, and the Politics, of Power*, 40 BUFF. L. REV. 441 (1992); Martha Shaffer, *Divorce Mediation: A Feminist Perspective*, 46 U. TORONTO FAC. L. REV. 162 (1988); Wanda A. Wieggers, *Economic Analysis of Law and Private Ordering: A Feminist Critique*, 42 U. TORONTO L.J. 170 (1992). But see Joan Kelly, *Mediated and Adversarial Divorce: Respondents' Perceptions of Their Processes and Outcomes*, 24 MEDIATION Q. 71, 78 Tbl. I (1989). The *Principles* reflect these concerns:

Notwithstanding its potential benefits, mediation poses some risks of coercion and intimidation insofar as it enhances the opportunity for the stronger parent to exploit vulnerabilities of the weaker one. The risks are especially high when domestic abuse has occurred or is occurring. . . . Another concern is that the mediation process itself is said to favor shared custodial and shared decisionmaking outcomes, which are not suitable for all parents.

ALI PRINCIPLES 1998, *supra* note 1, § 2.08(b) cmt. at 94-95.

40. See, e.g., Margaret F. Brinig, *Does Mediation Systematically Disadvantage Women?*, 2 WM. & MARY J. WOMEN & L. 1 (1995); Carol Bohmer & Marilyn L. Ray, *Effects of Different Dispute Resolution Methods on Women and Children After Divorce*, 28 FAM. L.Q. 223, 244 (Summer 1994); Richard D. Mathis & Lynette C. Yingling, *Analysis of Pre and Post Test Gender Differences in Family Satisfaction of Divorce in Mediation Couples*, 17 J. DIVORCE & REMARRIAGE 75 (1992).

41. Sally Burnett Sharp, *Modification of Agreement-Based Custody Decrees: Unitary or Dual Standard?*, 68 VA. L. REV. 1263, 1280 (1982) (parental agreements help preserve at least a superficial peace between parents and thereby facilitate an easier and more meaningful future relationship between the child and the non-custodial parent).

42. See, e.g., ELEANOR M. MACCOBY & ROBERT MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992) (observing that in California custody cases, mandatory mediation seems to have reduced litigation from ten percent of cases to less than two percent); see also Emery et al., *supra* note 40 (fathers who mediated were likelier to meet their child-support obligations than fathers who did not).

written agreements, or “parenting plans” can be seen as an effort to reduce discretion.⁴⁴ In this light, the *Principles* can be seen as preferring consensus⁴⁵ to judicial decisionmaking, which is likely to be less flexible and more dichotomous. Structuring child custody to favor agreed-upon alternatives over litigated outcomes also caters to what some believe is women’s greater aversion to risk, especially when that risk involves their children.⁴⁶

Feminist writers have a related concern that standards such as the best interests and joint custody standards may each operate to allow strategic

43. ALI PRINCIPLES 1998, *supra* note 1, § 2.07 requires a court to order an agreed-upon parenting plan unless it makes specific findings that the agreement is not knowing or voluntary or the plan would be harmful to the child. Supporters of this type of private decisionmaking stress the role deference plays in the informal incentive structure. See Maccoby & Mnookin, *supra* note 42, at 41-42; Carl E. Schneider, *On the Duties and Rights of Parents*, 81 VA. L. REV. 2477, 2485-86 (1995); Scott & Scott, *supra* note 37, at 2456, 2463 (1995). One state recently enacting parenting plan legislation is Minnesota. MINN. STAT. ANN. § 518.1705 (West 2000). For an enthusiastic student endorsement of this legislation, see Theresa A. Peterson, Note, *The State of Child Custody in Minnesota: Why Minnesota Should Enact the Parenting Plan Legislation*, 25 WM. MITCHELL L. REV. 1577 (1999).

44. Thomas J. Oldham, *ALI Principles of Family Dissolution: Some Comments*, 1997 U. ILL. L. REV. 801, 802 (1997) states:

This is a bold attempt by the ALI to set forth definite rules regarding the economic consequences of marriage breakdown. Traditionally, family law rules have given judges great discretion. Beginning less than two decades ago, judicial discretion when awarding child support has been significantly limited via child support guidelines. In most states, courts retain substantial discretion when determining how to divide the marital estate and whether to award postdivorce spousal support. The ALI proposal breaks from this tradition and attempts to largely eliminate judicial discretion.

For a discussion of the tradeoffs between discretions and rules in all divorce adjudication, see Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 411-26, 505-27 (1996). For applications to custody specifically, see ALI PRINCIPLES 1998, *supra* note 1, § 2.02 and reporter’s notes at 32. Bartlett writes:

It recognizes that determining the child’s best interests under a wide-open, subjective best-interests standard leaves too much discretion to judges and their individual views about childrearing and what is good for children, and in so doing, creates an unpredictability that enhances conflict and harms children. It recognizes, in short, that the best-interests test is not best for children.

Bartlett, *supra* note 20, at 482 (writing about Chapter Two). Mary Ann Glendon addresses the “best interests” standard:

The ‘best interests’ standard is a primary example of the futility of attempting to achieve perfect, individualized justice by reposing discretion in a judge. . . . Its vagueness provides maximum incentive to those who are inclined to wrangle over custody, and it asks the judge to do what is almost impossible: evaluate the child-caring capacities of a mother and a father at a time when family relations are apt to be most distorted by the stress of separation and the divorce process itself.

Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TULANE L. REV. 1165, 1181 (1986); see also Mnookin, *supra* note 14. But see Fineman, *supra* note 28; Carl E. Schneider, *Discretion, Rules and Law, Child Custody and the UMDA’s Best Interest Standard*, 89 MICH. L. REV. 2215, 2242-49 (1991).

45. Brinig, *supra* note 40, at 86 (citing Janet Moore, *Covenant and Feminist Reconstructions of Subjectivity within Theories of Justice*, 55 LAW & CONTEMP. PROBS. 159, 168 (1992); Marion Crane, *Feminism, Labor and Power*, 65 S. CAL. L. REV. 1819, 1857 (1992)). In terms of seeing law in “shades of blues and greens” rather than black and white, see Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

46. See generally Brinig, *supra* note 40; Cochran, *supra* note 28; Mnookin & Kornhauser, *supra* note 28.

bargaining. Some fathers may ask for greater custody shares than they actually want,⁴⁷ under a “best interests test.”⁴⁸ Others may use equal joint custody presumptions to get out of paying substantial child support.⁴⁹ The *Principles* seek to minimize this strategic behavior.⁵⁰

Another way in which Chapter Two reflects feminist concerns is in its sensitivity toward domestic violence⁵¹ and the ways in which violence plays out in child custody.⁵² I have already alluded to the feminist worries about

47. See Bartlett, *supra* note 20, at 470 (noting that her hypothetical David “may ask for primary custody, even if he does not want it, to create some negotiating room”).

