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Recommended Citation

10 J.L. & Fam. Stud. 103 (2007)

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Concerns at the Margins of Supervised Access to Children

Elizabeth Barker Brandt*

I. INTRODUCTION

Supervised access¹ has emerged as an important tool for managing child-custody matters. In the past fifteen years, formal supervised access programs have become increasingly common throughout the country.² Supervised access encompasses a number of different situations ranging from the supervision of custody exchanges between parents,³ to the supervision of all of a parent's contact with her or his child.⁴ Supervision may be provided by trained supervisors, by volunteers,⁵ by professionals who also provide therapeutic services in the context of supervision,⁶ or by family members.⁷ Supervision

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¹ I will use the term "supervised access" rather than the term "supervised visitation." The terms are synonyms and are used interchangeably in the literature. I believe that "access" better captures the nature of the parent/child contact than does "visitation."

² See Janet R. Johnston & Robert B. Straus, *Traumatized Children in Supervised Visitation: What Do They Need?*, 37 FAM. & CONCILIATION CTS. REV. 135, 158 n.2 (1999) (reporting that the number of supervised access providers had gone from 70 in 1992 to over 400 in 1998); Nancy Theonnes & Jessica Pearson, *Supervised Visitation: A Profile of Providers*, 37 FAM. & CONCILIATION CTS. REV. 460, 463-64 (1999) (describing the recent growth in 1999 of supervised access services for divorcing families).

³ For information on "supervised exchanges" generally, see SUPERVISED VISITATION NETWORK, QUESTIONS PARENTS ASK, <http://www.svnetwork.net/InformationForParents.html> (2006). These exchanges, "sometimes referred to as 'Monitored Exchanges' or 'Supervised/Monitored Transfers,'" involve transferring the child from the control of one parent to the other. *Id.* In these situations, supervision is limited to time when the exchange or transfer occurs; the visit itself remains unsupervised. *Id.* Supervision enables the parties to take precautions to avoid contact with one another while the exchange or transfer takes place. *Id.*

⁴ *Id.* ("Supervised Visitation [Access] refers to contact between a non-custodial parent and one or more children in the presence of a third person responsible for observing and seeking to ensure the safety of those involved. 'Monitored Visitation,' 'Supervised Child Access,' and 'Supervised Child Contact' are other terms with the same meaning.")

⁵ See Theonnes & Pearson, *supra* note 2, at 464 (reporting on a national survey of supervised access providers and indicating that half the surveyed programs used student volunteers and another third used community volunteers).

⁶ See Robert B. Straus, *Supervised Visitation and Family Violence*, 29 FAM. L. Q. 229, 235 n. 22 (1995) (noting that "[a] trained clinician may provide therapeutic supervision, but this is actually a form of parent-child psychotherapy with the unique

may take place in locations specially dedicated for supervision, in the offices of professional supervisors, in neutral public locations, or even in private homes.⁸

While parents may voluntarily utilize supervised access services, supervision is most often ordered by courts.⁹ The circumstances leading to court-ordered supervised access to children are varied. Supervised exchanges may be ordered for safety reasons because one or both parents pose a danger to each other or to the child or have a history of acting inappropriately when in the presence of each other or the child.¹⁰ Temporary supervision of a parent's contact with a child may be ordered where the parent and child have previously not had a relationship or where there has been a long interruption in the parent-child relationship; in such situations, supervision is ordered to facilitate the re-establishment of the parent-child relationship.¹¹ A parent's contact with his or her child also may be supervised temporarily when allegations are pending that he or she subjected the child to dangerous, abusive, threatening or

characteristic that the sessions may be the only contact between the parent and child(ren) involved.”).

⁷ See, e.g., *S.F. v. S.F.*, 2001 WL 1857124 (Del. Fam. Ct. 2001) (mother's visitation supervised by maternal grandmother); *Willis v. Willis*, 775 N.E. 2d 878 (Ohio Ct. App. 2002) (father's parents originally designated to supervised visitation between father and children); *Riedman v. Petrella*, 828 A.2d 538 (R.I. 2003) (supervision of mother's access to child provided by mother's sister and brother); *Engel v. Young*, 2003 WL 1129451 (Tenn. Ct. App. 2003) (visitation with father supervised by his former wife or eldest daughter).

⁸ See Nat Stern & Karen Oehme, *Defending Neutrality in Supervised Visitation to Preserve a Crucial Family Court Service*, 35 SW. U. L. REV. 37, 39-40 (2005) (“Supervised visitation programs are located in a variety of places, including schools, churches, universities, child care agencies, YMCAs, renovated houses, and courthouses.”).

⁹ See, e.g., SUPERVISED VISITATION NETWORK, *supra* note 3 (“Supervised exchanges may be court ordered or arranged by the parent and are generally appropriate when there is no question about the safety of the child but when one or both parents do not feel safe or comfortable interacting directly with the other.”)

¹⁰ See Robert B. Straus & Eve Alda, *Supervised Child Access: The Evolution of a Social Service*, 32 FAM & CONCILIATION CTS. REV. 230, 231 (1994) (“In separated or divorced families conflict between the parents is what brings child access problems to the attention of the state The issues involve risks to parents as well as children, including serious concerns about inter-parental violence.”); see also Robert B. Straus, *Supervised Visitation and Family Violence*, 29 FAM. L. Q. 229 (1995) (discussing the heightened risk of violence at custody exchanges and during visitation in domestic violence situations)

¹¹ Barbara E. Flory et al., *Supervised Access and Exchange: An Exploratory Study of Supervised Access and Custody Exchange Services: The Parental Experience*, 39 FAM. CT. REV. 469, 470 (2001) (pointing out that increased levels of child support enforcement have led to more interest on the part of absent parents in establishing parental relationships with their children).

inappropriate behaviors or situations. Often the goals of such temporary supervision are not only to protect the child until an accurate assessment of threat to the child can be undertaken, but also to deliver services to the child and parent with the goal that supervision may no longer be necessary at some future point in time.¹² If a court finds that a parent subjected his or her child to such conduct or circumstances, longer term supervision may be ordered to continue the contact of the child with the parent even where there is no realistic possibility that ordinary access will be possible.¹³

The growth of supervised access to children reflects larger trends in custody law. The absence of clear judicial rules in the area of custody has contributed to an increase in conflict and in strategic litigation behavior by parents.¹⁴ In highly conflicted cases, supervised access is a tool that can protect children from some aspects of parental conflict. However, supervised access can also be used as part of a litigation strategy by parents who seek to gain an advantage and to exercise dominion over the other parent.¹⁵ Furthermore, courts may award supervised visitation in high-conflict cases to provide a perceived buffer for the children when the court cannot or does not get to the bottom of the dispute.¹⁶ Second, the move of courts toward a paradigm of post-divorce shared parenting and custody determinations resulting from

¹² Martha Bailey, *Supervised Access: A Long Term Solution?*, 37 FAM. & CONCILIATION CTS REV. 478, 478–79 (1999).

¹³ *See Id.* at 479 (describing disagreement over whether the use of supervised access is appropriate in cases in which there is not a realistic possibility that ordinary access will be possible in the future).

¹⁴ *See infra* notes 52-56 and accompanying text.

¹⁵ *See, e.g., Little v. Linder v. Johnson*, 206 WL 3425021 (Ark. Ct. App. 2006) (each parent sought sole custody with supervised access for the other parent in high conflict cases where each alleged alienation by the other parent); *Smith*, 206 WL 3114376 (Conn. Super. Ct. 2006) (supervised access originally ordered because mother's severe depression posed a possible threat to child; continued supervision after mother's successful treatment and after five years appeared to be the result of growing conflict and posturing by the father to ensure his continued primary custody).

¹⁶ *See, e.g., Lasater v. Lasater*, 809 N.E. 2d 380 (Ind. Ct. App. 2004). In *Lasater*, the mother was aggressively litigious and uncooperative. Despite her ill-conceived litigation strategy, however, the basis for supervised access to the child is not clear from the extensive description of the facts in the appellate opinion. Despite the fact that the mother apparently had substantial custody of the child during the three years of the pending divorce, the appellate court rejected the mother's arguments against supervised access to her son and concluded that supervised visits were appropriate based on "an abundance of findings relating to the acrimonious relationship between the parties, the erratic behavior of [the mother], the history of not cooperating with or following court orders, and the risk of emotional harm [the mother] poses to [the child]." *Id.* at 402. Yet, no evidence is described in the appellate opinion regarding the actual emotional or psychological situation of the child. *See id.*

compromise and settlement¹⁷ has made it increasingly difficult to eliminate a parent's custodial contact with children. Together, these considerations have made many courts reluctant to eliminate custodial contact between parents and children. Supervised visitation is a mechanism that enables courts to continue parental custody in cases even where one parent is a threat to the child or to the other parent.

