

BACK TO THE FUTURE: AN EMPIRICAL STUDY OF CHILD CUSTODY OUTCOMES*

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As no-fault divorce replaced fault-based divorce in the late 1970's, proponents of alternative dispute resolution convinced courts and legislatures that mediation promised significant benefits for family law, especially for disputes about child custody. In 1981, states began to respond with statutes requiring the parties to mediate before bringing their custody disputes to the courtroom. The move for mandatory mediation of custody met a firestorm of protest, especially from feminist scholars who warned that mandatory mediation would lead to an increase in the incidence of joint physical custody arrangements. Mediators, warned the critics, would view joint physical custody as the easiest way to reach an agreement between the parents. Fearing the consequences of failing to cooperate, mothers would feel pressure to "agree" to the arrangement, even if they disagreed for legitimate reasons relating to the welfare of the child.

Because of the critics and for other reasons, relatively few states passed statutes requiring the mediation of custody disputes. This Article looks at child custody outcomes in a jurisdiction with

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mandatory mediation of custody disputes—Forsyth County, North Carolina. To test the thesis of mandatory mediation critics, the study analyzes custody outcomes in an entire population of parties involved with the courts in custody disputes in 2002. The data reveals no increase in the incidence of joint physical custody with mediation. To the contrary, mothers received sole physical custody more often in mandatory mediation than they did either in lawyer-negotiated settlements or in litigation. On the other hand, the model of mediation used in North Carolina avoided the most serious concerns of mediation opponents: giving mediators the power to make recommendations to the court and excluding lawyers from the mediation process. This study suggests that with certain safeguards in place, mandatory mediation deserves another look as a means to help resolve high conflict custody disputes.

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INTRODUCTION

As a nation,¹ indeed, as a world,² we are not satisfied with how we resolve disputed issues of child custody. In this country, for example, we continue to experiment with different processes and different personnel³ as we search for better ways to serve that elusive goal, “the best interests of the child.” While there is a consensus that we should resolve custody disputes in the best interests of the child, the statutory standard that most states articulate, there certainly is no consensus on the processes that will achieve it.

At one stage of our national experiment, we appeared to conclude that mediation offered the most promise for resolving custody disputes. Mediation proponents insisted that the adversary process and the lawyers who practiced it created acrimony between the parents, acrimony that decreased the chances that parents would cooperate in post-separation parenting. No sooner had proponents focused on mediation, however, than its detractors warned that mediation posed a dangerous threat to the custody process. These detractors, the most vocal of whom were feminist scholars, found that *mandatory* mediation posed the most serious peril.

Most of all, opponents feared that mandatory mediation created artificial incentives for parties to agree to joint physical custody, or the significant sharing of parenting time by both parents.⁴ While commentators generally applauded joint physical custody for parents committed to it, opponents of routine use of mediation argued that it would force equal parenting on parents in inappropriate cases. Circumstances might advise against joint physical custody, for example, for parents whose high conflict made it difficult to coordinate the child’s living arrangements in two households. Also, for parents whose approaches to discipline varied dramatically, joint physical custody might confuse an already troubled child. Most dramatically, domestic violence might make joint custody not only ill-

1. For some of the experimentation within the United States, see *infra* notes 247–51.

2. For a description of the international conference on high conflict divorce, known as the Wingspread Conference, see Sarah H. Ramsey, Rep., *The Wingspread Report and Action Plan, High-Conflict Custody Cases: Reforming the System for Children*, 39 FAM. CT. REV. 146 (2001). For more of the comparative law on custody, see, for example, Patricia L. Sullivan, *Culture, Divorce, and Family Mediation in Hong Kong*, 43 FAM. CT. REV. 109 (2005).

3. For a discussion of some of the emerging actors—parenting coordinators, court evaluators, and others—see *infra* notes 248–51.

4. For a description of many of the relevant terms, including mandatory mediation and joint physical custody, see *infra* Part II. For how the Article defines joint physical custody, using 123 overnights as a benchmark, see *infra* note 188.

advised but dangerous. For any number of reasons, joint physical custody might be inappropriate in a particular case.

Opponents feared that mediators and the mediation process would push joint physical custody and that in those cases in which it was inappropriate, mothers and the children for whom they had been primary caretakers would be the losers.⁵ To stem the tide of mandatory mediation, opponents argued that power imbalances in the parents' relationship, whether from domestic violence or other factors, would carry over to mediation. Opponents feared that mediators, committed to neutrality, would not redress the imbalances. Moreover, opponents argued that mediators demonstrated a bias favoring joint physical custody. According to opponents, with this bias and mediators' natural tendency to promote settlements, mediators would pressure mothers to agree to joint physical custody even when mothers thought that equal parenting time would not further the best interests of the child.

Over twenty years have passed since mediation opponents began to predict that mandatory mediation would lead to less physical custody for mothers. This Article tests the opponents' predictions in a state where we might expect to see their worst fears happen: a state, namely North Carolina, in which statutes mandate the mediation of child custody disputes.⁶

To test the predictions, this Article looks at a population involved with the court in a custody dispute in a judicial district in North Carolina—the twenty-first judicial district⁷—and analyzes the custody records of this population. In particular, the Article zeroes in on the first custody resolution event of this population filed between 1997 and 2005. As explained in Part V, these custody resolution

5. For the link between mediators and mediation on the one hand and joint physical custody on the other, see *infra* notes 93–104 and accompanying text.

6. The General Assembly established a pilot program for child custody mediation in Mecklenburg County in 1983. See LAURA F. DONNELLY & REBECCA G. EBRON, N.C. ADMIN. OFFICE OF THE COURTS, THE CHILD CUSTODY AND VISITATION MEDIATION PROGRAM IN NORTH CAROLINA: AN EVALUATION OF ITS IMPLEMENTATION AND EFFECTS 1 [hereinafter EVALUATION OF ITS IMPLEMENTATION], available at <http://www.nccourts.org/Citizens/CPrograms/Child/Documents/custvisitmedrept.pdf>. In 1989, the General Assembly authorized statewide implementation of the program. Act of Aug. 12, 1989, ch. 795, § 15, 1989 N.C. Sess. Laws 2912 (codified at N.C. GEN. STAT. § 7A-494 (2005)). Today the program exists in thirty judicial districts, comprising sixty of North Carolina's 100 counties. *Child Custody Mediation: Existing Programs*, NORTH CAROLINA COURT SYSTEM [hereinafter *Existing Programs*], <http://www.nccourts.org/Citizens/CPrograms/Child/Default.asp?topic=7> (last visited Aug. 27, 2007).

7. For a description of this district, comprised of Forsyth County, see *infra* notes 461–66 and accompanying text.

events manifested themselves either in an agreement reached in mandatory mediation, a lawyer-negotiated settlement filed with the court, or a court order entered as a result of litigation. While we gathered much information about the parents and children in this population, the analysis of the data focuses on the comparisons among these three different ways of resolving the custody issue—mediation (“mediation”), lawyer-negotiated settlements (“settlement”), and orders resulting from litigation (“litigation”)—especially in relation to the issue of physical custody.⁸ From the files of the families comprising our population, the data debunks some conventional wisdom.

The comparison of the three types of custody resolution events—mediation, settlement, and litigation—reveals that in this mandatory mediation jurisdiction, mothers did not receive less physical custody in mediation. On the contrary, in our study, in a comparison of those three types of custody resolution events, mothers received primary physical custody more often in mediation than they did in either settlements or litigation.⁹

The findings belie another widely-held belief about the prevalence of joint physical custody. Opponents of mandatory mediation also warned that mediators would promote joint physical custody and that equal sharing of physical custody would become the norm, regardless of whether the circumstances warranted such an arrangement. Again, to the contrary, in our study, custody disputes ended in joint physical custody in less than 16% of the cases. Moreover, joint physical custody appeared more often in lawyer-negotiated settlements than it did either in mediation or litigation.¹⁰

This data, however, does not lead to the conclusion that the opponents of mandatory mediation had no cause for concern. As this Article explores, the mediation process that most worried the early opponents of mandatory mediation has almost disappeared and, in fact, never took hold in North Carolina.¹¹ In other states, in the early days of custody mediation, the mediator was also the evaluator who made recommendations to the court on how to resolve the custody

8. The study labels the agreements reached in mandatory mediation as “mediation”; the agreements reached through lawyer-negotiated settlements as “settlement”; and the orders entered as a result of litigation as “litigation.”

9. See *infra* Table 5. The numbers in Table 5 indicate that the mother received primary physical custody in 83.1% (69/83) of the mediated cases; 69.5% (82/118) of the lawyer-negotiated settlements; and 66.4% (81/122) of the litigated cases. *Id.*

10. *Id.*

11. See *infra* notes 214–18 and accompanying text.

dispute when the mediation failed to result in agreement.¹² Now rejected as the norm,¹³ the mediator in North Carolina never held this dual status. In fact, custody mediation in North Carolina has always provided confidentiality and privilege for the proceedings.¹⁴ The mediator lets the court know whether the parties met and whether they reached agreement but does not file anything to influence subsequent proceedings. Moreover, the mediator cannot sanction a party for failing to reach an agreement that may seem desirable to the mediator. Because the parties are free to reject the mediator's suggestions, the custody mediator in North Carolina has no leverage over the parties, at least not over parties who understand the mediation process.¹⁵ Even if a mediator favors joint physical custody as the way to reach settlement, the mediator has no effective threat to pressure a parent knowledgeable of the rules into "agreeing" to it.

Opponents of mandatory mediation also feared a process where lawyers would have no role. Indeed, much of the early commentary about custody mediation discouraged lawyers from participating.¹⁶ Again, this model never took hold in North Carolina. While lawyers in North Carolina usually do not participate in the actual mediation sessions, mediators in North Carolina encourage the parties to consult with lawyers before the parties execute an agreement.¹⁷ Moreover, our data is unusual in one respect: in a high percentage of our cases, one or both parents were represented by counsel.¹⁸ National studies

12. *Id.*

13. *Id.*

14. N.C. GEN. STAT. §§ 50-13.1(e)-(f) (2005); *see infra* text accompanying note 79 (noting limited exceptions to confidentiality rule).

15. *See infra* notes 77-80 and accompanying text.

16. *See infra* notes 114-17 and accompanying text.

17. *See, e.g.*, LOCAL RULES FOR THE MEDIATION OF CUSTODY AND VISITATION DISPUTES, NORTH CAROLINA CUSTODY AND VISITATION MEDIATION PROGRAM, Twenty-First Judicial District, pt. V(G) (1999) [hereinafter LOCAL RULES]. For the statewide rules, which also encourage the parties to consult a lawyer, *see* N.C. ADMIN. OFFICE OF THE COURTS, UNIFORM RULES REGULATING MEDIATION OF CHILD CUSTODY AND VISITATION DISPUTES UNDER THE NORTH CAROLINA CUSTODY AND VISITATION PROGRAM: CUSTODY AND VISITATION MEDIATION PROGRAM PROCEDURES MANUAL 9 (1999) [hereinafter UNIFORM RULES]; *infra* text accompanying notes 75-76.

18. *See infra* Part V(B) and Table 2. As Table 2 indicates, 97.4% of plaintiffs and 72.6% of defendants were represented. The twenty-first judicial district does not have a family court, a factor that helps explain the low percentage of unrepresented parties. The number of pro se family law litigants has increased everywhere, but there has been an alarming increase in family courts. In family courts, where court personnel are more accustomed to the nature of the disputes and the litigants, the court personnel may indirectly encourage pro se representation. These personnel, with their familiarity with the system and the litigants, may be more inclined to assist the litigants, which in turn

have reported the trend toward pro se appearances in family law matters, and this trend has carried over to custody disputes.¹⁹ In this study, however, most of the parties were represented by lawyers, a factor which may help to explain some of the outcomes. In particular, to the extent that opponents of mandatory mediation feared that mediators would pressure mothers to agree to joint physical custody in inappropriate cases, perhaps there is no reason to worry about mediator influence—as long as the mothers have lawyers.²⁰

In sum, in our study, mothers did not routinely agree to joint physical custody in mandatory mediation, and joint physical custody did not emerge as the norm in either mediation, lawyer-negotiated settlements, or litigation. In this Article we explore why commentators predicted more joint physical custody, particularly against mothers' wishes, and why we did not find these results in our data. Part I of the Article traces the alternative dispute resolution movement, particularly as it began to focus on the law of custody. Part II provides background on the law of child custody and the process of mandatory mediation. Part III sets out the arguments on both sides of the mandatory mediation debate. As developed in Part IV, much of the empirical work on custody mediation focused on issues other than physical custody but generally suggested that the dire predictions were unfounded. Part V describes the methodology and results of this study, particularly, the data and analysis supporting the conclusions that mediation does not decrease primary physical custody for mothers nor lead to more arrangements involving joint physical custody. In Part VI, the Article offers some explanations for the results, and the conclusion suggests some implications of the results and the need for further studies.

I. THE ALTERNATIVE DISPUTE RESOLUTION MOVEMENT AND ITS FOCUS ON CHILD CUSTODY

Alternative dispute resolution (“ADR”) offers mediation as one of many alternatives to litigation. Through mediation, a neutral third party identifies issues between the parties and helps the parties

increases the incidence of pro se representation. See Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 145–64 (2001) (proposing a program for recent law graduates to address the legal needs of people who would otherwise represent themselves in family court).

19. See Connie J.A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y & L. 989, 992–95 (2000).

20. See *infra* Tables 5, 6, and 7 and accompanying text.

propose solutions to the problems between them.²¹ The method is thousands of years old in some parts of Asia and has deep roots among adherents of certain faiths, like Jews and Quakers.²² For family law, however, it is a relative newcomer.

Some researchers have traced mediation in the family law setting to the early 1960's when court personnel began experimenting with informal methods of addressing conflicts between divorcing couples.²³ As parties came to the court to file their lawsuits, clerks and other officers conducted informal sessions with the aim of reducing the conflict between the parties and perhaps prompting reconciliations.²⁴ These efforts, the precursors to formal mediation services, gained steam from the divorce reform movement of the late 1960's.

The divorce reform movement sought to replace the system of fault-based divorce. Indeed, by the time no-fault divorce swept through the country in the 1970's, the fault-based divorce system had completely broken so that the law on the books did not reflect the law in practice.²⁵ As a nation we simply rejected the basic premise of fault-based divorce: that divorce involved an innocent spouse pitted against a guilty spouse in an adversary proceeding, with a judgment of divorce as the prize for the innocent victor.²⁶ Even though the law varied among the states, all the states had various substantive and procedural rules to protect the basic premise.²⁷

21. JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 7 (1984).

22. Daniel G. Brown, *Divorce and Family Mediation: History, Review, Future Directions*, 20 *FAM. CT. REV.* 1, 1 (1982).

23. *Id.* at 11-13; see also Jay Folberg, *A Mediation Overview: History and Dimension of Practice*, *MEDIATION Q.*, Sept. 1983, at 3, 5-6 (describing divorce mediation efforts in the 1960's and the 1970's); Joan B. Kelly, Carl Zlatchin & Joel Shawn, *Divorce Mediation: Process, Prospects, and Professional Issues*, in *PSYCHOLOGY, PSYCHIATRY, AND THE LAW: A CLINICAL AND FORENSIC HANDBOOK* 243, 245 (C.P. Ewing ed., 1985) (noting that the emergence of divorce-related mediation coincided with the "gradual acceptance of no-fault divorce statutes" in the 1970's).

