

CHAPTER FOUR — CUSTODY AND SUPPORT

Child Custody Awards: Legal Standards and Empirical Patterns For Child Custody, Support and Visitation After Divorce

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TABLE OF CONTENTS

I.	INTRODUCTION	473
II.	THE LEGAL TRADITION IN CHILD CUSTODY AWARDS ...	478
III.	THE IMPACT OF NO-FAULT DIVORCE	485
	A. <i>The Impact of No-Fault Divorce On Physical Custody Requests and Awards</i>	488
	B. <i>The Impact of No-Fault Divorce on Legal Custody Requests and Awards</i>	490
	C. <i>The Impact of No-Fault Divorce on Visitation Orders</i>	492
	D. <i>The Impact of No-Fault Divorce on Child Support</i>	494
	E. <i>The New Age of Majority for Child Support</i>	500
IV.	REPEAL OF THE MATERNAL PRESUMPTION	501
V.	ATTORNEYS' ATTITUDES TOWARD CUSTODY	505
	A. <i>When Does the Maternal Preference Break Down?</i>	508
	B. <i>A Hypothetical Case: Further Exploration of the Strength of the Maternal Presumption</i>	512
	C. <i>The Working Mother</i>	513
	D. <i>The Court Docket Data: When Does the Husband Get Custody?</i>	515
VI.	DIVORCING COUPLES: SOME PRELIMINARY RESULTS	517
VII.	CONCLUSION	519

CHILD CUSTODY AWARDS: LEGAL STANDARDS AND EMPIRICAL PATTERNS FOR CHILD CUSTODY, SUPPORT AND VISITATION AFTER DIVORCE*

LENORE J. WEITZMAN** AND RUTH B. DIXON***

I. INTRODUCTION

Divorce and family breakdown are major events in the lives of many U.S. families. In 1975, for the first time in U.S. history, there were over one million divorces in a twelve-month period, involving over 3 million men, women and minor children.¹ In the future it is likely that one-third to one-half of all the adults in the United States, and close to one-third of the minor children under 18 will experience a divorce or dissolution.² These data reflect not only the numerical importance of divorce, but its increased social

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¹ H. CARTER & P. GLICK, *MARRIAGE AND DIVORCE: A SOCIAL AND ECONOMIC STUDY* 394 (rev. ed. 1976) (hereinafter cited as CARTER & GLICK). The number of divorces and annulments rose from 428,000 in 1963 to 1,036,000 in 1975, and the number of children involved in a divorce or annulment rose from 562,000 in 1963 to 1,123,000 in 1975. K. SNAPPER & J. OHMS, *THE STATUS OF CHILDREN IN 1977*, at 25 (U.S. Dep't of Health Education and Welfare Pub. No. (OHDS) 78-30133 1978).

² Preston estimates that 44% of all current marriages will end in divorce. Preston, *Estimating the Proportion of American Marriages that End in Divorce*,

significance as well. The decisions that are made about the care and custody of children at the time of divorce will inevitably have a major impact on their future lives and happiness.³

This article focuses on the most important legal decision that affects children of divorce: the custody decision.⁴ It examines both the legal standards for the decision and the ways in which custody decisions are actually made. It also explores the attitudes and experience of the judges and lawyers who specialize in family law.

3 SOC. METHODS & RESEARCH 435 (1975). The more conservative estimate of CARTER & GLICK, *supra* note 1, at 396, is that at least one third of all the first marriages of couples under 30 will end in divorce.

³ In the United States the total number of children under 18 years old living with a divorced parent tripled between 1960 and 1977. This statistic is all the more impressive because it can not be attributed to an increase in the total number of children in the United States. Surprisingly the total number of young children was about the same in 1977 as in 1960. As Dr. Paul Glick, Chief of the Population Division of the U.S. Census, reports

[T]he number of children under 18 years rose from 64.3 million in 1960, to 69.5 million in 1970 and then, because of the declining birth rate, it fell to 64.1 million in 1977. Thus, the total number of young children in 1977 was about the same as in 1960, but, in the meantime, the number living with a separated parent doubled, (and) the number living with a divorced parent tripled . . . by contrast the number of children living with two parents declined by 10 percent.

Glick, *The Future of the American Family*, CURRENT POPULATION REPORTS, January 1979, at 3. By 1977, less than 70% of all children under 18 were living with their two natural parents in a continuous first marriage. Approximately 18% were living in one parent families (usually following the divorce or separation of their parents) and 13% in two parent families in which one or both parents had remarried. *Id.*

⁴ Other research is now examining the social and psychological effects of divorce on children. Although we are just beginning to learn about the real emotional impact of divorce on children, and do not yet have good data on the effects over time, preliminary results of ongoing research have been reported by E. M. Hetherington, *The Aftermath of Divorce* (April 1977) (paper presented at the meeting of the American Orthopsychiatric Association); Hetherington, *Girls Without Fathers*, PSYCH. TODAY, February, 1976, at 52; E. M. HETHERINGTON, E. COX, & R. COX, BEYOND FATHER ABSENCE: CONCEPTUALIZATION OF THE EFFECTS OF DIVORCE; D. Jacobson, *The Impact of Marital Separation/Divorce on Children*, 1 J. DIVORCE. 341-60; 2 J. DIVORCE 3-19, 175-94; J. Wallerstein & J. Kelly, *The Effects of Parental Divorce*, in THE CHILD AND HIS FAMILY: CHILDREN AT PSYCHIATRIC RISK (E. Anthony & C. Koupernik eds. 1974); J. Wallerstein & J. Kelly, *The Effects of Parental Divorce: Experiences of the Preschool Child*, 14 J. AM. ACAD. CHILD PSYCH. (1974); J. Wallerstein & J. Kelly, *The Effects of Parental Divorce: Experiences of the Child in Later Latency*, 46

The first aim of this paper is to examine the impact of changing legal standards on child custody awards. The second aim is to examine the attitudes and practices of those who interpret and enforce the custody laws. The chronological focus of this analysis is a ten year period in California, from 1968 to 1977, which spans two major changes in California divorce law: the institution of a no-fault system of divorce in 1970,⁵ and the elimination of the statutory "maternal preference" in the standards for awarding custody in 1973.⁶

The first change in California divorce law, the institution of no-fault divorce in 1970, abolished all the traditional fault-based grounds and with them the necessity of alleging and proving spousal misconduct.⁷ Under the new divorce law the past moral (and immoral) behavior of the parties is irrelevant—and, therefore, inadmissible in the legal proceedings.⁸ If custody is at issue, however, anything that might bear on the parents' fitness can be introduced into evidence.⁹ Consequently when the Family Law Act was enacted there was considerable concern that angry or vindictive spouses would use custody to air their grievances, or to embarrass or harrass their ex-spouses. We therefore predicted that the number of contested custody cases would increase under the no-fault divorce law.

The second relevant change in California divorce law was instituted in 1973 and eliminated the statutory preference for the mother as the post-divorce custodian of young children.¹⁰ This change signaled the beginning of changing social norms: that

AM. J. OF ORTHOPSYCH. 256-69 (1976); J. Wallerstein, *Children Who Cope In Spite of Divorce*, FAM. ADVOCATE, Summer 1978, at 1-5, 35-39.

⁵ The California Legislature ended a fault based conception of divorce with the Family Law Act of 1969, effective January 1, 1970. 1969 Cal Stats. 3312, ch. 1608 (codified at CAL. CIV. CODE §§ 4000 -5138 (West 1970 & Cum. Supp. 1979)). For a general discussion on traditional fault based grounds for divorce, see H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §§ 12.1-12.7 (1968) [hereinafter cited as CLARK].

⁶ Act of Aug. 17, 1972, 1972 Cal. Stats. 1854, ch. 1007, § 1 (codified at CAL. CIV. CODE § 4600 (a) (West Cum. Supp. 1979)).

⁷ For a description of fault-based divorce, see CLARK, *supra* note 5, §§ 12.2 - 12.7.

⁸ CAL. CIV. CODE § 4509 (West 1970), as amended by Act of 1975 Cal. Stats. 59, ch. 35, § 1 (current version at CAL. CIV. CODE § 4509 (West Cum. Supp. 1979)).

⁹ *Id.*

¹⁰ CAL. CIV. CODE § 4600 (a) (West Cum. Supp. 1979).

mothers should no longer be either privileged or saddled by the traditional assumption that they alone could care for young children, and that fathers should no longer be disadvantaged by the pro-mother bias in the law. Once again, we predicted that contested custody cases would increase as a result of the change in the law.

In order to analyze the effects of each of these legal changes on child custody awards we drew random samples of divorce cases at three points in time: in 1968, two years before any legal changes took place; in 1972, two years after the no-fault law was instituted; and in 1977, four years after the mother presumption was removed. In each year approximately 500 cases were randomly drawn from the Certificates of Registry of Final Decrees of Divorce (1968) or Dissolution (1972 and 1977) granted in Los Angeles and San Francisco Counties.¹¹ The 1968 sample provides baseline data against which to measure the impact, if any, of the legal changes. The 1972 sample was drawn with an eye toward measuring the impact of the 1970 no-fault reform, and the 1977 sample to measure the impact of the 1973 reform which eliminated the maternal presumption.

In order to examine the attitudes and opinions of those who interpret and enforce the custody laws, the attorneys and judges who specialize in family law, we interviewed 169 matrimonial

¹¹ A random sample of approximately 500 cases was drawn from all final decrees of divorce/dissolution in each county in 1968 and 1972. In 1968 there were 26,603 divorces granted in Los Angeles County, requiring a sampling ratio of one in 53 for the sample (n=507). In San Francisco, with 2,328 divorces in 1968, the sampling ratio was one in five (n=498). In 1972, there were 35,635 final decrees of dissolution granted in Los Angeles and 3,495 in San Francisco, producing a sampling ratio of one in 71 in Los Angeles (n=486) and one in seven in San Francisco (n=506).

The 1977 sample was limited to Los Angeles County where approximately one-third of all California dissolutions are granted. In 1977 there were 128,205 decrees of dissolution in California, with 37,189 issued in Los Angeles County. Our sample was drawn from the 15,752 decrees of dissolution granted between January 1 and May 31, of 1977. Petitions filed prior to January 1, 1975 were excluded from the sample. The sampling ratio was one in 31.5 (n=500). The sample was limited to decrees granted between January 1 and May 31 because the California Legislature voted to abolish the collection of detailed socioeconomic and demographic information on the Certificates of Registry of Final Decrees of Dissolution (the basis for these samples) in June 1977. 1977 Cal. Stats. ch. 676. As a result, further research in this area has been effectively foreclosed in the foreseeable future.

We are indebted to Roger Smith and Merle Shields of the State of California Department of Vital Statistics for their aid in drawing these samples.

attorneys¹² and 44 Superior Court judges¹³ in San Francisco and Los Angeles counties between 1974 and 1976.

The discussion that follows seeks to answer the following questions. First, to what extent did traditional family law establish a preference for the mother as the child's custodian after divorce, and to what extent was a maternal preference reflected in California custody decisions under the old fault-based divorce law? The first section of this article examines the legal tradition and the empirical pattern of custody awards under fault-based divorce laws. Second, what impact did the 1970 change to no-fault divorce have on custody requests and decisions? Part II examines the impact of the no-fault law. Third, what impact did the 1973 shift from a mother-preference standard to a sex-neutral standard have on custody requests and decisions? The empirical effects of removing the maternal preference from the law are examined in Part III. Finally, how does the current standard of the child's best interests¹⁴ operate in actual practice? In other words, to what extent is custody actually determined by the behavior of the

¹² The San Francisco attorneys sample consisted of all members of the Academy of Matrimonial Lawyers, and all members of the Family Law Committee of the San Francisco Bar Association, and those additional attorneys identified by more than two members of the above groups as one of the three "most knowledgeable" or "most effective" attorneys in family law (n=77).

In Los Angeles a similar sampling procedure would have yielded over 1,400 attorneys. The interview sample was therefore restricted to all members of the Executive Committee of the Family Law Section of the Los Angeles and Beverly Hills Bar Associations over a ten-year period, the 20 members of an informal organization of elite matrimonial lawyers, and those additional attorneys who were identified by more than two attorneys in these groups as one of the three most knowledgeable and/or effective attorneys in family law (n=92). There was an extraordinarily high response rate in both cities: 97% in San Francisco and 100% in Los Angeles.

¹³ In San Francisco the judges sample consisted of those Superior Court Judges who were assigned the domestic relations calendar of uncontested divorces and preliminary hearings for six months or more, and/or those who were regularly assigned contested divorce cases.

The Los Angeles judges sample included all the Superior Court Judges and Commissioners in Department 2 (Domestic Relations) who heard contested and uncontested divorce cases. In San Francisco 18 of the 20 eligible judges, 90%, were interviewed in Los Angeles 26 of the 27 eligibles, 96%, were interviewed.

¹⁴ The standard of the child's best interests is now codified in California. CAL. CIV. CODE § 4600 (a) (West 1970 & Cum. Supp. 1979). The concern for the child's welfare as opposed to the parent's rights is considered the unifying principle of modern custody decisions. See CLARK, *supra* note 5, § 17.1.

mother, or the father, or by the interests and characteristics of the children? The major factors which influence custody awards today are explored in detail in Part IV.