Orders requiring some form of shared parenting after divorce are increasingly common. The support for this conclusion is largely anecdotal. There is little quantitative research on custody outcomes. The most important study—by Eleanor Macoby and Robert Mnookin—was conducted in 1990 and is thus fairly dated.¹⁸ In that study of California custody cases, joint physical custody of children was common. Even when neither parent requested joint physical custody, courts awarded it in more than a third of the cases.¹⁹ The study established that the higher the level of conflict the more likely the imposition of joint custody was (resulting from pressure to compromise).²⁰ Not only is joint custody used as a mechanism for settling high-conflict custody cases, this result is pushed by the law in a number of jurisdictions that impose

¹⁷ Recently, Jana Singer and Jane Murphey have described the procedural aspects of this shift as consisting of a number of factors: 1) skepticism about the value of the adversary system in family law cases; 2) the view that family disputes are “not discrete events but rather are ongoing social and emotional processes;” 3) a forward-looking focus on family reorganization as opposed to a backward-looking focus on family dissolution; 4) an effort to build capacity to enable families to resolve their own conflicts; and 5) an emphasis on preventative approaches to family conflict. Jana Singer & Jane Murphey, *Resolving Family Conflicts: Implications of a Paradigm Shift*, Presented at the Association of American Law Schools Annual Meeting (Jan. 6, 2007) (on file with the author). Some dispute the notion that joint custody is the pervasive norm in custody arrangements. See, e.g. Katherine Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles and the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 21–27 (2002).

¹⁸ ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 149 (1992).

¹⁹ *Id.*; see also Steven J. Bahr, et al., *Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference?*, 28 FAM. L. Q. 247, 258 (1994) (relying on census data to conclude that 30% of divorcing couples have joint physical custody of their children). But see Robert E. Emery, *Postdivorce Family Life for Children: An Overview of Research and Some Implications for Policy*, in *THE POST DIVORCE FAMILY: CHILDREN, PARENTING AND SOCIETY* 3, 6 (Ross A. Thompson & Paul R. Amato eds. 1999) (estimating that joint physical custody involves less than 5% of children nationally).

²⁰ MACCOBY & MNOOKIN, *supra* note 18, at 149–51 (“[J]oint custody is in fact being used to resolve highly conflicted cases The combined data show that the use of joint physical custody becomes more frequent toward the top of the [conflict] pyramid.”).

a statutory presumption in favor of joint custody.²¹ Even where sole custody is ordered, the non-custodial parent is given significant visitation in most instances. The West Virginia Supreme Court articulated the prevailing view: “[e]ven where there are allegations of abuse and/or neglect, parents whose rights have not been terminated generally have a right to continued contact with the child, although such visitation may be supervised for the protection of the child.”²² To be sure, the research seems to indicate that, on the whole, joint physical custody is good for children.²³ This movement towards the continuing involvement of both parents has overshadowed the question of when continuing contact with a parent should be eliminated. Supervised access is often the vehicle by which potentially dangerous and disruptive parental involvement with children is perpetuated.

Despite the growing frequency with which supervised access is ordered by courts, little research on the impact of supervision on children has been undertaken.²⁴ A growing body of research details the role of supervised access in reducing the level of conflict between parents and decreasing the frequency of parental interaction with the courts.²⁵ Research also documents parents’ perceptions of their children’s adjustment during supervised access.²⁶ Certainly, to the extent this research indicates that supervised access reduces levels of conflict, improves parenting behavior, and leads to more realistic expectations of parents, we can infer that supervised access is beneficial to children. Yet, we know little about children’s perceptions of supervised access, how or whether supervised access alters a child’s relationship with parents, or whether children are able to emerge from supervised access with the possibility

²¹ D.C. CODE ANN. §16-914 (2001); FLA. STAT. § 61.13(2) (b) (1997); IDAHO CODE §32-717B (1996); KAN. STAT. ANN. § 60-610(1994); LA. CIV. CODE ANN. art. 132 (1999); ME. REV. STAT. ANN. tit. 19A, §1653 (1964); MISS. CODE ANN. §93-5-24 (2004); MO. REV. STAT. § 452.375 (2003); N.H. REV. STAT. Ann. § 148:17 (1992); N.M. STAT. ANN. §40-9.1 (West 1978); WIS. STAT. § 767.41(2)(am) (West 2006).

²² State ex rel. George B.W. v. Kaufman, 483 S.E. 2d 852, 857–58 (W. Va. 1997).

²³ See Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements*, 16 J. FAM. PSYCH. 91 (2002) (meta-analysis of 33 studies); Janet R. Johnston, *High-Conflict Divorce*, 4 FUTURE OF CHILD. 165 (1994) (summarizing the social science research on joint custody).

²⁴ Rachel Birnbaum & Ramona Alaggia, *Supervised Visitation: A Call for a Second Generation of Research*, 44 FAM. CT. REV. 119, 120 (2006) (arguing that most of the research is descriptive of programs or involves very small programs and concluding that “there is a gap in the literature that examines parent/child outcomes and the intended and unintended consequences of supervised visitation between children and their parents”).

²⁵ See, e.g., Flory et al., *supra* note 11; Jennifer Jenkins et al., *An Evaluation of Supervised Access II: Perspectives of Parents and Children*, 35 FAM. & CONCILIATION CTS. REV. 51 (1997).

²⁶ See note 25 *supra* and sources cited therein.

of a normal relationship with parents. Most importantly, we do not know whether supervised access actually protects the best interests of children who have continued contact with an abusive, manipulative and/or threatening parent. Nor have we examined the impact of supervised access to a child on the ability of the other parent to build a new family unit and move past the custody dispute. These questions are especially important in situations in which the parent-child interactions will be supervised over a long period of time or the child resists the court-ordered supervised contact with a parent.

Also missing from our approach to supervised access is a coherent set of principles regarding when and under what conditions supervised access should be ordered by courts.²⁷ This absence of substantive standards may be a direct reflection of our lack of understanding of supervised access. Many jurisdictions have adopted detailed standards for the provision of supervised access services.²⁸ Yet few have articulated substantive guidelines for the imposition of supervised access beyond the physical safety or best interests of the child.

Our lack of understanding of the impact of supervision on children and the absence of coherent guidelines for courts raises two pragmatic concerns. First, courts may order supervised access under circumstances in which parent-child contact should be suspended. Second, courts may be continuing parent-child contact because of the perceived buffer it provides under circumstances in which contact is detrimental to the child(ren) involved. Thus, my central question is under what circumstances should supervised access be ordered? Given that the central legal command in all states is to fashion a custody arrangement that is in the child's best interests, what considerations should warrant the intervention of a court-appointed supervisor in the parent-child relationship, and what considerations should warrant the continuation of contact between a child and a parent who threatens a child's health, well-being or safety? As part of these questions, I will also examine whether supervised access provisions contain adequate safeguards to accomplish their objectives of protecting children.

²⁷ See, *infra*, note 28 and accompanying text.

²⁸ See, e.g., OKLA. STAT. tit. 43, § 110.1a. (West 2006); IDAHO R. CIV. P. 16(o). For a typical example of detailed standards, see SUPERVISED VISITATION NETWORK, STANDARDS AND GUIDELINES FOR SUPERVISED VISITATION PRACTICE, <http://www.svnetwork.net/StandardsAndGuidelines.html> (2004). The process of developing the standards and guidelines is discussed in Robert B. Straus et al., *Standards and Guidelines for Supervised Visitation Network Practice: Introductory Discussion*, 36 FAM. & CONCILIATION CTS. REV. 96 (1998).

II. THE CHANGING LANDSCAPE OF CUSTODY AND VISITATION

Supervised access has emerged as a response to increasingly intractable child custody disputes.²⁹ The difficulty of custody determinations is the result of many factors. The central legal test for allocating custodial rights—the “best interest of the child” test—has lost its historic substantive content as gender-based parenting roles have been eroded.³⁰ Changing norms regarding the roles of men and women at work and within the family have led to expectations (if not reality) of shared parenting and equal economic status.³¹ As a result, family organization no longer fits an established pattern and, in many situations, both parents will work in the paid labor force and will be involved in parenting children not only while relationships are intact but also in the wake of family breakdown.³²

²⁹ Significant theoretical and pragmatic focus has been directed to the impact of high-conflict custody litigation on children. See Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495 (2001); Janet R. Johnston, *High Conflict Divorce*, 4 FUTURE OF CHILD. 165 (1994); Hildy Mauzerall, et al., *Protecting the Children of High Conflict Divorce: An Analysis of the Idaho Bench/Bar Committee to Protect Children of High Conflict Divorce's Report to the Idaho Supreme Court*, 33 IDAHO L. REV. 291 (1997); Sarah Ramsey, *The Wingspread Report and Action Plan, High Conflict Custody Cases: Reforming the System for Children*, 18 FAM. CT. REV. 146 (2001); Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395 (2000); *High Conflict Custody Cases: Reforming the System for Children—Conference Report and Action Plan*, 34 FAM. L. Q. 589 (2001).