48. Maccoby and Mnookin found that 10% of fathers and 7% of mothers asked for more physical custody than they actually wanted. Twenty percent of fathers who wanted maternal custody according to their interviews requested joint physical custody or father physical custody. In the unusual cases where mothers expressed a desire for joint physical custody in their interviews, a third of them still requested sole maternal custody. Maccoby & Mnookin, *supra* note 42, at 100-03; see also ALI PRINCIPLES 1998, *supra* note 1, § 2.02.

49. See, e.g., Jessica Pearson & Nancy Thoennes, *Supporting Children After Divorce: The Influence Of Custody On Support Levels And Payments*, 22 FAM. L.Q. 319, 321 (1988) (noting that for many mothers, joint custody means the threat of potential loss of children to an all too frequently uninvolved, abusive father who seeks to minimize his financial obligations and continue to exercise control over his ex-wife through the children . . .); Nancy Polikoff, *Custody and Visitation: Their Relationship to Establishing and Enforcing Support*, in 2 IMPROVING CHILD SUPPORT PRACTICE III-131 (Diane Dodson & Sherry Greendela Garza eds., 1985) (arguing that to avoid a custody contest or a joint custody arrangement, many mothers accept a bargained-down property settlement or a reduced or nonexistent child support award); see also Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL’Y REV. 168, 177-78 (1984) (describing a child support obligor, typically the father, who pays less support than is warranted by the children’s needs and a wife who generally has a lower income or less earning power. The husband’s threats of a custody fight become less successful, however, if the state has taken away the capacity of the mother to bargain for custody in exchange for lower child support. Accordingly, joint custody effectively results in lowering the father’s child support burden or eliminating it altogether.); Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 517 (1988) (“Legislation skewed toward awards of joint custody increases the ability of the parent requesting joint custody to engage in this type of extortion. David Chambers has noted that ‘a parent who is not really interested in having joint custody may use the threat of demanding it as a tool to induce the other parent to make concessions on issues of property division and child support.’”) (citing Chambers, *supra* note 35, at 567). Grillo, *supra* note 22, at 1596 (in Trina Grillo’s Linda and Jerry mediation in California, Linda agreed to joint custody to avoid losing custody altogether). Naomi Cahn writes that joint custody gives a batterer additional power over his former spouse. See Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1058-59 (1991).

50. ALI PRINCIPLES 1998, *supra* note 1.

51. The *Principles* define domestic abuse as the infliction of physical injury, or of reasonable fear of physical injury, by a present or former member of a child’s household against a child or another member of the household. The requirement that physical injury, or reasonable fear thereof, has been inflicted is satisfied by proof of conviction for crimes [defined by the state]. Action taken by a person for reasonable self-protection, or the protection of another person, is not domestic abuse. *Id.* § 2.03(8).

52. See generally, Merle H. Weimer, *Domestic Violence And Custody: Importing The American Law Institute’s Principles Of The Law Of Family Dissolution Into Oregon Law*, 35 WILLAMETTE L. REV. 643 (1999). As Weimer notes, the attention paid to domestic violence issues pervades the draft:

The other significant difference between the Oregon statute and the Principles relates to the number of individual provisions that address domestic violence. The Principles have the advantage of being a well-integrated scheme, rather than a series of legislative initiatives adopted over time. As such, they address domestic violence in nearly every provision. An analysis of each provision that addresses domestic violence reveals that the

mediation in marriages in which violence is or was a factor.⁵³ Section 2.13 poses substantial obstacles for a parent obtaining custodial responsibility where domestic violence occurred.⁵⁴ When domestic abuse has been shown, “the court should impose limits that are reasonably calculated to protect the child or child’s parent from harm.”⁵⁵ Since domestic violence seems to be far more a concern for women than men,⁵⁶ this concern is not surprising.

drafters of the Principles appear to have had three goals: (1) identifying all cases that involve domestic abuse; (2) enhancing substantive justice in each case; and (3) strengthening domestic violence victims’ safety during and after the legal proceedings.

Id. at 685. Courts are also urged to provide education on domestic violence and its impact on children by ALI PRINCIPLES 1998, *supra* note 1, § 2.08(1)(c).

53. See *supra* note 49 and accompanying text; see also CAL. FAM. CODE § 3131 (1994); MINN. STAT. § 518.17(2) (1998) (joint custody only); WIS. STAT. § 767.11(8)(b) (2000); Charlotte Germane et. al., *Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence*, 1 BERKELEY WOMEN’S L.J. 175, 188 (1985); Lisa Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN’S L.J. 57, 71-100 (1984) (not specifically custody cases). As mentioned, § 2.08(3)(b) requires that the mediator “protect the safety of the victim “in cases where there is credible evidence of domestic abuse. ALI PRINCIPLES 1998, *supra* note 1, § 2.08(3)(b).

Some studies estimate that over half the marriages ending in divorce involve some form of violence. See Linda Girdner, *Custody Mediation in the United States: Empowerment or Social Control?*, 3 CAN. J. WOMEN & L. 134, 138 n.19 (1989) (reporting that a Canadian study shows physical violence given as reason for marital separation by 50-75% of women).

54. Section 2.13 provides that the court shall limit or deny access and responsibility of a parent otherwise allocated responsibility under a parenting plan to secure the safety and welfare of the child or of a child’s parent, where it finds that interests of the child would be served by such limit or denial, in light of credible evidence that the parent to be limited has “abused, neglected, or abandoned a child, as defined by state law; has inflicted domestic abuse, or allowed another to inflict domestic abuse, as defined in § 2.03(8).” ALI PRINCIPLES 1998, *supra* note 1, § 2.13.

For a comprehensive examination of the state statutes currently mandating consideration of violence, see generally Pauline Quirion, *Protecting Children Exposed to Domestic Violence in Contested Custody and Visitation Litigation*, 6 B.U. PUB. INT. L.J. 501 (1996); Family Violence Project, National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197 (1995).