II. THE LEGAL TRADITION IN CHILD CUSTODY AWARDS

"The English tradition was that the father was the natural guardian of the children and controlled their education and religious training."¹⁵ He had the primary right to his children's services and, in return, he was liable for their support and maintenance.¹⁶ It is therefore not surprising to find that if the parents separated, the father of a legitimate child, not the mother, had the right to and responsibility for child custody.¹⁷ As Blackstone stated the common law rule, the father had a natural right to the custody of his children, while the mother was not entitled to have any power over them; she was entitled only to their reverence and respect.¹⁸

In the widely cited case of *King v. De Manneville*,¹⁹ for example, Lord Ellenborough ordered a nursing infant returned to its French father, even though the man's cruelty had driven the mother and children from his home, because the father was "entitled by law to custody of his child."²⁰

"The common law preference for the father was secure," as Foster and Freed note, "as long as Feudalism flourished, but it disintegrated with the advent of the industrial revolution."²¹ As fathers moved off the farm into wage labor in factories and offices, women's maternal instincts were "discovered," and mothers be-

¹⁵ Foster & Freed, *Life with Father: 1978*, 11 FAM. L. Q. 321, 322 (1978).

¹⁶ *Id.* See also Foster, *Dependent Children and the Law*, 18 U. PITT. L. REV. 579 (1957).

¹⁷ Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, L. AND CONTEMP. PROB., Summer 1975, at 226, 233-34.

Foster and Freed note that the father's absolute right to the custody of his children was ordinarily conditioned upon his fitness as a parent, but "the father usually prevailed even in unlikely situations." Foster & Freed, *supra* note 15, at 326 (citing *King v. De Manneville*, 102 Eng. Rep. 1054 (K.B. 1804)).

¹⁸ W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 453 cited in Foster & Freed, *supra* note 15, at 325.

The married woman's inferior legal position with respect to her children provides but one example of her generally subordinate legal status under common law. See generally H. KAY, SEX BASED DISCRIMINATION IN FAMILY LAW (1974).

¹⁹ *King v. De Manneville*, 102 Eng. Rep. 1054 (K.B. 1804).

²⁰ *Id.* at 1055.

²¹ Foster & Freed, *supra* note 15, at 341.

came increasingly associated with child care.²² In 1839 the English Parliament modified the fathers' absolute right to custody by granting the mother the right to be awarded custody of children who were less than seven years old.²³ Thus, the "tender years" presumption in favor of the mother was introduced into law.²⁴

"An absolute rule of paternal preference does not appear to have been generally applied in nineteenth century America" according to Professor Mnookin, "and in many jurisdictions the courts were authorized to award custody to either parent as part of a divorce proceeding."²⁵ American courts were more likely to look at the circumstances and facts of the particular case²⁶ and to rely on fault as evidence of parental unfitness.²⁷ Since social convention customarily led to the wife's filing for and being awarded the divorce as the innocent party, and since the fault-based custody standard assumed that children would be best taken care of by the innocent party, the courts' reliance on fault as evidence of parental unfitness was more likely to result in a larger proportion of maternal custody awards.²⁸

The twentieth century brought the establishment of a new legal presumption that *expressly* preferred mothers as the custodians of their children after divorce, particularly if the children were young.²⁹ This new "legal tradition" was established primarily through case law, rather than black letter law, for while most statutes continued to put the wife on an equal footing with the husband, and instructed the courts to award custody in the best interest of the child, the judiciary typically held that it was in the child's best interests not to be separated from the mother unless

²² In 1890, as married women acquired the full-time responsibility for child rearing, it is understandable that legislators and judges came to view the mother as the person who should be responsible for the children. Van Gelder, *New Custody Customs: In the 'Best Interests' of the Child* (citing Los Angeles Attorney Harry Fain), N.Y. Times, Oct. 30, 1976, at 13, col. 21.

²³ Mnookin, *supra* note 17, at 234; Foster & Freed, *supra* note 15, at 326 (citing the Justice Talfourd's Act, An Act to Amend the Law Relating to the Custody of Infants, 1839, 2 & 3 Vict. c. 54).

²⁴ See generally CLARK, *supra* note 5, 17.4(a), outlining the "tender years" presumption in favor of the mother.

²⁵ Mnookin, *supra* note 17, at 234. The paternal preference was characterized as fiction as early as 1887. A. LLOYD, LAW OF DIVORCE 242 (1887), cited in Mnookin, *supra* note 17, at 235.

²⁶ Foster & Freed, *supra* note 15, at 326-27

²⁷ Mnookin, *supra* note 17, at 234.

²⁸ Mnookin, *supra* note 17, at 235. See also text and accompanying notes 44 to 47 *infra* which review the empirical research on child custody awards.

²⁹ *Id.*

the mother was shown to be unfit.³⁰

Thus the statutory standards of "the child's best interest" and "parental fitness" evolved into a judicially constructed presumption that the love and nurturance of a fit mother was always in the child's and society's best interest. The result was a consistent pattern of decisions which both justified and further reinforced the maternal presumption. For example, as one 1942 decision stated, the preference for the mother is "not open to question, and indeed *it is universally recognized that the mother is the natural custodian of her young.* This view proceeds on the well known fact that *there is no satisfactory substitute for a mother's love.*"³¹

Eventually, the belief that the mother was the natural and proper custodian of her children became so widely assumed that it was rarely questioned and even more rarely challenged. As Roth recently observed, the rare rationales that were offered for the maternal preference had the ring of divine right theory.³² For example, an Idaho court concluded that the preference for the mother "needs no argument to support it because *it arises out of the very nature and instincts of motherhood; nature has ordained it.*"³³ Similarly, a 1958 New Jersey decision referred to the preference as the result of an "inexorable natural force,"³⁴ and a 1972 Maryland decision as a "primordial" maternal tie.³⁵

In recent years some courts' justification for the maternal presumption seems to have shifted from the laws of nature to "the wisdom of the ages," as a 1973 appellate court phrased it.³⁶ Along the same lines, a 1975 Utah decision affirmed the presumption in favor of the mother because it was grounded in the wisdom inherent in traditional patterns of thought.³⁷

³⁰ *Id.*

³¹ Washburn v. Washburn, 49 Cal. App. 2d 581, 588, 122 P.2d 96, 100 (2d Dist. 1942).

³² Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. Fam. L. 423, 436 (1976-77).

³³ Krieger v. Krieger, 59 Idaho 301, 81 P.2d 1081, 1083 (1938) (emphasis added). See also Green v. Green 137 Fla. 359, 360, 188 So. 355, 356 (1939) in which a Florida court held "nature has prepared a mother to bear and rear her young and to perform many services for them and to give them many attentions for which the father is not equipped."

³⁴ Wojnarowicz v. Wojnarowicz, 48 N.J. Super. 349, 353, 137 A.2d 618, 260 (Ch. Div. 1958).

³⁵ Kirstukas v. Kirstukas, 14 Md. App. 190, 286 A.2d 535, 538 (1972).

³⁶ Commonwealth ex. rel. Lucas v. Kreischer, 450 Pa. 352, 299 A.2d 243, 245 (1973) (emphasis added) (citations omitted).

³⁷ Cox v. Cox, 532 P.2d 994, 996 (Utah Sup. Ct. 1975).

The wisdom of the maternal presumption was also supported by psychologists and child development specialists who emphasized the unique relationship between an infant and its mother.³⁸ These professionals asserted that "young children needed a mother in order to develop optimally" and that women were uniquely suited, biologically and psychologically, for the task of rearing children.³⁹ The social science dogma was that men and women were "biologically destined to play not only different but mutually exclusive roles as parents; that an inherent nurturing ability disposes women to be more interested in and able to care for children than are men; and that for their well-being, children need mothers in a way that they do not need fathers."⁴⁰

For example, the noted psychologist, Dr. Bruno Bettelheim, cautioned against the unnaturalness of fathers raising children — even in cooperation with the mother:

Male physiology and that part of his psychology based on it are not geared to infant care . . . infant care and child-rearing, unlike choice of work, are not activities in which who should do what can be decided independently of physiology The relationship between father and child never was and cannot now be built principally around child-caring experiences. It is built around a man's function in society: moral, economic, political.⁴¹

Surprisingly, even when the social science evidence which supported the maternal presumption was challenged, the presumption itself was considered wise because it avoided the "social costs" of contested cases.⁴² In addition, even in recent years, when

³⁸ The widely cited work of John Bowlby, which supported these assertions, has more recently been discredited. J. BOWLBY, *CHILD CARE AND THE GROWTH OF LOVE* 21 (1965). See also discussion of the refutation in notes 39 and 42 *infra*. A more reputable and widely respected advocate of the psychological basis for the mother presumption is Andrew Watson, a Professor of Law and Psychiatry. See, e.g., Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 82 (1969) in which Watson advocates a presumption in favor of the mother for children under 10 years of age, and for all female children.

³⁹ J. LEVINE, *WHO WILL RAISE THE CHILDREN: NEW OPTIONS FOR FATHERS (AND MOTHERS)* 41 (1976) [hereinafter cited as LEVINE]. For a critical review of the academic acceptance of the maternal role see generally Wortis, *The Acceptance of the Concept of the Maternal Role by Behavioral Scientists: Its Effects on Women*, 41 AM. J. ORTHOPSYCH. 733-46 (1971).

⁴⁰ J. LEVINE, *supra* note 39, at 21.

⁴¹ Bettelheim, *Fathers Shouldn't Try to Be Mothers*, PARENTS' MAGAZINE, October 1956, at 124-25, cited in, LEVINE, *supra* note 39, at 22.

⁴² See, e.g., Levy & Ellsworth, *Legislative Reform of Child Custody Adjudication*, L. AND SOC. REV., Nov. 1969, at 4, who undertook an exhaustive review of the research on divorce, broken homes, maternal deprivation, father

the passage of state Equal Rights Amendments would seem to require the elimination of the maternal preference doctrine, case law has continued to uphold it.⁴³ Thus the judicially constructed

absence, etc., so that they could learn

[W]hat social scientists have discovered about custodial arrangements and their consequences; . . . [and] what is empirically known about the differential effects on the child's development of awarding custody, let us say, to the mother rather than to the father, or to some third party rather than to either of the parents.

They concluded that there was simply no research which led to clear conclusions:

As must be painfully clear, the psychological research that can be considered both relevant and useful to the problems of custody adjudication is minimal. Direct studies of the effects of different types of custody arrangement are non-existent. Indirect studies may alert the judge to the hazards in the path of the child of divorce, but cannot indicate whether or in what circumstances a father or a mother is a "better" custodian - at least in part because of the paucity of data on mother-absent families.

Nevertheless they recommended that a maternal presumption be included in the [Uniform] Marriage and Divorce Act to discourage harmful custody contests:

The trial judge's most common task is deciding whether to prefer the father or the mother as custodian of the children. *A uniform divorce act should contain a presumption that the mother is the appropriate custodian—at least for young children, and probably for children of any age* (emphasis added)

Since wives will, under most circumstances, be awarded custody regardless of the statutory standard, and since it seems wise to discourage traumatic custody contests whenever it is possible to do so, the act should discourage those few husbands who might wish to contest by establishing a presumption that the wife is entitled to custody. The presumption resolves several value conflicts: it may well be true that because of the presumption some fathers who would be better custodians than their wives will either fail to seek custody or will be denied custody following a contest, but *that disadvantage has a lower "social cost" than the disadvantages of any alternative statutory formulation—more contested cases (with the trauma that contests seem to produce), more risk of a custody award to a father who will be only marginally better than the mother or even much worse.* (emphasis added)

While an examination of the influence of social science is beyond the scope of this article, it is interesting to note that advocates of fathers' rights have recently tried to strengthen their claims by pointing to research which emphasizes the fathers' role in child development. See, e.g., Solomon, *The Fathers' Revolution in Custody Cases*, TRIAL, Oct. 1977, at 33-37.

⁴³ Between 1969 and 1975 nine states passed legislation explicitly stipulating that the sex of the parent should not be a factor in determining custody. LEVINE, *supra* note 39, at 44. In fact, as of 1975, only three states retained an explicit maternal preference in their statutes. Mnookin, *supra* note 17, at 235.

preference appears to have operated as effectively as a statutory directive in upholding the mother's right to the post-divorce custody of her children.

In light of this strong legal presumption, it is not surprising to find that the empirical data since the turn of the century indicate that mothers are awarded custody of their children in the overwhelming majority of divorce decrees, and that the pattern has remained relatively stable over the years.

After reviewing the minimal empirical data available from 9 states between 1875 and 1949, Jacobson found that mothers received custody of their children in all states and in every decade.⁴⁴ Goode reports that women received custody of their

Nevertheless as recently as 1978, and notwithstanding the passage of State Equal Rights Amendments, Foster & Freed, *supra* note 15, at 332, concluded that the tender years doctrine remained "gospel" (but might be subordinated to the assumed best interests of the children) in 14 states, and in at least 12 other states there was still a preference for a "fit" mother, other things being equal. The doctrine's status was doubtful in an additional three states.