³⁰ Elizabeth Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 619–22 (1992).

³¹ See Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA L. REV. 921, 943–46 (2005) (documenting the growing expectation that fathers will be involved in their children's lives after divorce while at the same time arguing that expectations of paternal involvement are still ambiguous and that many fathers disengage from their children when they divorce the children's mother); see also Stephanie B. Goldberg, *Make Room for Daddy*, 83 A.B.A. J. 48, 49 (1997) (discussing the growth of the fathers' rights movement); Arlene Broward Huber, *Children at Risk in the Politics of Child Custody Suits: Acknowledging Their Needs for Nurture*, 32 U. LOUISVILLE J. FAM. L. 33, 45–46 (1994) (pointing out that divorcing fathers have a better chance of prevailing in disputes over custody under the best interests and joint custody approach of modern courts).

³² See MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 3–4 (1981) (identifying changes in lines of authority and roles within the family as one of the major characteristics that distinguishes late 20th Century families); Martha

The dual involvement of mothers and fathers in post-divorce parenting is one of the factors that has driven the increase in custody disputes—both parents expect continuing contact with their children. The growth of intractable custody litigation has also been fueled by the legal context in which custody issues are decided. The ‘best interests of the child’ test does not provide a meaningful standard for allocating custodial rights between parents. Joint custody has resulted in a focus on parental rights. This rights orientation in custody determinations has made it increasingly difficult for courts to curtail or eliminate a parent’s custodial rights.

A. Best Interests of the Child—A Little History

The central directive to courts in adjudicating the custody of children is to serve the best interests of the child.³³ This principle has been the touchstone of custody law since the latter half of the 19th century.³⁴ Until the last quarter of

Albertson Fineman, *Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1, 2–3 (arguing that profound shifts in our understanding of family disclose serious issues regarding how we care for children and the elderly); *see also* Scott *supra* note 30, at 616–17 (arguing that custody decisions should be based on the past relationship of each parent with the child, pointing out that the tender years doctrine reflected the actual role of the mother as the central nurturing figure in the life of her child and suggesting that the abandonment of that test and the adoption of an open-ended best interests test reflects the law’s struggle to decide custody cases without the guidance of differentiated gender roles within the family).

³³ The custody law of every state is expressly built on this standard. *See* Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L. Q. 1, 5 (1984) (“‘Best interest of the child’ is the universal standard for deciding child custody when custody is initially determined at the time of dissolution of marriage.”); *see also* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: “Same-Sex” Marriage Issue Dominates Headlines*, 38 FAM. L. Q. 777, 810 (2005) (summarizing the law of all 50 states); *Chart 2: Custody Criteria*, 38 FAM. L. Q. 810, 810 (2005) (summarizing the factors applied in evaluating the best interest of the child in all fifty states); *Family Law in the 50 States: 2003-04*, 38 FAM. L. Q. 817, 876–910 (2005) (providing a one year snapshot of child custody cases in the 50 states). The “best interests of the child” standard is pervasive even in international child custody law. *See, e.g.*, United Nations Convention on the Rights of the Child art. 9, § 3, Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* <http://www.unhcr.ch/html/menu3/b/k2crc.htm> (stating that a child who has been separated from a parent has a right “to maintain personal relations and direct contact with that parent, except if contrary to the child’s best interests”).

³⁴ MARY ANN MASON, *FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 49–50, 61–62 (1994) (discussing movement away from a father’s rights approach to custody toward a maternal preference evidenced by the best interest standard and the tender years doctrine); *see also* MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND FAMILY IN 19TH CENTURY AMERICA*, 237–42 (1985) (discussing the shift from paternal to maternal

the 20th Century, courts and social scientists assumed that the best interests of the child were served through a preference for maternal custody.³⁵ This preference was played out through the formal use of the tender years presumption and through less formal imposition of normative assumptions by both judges and parents about appropriate custody arrangements.³⁶

The assumption of maternal custody thrived in a context in which divorce was not a socially accepted practice and was difficult to obtain.³⁷ Less frequent divorce meant less frequent custody adjudications.³⁸ Custody litigation between unmarried individuals was even less common than between divorcing parents, and the preference for maternal custody in cases involving unmarried parents was even stronger.³⁹ Formal adjudication of custody between unmarried parents was unusual. Rather, out-of-wedlock births were often hidden and the allocation of parenting responsibilities handled through private ordering and interfamilial arrangements that reflected social norms of maternal

custody that occurred as custody analysis shifted from a property-based analysis to the best interests standard); Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody Adoption and the Courts, 1796–1851*, 73 NW U. L. REV. 1038, 1085 (1979) (arguing that the decline of property analysis of family relationships and the advent of child and relationship centered custody decision-making signaled the rise of an indigenous American family law).

³⁵ See, e.g., GROSSBERG, *supra* note 34, at 239–43; see also MASON, *supra* note 34, at 61–2; Lenore J. Weitzman & Ruth B. Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 471, 479 (1979); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1333–34 (1980).

³⁶ MASON, *supra* note 34, at 123; Jeff Atkinson, *Criteria for Deciding Custody in the Trial and Appellate Courts*, 18 FAM. L. Q. 1, 4–16 (1984).

³⁷ The rate of divorce increased steadily after the Civil War until the mid 1960's when it sharply increased. Frank N. Furstenberg Jr., *History and Current Status of Divorce in the United States*, THE FUTURE OF CHILD., Spring 1994, at 29, 30–31. Furstenberg points out that throughout the 20th century the institution of marriage was losing its centrality and experiencing increasing instability. *Id.* Yet public policy makers did not really recognize the development until after the rate of divorce spiked in the mid 1960's. *Id.*

³⁸ *Id.* at 34–35 (“Since the 1950s when the rates of [family] stability were at their highest point, the risk of family disruption has more than doubled, owing to much higher rates of divorce and separation and, more recently, an explosion of non-marital childbearing.”).

³⁹ The common law, reflecting a negative view of both women and of children born out of wedlock, recognized no legal relationship between an unwed father and his children born outside of marriage. See GROSSBERG, *supra* note 34, at 197–98, 234–36; MASON, *supra* note 34, at 14–18. This regime was only lifted when children's rights advocates sought to undermine the stigma of illegitimacy and the unequal treatment of illegitimate children. See, e.g., Mary L. Shanley, *Unwed Fathers' Rights, Adoption and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 67–68 (1995)

care for children.⁴⁰ Many states had statutory presumptions that unwed fathers were unfit parents, for example.⁴¹ To the extent courts became formally involved in these non-marital families it was often in the context of paternity and adoption.⁴²

Until recently, legal questions regarding the best interests of the child were more easily resolved in the context of a socially cohesive regime that disfavored divorce and out-of wedlock birth and applied a consistent assumption that in those instances where the adjudication of parental rights did occur, maternal custody was preferred.⁴³ As divorce became more common and experimentation with alternative relationships grew, as non-marital child-bearing increased,⁴⁴ and the stigma of illegitimacy waned,⁴⁵ and as the basic social, economic and familial roles of men and women changed, the commitment to a maternal custody preference disintegrated.⁴⁶

Notwithstanding these social, economic and familial changes, our custody adjudication system still functions on the central premise of serving the best interests of the child. Yet no consistent subtext has emerged to fill the gap left

⁴⁰ See GROSSBERG, *supra* note 34, at 200–07; MASON, *supra* note 34, at 144–49 (describing late 20th century changes in ideas of parenting that affected the relationships of unwed fathers and mothers with their children).

⁴¹ Stanley v. Illinois, 405 U.S. 645, 647–48 (1972).

⁴² See GROSSBERG, *supra* note 34, at 215–30 (describing 19th Century developments in paternity law).

⁴³ Mary Ann Mason observes, “[w]hile [the tender years doctrine] . . . undoubtedly caused some unfairness, it did focus on the child’s needs for nurture and stability rather than on the parents’ rights to access. It also discouraged dispute, since society’s attitudes were aligned with the law’s judgment about what was best for children.” THE CUSTODY WARS 2 (1999).

⁴⁴ Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L. Q. 1, 6–7 (2000) (summarizing data which shows the increase in the rate of non-marital births and indicating that the rate has leveled and even declined during the 1990s).