55. ALI PRINCIPLES 1998, *supra* note 1, § 2.13(2); see also Katherine M. Reihing, *Protecting Victims of Domestic Violence and Their Children After Divorce: The American Law Institute’s Model*, 37 FAM. & CONCILIATION CTS. REV. 393 (1999). Reihing notes that:

violence, focusing on the amelioration of the past effects of domestic violence and on future protection and safety for both children and victims. What is novel about the ALI model is that it recognizes that abusers often use children to continue the abuse of their victims. Protection and safety of the abused parent is essential to achieving protection of the welfare of the child. Thus, when a parent is violent toward the other parent of a child, special measures must be taken to protect the victims.

Id. at 398 (citing ALI PRINCIPLES 1998, *supra* note 1, § 2.13 cmt. c.).

56. Acting Bureau of Justice Statistics Director Lawrence A. Greenfeld stated that, “The number of women attacked by spouses, former spouses, boyfriends, parents or children is more than 10 times higher than the number of males attacked by such people.” However, husbands are convicted more frequently than wives for killing their spouses, and wives more often were acting in self-defense. Department of Justice, *Bureau of Justice Statistics Fact Sheet*, (October 11, 1995). As Katharine Bartlett noted:

Feminists also have linked family violence with women’s inequality and oppression. Traditionally, the law has viewed violence in the family as a private issue, into which the law should not intrude, for fear of exposing the family to ‘public curiosity and criticism’ and thus undermining it. Feminists have shown that, to the extent family violence is

In addition to specifying positive factors that a court may use in awarding custodial responsibility, primary among which is the "approximation standard," the *Principles* include "prohibited factors" in section 2.14. One of these is "the parents' relative earning capacities or financial circumstances." Were earning capacities to be considered, men would be favored,⁵⁷ since they, and especially married men, tend to have earning capacities and financial situations⁵⁸ that are better than their former wives. Yet the ALI, as well as a number of cases,⁵⁹ suggests that this factor should not be taken into consideration.

A related concept appears in the ALI's approximation standard itself. Section 2.06 lists which functions are "caretaking functions," and this will operate to determine for which portion of time each parent should have residential responsibility under section 2.09 (1). These function generally include "interaction with the child or decisionmaking on the child's behalf."⁶⁰ On the other hand, parenting functions that will justify maintaining a relationship with the child but not a large portion of residential placement⁶¹ include "parenting functions."⁶²

beyond the reach of the law, men's abuse of and power over women is enabled and affirmed.

Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 494-95 (1999).

57. The connection between gender and relative wealth is pointed out by *Dempsey v. Dempsey*, 292 N.W.2d 549, 554 (Mich. App. 1980) ("In most cases the mother will be disadvantaged. . . . [T]he danger in placing undue reliance on economic circumstances is its potential prejudicial effect upon the dchild's best interests. The party with the more modest economic resources should not be excluded from equal consideration as the custodial parent.").

58. STEVEN L. NOCK, MARRIAGE IN MEN'S LIVES 66, 67-68 and 143 (Appendix A) (1999)(using the *National Longitudinal Survey of Youth: 1979-93* and showing that the same married men earn \$4260.85 more than before they were married, holding age constant). PAULA ENGLAND & GEORGE FARKAS, HOUSEHOLDS, EMPLOYMENT AND GENDER (1986); see also Fuchs, *supra* note 30, at 60; Steven L. Nock, *Turn-Taking as Rational Behavior*, 27 SOC. SCI. RES. 235, 243 (1999) ("Several decades of research have shown, for example, that men are the greater beneficiaries of marriage than women.").

While men's financial situations improve, women's income and hours of employment decrease following marriage. Fuchs, *supra* note 30, at 58; see also FRANCINE D. BLAU, MARIANNE A. FERBER, & ANNE E. WINKLER, THE ECONOMICS OF WOMEN, MEN, AND WORK at 95 & tbl.4.4 (1998). This disparity is apt to continue following divorce. See, e.g., Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528 (1996); Pamela J. Smock, *Gender and the Short-Run Economic Consequences of Marital Disruption*, 73 SOC. FORCES 243 (1994); Ross Finnie, *Women, Men, and the Economic Consequences of Divorce: Evidence from Canadian Longitudinal Data*, 30 CAN. REV. OF SOC. & ANTH. 205 (1993); Greg Duncan & Saul Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 DEMOG. 485 (1985).

59. *Matter of Adoption of L.*, 462 N.E.2d 1165, 1170 (N.Y. 1984); *Brooks v. Brooks*, 466 A.2d 152, 156 (Pa. Super. Ct. 1983) ("[T]he sole permissible inquiry into the relative wealth of the parties is whether either parent is unable to provide adequately for the child; unless the income of one party is so inadequate as to preclude raising the children in a decent manner, the matter of relative income is irrelevant.").

60. ALI PRINCIPLES 1998, *supra* note 1, § 2.06. They include the tasks of: (a) meeting the "daily physical needs of the child," (b) direction of child's developmental needs, (c) discipline and other tasks attending to the child's needs for behavioral control and self restraint; (d) arrangement of the child's education; (e) development and maintenance of appropriate interpersonal relationships; (f) arrangement of health care; (g) moral guidance; and (h) arrangement and supervision of alternative child care. *Id.*

61. *Id.* § 2.09(2). In making residential provisions, the court shall give greatest weight to factor (a) (caretaking functions) except that it shall allocate to a legal parent who has exercised a reasonable

Among the prohibited factors is “the sexual conduct or sexual orientation of a parent, except as necessary to protect a child from demonstrated harm.”⁶³ While this rule would seem to be gender neutral, in fact it has operated in the past to penalize women: since children lived with their mothers following the parent’s divorce, the women could not have sexual relationships without jeopardizing custody unless they remarried. Their former husbands, who only saw the children occasionally, could date and have intimate conduct without their children ever being aware of these adult relationships.⁶⁴

Finally, the ALI attempts to resolve relocation questions in a way that will benefit many women. Relocation presents a “substantially changed circumstance” justifying a change of custody only “when it significantly impairs another parent’s ability to exercise responsibilities that parent has been exercising under a parenting plan.”⁶⁵ Even when this is shown, the court will

share of parenting functions for the child sufficient residential responsibility to satisfy factor (b) (parenting functions).

62. *Id.* § 2.03(7). These include:

- (a) provision of economic support, (b) participation in decision-making regarding the child’s welfare; (c) maintenance or improvement of the family residence, home or furniture repair, home improvement projects, car repair and maintenance, yard work, and house cleaning; and (d) financial planning and organization, food and clothing purchasing, cleaning and maintenance of clothing, and other tasks supporting the consumption and savings needs of the family.