Among the 17 states with Equal Rights Amendments in 1978, it is surprising to find that the tender years doctrine was "alive and well" in 8 states, while it had "supposedly been discarded" in the other 9 states with state ERAs. *Id.* at 333. Foster and Freed observe that courts wanting to find a way around the ERA have assumed that the child's welfare is ordinarily best served by being with the mother. *Id.*

⁴⁴ P. JACOBSON, *AMERICAN MARRIAGE AND DIVORCE*, 131-32 (1959). In chronological order of the study, mothers were awarded custody of their children in 76% to 80% of the cases in Hennepin County, Minnesota between 1875 and 1939, in 81-87% of the cases in Ohio between 1900 and 1949, in 85% of the cases in New Haven County between 1919 and 1932, in 83% to 87% of the cases in Kansas between 1927 and 1939, in 68% of the cases in Maryland in 1929, in 86% of the cases in Cook County, Ill. between 1945 and 1948, in 84% of the cases in Missouri in 1948 and 1955, in 74% of the cases in New Jersey in 1949, and in 82% of the cases in Tennessee in 1949. *Id.* at 132. Jacobson concludes that

The great majority of minor children are entrusted to the custody of their mother. . . . Although the experience varies somewhat from area to area, the mother receives custody in close to four fifths of all cases and the father in only about one tenth. In the relatively few remaining cases, both parents are given custody for part of the time, or the children are awarded to a relative or guardian. *The available data also indicates that there has been little if any change in the pattern of custody dispositions since before the turn of the century.* (emphasis added)

Id. at 131. He goes on to note, however, that

This does not necessarily mean that our courts tend to favor the mother. In our society both parents have an equal claim upon the children. However, many men recognize that their children will be better cared for by the mother. Moreover, when a couple separates, even if they disagree regarding the custody of the children, the tendency is for the children to stay with the mother. In consequence, most minor children are living with their mother at the time a di-

children in 95% of the divorce cases he examined in Michigan in 1948,⁴⁵ a Maine study in 1960 showed mother custody in 87% of the cases,⁴⁶ and one in Tippecanoe County, Indiana with the lowest reported figure for mother custody, was 74%.⁴⁷ On a nationwide basis, it has been estimated that mothers received custody in 90% of the divorce cases decided in 1968.⁴⁸

The traditional legal pattern in California was similar with respect to both "the law on the books" and "the law in action." As noted above, the statutory law included a mother preference for young children,⁴⁹ and mothers were, in fact, awarded custody

orce is started, and the courts infrequently alter this arrangement. Nevertheless, disputes regarding child custody may be bitter and prolonged. Some are resolved in attorneys' offices, but a few are vigorously contested even in the courtroom.

Id. at 132.

⁴⁵ W. GOODE, *WOMEN IN DIVORCE* 29 (1956).

⁴⁶ MAINE DEP'T OF HEALTH AND WELFARE, *SOCIAL CASEWORK SERVICES IN A DIVORCE COURT* (1960).

⁴⁷ Christensen & Meissner, *An Analysis of Divorce in Tippecanoe County, Indiana*, 40 *SOC. & SOC. RESEARCH* 247, 248 (1956). In addition, LEVINE, *supra* note 39, at 184 n. 23, cites statewide data from the Missouri Center for Health Statistics which reports on the percentage of custody awards made to men. In 1960, 11,253 divorces resulted in 458 (7.9%) custody awards to fathers; in 1968, 16,389 divorces resulted in 714 (7.6%) custody awards to fathers; and in 1973, the latest year for which figures are available, 21,670 divorces resulted in 776 custody awards to fathers (6.4%).

⁴⁸ Note, *Divided Custody of Children After Their Parents Divorce*, 8 *J. FAM. L.* 58, 59 (1968).

⁴⁹ Prior to its amendment in 1972, CAL. CIV. CODE § 4600 read as follows:

If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof. Custody should be awarded in the following order of preference:

(a) To either parent according to the best interests of the child, but, *other things being equal, custody should be given to the mother if the child is of tender years.*

(b) To the person or persons in whose home the child has been living in a wholesome and stable environment.

(c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child (emphasis added).

1969 Cal. Stats. 3330, ch. 1608, § 8 (current version at CAL. CIV. CODE § 4600 (West Cum. Supp. 1979)).

Although mothers are favored only for children of tender years, in 1968, 66% of the divorced families with children had at least one child under the age of six. Thus, the maternal presumption effectively applied to a significant majority of all divorced families with children.

in the overwhelming majority of divorces granted under the old law.⁵⁰ In our random samples of 1968 Los Angeles and San Francisco divorce decrees, mothers were awarded sole physical custody of their children in 88% of the cases, fathers in 9%, and the remaining 3% of the children were either divided between the two parents, or awarded jointly to them or to third parties. Thus, before the change to no-fault divorce, the mother was clearly preferred as the custodial parent in California, as in other states.

III. THE IMPACT OF NO-FAULT DIVORCE

In 1970, California became the first state in the United States to institute a no-fault system of divorce.⁵¹ The new law eliminated the need for grounds such as adultery, extreme cruelty, or willful desertion in order to obtain a divorce.⁵² Instead, it provides for a dissolution of the marriage when one party asserts (and the court finds) that there are "irreconcilable differences" between the spouses.⁵³

Before the law changed, allegations of fault played a critical role in the divorce process. Not only did they help prove that one had sufficient "grounds" to obtain a divorce, but more important to our subsequent analysis, fault was linked to the *financial* aspects of the divorce through its influence on alimony and property awards. For example, the statute mandated an award of more than half of the community property to the prevailing party in a divorce action if the grounds were adultery or mental cruelty. Thus proof of innocence also meant that a spouse would fare better financially.⁵⁴

Under the new law, allegations of fault became inadmissible,

⁵⁰ Elaine May's examination of 500 divorce cases from the Los Angeles County Archives in 1919 (the first year the divorce files were preserved on microfilm) indicates that wives were awarded custody of the children in over 80% of the cases. Elaine Tyler May, "The Pursuit of Domestic Perfection: Marriage and Divorce in Los Angeles, 1890-1920," Ph.D dissertation, University of California at Los Angeles, 1975.

⁵¹ The Family Law Act, 1969 Cal. Stats. 3312, ch. 1608 (codified at CAL. CIV. CODE §§ 4000-5138 (West 1970 & Cum. Supp. 1979)). See Comment, *California's Divorce Reform*, 1 PAC. L.J. 310 (1970); Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 U.C.L.A. L. REV. 1306 (1970).

⁵² For a discussion of the traditional grounds for divorce still in effect in other states, see CLARK, *supra* note 3, §§ 12.1-12.7.

⁵³ CAL. CIV. CODE § 4506 (West 1970). The code defines "irreconcilable differences," *id.* § 4507, and specifically makes acts of misconduct irrelevant except as to child custody. CAL. CIV. CODE § 4509 (West Cum. Supp. 1979).

⁵⁴ See former CAL. CIV. CODE § 146, enacted in 1872, 1873-74 Code Ann. 191, ch. 612, § 34, as finally amended in 1968 Cal. Stats. 1077, ch. 457, § 1.

as the past conduct or misconduct of the parties was assumed to be irrelevant to an equitable settlement. The criterion of "irreconcilable differences" recognizes that whatever the reasons for marital failure, they are best left out of the proceedings. With this no-fault standard the California Legislature sought to eliminate the adversarial nature of divorce, and thereby to reduce the hostility, acrimony and trauma of fault-based divorce.⁵⁵

Custody provides the only exception to the rule that testimony about fault is inadmissible under the new law. The Act states that "evidence of specific acts of misconduct shall be improper and inadmissible, *except where child custody is in issue* and such evidence is relevant. . . ."⁵⁶ Legislative intent was clearly to restrict allegations to limited, specific acts of misconduct bearing directly on the custodial competence of the parent. The Assembly Journal states, "It is intended that the court be very strict in exercising its discretion to admit evidence. . . ."⁵⁷ Nevertheless, the question of what is relevant is ambiguous and probably depends on subjective considerations on the part of the judge.⁵⁸

Even though a request for custody requires no supporting statements under the new act⁵⁹ (in contrast to the old format in which father custody claims were automatically accompanied by

⁵⁵ Proponents of divorce law reform had several aims which are beyond the scope of this paper. In brief they sought to eliminate the hypocrisy, perjury and collusion "required by courtroom practice under the fault system," Kay, *A Family Court: The California Proposal*, 56 CALIF. L. REV. 1205, 1223 (1968), to reduce the acrimony and bitterness surrounding divorce proceedings, to lessen the personal stigma attached to the divorce, and to create conditions for more rational and equitable settlements of property and spousal support. Hogoboom, *The California Family Law Act of 1970: 18 Months Experience*, 27 J. MO. B. 584 (1971); Kay, *A Family Court: The California Proposal*, in *DIVORCE AND AFTER* (P. Bohannon ed. 1970); Krom, *California's Divorce Law Reform: An Historical Analysis*, 1 PAC. L.J. 156 (1970). In essence, the new law attempted to bring divorce legislation into line with the social realities of marital breakdown in contemporary society. It also recognized that marital conduct and misconduct no longer fit rigid categories of fault.

⁵⁶ CAL. CIV. CODE § 4509 (West 1970 & Cum. Supp. 1979) (emphasis added).

⁵⁷ Freeman, Hogoboom, MacFaden, Olson, & Li, *ATTORNEYS GUIDE TO FAMILY LAW ACT AND PRACTICE* 300 (2d ed. C. Brosnahan & Colburn eds. 1972) [hereinafter cited as Freeman].

⁵⁸ Walker, *Disarming the Litigious Man: A Glance at Fault and California's New Divorce Legislation*, 1 PAC. L.J. 182 (1970); Comment, *The End of Innocence*, *supra* note 51, at 1318-23.

⁵⁹ Freeman, *supra* note 57 at 290. *Id.* Freeman suggests that the new law was written to avoid past charges of unfitness which unfairly "branded" parents. The new phrase, "least detrimental to the best interests of the child," is not meant to be supported with specific allegations.

charges that the mother was "unfit."⁶⁰), there was fear that it would encourage fault-based allegations,, since the new legislation forecloses other opportunities for the spouses to air their grievances.⁶⁰ In fact, it was thought that if husbands and wives could no longer charge each other with adultery, mental cruelty or other irresponsible behavior while litigating other divorce issues, they might turn to disputes over child custody if it provided the only arena for a fault-based battle.⁶¹ It was also believed that the threat of a custody suit might be used in the negotiations over property or support awards.⁶² Thus while allegations of promiscuity or adultery were inadmissible and irrelevant in a no-fault divorce, they might be introduced into evidence if custody were contested and thus the wife's fitness as the child's custodian were at issue. Similarly, a husband's physical abuse of his wife and/or children would normally have no bearing on a no-fault divorce and could not be discussed in court. His wife, however, could submit evidence of his misbehavior if he requested custody, if she wanted to show that he would be an unfit caretaker.⁶³

⁶⁰ In traditional divorce law, as Michael Wheeler notes, the grounds for divorce and the resolution of custody disputes were also two separate matters. But in practice, custody disputes typically relied on charges of fault and unfitness:

[N]otions of fault have become entwined in custody law . . . It was not enough for the father to prove that he would be a better custodian, but he also had to establish that his former wife was so irresponsible or immoral that she would actually harm the child, either physically or emotionally.

M. WHEELER, *NO-FAULT DIVORCE* (1974). Similarly, in the more vivid language of Victor and Winkler, "the parent desiring custody has to prove the "unfitness" of the other parent, [and] the one who will stoop the lowest in mudslinging, slander, character defamation, perjury, and vilification of the other is the one who has the best chance of gaining custody . . . or being declared the most 'fit' parent."

I. VICTOR & W. WINKLER, *FATHERS AND CUSTODY* 37 (1977).

⁶¹ Krom, *supra* note 55, at 178-79; Comment, *supra* note 51, at 1328-29; Comment, *The Role of the Child's Wishes in California Custody Proceedings*, 6 U.C. DAVIS. L. REV. 332, 346-49 (1973).

While some legislators doubted that anyone would "create" a battle when none was necessary, our interviews with California judges and lawyers reflect the widespread belief that "some" divorcing people need to "fight" and to vent their hostility at their ex-spouse. If they can not legitimately challenge the granting of the divorce itself, they might turn to custody to secure a forum to air their grievances.

⁶² The extent to which attorneys were willing to suggest threatening a custody suit in order to gain some advantage in the property negotiations is explored in our forthcoming book, L. WEITZMAN, H. H. KAY, & R. DIXON, *NO FAULT DIVORCE: CHANGES IN THE LAW AND THE LEGAL PROCESS* [hereinafter cited as WEITZMAN, KAY AND DIXON].

⁶³ A thorough discussion of the extent to which a vindictive spouse may "use"

While the new law may have opened the door to spurious custody suits, it also opened the door to fathers who genuinely wanted to gain custody of their children after a divorce. In this regard, it is important to note that the passage of the no-fault divorce law coincided with the first stages of the fathers' rights movement and reflected, in part, a growing awareness of men's increased interest in parenting both during marriage and after divorce.⁶⁴

We began this research with two hypotheses about the impact of no-fault divorce on child custody. First, we predicted that an increased percentage of divorced fathers would request custody under the no-fault law. We assumed that some men would be genuinely interested in gaining custody; that others would feel morally wronged or vindictive enough to use custody as a means of intimidating or harrasing their ex-wives; and still others would ask for custody as a route to economic gain, especially if they thought that their ex-wives would be willing to take less property or support in order to avoid a custody fight. Second, we predicted that some of the spurious requests would be dropped and that others would be unsuccessful, resulting in a lower overall success rate for men who requested custody.

A. *The Impact of No-Fault Divorce On Physical Custody Requests and Awards*

To our surprise, neither of these predictions was supported by the 1972 data. First, under the no-fault divorce law there was no increase in the percentage of fathers who requested physical custody in 1972. As Table 1 shows, the percentage of husbands who requested sole physical custody of their children declined in Los Angeles, from 18% to 11%, between 1968 and 1972 (statistically significant at the .05 level), and rose slightly in San Francisco, from 11% to 14% (not statistically significant.) Thus the no-fault law had no consistent or significant impact on custody requests.

the legal process to embarrass or harass an ex-spouse is beyond the scope of this article. Our interviews with recently divorced California men and women, however, clearly indicate that many spouses feel that a variety of legal actions have been undertaken to express "emotional" needs.

⁶⁴ See generally Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1224-26 [hereinafter cited as Weitzman].

Goode discusses three factors which influenced traditional fathers to want the mother to have custody: (a) the social role of the father (b) the male's lack of child care skills and (c) his allocation of time to his occupation. Goode, *supra* note 45, at 312.