⁴⁵ See Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 478–80 (2007) (“The stigma of illegitimacy has lessened somewhat over time as the number of illegitimate births has increased and as alternative models of the family have become more accepted.”); cf. Lili Mostofi, *Legitimizing the Bastard: The Supreme Court’s Treatment of the Illegitimate Child*, 14 J. CONTEMP. LEGAL ISSUES 453 (2004) (reviewing United States Supreme Court precedent striking down laws that discriminate against illegitimate children).

⁴⁶ ANDREW CHERLIN, MARRIAGE DIVORCE & REMARRIAGE 55 (rev. ed. 1992) (concluding that even though the link between the increase in divorce rates and women’s participation in the workforce between 1960 and 1980 is “circumstantial, . . . it is stronger and more suggestive than that linking any other concurrent trend with the rise in divorce”). Nonetheless, this link could be attributable to any of a number of factors including the fact that increased employment not only undermined their marital roles but also afforded them the opportunity to exit bad marriages. Ellman, *supra* note 44, at 13–14.

by the abandonment of the maternal custody preference. Feminists focus on past parental roles and the relationship of those roles to children's well-being to fashion an approach to resolving custody disputes.⁴⁷ They argue strenuously that women and children are disadvantaged by the abandonment of maternal preferences because gender-neutral approaches to custody deny the reality that women are still most often the primary nurturers of children.⁴⁸ Likewise, advocates for fathers' rights focus on parental roles, but with a more prospective approach.⁴⁹ The central theme of their advocacy is that the breakup of the family changes the dynamics and that the new context must be considered to ensure a role for fathers in their children's lives. Thus, fathers' rights advocates seek for a custody system that ensures frequent and continuing contact with both parents.⁵⁰

More pragmatic advocates seek to minimize the conflict in custody litigation and impose procedural norms and court management regimes that emphasize peaceful settlement and compromise of custody disputes. The pragmatists have largely abandoned the effort to articulate a substantive standard beyond the best interests of the child for the resolution of custody disputes and have instead focused on the process of custody litigation. This focus has emphasized mechanisms to force settlement of disputes, minimizing conflict when custody is not settled, and controlling the consequences of custody disputes. Supervised access to children is a procedural tool in this pragmatic approach to custody dispute resolution.⁵¹

⁴⁷ Fineman, *supra* note 32, at 12–13; Scott, *supra* note 30, *passim*.

⁴⁸ Margaret F. Brinig, *Feminism and Child Custody under Chapter Two of the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 301, 302 (2001) (praising the allocation standard for its implementation of feminist principles).

⁴⁹ See RICHARD A. WARSHAK, *THE CUSTODY REVOLUTION: THE FATHER FACTOR AND THE MOTHERHOOD MYSTIQUE* 125–52 (1992) (advocating for a shift from a maternal focus to consideration of children's potential relationships with fathers); Thomas J. Simone, *Great Expectations: New York's Attempt to Eliminate Gender Preferences Between Parents in Child Custody Disputes*, 24 COLUM. J. L. & SOC. PROB. 457, 460–67 (1991) (advocating a focus on potential relationships to eliminate perceived gender bias from custody laws).

⁵⁰ Goldberg, *supra* note 31, at 49.

⁵¹ For example, the paradigm shift identified by Singer and Murphey is almost exclusively procedural in nature. Singer & Murphey, *supra* note 17 (focusing on the advent of mediation, court connected family services, mediation and other procedural reforms as evidence of a paradigm shift).

B. *The Problem of Indeterminacy*

The indeterminate best interests test⁵² has had significant consequences for the resolution of child custody disputes. One argument is that indeterminacy permits judges to act out their own, or even societal, biases in the determination of custody.⁵³ Another argument is that indeterminacy insulates trial court decision-making from appellate review—making trial courts a “law unto themselves” in the area of custody.⁵⁴ Still another suggests

⁵² See, e.g., Katherine T. Bartlett, *Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute’s Family Dissolution Project*, 36 FAM. L. Q. 11, 11–12 (2002) (summarizing the indeterminacy critique of the best interest of the child test and the decision of the American Law Institute’s Family Dissolution Project to adopt a parental approximation standard); Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota’s Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 442–50 (1990) (arguing that the certainty provided by the primary caretaker standard was an attractive response to the indeterminacy of the general best interests standard); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 1 (1987)

“These two features—the knowledge that the decision will have momentous importance for the parties directly involved and the recognition that it may not be possible to have a rational preference for one parent over the other—conspire to create a psychological tension in decision makers that many will be unable to tolerate. Often, they will resolve this tension by adopting an irrational belief in the possibility of a rational preference.”

Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 255–61 (1975) (analyzing the inherent indeterminacy of child custody determinations under an undifferentiated best interests standard).

⁵³ See, e.g., Elster, *supra* note 52, at 14–15 (arguing that the indeterminacy of the best interest test not only invites but requires judges to impose value judgments on the parties in custody adjudications); Mnookin, *supra* note 52, at 263 (arguing that the indeterminate standard of best interests means that judges rely on “unarticulated predilections and preferences,” raising the risk that custody will be decided based on “values not widely shared in our society”); Steven N. Peskind, *Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determine Child Custody*, 25 N. ILL. L. REV. 449, 457 (2005) (noting that indeterminate standards which provide little concrete guidance contribute “to the problem of reliance on the subjective preferences of the fact finder”).

⁵⁴ See Crippen, *supra* note 52, at 443–44 (discussing the limited nature of appellate review even in the face of efforts to facilitate such review); Peskind, *supra*

that indeterminacy discourages peaceful settlement of disputes and encourages strategic behavior by parents in divorce cases that is not related to the best interests of the child.⁵⁵

Whatever the other impacts of an indeterminate custody standard, it clearly pushes most custody decision making away from the ends of a continuum: one end of which is sole maternal custody and the other end of which is sole paternal custody. Without clear rules to guide their decisions, most judges opt for uncontroversial custody determinations that will be insulated from appellate review. Especially in custody litigation where a judge's decision is subject to on-going modification, the indeterminate standards also push judges to make decisions to try to keep the parties happy.⁵⁶

note 53, at 461–62 (recognizing that “not only is a trial court required to struggle through the thicket of the unknown, the appellate court does not consider itself in a position, because of the trial court’s unique opportunity to evaluate the witnesses first hand, to challenge the trial court’s omniscience”).

⁵⁵ See Mnookin, *supra* note 52, at 262–64 (arguing that indeterminacy makes the outcome of litigation difficult to predict and thus encourages more litigation); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 963–66 (1979) (arguing that uncertainty increases strategic tradeoffs of custody for other perceived benefits at divorce that do not serve the best interests of children). Katharine Bartlett crystallizes the role played by indeterminacy in forcing settlement as follows:

the [best interest of the child] standard allows so much judicial discretion that Jane and David may find it hard to predict what the court will do. Either party may win and, thus, each has reason to secure his or her respective advantage, most likely at the expense of cooperation with the other. For example, . . . [the father] may ask for primary custody, even if he does not want it, to create some negotiating room. He may attempt to build his reputation as the more responsible parent by alienating . . . [the mother] from the court-appointed psychiatrist, the children’s teachers, or the parents of the children’s friends. [The mother] . . . , for her part, may begin to exclude [the father] . . . from decisionmaking, or suggest to the children in subtle, or not-so-subtle, ways, that their father is a real drag. None of these strategies is likely to benefit the children.

Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child’s Best Interests*, 35 WILLIAMETTE L. REV. 467, 470–72 (1990).

⁵⁶ Mnookin and Elster point out that indeterminacy leads to compromise. Elster, *supra* note 52, at 12–17; Mnookin, *supra* note 52, at 255–61; Mnookin & Kornhauser, *supra* note 55, at 963–66.

*C. Primary Caretakers and Approximation—
Workable New Standards for Custody Adjudication?*

A number of substantive tests have been proposed in various attempts to fill the gap left by the abandonment of the maternal preference and to limit the indeterminate nature of the best interest of the child standard. In the 1980's some states experimented with the "primary caretaker" presumption.⁵⁷ This presumption dictated the award of custody based on the courts finding as to which parent has been the primary caregiver for the child. The test had the merit of seeking the best interests of the child by preserving the most significant care-giving relationship in the child's life. The jurisdictions that adopted this standard, however, have all abandoned the formal presumption.⁵⁸ In Minnesota, the primary caretaker presumption did not lead to reduced litigation in custody disputes; rather the presumption may have fueled additional litigation as parties battled over the definition of "primary caretaker."⁵⁹

⁵⁷ See Crippen, *supra* note 52, at 428–31 (describing Minnesota's four year judicial experiment with the primary caretaker standard which was eventually overruled by the Minnesota legislature). For critiques of the primary caregiver standard, see David Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 527–38 (1984) which explains the primary caregiver standard generally and discussing its critiques; Marcia O'Kelly, *Blessing the Tie that Binds: Preference for the Primary Caretaker as Custodian*, 63 N.D. L. REV. 481, *passim* (1987); Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291, *passim* (1992); and Elizabeth Scott, *Pluralism, Paternal Preference and Child Custody*, 80 CAL. L. REV. 615, 618–29 (1992).