24. CONNIE J.A. BECK & BRUCE D. SALES, *FAMILY MEDIATION: FACTS, MYTHS, AND FUTURE PROSPECTS* 5-7 (2001).

25. For the ways the system was "broken," see *infra* notes 26-39 and accompanying text.

26. 2 SUZANNE REYNOLDS, *LEE'S NORTH CAROLINA FAMILY LAW* § 7.2, at 9 (5th ed. 1999); see sources cited *infra* note 29. For the participation of lawyers in manufacturing grounds for divorce, see Joel S. Newman, *Legal Advice Toward Illegal Ends*, 28 *U. RICH. L. REV.* 287, 304-08 (1994) (discussing whether lawyers were disciplined for their roles in the fraud on the courts in cases trying to circumvent the fault grounds).

27. See, e.g., 2 REYNOLDS, *supra* note 26, § 7.4, at 16 (discussing the "injured spouse" requirement for a divorce in North Carolina).

Hard as the law on the books tried to protect the premise, the law in practice did not.²⁸ In contested divorces, judges granted divorces with weak evidence of the grounds. In uncontested cases, parties colluded in fabricating grounds for divorce. As explained in a treatise on North Carolina family law, the discrepancy between the law on the books and in practice “encouraged an unholy conspiracy among the parties, their lawyer, and the judge hearing the case. Unscrupulous lawyers advised their clients how to manufacture ‘evidence’ and then coached them in perjury. For their part, judges granted divorces on the basis of evidence that everyone recognized for the perjury it was.”²⁹

In light of the practices that circumvented fault-based statutes, some would say that no-fault divorce replaced fault-based divorce long before no-fault statutes brought an official end to divorce based on fault grounds. Nevertheless, it was not until no-fault divorce statutes replaced fault-based divorce statutes that proponents of ADR seized the moment and began in earnest to promote mediation as the likely successor to adversary divorce proceedings. Some of these proponents were lawyers who feared that the divorce rates would soar and believed that the civil justice system needed to offer conciliation services in an effort to keep marriages together.³⁰ Coalitions of lawyers, social workers, family therapists, and family mediators drafted training materials and model rules for family mediation and developed divorce mediation centers.³¹ Scholars from a variety of fields—cultural anthropology, sociology, social psychology, as well as law—contributed to the movement.³² In hindsight, in the waning days of fault-based divorce, the process was probably not as adversarial as it appeared so that the formal change to no-fault divorce probably did not work as big a difference as some

28. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 577 (3d ed. 2005).

29. 2 REYNOLDS, *supra* note 26, § 7.2, at 9–10. For example, see FRIEDMAN, *supra* note 28, at 577–78, describing the practice in New York of a man who wanted a divorce paying a woman to disrobe in a motel room in which a photographer would capture the “evidence.” See also Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 COLUM. L. REV. 1121, 1127–28 (1936) (reporting widespread belief that legislators, judges, other court personnel, lawyers, parties, and others colluded to concoct evidence in divorce cases to satisfy the requirements of New York’s fault-based law).

30. See, e.g., UNIF. MARRIAGE & DIVORCE ACT § 305(b), 9A U.L.A. 242 (1998) (providing the court the option of continuing the dissolution action and, on request of either party or on its own, ordering a “conciliation conference” if the judge believes there is a “prospect of reconciliation”).

31. BECK & SALES, *supra* note 24, at 5–9.

32. *Id.* at 8.

believed.³³ Nevertheless, the proponents of ADR worried that removing fault as the central feature of divorce law removed the legal framework for deciding the issues presented by divorce, and they tried to fill the void that they believed had been created.

While mediation became a part of the divorce landscape in general, it took on the most significance for child custody. During the days of fault-based divorce, the law had tried to keep the fault relevant to dissolving the marriage distinct from the custody issue. As explained in one North Carolina case,

[I]n a custody proceeding it is not the function of the courts to punish or reward a parent by withholding or awarding custody of minor children; the function of the court in such a proceeding is to diligently seek to act for the best interests and welfare of the minor child.³⁴

The courts did not always manage to keep fault out of custody,³⁵ however, and when mediation emerged as the alternative to the adversary divorce system, reformers were more than eager to bring it first to the issue of custody.

The proponents of mediation offered a number of reasons why mediation should become the preferred process for resolving family disputes in general and custody disputes in particular. Mediation, they argued, offered benefits for the legal system. According to the proponents, mediation would resolve custody disputes more quickly, less expensively, and privately.³⁶

Even more importantly, mediation offered benefits for the parents because it empowered them to settle their own disputes. The mediators would help the parties resolve their conflicts and in the course of the mediation sessions teach them some skills they could use in later disputes. The parents could air their grievances, assisted by a neutral third party, who could help make sure that the other parent heard the grievance. The process would put the interests of the children at the heart of the proceeding and keep the parents' attention focused on the children instead of their own conflicts. Parents would like the process better and would therefore be more satisfied with the results. The advocates for mediation did not stop

33. See Lee E. Teitelbaum & Laura DuPaix, *Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law*, 40 RUTGERS L. REV. 1093, 1113 (1988) (questioning just how adversarial most divorces were).

34. *In re McCraw Children*, 3 N.C. App. 390, 395, 165 S.E.2d 1, 4-5 (1969).

35. See 3 REYNOLDS, *supra* note 26, § 13.14(b), at 13-49 (discussing the effect of a parent's sexual conduct on the custody issue).

7 36. See Beck & Sales, *supra* note 19, at 991.

there: they predicted that obligors of child support would pay more child support once mediation replaced the adversary system, that non-custodial parents would maintain more post-separation contact with their children, and that there would be fewer subsequent disputes in mediated custody disputes. Most significantly, the process, less conflict-ridden, would be more beneficial to children and help their adjustment to divorce.³⁷

The claims for the superiority of mediation over litigation stemmed in part from the conclusion that lawyers hindered the process of resolving custody disputes. Removing lawyers and replacing them with mediators and other mental health professionals, said some observers, would increase the chances of a good resolution of custody disputes. Characterizing the typical custody lawyer as a “bomber” who encouraged clients to make unreasonable demands,³⁸ proponents of mediation argued that replacing lawyers with third party neutrals, namely mediators, promised to reduce the acrimony between the parties and promote amicable settlements of the custody issue.³⁹ Mediators, unlike most lawyers, had professional training in family conflict and dispute resolution, and therefore mediation offered a clearly superior alternative.⁴⁰

These kinds of claims for mediation help to explain the decisions in some states to make child custody mediation mandatory. In 1980, Massachusetts and Connecticut became the first states to mandate custody mediation, and California followed in 1981.⁴¹

37. *Id.* at 991–92 (addressing most of the claimed benefits). For these and other benefits, see also Robert Dingwall & John Eekelaar, *A Wider Vision?*, in *DIVORCE MEDIATION AND THE LEGAL PROCESS* 168–82 (Robert Dingwall & John Eekelaar eds., 1988). Though this Article concludes that custody mediation did not deliver all it promised, that is not to say that we have lost confidence in mediation generally. On the contrary, different communities are exploring the use of mediation in settings once thought off-limits. John A. Martin & Steven Weller, *Mediated Child Protection Conferencing: Lessons from the Wisconsin Unified Family Court Project*, *JUDGES’ J.*, Spring 2002, at 5 (describing projects in two counties in Wisconsin using mediated child protection conferencing for civil and criminal child abuse cases); see also Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications For Child Custody*, 65 *LA. L. REV.* 1379, 1408 (2005) (distinguishing between intimate terrorism and situational couple violence and concluding that custody mediation may be inappropriate in the former while helpful in the latter).

38. Rudolph J. Gerber, *Recommendation on Domestic Relations Reform*, 32 *ARIZ. L. REV.* 9, 13 (1990).

39. *Id.* at 16.

40. Beck & Sales, *supra* note 19, at 991.

41. Brown, *supra* note 22, at 18.

Obviously—especially in hindsight—there was no way for mediation to live up to all that its proponents promised.⁴² As two important scholars have observed, “advocates and academics often expect too much from divorce law and policy,”⁴³ and nowhere does that appear to be more true than in the promises made about what mediation would do for child custody.

II. CHILD CUSTODY AND MANDATORY MEDIATION: BACKGROUND

High hopes for resolving child custody disputes are nothing new, however. Reformers have continued to study the process, searching for better approaches, simply because resolving these disputes is so difficult. As judges and others involved in the process have acknowledged, “One of the gravest responsibilities that can be placed upon a court—and one of the most heart searching—is to determine the proper custodian of a child.”⁴⁴

Despite the gravity of the issue, many of the terms in child custody lack precision. The following gives some background on the terms most significant for this Article:

A. *Custody*

While everyone acknowledges its importance, “custody” remains a largely undefined term.⁴⁵ As explained in a treatise on North Carolina family law,

The North Carolina statutes, for example, do not define “custody” nor many of the related terms. By common understanding, custody of a minor child refers to all of the rights and obligations related to giving care, providing protection, and exercising control over a child. The law may give some of the rights and obligations to one person, some to another. Also, several kinds of custody may be simultaneously in issue.⁴⁶

42. As one proponent said of mediation, “There seems to be an undeniable power, if not magic, to mediation. It almost seems heaven-sent.” James Melamed, *Attorneys and Mediation: From Threat to Opportunity*, *MEDIATION Q.*, Spring 1989, at 13, 14.

43. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 282 (1992).

44. *Wall v. Hardee*, 240 N.C. 465, 467, 82 S.E.2d 269, 372 (1954).

45. See *Patterson v. Taylor*, 140 N.C. App. 91, 95–97, 535 S.E.2d 374, 377–78 (2000) (commenting that the statutes fail to define joint custody and do not distinguish between joint legal custody and joint physical custody).

7 46. 3 REYNOLDS, *supra* note 26, § 13.2(a), at 13-15 to -16.

B. Legal Custody

“Legal custody” refers to the authority to make major decisions about the child’s life, decisions with long-term consequences, such as those relating to secular and religious education and medical care.⁴⁷ A custodian may have the right to make all major decisions for the child, in which case the person has “sole legal custody.” By the same token, persons may share the right to exercise this authority, in which case the persons have “joint legal custody.”⁴⁸ Moreover, the court may allocate, or the parties may agree, to divide legal custody between the custodians, giving the right to make certain decisions to one parent, the right to make other decisions to the other parent.⁴⁹

C. Physical Custody: Primary, Sole, or Joint Physical Custody

When the law uses the phrase “physical custody,” it refers to the rights of the custodian with whom the child resides. In recent years, some commentators and legislatures have avoided the phrase altogether, choosing instead to refer to “custodial responsibility”⁵⁰ or similar phrases. The phrase still appears, however, and refers to the right and responsibilities associated with residing with and supervising the child.⁵¹ In contrast to the long-term decisionmaking authorized by legal custody, physical custody recognizes the authority to supervise the day-to-day routine of the child’s life.

A custodian may have primary, sole, or joint physical custody. As explained in North Carolina commentary:

If the child resides only with one person for significant periods of time, that person has “primary physical custody” or “sole physical custody.” If the child resides for significant periods of time with two persons, these persons may have “joint physical

47. See, e.g., *Patterson*, 140 N.C. App. at 96, 535 S.E.2d at 378 (referring to the term).

48. For a recent case in North Carolina on the topic of legal custody, see generally *Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006) (concluding that in awarding joint legal custody the trial court erred in giving one parent all decisionmaking authority in the absence of findings of fact justifying such a severe restriction on legal custody).

49. See *MacLagan v. Klein*, 123 N.C. App. 557, 565, 473 S.E.2d 778, 784 (1996) (awarding responsibility for decisions about social activities to one parent, decisions about religious training and practice to the other). For an opinion on allocating legal custody, see generally *Diehl*, 177 N.C. App. 642, 630 S.E.2d 25.

50. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 (2002) [hereinafter LAW OF FAMILY DISSOLUTION].

51. The Uniform Child-Custody Jurisdiction and Enforcement Act (“UCCJEA”) defines physical custody as “the physical care and supervision of a child.” U.C.C.J.E.A. § 102(4) (1997); cf. N.C. GEN. STAT. § 50A-102(14) (2005) (adopting UCCJEA definition of physical custody). As the title indicates, however, this Act does not provide the process for deciding custody but for exercising jurisdiction and for enforcing orders.

custody.” While the phrase “sole custody” often refers to the person who has primary physical custody, “sole custody” may refer either to “sole physical” or “sole legal” custody or both.⁵²

D. Visitation

“Visitation,” as it indicates, refers to a more limited right than the right to physical custody. “A person with visitation rights has a kind of custody of the child, and, indeed, the law may refer to visitation as ‘a lesser degree of custody’ or as ‘secondary custody.’”⁵³ A court may carve up these rights in various ways or the parties may agree to various allocations so that a person may have visitation rights and certain rights associated with “legal custody.”

For an issue as wrenching as custody, commentators seldom reach consensus—except on the hope that the parents agree on how to resolve it. The American Law Institute’s Principles of the Law of Family Dissolution, for example, encourage the parties to reach their own “parenting plans,”⁵⁴ an approach that a number of states have adopted.⁵⁵

E. Mandatory Mediation

When the parents do not agree and enlist the aid of the court, jurisdictions with mandatory mediation require the parties to appear before a mediator—usually a court official—and attempt to reach their own agreement on custody. The mandatory mediation provisions may condition further access to the courts to the parties’ attempting to resolve their custody dispute through mediation.

Many of the features of the North Carolina approach have become typical.⁵⁶ The enabling legislation provides for statewide rules to implement the program, which judicial districts may supplement with local rules.⁵⁷ The regulations require mediators to have at least a master’s degree in psychology, social work, family

52. 3 REYNOLDS, *supra* note 26, § 13.2, at 13–16. In this Article, we adopt the definition of joint physical custody as custody in which the child spends at least 123 overnights with each parent. *See infra* note 188.

53. 3 REYNOLDS, *supra* note 26, § 13.2, at 13–16 & n.11 (citations omitted).

54. LAW OF FAMILY DISSOLUTION, *supra* note 50, § 2.05.

55. *See, e.g.*, WASH. REV. CODE ANN. § 26.09.181(1) (West 2005).

56. In North Carolina, for example, mediators do not make recommendations on outcomes when parties fail to reach an agreement. *See infra* note 79 and accompanying text. For the observation that this practice has become the norm, see Beck & Sales, *supra* note 19, at 1010. For other observations about features that have become typical that reflect the North Carolina program, see generally Beck & Sales, *supra* note 19, at 1000–13.

57. N.C. GEN. STAT. §§ 7A-494 to -495 (2005). For narrative on the program, see 3 REYNOLDS, *supra* note 26, § 13.77(a), at 13–148.

counseling, or a comparable field. In practice, mediators in the mandatory programs usually do not have law degrees.⁵⁸ The statutes also require a certain number of hours of training in mediation as well as professional training and experience in child development or family relations.⁵⁹ The program operates at no cost to the parties.⁶⁰

Even within North Carolina, the judicial districts vary somewhat on how the parties get to mediation. In some districts, the filing of the custody action triggers a waiting period, at the conclusion of which the court orders the parties to an orientation session, followed by a private mediation session.⁶¹ In other districts, providing for more control by the parties and their lawyers, the filing of the action triggers a referral to the orientation session, with the parties scheduling their private session without a waiting period.⁶² Forsyth County, which comprises the twenty-first judicial district in North Carolina, follows the latter model.⁶³

The statutes and implementing rules provide for waiver of mediation for good cause shown.⁶⁴ The statute provides a non-exclusive list of reasons, referring specifically to undue hardship because of distance from the meeting site, agreement to voluntary mediation, history of abuse or neglect of the child, history of alcoholism or drug abuse, allegations of domestic violence, and charges of severe psychological, psychiatric, or emotional problems. The parties usually initiate the request to waive mediation. In addition, the court may waive mediation on its own,⁶⁵ or the mediator may move for a waiver.⁶⁶

Unless the parties receive a waiver, they must participate in the general orientation session and in one private mediation session.⁶⁷ Because the court has ordered the parties to the sessions, the court

58. Interview with Katherine Alschuler, Child Custody Mediator, Wake County, Child Custody Mediation Program, in Raleigh, N.C. (May 25, 2007).