TABLE 1
HUSBAND'S REQUEST FOR PHYSICAL CUSTODY, 1968-1972
SAN FRANCISCO AND LOS ANGELES COUNTIES

	San Francisco		Los Angeles	
	1968 (n=276)*	1972 (n=241)	1968 (n=310)*	1972 (n=245)
Wife (sole physical custody)	85.9%	84.2%	79.7%	86.9%
Husband (sole physical custody)	10.5	14.1	18.4	11.1
Children split	0.0	.4	1.3	1.2
Joint physical custody	1.1	.8	.3	.4
Other	2.5	.4	.3	.4
Total	100.0%	99.9%	100.0%	100.0%
Total husband's requests (sole, split and joint)	11.6%	15.3%	20.0%	12.7%

*n designates the number of families with minor children at the time of the divorce (for which the relevant information was available) in each sample of approximately 500 divorce cases.

Table 1 also indicates that the no-fault law had no significant impact on the percentage of husbands who requested split custody (i.e., that one or more children be awarded to the husband with another or others to the wife) or joint custody (i.e., that physical custody be shared by the husband and wife).

Second, there was no significant difference in paternal custody awards. Table 2 shows that the percentage of sole physical custody awards to husbands declined slightly in Los Angeles between 1968 and 1972 (from 9% to 6% of the cases with minor children) and rose slightly in San Francisco (from 9% to 10%).

TABLE 2
PHYSICAL CUSTODY AWARDS, 1968-1972
SAN FRANCISCO AND LOS ANGELES COUNTIES

	San Francisco		Los Angeles	
	1968 (n=267)	1972 (n=228)	1968 (n=310)	1972 (n=245)
Wife (sole physical custody)	88.4%	84.6%	87.7%	88.8%
Husband (sole physical custody)	8.6	9.6	9.4	5.8
Children split	1.1	1.8	2.3	2.9
Joint Physical Custody	.4	2.2	0.0	.8
Other	1.5	1.8	.6	1.7
Total	100.0%	100.0%	100.0%	100.0%
Total to husband (sole, split and joint)	10.1%	13.6%	11.7%	9.5%

Nor was there any significant difference in the success rate of fathers who requested custody. It remained fairly stable. For example, in Los Angeles 35% of the fathers who requested physical custody received it in 1968 as did 37% of those who requested it in 1972.

It should be noted that some husbands who did not request custody (on the divorce petition or response) were awarded it nevertheless. This seemingly improbable situation occurs when there is a private agreement between the parties, the wife files for a divorce, and the husband does not participate in the formal legal process. Thus, the success rate of husbands, which is the percentage of awards to those husbands who requested custody, does not always correspond to the total percentage of custody awards to husbands.

These data appear to indicate that the no-fault law did not lead to an increase in spurious custody claims. While it is difficult to tell from court records what proportion of fathers was requesting custody on the petition because they really wanted it, and what proportion was doing so solely or primarily to escalate the legal conflict, it is indicative that the same percentage of fathers' custody claims under the new law were seen as justified, at least in the eyes of the court. If this interpretation is correct, then the no-fault law, by denying a forum for airing grievances in matters of spousal support or property division, did *not* lead to an escalation of frivolous or punitive custody claims by fathers.

B. The Impact of No-Fault Divorce on Legal Custody Requests and Awards

Thus far we have focused on physical custody decisions which designate the parent with whom the child will live. The court, however, also awards legal custody to one or both parents, and it may differ from the physical custody award. The child's legal custodian is responsible for the education and welfare of a child under 18; he or she may control the child's religious instruction and has the authority to authorize medical care for the child.⁶⁵

⁶⁵ Legal custody may be awarded to one or more persons or the child may be made a ward of the court. See generally CAL. CIV. CODE §§ 4000-4003.

The person awarded custody of a child is responsible to provide at least a minimum of schooling. But there is no obligation to provide a college education. . . . Except as may be agreed to between the parents and approved by court, the religion a child may or may not be taught is left to the discretion of the person who has its custody. . . . Power to delegate authority to authorize medical care for the child is in the parent or person with custody. Such delegation

The percentage of husbands receiving legal custody of their children was similar to the percentage receiving physical custody in both 1968 and 1972. As Table 3 shows, this percentage again declined slightly between 1968 and 1972 in Los Angeles and rose slightly in San Francisco, once more indicating no consistent or statistically significant effect of the new law.

TABLE 3
LEGAL CUSTODY AWARDS, 1968-1972
SAN FRANCISCO AND LOS ANGELES COUNTIES

	San Francisco		Los Angeles	
	1968 (n=263)	1972 (n=221)	1968 (n=310)	1972 (n=245)
Wife (sole legal custody)	80.6%	72.4%	87.7%	87.6%
Husband (sole legal custody)	6.8	8.1	8.4	5.4
Children Split	1.5	.9	2.3	2.9
Joint legal custody	10.3	16.3	1.0	2.9
Other	.8	2.3	.6	1.2
Total	100.0%	100.0%	100.0%	100.0%
Total to Husband (sole, split and joint)	18.6%	25.3%	11.8%	11.2%

The data in Table 3 reflect a surprisingly high rate of joint legal custody awards in San Francisco in both 1968 (10%) and 1972 (16%). Despite the similarity in the pattern of requests for joint legal custody in the two counties (2% in each county), San Francisco judges were apparently significantly more likely to award joint legal custody than Los Angeles judges. The rate of joint legal custody awards did rise slightly between 1968 and 1972 in both counties: from 1% to 3% in Los Angeles and from 10% to 16% in

must be in writing.

Address by Judge E. M. Porter, Los Angeles Municipal Court, *American Academy of Matrimonial Lawyers, Northern California Chapter, Regional Family Law Symposium 133* (April 10, 1977).

As Judge Porter noted:

The custody of a child includes the power to mold and shape a child for good or to twist and warp its personality for ill. However, the discretion of the parent does not include the right wilfully to inflict personal injuries beyond the limits of reasonable parental discipline. Parent is also liable to the child for injuries sustained through the negligence of the parent. The test is the standard of conduct expected of a prudent parent under similar circumstances.

Id. at 133.

San Francisco (both statistically insignificant differences).⁶⁶

In summary, contrary to our predictions that the enactment of the no-fault divorce law would lead to more custody disputes, and to more paternal custody awards, no such effects appear to have occurred. On the whole, fathers' requests for physical and legal custody were not significantly different, nor was there any significant increase in physical or legal custody awards to fathers.

C. *The Impact of No-Fault Divorce on Visitation Orders*

The traditional formula for parenting after divorce is to award legal and physical custody of the children to one parent, and visitation rights to the other. Prior statutory law did not spell out the standards for establishing visitation rights.⁶⁷ Consequently, the courts developed standards on a case-by-case basis. The no fault law, however, attempted to make these standards explicit by providing for "reasonable" visitation rights to be awarded to the non-custodial parent except where detrimental to the child's best interest.⁶⁸ Unfortunately, this new standard is still vague and gives rise to disputes about whether a particular visitation arrangement is harmful to the child. Thus, it provides parents with another arena for airing their grievances against one another by claiming that the time, location, activities, or parental behavior during visitation have a detrimental effect on the child.⁶⁹

Our court observations included many disputes over visitation in which a wide variety of fault-based allegations were made: charges that physical violence was used against children or the spouse in the children's presence, claims that abusive language, liquor, or drugs were used in the children's presence, allegations of sexual misconduct (by the father or by the wife's male companions) toward the children, assertions that the children were taken

⁶⁶ Baum, *The Best of Both Parents*, N. Y. TIMES MAGAZINE, October 31, 1976, at 44-48; Grote & Weinstein, *Joint Custody: A Viable and Ideal Alternative*, 1 J. DIVORCE 43-53 (1977); Cox & Cease, *Joint Custody*, FAM. ADVOCATE, Summer 1978, at 10-13, 42-44.

⁶⁷ Bodenheimer, *Equal Rights, Visitation and the Right to Move*, FAM. ADVOCATE, Summer 1978, at 18, 19.

⁶⁸ CAL. CIV. CODE § 4601 (West 1979) provides:

Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child.

⁶⁹ Attorney Richard Johnson observes that the use of "reasonable" visitation orders has often led to more litigation between "unreasonable" parents. *Visitation: When Access Becomes Excess*, FAM. ADVOCATE, Summer 1978, at 14, 15.

to dangerous or inappropriate places during visits, and other charges of abusive and harmful behavior. Nevertheless visitation privileges were almost never denied by the court. In fact, in both 1968 and 1972 divorces, fewer than one percent of the Los Angeles fathers were forbidden to see their children. The percentage was only slightly higher in San Francisco, as Table 4 indicates.

TABLE 4
VISITATION AWARDS, 1968-1972
(on the interlocutory decree, where specified)
San Francisco and Los Angeles Counties

	San Francisco		Los Angeles	
	1968 (n=242)	1972 (n=215)	1968 (n=314)	1972 (n=241)
Unrestricted	2.1%	1.4%	0.3%	0.8%
"Reasonable"	91.7	90.2	95.2	92.1
Specified 0-4 days per month	4.1	3.3	3.2	3.3
Specified 5 days or more per month	0.8	2.3	0.6	2.9
Visitation denied	1.2	2.8	0.6	0.8
Total	99.9%	100.0%	99.9%	99.9%

Table 4 shows that over 90% of the visitation orders are for "reasonable" visitation, leaving the precise arrangements to the parents to work out. Only five percent of the interlocutory decrees either spell out the visitation order in greater detail, or make reference to a marital agreement which specifies the particular days and times at which visitation is permitted. While some of these agreements include elaborate specifications for birthdays, Christmas, alternate Saturdays and Sundays, particular afternoons, summer vacations, and other times, they are clearly not the norm.

One might anticipate that the narrower scope of fault-based allegations allowed under the Family Law Act would have restricted the visitation incidents reported, and therefore would have resulted in more liberal visitation awards. But visitation was almost never denied under the old law when a much wider range of accusations was admissible.

Nevertheless, disputes over visitation may provide an arena for a continuous battle between the spouses and may persist long after the divorce is finalized.⁷⁰ It is therefore not surprising to find

⁷⁰ As Goode, *supra* note 45, at 313 observed,
[T]he relationship with children contains one of the most impor-

that the courts set additional conditions on the exercise of visitation rights in about 20 percent of the cases in both 1968 and 1972. The majority of these restrictions fell into a few categories: requiring the husband to notify his ex-wife before visiting the children, requiring the father to visit with the children in their home (or explicitly allowing or requiring him to take them somewhere else), and restricting visitation to times when the father was not under the influence of alcohol or drugs.⁷¹ Unfortunately, there is no way of knowing from the court records how frequently any of these specifications are observed.⁷²

The issue of visitation is becoming increasingly controversial as experts begin to debate whether it is a *right* for husbands to exercise, or an *obligation* that must be fulfilled except under unusual circumstances. At least one commentator, Professor Bruch, has suggested that courts apply some form of negative sanctions to husbands who consistently fail to visit their children because visitation must be viewed not only as a matter of parental rights, but also as one of children's rights.⁷³

D. *The Impact of No-Fault Divorce on Child Support*

The law has traditionally assigned the father the major legal

tant weapons in the conflict of wills between ex-spouses: both during the divorce conflict and afterwards. This exploitation of the parent child relationship may, of course, be unconscious, since few parents can admit that they use their children as punitive instruments. Our child centered values are rather strongly against any such open usage.

Nevertheless, as Goode notes, visitation is often made more difficult by the wife's making visits hard or excessively restrictive for the husband, the husband's impinging on the wife's plans by being late and/or failing to take the children when promised, and both parents using the children to get at, or find out about, the other spouse.

⁷¹ Temporary orders forbidding a spouse from removing the child from the county or state were filed in 4% to 11% of the cases in the two counties between 1968 and 1977. Interlocutory decrees contained similar injunctions in 3% to 9% of cases with minor children.

⁷² We did obtain information on actual visitation patterns and compliance with court ordered specifications in the interviews with recently divorced California men and women. This information will be reported in WEITZMAN, KAY AND DIXON, *supra* note 62.

⁷³ Bruch, *Making Visitation Work: Dual Parenting Orders*, FAM. ADVOCATE, Summer 1978, at 22, 41. Bruch argues that visitation must be viewed as a child's right for two reasons: first, to relieve the child of the "specter of abandonment that haunts some children of divorces, and second, to enrich the child's relationship with the custodial parent by occasionally relieving that parent of the duties of a single-parent household. *Id.* at 26.

responsibility for the financial support of minor children.⁷⁴ And until recently it was widely assumed that fathers both *should* and in fact *did* bear the major burden of child support after divorce. For example, Robert Levy's 1968 analysis of the proposed uniform marriage and divorce legislation urged the Conference of Commissioners on Uniform State Laws to impose an equal obligation for child support on the wife,⁷⁵ clearly implying that wives did not then share such responsibilities equally.

However, it is empirically doubtful whether fathers actually assumed the major burden of child support after divorce. If one considers the generally low level of court-ordered child support awards, the high incidence of noncompliance with these court orders (e.g., irregular payments, arbitrarily reduced payments, and the cessation of payments entirely), the wife's opportunity costs (in foregone employment and/or career advancement), and the additional direct costs born by the wife in paying for the child's food, clothing, housing, babysitters and other childcare, it becomes evident that the custodial mother has typically born an equal if not greater share of the cost of raising children after divorce.⁷⁶ Thus, a 1972 report of the Citizens' Advisory Council on the Status of Women concluded that "the data available indicate that payments generally are less than enough to furnish half of the support children," and that in most cases, ". . . the mother is actually fulfilling a coextensive duty of support to the child."⁷⁷

In order to evaluate the impact of no-fault divorce on child support we first had to calculate the proportion of total child support contributed by each parent before the law changed. With this aim, we examined the amount of child support the non-custodial parent was ordered to pay and compared that amount to the actual cost of raising children.