⁵⁸ The Minnesota Supreme Court adopted the primary caretaker presumption in *Pikula v. Pikula*, 374 N.W. 2d 705 (Minn. 1985), but backed away from the presumption four years later in *Sefkow v. Sefkow*, 427 N.W.2d 203, 212 (Minn. 1988). For further discussion of Minnesota's primary caretaker presumption, see Crippen, *supra* note 52, at 428–29. In articulating the applicable standard, the Minnesota Supreme Court relied on a case from West Virginia, *Garska v. McCoy*, 278 S. E. 2d 357 (W. Va. 1981). In 2001, West Virginia legislatively adopted the American Law Institute's approximation standard. 2001 W. Va. Acts 91(codified at W. VA. CODE § 48-9-206). For further materials related to the primary caretaker presumption see Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1984) and Kathryn L. Mercer, *The Ethics of Judicial Decision-Making Regarding Custody of Minor Children: Looking at the "Best Interests of the Child" and the "Primary Caretaker" Standards as Utility Rules*, 33 IDAHO L. REV. 389, *passim* (1997), comparing cases applying an undifferentiated best interests test with cases applying a primary caretaker presumption and describing the approach of states adopting the primary caretaker presumption.

⁵⁹ See Crippen, *supra* note 52, at 454–55, 456 tbls.1-1 & 1-2, 457 tbls.2-1 & 2-2, 458 tbl.2-3, 459–60 (discussing the results of a survey concerning the effectiveness of the primary caretaker standard in reducing litigation).

More recently the drafters of the American Law Institute's Principles of Family Dissolution (ALI Principles),⁶⁰ have re-articulated the primary caretaker standard as the "approximation standard."⁶¹ The ALI Principles are unique in a number of respects. They defer to parental decision-making regarding the child's residential custody arrangements by requiring courts to approve a parenting plan entered into knowingly and voluntarily by the parents unless the plan would be harmful to the child.⁶² If parents cannot agree to a parenting plan, the ALI Principles recommend that custody 'approximate' the role the parents played in parenting the child during the marriage.⁶³ While the ALI's approximation standard has been noted and considered by many courts, it has not been widely adopted as the decisional rule for custody cases.⁶⁴

D. Joint Physical Custody and Shared Parenting

The trend in custody awards is toward joint physical custody and shared parenting. Beginning in the 1970s, in response to efforts by the fathers' rights movement, courts and state legislatures began to seriously consider awards of joint physical custody of children.⁶⁵ Most states today have adopted legislation authorizing courts to award joint physical custody of children even over the objection of one or both of the parents.⁶⁶ Some states impose a presumption in favor of joint custody of children.⁶⁷ In a significant number of cases, both parents have the right to substantial physical time with their children. Custody

⁶⁰ AM LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ALI PRINCIPLES (2000) [hereinafter ALI Principles].

⁶¹ The ALI Principles are an attempt to recommend best practices in the area of family dissolution. See generally Marygold S. Melli, *The American Law Institute Principles of Family Dissolution, the Approximation Rule and Shared-Parenting*, 25 N. ILL. U. L. REV. 347, 347-48 (2005).

⁶² ALI PRINCIPLES § 2.05, at 143 (2000).

⁶³ *Id.* § 2.08. The approximation rule was first proposed by Professor Elizabeth Scott. See generally Scott, *supra* note 30.

⁶⁴ In 2001 the West Virginia Legislature adopted a statute replacing the primary caretaker standard that had been adopted by the West Virginia courts with a standard similar to the ALI approximation standard. 2001 W. Va. Acts 91 (codified at W. VA. CODE § 48-9-206).

⁶⁵ Chambers, *supra* note 57 (evaluating both the reform in progress during the 1980s and the forces behind competing approaches to custody including joint custody); Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L. J. 455, 455-58 (1984) (summarizing the movement toward joint custody); Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 500-502 (1984) (summarizing the rationale for joint custody).

⁶⁶ Judith Bond Jennison, *The Search for Equality in a Women's World: Father's Rights to Child Custody*, 43 RUTGERS L. REV. 1141, 1147-48 (1991) (reporting that 38 states had adopted statutes authorizing the use of joint custody).

⁶⁷ See *supra* note 21.

orders today reflect the effort to ensure that both parents maintain continuing involvement in the lives of their children.⁶⁸ Both fathers' rights advocates and pragmatists have either advocated for or endorsed joint custody as an approach to custody disputes. For fathers' rights proponents, joint custody represents the best opportunity for substantial paternal involvement in children's lives after family breakdown.⁶⁹ Pragmatists have been attracted both by the ideal of gender neutrality that is embodied in joint custody and the opportunity for compromise that joint custody offers.⁷⁰

E. Filling the Gap by Managing Cases

In addition to casting about for a decisional standard to reign in the best-interest standard, many courts have instituted procedural rules to shape the process of adjudicating custody. These rules often push parents toward non-judicial decision-making and institute efforts to reduce or diffuse parental conflict.⁷¹ This procedural approach may reduce the number of cases that end up going to trial. Procedural approaches may also be successful in diffusing and reducing the level of conflict in some families. However, they do not provide a framework for deciding the cases that do go to the judge for resolution. Thus, all of the procedural mechanisms that courts adopt operate within the context of the best interests of the child test. These mechanisms include parent education workshops, mandatory mediation of custody disputes, the use of custody managers and intermediaries such as parent coordinators to facilitate parental collaboration and communication, and the use of guardians ad litem and others to represent the interests of the child(ren).

⁶⁸ ANDREW SCHEPARD, *CHILDREN, COURTS & CUSTODY: INTERDISCIPLINARY MODELS FOR CHILDREN COURTS & FAMILIES* 45–49 (Cambridge 2004).

⁶⁹ Jennison, *supra* note 66, at 1148 (noting that fathers' rights groups pushed for joint custody for equality reasons).

⁷⁰ Gerald Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 *FAM. L. Q.* 201, 203–04 (1998); Schepard, *supra* note 29, at 402.

⁷¹ See Barbara Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 *IND. L. J.* 775, 784–86 (1997); Richard Boldt & Jana B. Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Courts and Unified Family Courts*, 65 *MD. L. REV.* 82, 94 (2006); Christine Coates, et al., *Parenting Coordination for High Conflict Families*, 42 *FAM. CT. REV.* 246, 246–47 (2004) (“The past two decades have seen a progressive development of alternative dispute resolution processes within the family court system.”); Gregory Firestone and Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 *FAM. CT. REV.* 203, 207–212 (2004) (discussing “a comprehensive dispute resolution program for families experiencing divorce or child protection problems”).

III. SUPERVISED ACCESS

A. *The Factual Context*

Supervised access provisions are a reflection, at some level, of all of these forces. Most directly, supervised access has been developed in most jurisdictions as a pragmatic tool for the management of intractable or difficult custody cases.⁷² To the extent that the growing use of joint custody and the indeterminacy of the best interests of the child standard have led to a situation in which continuing contact of both parents with children is a norm in custody disputes, supervised visitation is one of the most important tools we have to ensure child safety. However, at the margin, my concern is that supervised access is a stopgap that relieves judges of the responsibility of eliminating parental contact with children where such contact is not in the child(ren)'s best interests.

In most states the decision to order supervised access to children is in the discretion of the trial judge.⁷³ Very few states or local courts have attempted to articulate guidelines for the exercise of that discretion other than the immediate safety of the child or general best interest of the child test.⁷⁴ Most supervised access cases involve serious allegations of parental misconduct aimed either at children and/or at the other parent. In most of the cases, there is a record of family violence, sexual abuse, extreme custodial interference such as removing the child to a foreign country, or parental conduct that is divisive and

⁷² Bonnie S. Newton, *Visitation Centers: A Solution Without Critics*, FLA. B.J., (Jan. 1997), at 54, 57; Ramsey, *supra* note 29, at 152; Thomas Schacht, *Prevention Strategies to Protect Professionals and Families Involved in High-Conflict Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 565, 581(2000).