Id. In married couples, wives are more likely to provide the bulk of caretaking and parenting functions. *See, e.g.,* Cathleen D. Zick & Jennifer Geurer, *Trends in Married Couples’ Time Use: Evidence from 1977-78 and 1987-88*, 24 *SEX ROLES* 459 (1991). Men are more likely to spend hours on provision of economic support. Further, men have seen provision for their families as an essential part of their role as husbands and fathers. *See, e.g.,* Katharine Silbaugh, *Marriage Contracts and the Family Economy*, 93 *NW. U. L. REV.* 65, 101-10 (1998). Fathers who seek custody argue that their work hours, and especially overtime work, was done for the family and wasn’t something they would have contemplated in the abstract. They therefore find it difficult to swallow the idea, present in its most vivid form in the “primary caretaker” and “approximation” custody rules, that time spent directly with children is somehow qualitatively different from time spent working for them. For example, consider the portrayal of a father working overtime in *ARLIE HOCHSCHILD, THE TIME BIND* 177-83 (1997).

63. ALI PRINCIPLES 1998, *supra* note 1, § 2.14(4).

64. For one state’s struggle with this problem, see *Piatt v. Piatt*, 499 S.E.2d 567 (Va. App. 1998) (experimentation with sexual preference and promiscuity though the dissent noted both parents had been promiscuous while still married); *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995) (sexual orientation); *Brown v. Brown*, 237 S.E.2d 89 (Va. 1977) (sexual conduct); *see also* *Petersen v. Petersen*, 13 Va. Cir. 216 (1988) (the mother “dated” while still married and worked in a bar, while the father of the nine year-old boy was stable, mature, and hardworking, and had “immediately accepted the pleasures and responsibilities of fatherhood.”). The most frequently cited case dealing with the custodial parent’s morality is *Jarrett v. Jarrett*, 400 N.E.2d 421 (Ill. 1979); *see also* *Rose v. Rose*, 340 S.E.2d 176 (W. Va. 1985) (dissent) (where the father’s anger about the sexual relationship in question seems to have been transmitted to the language used by the ten year-old son: “I don’t like Denver and I don’t like what went on,” said the boy, who had only met Denver once, while viewing fireworks); *see also* *Murray v. Murray*, 2000 WL 827960 (Ct. App. Tenn. 2000) (Mr. Murray strongly objected to the fact that his former wife allowed Mr. Neiswinter to spend nights in her apartment when the children were present and he asked the court to order her to “cease having men she is not married to spending the night at her home in the presence of the children or, in the alternative, that the children not be forced to spend the night in the home of their mother’s boyfriend or any other man.” The mother eventually married Mr. Neiswinter.).

65. ALI PRINCIPLES 1998, *supra* note 1, § 2.20(1).

normally “revise the parenting plan so as to both accommodate the relocation and maintain the same proportion of residential responsibility being exercised by each.”⁶⁶ Most states currently have rules that either give the primary custodial parent should have the benefit of a presumption allowing relocation with the child,⁶⁷ or place the burden should on that parent to show that a relocation is in the child’s best interests.⁶⁸ Without picking either approach, the *Principles* line up each parent’s burdens in accordance with past caretaking patterns. Thus, the primary caretaking parent is allowed to relocate with the child if that parent has been exercising a significant majority of custodial responsibility and intends to move for a legitimate reason to a location that is reasonable in light of the purpose.⁶⁹ Other relocation policies tend to penalize mothers.⁷⁰

IV. OBSERVATIONS ON “SELLING” THE PRINCIPLES TO MEN

In order for the *Principles* to be adopted in states other than West Virginia, legislators will need to be convinced that the change in standards will benefit men as well as women.⁷¹ In talking to male legislators and interest groups and

66. *Id.* § 2.20(3). This is quite different from the attitude of some states, who assume that relocation that makes frequent visitation impractical justifies a change of custody. *See, e.g.,* Carpenter v. Carpenter, 257 S.E.2d 845 (Va. 1979) (mother sought to relocate from Tidewater, Virginia to New York); Rowlee v. Rowlee, 179 S.E.2d 461 (Va. App. 1971) (holding that the failure to return a child to the state may result in a loss of custody since the parent is not then a fit and proper person); DeCapri v. DeCapri, 1996 Va. App. LEXIS 36 (the mother moved to Cleveland to attend community college resulting in a change from joint to sole custody in the father); *cf.* Bostick v. Bostick-Bennett, 478 S.E.2d 319 (Va. App. Ct. 1996) (the custodial father was not permitted to relocate to North Carolina).

67. This is the rule in California. *See In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996), *criticized in* Richard A. Warshak, *Social Science and Children’s Best Interests in Relocation Cases: Burgess Revisited*, 34 FAM. L.Q. 83 (2000) (contending for a case-by-case examination of relocation decisions).

68. Compare Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245 (1996) (arguing that relocation rules should give priority to the child’s relationship with the custodial parents) with Frank G. Adams, *Child Custody and Parent Relocations: Loving Your Children from a Distance*, 33 DUQ. L. REV. 143 (1994) (arguing that greater weight should be given to the importance of the noncustodial parent-child relationship).

69. Bartlett, *supra* note 20, at 281-82.

70. Mothers may need to relocate to accept employment following divorce, especially if they were not employed during the marriage. They may also wish the support of friends or family from whom they moved during the marriage because of their husband’s employment. They may wish to relocate because a of a second spouse’s job, and since his earning capacity will usually be greater than hers, it may be rational to accommodate his employment. *See, e.g.,* Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody Disputes—1920, 1960, 1990, and 1995*, 31 FAM. L.Q. 215, 224 (1997). Decisions about remaining in the service or leaving it are influenced by potential implications for the wife, especially her earnings capacity. However, traditional men make career decisions without much concern for their wives. Noncustodial parents (mostly fathers), are free to move for any reason since they have no custody to lose. *See* H. Leroy Gill & Donald R. Haurin, *Wherever He May Go: How Wives Affect Their Husband’s Career Decisions*, 27 SOC. SCI. RES. 264 (1998).