59. § 7A-494(c).

60. In some states, the parties share the costs. See, e.g., UTAH CODE ANN. § 30-3-39(4) (Supp. 2007).

61. A publication of the North Carolina Administrative Office of the Courts synthesizes the various approaches. See EVALUATION OF ITS IMPLEMENTATION, *supra* note 6, at 5.

62. *Id.*

63. LOCAL RULES, *supra* note 17.

64. N.C. GEN. STAT. § 50-13.1(c) (2005); UNIFORM RULES, *supra* note 17, at 7.

65. § 50-13.1(c).

66. *Standards of Practice for Mediators in the North Carolina Mandatory Custody Mediation Program*, in UNIFORM RULES, *supra* note 17, app. b, at 20.

67. UNIFORM RULES, *supra* note 18, at 8.

has the authority to hold a party in contempt for failing to appear.⁶⁸ Instead of using this power, the judge may choose instead to order the party back to mediation or allow the party to forego it and pursue litigation.⁶⁹

At the private mediation session, the parties attempt through the mediator to reach an agreement over whatever custody issues are in dispute. In the North Carolina program, the mediator may address only custody issues, however, with financial issues strictly segregated to other processes.⁷⁰ The disputes may arise in initial custody arrangements or in subsequent conflicts over how to modify them.⁷¹ Usually the sessions last less than two hours.⁷² Rarely do the parties have more than one or two sessions, but with court approval, the parties may schedule more than three.⁷³ The goal of the sessions is to reach a “parenting agreement,” the term that the North Carolina statutes give to the agreement that parties reach in court-ordered custody mediation.⁷⁴ If mediation results in a parenting agreement, the mediator helps the parties put the agreement into writing.⁷⁵ The mediator mails a copy of the proposed parenting agreement to the parties and their lawyers and encourages the parties to review the parenting agreement with their lawyers.⁷⁶

In several ways, the North Carolina version of mandatory mediation makes the failure to reach an agreement risk-free.⁷⁷ In the first place, after the party attends the private mediation session, the party may then withdraw with no penalty for failing to reach an agreement.⁷⁸ At that stage, the party may litigate the custody dispute. Equally as important, the mediator does not make any recommendation to the court to try to influence subsequent proceedings. In fact, the statutes governing mediation provide confidentiality and privilege for the communications exchanged

68. *Id.*

69. For the effect of the lack of consequences, see *infra* notes 77–79 and accompanying text.

70. § 50-13.1(b) (providing that the court refer to mediation issues relating to custody, not economic issues); see UNIFORM RULES, *supra* note 17, at 7 (naming only “unresolved issues as to custody or visitation of minor child” as appropriate for mediation).

71. § 50-13.1(b). The statute requires mediation also for motions seeking enforcement, like contempt. *Id.*

72. UNIFORM RULES, *supra* note 17, at 8.

73. *Id.*

74. § 50-13.1(h).

75. UNIFORM RULES, *supra* note 17, at 9.

76. *Id.*

77. Contrast the approach of some states, at least in other versions of mandatory mediation, *infra* notes 120–24 and accompanying text.

78. UNIFORM RULES, *supra* note 17, at 8.

during the sessions, with exceptions only for criminal conduct or other conduct amounting to abuse or neglect.⁷⁹

The North Carolina version of mandatory mediation, in effect, simply offers another opportunity for the parties to reach their own agreement. As enacted, the program contemplates the participation of lawyers and attaches no penalties for parties who refuse to reach an agreement. Even parties who refuse to participate may face no consequences.⁸⁰ With this version of mandatory mediation in mind, the firestorm of criticism that accompanied mandatory mediation for custody comes as a surprise. The mandatory mediation model that triggered the controversy, however, was much different.

III. THE FEMINIST CRITIQUE OF MANDATORY MEDIATION

Feminist scholars rejected the notion that mandatory mediation offered salvation for child custody and warned instead that it threatened the proper resolving of custody disputes. Early in divorce reform, Martha Fineman cautioned that no-fault divorce in general left women with serious economic disadvantages,⁸¹ and she insisted that mandatory mediation in custody proceedings threatened further disadvantage to women as the family dissolved.⁸²

Though she was the most prominent, Fineman was not the first to challenge the use of mandatory mediation for custody disputes. Even before mediation focused on custody, commentators cautioned about the use of ADR for poor or otherwise disempowered

79. § 50-13.1(e)–(f).

80. See *infra* notes 217–18 and accompanying text.

81. See Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 827–30 (1983). In this law review article, Fineman argued that fault-based divorce at least offered some leverage to the economically disadvantaged spouse as long as she remained the innocent spouse. See *id.* 848–49, 883. Without fault-based divorce, the innocent spouse had lost her leverage. See *id.* Fineman later expanded her article into a book, MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991).

82. Martha L. Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107 (1987). For another important work with this theme, see LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985). While some have cast doubt on certain of Weitzman's claims, see, e.g., Saul D. Huffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce*, 25 DEMOGRAPHY 641, 641 (1988), her basic points appear sound.

participants.⁸³ In the setting of custody, however, the tide bringing mediation to custody inspired a tidal wave opposing it.

The opponents voiced a number of interrelated concerns, some having to do with the traits of the parents, some with the process, and still others with the effect on the substantive law of custody. On the traits of the parents, all of the opponents pointed out that the social and economic circumstances of a majority of wives left them at power disadvantages with their husbands. The opponents argued that these power imbalances would carry over to mediation, and the “agreements” that issued from mediation would not represent real agreements on the part of many of the mothers executing them.⁸⁴ Knowing that a “successful” mediation was supposed to end in an agreement, too many mothers would succumb to the demands of their typically more powerful husbands. Even if wives did not give in to the demands of their husbands, other traits might work to the disadvantage of mothers. Opponents feared that women’s “relational sense of self” might cause them, if forced to mediate, to work on maintaining a connection with their ex-husbands, even against their self-interests.⁸⁵ In addition, opponents worried about the “Solomon syndrome.”⁸⁶ When the mediators had indicated the wisdom of a certain custody arrangement, mothers might feel pressure to agree to that arrangement even if the mothers thought it was ill-advised. Otherwise, the mediators might become irritated, argued the opponents of mandatory mediation, causing some mothers to fear—

83. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1360–61 (1985).

84. See, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 445–46 (1992); Harriet Cohen, *Mediation in Divorce: Boon or Bane*, WOMEN’S ADVOC., July 1983, at 1; Richard E. Crouch, *The Dark Side of Mediation: Still Unexplored*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 339 (Howard Davidson et al. eds., 1982); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1592 (1991); Carol Lefcourt, *Women, Mediation and Family Law*, 18 CLEARINGHOUSE REV. 266 (1984); Laurie Woods, *Mediation: A Backlash to Women’s Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431 (1985).

85. Grillo, *supra* note 84, at 1550. See generally Janet Rifkin, *Mediation from a Feminist Perspective: Promises and Problems*, 2 LAW & INEQ. 21, 22 (1984); Martha Shaffer, *Divorce Mediation: A Feminist Perspective*, 46 U. TORONTO FAC. L. REV. 162 (1988).

86. The phrase refers to a mother’s willingness to sacrifice for the welfare of her child. In the Biblical story of King Solomon, the good ruler manifested his wisdom as he listened to two women who both claimed a baby. Solomon demanded that his attendant bring a sword and ordered the attendant to sever the baby in half and give one half to each woman. One woman accepted the proposal while the other woman begged the king to spare the child and give the baby to the other woman. King Solomon decreed that the baby was the child of the woman who asked him to spare the child’s life. 1 Kings 3:16–28.

perhaps irrationally—that the mediators’ displeasure might result in their losing custodial time. Because of their care orientation, mothers might reach an “agreement” out of a fear that they otherwise might lose more time with their children.⁸⁷

All of these concerns—power imbalances, relational sense of self, the Solomon syndrome—were even more acute if the mothers were victims of domestic violence. For victims of domestic violence, opponents thought mandatory mediation was particularly wrong-headed.⁸⁸ In fact, for domestic violence victims, these concerns became acute.

Others opposed mediation for related reasons about the process itself. Because mediators were supposed to remain neutral, they would not be inclined to correct any power imbalances, even if they became aware of them.⁸⁹ Also because of mediators’ training, the sessions would tend to be person-oriented and forward-looking when the best interests of the child might warrant a look backward to the custodial arrangement and the conduct of the parties before the separation.⁹⁰ Moreover, the parties might need to discuss the history of their relationship, something which mediation actively discourages.⁹¹ Also, any benefit that might come from mediation was unlikely to occur in mandatory mediation. Because the docket of the court-ordered programs left little time for extended sessions,

87. Bryan, *supra* note 84, at 480.

88. Grillo, *supra* note 84, at 1584. For a later critique of mediation and domestic violence, see Ver Steegh, *supra* note 37, at 1406–08. See also Lauri Boxer-Macomber, *Revisiting the Impact of California’s Mandatory Custody Mediation Program on Victims of Domestic Violence Through a Feminist Positionality Lens*, 15 ST. THOMAS L. REV. 883, 884 (2003) (arguing that many of the potential harms for domestic violence victims initially posed by California’s mandatory mediation model have since been “eliminated, mitigated, or should be reconsidered from a new standpoint”).

89. Bryan, *supra* note 84, at 498. For support that mediators do not address power imbalances, see generally JOHN M. HAYNES, *DIVORCE MEDIATION: A PRACTICAL GUIDE FOR THERAPISTS AND COUNSELORS* (1981); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (1996). For a more recent concern about mediator training, see the conclusion by Dean Katharine Bartlett, reporter for the ALI’s Principles of the Law of Family Dissolution, that the ALI did not favor mandatory mediation because “the quality of mediation nationwide was not yet at the level to justify a broad, mandatory approach.” Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL’Y & L. 5, 15 (2002).

90. Teitelbaum & DuPaix, *supra* note 33, at 1117.

91. Grillo, *supra* note 84, at 1563–64, 1574–75.

mandatory mediation would not provide the time necessary for therapeutic interventions.⁹²

Most of all, however, the opponents rejected mandatory mediation because of a perceived mediator bias towards joint physical custody. To the opponents, there could be no doubt of this bias,⁹³ and they cited mediator training manuals indicating that for mediators, “joint physical custody” was the code phrase for “best interests of the child.”⁹⁴ In fact, the momentum for mediation coincided with the momentum for joint physical custody.

As a principle of family law, joint physical custody, or the sharing of significant custodial time with both parents, appeared, and then took hold, relatively quickly. Some trace the joint custody movement to a 1978 work by two disgruntled fathers, who resented their own custody arrangements.⁹⁵ Whatever its origins, the principle gained a foothold, and states responded with statutes that promoted awards of joint custody. In some states, the statutes directed the court to presume an award of joint custody, with the burden on the objecting parent to rebut the presumption.⁹⁶ In other states, legislatures

92. Bryan, *supra* note 84, at 501. Mediators in these programs would have to keep the sessions focused, and the drive for efficiency would undermine any gain to be had from mediation. *Id.* at 511–12.

93. Bryan, *supra* note 84, at 491; Linda K. Girdner, *Custody Mediation in the United States: Empowerment or Social Control?*, 3 CAN. J. WOMEN & L. 134, 142 (1989) (noting that many private mediators advocate for joint custody as the “best interests” of the child) [hereinafter Girdner, *Empowerment or Social Control?*]; Linda K. Girdner, *Adjudication and Mediation: A Comparison of Custody Decision-Making Processes Involving Third Parties*, J. DIVORCE, Spring/Summer 1985, at 33, 42 (noting mediators’ common preference for coparenting); Grillo, *supra* note 84, at 1594 (reporting that mediators steer clients toward joint custody); Lois Vanderkooi & Jessica Pearson, *Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles*, 32 FAM. REL. 557, 560 (1983) (describing the “distributive solutions” proposed by mediators, including “log rolling” where the parents split physical custody on important dates such as holidays and birthdays).

94. See, e.g., DONALD T. SAPOSNEK, *MEDIATING CHILD CUSTODY: A SYSTEMATIC GUIDE FOR FAMILY THERAPISTS, COURT COUNSELORS, ATTORNEYS, AND JUDGES* 81 (1985); Andrew Shepard, Melissa D. Philbrick & Dvora Wolff Rabino, *Ground Rules for Custody Mediation and Modification*, 48 ALB. L. REV. 616 (1984); see also Mary Tall Shattuck, *Mandatory Mediation*, in *DIVORCE MEDIATION THEORY AND PRACTICE* 191, 204 (Jay Folberg & Ann Milne eds., 1988) (explaining that parties need to find their solutions within the state “statutory standard that calls for close and continuing contact between the child and both his parents”).

95. Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody: The Parent-Child Relationship and the Current Cycle of Family Law Reform*, 45 OHIO ST. L.J. 455, 455 n.1 (1984) (citing MEL ROMAN & WILLIAM HADDAD, *THE DISPOSABLE PARENT* 75 (1978)).

96. For the first presumption as it appeared in California in 1979, see CAL. CIV. CODE § 4600.5(b) (Deering 1981) (repealed 1994) (presuming joint custody even in a disputed case). For the presumption which remains in the current version of the Florida custody statute, see FLA. STAT. ANN. § 61.13(2)(b)(2) (West 2006) (requiring shared parenting unless the court finds the arrangement detrimental to the child).

adopted “friendly parent provisions” that instructed the court to consider how willing a parent was to promote contact with the other parent.⁹⁷ As used in some states, these friendly parent provisions applied pressure. If a parent thought that opposing joint custody might appear “unfriendly,” the parent would agree to joint custody to avoid a judge awarding custody to the “friendlier” parent.⁹⁸

A number of factors paved the way for this bandwagon for joint physical custody, factors which combined to make judges eager for any presumption to help decide custody cases. In the first place, the divorce rate was rising.⁹⁹ As divorce affected increasing numbers of children,¹⁰⁰ everyone in the system felt pressure to handle custody cases better. Second, several important longitudinal studies published in the late 1970’s and early 1980’s reported the devastating effects of divorce on children,¹⁰¹ and these reports stimulated interest in changing the custody paradigm. Third, increasing numbers of mothers in the workforce had altered, at least somewhat, traditional parenting roles. In this light, joint physical custody simply responded to the realities of modern parenting.¹⁰² Fourth, in the decades before this attention to joint physical custody, the substantive law of custody had rejected the tender years’ presumption, the presumption that the court should award custody of a young child to the mother.¹⁰³ As compared to the tender years’ presumption, the indeterminate “best interests of the child” standard left the courts struggling with little

97. See, e.g., IOWA CODE ANN. § 598.41(1)(c) (West Supp. 2006) (directing court to “consider the denial by one parent of the child’s opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the property custody arrangement”).

