

Relitigation after Contested Custody and Visitation Evaluations

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Relitigation of custody, visitation, and child support during a two-year period was used as a measure of postdivorce adjustment. A sample of highly adversarial families (n = 58) referred for a court-ordered psychiatric evaluation as part of a contested divorce custody or visitation action was compared to control samples of mother custody (n = 43), father custody (n = 30), and joint custody (n = 54) families in which custody was not contested. Nineteen percent of adversarial families evaluated predivorce relitigated custody, a significantly higher rate than control families. Mother custody cases had a higher rate of relitigation over child support than did father or joint custody arrangements. Joint custody controls had approximately the same rate of relitigation of custody as did father custody and mother custody controls. A sample of families referred for evaluation of a postdivorce custody or visitation dispute (n = 46) had a higher rate of relitigation of problems regarding visitation than did a control sample of postdivorce families (n = 36). Possible explanations for these findings are discussed.

Although there is a considerable literature dealing with the conduct of custody and visitation evaluations that arise out of contested divorces, there has been relatively little study of the long-term outcomes of contested custody and visitation cases. Although many studies in the divorce literature have focused on the consequences of divorce for children and their parents, we are not aware of

follow-up studies that focus specifically on those families who vigorously contest custody or visitation.

In the present study we followed a group of families who had been involved in highly adversarial child custody and visitation disputes. For several years, we have worked with a university-based clinic that received court-ordered referrals for custody evaluations, conducted extensive evaluations, and reported our findings to the parties, their attorneys, and the courts. In a previous study we reported the implementation of our recommendations by the courts.¹ We found that our custody/visitation recommendations had been implemented in court orders in approximately 90 percent of

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cases. In the bulk of these cases, the parties had entered a consent agreement in accord with the evaluators' recommendations rather than resort to trial. In all but 5 percent of these cases, the matter at issue was settled without the evaluator testifying. The phase of follow-up we will focus on here is the postjudgment adjustment of these "adversarial" families.

The measure used to assess adjustment was the amount of relitigation—how frequently the parties returned to court after entry of a final judgment. Relitigation is an operational measure of the level of conflict between the parents and, conversely, a measure of the stability of the custodial, visitation, and child support arrangements. As a measure, relitigation has several advantages when contrasted with psychologic measures: It is relatively quantifiable, the measure is reliable, and one avoids the difficulties of locating and reinterviewing the parties. Using relitigation as a measure also has some drawbacks. As a measure of conflict it is not completely valid: Failure to return to court may not mean that all is well, and some relitigation does not represent conflict. (A common instance of nonconflictual relitigation is a change of custody negotiated between the parents and entered as a consent agreement, often in response to the stated wishes of an adolescent child.) A second difficulty with relitigation is that it is highly dependent on the legal jurisdiction in which it is measured. Statutes vary from state to state, and judges differ in their conduct within each state. Returning to court in California is different from returning to court in

Michigan; taking the MMPI is not. For this reason, relitigation rates require controls within the jurisdiction for valid conclusions to be drawn.

Several published studies have used relitigation as a measure of the stability of custodial arrangements. Cline and Westman,² studying a sample of 105 cases, found that 52 percent had at least one court intervention in the two-year period after divorce. Ilfeld *et al.*,³ studying a California sample, used relitigation as a measure for assessing the stability of joint custody when contrasted with sole custody, and they reported joint custody arrangements to have half the relitigation rate of sole custody arrangements. Pearson and Thoennes,⁴ in a follow-up study of the consequences of mediation, reported as preliminary data that couples who successfully mediated their disputes had lower rates of custody relitigation than did controls.

In our clinical work, we were impressed by the high level of conflict between the contesting parents in our sample. Evaluators often felt that the parties were intransigent in their views; in case conferences, an often-heard comment was, "These parents just love to fight." We hypothesized that parents who vigorously contested custody or visitation would continue to have conflicts that would lead to higher levels of subsequent litigation over custody, visitation, and child support than would parents who had not contested custody or visitation at the time of divorce.