71. Men still make up the vast majority of legislators on the state level. In the United States generally, women have been winning state legislative seats in increasing numbers, especially in the last two decades. The number of female legislators increased five-fold between 1969 and 1996, from 4.0% in 1969, to 10.3% in 1979, to 14.7% in 1985, to 18.1% in 1991, and to 20.8% in 1996 (1541 female legislators). However, there were considerable differences among the states. Washington led the

in receiving email messages from them, I have discovered that most favor joint custody. Taking these men at their word, it may be that joint custody appeals because it provides a solution where men do not have to be thought of as *losing* custody.⁷² Some of the more thoughtful among them seem interested in parenting plans,⁷³ which could account for the increasing success of this legislation. While joint legal custody⁷⁴ may have seemed to fill this function and is the primary arrangement in many states,⁷⁵ it has not resulted in the increased child support or contact sought by its proponents.⁷⁶ It also does not apparently reduce the depression felt by noncustodial parents even beyond what they would ordinarily feel upon divorce, as illustrated in Tables 1 and 2 (appended at end of commentary).

As part of a larger project, Brinig and Nock⁷⁷ examined the effect of loss of physical custody on fathers' mental states.⁷⁸ The National Survey of Families

nation with a state legislature that was 39.5% female; then Nevada at 34.9%; Colorado at 31.0%; and both Arizona and Vermont at 30.0%. In contrast, Alabama's legislature then held the distinction once held by Kentucky; it was just 3.6% female. The five states with the lowest percentages of women state legislators in 1996 were Alabama (3.6%), Kentucky (8.0%), Oklahoma (10.7%), Louisiana (11.1%), and Mississippi (11.5%), and three of the next five are also in the South, perhaps reflecting this region's traditional, conservative political culture. In 1996, women hold 343, or 17.3%, of the 1984 state Senate seats and 1198, or 22.0%, of the 5440 state House seats. See ROBERT DARCY ET AL., *WOMEN, ELECTIONS, AND REPRESENTATION* 53-54 (2d ed. 1994); *Women in Elective Office* 1996, available at Center for the American Woman and Politics, Eagleton Institute of Politics, Rutgers University.

72. Men or women were apt to file for divorce if they obtained sole custody; women were only slightly more likely to file than men if the custody award was joint. See Margaret F. Brinig & Douglas W. Allen, "These Boots are Made for Walking: Why Most Divorce Filers are Women," 2 AM. L. & ECON. REV. 126 (2000).

73. See, e.g., the Michigan legislation proposed by Dads, Inc.

74. This is called "decisionmaking responsibility" by the *Principles*. See ALI PRINCIPLES 1998, *supra* note 1, § 2.03 cmt. e (noting that it gives the parent "the authority to make significant decisions delegated to parents as a matter of law, such as those relating to health care, education, permission to marry at certain ages, or to enlist in the military").

75. Margaret Brinig and Steven Nock found that about two-thirds of the custody arrangements in the early 1990s contained provision for joint legal custody. Margaret F. Brinig & Steven L. Nock, "I Only Want Trust": *Norms, Trust, Autonomy and Community* (Working Draft, University of Iowa, 2001) (on file with the author). For a listing of the statutes, see Margaret Martin Barry, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U.L. REV. 767, 774 (1997).

76. See, e.g., Catherine R. Albiston et al., *Does Joint Legal Custody Matter?*, 2 STAN. L. & POL'Y REV. 167 (1990) (using the 1124 subjects in the Stanford Child Custody Study). The authors noted that proponents of joint legal custody argue that it strengthens the bond between nonresidential fathers and their children, emphasizing fathers' responsibilities and encouraging them to pay more of the child support they owe: "[i]n some studies, fathers with joint legal custody show higher compliance with support awards than fathers where the mother has sole legal custody." *Id.* at 169. When they compared fathers' involvement in everyday decisions between custody groups and controlled for initial differences, "joint legal custody fathers were no more involved in everyday decisions than mother legal custody fathers, and the only significant relation that emerged was a negative one between mothers' initial hostility and fathers' involvement in such decisions." *Id.* at 173. Albiston et al., found that "joint legal custody fathers also were not more involved than mother legal custody fathers in major decisions concerning their children." *Id.* at 174. They also found that "joint legal custody does not, in fact, improve fathers' compliance with child support awards once their ability to pay is taken into account." *Id.* at 176.

77. Brinig & Nock, *supra* note 75.

and Households⁷⁹ developed two waves of data, asking similar questions each time. Among these questions were several that make up the CESD-2,⁸⁰ or brief depression scale, which is used by psychiatrists to diagnose clinical depression. The results shown in the tables are the most complicated equations we used in each case. Table 1 isolates some of the effects of divorce, loss of custody, and legal loss of custody from other factors that also might affect depression: depression at the time of the first interview, income, education, change of income, remarriage, loss of a spouse through death. To keep the sample as large as possible, we began with all the men, married or single. What we found was that having a legal agreement or decree giving custody to the child's mother is not only statistically significant in predicting increased depression, but also has one of the largest standard coefficients in the equation. In practical terms, loss of custody through a legal agreement or decision increases depression by about 4 points, or 1/4 of a standard deviation. Table 2 presents the same equation with

78. *Id.* They examined mothers, too, but there were only twenty-three who lost custody during this period, so though the direction and magnitude of the coefficients is the same as for men, the results were not statistically significant. It would be interesting, given the right data, to see if the results hold out for women who were primary caretakers before separation and who are awarded joint custody. My guess is that they would be very nearly the same.

79. The National Survey of Families and Households (NSFH) was first administered in 1987-88 and included personal interviews with 13,007 respondents from a national sample. The sample includes a main cross-section of 9,637 households plus an oversampling of blacks, Puerto Ricans, Mexican Americans, single-parent families, families with step-children, cohabiting couples and recently married persons. One adult per household was randomly selected as the primary respondent. Several portions of the main interview were self-administered to facilitate the collection of sensitive information and to ease the flow of the interview. The average interview lasted one hour and forty minutes. We used questions asked of the male primary respondents. The NSFH was administered by the Center for Demography and Ecology of the University of Wisconsin-Madison.

80. Centers for Epidemiological Studies Depression scale. The questions on the survey are as follows:

L12. Now let's think about you personally, here and now. Here is a list of ways you might have felt or behaved during the past week. Circle your answer to each question.