98. 3 REYNOLDS, *supra* note 26, § 13.60 at 13–122. For an analysis of the effect of these statutes in one state, see Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U. L. REV. 779, 804–13 (2006) (analyzing the shared-custody preference enacted in Oregon and concluding that the statutes had only a limited effect on joint physical custody awards). For a similar conclusion about custody settlements, see Margaret F. Brinig, *Unhappy Contracts: The Case of Divorce Settlements*, 1:2 REV. L. & ECON. 241, 249–61 (2005) (analyzing settlements in a county in Iowa and concluding that what the parties might have expected in litigation did not significantly affect the custody terms of their settlements).

99. Scott & Derdeyn, *supra* note 95, at 458.

100. See Paul C. Glick, *Children of Divorced Parents, in Demographic Perspective*, 35 J. SOC. ISSUES 170, 170, 174 (1979).

101. JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980); E. Mavis Hetherington et. al., *The Aftermath of Divorce, in MOTHER/CHILD, FATHER/CHILD RELATIONSHIPS* 149 (Joseph H. Stevens, Jr. & Marilyn Matthews eds., 1978).

102. Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 501 (1988).

103. 3 REYNOLDS, *supra* note 26, § 13.6, at 13-30 to -32.

guidance on how to make custody decisions. In this void, joint physical custody offered something determinant.¹⁰⁴

With these factors as a backdrop, for opponents of mediation, mediator bias in favor of joint physical custody created the perfect storm to overwhelm the fair resolution of child custody at divorce. The opponents foresaw a world where joint physical custody would become the norm even if high conflict or other factors made shared physical custody inappropriate. In fact, in one of her important articles on the topic, Fineman named the “helping professions” as the people who deserved most of the blame for constructing the joint physical custody bandwagon.¹⁰⁵ She put social workers and others trained in mental health and the behavioral sciences, including mediators, in the category of the helping professions and accused them of feeding “the joint custody norm” that devalued the primary caregiver.¹⁰⁶ The helping professions, she insisted, had wrested custody from the law and lawyers and claimed custody as their own by posing as the facilitators of reform.

Fineman found most pernicious the way the helping professions had changed the discourse about custody. No longer was a custody dispute a legal event: instead, it was an emotional crisis calling for mental health professionals, not lawyers.¹⁰⁷ A “good” parent became the parent most cooperative in getting through the crisis and getting on with her life. In this setting, if a parent refused to cooperate, that refusal labeled the parent pathological.¹⁰⁸ Fineman concluded that custodial mothers lost their voice in the custody debate because they could not express their concerns “through existing and accepted discourses or rhetorical concepts.”¹⁰⁹ And according to Fineman and others, the cooperation the mediator wanted facilitated an agreement reflecting joint physical custody: the shared parenting ideal. To the extent the substantive law gave the mother an advantage as the primary caregiver, mediation took it away.¹¹⁰ If the mother did not

104. Scott & Derdeyn, *supra* note 95, at 464.

105. Fineman, *supra* note 82, at 728.

106. *Id.*

107. *Id.* at 743–44; *see also* Girdner, *Empowerment or Social Control?*, *supra* note 93, at 141 (comparing attorney mediators, whose focus is negotiating agreements about the disputed issues, to nonlawyer mediators, whose focus is restructuring the family).

108. Fineman, *supra* note 82, at 765–66; *see* Shattuck, *supra* note 94, at 204 (“Joint legal custody with its emphasis on shared decision making, is routinely ordered by the court . . .”).

109. Fineman, *supra* note 82, at 730.

7 110. Bryan, *supra* note 84, at 491 (describing the models of mediation).

agree to joint physical custody, the mediator might consider her “unfriendly,” or pathological.

Some of these reactions to mediation make sense only in light of the mediation model against which the opponents railed. Mediation takes many shapes,¹¹¹ but the criticism assumed a model with fairly consistent features. Many of these features drew on the California experience, one of the first states to require mediation as a prerequisite to litigating the custody issue. The following describes the California model, at least when it first appeared in 1981.

In the first place, the model involved *mandatory* mediation. In this model, the court *ordered* the parties to mediate, and it was mandatory mediation that drew the most ire. Indeed, some of the most vocal critics of mandatory mediation had no problems with voluntary mediation, where there was less reason to worry about power imbalances and mediator coercion.¹¹² A legal penalty attached to failing at least to attempt to reach agreement through mediation: no access to the court to litigate the dispute.¹¹³

Just as troubling for the critics, this model of mediation excluded lawyers. At one point in California, the mediation statute itself gave the mediator the power to exclude lawyers from participating in the mediation proceedings.¹¹⁴ The mediator, with training in mental health rather than law, focused the parties on reaching an agreement, not on the law of custody, in which the mediator had no training. Critics complained that without the law to set boundaries, this model left the decision to the mediator’s own personal biases.¹¹⁵ Indeed, this model of mediation encouraged the mediator to recommend to the parties how they ought to resolve their disagreements and to reorient the parents about their post-separation parenting.¹¹⁶ To accomplish these goals, in the early days of mediation, it was common for the mediator to meet with the child and advocate for the child in the mediation session with the parents, who participated without lawyers.¹¹⁷

Excluding lawyers troubled the critics, especially in the setting of domestic violence. At this stage of mandatory mediation, there was not the consensus that later emerged that the process should screen

111. See BECK & SALES, *supra* note 24, at 9–16.

112. See, e.g., Fineman, *supra* note 82, at 729.

113. Shattuck, *supra* note 94, at 199.

114. CAL. CIV. CODE § 4607(a) (Deering 1981) (repealed 1994).

115. Teitelbaum & DuPaix, *supra* note 33, at 1125.

116. Shattuck, *supra* note 94, at 199.

117. *Id.*

out victims of domestic violence.¹¹⁸ Even so, mandatory mediation critics complained that the law should not force spouses who suffered abuse at home to mediate custody disputes with their abusers.¹¹⁹

Finally, the mediator performed the dual role of mediator and evaluator, with the power to make recommendations to the court when the mediation failed to result in an agreement.¹²⁰ With this dual role, the mediator had a great deal of leverage: if a party failed to agree to what the mediator appeared to prefer, the mediator could hold it against the party as the mediator framed a recommendation to the court. With this kind of power, a party would feel pressure to “agree.”¹²¹ In California, the first state with mandatory mediation of child custody, courts in most counties could *require* the mediators to make recommendations.¹²² Also, if the parties failed to reach an agreement, the mediator could recommend an investigation or the issuing of mutual restraining orders.¹²³ At any rate, what happened in the mediation formed the basis for the mediator’s recommendation, which the judge usually followed, and mediators sometimes reminded parties of their recommendation in order to force an agreement.¹²⁴ Even without this reminder, parents with any knowledge of human behavior surely understood that if the mediator had suggested to the parties what custody arrangement was best, that suggestion would appear in the mediator’s recommendation to the court.

118. For a description of programs in the 1990’s that mediated in the presence of family violence, see BECK & SALES, *supra* note 24, at 29. For the current trend towards exempting parties from mandatory mediation because of domestic violence, see LAW OF FAMILY DISSOLUTION, *supra* note 50, § 2.01, at 171–72. Even so, commentators worry that the screening in mediation and other settings is ineffective. See Ver Steegh, *supra* note 37, at 1401–02.

119. Phyllis Gangel-Jacob, *Some Words of Caution about Divorce Mediation*, 23 HOFSTRA L. REV. 825, 884 (1995) (giving the perspective of a judge in New York on the reasons why mandatory mediation posed threats to domestic violence victims); see also BECK & SALES, *supra* note 24, at 31 (“Mediators, like everyone, are incapable of identifying abusers’ hidden signals; thus current screening procedures are useless for this population of abused women.”).

120. Shattuck, *supra* note 94, at 196 (noting that the practice of mediator as recommender was not consistent even in California).

121. Contrast with the North Carolina model, *supra* notes 56–80 and accompanying text.

122. Grillo, *supra* note 84, at 1554–55.

123. *Id.*

7 124. *Id.*

IV. EMPIRICAL STUDIES COMPARING CUSTODY MEDIATION AND LITIGATION

Since the dire predictions by the opponents of mandatory mediation, researchers across disciplines have conducted hundreds of studies related to family mediation, including custody mediation.¹²⁵ Even so, for the reasons explained below, the studies have given us little insight into the effect of mandatory mediation on dividing physical custody between mothers and fathers.¹²⁶

In the first place, most of the studies involved voluntary mediation. Some studies, for example, compared the experience of couples who chose mediation to the experience of couples who chose litigation.¹²⁷ As two prominent psychologists observed “couples who self-select into a mediation-only option differ in substantial ways from couples who self-select into a litigation-only option, which makes obtaining matched samples of mediation and litigation samples nearly impossible.”¹²⁸ In one of the most famous longitudinal studies of mediation and litigation of custody disputes, conducted by Jessica Pearson and Nancy Thoennes, the researchers based their conclusions on couples who chose to participate in the mediation.¹²⁹

125. For the concern that the studies lump multi-issue mediation with single issue mediation, see *infra* note 158.

126. For the problems with empirical work in family law in general, see Margaret F. Brinig, *Empirical Work in Family Law*, 2002 U. ILL. L. REV. 1083.

127. See Jessica Pearson, *The Equity of Mediated Divorce Agreements*, 9 MEDIATION Q. 179, 179–97 (1991). One important study involved only couples who had chosen litigation. The couples then agreed to be randomly assigned either to mediation or litigation. For reports of this study, see, e.g., Robert E. Emery & Melissa M. Wyer, *A Systematic Comparison of Child Custody Mediation and Litigation*, FAIRSHARE, Feb. 1988, at 10 [hereinafter Emery & Wyer, *A Systematic Comparison*]; Robert E. Emery & Melissa M. Wyer, *Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of Parents*, 55 J. CONSULTING & CLINICAL PSYCH. 179 (1987). For the longitudinal study based on these participants, see Robert E. Emery et al., *Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years after Initial Dispute Resolution*, 69 J. CONSULTING & CLINICAL PSYCH. 323 (2001). For the book drawing on this study, see ROBERT E. EMERY, *THE TRUTH ABOUT CHILDREN AND DIVORCE* (2004).

128. BECK & SALES, *supra* note 24, at 165. Jessica Pearson has labeled as a “myth” the conclusion that “[m]ediation cannot be effective unless participation is voluntary.” Jessica Pearson, *Ten Myths about Family Law*, 27 FAM. L.Q. 279, 286–88 (1993). While the voluntary/involuntary nature may not affect its efficacy, it surely is relevant in comparing the results on so crucial an issue as physical custody.

129. See Jessica Pearson & Nancy Thoennes, *Divorce Mediation Research Results*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 429 (Jay Folberg & Ann Milne eds., 1988) (describing the Denver Custody Mediation Project); see also Joan B. Kelly, Lynn Gigy & Sheryl Hausman, *Mediated and Adversarial Divorce: Initial Findings from a Longitudinal Study*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 453 (Jay Folberg

With that limitation in mind, the studies reported mixed results on the comparison of physical custody as a result of mediation and litigation. Some reported more joint legal custody in the mediation group as compared to the litigation group but no differences in the two groups in primary physical residence or number of days spent with the noncustodial parent. Thus, although mediation appeared to increase shared decisionmaking over important life decisions of the child after divorce, it seemed not to increase the instances of shared physical custody.¹³⁰ In another famous longitudinal study, on primary residence, the mediating and litigating groups looked similar after the passage of time, with most of the children residing with their mothers.¹³¹

California adopted mandatory mediation early in the mediation movement, so findings comparing mediated and litigated outcomes in California offer evidence relating to the concerns of the feminist scholars regarding *mandatory* mediation. In the most significant study of custody in California, the prominent legal scholar, Robert Mnookin, and the prominent psychologist, Eleanor Maccoby, collaborated on a longitudinal study for data relating to gender and parenting, legal conflict, children's contact with parents post-separation, and the nature of post-separation co-parenting. To do this, Maccoby and Mnookin studied about 2,000 families identified in court records of divorce petitions in two California counties in the mid-1980's. The study developed a cohort of persons who had children who would remain minors for the length of the study. While other studies tended to focus on white families in higher income brackets,¹³² Maccoby and Mnookin screened the families to reflect a broader socioeconomic demographic. Research teams interviewed the parents shortly after they had filed for divorce, usually within six months after separation. Teams interviewed the subjects again one year later, and for a third time, after about three and one-half years after separation.¹³³ In 1992, the researchers published their findings in

& Ann Milne eds., 1988) (studying couples who voluntarily came to the mediation center for mediation on all issues related to divorce).

130. Pearson & Thoennes, *supra* note 129, at 445.

131. Emery et al., *supra* note 127, at 325 (involving parties assigned to mediate). While this study found no difference in primary residence, it concluded that on other measures, like parent-child contact, parenting quality, and coparenting conflict, mediation offered significant benefits. *Id.* at 330-31.

132. See this criticism voiced in Scott & Derdeyn, *supra* note 95, at 484.

133. Charles E. Depnder, *Methods*, in MACCOBY & MNOOKIN, *supra* note 43, at 308-38.

the monumental work, *Dividing the Child: Social and Legal Dilemmas of Custody*.¹³⁴

Among the authors' many analyses, Mnookin and Maccoby examined the impact of the process on the physical custody outcome, the primary focus of this Article. On physical custody, Mnookin and Maccoby concluded that mandatory mediation resulted in higher instances of joint physical custody, but only slightly,¹³⁵ confirming only marginally what the feminist critique had predicted. However, the authors confirmed other concerns, as they noted that mediators were recommending joint physical and legal custody.¹³⁶ Maccoby and Mnookin worried, too, that joint physical custody emerged as a way to resolve conflict rather than as a way to further the best interests of the child, observing that cases that resolved right before trial revealed disproportionately high percentages of joint physical custody.¹³⁷ On a positive note, however, the authors found that mandatory mediation contributed to settling custody disputes. Overall, the authors concluded "that mandatory mediation is a useful if imperfect means for resolving legal conflict during divorce."¹³⁸

As for other claims of the benefits of mediation, many of the other studies suffered from the same limitations, relying on samples involving participants who volunteered to mediate and thus might not reflect the experiences of participants whom the court ordered to mediate. Using voluntary mediation models, some of the studies reported that parents had higher levels of satisfaction with mediation as opposed to litigation.¹³⁹ Others compared voluntary, private mediation with court-ordered mediation and reported higher satisfaction for the private process.¹⁴⁰ In studies comparing men and women, however, some of the studies supported the concerns of the feminist critique of mediation. In particular, in several of these comparisons, women reported higher levels of satisfaction with

134. MACCOBY & MNOOKIN, *supra* note 43.

135. *See id.* at 290.

136. *Id.*

137. *Id.*

138. *Id.*

139. Nina R. Meierding, *Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Private Mediated Agreements*, 11 *MEDIATION Q.* 157 (1993); Pearson & Thoennes, *supra* note 129, at 437.

140. *See* Carol Bohmer & Marilyn L. Ray, *Effects of Different Dispute Resolution Methods on Women and Children After Divorce*, 28 *FAM. L.Q.* 223, 244 (1994) (concluding generally, however, that women and children are not worse off for mediating rather than litigating under the Georgia mediation system).

litigation than they did with mediation,¹⁴¹ though certainly not consistently.¹⁴² Other studies suggested that women were more satisfied with a voluntary mediation program in which they felt free to terminate the session if they felt pressure,¹⁴³ a finding that would also tend to justify the feminist critique.