In our 1968 samples of divorce decrees the median amount of child support ordered for each child was \$73 per month in San

⁷⁴ For an analysis of the social, psychological and economic effects of this obligation, see *The Husband's Responsibility for Family Support* in WEITZMAN, *THE MARRIAGE CONTRACT: COUPLES, LOVERS AND THE LAW* (1979) [hereinafter cited as WEITZMAN, *THE MARRIAGE CONTRACT*].

⁷⁵ Robert J. Levy, *Uniform Marriage and Divorce Legislation: A Preliminary Analysis* (report prepared for the Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws). NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 1968, at 205.

⁷⁶ See generally, *The Responsibility for Children* in WEITZMAN, *THE MARRIAGE CONTRACT*, *supra* note 74.

⁷⁷ CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, U.S. DEPT. OF LABOR, *THE EQUAL RIGHTS AMENDMENT AND ALIMONY AND CHILD SUPPORT LAWS 6-7* (1972).

Francisco and \$65 per month in Los Angeles. The median total amount of child support per month per family (for all children) was \$102 in San Francisco and \$110 in Los Angeles. Even if there was total compliance with these court-ordered child support awards they could not have provided half of the actual cost of raising children.⁷⁸ Apparently then, the custodial mother must have typically contributed an equal if not greater amount of child support in 1968 before the no-fault law was instituted.

Because the California Family Law Act made no change in the specifications for child support, we predicted no shifts in the pattern or amount of child support awards under the new law. In general these predictions are supported by the data. With respect to the pattern of child support awards, Table 5 shows that the percentage of awards to the wife declined slightly between 1968 and 1972 in both counties, while the percentage of cases in which child support was *not* awarded (often those with split or joint custody or when the whereabouts of the noncustodial spouse were not known) increased slightly. These differences, however, are *not* statistically significant. In both years, wives were awarded child support in about 80 to 85 percent of the cases — slightly lower than the percentage receiving custody — while husbands were awarded child support in about 2 to 3 percent.

TABLE 5
CHILD SUPPORT AWARDS, 1968-1977
LOS ANGELES AND SAN FRANCISCO COUNTIES

	San Francisco		Los Angeles		
	1968 (282)	1972 (248)	1968 (327)	1972 (251)	1977 (257)
Child support awarded to:					
Wife	83.0%	77.4%	84.7%	82.1%	85.2%
Husband	3.2	1.6	1.5	2.0	0.4
Third party	0.0	0.8	0.3	0.0	0.0
Other	1.1	2.8	0.9	0.8	3.9
Not awarded	12.8	17.3	12.5	15.1	10.5
Total	100.1%	99.9%	99.9%	100.0%	100.0%

With respect to the amount of child support awarded, average monthly awards showed a net decline in real monetary value in light of inflation. The median amount of monthly support ordered for each child failed to keep up with inflation between 1968 and 1972 increasing from \$73 to only \$76 in San Francisco, and from

⁷⁸ See note 79 *infra* and accompanying text.

\$65 to \$75 in Los Angeles. The total value of the child support awards per family declined even more, in part because couples had fewer children on the average in 1972. The median total child support award in San Francisco remained at \$102 for both years. In Los Angeles the median award was \$110 in 1968, and \$121 in 1972. These data are presented in Table 6. Surprisingly, less than ten percent of the child support awards were tied to potential increases in the husband's income, or to cost of living increases. Thus, even if husbands had complied fully with these child support awards the payments would have been gradually consumed by inflation and with each passing year the wife would have had to assume an even greater share of the financial responsibility for the children.

Yet even without future increases in the cost of living, these data indicate that *mothers were carrying more than half the responsibility for child support at the time of the divorce*, for the average child support award in 1972 provided less than one-half of the direct cost of raising children in a low income family. For example, when compared to the estimated cost of raising two children to age 18 made by a large national Consumer Expenditure Survey in 1960-61, the median amount of total child support ordered in our 1972 Los Angeles sample is only *half* that required for *low income families at 1960-61 prices*.⁷⁹

The low level median monthly child support awarded by the court is due, in part, to the large number of low income families in the divorcing population. This suggests the importance of analyzing support awards in terms of the husband's monthly income. According to Los Angeles County Superior Court guidelines for

⁷⁹ T. ESPENSHADE, *THE COST OF CHILDREN IN THE UNITED STATES* 46, University of California, Berkeley, Population Monograph Series, No. 14 (1973). In 1960-61 the cost of raising two children to age 18 was \$37,655 for the first child and \$17,928 for the second, or a total of \$55,583 for urban *low income families*. This averages \$2,779 per year for two children.

The median amount of total child support in our 1972 Los Angeles sample was \$121 per month for a median of 1.9 children or \$1,452 per year, which is only half that required for low income families at 1960-61 prices. The cost of raising two children to age 18 for middle income families is estimated at \$61,442 total, or \$3,072 per year; for upper income families, \$71,644 total, or \$3,582 per year in 1960-61.

These monetary estimates do not even take into account the mother's *time costs* which, if added, would indicate that the custodial parent assumes an even greater share of the total cost of rearing the children. See, e.g., Clair Vickery's innovative analysis of time and monetary resources in *The Time-Poor: A New Look at Poverty*, 12 J. HUMAN RESOURCES 423 (1977).

TABLE 6
AMOUNT OF CHILD SUPPORT AWARDED PER MONTH, 1968-1977
San Francisco and Los Angeles Counties

	<u>San Francisco</u>		<u>Los Angeles</u>		
	1968 (245)	1972 (197)	1968 (283)	1972 (212)	1977 (221)
Support per child					
Under \$50	14.3%	16.2%	17.7%	14.6%	5.9%
\$50 to \$99	61.2	41.9	56.7	45.3	26.7
\$100 to \$149	20.4	29.3	19.8	29.8	36.2
\$150 or more	4.0	12.5	5.7	10.4	31.2
	<u>99.9%</u>	<u>99.9%</u>	<u>99.9%</u>	<u>100.1%</u>	<u>100.0%</u>
Median per child	\$ 73	\$ 76	\$ 65	\$ 75	\$100
Mean per child	\$ 71	\$ 91	\$ 76	\$ 88	\$126
Total child support					
Under \$50	6.1%	7.7%	2.5%	2.8%	2.3%
\$50 to \$99	30.7	24.3	27.6	26.7	14.9
\$100 to \$149	24.5	24.9	30.9	27.3	25.8
\$150 to \$199	17.5	13.2	19.5	15.0	13.6
\$200 or more	21.2	29.9	19.6	28.2	43.4
	<u>100.0%</u>	<u>100.0%</u>	<u>100.1%</u>	<u>100.0%</u>	<u>100.0%</u>
Median total	\$102	\$102	\$110	\$121	\$150
Mean total	\$128	\$158	\$143	\$147	\$195

temporary support orders, a "provider" spouse would not ordinarily be expected to pay more than half of his net monthly income to a non-employed custodial spouse, regardless of the number of children. Thus, the wife and two children of a man earning \$1,000 per month net could expect no more than \$500 to live on, while the husband would retain an equal amount for himself. At lower incomes, of course, the support dilemma becomes critical: a man bringing home \$600 per month would be expected to pay \$300 per month maximum for a dependent spouse and one, two, or three or more children. (The figure of \$600 is not atypical: the reported median net monthly income of Los Angeles husbands receiving final decrees of divorce in 1972 was \$587.) At these levels and below, a non-employed custodial mother would generally require state assistance.

Although not all court dockets included information on the husbands' income, in those cases in which the husband's net income was reported (by him, or could be estimated from his reported gross income, or from his wife's statement of his net or

gross), we were able to calculate the percentage of the husband's net income ordered for child support. Table 7 shows that in this sub-sample of cases, the percentage of the husband's net income going to child support held constant between 1968 and 1972 at about 30% in San Francisco (where average net incomes are lower) and 25% in Los Angeles. These percentages are overestimated to the extent that husbands underreport their incomes on the financial declaration. Not surprisingly, the more children in a family that were under age 18, the higher the percentage of the husband's net income that went to child support. But the higher the husband's income, the lower the percentage ordered for child support.

TABLE 7

TOTAL AMOUNT OF CHILD SUPPORT AWARDS AS A PERCENTAGE
OF HUSBAND'S NET INCOME 1968-1977
San Francisco and Los Angeles Counties

	San Francisco		Los Angeles		
	1968	1972	1968	1972	1977
	43	57	135	98	130
Median percentage	32.2%	29.1%	25.0%	24.4%	22.6%
Mean percentage	35.3%	33.5%	28.6%	25.3%	25.2%

The data reported above refer only to court ordered child support and therefore do not take into account the degree of noncompliance with court orders. Where child or spousal support or both were ordered, orders to show cause why the provider should not be held in contempt were filed within one year of the interlocutory decree in 16% of the 1968 San Francisco cases and 8% of the 1972 cases, and in 26% and 16% respectively of the Los Angeles cases. But even these figures underestimate the degree of noncompliance with court-ordered child support since they include only those cases brought to court within the first post-decree year, and only those cases in which the noncompliance was extreme enough or the custodial parent was willing and able (in terms of time, energy and monetary resources) to return to court. Other research has placed the rate of noncompliance with child support orders at 50% or more.⁸⁰

E. The New Age of Majority for Child Support

Quite apart from the Family Law Act, divorced mothers in 1972 were typically required to bear a heavier burden for child support because the legal age for minors in need of support was reduced from 21 to 18 years. Effective March 4, 1972, the California legislature reduced the age of majority for most purposes from 21 to 18 years, amending Civil Code section 25 to provide that "Minors are all persons under 18 years of age."⁸¹ As a consequence, children who were 18 to 20 in 1972 (if the interlocutory decree was granted after March 4) were no longer considered to be minors in need of support, unless otherwise specified. The amendment was drafted to exclude previous child support orders from the generally retroactive intent of the legislature, although the wording is ambiguous.

About 85 percent of the child support orders in 1968 in both San Francisco and Los Angeles stated that they were to terminate at the age of majority or at emancipation, whichever came first, or at the further order of the court. The latter was understood to end at majority unless termination was ordered earlier. In 1968 the age of majority was 21, and only two cases specified a termination date at age 18. In 1972, 75% of San Francisco cases and 85% of Los Angeles cases used an equivalent terminology in the child support orders. With the exception of interlocutories granted before March 4, these orders implied termination of child support at age 18.

Thus women divorced in 1972 suddenly found themselves with a heavier burden of child support for children between 18 and 21 in their custody, just when expenses for schooling were likely to be heaviest. Fewer than 5% of cases in any year specifically required the husband to pay for the children's education. A slightly higher percentage of fathers (about 40% in Los Angeles, half that in San Francisco) were required to pay medical expenses, but only until the age of majority.

Cumulatively, these data indicate that the major responsibility for child support typically fell on the custodial mother in both 1968 and 1972. Although over 80% of the noncustodial fathers were ordered to pay child support in both years, the amount of child support awarded was usually less than half of the minimum financial cost of rearing a child. As a result the custodial mother

⁸¹ 1971 Cal. Stats. ch. 1748 § 23. See also 1972 Cal. Stats. ch. 38 § 4 (codified in CAL. CIV. CODE § 25 (West Cum. Supp. 1979)).

was usually left with the de facto burden of providing more than half of the child support.

In addition, the financial costs of winning custody grew between 1968 and 1972: not only were child support awards worth less in real dollar value in 1972 than those in 1968; in the absence of built in cost-of-living increases, their real dollar value continued to decline each year after the divorce. Finally, support awards were now terminated at age 18, an age at which many children continued to live with and be financially dependent upon the custodial parent.

IV. REPEAL OF THE MATERNAL PRESUMPTION

In 1973, the maternal preference was removed from the law and judges were instructed to award custody to either parent "according to the best interests of the child."⁸² Fathers who had complained of the sex bias in the old law and asserted that it prevented men from even trying to gain custody, welcomed the change as the beginning of a new era of "equal rights for fathers."⁸³ At the same time the women's liberation movement was encouraging women to be more career oriented and less tied to traditional norms of exclusive motherhood. This helped to dissuade at least some women from assuming that they alone had to be responsible for their children after divorce.⁸⁴ The women's

⁸² Act of Aug. 17, 1972, 1972 Cal. Stats. 1854, ch. 1007, § 1 (codified at CAL. CIV. CODE § 4600 (a) (West Cum. Supp. 1979)).

⁸³ The "new legal era" probably began with the Supreme Court's decision in *Stanley v. Illinois* 405 U.S. 645 (1972) (presumption that an unwed father is an unfit parent held to be unconstitutional as a denial of both due process and equal protection). See also Comment, *The Rights of Fathers of Non-Marital Children to Custody, Visitation and to Consent to Adoption*, this issue.

