

# Children, Courts, and Custody

## Interdisciplinary Models for Divorcing Families

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# I Overview

## **What Is the Child Custody Court?**

This book is about the policies and practices of the institution that American society charges with the responsibility of supervising the reorganization of parent-child relationships after divorce – the child custody court. The child custody court essentially determines which divorced parent gets the right to make decisions for the child and how much time each parent gets to spend with the child, two different ideas that the legal system groups together as “custody.”

All states have child custody courts. Often, however, they cannot be easily located on an organizational chart of the federal or state court system. American custody law is highly decentralized. The United States does not have a uniform national divorce and custody law as do Australia, England, and Canada. The power to determine custody is left to each state. A national law establishing parental rights and responsibilities after divorce is part of what makes those countries unified political and social entities. The child custody courts in Sydney and Melbourne are essentially the same.<sup>3</sup> In contrast, as described in Chapter VII, New York’s child custody court is very different from San Francisco’s.

There are fifty different state systems that administer child custody courts and create the substantive law that those courts apply. Even within a single state, child custody courts are often organized on a county basis, and different courts use principles of local autonomy to implement the same statutes differently. Court organization, procedures, and funding differ from state to state and between counties within a state.

No court anywhere is labeled a “child custody following divorce” court on an organization chart. In some states, the court that makes a child custody determination for divorcing parents is part of a unified family court that hears all legal matters relating to families (e.g., child abuse and neglect cases, foster-care review proceedings, juvenile delinquency petitions) in addition to divorce and custody.<sup>4</sup> In others, the court responsible for child custody

decisions for divorcing parents might be colloquially labeled the “divorce court,” but is more formally labeled the “superior court.” The superior court is usually a state’s trial (first level) court of “general jurisdiction” and hears everything from contract disputes to auto accident cases and divorces. The superior court may have a special division that hears divorce and custody cases.

To illustrate how confusing identifying the proper court for child custody cases can become, consider court organization in New York State. There, the superior court is misleadingly called the “supreme court,” which is not New York’s highest court but its highest trial court. Only the supreme court can grant parents a divorce, and in the process of doing so, decides their child custody disputes. New York also has a family court. The New York family court, however, has no power to grant a divorce, but deals with most other kinds of family disputes. Many of those disputes heard in the family court are post-divorce, and are initiated by parents who want to change the custody arrangement they either agreed to or the supreme court ordered when the marriage was dissolved.

To avoid confusion, “child custody court” as used in this book refers to all these differently labeled courts throughout the United States that perform the profoundly important function of determining parenting arrangements for a child of divorce.

### **An Evolving Mission**

Traditionally, courts define their role in civil cases such as contract disputes or claims for damages arising from an automobile accident as that of an umpire rather than as a proactive force to improve the lives of the parties to the dispute. An umpire (the judge) resolves disputes between the players according to the rule book. Sometimes, umpires have to interpret rules. They do not have an obligation to teach the players (the parties and their lawyers) the rules of the game or compensate for a player’s weakness on the playing field by awarding one team extra points, nor do they warn players about the harm that the game can cause them. If a dispute arises, the parties present their evidence, and the umpire decides. A judge makes little effort to help the players resolve the dispute themselves, focusing instead on gathering evidence to make a decision. A judge’s efforts to promote a settlement traditionally have been seen as inconsistent with the judge’s role as a neutral umpire. In recent years, as we will see in Chapter V, courts have actively supported mediation and other alternatives to litigation designed to promote a settlement.

Child custody disputes are like most other civil cases in that the parties to it are private citizens. The private citizens who are parties to the child custody dispute are in court, not because of commercial relationships, but because they have a unique and special status – they are parents. Child

custody disputes are thus not like auto accident or contract cases. In most civil cases, courts reconstruct a past event – Who went through the red light? Why were the goods defective? – and then assess blame or damage for that event. In a child custody case, in contrast, a court reconstructs past events concerning family relationships for the purpose of making a prediction about the future: What kind of post-divorce parenting arrangement is in the child's best interests? That prediction is not made to assess blame or damage but to make an educated guess about what will happen to the child if the court orders one custody arrangement or the other.

Historically, courts that resolve disputes involving children other than custody following divorce have adopted a different operational philosophy from courts that resolve contracts or auto accidents. Instead of defining their mission solely as that of umpiring, courts for children try to promote positive change in the problems that brought the family to court in the first place. This proactive philosophy for families in court has its clearest expression in the juvenile court movement. The juvenile court was created as a special court for young offenders, mobilizing community resources and working with parents to help rehabilitate them.<sup>5</sup> The first specialized juvenile court was established in Chicago in 1899, and the practice spread across the country. Numerous questions have been raised subsequently about whether the juvenile court actually fulfills its rehabilitative function,<sup>6</sup> and recently, the goal of the juvenile court has shifted somewhat from rehabilitation to punishment. Nonetheless, rehabilitation of the child with the support of the family and community remains a major goal of juvenile courts.