⁷³ See *Kryvanis v. Kruty*, 733 N.Y.S. 2d 297, 299 (N.Y. App. Div. 2001) (declining to modify order of supervised access stating that “[it] is well settled . . . that the determination of whether visitation should be supervised ‘ . . . is a matter left to Family Court’s sound discretion’”) (internal citation omitted); *Willis v. Willis*, 775 N.E. 2d 878, 886 (Ohio App. 2002) (upholding court ordered supervision stating that “[i]t is well established that the trial court has broad discretion in determining matters relating to visitation”).

⁷⁴ See MO. REV. STAT. § 452.400 (2005) (providing for visitation unless it would “endanger the child’s physical health or impair his or her emotional development” and imposing a presumption of supervised visitation where a parent has been convicted of certain sex offenses or criminal child abuse). A number of courts have expressly held that the only limit on the Court’s exercise of discretion in an award of supervised visitation is the best interests of the child. *Willis*, 775 N.E. 2d at 886. See also *Abranko v. Vargas*, 810 N.Y.S.2d 509, 510 (N.Y. App. Div. 2006) (denying motion to modify visitation eliminating provision for supervision stating “[t]he standard ultimately to be applied, however, remains what is in the best interest of the child”); *Sedgwick v. Sedgwick*, 2002 WL 651607, *3 (Tex. App. 2002) (“The trial court may place conditions on visitation if they are necessary for the best interest of the child.”).

damaging to children. Although the cases are incredibly diverse, they tend to fall into several distinct categories.

The first group of cases are those in which one or both of the parents is locked in a pattern of difficult and inappropriate behavior that is thwarting the process of shared parenting and/or jeopardizing the mental and emotional health of the children.⁷⁵ *Willis v. Willis*⁷⁶ is an example of this type of case.⁷⁷ In *Willis*, the father told the children that he and their mother were still “biblically married,” that the mother’s new boyfriend was an “imposter,” and that the mother was an “adulterer”—in addition to which he required the children to study biblical passages on adultery.⁷⁸ Upon receiving a copy of a psychological report containing statements the children had made about him, the father flew into a rage and tried to force the children to recant the statements on videotape.⁷⁹ The children had mixed feelings about the father, reporting that they loved him but did not like his behavior toward their mother.

⁷⁵ This type of conduct has been the study of much commentary and debate among family law experts. See Janet R. Johnston, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, 35 FAM. L. Q. 757, 757–58 (2005) (noting that conduct by one parent that interferes substantially with the relationship between the other parent and the child has been labeled “Parental Alienation Syndrome”); see also STANLEY S. CLAWAR & BRYNNE V. RIVLIN, CHILDREN HELD HOSTAGE: DEALING WITH PROGRAMMED AND BRAINWASHED CHILDREN (1991); RICHARD A. GARDNER, THE PARENTAL ALIENATION SYNDROME (2d ed. 1998); John Dunne & Marsha Hedrick, *The Parental Alienation Syndrome: An Analysis of Sixteen Cases*, 21 J. DIV. & REMARRIAGE 21 (1994); Richard Warshak, *Bringing Sense to Parental Alienation: A Look at the Dispute and the Evidence*, 37 FAM. L.Q. 273 (2003); Richard Warshak, *Current Controversies Regarding Parental Alienation Syndrome*, 19 AM. J. FORENSIC PSYCH. 29 (2001). On the other hand “advocates for victims of domestic violence argue that the child and the allied parent have suffered real abuse at the hands of the rejected parent, abuse that has been largely ignored, dismissed, or greatly minimized by family courts.” Johnston, *supra* at 758, (citing LUNDY BRANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS (2002)); see also PETER G. JAFFE, NANCY K.D. LEMON & SAMANTHA E. POISSON, CHILD CUSTODY & DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY (2003); Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273 (1999); Lenore E.A. Walker, Kristi L. Brantley & Justin A. Rigsbee, *A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court*. 1 J. CHILD CUSTODY 47 (2004).

⁷⁶ 775 N.E. 2d 878.

⁷⁷ See also *Linder v. Johnson*, 2006 WL 3425021 (Ark. App. 2006); *Coleman v. Coleman*, 2004 WL 1966083 (Conn. Super. 2004); *Tarachanskaya v. Voldarsky*, 897 A. 2d 884 (Md. App. 2006); *Seitz v. Seitz*, 2007 WL 80039 (Ohio App. 2007).

⁷⁸ *Willis*, 775 N.E. 2d at 881. Much of this evidence resulted from an *in camera* interview by the trial judge with the children.

⁷⁹ *Id.* at 882.

Expert testimony established that they were fearful of him and experienced emotional and physical stress in preparation for visitations with him. The expert also testified that the father could not acknowledge the effect his behavior had on his children and was unaware of the emotional trauma to which he was subjecting them. The trial court's order that the father's visitation with the children be supervised and that the father attend counseling for himself and with his children was upheld on appeal.⁸⁰

In the second category of cases, the child's relationship with a parent is threatened by a risk of parental kidnapping or substantial interference with the other parent's access to the child. *Sedgwick v. Sedgwick*⁸¹ is an example of such a case. In *Sedgwick*, the mother fled with the couple's four-year-old daughter two months after filing for divorce. She kept her whereabouts secret for several months. After the court entered a final decree of divorce in the mother's absence, she entered an appearance through her counsel and requested a new trial. In the meantime, the court ordered supervised visitation between the child and father. The father and his mother (the paternal grandmother) twice traveled from Texas to Virginia for the court-ordered supervised visitation. The mother failed to appear with the child for the scheduled visitations. During this time, the mother also consistently avoided service of various documents relating to the case. Based on the mother's flight, her evasion of service, and her repeated failure to comply with the court's orders regarding father-child contact, the trial court granted sole custody to the father and ordered that the mother's access to the child be supervised. This order was upheld on appeal.⁸²

⁸⁰ For recent cases involving allegations of alienating conduct by a parent in which supervised access was ordered, see *Peet v. Parker*, 805 N.Y.S. 2d 149 (N.Y. App. Div. 2005) where a court ordered supervised visitation based on the mother's repeated attempts to get children to make false allegations of abuse against father; *Lasater v. Lasater*, 809 N.E. 2d 380 (Ind. App. 2004) where a mother attempted to undermine the child's relationship with his father and consistently failed to cooperate with court orders; *Goldman v. Link*, 824 So. 2d 296 (Fla. App. 2002) where a mother's visitation was supervised apparently because of her conduct interfering with the relationship of the child and the father.

⁸¹ 2002 WL 651607 (Tex. App. 2002).

⁸² *Id.* at *1. See also *DeVeau v. Azemoto-DeVeau*, 2000 WL 1015855 (Va. App. July 25, 2000) (supervised visitation ordered after the mother fled the jurisdiction with one of the two children and was detained while attempting to leave the country); *Kogel v. Robertson*, 2005 Tex. App. LEXIS 10028 (Dec. 2, 2005) (Mother fled with child to Belgium. Texas Ct. Granted sole custody to Father with supervised visitation to mother. Eventually Belgian Court ordered enforcement of the Texas order and Belgian officials forcibly removed the child from the mother and returned her to father. Texas court denied mother's efforts to avoid supervised visitation); *Ishmael v. Ismail*, 989 S.W. 2d 923 (Ark. App. 1999) (father's visitation supervised because of his repeated threats to take child out of the country and not let mother see him); *Huyak v. Croke*, 2003 Iowa App. LEXIS 185 (March 12, 2003) (father visitation supervised because he

In a third group of cases, the child's health and safety are threatened because the parent's judgment regarding care for the child is impaired by mental-health or substance-abuse issues. *In the Interest of Walters*⁸³ is such a case. In *Walters*, the mother was an angry alcoholic who would not only drink until she passed out, leaving her five-year-old son alone and unattended in the home, but would also have violent rages in front of her child while she was drunk (including physically attacking her husband in front of her child). Like the trial court in *Sedgwick*, the trial court ordered that the mother's contact with the child be supervised so that it could ensure that she was not abusing substances during visitations. This order was upheld on appeal.⁸⁴

Finally, supervised access to children is often ordered in cases involving domestic violence. *Rodvik v. Rodvik*⁸⁵ is a recent case in which the court ordered that the father's access to the children be supervised because he was tardy, bad-mouthed the mother in front of the children, was abusive to the mother and repeatedly violated protective orders.⁸⁶ The court of appeals affirmed the trial court's reasoning that "[b]ecause of [the father's] apparent lack of insight into his children's needs, the harm his actions have done to them and the necessity that he comply with rules established by the court, it is in the children's best interests to immediately implement [supervised access]"⁸⁷

These common scenarios capture the majority of cases in which courts order supervised access. However, they do not capture the cases on the margin in which supervised access is perpetuating potentially dangerous and divisive situations. Many of these cases on the margin arise in two contexts. The first are cases in which a parent has severely physically or sexually abused a child. For example, in *In re Marriage of M.A.*,⁸⁸ the father was awarded supervised visitation even after he was convicted of committing sodomy on his infant

fled with children to Canada); *Shady v. Shady*, 858 N.E. 2d 128 (Ind. App. 2006) (supervised visitation ordered because father was an Egyptian national and psychological testimony indicated he was at risk to abduct the child).