In the years directly preceding the change in the California law the national and local news media had focused considerable attention on fathers who had asked for custody of their young children, and divorced fathers in the Bay Area had formed an active organization, "Equal Rights For Fathers," which aided men seeking legal help and social support for their custody claims. Equal Rights for Fathers Leaflet, N.D. (circa 1973) P.O. Box 6367, Albany, CA 94706. See also Lane, *Group Works For Father's Rights*, Oakland Tribune, January 2, 1974. LEVINE, *supra* note 39, at 44, observes that at the same time (1972 to 1975), "Fathers' rights groups were springing up all over the country." "Fathers United for Equal Justice," which started in Boston as a group of six divorced men meeting to share their problems grew into a 600-member organization by 1975. It also provides men with legal and emotional support and "watchdogs judges of particular prejudice." *Id.*

⁸⁴ The negative effects of the pro-mother presumption on women are discussed in Weitzman, *supra* note 64, at 1193-97. See also Rollin, *Motherhood*:

movement also supported those women who did not want custody of their children after divorce, asserting that these mothers should not feel guilty, deviant, or pressured into the custodial role.⁸⁵ Thus quite apart from the law itself, the social climate was changing: both mothers and fathers were being encouraged to allow fathers to assume greater parental responsibility after divorce.⁸⁶

Although journalistic accounts of the widespread incidence and acceptance of father custody seemed exaggerated,⁸⁷ we nevertheless predicted that the changing social and legal norms would make it easier for fathers to ask for and gain custody of their children after divorce, and that the 1977 sample of Los Angeles divorce decrees would reflect these increases.⁸⁸

Once again, however, our hypothesis was not substantiated by the data. The relative proportions of mothers and fathers who were awarded custody of their children in Los Angeles divorce decrees remained virtually the same in 1977, four years after the mother preference was eliminated. Comparing Tables 2 and 3 with Table 8 indicates that there was no statistically significant

Who Needs It. THE FAMILY IN TRANSITION (A. & J. Skolnick eds. 1971).

⁸⁵ Psychotherapists Susan Gettleman and Janet Markowitz argue that women should relinquish custody to their husbands "so that they themselves will have more time and energy to devote to education and job training and can therefore, move more rapidly toward economic self-sufficiency." S. GETTLEMAN & J. MARKOWITZ, *THE COURAGE TO DIVORCE* 217-19 (1974). As they note, many women "have become primary caretakers not just because they are capable and devoted to their children, but because they have grown up in a society that conditions them to be mothers, while offering them few other alternatives." *Id. cited in* LEVINE, *supra* note 39, at 60. They therefore argue that women (and children) would be better off if this role were not perpetuated — and if we instead made it the normal practice to award custody to fathers after divorce.

⁸⁶ See generally *THE FAMILY IN TRANSITION* (A. & J. Skolnick eds. 1980 forthcoming); LEVINE, *supra* note 39; Palme, *The Emancipation of Man*, 28 *J. Soc. ISSUES* 237-46 (1972); W. FARRELL, *THE LIBERATED MAN* (1974) (ch. 7 is especially interesting); Men's New Roles in the Family: Housework and Childcare, (Nov. 1975) (unpublished paper in Wellesley Center for Research on Women); Pleck, *Men's Family Work Role*, *THE FAM. COORDINATOR* (forthcoming 1979); Fein, *Research on Fathering: Social Policy and an Emergent Perspective*, 34 *J. Soc. ISSUES* 122-35 (1978).

⁸⁷ As did the glib empiricism of legal scholars who deduced a social trend from a single case. See, e.g., Solomon, *The Fathers' Revolution in Custody Cases*, *TRIAL*, October 1977, 33-37. See also Molinoff, *Increased Demand by Divorced Fathers for Custody*, *N. Y. Times* April 27, 1977, at 7, col. 1; and Molinoff, *Life With Father*, *N. Y. TIMES MAGAZINE*, May 22, 1977, at 12-17.

⁸⁸ The 1977 sample was limited to Los Angeles as explained *supra* note 11.

increase in the percentage of fathers who either asked for or were awarded custody of their children between 1972 and 1977. In both 1972 and 1977, Los Angeles fathers were awarded sole legal or physical custody in 5% to 6% of the final decrees, while mothers were awarded sole physical custody in 88% to 90% of the final decrees, and sole legal custody in 88% to 89% of the final decrees.

TABLE 8
LEGAL AND PHYSICAL CUSTODY AWARDS 1977
LOS ANGELES COUNTY

	Physical Custody (n=246)	Legal Custody (n=246)
Wife (sole custody)	90.2%	89.0%
Husband (sole custody)	6.1	6.1
Children split Joint custody	1.6	1.6
Other	2.0	2.8
Total	0.0	.4
	99.9%	99.9%
Total to Husband (sole, split and joint)	9.7%	10.5%

The 1977 data do reflect two small and statistically insignificant changes that are nevertheless in accord with our predictions. First, although the percentages are tiny, there does appear to be a slight increase in joint physical custody awards in Los Angeles (from 0% of the 1968 cases, to less than 1% of the 1972 cases, to 2% of the 1977 cases) indicating that more couples are willing to share the day-to-day tasks of raising children. This change is too small to be statistically significant in a random sample in which only half of the couples had minor children, but it may signal a future trend.

A second notable but statistically insignificant change is in the "success rate" of fathers who ask for custody, as shown in Table 9. Although the number of fathers requesting custody is small, among those fathers who requested physical custody, 35% were awarded it in 1968, 37% in 1972, and 63% in 1977. Similarly, the success rate of fathers who requested legal custody rose from 33% in 1968, to 35% in 1972 to 63% in 1977. Thus, by 1977, a surprisingly large proportion—close to two-thirds—of the fathers who requested custody were awarded it.⁸⁹

⁸⁹ This is discussed further in text following note 121 and accompanying notes 122-24, *infra*.

TABLE 9

SUCCESS RATES OF HUSBAND'S WHO ASK FOR SOLE CUSTODY
LOS ANGELES COUNTY

	Physical Custody	Legal Custody
1968	35% (n=57)	33% (n=60)
1972	37% (n=27)	35% (n=26)
1977	63% (n=16)	63% (n=16)

Despite these small changes in joint custody awards and fathers' success rates, it is important to emphasize that women continue to be awarded both physical and legal custody of their children in the overwhelming majority of the cases. Thus, *the major finding in these data is the continued strength of the preference for the mother as the custodian of children after divorce.*

One explanation for the enduring maternal preference is that judges are still following the traditional standard: most judges, having spent the major portion of their legal careers in an era in which a mother's special nurturing abilities were unquestioned,⁹⁰ may still be reluctant to "take little children away from their mothers." These judges may themselves believe that mother custody is in the child's best interest. In fact, 81% of the Los Angeles judges we interviewed said they thought that there was still a presumption in favor of the mother for preschool children, although most of them qualified their responses by noting that the presumption was an attitudinal predisposition rather than "the law."⁹¹ Similarly, in a 1976 survey of judicial attitudes in Illinois, judges who were primarily responsible for hearing divorce cases held an "underlying assumption that the mother would assume custody and the father would assume support obligations."⁹²

Judges' attitudes alone, however, cannot explain what happens in the vast majority of divorce cases since only 10% of the divorce cases in our Los Angeles and San Francisco samples went to trial.⁹³ In addition, as we have already seen, the court records

⁹⁰ See notes 29 through 50 and accompanying text *supra*.

⁹¹ As one judge explained "Even though the law says there isn't a presumption I think that mothers make better mothers."

⁹² Johnson, *Divorce, Alimony, Support and Custody: A Survey of Judges Attitudes in One State*, 3 Fam. L. Rep. (BNA) 4003 (1976).

⁹³ This is not to deny the precedent setting value of the decisions made in those contested cases. It also does not neglect the judicial influence in preliminary hearings and through temporary orders. Our contention is simply that judges do not directly shape the outcome of the vast majority of divorces.

indicate that when fathers do request custody, they have a fairly good chance of obtaining it.⁹⁴ Consequently, the predominance of mother custody awards must be explained by examining an earlier stage in the legal process: either the negotiations between clients and attorneys, or the decisions made by husbands and wives before they talk to their attorneys. Perhaps the low percentage of father custody awards is the result of lawyers dissuading fathers from asking for custody.⁹⁵ Another possibility is that the divorcing couple may themselves decide that their children will be better off living with the mother after the divorce. The following section examines each of these possible explanations, turning first to the attorneys' interviews, and then to some preliminary data from interviews with recently divorced California men and women.

V. ATTORNEYS' ATTITUDES TOWARD CUSTODY

Attorneys play a central role in influencing the outcome of a divorce case because they provide their clients with their basic knowledge of the law and the legal process. Lawyers explain the law to their clients, help them decide what to ask for, and shape their expectations of what they will get. In addition, attorneys typically negotiate and thus influence the terms of the settlement itself. Because the vast majority of all divorce settlements are negotiated by lawyers and then "approved" by the court,⁹⁶ the

⁹⁴ As noted *supra*, 63% of the fathers who requested custody in 1977 were awarded custody. But this "finding" is qualified by the data reported in the text following note 124 *infra*.

⁹⁵ This is a charge frequently made by "Equal Rights for Fathers" (ERF). Field notes of Barbara Shimmel, Participant Observer at "Equal Rights for Fathers" meetings (September 1974 to June 1975) (on file at the California Divorce Law Research Project, Center for the Study of Law and Society, University of California, Berkeley).

Dave Gerfen, President of ERF was quoted as saying, "Even the father's lawyer will try to argue him out of trying to win custody of the children, regardless of the mother's fitness to have custody, because he knows it will be an expensive court battle with little chance for success. If the father insists on seeking custody, many attorneys will then refuse to handle his case." Even with the new law, ERF feels that the courts "arbitrarily award the children to the custody of the mother — independent of relevant testimony, regardless of existing laws and contrary to the best long-term interests of the children. The current system creates a 'quiet conspiracy' involving attorneys, judges, probation departments, Conciliation Courts — even the husband's attorney — and is clearly not in the best interests of the child." Oakland Tribune, Jan. 2, 1974, at 19, col. 1.

⁹⁶ It should be noted, however, that the percentage of couples who appear to be filing and obtaining a divorce/dissolution without an attorney has increased

attorneys' own opinions of appropriate custodial arrangements must have a significant influence.

Most of the Los Angeles attorneys' interviews⁹⁷ were conducted in 1975, two years after the presumption favoring mother custody was removed from the law. Nonetheless, 98% of these domestic relations specialists said that they perceived most judges as acting as though there were still a presumption in favor of the mother in making decisions about the custody of preschool children.⁹⁸ The consensus was not as clear, however, with regard to older children. Although about a third of the attorneys thought that judges used a maternal presumption in awarding custody of older children, another third reported that neither parent was preferred for older children because "the best interest of the child" was paramount. The final one-third of the attorneys said that the outcome depended on the child's preference, age, and sex.⁹⁹

Since the questions focused on the attorneys' perceptions of what judges will do, rather than on the attorneys' own opinions of what is right, these answers indicate how the attorneys think the law actually operates. These same predictions are therefore influential in shaping the attorneys' predictions in their clients' cases—and thus their advice to their clients. The attorneys' advice to clients affects, in turn, what clients will strive for and settle for.

Other data collected in the Los Angeles attorney interviews indicate that attorneys do, in fact, play an active role in influencing the custody decisions in the divorce cases they handle. For example, we asked each attorney if he or she had ever tried to talk a client out of trying to get custody and why. Over 95% of the attorneys reported having tried to dissuade a client from requesting custody. Of those who explained why,¹⁰⁰ 46% did so when they

dramatically under the new law. For example, in L.A., *in pro per* filings rose from 1% in 1968, to 5% in 1972, to 31% in 1977.

⁹⁷ This section focuses exclusively on the Los Angeles attorneys sample (n=92) because these interviews were conducted more recently. The responses of the San Francisco attorneys (to similar questions) in no way contradict the results reported here.

⁹⁸ This and all subsequent percentages in this section are based on the attorneys who responded to the question.

⁹⁹ When asked "if a child of 15 has a strong preference, will that be decisive?" 72% of the attorneys said "yes."

¹⁰⁰ The responses to this question and subsequent questions do not always add up to 100%. In some cases not all of the attorneys responded to each part of a question (i.e., not all explained "why"), and in other cases the attorneys could respond with more than one reason.

thought the client's legal chances were poor,¹⁰¹ 19% when they thought their client was trying to be vindictive,¹⁰² and 19% when the attorney did not believe that their client would be the better custodial parent.¹⁰³ These data indicate that attorneys do, in fact, try to influence custodial decisions, and their advice is based not only on their personal opinions of their clients,¹⁰⁴ but also on their evaluations of the client's chance of legal success.

On one hand these responses seem to support the inference that at least some attorneys try to dissuade men from asking for custody of young children,¹⁰⁵ especially when the 46% of the attorneys who were reluctant to ask for custody for a client whose legal chances "were poor," is read in light of the 98% who think an informal maternal presumption is still in effect.

On the other hand, the attorneys' own beliefs are more liberal than those they attribute to the courts, and these personal preferences must also affect the advice they give to clients. When asked for their personal preferences about the mother presumption for preschool children, only one-half (48%) of the attorneys said that they favored it, compared to 98% who thought most judges did.

¹⁰¹ Several attorneys mentioned the high cost of contested custody cases (estimated by one Beverly Hills attorney at \$15,000 with psychiatric reports and trial witnesses) and their interest in saving their clients (and themselves) time and money if the client had little chance of winning.

Other attorneys mentioned the "automatic assumption" of men from Latin American countries that they will get custody as they would at home. As one explained, "I tell them that this country is different and that there is equality for both spouses, and that it may be futile in their case. If they are stubborn about it I suggest they return home and seek a divorce there."

¹⁰² One attorney said "Generally speaking, a man is asking for custody to punish his spouse. He feels that he can hurt his wife the most by trying to take kids away from her." Another observed:

Often there is an ego battle with his wife. He wants to feel that he has won the case because he's lost his family and has nothing left after the divorce - no family and no children. So he tries to get custody to hold onto something - and to win the battle with her, but he doesn't really want custody - he wants to triumph over her.

¹⁰³ One attorney suggested another way of dealing with a client whom he thought would not be the better custodial parent:

I petition for the appointment of a court appointed psychiatrist, and let the psychiatrist make the evaluation. . . . [T]hose guys who evaluate custody cases for the court develop a real sensitivity. They're doing this all day long, and sort of have a feel for it. They can smell out a lot of nuances very quickly. . . .

¹⁰⁴ For example, whether the attorney believes that the client would make a better custodial parent, and whether the attorney believes that the client is being vindictive by trying to obtain custody.