Child protection courts, which decide disputes when parents are accused by the state of abusing or neglecting their children, also have a proactive rehabilitative mandate. They order the use of services to help parents and children (e.g., counseling, homemaking help, participation in drug programs). They terminate parental rights, and free the child for adoption only if these rehabilitative efforts fail.<sup>7</sup>

For a long time, courts that decided child custody disputes arising from divorce followed an umpiring rather than a rehabilitative model. They functioned more like traditional courts in disputes between private parties, deciding contract cases or awarding damages from auto accidents, than juvenile or child protection courts. Disputes between parents over custody were private matters that were in court only because the parents could not agree on how the child should be brought up. Each parent argued that he or she promised a better future for the child. The court used the same adversary procedure as in other civil cases – accusation and counter-accusation, direct and cross-examination to probe the historical facts on which predictions were based. The court's function was to resolve the parents' dispute by choosing one or the other as the custodial parent and awarding the other parent visitation. Divorce was the death of a family. The legal system believed that divorcing couples should make a "clean break" from each other without further

dealings. The court had to choose between parents because the child could not be left in emotional limbo, subject to continuous disputes, not knowing where he or she lived or which parent could make a decision about which doctor could treat him or her.

It took the advent of mass divorce and much research and time to understand that these underlying philosophical premises were incompatible with the needs of most children. For children, divorce is a time of reorganizing emotional relationships with parents, not ending them with one or the other. As will be discussed in later chapters, most children of divorce are better off if they are placed in a demilitarized zone between their parents. And, also as discussed in later chapters, they are also better off if, consistent with safety, they have a meaningful relationship with both parents.

The operating philosophy of the child custody court over the last twenty-five years has evolved toward a rehabilitative model closer to that of the juvenile and child protection courts. The child custody court has redefined its mission from deciding *which* parent should receive custody after divorce to determining *how* to involve both parents in the life of the child safely. The modern child custody court sees parental conflict in most families as modifiable and manageable through coordinated interventions. Instead of relying on courtroom combat, the modern custody court mandates educational programs and mediation to encourage parents to put their children's interests first and to negotiate their own parenting plans.

The evolution of the modern child custody court parallels the continuing movement to create unified family courts in which a single judge and a single interdisciplinary support team are assigned to a family regardless of whether the case arrives in court as a result of a charge of juvenile delinquency, violence between the parents, abuse or neglect of the child, divorce, or other trauma to the family. The first family court was established in Cincinnati in 1914, and the idea has been adopted in other states since. In the words of the great legal scholar Roscoe Pound, the logic behind the unified family court movement is

to put an end to the waste of time, energy, money, and the interests of the litigants in a system, or rather lack of system, in which as many as eight separate and unrelated proceedings may be trying unsystematically and frequently at cross-purposes to adjust the relations and order the conduct of a family which has ceased to function.<sup>8</sup>

The modern child custody court is also part of the movement for "therapeutic justice." Therapeutic justice evaluates the legal system by applying mental health criteria. When persistent social problems such as child abuse, domestic violence, drug addiction, and, more recently, parental conflict following divorce, appear on court dockets, therapeutic justice asks whether legal interventions are likely to produce net benefits or burdens for the mental health of the litigants. It weighs those benefits and burdens against other critical values such as due process of law.<sup>9</sup>



Therapeutic-justice values support the child custody court's evolution from umpire to proactive problem-solver. Mediation and education have helped thousands of parents to maintain a meaningful relationship with their children after divorce and settle their own disputes rather than having a judge impose a solution on them. But significant challenges remain in the court's continuing evolution toward providing effective therapeutic justice.

### **Differential Diagnosis and Treatment**

A major benefit of a child custody court's adopting a proactive philosophy is that it can require parents and children to attend education, mediation, and mental health evaluation and treatment. The problem is that once the court defines its role as a family problem-solver, it must figure out what services it should order in a particular case. It must also have the services available to parents of all income levels and backgrounds. The millions of divorcing parents and children range from cooperative to combative, from functional to violent. The modern child custody court must carefully match available services with family needs and resources. It must use limited resources wisely by ensuring that families are not enmeshed in interventions they do not need. Modern custody courts have to make these difficult classification decisions, and often need help from the mental health and social service professions to do so.