Other findings in studies comparing voluntary mediation and litigation found that mediation saved the parties some costs in lawyers' fees if they mediated but that the state saved costs only with mandatory mediation.¹⁴⁴ Again, as other commentators pointed out, one would expect parties inclined to mediate to need less lawyers' time to resolve their disputes.¹⁴⁵

On the post-separation functioning of the family, the findings of most of the studies did not support significant benefits from mediation. In a study comparing mandatory mediation in one state with litigation of custody in another state, the researchers reported that mediation was "less damaging" for the relationship between the parents.¹⁴⁶ But whether the studies involved voluntary or mandatory mediation, the findings suggested that after a passage of time, the process used at separation seemed not to affect how well the parties functioned after some time had elapsed since the actual dissolution of the family.¹⁴⁷ In one study involving voluntary, private mediation, the researchers' main goal was to assess the difference in psychological distress between a mediating and a litigating group. The private mediation group was in a higher socioeconomic status than the average divorcing couple and had more mediation sessions than the

141. Robert E. Emery & Joanne A. Jackson, *The Charlottesville Mediation Project: Mediated and Litigated Child Custody Disputes*, 24 *MEDIATION Q.* 3, 12-14 (1989) (using a cohort of parties assigned to mediate); DESMOND ELLIS & NOREEN STUCKLESS, *MEDIATING AND NEGOTIATING MARITAL CONFLICTS* 96-97 (1996).

142. See Beck & Sales, *supra* note 19, at 1037-39 (contrasting studies that found very different results regarding gender differences in reactions to mediation).

143. *Id.* at 1038-39.

144. Pearson & Thoennes, *supra* note 129, at 447-48.

145. See Teitelbaum & DuPaix, *supra* note 33, at 1115 (arguing that the time-savings resulted not from the process of mediating but rather from the characteristics of the parties who chose voluntarily to mediate, since such parties tend to be more inclined to resolve their differences). Pearson and Thoennes also claimed that the process of voluntary mediation cut down the time the parties spent in resolving their custody disputes. See Pearson & Thoennes, *supra* note 129, at 447 (describing the finding that voluntary mediation takes less time than court-mandated as "not surprising").

146. Pearson & Thoennes, *supra* note 129, at 443. On the limitations of the comparison, see *supra* note 127 and accompanying text.

147. See, e.g., ELLIS & STUCKLESS, *supra* note 141, at 61 (finding no difference in parental conflict post-divorce). But see Emery et al., *supra* note 127 (reporting less conflict with mediation).

typical mandatory, court-annexed program. Still, the researchers did not find mediation “to be significantly more effective overall in reducing divorce related psychological distress than the adversarial divorce process.”¹⁴⁸ Rather, the decrease in distress in both groups seemed to derive from the passage of time rather than from the process.¹⁴⁹ And, on what is surely the most important measure—the adjustment of children—the findings did not support the superiority of one process over another. As one of the most famous studies concluded, “[O]ur findings suggest that the child’s adjustment is more a factor of family dynamics and overall environment than a result of having parents who do not contest custody, mediate custody, or pursue the issue through the courts.”¹⁵⁰ Similarly, reporting on the results of mandatory mediation, Robert Mnookin and Eleanor Maccoby reported no evidence that the process helped “to create and sustain a cooperative co-parental relationship.”¹⁵¹

Two important commentators on custody mediation, the psychologist Connie J.A. Beck, and the J.D.-psychologist, Bruce D. Sales, detailed a number of other problems with the empirical research on family mediation in general, and custody mediation in particular.¹⁵² Noting a deficiency important for the data of this study, Beck and Sales observed that the studies virtually ignored the impact of lawyers in effecting settlements. In analyzing the studies, Beck and Sales concluded that there was no investigation of the work of lawyers involved in the disputes.¹⁵³ Because both lawyers and mediators facilitated agreements, the failure to study lawyers undermined the conclusions.¹⁵⁴

The research also suffered from not taking into account differences in the relevant law. In another famous study comparing mediation and litigation, the researchers compared the experience of couples who had mediated in several states with couples who had litigated in another state.¹⁵⁵ The research did not refer to the relevant law of custody in any of the subject states. In fact, much of the research in this area ignores that the parties may be mediating or

148. Kelly, Gigy & Hausman, *supra* note 129, at 472.

149. *Id.*

150. Pearson & Thoennes, *supra* note 129, at 446.

151. MACCOBY & MNOOKIN, *supra* note 43, at 290.

152. See their article, Beck & Sales, *supra* note 19, and the book expanding on some of their observations, BECK & SALES, *supra* note 24.

153. Beck & Sales, *supra* note 19, at 1044–46.

154. *Id.* at 1045–46.

155. Pearson & Thoennes, *supra* note 129, at 430–32 (describing the Divorce Mediation Research Project).

litigating in the shadow of differing statutory or case law presumptions that one would expect to affect the outcomes.¹⁵⁶

Beck and Sales cited other problems with the research. In nearly all the studies, they found problems with “small sample sizes, nonrandom samples and nonrandom assignment to dispute resolution methods, nonequal comparison groups or more often no comparison groups, confounding of dispute resolution process with issues resolved by that process, few actual sessions recorded, and no detailed, step-by-step manuals of the different models of mediation used.”¹⁵⁷

Especially in the studies drawing comparisons between mediation and litigation, the authors found that the researchers paid little or no attention to the issues being mediated.¹⁵⁸ Sometimes the mediation covered a variety of issues relating to the dissolution—property and family support, as well as custody. For other families in the study, the mediations may have involved only custody.¹⁵⁹ Lawyers know that the dynamics vary dramatically depending on whether settlement discussions involve a single issue or multiple issues.¹⁶⁰ In sum, while researchers from a variety of fields have studied mediation, they have not conclusively confirmed or dispelled the feminist concerns about the effect of mandatory mediation on the sharing of physical custody.

V. THE STUDY

A. *The Parameters of the Study*

With the limitations of the other studies in mind, we chose not to devise a random sample with the purpose of proving a causal relationship between factors. Instead, we examined an entire population of people involved in custody disputes in a mandatory mediation jurisdiction to describe outcomes in custody.

We drew the population from the Twenty-First Judicial District of North Carolina, which is comprised of Forsyth County. In many

156. For the famous law review article from which the phrase is borrowed, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). Even though we may wonder how much attention parents embroiled in custody disputes pay to the law—see, e.g., Brinig, *supra* note 126, at 1096–97—law surely plays a role when parents litigate custody disputes.

157. Beck & Sales, *supra* note 19, at 1044.

158. *Id.* at 1034–35.

159. *Id.* at 1034.

160. See *infra* Table 9 and note 194.

ways, Forsyth County is typical of North Carolina as a whole. It is both urban and rural. The county's estimated 2005 population was 325,967, representing a 6.5% increase from the 2000 census population of 306,067.¹⁶¹ The county seat of Winston-Salem, with a 2000 population of 185,776, ranks as one of the five largest cities in the state.¹⁶² The 2003 median household income for Forsyth County was \$41,239, slightly higher than the statewide median of \$39,438.¹⁶³ The average number of persons per household was 2.39, somewhat less than the statewide average of 2.49.¹⁶⁴ According to the 2000 census, whites accounted for 71.3% of the county's population, and blacks accounted for 25.9% of the county's population. The corresponding percentages for the state as a whole were 74.1% and 21.8%, respectively.¹⁶⁵ As of 2000, the percentage of persons age 25 or older in Forsyth County who were high school graduates was 82%, compared to a statewide percentage of 78.1%.¹⁶⁶

We defined the population as everyone in the twenty-first judicial district who was involved with the court in a custody dispute in 2002. We defined "involved with the court" as one of the following occurring in 2002:

1. filing an action raising a claim for custody,
2. being referred to court-ordered custody mediation,
3. resolving a custody dispute through a parenting agreement in court-ordered mediation,
4. resolving a custody dispute by lawyer-negotiated settlement in a document filed with the court,¹⁶⁷ or
5. resolving a dispute by litigation resulting in a custody order.

If any of these five events occurred in 2002, we included the persons so involved in the study.

To find all the subjects of the study, we used the records of the North Carolina Administrative Office of the Courts and of the court

161. Bureau of the Census, U.S. Dep't of Commerce, State and County Quick Facts, Forsyth County, North Carolina, <http://quickfacts.census.gov/qfd/states/37/37067.html> (last visited Aug. 27, 2007).

162. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATABOOK: 2000, at 854, available at http://www.census.gov/prod/2002pubs/00ccdb/cc00_tabC1.pdf.

163. Bureau of the Census, *supra* note 161.

164. *Id.*

165. *Id.*

166. *Id.*

167. We did not include parties whose only filing in 2002 was a separation agreement incorporated by reference in a divorce judgment. If that were the only filing in 2002, those persons were not "involved with the court" within the meaning of this study.

personnel of the Forsyth County District Court. From the administrative office of the courts, we compiled a list of all filers of actions in 2002 in the twenty-first judicial district in which one of the parties raised a claim for custody. To get to all the other categories, we enlisted the court personnel of the Forsyth County District Court. From the records of the court mediator, we identified the names of all persons in the twenty-first judicial district referred to custody mediation in 2002 and all persons in the twenty-first judicial district for whom a referral resulted in a mediated custody settlement, or parenting agreement.¹⁶⁸ From the calendar records of the assistant to the chief district court judge, we identified all persons involved in custody hearings in 2002 in the twenty-first judicial district. Many of these “hearings” involved a judge merely signing a document in which the parties had consented to some arrangement relating to custody.¹⁶⁹ Other hearings involved the litigation of a custody dispute, resulting not in a consent document but rather in a formal custody order.

These records enabled us to identify all the custody resolution events for our population. We defined a custody resolution event as one concluded by settlement or litigation. We further distinguished between court-mediated settlements that involved a parenting agreement, labeled “mediation” in this study, and other types of consent filings. Those consent filings, reached outside mediation, usually resulted through lawyer-negotiated settlements; therefore, in this study we labeled these other consent filings “settlement.” The third type of custody resolution event, one concluded by court order, we labeled “litigation.”¹⁷⁰

After we compiled the list of persons involved with custody in the twenty-first judicial district in 2002, we collected all the information about those persons relating to custody for a relevant time period. We decided on an eight-year period, from 1997 through 2005. Because of how mandatory custody mediation operates,¹⁷¹ we needed to capture several years before 2002, the year defining the population. For the people who resolved their custody disputes in 2002 by settlement or by litigation, the court had previously ordered

168. For the statutory definition of mediated custody settlement as a parenting agreement, see N.C. GEN. STAT. § 50-13.1(h) (2005); *supra* text accompanying note 75.

169. We recognize that we might have missed cases settled in 2002 and filed without a hearing. The court administrators believed, however, that all of the cases would have appeared on the court calendars for 2002 even if they were settled without a hearing.

170. See *supra* note 9 and accompanying text.

7 171. See *supra* notes 56–80 and accompanying text.

most of them to mediate.¹⁷² Collecting information on our population prior to 2002 usually revealed that this population had experience with court-ordered mediation.¹⁷³ We chose 1997 because Forsyth County began to implement mandatory mediation in 1995, with cases routinely referred to mediation at least by 1997.

We also wanted to capture several years after 2002. Since we had chosen 2002 as the year defining the population, we collected custody information through 2005 so that the part of the population just entering the court system in 2002 would have had time to resolve some issue relating to custody.

By confining the study to a relatively short time period, we avoided problems reflected in some of the other studies. In a confined period, the model of mediation used by the mandatory program had not varied.¹⁷⁴ Moreover, we picked a time period in which the law of custody had not changed in any way that would affect the conduct of either the lawyers or the judges involved in the custody disputes. On the other hand, the study suffers from the problem common to many empirical studies in family law—namely, that it was restricted to a population with its own idiosyncrasies.¹⁷⁵ For example, despite statewide rules, the practices of lawyers and judges in Forsyth County differ from the practices of lawyers and judges in other parts of the state, and perhaps even more so in other parts of the country. Also, we confined our study to the information in the court records. Depending on the issues between the parties in the population, some records contained significant information about

172. See *infra* Table 10. In North Carolina, while the court orders the parties to mediate, they can proceed to litigate after attending one private mediation session. See *supra* notes 77–78 and accompanying text. Moreover, few penalties attach to failing to mediate. *Id.*; see also *infra* notes 217–18 and accompanying text (noting that while the local rules of Forsyth County authorize contempt, in practice, the court usually orders the parties back to negotiation). Finally, the court may exempt parties from mediation for good cause. See *supra* notes 64–66 and accompanying text.

173. In another way our data established that the parties who resolved their disputes through settlements and litigation had probably been already involved in mediation. The average length of time between the first filing and the first custody resolution event was 112 days for parties who resolved their dispute by mediation. For parties whose first custody resolution event was a settlement, the average length of time was longer—167 days. For parties whose first custody resolution event was litigation, the average length of time was the longest—204 days. These findings reflect that most members of the population involved in this study made their way through the mediation process and then either to a negotiated settlement or litigation.

174. In fact, only several mediators were involved in all of the mediations for the period covered by the study. See *infra* note 195.

175. See Brinig, *supra* note 126, at 1095 (warning about generalizing across populations).

incomes and other matters while other records did not. Finally, and perhaps most significantly, our population reflects families in real conflict about custody. According to some studies, about one-half of divorcing couples resolve issues about custody with no interventions from the court or other process.¹⁷⁶ Another 30% of divorcing couples resolve their custody conflicts shortly after filing something with the court.¹⁷⁷ Our population reflects people who are in more serious conflict about custody and excludes all those people who were able to work the issues out for themselves. Since most of the people in our population hired lawyers,¹⁷⁸ the population probably also excludes people with very low incomes. Since people with high income may resolve their custody disputes through private mediators, people at high income levels may also be absent from our population. Despite these limitations, some of which are simply endemic to empirical work in family law,¹⁷⁹ the results nevertheless told a story.

With data collection forms on their laptops, students from Wake Forest Law School extracted information from the records in the court files on this population. They gathered all information available about both parties, the children, the allegations the parties made against each other, and the findings reflected in custody resolution events, whether through mediation, settlements, or litigation. If the parties mediated, we searched for information about the sessions. If the mediation resulted in a parenting agreement, the agreement reached in court-ordered mediation,¹⁸⁰ the students recorded the terms to which the parties agreed. On the other hand, if the parties failed to reach a parenting agreement, the students looked for indications from the court documents explaining the failure to agree.

The students recorded the terms of every custody resolution event in the file. The collection form defined custody resolution events as “file documents relating to custody and/or child support, including parenting agreements, consent orders, memoranda of agreement, court orders and temporary custody orders, as well as court rulings on motions to modify or enforce.” Similarly, the students recorded everything about the custody resolution events: the division of physical custody, provisions for legal custody, and

176. MACCOBY & MNOOKIN, *supra* note 43, at 137.

177. *Id.* at 138 (finding that “about 30 percent of . . . [their] sample . . . were also resolved without the need for mediation, evaluation, or trial”).

178. *See infra* Part V(B).

179. Brinig, *supra* note 126, at 1084.

7 180. N.C. GEN. STAT. § 50-13.1(h) (2005).

terms and conditions of visitation. They also noted information on the lawyers involved.