¹⁰⁵ See notes 100 through 104 and accompanying text *supra*.

A significant minority of the attorneys (38%) believed that fathers should have an equal right to custody of young children. Another 13% were ambivalent.

A. *When Does the Maternal Preference Break Down?*

Given the reported strength of the maternal presumption in most cases, we wanted to examine the circumstances under which this preference broke down. We began this exploration by asking the attorneys in our sample the question directly: "Under what conditions do you think a husband is likely to get custody of a preschool child today?" The most frequently mentioned factors, in rank order, were: if the mother physically neglects the children (65%), psychologically neglects the children (36%), is sexually promiscuous (33%), is an addict (31%), is mentally unstable (27%), or is an alcoholic (23%).¹⁰⁶ It is only when we reach the seventh ranked factor, that the father had a better emotional relationship with the children, mentioned by 10% of the attorneys, that we reach the father's relationship with the children. These responses suggest that *custody issues are still framed in terms of the fitness or unfitness of the mother*. They also suggest that in balancing the merits of the two parents the attorneys still look to the mother first.

Of course these responses deal with answers to a hypothetical situation rather than to actual cases. Consequently we also asked the attorneys if they had handled any cases, as either the attorney for the husband or the wife, in which the husband was awarded custody of preschool children. Those who had were asked to identify the factors which were important in determining the award. Once more their responses focused on the mother's fitness. The most commonly mentioned factors were, in rank order: the mother's physical neglect of the children, sexual promiscuity, mental instability, and the mother's inadequate psychological care for the children.¹⁰⁷ Thus, the relative merits of the father as

¹⁰⁶ These were responses to an open end rather than a closed choice question. Up to 5 responses were coded for each attorney. Less than 10% of the attorneys mentioned the following factors: the father has more money, and can provide the children with more benefits (8%); the mother deserted the family home (8%); the mother's life-style is objectionable - her friends, living arrangements, etc. (6%); the mother is a lesbian (5%); the father remarried and the children could live with a whole family (5%); the father had more time to spend with the children (5%).

¹⁰⁷ The percentages of attorneys mentioning these factors were, in order, 27%, 26%, 26%, and 21%. The fifth and sixth factors, each mentioned by 19% of the attorneys were "the father has a better emotional relationship with the chil-

the custodial parent were ranked second to those of the mother.

Correspondingly, despite the best interests of the child standard, child-oriented factors do not rank very high either. When we grouped the attorneys' responses to the hypothetical question about the conditions under which a husband was likely to get custody into three categories — mother-oriented, father-oriented, and child-oriented factors — we found that 77% of the attorneys' responses focused on the mother, 7% on the father, and 17% on the child. Moreover, the attorneys' perceptions of the important factors in the actual cases they handled were quite similar. Although slightly fewer focused on the mother, nevertheless 61% of their responses were oriented towards the mother, 17% towards the father and only 23% toward the children.

In order to understand the attorneys' responses further, we examined the extent to which their answers reflected old versus new law standards. We defined the old law standard as a pro-mother "moral" orientation. In other words, we assumed that the mother would get custody unless she was sexually promiscuous, an alcoholic, or a drug addict. In contrast, we characterized the new law standard as a focus on the well-being of the child. It included both the mother's and father's psychological and emotional relationship with the child and the extent to which the child would flourish in either home. For this analysis we excluded neutral factors which were clearly harmful to children and thus relevant to both laws, such as physical neglect and abuse.

We found that the attorneys' responses to the hypothetical situations were more likely to reflect the old law standard (44% compared to 25% reflecting the new law standard). However, when the attorneys reported their experiences with actual cases in which the father was awarded custody, the moral issues were less salient: only 39% of these reports focused on the mother's moral conduct. True neglect accounted for 22% of the father awards, while the well being of the child accounted for 40%. These responses seem to indicate a lag between what the attorneys generally think is happening in court and what they report as happening in actual cases. It may also reflect the fact that very few attorneys deal with a large volume of contested custody cases in which fathers are successful in obtaining custody.¹⁰⁸

dren" and "the father had remarried and the child would live in a 'whole' family."

¹⁰⁸ Eighty percent of the attorneys in our sample said they had handled at least one case in which the husband got custody in the past three years. The 61 attorneys who specified how many cases they handled averaged 4.5 cases per attorney.

B. A Hypothetical Case: Further Exploration of the Strength of the Maternal Presumption

Since there was considerable variety in the actual cases the attorneys had handled, we constructed two hypothetical cases so that we could compare the attorneys' responses to a uniform set of facts. Through this hypothetical case we tried to examine the extent of the presumption in favor of the mother for preschool children, and the circumstances under which it breaks down. The case we presented to attorneys focused on moral notions of fitness and was purposely "loaded" to present a very traditional portrait of an "unfit" mother. It read as follows:

A woman and a man who have been married 5 years are dissolving their marriage. She is 23 and he is 27. The husband is an accountant and works for IBM. He has a gross income of \$14,000 a year, or \$1,000 *net* (income after taxes) per month with some expectations of upward mobility. The couple has two sons, aged 3 and 4.

The husband is requesting custody of the children, claiming that his wife is an unfit mother. He contends that she smokes marijuana, has had and is having numerous affairs, and at times does not come home at night. He also contends that his sons have found strange men in the house having breakfast with them. The husband also reports that his wife has been seen (by mutual friends) having lunch with various men while her children are home with babysitters.

The wife held a secretarial job before marriage but has not worked since. She says she has been reluctant to take a job because it would interfere with her time with her preschool children.

The husband has now moved in with his widowed mother who owns a comfortable home in the same area of town. The couple has furniture worth about \$3,000, a new sports car, and no savings.

Assume the husband's allegations are substantiated. Whom do you think would be awarded custody of these children?

In response to this case, half (54%) of the attorneys said they thought the judge would award the husband custody of the children, one-third (33%) thought the wife would get custody, and the remaining 13% said they needed more information before they could decide.

The attorneys' explanations for their judgments provide us with another indication of the pivotal importance of the mother in the custody decision. Most framed their answers in terms of positive and negative responses to the mother; few focused on either the father or the children.¹⁰⁹ For example, when asked to

¹⁰⁹ Although the facts we presented in this case did begin with allegations about the mother, the case also included several factors about the father's situation which could have been given more weight if attorneys were neutrally weighing the advantages of the two homes. For example, the father lived with his

discuss the basis for their responses, over half of those who predicted that *the father* would get custody said it was because the *wife* was not a good mother.¹¹⁰ In contrast, a quarter of them thought that the father would get custody because he could provide a better home for the children.¹¹¹

Those who predicted that the wife would probably get custody also framed their answers in terms of the wife. Almost half (46%) said that there was no evidence that the wife was not a good mother. They reasoned that the quality of mothering was most important and that the case had not shown that her activities interfered with her ability to be a good mother.¹¹² Another third (39%) of the attorneys explained their answer in terms of the

widowed mother who was likely to help him care for the children, and less likely to have an active social life to compete for their attention. In addition, the father now lived in a "comfortable home," indicating the children were likely to have a good standard of living. Further, the grandmother's home was in the same area of town, indicating that the children would not have to undergo a disruptive long distance move. Finally, and most important, since they would continue to live near the mother it would be easy to give the mother liberal visitation privileges while granting physical custody to the father.

¹¹⁰ For example, one attorney said: "The wife has created an atmosphere which is not in the children's interest. She smokes marijuana, maybe in front of the kids . . . affairs are OK but not if the children are involved. Men in the house means the affairs are at home and it involves the children." Another commented, "The children were left unattended. Her behavior could cause the children to have complexes. Her moral conduct is reprehensible."

¹¹¹ The remaining attorneys said both factors were important.

¹¹² As one attorney said:

"What matters is whether she loves the children and it shows. Smoking pot and fucking have very little to do with it. It all depends on how she comes across—not in words but how she feels about the kids . . . if she is loving, warm, caring, which she seems to be, then she's a good mother and the kids shouldn't be taken away from her.

Another attorney said:

The major factor is the mother's psychological relationship with the children. If she is nurturant and cares for them it doesn't matter what she does outside. Even if the mother is a hooker and works nights outside the home but spends her days with the child, she would get custody. Conversely, if mother is gone all the time, doing her thing, even if legitimate, and if her time with the child is minimal, she should not get custody.

A third pointed out:

She left them with babysitters so they're taken care of—and she has a right to a life of her own. She'll be a better mother if she isn't stuck at home with her young kids all the time . . . a regular divorce judge who hears these things all the time would not be as impressed by a little pot smoking and an occasional affair. I don't think judges expect women to be celibate.

“presumption in favor of the mother” while the remaining respondents cited both reasons. Thus, once again, the mother and her qualifications were most salient in the attorneys’ decisions.

A minority of the attorneys said that they needed more information before they could predict who would get custody in this case. When asked what they wanted to know, most of those who responded said that they needed more information on “the mother’s relationship to the children.”¹¹³ Surprisingly, not one attorney said he or she needed more information on the father’s relationship to the children.¹¹⁴

As a further check on these responses the attorneys were asked what factor in the hypothetical case a court would consider most important in the custodial decision. The factors mentioned,¹¹⁵ in rank order, were as follows: the wife’s behavior, mentioned by 43% of the attorneys; the best interests of the children (including the amount of time spent with them, the quality of care they received, etc.) mentioned by 32%; the quality of the wife’s psychological-emotional relationship with the children (11%); and the husband’s fitness (5%). Other factors, such as the age and sex of the children, and domestic relations or psychiatric reports, together accounted for less than 5% of the answers. Interestingly, financial considerations were never mentioned as an important factor in the decision. In summary, mother-related factors were ranked as more than ten times as important as father-related factors (54% vs. 5%).

Finally, when asked for their personal opinion as to which parent should get custody, the attorneys’ responses were virtually identical to their assessments of the court’s response. The reasons

¹¹³ A few attorneys wanted to know which judge would hear the case and asserted that it all depended on the judge. As one attorney commented:

Most of the judges would award the custody to the mother but there are a couple of judges in this town that I think are super straight and would probably give custody to the husband. It really depends on the subjective prejudices of the judges If I had this case I’d try to get it transferred to a judge who was sympathetic to the party I represented.

¹¹⁴ In analyzing the dominance of mother-related reasons for the custody decision in this case, we considered the possibility that we had biased the case by giving more information about the mother, *Cf. supra* note 107, thus creating responses which were an artifact of our question rather than an accurate reflection of the social world. However, none of the attorneys who were undecided about the case wanted to know more about the father or about his relationship to the children. On their own accord they focused almost exclusively on the mother.

¹¹⁵ Multiple responses were allowed.

the attorneys gave for their decisions, however, were somewhat more likely to focus on the quality of the father's home (49%) instead of on the mother's unfitness (39%).

Nevertheless, the attorneys' overall responses continued to reflect a preoccupation with the characteristics of the mother rather than balancing the merits of both parents. Perhaps the strongest indication of this continuing focus on the mother comes from a coder rating. After reading through each attorney's response to this case (which averaged 10 pages of interview transcript), the coders were asked whether they thought the attorney emphasized the mother, the father, or the children. The coders rated 50% of the attorneys as focusing on the mother, 29% as focusing on the children, and 19% as comparing both parents. Only one attorney was rated as placing primary emphasis on the father.

C. The Working Mother

In contrast to the moral notions of fitness and unfitness in the first hypothetical case, the second hypothetical case focused on the relationship between each of the parents and the children. This second hypothetical case sought to explore another issue as well. In preliminary interviews several attorneys expressed concern about what they perceived as a new standard of mother fitness. This standard, which was closely linked to the new emphasis on psychological parenting, seemed to equate a mother's fitness with her exclusive devotion to her children. In contrast to the "moral" unfitness described in the first hypothetical case, these attorneys feared that divorced women who worked outside the home were being accused of being unfit mothers because their employment took them away from their children. Thus, they were concerned that women who did not follow the traditional female role of fulltime housework and motherhood were more likely to be penalized in custody decisions.

To explore these assertions we constructed another "loaded" case in which the woman not only worked, but was also a member of the women's liberation movement. The case read as follows:

Now, let me ask you about a different version of that case (referring to the first hypothetical case). Assume that instead of sexual or drug allegations, the husband claimed that the wife neglected her children, because she had a full time job, and went to women's liberation meetings at night. In this situation, who would be awarded custody of the children?

In response to these new facts, 75% of the attorneys thought the

working mother would receive custody of her children.¹¹⁶ Only 15% of them predicted that the judge would give custody to the husband (compared to over 54% in the first case).¹¹⁷ Thus it would seem that most attorneys do not think that judges view women who work as inadequate or neglectful mothers.

In explaining their predictions, most of the attorneys said that the mother's "job was irrelevant if she provided care for the children."¹¹⁸ The next most common explanation was that the new case presented "no evidence that she was not a good mother . . . the *quality* of mothering was most important."¹¹⁹ The third most common reason was that the presumption in favor of mother was still effective. None of the attorneys referred to the husband in responding to the revised case.

These responses suggest that, in the eyes of the law, a mother's working does not make her unfit if she provides the necessary care for her children, nor does it seem to undermine what remains of the maternal presumption. To be certain of this conclusion we probed these answers once again by asking: "What if she had to travel about five days per month for her job? Who would get custody then?" Most attorneys still predicted that the mother would get custody of the children. In fact, this added unconventional fact caused only one attorney to change his mind and say he "wasn't sure." Thus "loading" the situation even more does not alter the attorneys' views of working women as "fit" custodial parents. All told, the presumption in favor of the mother to receive custody of young children appears fairly well ingrained.¹²⁰

¹¹⁶ Father's fitness included, for purposes of coding, the care the children would get in the father's (grandmother's) home, the grandmother's role, and so forth.