On how many days during the past week did you:	Number of Days in Past Week
(L12a) Feel bothered by things that usually don't bother you?	None 1 2 3 4 5 6 7
(L12b) Not feel like eating (your appetite was poor)?	None 1 2 3 4 5 6 7
(L12c) Feel that you could not shake off the blues even with help from your family or friends?	None 1 2 3 4 5 6 7
(L12d) Have trouble keeping your mind on what you were doing?	None 1 2 3 4 5 6 7
(L12e) Feel depressed?	None 1 2 3 4 5 6 7
(L12f) Feel that everything you did was an effort?	None 1 2 3 4 5 6 7
(L12g) Feel fearful?	None 1 2 3 4 5 6 7
(L12h) Sleep restlessly?	None 1 2 3 4 5 6 7
(L12i) Talk less than usual?	None 1 2 3 4 5 6 7
(L12j) Feel lonely?	None 1 2 3 4 5 6 7
(L12k) Feel sad?	None 1 2 3 4 5 6 7
(L12l) Feel like you just could not get going?	None 1 2 3 4 5 6 7

the addition of a joint legal custody variable. If the award of joint legal custody relieved men's depression, the coefficient would be negative. Instead, it is positive though not statistically significant.

Joint legal custody isn't something that ultimately benefits noncustodial parents, and we have seen that it doesn't benefit children. Joint legal custody isn't something that custodial parents like either, since it restricts their autonomy and independence.⁸¹ The *Principles'* approximation rule would seem to suggest happier results, both because some men would have a quantitatively larger amount of time with their children,⁸² and because they would continue to have the same proportion of time they spent prior to the separation.⁸³ Neither parent loses anything.

One question, and one that I have been asked by some fathers, is whether it makes any difference what the default rule is, so long as it is known. Though many if not most couples would *not* prefer an equal joint custody arrangement,⁸⁴ the reasoning is that they would bargain to what they did prefer.⁸⁵ Most parents

81. Singer & Reynolds, *supra* note 49, at 508.

82. This is because section 2.09(1)(b) requires that each parent who fulfilled parenting functions be allocated "the amount of residential time that will allow the child to maintain a meaningful relationship with each parent," no matter how small the actual quantity of caretaking functions he performed. See ALI PRINCIPLES 1998, *supra* note 1, § 2.09(1)(b).

83. ALI PRINCIPLES 1998, *supra* note 1, § 2.09(1)(each would have residential provisions approximating "the caretaking functions each parent performed for the child before their separation").

Under an equal joint custody arrangement, women lose because men are unlikely to have done half the caretaking prior to separation. They feel that their prior sacrifices on behalf of their children are discounted. See Grillo, *supra* note 22.

84. When custody is contested, however, sole custody is awarded to the father in about 21% of the cases, to the mother in 50% of the cases, and joint custody is nevertheless awarded in about 17% of the cases. Jed H. Abraham, *Why Men Fight for Their Kids: How Bias in the System Puts Dads at a Disadvantage*, 17 FAM. ADVOC. 48 (Summer 1994). About 75% of divorced couples receive joint legal custody; only about 29% receive joint physical custody. See Steven J. Bahr et al., *Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference?* 28 FAM. L.Q. 247, 255 (1994) (Utah study of 1087 couples, 1970-93); Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM. L.Q. 201, 212-13 (1998):

Further, joint custody is a more expensive proposition than sole custody. Joint custodians are each required to maintain suitable housing for children, with extra clothing and toys. It has been estimated that these expenditures constitute from one-fourth to one-third of the total child-related expenditures. Initially, there is the question of whether the costs associated with joint custody make such arrangements feasible for low-income families. One study noted that joint custody is not spreading very quickly to lower socio-economic populations. Reviewing the literature, one is left with the feeling that joint custody is an upper-middle class phenomenon.

85. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). For an example of how this might work with joint custody:

There is some evidence that couples awarded joint custody settle into custody patterns not unlike those under sole custody. However, the empirical issue is by no means settled. Moreover, as a theoretical matter, the Coasian critique might fail in several ways. First, even parents of ordinary delicacy might be unwilling to treat their children as fungible with money in bargaining over custody. One reason for this is that the willingness to "sell" one's child might be taken as a signal of parental unfitness.

See Brinig & Buckley, *supra* note 9, at 400 (citing Maccoby & Mnookin, *supra* note 42, at 113-14, 225 (1992)); see also Albiston et al., *supra* note 77; Judith A. Seltzer, *Legal Custody Arrangements and Children's Economic Welfare*, 96 AM. J. SOC. 895, 900 (1991) (reporting few differences in physical-

apparently eventually settle into something approaching their arrangements before separation with the mother having the lion's share of time with the child in most cases.⁸⁶ Giving a presumption in favor of a joint custodial arrangement poses a number of problems, however.

The first is that law usually sets default provisions to what most parties would want⁸⁷ or to what will promote efficiency.⁸⁸ Joint custody (at least equal sharing of time) is not what most people want.⁸⁹ It is also not efficient, since in

custody arrangements, but lower child-support payments by noncustodial fathers). Whatever the custody award, in practice one parent, usually the mother, will have primary physical custody. See MACCOBY & MNOOKIN, *supra* note 42; Judith A. Seltzer, *Consequences of Marital Dissolution for Children*, 20 ANN. REV. SOC. 235 (1994); Margaret F. Brinig & Michael V. Alexeev, *Trading at Divorce: Preferences, Legal Rules and Transaction Costs*, 8 J. DISP. RESOL. 279 (1993).

86. See, e.g., Carol Bohmer & Marilyn L. Ray, *Effects of Different Dispute Resolution Methods on Women and Children after Divorce*, 28 FAM. L.Q. 223, 236 (1994) (finding that "[i]n Georgia, mothers had responsibility for child caretaking, as represented by sole or residential custody in 75 percent of cases, but mothers were found to be providing the day- to-day child caretaking in 84 percent of cases"); see also Albiston et al., *supra* note 75 (Stanford Child Custody Study, finding only 20% had joint physical custody).

87. Default rules are common in contractual settings. In law and economics jargon, they at least theoretically provide for what most parties would have agreed to under the given circumstances. See, e.g., Russell Korobkin, *Inertia And Preference In Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998); J.P. Kostritsky, *"Why Infer"?: What the New Institutional Economics Has to Say About Law-Supplied Default Rules*, 73 TUL. L. REV. 497 (1998); Morten Hviid, *Default Rules and Equilibrium Selection of Contract Terms*, 16 INT'L REV. L. & ECON. 233 (1996); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990); Ian Ayres & Robert Gertner, *Filling Gaps In Incomplete Contracts: An Economic Theory Of Default Rules* 99 YALE L.J. 87 (1989); Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989). Even more relevant to this paper, fiduciary duties can be seen as default rules. See, e.g., Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999) (discussing elected officials and election law); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1250-51 (1998) (discussing marriage); Tamar Frankel, *Fiduciary Duties as Default Rules* 74 OR. L. REV. 1209 (1995) (discussing corporations).