We developed a code book to standardize the data collected by the students and coded almost all of the information that they collected. In particular, for the custody resolution events, we coded all of the information on the parties' first custody resolution event and all changes to the terms resolved by the initial event in subsequent resolution events. As noted above, the court files had some data for some parties and not for others. In the following report of the findings, therefore, some of the totals in the tables differ, reflecting that data was not available for some of the categories. We followed standard methodology to report the data as available, and a number of the findings were statistically significant.

B. Findings: The Parties and Their Lawyers

As one would expect, child custody conflicts usually involve disputing parents.¹⁸¹ The sum of 426 cases reflected the total population, and of these cases, either the mother or father was the plaintiff in 407 of them, or 95.5%. In 13 of the 19 cases in which the plaintiff was someone else, the plaintiff was a grandparent. The defendant was either the mother or the father in 415 cases (97.6%). The dominant pattern, then, involved one parent suing the other parent (Table 1).

Party category	Plaintiffs and defendants			
	Plaintiff	Percentage	Defendant	Percentage
Mother	246	57.7%	165	38.8%
Father	161	37.8%	250	58.8%
Grandparent(s)	13	3.0%	2	.5%
Other	6	1.4%	8	1.9%
Total	426	99.9%	425*	100%

*One file did not identify the defendant.

181. The study involved child custody disputes related to family dissolution, regulated in North Carolina under Chapter 50 of the General Statutes of North Carolina. N.C. GEN. STAT. ch. 50, art. 1 (2005 & Supp. 2006). When the state seeks protective custody because of allegations of abuse and neglect, the state is a party to the proceedings under Chapter 7B of the General Statutes of North Carolina. N.C. GEN. STAT. ch. 7B, arts. 1–14 (2005 & Supp. 2006). This study excluded proceedings under Chapter 7B, however.

Table 1 also shows that the plaintiff was more likely to be the mother (246/426, 57.7%) than the father (161/426, 37.8%). Likewise, the defendant was more often the father (250/425, 58.8%) than the mother (165/425, 38.8%).¹⁸²

As indicated in the introduction, this study is unusual because of the high number of represented parties.¹⁸³ Forsyth County does not have a family court, where pro se appearances are more common, and as reflected in Table 2, the plaintiffs usually had counsel (413/424, 97.4%). Although representation occasionally changed, most plaintiffs were represented by the same lawyer throughout their cases (326/397, 82.1%). These percentages are surprising not only because of the national experience on declining representation in family law cases, but also because of the data we collected on the income level of plaintiffs. We collected income data in the files in which it appeared, usually because the parties had disputed child support. When child support was in issue, the files contained affidavits from which we could determine income. In 279 of the cases, however, there was nothing on income. Although data was available only in 147 of the cases, the median annual income of the plaintiffs for whom we had this information was \$26,000; the mean, \$31,556.59.¹⁸⁴

As reflected in Table 2, defendants were less often represented by counsel, although the percentage was still quite high (294/405, 72.6%). Like the plaintiffs, defendants tended to retain their initial lawyer (197/268, 73.5%). The median annual income of the defendants for whom we found information was \$30,000; the mean, \$39,962.07 (n=144), an amount similar but slightly higher than that reported for plaintiffs.¹⁸⁵ Women were more often plaintiffs, however, and with women's income statistically lower than men's, the higher income for defendants was not surprising.

Table 2: Representation by counsel

182. In some of the cases, only one of the parents was either the plaintiff or defendant. In 405 of the 426 cases (95%), however, the dispute pitted one parent against the other.

183. See *supra* notes 18–19 and accompanying text.

184. Because a few instances of extremely high or low income may skew the mean, the median may be a more useful number in these cases.

185. See *supra* note 184 and accompanying text.

Representation	Plaintiffs and defendants			
	Plaintiff	Percentage	Defendant	Percentage
Represented by counsel	413/424	97.4%	294/405	72.6%
Represented by same counsel	326/397	82.1%	197/268	73.5%

We have a picture, then, of plaintiffs and defendants of modest means who nonetheless almost always find the money to retain counsel.

C. *The Children and the Family*

Rarely were more than two children the subject of a custody dispute. Almost two-thirds of the cases involved only one child (277/425, 65.2%). Two children were involved in most of the rest of the cases (117/425, 27.5%). Less than 10% of the cases involved more than two children (31/425, 7.3%). As national studies have found, most of the custody disputes involve young children. The average age of the oldest child, or the only child in cases involving just one child, was just under 7 years at the time of the first custody resolution event. The average age of the second child was 2 years 7 months.

Our data show a rather traditional picture of the family. In cases in which we could determine a primary caregiver before the custody dispute, that person was usually the mother (223/313, 71.2%). The father provided primary care only 7.7% of the time (24/313). In another 42 cases, the parties disputed who had been primary caregiver (42/313, 13.4%). The records did not always indicate whether the parents involved in the dispute had ever been married. When they did, they revealed that the children in the study had parents who were or had been married (296/409, 72.4%).¹⁸⁶ The parents had been married, on average, 8.7 years at the time of their separation, with a median of 8.0 years (n=231).

186. For information on nonmarital families, see *The Fragile Families and Child Wellbeing Study of the Bendheim-Thoman Center for Research on Child Wellbeing*, <http://www.fragilefamilies.princeton.edu> (last visited Aug. 26, 2007).

D. Type of Custody Sought

To the extent that the mother as primary caregiver reflects the traditional family, the traditional family emerged also in the custody the parents sought. We distinguished among three kinds of requests: (1) primary physical custody (regardless of the type of legal custody); (2) joint physical custody¹⁸⁷ (regardless of type of legal custody); and (3) visitation only. The results are set forth below:

Type of custody	By gender					
	All Cases	Percentage	Mothers	Percentage	Fathers	Percentage
Primary physical custody	351	90.7%	222/224	99.1%	111/144	77%
Joint physical custody	23	5.9%	1/224	.4%	22/144	15.3%
Visitation only	10	2.6%	1/224	.4%	9/144	6.3%
Other	3	.8%	0	0	2/144	1.4%
Total	387	100%	224	99.9%	144	100%

We were able to determine the specific type of custody sought in 387 of the cases. In 351 of those cases (90.7%), the plaintiff sought primary physical custody. The complaints reflected that the plaintiff sought joint physical custody in 5.9% of the cases (23/387), visitation only in 2.6% (10/387), and something else in only 3 of the cases (.8%).

The breakdown between mothers and fathers also reflected the traditional roles. When the mother was the plaintiff, we could determine the specific type of custody sought in 224 cases. Of those, the mother sought primary physical custody in 222 of them (99.1%). Fathers also usually sought primary physical custody when they were plaintiffs, but were less likely than mothers to do so. When the father was plaintiff, we could determine the specific type of custody sought

187. For other parts of the study, we defined joint physical custody. *See infra* note 188. For purposes of this statistic, we were interested only in what the parties characterized as joint physical custody.

in 144 cases. Of those, the father sought primary custody in 111 of the cases (77%).

Mothers almost never sought joint physical custody or visitation only (2/224). When plaintiffs sought either joint physical custody or visitation only, the plaintiffs were almost always fathers (22/23, 9/10).

E. Custody Outcome

Of all custody outcomes involving mother and father, primary physical custody to mother was the most common. Of the custody resolution events awarding physical custody either to mother or father or jointly, the mother received primary physical custody in 71.9% of the cases (235/327). The father received primary physical custody in 12.8% of the cases (42/327). Joint physical custody, defined for the study as one involving at least 123 overnights,¹⁸⁸ resulted in 15.3% of the cases (50/327).

When either the mother or father as plaintiff sought primary physical custody, the plaintiff usually got it (182/264, 68.9%) (Table 4).¹⁸⁹ It made a difference, however, if the plaintiff was the mother. If the plaintiff was the mother and sought primary physical custody, she got it in 81.5% of the cases (145/178). If the plaintiff was the father and sought physical custody, he received it in 33.7% of the cases (29/86). The difference was statistically significant ($p < .001$).

When the plaintiff sought primary physical custody, the arrangement reflected in the custody resolution event was rarely joint physical custody—only in 16.7% of the cases (44/264) (Table 4). If the mother sought primary physical custody, the arrangement was joint physical custody in only 13.5% of the cases (24/178). If the

188. As explained in the background, *supra* notes 45–55 and accompanying text, many terms relating to child custody are undefined, including “joint physical custody,” which has no commonly-accepted definition. *But cf.* *Patterson v. Taylor*, 140 N.C. App. 91, 95, 535 S.E.2d 374, 377 (2000) (noting that “the bench and bar have proven adept at distinguishing in practice between physical and legal custody” but urging more precision in the use of the terms in “fashioning orders and agreements” to avoid “later confusion and obviate litigation”). In North Carolina, the child support guidelines offer an indirect way to define joint physical custody as custody in which each parent has physical custody of the child for at least 123 nights during the year. *See* ADMIN. OFFICE OF THE COURTS, NORTH CAROLINA CHILD SUPPORT GUIDELINES, AOC-A-162, Rev. 10/06, at 5, *available at* <http://www.nccourts.org/Forms/Documents/981.pdf> (instructing the parties to use a different worksheet to calculate the amount of child support once the child spends 123 overnights with each parent). We borrowed the measure of 123 overnights from the child support guidelines as the measure for joint physical custody in this study.

189. *See* Margaret F. Brinig & D.W. Allen, “*These Boots Are Made for Walking*”: *Why Most Divorce Filers Are Women*, 2 AM. L. ECON. REV. 126, 136–37, 154–58 (2000) (suggesting that custody partly explains why in so many divorces the women bring the action).

father sought primary physical custody, the arrangement was joint physical custody in 23.3% of the cases (20/86). Again, the difference was statistically significant ($p < .001$).

Who was plaintiff?	Award of custody						Total
	Mother primary	%	Father primary	%	Joint physical	%	
Mother	145	81.5%	9	5.1%	24	13.5%	178
Father	37	43%	29	33.7%	20	23.3%	86
Total	182	68.9%	38	14.4%	44	16.7%	264

$\chi^2 = 48.850$; $df = 2$; $p < .001$; $v = .430$.

F. Custody Outcome by Process

We were particularly interested in determining what kind of custody resolution events emerged from which process: mediation, other settlement, or litigation.¹⁹⁰ Custody resolution events in those three categories occurred in 360 cases. Of those cases, 85, or 23.6%, came from mediation; 130, or 36.1%, from other settlements; and 145, or 40.3%, from litigation. When we confined the events to those cases with physical custody either to mother, father, or jointly, the numbers reveal 25.7% from mediation (83/323), 36.5% from settlement (118/323), and 37.8% from litigation (122/323) (Table 5).¹⁹¹ Of those, the most typical custody result was primary physical custody to the mother (232/323, 71.8%). The father received primary physical custody in 12.7% of the cases (41/323), with joint physical custody in 15.5% of the cases (50/323).

When we correlated the process for the custody resolution events with the outcomes, we discovered the most surprising of our findings: mothers received primary custody more often in mediation than they did either in lawyer-negotiated settlements or in litigation. The difference was statistically significant ($p < .05$).

190. If the first custody resolution event appeared as a parenting agreement, we classified it as mediation; if it appeared in some other kind of consent filing, which was almost always a lawyer-negotiated settlement, we classified it as a settlement; and if it appeared by court decree, we classified it as litigation. See *supra* notes 166–68 and accompanying text.

191. This comparison involved fewer numbers because it excluded awards of custody to parties other than mother or father, or mother *and* father in the case of joint physical custody.

In mediation, mothers received primary physical custody 83.1% of the time (69/83), the setting that we once thought would lead to mother custody the least of all the settings. In lawyer-negotiated settlements, mothers received primary physical custody in 69.5% of the cases (82/118); and in litigation, mother-custody emerged in 66.4% of the cases (81/122). Fathers, on the other hand, received primary physical custody most often in litigation—in 18.9% of the cases (23/122)—and received primary physical custody least often in mediation (5/83, 6%), compared to 11% in other settlements (13/118).

A second prediction of opponents of mandatory mediation warned that mediators would promote joint physical custody and that equal sharing of physical custody would become the norm. Of the joint physical custody awards in our study, most of them appeared in other settlements (23/50, 46%). The fewest joint physical awards emerged from mediation (9/50, 18%), with the remainder from litigation (18/50, 36%). There was a statistically significant difference in custody outcome by process ($p < .05$).

Outcome	Type of custody resolution event						Total
	Media- tion	%	Settle- ment	%	Litiga- tion	%	
Mother primary	69	29.7%	82	35.3%	81	34.9%	232
Father primary	5	12.2%	13	31.7%	23	56.1%	41
Joint physical	9	18%	23	46%	18	36%	50
Total	83	25.7%	118	36.5%	122	37.8%	323

$\chi^2 = 11.305$; $df = 4$; $p < .05$; $v = .132$.

In looking for explanations for these results, we tried to isolate factors that seemed to make a difference. In the first place, mothers were represented. Out of the 407 cases involving mothers as either plaintiffs or defendants, mothers had lawyers in 355 of them (87.2%). Fathers were represented slightly less often (331/405, 81.7%). Our

study did not involve the mediation model that worried the critics of mandatory mediation, one in which mothers would face a power imbalance without someone to give her advice about what the law of custody provided.¹⁹² Based on these numbers, one possible inference is that involving lawyers in the mediation process tends to decrease the number of mothers who feel constrained to agree to joint physical custody.

More analysis on the presence of lawyers, however, led to another interesting finding (Table 6). We wanted to determine if the presence of lawyers made a difference in reaching a custody resolution event. Because almost all the plaintiffs in our study had lawyers, the analysis of the representation of plaintiffs did not reveal much. But the analysis of when the defendants also had lawyers revealed that in that case, there was a higher percentage of cases with a custody resolution event. We could determine whether the defendants had lawyers in 380 cases in which we also determined whether the parties reached a custody resolution event. The parties reached custody resolution events overall 90.3% of the time (343/380). But when the defendants had lawyers, they reached custody resolution events 91.5% of the time (248/271) and 87.2% of the time (95/109) when they did not. Likewise, the parties failed to reach a custody resolution event 9.7% of the time (37/380). But when the defendants had lawyers, the parties failed to reach custody resolution events only 8.5% of the time (23/271), compared to 12.8% of the time when they did not (14/109). The finding was interesting, though not statistically significant.

Table 6: Custody resolution event (CRE) and defendant representation

⁷ 192. See *supra* notes 114–17 and accompanying text.

Was defendant represented?	Whether the parties reached a custody resolution event				
	No CRE	%	CRE	%	Total
Represented	23	8.5%	248	91.5%	271
Not represented	14	12.8%	95	87.2%	109
Total	37 ns	9.7%	343 ns	90.3%	380

ns = not significant

Not only did lawyers seem to affect whether there was a custody resolution event, but they also appeared to affect the *type* of custody resolution event (Table 7). The difference was statistically significant ($p < .05$). If the defendant was not represented, more of the custody resolution events concluded by litigation (42/89, 47.2%). The rest were fairly evenly divided between mediation (26/89, 29.2%) and other settlement (21/89, 23.6%). When there were lawyers for both the plaintiff and defendant, however, the numbers shifted. With two lawyers, 40% of the cases concluded by a settlement (96/240). The percentage of litigated cases dropped from 47.2% to 36.7% (88/240), while the mediated cases declined from 29.2% to 23.3% (56/240).