METHOD

Evaluated Cases The sample of evaluated cases consisted of 104 families

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referred to our program by court order or stipulation for evaluation during the pendency of a contested custody or visitation action in the three years 1979, 1980, and 1981. Fifty-eight cases were referred predivorce; 46 cases were referred postdivorce. Cases were generally referred because they were especially difficult. Most often the difficulty included high levels of parental conflict, often including violence or allegations of abuse. Other cases were referred because of concerns about mental illness or because the case appeared to be too close to call. In most cases, the parents had already been interviewed by a caseworker of an adjunctive agency of the court that conducts investigations in contested custody matters and issues recommendations to the judge. The sample referred to us comprised approximately 8 percent of the contested custody cases in the local jurisdiction.

Evaluations were structured so that the evaluator sought the best interests of the child, was not a party expert, and was assured that his evaluation would reach the court, confidentiality notwithstanding. To achieve this, the following

ground rules were used: (1) cases were accepted only with a court order or a stipulation by the parties; (2) all parties to the litigation (parents, children, and other litigants) agreed to participate; (3) all parties paid for their own interviews and the summary report according to an ability-to-pay scale; and (4) the report and recommendations were discussed with the parties and sent to the court and the parents' attorneys.

Recommendations as to custody were made in 92 cases. Our recommendations as to custody and the subsequent court dispositions are shown in Table 1. In the sample, custody recommendations were implemented 90 percent of the time. In 83 cases, visitation recommendations were made; they were implemented 93 percent of the time. Of the 104 cases, only 12 (12%) went to trial, and evaluators were called to testify in 5 cases. Relitigation was measured in a two-year follow-up period. The operational definition for relitigation was that a petition was filed with the court or that the court issued an order to show cause why a parent should not be held in contempt of court for failing to comply with a

Table 1
Custody Recommendations of Evaluated Cases

Placement	Mental Health Professional's Recommendation		Court Disposition (% Agreement with Recommendations*)
	N	%	
Sole—mother	57	62	95
Sole—father	24	26	92
Joint—equal possession	3	3	67
Joint—unequal possession	3	3	0
Other—other relatives or foster care	5	6	100
Total	92	100	90†

* Includes cases in which petition was dropped after evaluation.

† Weighted mean.

previously issued court order. For predivorce cases, the two-year follow-up period began at the time the court entered a judgment of divorce. For a case evaluated postdivorce, the follow-up period began either with the ruling of the court on the petition that had led to the evaluation, or, in those cases in which the petitioner dropped his or her petition after hearing the evaluator's recommendation, from the date a recommendation was communicated to the court.

Control Cases A sample of control cases was selected for comparison with the evaluated group. These were obtained by selecting the divorce case filed with the circuit court immediately after the filing of a case referred to us. This method of sampling was used so that the control sample matched in time the evaluated sample, to control for changes in statutes and judicial practice that developed over the three-year time period covered by the study. As with the evaluated group, the control group follow-up period was two years after the judgment of divorce, and, for each postdivorce control case, the corresponding time period was the same as that used for its matching evaluated case. Approximately 75 percent of control cases thus selected were sole maternal custody. To compare results of our contested sample with alternative custody arrangements, control cases of mother custody were separated out. To obtain a sufficient number of joint and father custody cases, a random sample of 540 divorce cases filed in the period of 1979 to 1981 was drawn. All joint custody cases and father custody cases in that drawing were identified. (Legal joint custody cases

with unequal possession were grouped with joint custody cases in which children alternated their time equally between their parents.) This provided us with a subsample of 54 joint custody cases and a subsample of 30 father custody cases.

Relitigation (petitions and show cause orders) was coded from court files for problems concerning custody, petitions to decrease visitation initiated by the custodial parent, petitions to increase or enforce visitation initiated by the non-custodial parent, and child support actions. Differences between groups were analyzed using chi-square analysis and logistic regression.^{5,6}

Results

Predivorce Cases Results are summarized in Table 2. Couples in the joint custody and father custody groups had, on average, been married longer before divorce (mean, 14 years) and had older children (mean age of youngest child, 9 years) than had the contested group (mean length of marriage, 9 years; mean age of youngest child, 8 years) and the noncontested, maternal custody group (mean length of marriage, 10 years; mean age of youngest child, 6 years). These differences, however, were not significant in the logistic regression model. The differences in relitigation rates between the differing custodial placements in the evaluated group were minimal except for child support, to be discussed below.