¹¹⁷ See text preceding note 109 *supra*.

¹¹⁸ Several attorneys added that they didn't have any objection to women's liberation suggesting that we may have "loaded" the case too much.

A typical attorney's explanation was,

She'll get custody unless he can show neglect. He can't complain unless he can support her at home. The court doesn't care what she does — if she's a women's libber or a go go dancer — as long as she takes care of the kids . . . she has to work . . . a wife's working would be a plus to most judges.

In fact, in response to the direct question, "Do you think judges are more likely to want a woman with young children to work today?" 77% of the attorneys said yes.

¹¹⁹ As one attorney said: "There is no evidence of neglect . . . and it's the quality of mothering, not the mere quantity, that counts."

¹²⁰ Our one reservation about this conclusion comes from the scattered comments about the advantages of a "whole family" if the father remarries. Since

At the same time, it was clear that the attorneys believed that things had changed. For example, 87% of the attorneys said they thought it was easier for fathers to get custody today (circa 1975) than under the old law. Among those attorneys, 42% attributed the change directly to the change in the law and the presumption of equality for men. Another 46% attributed the difference to general societal changes—to the men's increased interest in obtaining custody, to the increased acceptability of male custodians, and to the increased willingness of women to relinquish custody. Nevertheless, when pressed, and asked, "if a mother is OK, can a father get custody by showing he is the better parent—or do you have to prove the mother is unfit?" most attorneys, 54%, said that it was still necessary to show that the mother was unfit. Yet a significant minority, 27%, said it was enough to show the father was the better parent, while the remaining 19% said it all depended on the case.¹²¹

D. The Court Docket Data: When Does the Husband Get Custody?

After analyzing the attorneys' responses we went back to the data from the court dockets to see if we could factor out either the old moral standard or the new parent-child relationship standard in the cases in which the father was awarded custody. Instead, we found that the most important factor in explaining paternal custody awards was rarely mentioned in the attorneys' interviews: more than half of the cases in which the father received custody contained an agreement between the parties. Thus the mother apparently agreed to the father's request. While

we did not ask the attorneys to compare a single-parent-mother-headed-family with a remarried-father-stay-at-home-stepmother-family we do not have any data on the attorneys' perceptions of their relative merits. Nevertheless, we suspect that the single parent mother might have a harder time than the woman in this case, and that she is most likely to have the burden of proving that she is fit, although she is working, when she is compared to a stay-at-home-full-time-stepmother, instead of a grandmother.

¹²¹ Referring to both the legal and social changes one attorney noted:

The policy of favoring the mother has eroded — and this is the temper of the times. The law no longer presumes a mother's fit — now we talk about the welfare of the kids . . . There are also more affluent young fathers who are serious about their children and who are not embarrassed to go to a shrink [for a psychiatric evaluation of who is the better parent]. They are much more aware and have opened things up . . . These new young fathers really want to keep the children — and they have the ability and financial resources to do it.

the majority of these cases contain an explicit stipulation between the parties, the mother's acquiescence is suggested in other forms as well; in some cases she had moved out of the family home, leaving the children with the father; in other cases she did not participate in the divorce at all.

The cases in which the father gets custody have other characteristics which distinguish them from most cases: for instance, husbands who request and are awarded custody tend to be slightly older, better educated, and have a higher occupational status than most divorcing men. Husbands who ask for custody are also much more likely to be petitioners, indicating that they have taken the initiative in the divorce.¹²² Furthermore, there is less likelihood of a response being filed in cases in which the husband asks for custody, again suggesting acquiescence or little interest on the part of the wife.¹²³ Finally, most cases in which the husband gets custody do not go to trial, once more indicating a *de facto* agreement between the two parties.

Earlier in this article¹²⁴ we reported that about two thirds of the husbands who asked for custody in 1977 were awarded it. A closer examination of the cases, however, suggests that the wife had "consented" to many of these paternal custody awards. In the 1977 sample of court dockets, only 15 custody cases were fully contested and went to trial. In this small sub-sample of cases decided by a judge, custody was awarded in 5 cases to the husband, and to the wife in the remaining 10 cases. Thus these limited docket data suggest that the husband is most likely to get custody when he takes an active role in initiating the action and has, or acquires, his wife's agreement.

One implication of the study's finding that fathers obtain custody by agreement is that a focus on fathers may be misplaced. The gatekeepers in the process of determining custody are more likely to be the attorneys and mothers who are deciding, in large part, to which fathers they will "give" custody.

It is interesting to note that the docket data do reflect a relationship between the husband's request and the age of the children. Husbands were almost twice as likely to ask for custody if there was a teenage child in the family rather than a preschool

¹²² Sixty-one percent of the fathers who ask for custody are petitioners in contrast to the 36% of husband petitioners in the overall sample.

¹²³ In 1977, a response was filed in only 40% of the cases in which the father got custody, in contrast to 70% of the cases in which the wife received custody.

¹²⁴ See note 89 and accompanying text *supra*.

child. Among the fathers who did request custody, however, the child's age made no difference in their likelihood of success: fathers were just as likely to be awarded preschool children as teenage children if they requested their custody. As expected, fathers were more likely to be awarded custody of their sons than their daughters.¹²⁵

Overall, however, the major finding in the docket data is that fathers who seek and obtain custody of their children are self-selected—and have often obtained their ex-wife's agreement to the arrangement. This leads us to the more basic question of what type of custody decisions are made outside of the legal process and, more specifically, how many fathers and mothers are interested in obtaining custody of their children after divorce.

VI. DIVORCING COUPLES: SOME PRELIMINARY RESULTS

Preliminary data from 1977 interviews with recently divorced men and women in California¹²⁶ provide complex, multi-layered answers to the question of how many spouses actually want to be their children's custodian after divorce. First, fewer husbands than wives said they wanted custody of their children after divorce: 96% of the divorced women report that they wanted custody compared to 57% of the divorced men in our sample. Nevertheless, that over half of the divorced men report that they wanted custody is, in and of itself, an astonishing figure.¹²⁷

On the other hand, the fathers' expressed interest in custody fluctuates depending on how the question is asked. For example, when asked if they ever told their wives that they wanted custody,

¹²⁵ In preliminary data from the divorcing couples sample (discussed in note 126 *infra*) fathers contested custody in 17% of the families with only male children, and in 11% of the families with children of mixed sexes, in contrast to 0% (none) of the families with only girls.

¹²⁶ The divorcing couples sample was drawn from final decrees of dissolution granted in Los Angeles County between May and July 1977. The sample was stratified by socioeconomic status and length of marriage. A total of 225 interviews were completed. Approximately half of the respondents were women; the other half were men. The preliminary data reported below focus on the 110 respondents who had one or more children under 18 at the time of the divorce.

¹²⁷ When stratified by length of marriage we find that among men married 1-4 years, 0% of those with children said that they wanted custody, among those married 5-10 years 30% wanted custody, among those married more than 17 years, 55% wanted custody. These data support the finding from the docket data that men are much more likely to want custody of teenage children, especially in comparison to pre-school children. (These data are presented by length of marriage rather than by age of children because of the complexity of grouping families with several children of different ages.)

the 57% drops to 41% of the men who said yes. And when queried if they ever asked their lawyer if they had a chance of getting custody, the 57% drops to 38% of the men who said yes. Finally, only 13% of the sample of men we interviewed actually requested custody on the divorce petition.¹²⁸

In attempting to make sense of this variety of answers we offer the following tentative interpretation. If we were to begin with a random sample of 100 divorcing men, two out of five would say that they had never thought of having custody of their children after divorce and would, if given the option again, simply reject it. Both they and their wives would assume that the children would stay with her, and would assert that was "natural" and best for the children. The other three fifths of the men would say that they had positive thoughts about having their children with them after divorce. But when they are "being practical" another one fifth of the total would decide that they do not really want to commit themselves to the full-time job of taking care of their children. Thus although close to three-fifths of the divorcing men could honestly report that they may have wanted custody in the abstract sense of wanting to have their children with them, their reports of their own behavior (talking to their wives or their attorneys) indicate that one out of three in this sub-sample have not taken any steps to try to obtain it.

The remaining two-fifths of the divorced men are willing to pursue more seriously the idea of obtaining custody. Some of them, however, are dissuaded by their wives, others by their lawyers, and others by their own realization of the practical and financial difficulties they may encounter. Still others may simply be discussing custody as a means of harassing their ex-wives or as an economic bargaining device. Eventually, only one-third of this sub-sample of men will decide that they want custody enough to pursue the matter in the legal process, either formally or informally.

It is the claims of this minority of about 13 fathers in a hundred, or one out of every eight fathers, that are processed by the legal system. About three of these men will have worked out their custodial arrangements with their wives, and want the court to sanction their agreement. One or two of the others will eventually settle their cases and obtain joint custody or liberal visitation. The remaining 8 or 9 men will proceed with a fully contested

¹²⁸ This is a slightly higher percentage than in the random sample of 1977 divorce decrees, which is a product of our stratified sample.

custody battle and their claims will be heard in court. Eventually, the court will award sole physical custody of the children to about 3 men, one-third of those who actually contested custody in court.

It is important to note that the legal system may itself contribute to the low percentage of custodial fathers by creating strong financial disincentives for those who seek custody since the custodial parent must also bear the major responsibility for child support. The high cost of raising children and the unequal share that the custodial parent must bear may have as great an effect on the father's final decision not to seek custody as the practical difficulty of day-to-day arrangements. Although the median child support award per child rose from \$75 to \$100 per month in Los Angeles between 1972 and 1977, and the total from \$121 to \$150, these amounts clearly have not kept up with the cost of living (calculated as an increase of 8% per year). Further, as noted above, these amounts are not nearly equal to half of the actual cost of raising a child, even in low income families. In addition, the amount of child support ordered in 1977 did not increase as a percentage of the husband's net income. It remained at about 25%. Thus, a husband would probably be better off financially without the custody of his children, especially since his responsibility for support would typically end when the child reached 18 years of age.

CONCLUSION

This article has indicated that despite the recent changes in divorce law over the past ten years, there has been very little change in the actual distribution of child custody awards. Yet media reports and common perception suggest that a growing number of fathers are seeking and obtaining custody of their children after divorce. There are several possible ways to reconcile our data with this common perception.

One explanation is that even though the *percentage* of fathers who obtain sole custody has remained fairly constant, the *numbers have changed dramatically* because of the steady increase in the number of divorcing couples in the past decade. In Los Angeles County alone there were 3,100 divorces *each* month in 1977 and about half of these couples had minor children. When 6% of the fathers are awarded sole physical custody, and an additional 2% are awarded joint physical custody we are talking about 125 fathers a month, or close to 1500 fathers each year who are obtaining custody in just one county. Moreover, simply because

there are more fathers who are awarded custody, more people know "someone" who has custody of his children.

Although one must always be cautious in extrapolating California data to the country as a whole, if these figures were representative, it would mean that among the over one million divorces in 1977, there would be 30,000 fathers with sole physical custody of their children nationwide, and another 10,000 with joint physical custody.¹²⁹ Thirty to forty thousand new custodial fathers each year are socially significant even if they remain a small minority of all divorced fathers.

A second explanation for the common perception lies in the social characteristics of the fathers who are asking for and being awarded custody. They tend to be better educated and have a higher occupational status. Thus, they are more visible, and likely to be seen as trendsetters. They are also more likely to hire the elite attorneys who have greater access to the media.

But, despite their increasing numbers, and despite their social visibility, fathers who are awarded physical custody of their children remain the distinct minority. Overwhelmingly, it is mothers who continue to be their children's primary caretaker after divorce.

Although there has been a considerable debate about the desirability of dual parenting after divorce,¹³⁰ if this is indeed a societal goal, then it is important to recognize that changing the law will not alone accomplish this result.¹³¹ To overcome the pervasive weight of traditional male and female roles we have to change the material conditions of men's and women's lives, and the costs and benefits of custody for fathers and for mothers. In other words, we cannot expect many more women to want to "relinquish" custody unless we provide options and incentives for women to achieve fulfillment in other parts of their lives. Similarly, we cannot expect more fathers to want to share parenting after di-

¹²⁹ Since the number of children involved in a divorce has increased threefold since 1960, the number of children living with a divorced father also tripled between 1960 and 1977. Glick, *supra* note 3, at 3. Glick notes that in the United States as a whole, the percentage of children of divorced parents who lived with a divorced father was approximately 10% in both 1960 and 1977. However, between 1960 and 1977 there was a threefold increase in the number of children of divorced parents.

¹³⁰ See generally Bruch, *supra* note 73 and M. ROMAN, JOINT CUSTODY (1978).

¹³¹ This is not to deny that the law plays an important role in structuring options and creating incentives. Thus dual parenting orders along the lines suggested by Professor Bruch may go a long way towards helping men and women who are seeking alternatives to the present system.

orce unless we give them a larger financial and personal incentive to do so.

Today, the vast majority of divorced fathers are not really interested in obtaining custody of their children after divorce, while the vast majority of divorced women are. And until these preferences and the social patterns on which these preferences are based change, mothers will continue to have custody of most children after divorce. Thus the legal system serves primarily as a means of formalizing the custodial arrangements that have already been agreed upon by divorcing fathers and mothers.¹³²

¹³² This is similar to the results of a recent study of the role of the courts in custody decisions in Great Britain in which Eekelaar and Clive found that most of the arrangements are made by the parents and, although the court completed its required review of the custodial arrangements for all children, it almost never determined or changed the custodial arrangements. J. EEKELAAR & E. CLIVE, *CUSTODY AFTER DIVORCE* (Oxford Centre for Socio-Legal Studies, Family Law Studies No. 1, 1977).