88. Promotion of efficient outcomes, as opposed to what the parties most often want, is the other justification commonly given for default rules. See, e.g., Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389 (1993) (citing various kinds of efficiency-producing norms); cf. Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1820 (1998) ("Commercial law instead provides parties with default rules that, at least in theory, direct the ex ante efficient result in standard cases.").

The economic model of marriage, concluding that what should be maximized is "household production," or some combination of consumer goods and the leisure time within which to enjoy them, is explained in relatively simple terms in Robert A. Moffitt, *Female Wages, Male Wages, and the Economic Model of Marriage: The Basic Evidence*, in THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION 302, 303-06 (Linda J. Waite ed., 2000). Much of the work on the economics of households began with Gary S. Becker's *A Theory of Marriage: Part I*, 81 J. POL. ECON. 813 (1973), and *A Theory of Marriage: Part II*, 82 J. POL. ECON. S11 (1974); see also GARY S. BECKER, A TREATISE ON THE FAMILY (2d ed. Cambridge Univ. Press 1991). For a more recent argument, see LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2000).

89. Susan B. Steinman, et al., *A Study of Parents Who Sought Joint Custody Following Divorce: Who Reaches Agreement and Sustains Joint Custody and Who Returns to Court*, 24 J. AM. ACAD. CHILD PSYCHIATRY 554 (1985). A Massachusetts study of the records of 500 divorced families found that only 10.1% of those families with joint legal custody also had joint physical custody. See W.P.C.

conflicted cases it can lead to far worse situations for children, because the parties are apt to engage in strategic bargaining benefiting men at the expense of women and children,⁹⁰ and since it requires a change on the children's part from what they were used to.⁹¹

One way of evaluating what is efficient is to examine whether joint custody awards are relitigated to the same extent as are sole custody awards.⁹² To the

Phear et al., *An Empirical Study of Custody Arrangements: Joint Versus Sole Legal Custody*, in *JOINT CUSTODY AND SHARED PARENTING* 142, 147 (Jay Folberg ed., 1984).

90. For example, fathers in joint custody arrangements pay approximately 14 percent of their net income in contrast to sole custody fathers who are required to pay 26 percent. See Singer & Reynolds, *supra* note 49, at 514-15 ("The univariate tests of significance revealed that although joint-custody fathers' and noncustodial fathers incomes were significantly different, the amount of their child support payments was not. The findings suggest that joint custody-fathers pay less child support relative to their income than do noncustodial fathers."). Trina Grillo gives an example of a mother who had been the primary custodian of the couple's son and who was forced to accept a joint custody arrangement because she would otherwise be viewed as an uncooperative parent by the mediator. Grillo, *supra* note 22, at 1594-95. For this mother (and the child), joint custody presented a diminution of their relationship quantitatively similar to that felt by many fathers who in fact spend significant time with their children before separation and are relegated to "visitor" status. Also the rights of a child to his father and those of a father to his child are ignored or at least subjugated to the perceived right of the other parent to total custody and control of the child's life and to the financial resources (alimony and child support payments, medical expenses, sometimes mortgage payments) with which to implement and maintain same. Fathers and their families are not considered to be relevant now, except as sources of relief and help for women and "their" families. Father's families are deemed no longer to exist. They (fathers) will be "visitors" now. See Fay, *supra* note 17, at 412.

91. Instead of benefiting from joint custody, one study found a "substantial portion of [joint custody] children were visibly distressed and confused." Marsha Kline et al., *Children's Adjustment in Joint and Sole Physical Custody Families*, 25 *DEV. PSYCHOL.* 430, 430 (1989).

92. Court-ordered joint custody in which one parent was forced to accept the arrangement had relitigation rates comparable to those in sole custody. See Frederic W. Ilfeld, Jr., et al., *Does Joint Custody Work? A First Look at Outcome Data of Relitigation*, 139 *AM. J. PSYCHIATRY* 62, 64-65 (1982). In another study, Steinman and colleagues found that parents whose joint custody arrangement was court-ordered had the least successful relationships and were most likely to relitigate. Steinman et al., *supra* note 89. A study of 500 family records by Phear and colleagues found the instances of relitigation to be the same between joint and sole custody families. See W.P.C. Phear et al., *supra* note 90 (noting that cooperation and lack of parental conflict are called the "primary" and "most important" criteria for joint custody decisions.). Without cooperation between the parents, joint custody awards are "doomed to fail." Singer & Reynolds, *supra* note 49, at fn. 35. Many proponents of joint custody assert, however, that it can be imposed in contested cases. The assumption is that the entering of a joint custody order will lead to cooperation between parents. Hardcastle, *supra* note 84, at 214-15. Moreover, in the only study which included a sample of joint custody arrangements that were ordered or strongly influenced by a court, none of the families with court-imposed or court-influenced joint custody was found to be 'successful' one year after the arrangement began. Steinman, et al., *supra* note 89, at 558; see also DEBORAH A. LUEPNITZ, *CHILD CUSTODY* (1982); Susan Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 *U.C. DAVIS L. REV.* 739 (1983); W. Glenn Clingempeel & N. Dickon Reppucci, *Joint Custody After Divorce: Major Issues and Goals for Research*, 91 *PSYCHOL. BULL.* 102 (1982); Alice Abarbanel, *Shared Parenting After Separation and Divorce: A Study of Joint Custody*, 49 *AM. J. ORTHOPSYCHIATRY* 320 (1979). Further, "when joint custodians opt for additional litigation over cooperation, a never-ending custody struggle may ensue, even more bitterly contested than the original custody question." Richard K. Schwartz, *A New Role for the Guardian Ad Litem*, 3 *J. DISP. RESOL.* 117, 126 (1987).

extent they are voluntary arrangements, as opposed to court-imposed ones, they are not efficient.⁹³ But an ultimately more satisfactory “efficiency,” given a preference for children’s interests over parents’, is to look instead at which regime is likely to promote the best outcomes as far as child well-being is concerned. I have argued elsewhere that child flourishing depends upon parental autonomy⁹⁴ and involvement of the community (though not as rights-holders).⁹⁵ Children do best when they, and their parents, see their relationships as permanent.⁹⁶ With enactment of Chapter Two, families are assured that they will go on regardless of the disruption of the adult relationships.⁹⁷ So no parent loses,⁹⁸ and children win.

Joint custody is particularly problematic when the marriage has experienced domestic violence. Mary Becker, *Maternal Feelings: Myth, Taboo and Custody*, 1 S. CAL. REV. L & WOMEN’S STUD. 133, 187 (1992).