Custody Relitigation The predivorce evaluated group had a significantly higher rate of relitigation over custody

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Table 2
Relitigation in Two Years after Divorce

	N	Type of Relitigation (% Cases Relitigated)			
		Custody	Visitation Brought by		Child Support
			Noncustodian	Custodian	
Evaluated contested cases	58	19.0	10.3	6.9	36.2
Controls					
Maternal custody	43	7.0	9.3	2.3	48.8
Paternal custody	30	6.7	0.0	0.0	16.7
Joint custody	54	7.4	7.4	0.0	16.7
Chi-square		5.8*			15.3†
Significance		$p < .02$	NS	NS	$p < .002$

* Difference between evaluated and controls (1 *df*).

† Difference among all four groups (3 *df*).

than did the control groups. In comparing the mother, father, and joint custody control groups, differences were nonsignificant. Our data therefore do not replicate the findings of Ilfeld *et al.*,³ who found a joint custody group to have half the rate of custody relitigation that a sole custody group has. Relitigation over custody was not associated with relitigation over child support; in other words, parents who returned to court on matters of custody had no greater likelihood of going back on matters of support than did parents who did not contest custody. This finding goes against the commonly held belief that disputes over support are a major trigger for postdivorce custody fights.

Visitation In the two-year follow-up period, the evaluated group had more visitation problems than did controls, but this difference was not of a magnitude that was statistically significant. Differences between the control groups, mother custody, joint custody, and father custody, were not statistically significant. It is notable that in no father custody arrangement did the mother

make even informal complaints to the court about visitation arrangements.

Child Support Relitigation Difficulties over child support were far and away the most frequent source of problems, occurring in about one third of the contested group and half of the mother custody control group. The control mother custody group and evaluated group had over twice as many difficulties over support as did the joint custody and father custody groups, a difference that was statistically significant. Before interpreting this finding as evidence that joint custody or father custody are more stable with regard to child support, it must be noted that in many joint custody and father custody arrangements, child support was either not ordered or significantly less than what it would have been in a sole maternal custody arrangement. (The apparent finding that the mother custody control group had a higher rate of relitigation over support than the evaluated group is a reflection of the fact that not all the evaluated cases were maternal custody. When evaluated maternal custody cases were compared

with control maternal custody cases, the rates were about equal.) From clinical experience, we expected to find that problems obtaining child support were associated with attempts to decrease or block visits, and this association was supported in the data (Pearson $r = .15$, $p = .01$), although the magnitude of the correlation was low.

Postdivorce Cases Because the post-divorce period poses different problems for families than does the separation and predivorce period, these cases were considered separately. The mean time for a postdivorce referral to our clinic was 3.5 years after divorce. The period selected for measurement of relitigation in the control sample was matched to the time period of the evaluated cases to control for diminishing relitigation with the passage of time after divorce. Because post-divorce families evaluated for visitation disputes had relitigation rates that were different from those of families seen for custody disputes, these groups were analyzed separately. Differences among visitation, custody, and control groups were analyzed using chi-square analysis.

Possible effects of age of youngest child, length of marriage, and length of time from the divorce to referral for evaluation were examined using logistic regression⁵ and found to be nonsignificant. Results are shown in Table 3. The only significant differences evaluated and control post-divorce cases were in the frequency of relitigation of visitation problems. These differences were most noted in cases that were referred for evaluation of visitation problems. Over half of these families continued to litigate over visitation.