A useful way of thinking about the challenge facing the modern child custody court is by way of a medical analogy – the emergency room of a major hospital. The child custody court needs to evolve, in many ways, into an emergency room for parenting disputes. In the same way they go to the emergency room, parents go to the child custody court when the symptoms of conflict become acute and need immediate treatment. The child custody court needs methods of triaging cases, stabilizing parents and children, and diagnosing whether further and more comprehensive treatment is necessary. It needs to devise procedures to carefully plan, coordinate, and evaluate the family's care. This planning can only be accomplished with the help of interdisciplinary professionals to develop a workable scheme for services for the family that the court ensures parents and children adhere to.

### **Protecting Safety**

An abusive, neglectful, or violent parent is a serious risk to the safety of children and the other parent, whose protection justifies restrictions on a violent parent's relationship with the children. The child custody court's first challenge is to distinguish cases in which the fear of violence or neglect is documented and credible from those in which it is exaggerated or imagined for emotional reasons or is deliberately falsified for tactical advantage. A

second challenge is to devise appropriate remedial plans for families in which a parent is violent. All violence in a family is deplorable. Violence, however, differs in degree and context – from a one-time slap expressing anger when one spouse learns the other has committed adultery, to an escalating pattern of assault, inflicted by a controlling batterer as part of a pattern of physical, financial, and emotional control over his or her victim, to continuing sexual abuse of a child. Child custody courts need help from the mental health community in making these kinds of distinctions and in devising restrictions on the relationship between the violent parent and his or her child that is proportionate to the actual risk to safety the parent presents.

### **Ensuring Accountability**

The relationship between parents and children is not only emotionally precious; it is also a constitutionally recognized value. The Constitution does not explicitly mention the words “parent,” “child,” or “family.” The U.S. Supreme Court has nonetheless held that parental rights are entitled to procedural protection as part of the “liberty” protected by the due process clause, and cannot be terminated without a hearing.<sup>10</sup> In the context of a grandparent visitation dispute, the Supreme Court recently held in *Troxel v. Granville* that a parent has a constitutional right to control the upbringing of his or her child as part of due process of law.<sup>11</sup> The deference to parents’ decisions that *Troxel* seems to require signifies that parental rights have a substantive meaning as well. Other courts have described a constitutional right to family integrity that cannot be violated by government action absent a “compelling” state interest in, for example, the protection of children.<sup>12</sup>

Procedural protections such as cross-examination of witnesses and reliance on the rules of evidence to restrict the information that a court can consider put a brake on the power of courts to make arbitrary decisions in child custody disputes that affect these constitutionally protected interests. The high value we place on parental and family rights requires that elected or appointed judges, accountable public officials, make custody decisions if parents contest.

The modern child custody court nonetheless relies heavily on non-judicial personnel such as mediators, neutral mental health evaluators, and guardians for the child. These professionals can be extremely helpful to the court, parents, and children. But they are not elected or appointed public officials. The training and practices of these important professionals have not yet been standardized. The child custody court faces a challenge to ensure that these non-judicial professionals are qualified and accountable, do not coerce parents into uninformed, involuntary agreements, or supplant the role of the judge in making ultimate determinations that affect the parent-child relationship.

### **Redefining the Role of Lawyers**

A related problem is defining the appropriate role of lawyers in the modern child custody court. Most parents and children who come before the child custody court are not represented by counsel, but desperately need legal information and advice. On the other hand, the modern child custody court emphasizes parental cooperation and planning, whereas some lawyers believe that the ethical responsibilities of the profession require them to be contentious and adversarial. For the modern child custody court to realize its mission, it will have to encourage lawyers to engage in more collaborative, problem-solving behavior and clarify their professional responsibility obligations to take the welfare of the children into account.

### **Ensuring Efficiency and Access to Justice and Services**

Child custody disputes have significant economic costs both to society and the parents involved. Taxpayers pay for the courts and the education, mediation, evaluation, and therapeutic services connected to the court that help process and resolve them. Parents who are not eligible for legal aid have to pay the costs of private counsel and other mandated services. These costs can be substantial, especially in very contentious cases. A small number of parents with means can afford these costs; more and more of the parents who seek the help of the child custody court to resolve their disputes cannot. At a minimum, the child custody court must be careful to ensure that mandated services are necessary and are provided efficiently and expeditiously. More broadly, the same services that benefit wealthier parents and children should be available to all families regardless of income.

### **Public Support and Research and Development**

There is no single magic solution to the challenge the child custody court faces from too many cases and too few resources. The court needs a plan and public support to help it meet the needs of parents and children. Lawyers, judges, mediators, parent educators, mental health professionals, and concerned citizens need to join forces in an interdisciplinary coalition to create support for the development of a truly family-friendly child custody court. A coordinated national and interdisciplinary program of research and development that can be shared by all child custody courts would help fill in the significant gaps in our knowledge about how to best serve children and parents. It would also provide a laboratory to develop the best practices for courts everywhere.