93. The empirical problems here are considerable. The couples who by themselves work out joint custody arrangements are not demographically or attitudinally the same as those who contest custody and who have already demonstrated animosity by litigating the original decision. See Bahr et al., *supra* note 84.

94. See Brinig, *supra* note 11; see also Scott & Scott, *supra* note 37.

95. Brinig, *supra* note 11.

96. Compare Margaret F. Brinig, *The Family Franchise: Elderly Parents and Adult Siblings*, 1996 UTAH L. REV. 393 with Nock, *supra* note 58, at 239-40 (1999) (arguing that obligations, such as debt and promise, are the threads from which marital intimacy is woven).

97. Compare the argument that Martha Fineman makes in *THE NEUTERED MOTHER* (1995), with that made in June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359 (1994), and JUNE CARBONE, *FROM PARTNERS TO PARENTS* (2000). Fathers should be assured that the continuity is not simply a financial one; see also Fay, *supra* note 17, at 412 (“Indeed, if anyone even says ‘they’re his children, too,’ it is in the context of a discussion of his financial support obligations. His nurturing/parenting abilities (present or potential) and his desires, not to mention the desires and needs of his children for him are largely ignored.”). But see *Conway v. Conway*, 395 S.E.2d 464 (Va. App. Ct. 1990) (though marriage ends at divorce for purposes of alimony, it continues for purposes of child support so that the standard of living is not fixed at that enjoyed during the marriage). Compare Brinig & Buckley, *supra* note 9 (maintaining that joint custody gives fathers incentives to form better relationships with children during marriage because the relationships will not be disrupted after divorce); Brinig & Allen, *supra* note 72 (referring to the approximation rule).

98. Of course any kind of parenting following dissolution will have its problems, even for cooperative families. We are not talking about a “first best” world here. Just for starters, the time shares each parent receives will not be shares of 100% of the child’s waking hours, since some of these must be spent in transportation between parent’s homes. The money the parents can spend on child-related activities will decrease following separation because, just as with more traditional joint custody, there will be a required duplication of physical equipment and a loss of “economies of scale.” See *supra* note 85 and accompanying text; BRINIG, *supra* note 27, at 188. Over time, situations will change, and families will become more complicated with the entry of stepparents. See, e.g., E. Mavis Hetherington & Kathleen M. Jodl, *Stepfamilies as Settings for Child Development*, in *STEPFAMILIES: WHO BENEFITS? WHO DOES NOT?* 55 (1994) (“Before the youngest child reaches the age of 18, 40% of family members currently in a first marriage will eventually become members of a stepfamily, with 86% of these stepfamilies composed of a biological mother and stepfather.”); see also ALI PRINCIPLES 1998, § 2.20 cmt. a (noting that between 1985 and 1990 almost half the country changed living quarters, and 20 percent of them (10% of the whole country) moved across state lines; figures for families who have experienced divorce are higher). It appears that 75% of custodial mothers move at least once within four years of separation or divorce, and over half of them move again. Anne L. Spitzer, *Moving and Storage of Postdivorce Children: Relocation, The Constitution and The Courts*, 1985 ARIZ. ST. L.J. 1, 3.

TABLE 1. RISK OF FATHER'S DEPRESSION BASED UPON
CHILDREN'S LIVING ARRANGEMENT⁹⁹

CEDS-2 is "Centers for Epidemiological Studies Depression Scale".
Averages for Married Respondents was 13.0843; Divorced was 18.07;
Separated was 22.73. Respondents are compared to those who never married.
Data comes from the National Survey of Families and Households.

Variable	Coefficient (Error)	Standardized Coefficient (Beta)	T-statistic	Significance
Model 4 (R2=.083)				
Constant	13.409 (.949)		14.117	.000
Brief Depression scale (first wave)	.240 (.018)	.221	13.487	.000
Any kids now living with other parent?	.189 (1.516)	.002	.125	.901
Legal agreement giving custody to other parent	4.256 (1.541)	.050	2.761	.006
Married for first time since first wave, still married	-1.760 (1.743)	-.016	-1.009	.313
Remarried since first wave	-2.341 (2.608)	-0.18	-8.97	.370
Divorced since first wave	1.298 (1.799)	.016	.722	.471
Widowed since first wave	1.733 (2.732)	.010	.634	.526
Respondent total earnings	-2.76E-05 (.000)	-.033	-1.744	.081
Best income measure wave 2	-4.14E-05 (.000)	-.071	-3.708	.000
Education Level	-.123 (.058)	-.035	-2.106	.035
Black?	4.753 (.967)	.081	4.914	.000
Hispanic?	1.919 (1.377)	.023	1.394	.163
Asian?	-2.519 (3.747)	-.011	-6.72	.501
American Indian?	.181 (5.196)	.001	.035	.972

99. Brinig & Nock, *supra* note 75, tbl.2.

TABLE 2. RISK OF MALE DEPRESSION BASED UPON
CHILD'S LIVING ARRANGEMENT AND LEGAL CUSTODY AWARD¹⁰⁰

(204 out of 380 couples were awarded joint legal custody)

Variable	Coefficient (Error)	Standardized Coefficient (Beta)	T-statistic	Significance
Model 4 (R2=.083)				
Constant	13.381 (.950)		14.092	
Brief Depression scale (first wave)	.240 (.018)	.221	13.500	.000
Any kids now living with other parent?	.110 (1.581)	.001	.072	.942
Legal agreement giving custody to other parent	3.021 (1.839)	.036	1.643	.100
Is there joint legal custody?	2.661 (2.163)	.026	1.230	.219
Married for first time since first wave, still married	-1.747 (1.743)	-.016	-1.002	.316
Remarried since first wave	-2.181 (2.611)	-.013	-835	.404
Divorced since first wave	1.034 (1.811)	.010	.571	.568
Widowed since first wave	1.749 (2.732)	-.033	.640	.522
Respondent total earnings	-2.75E-05 (.000)	-.071	-1.736	.083
Best income measure wave 2	-4.14E-05 (.000)	-.035	-3.713	.000
Education Level	-.122 (.058)	.081	-2.097	.036
Black?	4.764 (.967)	.022	4.925	.000
Hispanic?	1.872 (1.377)	-.011	1.359	.174
Asian?	-2.550 (3.746)	.000	-.681	.496
American Indian?	.156 (5.195)		.030	.976

100. *Id.* tbl.3.