Cases that were referred for evaluation of a visitation dispute after divorce were typically those cases that had already been to court numerous times. They were the cases of which judges said, "At least every few months and every holiday those parents are in my court." Previous visitation orders had had little effect in modifying the ongoing parental conflict. Unlike custody orders and wage assignments, which do not rely on parental cooperation, ongoing visitation requires some acceptance by the parents in order to be workable. It was not sur-

Table 3
Relitigation after Postdivorce Conflicts in Two-Year Period

	N	Type of Relitigation (% Cases Relitigated)			
		Custody	Visitation Brought by		Child Support
			Noncustodian	Custodian	
Evaluated for custody conflict	32	7.1	9.3	6.3	50.0
Evaluated for visitation conflict	14	9.4	57.1	21.4	50.0
Control (maternal custody)	36	8.3	2.8	2.8	38.9
Chi-square			25.0*	4.7**	
Significance		NS	$p < .0001$	$p < .05$	NS

*Difference between all three groups (2 *df*).

** Difference significant only between "Evaluated for visitation conflict" and controls (1 *df*).

prising that many parents referred for a visitation dispute returned to court; we were surprised that such a large proportion did not.

Other Factors We considered whether cases that had considerable conflict reaching a decision, as exemplified by a trial, had more problems after judgment than did other cases. Parents who went to trial had less relitigation of all types than did parents who settled after the evaluation, although the number of trials was so small (12) that the findings were not statistically significant. This trend suggests that bearing the emotional and financial costs of a full trial may act as a disincentive to further litigation.

Discussion

Although families who had gone through contested custody evaluations at the time of divorce had higher rates of later difficulties on almost all types of relitigation than control families had, we were surprised to find that the magnitude of these differences was small. In 81% of vigorously contested custody cases, resolution of the custody question, usually by consent, appeared lasting. The higher rate of visitation relitigation was only significant in those families referred for a postdivorce evaluation of a visitation dispute, families typically who had established a long track record of visitation problems. The hypothesis that a case that was vigorously contested at the time of divorce was likely to be particularly troublesome for the courts after divorce was not supported by our data. Additionally, the data presented here do not support the hypothesis that

most parents who contest custody are characterologically prone to litigation or that parents once led to use the legal system to resolve their differences move quickly to further litigation when future conflicts arise. The "conflict-prone" hypothesis that underlies the statement one frequently hears in case conferences, "These parents just love to fight," is not supported by our data, at least insofar as fighting takes place in the courts.

The patterns of parental conflict that were observed are consistent with a conceptualization of divorce as a crisis, which may elicit hostile behavior, but the level of hostility at the time of divorce did not appear to be a very strong predictor of postdivorce conflict. To the extent that our measures are associated with more general levels of postdivorce adjustment, it appears that even parents who are highly adversarial during the divorcing period tend to "settle down" and behave not especially differently from other divorcing families. Settling the disputed matter between the parties may be a necessary step for allowing their psychologic disengagement and the tempering of their conflicts.

The difficulties that these families encounter involving visitation are consistent with the hypothesis (and congruent with our clinical experience) that contested cases represent particular difficulty in the parents' capacity for making plans for their children. Once questions of custody and child support are settled, ongoing planning concerning these matters need not be made. Visitation, which does require ongoing cooperation, interaction, and planning, emerges as the arena of difficulty. Interventions that

emphasize and encourage parental planning, such as divorce mediation, may serve to alleviate some of this difficulty.

Another possible factor to account for the relatively low rate of relitigation among the evaluated group is that the process of evaluation itself had an effect on the frequency of later litigation. Psychiatric evaluation has functions beyond simply providing evidence for judicial consideration. In some cases, evaluation has effects similar to treatment and to mediation. Although evaluators did not engage in formal psychotherapy with the contesting parents, parents sometimes reached new insights as a result of putting their feelings into words and reflecting upon the evaluator's clarifications and interpretations about their statements. Some families, who came to us convinced that no agreement was possible, reached an agreement on the disputed issue during the course of the evaluation. For others, the evaluation reopened a process of negotiation, which then led to a later consent judgment. Psychiatric evaluation sometimes functions as an alternative method of dispute resolution, which may itself promote a smoother course in the following years. Research regarding the course of highly adversarial cases that are not referred for psychiatric evaluation would illuminate whether the outcomes reported here may derive from effects the evaluations had beyond providing evidence to judges, parents, and others associated with the cases.

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