⁸³ 39 S.W.3d 280 (Tex. App. 2001).

⁸⁴ *Id.* at 287. See also *Virant v. Bunce*, 899 So. 2d 1157 (Fla. 2005) (father's visitation supervised after he received a DUI while the child was in the car with him); *Riedeman v. Petrella*, 828 A. 2d 538 (R.I. 2003) (visitation supervised because of mother's continuing abuse of cocaine and prescription drugs leading to her failure to adequately supervise child); *In the Interest of L.A.M.*, 206 Tex. App. LEXIS 532 (January 24, 2006) (mother's visitation supervised because of continuing substance abuse problem).

⁸⁵ 151 P.3d 338 (Alaska 2006).

⁸⁶ *Id.* at 341-42.

⁸⁷ *Id.* at 345. See also *Patterson v. Patterson* 207 S.W.3d 179 (Mo. App. 2006); *Kargoe v. Mitchell*, 785 N.Y.S.2d 557 (2004); *In re Marriage of Pooler*, 136 P. 3d 1153 (Or. App. 2006).

⁸⁸ 2004 WL 1048194 (Mo. Ct. App. 2004).

daughter. The appeal actually arose, not from the original order granting the father supervised access to his children, but from his subsequent petition for unsupervised visitation and joint custody filed after he had obtained treatment for several years. While the court denied his request for visitation with his daughter who was the victim of his abuse, it permitted continued supervised visitation with the child-victim's twin brother and ordered counseling to determine whether unsupervised visitation might be appropriate in the future.⁸⁹

The second situation involving questionable continuation of parent-child contact through supervised access involves cases of extreme domestic violence. This situation is obliquely illustrated by *Suttles v. Suttles*.⁹⁰ There, the father shot his father-in-law in front of his child, and kidnapped his wife and child in his car, leading the police on a high-speed chase that ended in a wreck.⁹¹ He was convicted of crimes arising from these facts and sentenced to thirty-five years in prison. While the court rejected the father's petition for supervised visitation with his child at the prison based on the facts that lead to his imprisonment,⁹² it left the courthouse door open for future contact between the father and the child: "[While] visitation should be suspended until a change of circumstances can be shown [, d]efendant may . . . petition the trial court to modify this order upon a demonstration of changed circumstances . . ."⁹³

It is simply not clear what purpose is served by holding the children and custodial parents in cases such as *Suttles* and *M.A.* hostage to continuing contact, or the possibility of such contact, by the abusive parent. The appellate court in *Suttles* gave no consideration to the relationship between the child and the father, if any. In *M.A.* the child was an infant at the time of the sexual abuse and does not appear to have had a well established relationship with the father.⁹⁴ The court does not appear to have considered the impact of abuse or the effect of witnessing violence on the children in either case.⁹⁵ Nor did the

⁸⁹ *Id.* at *4–5; *cf.* *Mary D. v. Watt*, 338 S.E. 2d 521 (W. Va. 1992) (stating that if a finding that sexual abuse has occurred is supported by credible evidence, visitation with the abuser must be supervised).

⁹⁰ 748 S.W.2d 427 (Tenn. 1988).

⁹¹ *Id.* at 428.

⁹² *Id.* at 429.

⁹³ *Id.* In fact, the court went on to further indicate how the father could stay involved in the child's life, even if the father could not visit the child. *See id.* ("Of course, to prevent the bonds between Defendant and child from being severed completely, he is free to communicate with his child by telephone or mail or other means approved by the trial court[.]").

⁹⁴ *M.A.* involved different-sex twins who were adopted. The sexual abuse of the daughter occurred shortly after the adoption. *M.A.*, 2004 WL 1048194, *1.

⁹⁵ A growing body of research indicates that children who suffer abuse or who witness abuse suffer profound emotional, psychological and social harms. *See* DANIEL J. SONKIN, DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 99 (1987); Pearl S. Berman, *Impact of Abusive Marital*

courts in either case consider the difficulty the mothers and children might experience in building a new family life together when confronted with the specter of ongoing communication from the fathers, and the possibility of future, court-ordered contact between the children and their fathers.⁹⁶

More startling is that if the children in these cases had been removed from their respective homes in an abuse and neglect action based on the abusive parent's conduct, aggravated circumstances would have existed that would have relieved the public agency of any responsibility to reunify the abusive parent and child.⁹⁷ Since the children in *Suttles* and *M.A.* had one appropriate

Relationships on Children, in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 134, 141–43 (Marsali Hansen & Michele Harway eds., 1993); Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 158, 158–61 (Kersti Yllo & Michele Bograd eds., 1988); Elaine Hilberman & Kit Munson, *Sixty Battered Women*, 2 VICTIMOLOGY 460, 463 (1978); Bonnie E. Rabin, *Violence Against Mothers Equals violence Against Children: Understanding the Connections*, 58 ALBANY L. REV. 1109, 1113 (1995) (summarizing and synthesizing the research), citing, PETER G. JAFFE ET AL., CHILDREN OF BATTERED WOMEN 39 (1990). See also B.B. ROBBIE ROSSMAN ET AL., CHILDREN AND INTERPARENTAL VIOLENCE: THE IMPACT OF EXPOSURE 11–64 (2000); Jeffrey L. Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 J. INTERPERSONAL VIOLENCE 839 (1999); Gayla Margolin, *Effects of Domestic Violence on Children*, in VIOLENCE AGAINST CHILDREN IN THE FAMILY AND THE COMMUNITY 57 (Penelope K. Trickett & Cynthia J. Schellenbach eds., 1998); Joseph C. McGill, et al., *Visitation and Domestic Violence: A Clinical Model of Family Assessment and Access Planning*, 37 FAM. & CONCILIATION COURTS REV. 315 (1999); B.B. Robbie Rossman, *Longer Term Effects of Children's Exposure to Domestic Violence*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTION, AND SOCIAL POLICY 35 (Sandra A. Graham-Bermann & Jeffrey L. Edleson eds., 2001); Alan J. Tompkins et al., *The Plight of Children Who Witness Woman Battering: Psychological Knowledge and Policy Implications*, 18 L. & PSYCHOL. REV. 135, 143 (1992); Janis Wolak & David Finkelhor, *Children Exposed to Partner Violence*, in PARTNER VIOLENCE: A COMPREHENSIVE REVIEW OF 20 YEARS OF RESEARCH 73 (Jana L. Jasinski & Linda M. Williams eds., 1998).

⁹⁶ See, e.g., Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 Geo. Wash. L. Rev. 1071, 1098–1103 (1995) (discussing the issues experienced by family violence survivors).

⁹⁷ States, under the influences of the federal Adoption and Safe Families Act of 1997, do not have to make reasonable efforts to reunify a child with parents in an abuse and neglect proceeding if there is a showing of aggravated circumstances. See 42 U.S.C.A. § 671(15) (West 2007). Aggravated circumstances include a parent's commission of a felony assault against a child. *Id.*; see also Terry Lyons, *When Reasonable Efforts Hurt Victims of Abuse: Five Years of the Adoption and Safe Families Act of 1997*, 26 SETON HALL LEGIS. J. 391, 392–93 (2002) (describing the legislative framework in child abuse and neglect cases regarding aggravated circumstances).

parent, however, no such state intervention took place. Thus, the presence of one appropriate parent in combination with supervised access ensures that these children will have to continue contact with the bad parent. This is a perverse result. Apparently the only way for the appropriate parent to avoid further contact with an abuser, or to protect the child from continued contact with the abusive parent, is to petition to terminate parental rights—an action that could likely prove difficult, expensive and unsuccessful.⁹⁸

Two rationales can be offered for the continued contact between parents and children in cases such as *Suttles* and *M.A.*. The first is that the parents have a “right” to such contact with their children. Certainly this rationale infuses the judicial reasoning in these two cases. The *Suttles* Court notes as a preliminary matter that “the *right* of the noncustodial parent to reasonable visitation is clearly favored” and can only be limited or eliminated “if there is definite evidence” that “the *right* [to visitation] would jeopardize the child”⁹⁹ This emphasis on parental rights to visitation is not a nuanced reading of the United States Supreme Court authority regarding parents’ rights. The Supreme Court has not suggested that the best interests of the child test is inappropriate in litigation between parents.¹⁰⁰ Although there is an argument that the constitution may protect the interests of noncustodial parents to a greater extent than previously thought, such protection would certainly give way in the face of credible evidence of abuse. In both *Suttles* and *M.A.*, the fathers were convicted of abusive conduct. Thus, the general suggestion that the rights of the abusive parent justify continued supervised contact with a child is ill-conceived.