Was defendant represented?	Type of custody resolution event						
	Mediation	%	Settlement	%	Litigation	%	Total
Represented	56	23.3%	96	40%	88	36.7%	240
Not represented	26	29.2%	21	23.6%	42	47.2%	89
Total	82	24.9%	117	35.6%	130	39.5%	329

$\chi^2 = 7.634$; $df = 2$; $p < .05$; $v = .152$.

Besides representation, another factor that seemed to make a difference on the type of custody resolution event was whether the mother had been the primary caregiver. As reflected in Table 8, we knew whether the mother had been the primary caregiver in 271 of

the cases in which custody was resolved by either mediation, settlement, or litigation. When the mother had been the primary caregiver, the percentages reflected the overall breakdown of custody resolution events: 26% by mediation (51/196), 35.7% by settlement (70/196), and 38.3% by litigation (75/196). When the mother had not been the primary caregiver, however, those numbers shifted from mediation and settlement to litigation. If the mother had not been the primary caregiver, only 20% of the resolutions were by mediation (15/75) and 28% by other settlement (21/75), while 52% ended by litigation (39/75). These results suggest that the parties saw more doubt in the ultimate resolution of custody when the mother had not been the primary caregiver and were willing to take some chances in litigation. On the other hand, when the mother had provided primary care, the results suggested that the parties assumed that the ultimate resolution would favor the mother and settled the custody dispute rather than pursuing it through litigation.

Mother as caregiver	Type of custody resolution event						
	Mediation	%	Settlement	%	Litigation	%	Total
Primary	51	26%	70	35.7%	75	38.3%	196
Not primary	15	20%	21	28%	39	52%	75
Total	66 ns	24.4%	91 ns	33.6%	114 ns	42.1%	271

ns = not significant

The presence of multiple issues also seemed to have an impact on the type of custody resolution event. We looked at whether custody alone was in issue and compared it to cases in which the parties disputed custody and some other issue—like child support or property division, for example. As reflected in Table 9, if only custody was in issue, the parties were less likely to resolve it by agreement, either through mediation or other settlement. Multiple issues increased the likelihood of settlement in one form or another. With only custody in issue, the custody resolution event ended by mediation in only 10.4% of the cases (8/77). If custody and another issue were involved, the custody resolution event ended by mediation

in 25.8% of the cases (62/240). If custody and no other issue were involved, the custody resolution event concluded by litigation in 53.2% of the cases (41/77). If multiple issues were involved, the parties concluded custody by litigation in only 36.7% of the cases (88/240). The parties settled the custody issue by other settlement in 36.4% of the cases when only custody was involved (28/77), compared to 37.5% when custody and another issue were involved (90/240). The result is particularly interesting for a state like North Carolina, in which the child custody mediator does not address economic issues.¹⁹³ But as many negotiation and mediation theorists believe,¹⁹⁴ having multiple issues in dispute makes reaching agreement more likely since there are more opportunities for favorable trades between the parties. The results of this study suggest that this phenomenon may affect custody disputes as well.

No. of issues	Type of custody resolution event						
	Media-tion	%	Settle-ment	%	Litiga-tion	%	Total
Custody alone	8	10.4%	28	36.4%	41	53.2%	77
Custody and other issues	62	25.8%	90	37.5%	88	36.7%	240
Total	70 ns	22.1%	118 ns	37.2%	129 ns	40.7%	317

ns = not significant

We also looked at the data to determine if mediation appeared to encourage some kind of custody resolution event (Table 10). It did. If the parties attended a mediation session, a custody resolution event occurred in 70.5% of the cases (220/312). If they did not, a custody resolution event occurred in only 29.5% of the cases (92/312).

193. See N.C. GEN. STAT. § 50-13.1(b) (2005) (providing that the court may not refer economic issues to the custody mediator); see also UNIFORM RULES, *supra* note 17, at 8 (restricting the mediation to non-economic issues).

194. See, e.g., ROGER FISHER & WILLIAM URY, GETTING TO YES 68-76 (2d ed. 1991); RUSSELL KOROBKIN, NEGOTIATION THEORY AND PRACTICE 130 (2002).

Moreover, the numbers of cases resolved through litigation significantly increased if the parties did not mediate. If the parties mediated, only 38.2% of the custody resolution events occurred through litigation (84/220). If the parties did not mediate, 50% of the custody resolution events occurred in litigation (46/92). There was a statistically significant difference in the type of custody resolution event based on whether mediation was held or not ($p < .01$).

Was mediation held?	Type of custody resolution event						
	Mediation	%	Settlement	%	Litigation	%	Total
Mediation held	67	30.5%	69	31.4%	84	38.2%	220
Mediation not held	9	9.8%	37	40.2%	46	50%	92
Total	76	24.4%	106	34%	130	41.7%	312

$\chi^2 = 15.052$; $df = 2$; $p < .01$; $v = .220$.

Finally, we analyzed whether parenting agreements looked any different from other custody resolution events on the issue of joint legal, as opposed to joint physical, custody (Table 11). They did, and the difference was statistically significant ($p < .001$). Out of the total custody resolution events by mediation, other settlement, or litigation, joint legal custody appeared in 69.7% of them (175/251). But when we analyzed the type of custody resolution event in which joint legal custody appeared, we discovered joint legal custody in 90.5% of parenting agreements (67/74). In other settlements, joint legal custody appeared 71.6% of the time (63/88). In litigation, joint legal custody appeared the fewest number of times, in only 50.6% of the cases (45/89). Our numbers provide some support for what the critics suspected: that certain terms on joint custody become standard in mediated agreements.¹⁹⁵ In our data, however, the standard term—

195. This result is not surprising in light of the operation of court-ordered custody mediation. For example, in North Carolina, one mediator serves the entire judicial district. *Existing Programs*, *supra* note 6 (reporting that for the thirty judicial districts in which mandatory mediation has been implemented, thirty mediators serve all the districts). In Forsyth County, our study involved only two mediators for the entire eight-

joint legal custody—promoted joint decisionmaking rather than the sharing of physical custody.

Was there joint legal custody?	Type of custody resolution event						Total
	Mediation	%	Settlement	%	Litigation	%	
Joint legal custody	67	38.3%	63	36%	45	25.7%	175
Not joint legal custody	7	9.2%	25	32.9%	44	57.9%	76
Total	74	29.5%	88	35.1%	89	35.5%	251

$\chi^2 = 30.815$; $df = 2$; $p < .001$; $v = .350$.

VI. IMPLICATIONS OF THE STUDY

In light of the history of dispute resolution and custody, some of the more surprising findings of this study relate to the incidence of primary physical custody in relation to mandatory mediation. Contrary to what had once been conventional wisdom, mandatory mediation did not appear to lead to increased sharing of physical custody. Before we suggest any explanations, we acknowledge the dangers of drawing conclusions from a population with its own idiosyncrasies. As Margaret Brinig has cautioned us, we act at our peril if we rely on empirical results from one part of a state to draft policy for the entire state, or even worse, for another state or region.¹⁹⁶ Some of these findings, however, parallel findings from across the nation, giving us confidence in drawing at least some preliminary conclusions. As explained below, at a minimum, the findings raise questions that warrant further study on some of the influences on the sharing of physical custody, some of the influences on mandatory mediation, and some of the implications for the future of mandatory mediation.

year period of the study. One would expect similar terms to appear in agreements facilitated by the same mediator.

196. Brinig, *supra* note 126, at 1085.

A. *Influences on the Sharing of Physical Custody*

Our study suggests that critics were wrong in supposing that mandatory mediation would lead to widespread, routine arrangements of joint physical custody. At the time of the criticism, the momentum for joint physical custody had gained steam, and critics worried that mandatory mediation would only accelerate the trend, regardless of the merits of shared physical custody in a particular case. In some ways, however, forces coalesced to slow the momentum favoring joint physical custody.

For one, researchers released more nuanced findings about the effect of divorce on children. While studies in the early 1980's reported about the devastating effects of *divorce*, subsequent studies warned about the devastating effects of *conflict*. For those marriages characterized by high conflict, children fared better after divorce. For children of marriages with low to moderate conflict, divorce continued to cause lingering psychological problems.¹⁹⁷

By emphasizing the central role of conflict, the later research gave some support to people opposed to doctrines that presumed that joint physical custody favored the best interests of the child.¹⁹⁸ If joint physical custody led to more conflict, then parents should not agree to it. If mediators, judges, or the parties reached joint physical custody as a compromise for cases of high conflict, then children suffered.¹⁹⁹

197. See PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL 238 (1997) (cautioning parents to stay together in "less than satisfactory" marriages); Christy M. Buchanan, Eleanor E. Maccoby & Sanford M. Dornbusch, *Caught Between Parents: Adolescents' Experience in Divorced Homes*, 62 CHILD DEV. 1008 (1991); see also JUDITH WALLERSTEIN, JULIA LEWIS & SANDRA BLAKESLEE, THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY 297-301 (2000) (drawing more somber conclusions); E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 208 (2002) (noting adverse risks for children of divorce).

198. See, e.g., MACCOBY & MNOOKIN, *supra* note 43, at 284-85 (rejecting a presumption of joint custody); see also Margaret Martin Barry, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U. L. REV. 767, 821 (1997) (rejecting a presumption of joint custody). More recently, after intense efforts, courts are reluctantly recognizing the significance of domestic violence in determining custody and visitation. See, e.g., Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 667-98 (2003).

199. MACCOBY & MNOOKIN, *supra* note 43, at 285. This study also suggests that courts may use joint physical custody as a compromise in high conflict cases. As noted *supra* notes 172-73, most of the parties in this study who litigated custody had already tried and failed to mediate their disputes. Moreover, the custody conflicts of parties in this study who had litigated custody had continued for the longest periods of time. See *supra* note 173. Nevertheless, 36% of the joint physical custody outcomes occurred in litigation.

As critics began to point out, “conflict localized around the time of litigation and divorce is less harmful than conflict [that] remains an intrinsic and unresolved part of the parents’ relationship and continues after their divorce.”²⁰⁰

In place of presumptions for joint physical custody, commentators began to promote the approximation rule. First proposed by Elizabeth Scott,²⁰¹ this rule divides post-separation physical custody in proportion to the time that the parent spent performing caretaking functions with the child before divorce. Related both to primary caregiving and shared parenting,²⁰² the rule recognizes that parents in modern households often share caregiving responsibilities. Instead of one spouse or the other receiving primary caregiver status after separation, the approximation rule honors the realities of dual career families by recognizing shared custody but only in proportion to the pre-separation experience of the parents and child. The American Law Institute adopted the rule in its *Principles of the Law of Family Dissolution: Analysis and Recommendations*,²⁰³ and it has received significant support. While offering something concrete for the indeterminate best interests standard, the approximation rule acknowledges both the importance of bonding and attachment security.²⁰⁴ At the same time, the approximation rule continues the shared custody arrangements that existed before separation. Moreover, some studies have suggested

Supra Table 5. For parties with this serious level of conflict, one might question the propriety of joint physical custody.

200. Michael E. Lamb, *Placing Children’s Interests First: Developmentally Appropriate Parenting Plans*, 10 VA. J. SOC. POL’Y & L. 98, 105–06 (2002).

201. Elizabeth S. Scott, *Pluralism, Parental Preferences and Child Custody*, 80 CAL. L. REV. 615, 617 (1992).

202. With the primary caregiver presumption, the judge makes findings on which parent, if either, performed most of the caregiving functions. If there was a primary caregiver, the court awards primary custody to that parent, visitation to the other. The approximation rule allocates time between the two based on time spent, without requiring the court to label one parent or the other as primary. *See generally* LAW OF FAMILY DISSOLUTION, *supra* note 51, § 2.08, at 210–15 (describing the use of the approximation rule and variations of the rule).

203. *Id.* at § 2.08. For an explanation of the rule by the reporter for the custody chapter, see Bartlett, *supra* note 89, at 5. *See also* Robert F. Kelly & Shawn L. Ward, *Allocating Custodial Responsibilities at Divorce: Social Science Research and the American Law Institute’s Approximation Rule*, 40 FAM. CT. REV. 350, 351 (2002) (relating social science research to the approximation rule).

204. Nancy S. Weinfield, *Comments on Lamb’s “Placing Children’s Interests First,”* 10 VA. J. SOC. POL’Y & L. 120, 127–28 (2002); *see also* Cheri L. Wood, *Childless Mothers?—The New Catch-22: You Can’t Have Your Kids and Work for Them Too*, 29 LOY. L.A. L. REV. 383, 386 (1995) (arguing for custody based on previously established patterns of care).

that even when parties entered joint physical custody arrangements, the parties drifted into the custody patterns that had pre-existed the separation, often mother custody.²⁰⁵ In this light, the approximation rule simply reflects the likely long-term outcomes.

While the debate about whether the law should promote joint physical custody continues to rage,²⁰⁶ this study supports other studies suggesting that mandatory mediation does not increase its use. In Forsyth County, North Carolina, as in the rest of the country, joint physical custody has not become the dominant custody arrangement. To the contrary, of the custody resolution events concluding with primary physical custody either to mother, father, or jointly, the mother received primary physical custody in 71.9% of the cases. Joint physical custody appeared in only 15.3% of the cases.²⁰⁷ Notably, plaintiffs in our study did not ask for joint physical custody, and the study also suggested that plaintiffs usually received the custody that they requested. While joint physical custody resulted more often than plaintiffs requested it, particularly if the father sought primary physical custody,²⁰⁸ still, the outcome generally followed the plaintiffs' requests. We should not take from these findings that mediators and courts favor plaintiffs, but rather that the people for whom custody is most significant self-select to be plaintiffs.²⁰⁹

Neither should we assume from our findings that courts favor fathers. In our study, when fathers received primary physical custody, they did so more often in the litigated cases (23/41, 56.1%) than they did by mediation (5/41, 12.2%) or by other agreement (13/41, 31.7%).²¹⁰ These numbers probably reflect what researchers in other studies have concluded: lawyers counsel fathers with weak facts for primary custody not to pursue it. The litigated cases probably reflect those in which lawyers have advised their father clients that the facts

205. See MACCOBY & MNOOKIN, *supra* note 43, at 197; see also Wood, *supra* note 204, at 420.

206. See, e.g., FINEMAN, *supra* note 81, and the critical review of her work in Milton C. Regan, Jr., *Divorce Reform and the Legacy of Gender*, 90 MICH. L. REV. 1453 (1992). See generally Margaret F. Brinig, *Does Parental Autonomy Require Equal Custody at Divorce?*, 65 LA. L. REV. 1345 (2005) (offering empirical evidence that statutes with strong presumptions for joint physical custody do not further the best interests of the child), and the critical review challenging her methodology in William S. Comanor, *Child Visitation and Performance: The Evidence*, 66 LA. L. REV. 763 (2006).

207. See *supra* note 188 and accompanying text.

208. Cf. Tables 3 and 4.

209. See Brinig & Allen, *supra* note 189, at 158 (suggesting that as women have higher income, custody may eventually be the main reason that they file for divorce).

210. See *supra* Table 5.

warrant pursuing the case, most notably, when the facts do *not* involve a mother who has been the primary caregiver.²¹¹

Moreover, custody disputes often ended with mothers having primary custody—in 71.9% of the cases.²¹² While this percentage reflects a decline from the percentages in prior decades,²¹³ it remains high. But as other studies have also concluded, the caregiving before separation has a significant impact on the arrangement post-separation. Indeed, as reflected in Table 8, the fact that the mother had been the primary caregiver shifted resolutions away from litigation and towards some kind of agreement—either by mediation or by other settlement. These findings lend indirect support to the approximation rule. A presumption in favor of the approximation rule might encourage still more cases to settle in ways that might also reflect the likely long-term outcomes.

B. Influences on Mandatory Mediation

While this study did not support the concerns that animated the mediation critics, we hardly recognize court-ordered custody mediation from the model that existed when California began its experiment. In two dramatic ways, the model the critics loved to hate disappeared: the mediator lost the power to recommend an outcome to the court and lawyers became involved in the process. Together, the changes worked a metamorphosis.

The model of the mediator as recommender simply vanished so that by the time Beck and Sales wrote their book on family mediation in 2001, the authors did not include that model of mediation among

211. Lawyers may also give this advice, for example, when mothers have physical or mental health issues, drug problems, boyfriends, or plans to move. Feminist scholars caution that a high proportion of the litigated cases involve batterers seeking to exert control by pursuing custody. See Meier, *supra* note 198, at 682–86 (citing studies that domestic violence characterizes up to 75% of couples litigating custody and visitation). For earlier works by mental health professionals on custody and domestic violence, see LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* (2002); PETER G. JAFFEE, NANCY LEMON & SAMANTHA E. POISSON, *CHILD CUSTODY & DOMESTIC VIOLENCE* (2002); Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973 (1995).

212. See *supra* Part V(E).

213. For the decline in mother sole-custody awards, see also Maria Cancian & Daniel Meyer, *Who Gets Custody?*, 35 DEMOGRAPHY 147, 147–57 (1998); Robert F. Kelly, Laura Redenbach & William C. Rinaman, *Determinants of Sole and Joint Physical Custody Arrangements in a National Sample of Divorces*, 19 AM. J. FAM. L. 25, 25 (2005); Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody Disputes—1920, 1960, 1990, and 1995*, 31 FAM. L. Q. 215, 227 (1997).

the many models that they described.²¹⁴ Instead, North Carolina's model has become typical, providing for confidentiality of the proceedings except under certain circumstances²¹⁵ and disqualifying the mediator from disclosing anything about the mediation to the court.²¹⁶ Furthermore, almost no penalties attach to a failure to appear for mediation. The Local Rules for Forsyth County acknowledge indirectly a penalty for failing to appear,²¹⁷ but in practice, the court rarely holds a party in contempt, referring the party back to mediation or imposing no consequences. This model clearly puts little pressure on the parties to reach a parenting agreement.²¹⁸

Equally as dramatic, from mediation that forbids the participation of lawyers, Beck and Sales report that most mediation models now assume that parties have legal advice.²¹⁹ At one point in the development of custody mediation, sociologists and psychologists assumed that lawyers interfered with the resolution of custody matters.²²⁰ The commentary showed little or no understanding of the lawyer's role as counselor and negotiator even when procedurally the lawsuit named one parent as an "adversary" against the other.

As Beck and Sales pointed out in 2000, the psychologists and sociologists who named lawyers as the culprits in the custody process had no evidence to support their conclusions.²²¹ In fact, both before and after the observations by Beck and Sales, other studies have found that lawyers positively affect custody mediation. The culmination of a number of studies on how lawyers operate in family law appeared in *Divorce Lawyers at Work: Varieties of Professionalism in Practice*.²²² The authors studied lawyers practicing divorce law in New Hampshire and Maine and found not "bombers" but client-centered counselors who tried to help their clients

214. BECK & SALES, *supra* note 24.

215. N.C. GEN. STAT. § 50-13.1(e) (2005); *see also supra* text accompanying note 79.

216. LOCAL RULES, *supra* note 17, at pt. V(F) ("The mediator shall not at any time disclose to any Judge or Court Personnel the reason that the mediation was not successful. The Court will not inquire of the parties or the mediator as to the reasons for the success or failure of the mediation.").

217. *Id.* at pt. II(2) ("In motions for contempt, the presiding judge may determine whether to hear the motion or to refer the matter for expedited mediation.").

218. The lack of pressure partially explains the relatively low incidence of parenting agreements: only 25.7% in our study. *See supra* Table 5.

219. *See* Beck & Sales, *supra* note 19, at 992.

220. *See, e.g.,* ELLIS & STUCKLESS, *supra* note 141, at vii.

221. Beck & Sales, *supra* note 19, at 1013-16.

222. LYNN MATHER, CRAIG A. MCEWEN & RICHARD J. MAIMAN, *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* (2001).

appreciate their own and their children's long-term interests. In both states, the lawyers worked with their clients to help them understand what was reasonable.²²³ Lawyers in divorce practices accommodated each others' schedules even more so than lawyers in other types of practices. As a group, they were sympathetic, serving clients at reduced fees when the clients could not pay.²²⁴ When we compare the lawyers described in *Varieties of Professionalism* to the lawyers who inspired the non-lawyer mediation advocates, we hardly recognize them as members of the same profession.

Our study supports the more sympathetic view of lawyers as well. Even after parties have filed a lawsuit, most of their cases end in an agreement, either by mediation or other settlement (59.7%).²²⁵ Moreover, the more lawyers, the more likelihood that the case will settle. When one lawyer was involved, the parties reached an agreement in 52.8% of the cases. When two lawyers were involved, the parties reached an agreement, either mediation or settlement, in 63.3% of the cases (Table 7).

We know that in general, lawyers in other kinds of court-ordered mediation programs have helped to settle cases.²²⁶ This study and others suggest that by the same token, lawyers' participation in custody helps resolve disputes.

C. *Implications for the Future of Mandatory Mediation*

Not many states have decided to mandate mediation in custody disputes. At the time the American Law Institute published its *Principles of the Law of Family Dissolution: Analysis and Recommendations*,²²⁷ only eleven states ordered parents who filed a custody claim to mediation as a condition of pursuing it. Furthermore, the American Law Institute itself did not endorse the concept.²²⁸

On whether more states should adopt mandatory mediation, we cannot draw anything conclusive from this study. As for the concerns reflected in the feminist critique, our study suggests that we have no reason to fear that mediators foist a joint physical custody agenda on compliant mothers in mandatory mediation—at least not with this

223. *Id.* at 58–59.

224. *Id.* at 135.

225. *See supra* Part V(F).

226. Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 685–86 (2002).

227. LAW OF FAMILY DISSOLUTION, *supra* note 50.

228. *Id.* § 1, at 8.

model of mediation and not with parties who are represented. Most of the mothers in our study received the primary physical custody that they requested, and they received it more often in mediation than they did in other settlements or litigation.²²⁹ In fact, work in other studies has challenged whether the feminists correctly concluded that women suffer any disadvantage in mediation.²³⁰

If the study does not support the fears of mandatory mediation, does it support the conclusion that more states ought to adopt it? The results do not answer this question. If we measured mandatory mediation by the numbers of parenting agreements, we would have to say “no.” In our study, parenting agreements resulted only in 23.6% of the cases.²³¹ But as other commentators have concluded, the attempt at mediation appears to increase the likelihood that the parties will resolve the dispute by agreement, if not by parenting agreement.²³² Our study suggested the same. With no attempt at mediation, first custody resolution events occurred by court order in 50% of the cases. After an attempt at mediation, significantly fewer first custody resolution events required the court to issue an order—only in 38.2% of the cases.²³³

We do need to analyze, however, the routine use of joint legal custody. As our study reveals, joint legal custody has become standard issue in parenting agreements.²³⁴ In this finding, our study is not unusual. Across the country, researchers report that joint legal custody has become the norm.²³⁵ We need to study the effects of joint

229. See *supra* Table 5.

230. See Margaret F. Brinig, *Does Mediation Systematically Disadvantage Women?*, 2 WM. & MARY J. WOMEN & L. 1, 6 (1995) (concluding that “[t]here is nothing inherent in being a woman that precludes a successful mediation of marital problems”). The experts, however, acknowledge that clients ought to have a certain level of competence in order to mediate. See Connie A. Beck, *Defining a Threshold for Client Competence to Participate in Divorce Mediation*, 12 PSYCHOL. PUB. POL’Y & L. 1, 23–29 (2006).

231. See *supra* Part V(F) and text accompanying notes 190–91.

232. MACCOBY & MNOOKIN, *supra* note 43, at 272; see also Melanie R. Trost, Sanford L. Braver & Russell Schoeneman, *Mandatory Mediation: Encouraging Results for the Court System*, 26(2) CONCILIATIONS CT. REV. 26, 59–65 (1988) (offering data suggesting that mandatory mediation rules decreased the number of custody and visitation issues decided by judges).

233. See *supra* Table 10.

234. See *supra* Table 11.

235. MACCOBY AND MNOOKIN, *supra* note 43, at 273–74; Kathryn E. Maxwell, *Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Clients’ Divorces on Their Children*, 67 REV. JUR. U.P.R. 137, 145–46 (1998).

legal custody more closely, recognizing that in high conflict families, it may not be appropriate.²³⁶

If states keep or adopt mandatory custody mediation, the process should protect the participants' freedom to walk away from it.²³⁷ Moreover, we should continue to study the process, making changes that respond to the unique dynamics of custody disputes,²³⁸ perhaps encouraging mediation that involves multiple issues.²³⁹ We must remain vigilant about the qualifications of mediators²⁴⁰ and think more critically about other issues—like culture and race—in mediation.²⁴¹ While there are a few cautiously dissenting voices,²⁴² experience continues to argue against mediation in families where there has been domestic violence.²⁴³

If mediation is to live up to its promise, however, it must address issues beyond the immediate conflict surrounding family dissolution. We have learned that the conflict at the time of separation, while painful, is not as important as the long-term post-separation relationship of the parents. We do not know, however, if mediation

236. Maxwell, *supra* note 235, at 146; *see also* Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 14 WOMEN'S RTS. L. REP. 175, 183 (noting ill effects of joint legal custody on custodian with primary responsibility) (1992); Ver Steegh, *supra* note 37, at 1422 (urging that joint legal custody is dangerous in the intimate terrorism type of domestic violence).

237. *See* Timothy Hedeem, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary than Others*, 26 JUST. SYS. J. 273, 273–75 (2005) (referring to court-annexed mediation in general and arguing that the process should not coerce the participants). For the argument in the child custody setting, *see generally* Kit Furey, *Mediators Cannot Be Both Mediators and Evaluators*, 38 THE ADVOC. 11 (Idaho State Bar, Dec. 1995).

238. Randy Frances Kandel, *Power Plays: A Sociolinguistic Study of Inequality in Child Custody Mediation and a Hearsay Analog Solution*, 36 ARIZ. L. REV. 879, 881–82 (1994).

239. *See supra* Table 9.

240. *See generally* Joan B. Kelly, *Issues Facing the Family Mediation Field*, 1 PEPP. DISP. RESOL. L.J. 37 (2000) (discussing the requisite skills and training the effective mediators).

241. Cynthia R. Mabry, *African Americans "Are Not Carbon Copies" of White Americans—The Role of African American Culture in Mediation of Family Disputes*, 13 OHIO ST. J. ON DISP. RESOL. 405, 413–57 (1998).

242. *See, e.g.*, Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145 (2003); *see also* Ver Steegh, *supra* note 37, at 1408 (distinguishing between intimate terrorism and domestic violence, where mediation is inappropriate, and situational couple violence, where it might be constructive).

243. ABA Committee on Family and Divorce Mediation, Andrew Schepard, *Model Standards of Practice for Family and Divorce Mediation: The Symposium on Standards of Practice*, 39 FAM. CT. REV. 121, 132–33 (2001).

has any influence on the post-separation functioning of the family.²⁴⁴ Since court-ordered mediation tends to involve only a few sessions, at most, it may not be up to the challenge.²⁴⁵

CONCLUSION

Just like Marty McFly,²⁴⁶ what we have learned about resolving custody disputes is that we have to be active in creating our future. We know that mandatory mediation has not achieved all that its proponents claimed it would, nor caused the harm that its critics predicted. Instead, we seem to be developing a consensus around family courts and a differentiated case management to handling family dissolution.²⁴⁷

This study suggests, however, that as we head towards family courts, we should try to make sure that parties have counsel. The future of custody should have a place for law and lawyers, perhaps playing more collaborative roles than we have in the past,²⁴⁸ but continuing to bring the substantive law to bear on the resolving of the disputes. What other personnel should be involved, however, remains in doubt. In North Carolina, we have recently introduced the parenting coordinator, a court official who helps the parties resolve conflicts and may decide certain issues pending court review.²⁴⁹ Other

244. Beck & Sales, *supra* note 19, at 1027–28; MACCOBY & MNOOKIN, *supra* note 43, at 290. See generally Ernest A. Sanchez & Sherrie Kibler-Sanchez, *Empowering Children in Mediation: An Intervention Model*, 42 FAM. CT. REV. 554 (2004) (suggesting that children participate in the mediation process). For a finding that mediation positively influences post-separation functioning, see Emery et al., *supra* note 127.

245. See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR,”* 19 FLA. ST. U. L. REV. 1, 3 (1991) (warning that mandatory dispute resolution may result in mediation losing some of its transformative power as the system shapes it to fit the needs of the system).

246. BACK TO THE FUTURE (Universal Studios 1985).

247. See ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 113–24 (2004); see also Ver Steegh, *supra* note 37, at 1399–1414 (arguing for treatment differentiated by the types of domestic violence involved).

248. See, e.g., Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 499 (2001); Association of Family and Conciliation Courts California Chapter Conference, Symposium, *Collaborative Family Law—The Big Picture*, 4 PEPP. DISP. RESOL. L.J. 401, 402–17 (2004). On the other hand, others take issue with the phrase “high-conflict divorce,” contending that the phrase turns cases involving the father’s violence toward the mother into cases involving mutual parental problems. Meier, *supra* note 198, at 692–700. Meier proposes the participation of enlightened child protection agencies in private custody litigation. *Id.* at 717–21.

249. N.C. GEN. STAT. §§ 50-90 to -100 (Supp. 2006). The court may appoint a coordinator if the parties consent. Without consent, the court may appoint a coordinator upon entry of a court order or upon entry of a parenting plan and specific findings that the case involves high conflict. § 50-91(b).

jurisdictions are experimenting with still other processes²⁵⁰ and other actors.²⁵¹

Just where are we to get the money for this approach?²⁵² While we suggest that we create family courts, keep lawyers, and add other actors, we know that costs force families increasingly to represent themselves in custody disputes. We also need to study the impact of pro se representation and respond to it. All we really know is our goal: when families dissolve, we want to help children adjust. To achieve that goal, we need to know more about children's living arrangements after family dissolution and be ready to respond to what the research reveals.²⁵³

250. See SCHEPARD, *supra* note 247, at 122 for a discussion of differentiated case management. See also Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?*, 22 U. ARK. LITTLE ROCK L. REV. 453, 456 (2000) (discussing the use of more collaborative approaches).

251. See the discussion of the special master in Janet Griffiths Peterson, *The Appointment of Special Masters in High Conflict Divorces*, 15 UTAH BAR J. 16, 16-21 (Sep. 2002).

252. As Nancy Ver Steegh urges, we need to analyze very carefully the families and their conflict to determine the proper handling of their cases. See Ver Steegh, *supra* note 37, at 1402-06.

253. Joan B. Kelly, *Children's Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research*, 46 FAM. PROCESS 35, 47 (2006) (urging professionals to be more creative in devising post-divorce living arrangements).