The second possible rationale for ordering supervised access in cases such as *Suttles* and *M.A.* is that the complete elimination of parent-child contact would be detrimental to the child. Such detriment could occur because the child has formed an important and attached relationship with the parent despite

⁹⁸ Very little discussion of private termination of parental rights has occurred in the literature. Most termination of parental rights cases arise in the context of public agency interventions in families. See, e.g., Donald C. Boss, *Terminating the Parent-Child Legal Relationship as a Response to Child Sexual Abuse*, 26 LOY. U. CHI. L. J. 287 (1995); Manvinder Gill, *Protecting the Abused Child: It is Time to Reevaluate Judicial Preference for Preserving Parental Custody Rights Over the Rights of the Child to be Free from Physical Abuse and Sexual Exploitation*, 18 J. JUV. L. 67 (1997).

⁹⁹ *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988) (emphasis added).

¹⁰⁰ See David D. Meyer, *The Constitutional Rights of Noncustodial Parents*, 34 HOFSTRA L. REV. 1461, 1464 (2006) (noting that while the Court has recognized the parenting status of some unwed fathers, most noncustodial parents have encountered frustration when resorting to having rights recognized in the Constitution, including “impediments relating to standing, jurisdiction, or the merits” which impediments effectively give the state “considerable discretion” to give one parent a “superior and dominant childrearing role, without having to prove extraordinary or compelling grounds”).

the parent's dangerous or inappropriate parenting. Research is necessary to determine whether and when the continuation of these unproductive, but attached relationships is appropriate and healthy for the child. We need to know more about the nature and impact of attachments between children and bad parents. If the child has formed an attachment relationship with a parent that is disrupted when the child is separated from the parent, the child may be harmed. This concept, built on "attachment theory," is often lurking in the back of decisions to require ongoing supervised contact with a bad parent. Yet attachment theory is often misunderstood by courts and lawyers in the custody arena. The theory is based on the hypothesis that children have a biologically based need to form close affectionate bonds, and that those bonds will form along a specific developmental course.¹⁰¹ Children can be harmed both by the failure to form appropriate attachments and by the loss of attached relationships. A key aspect of attachment theory is that children learn to adapt to the relationship environment in which they find themselves and organize their behavior to the care-giving they receive.¹⁰² The quality of relationships children form have been described as secure (optimal), insecure (non-optimal) and disorganized (showing some characteristics of both secure and insecure attachments).¹⁰³ Research on attachment theory does not yield an ability to predict the later development of children based on their early attachments, but does establish a relationship between insecure attachment and a range of characteristics harmful to children including lack of trust and the development of controlling or survival strategies.¹⁰⁴ Just as the formation of insecure attachments may be harmful to children, so also may be the loss of attached relationships through separation. Parental separation, especially for very young

¹⁰¹ Attachment theory was first articulated by John Bowlby. *See generally* JOHN BOWLBY, ATTACHMENT AND LOSS: VOL II. SEPARATION: ANXIETY AND ANGER (1973); JOHN BOWLBY, ATTACHMENT AND LOSS: VOL. III. LOSS: SADNESS AND DEPRESSION (1980); John Bowlby, *Developmental Psychiatry Comes of Age*, 145 *Am. J. Psychiatry* 1, 1-10 (1988). Important elaborations of Bowlby's theory add significantly to the body of basic information on attachment theory. *See, e.g.*, MARY D. SALTER AINSWORTH ET AL., PATTERNS OF ATTACHMENT: A PSYCHOLOGICAL STUDY OF THE STRANGE SITUATION (1978); Mary D. S. Ainsworth, *Attachments Across the Life Span*, 61 *BULL. N.Y. ACAD. OF MED.* 792, 792-812 (1985).

¹⁰² *See* Gillian Schofield & Mary Beek, *Providing a Secure Base: Parenting Children in Long-term Foster Family Care*, ATTACHMENT & HUM. DEV., Mar. 2005, at 3, 3-25.

¹⁰³ James G. Byrne et al., *Practitioner Review: The Contribution of Attachment Theory to Child Custody Assessments*, 46 *J. CHILD PSYCHOL. & PSYCHIATRY* 115 (2005) (describing attachment theory as it is relevant to child custody evaluations); Nicola Morton & Kevin D. Brown, *Theory and Observation of Attachment and Its Relation to Child Maltreatment: A Review*, 22 *CHILD ABUSE & NEGLECT* 1093 (1997) (synthesizing attachment theory research as it relates to child maltreatment and describing the development of the theory of disorganized attachment).

¹⁰⁴ *See* Byrne et al., *supra* note 103; Schofield & Beek, *supra* note 102.

children who are not developmentally able to understand it, can be harmful.¹⁰⁵ Despite the large body of research on attachment theory, little of it has focused on unproductive attachment formed by children. Without this research it is difficult to justify continued contact between a child and an abusive parent based on the child's attachment to the abusive parent.

Finally, the result of this analysis should not be to remove children from their good parent/survivor of domestic violence in these cases.¹⁰⁶ Rather, it is the continued exposure of children to an abusive or violent parent in a custody case under circumstances in which the parent's contact with the child could be curtailed that does not make sense. Supervised access, which is intended to help ensure the safety of children, should not be the vehicle by which unproductive and detrimental parental relationships are continued.

B. Rules & Statutes Governing Supervised Access

Setting aside these cases on the margin in which supervised access to children should not be used to continue dangerous or threatening parental relationships with children, courts and state legislatures should address some of the gaps in current supervised access provisions to increase its utility and to avoid the possibility that, over time, the absence of sufficient standards and expectations for the use of supervised access will undermine its effectiveness as a tool to protect children.

The states have taken different approaches in their provisions authorizing supervised access to children. A number of states have adopted statutory authorizations for supervised access.¹⁰⁷ In addition, courts have adopted rules

¹⁰⁵ Byrne et al., *supra* note 103.

¹⁰⁶ All too often children have been removed from the parent who has survived domestic violence. For an analysis of the relationship between child protection and domestic violence, see 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 (2003); and Lois A. Weithorn, *Protecting Children From Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L. J. 1 (2001).

¹⁰⁷ See, e.g., ALA. CODE § 30-3-135 (2006); ALASKA STAT. § 25.24.150 (2006); ARIZ. REV. STAT. § 25-403 (LexisNexis 2006); ARK. CODE ANN. § 9-13-406 (West 2006); DEL. CODE ANN. tit. 13 § 710A (2006); FLA. STAT. ANN. § 753.001 (West 2006); GA. CODE ANN. § 19-9-7 (West 2006); HAW. REV. STAT. ANN. § 571-46 (LexisNexis 2006); 750 ILL. COMP. STAT. ANN. § 5/607.1 (West 2006); IND. CODE ANN. § 31-17-2-8.3 (West 2006); KAN. STAT. ANN. § 23-701 (2006); LA. REV. STAT. ANN. § 9:341 (2006); MD. CODE ANN., FAM. LAW § 9-101 (West 2006); MASS. GEN. LAWS ANN. ch. 208, § 31A (West 2006); MINN. STAT. ANN. § 518.175 (West 2006); MISS. CODE ANN. § 93-5-24 (West 2006); MO. ANN. STAT. § 452.375 (West 2006); MONT. CODE ANN. § 40-4-218 (2006); N.H. REV. STAT. ANN. § 173-B:5 (2006); N. M. STAT. ANN. § 40-12-5.1 (West 2006); N.C. GEN. STAT. ANN. § 50B-2 (West 2006); N.D. CENT. CODE § 14-05-22 (2006); OKLA. STAT. ANN. tit. 43, §§ 112.2, 111.3 (West

to govern awards of supervised access.¹⁰⁸ Still other jurisdictions rely upon the inherent power of the court to supervise custody and visitation as the basis for supervised access to children.¹⁰⁹ These statutes, rules and judicial standards vary substantially.

A few states expressly authorize courts to order supervised access to children regardless of the specific factual context of the case. The standards in these provisions vary. Some statutes impose few substantive limitations on the imposition of supervised access to children.¹¹⁰ Some require a showing that supervised access is necessary to protect the child's physical or psychological health.¹¹¹ Still other statutes authorize the imposition of supervised access only in limited circumstances to, for example, avoid parental abduction¹¹² or interference with the parent-child relationship.¹¹³

By far the most common circumstance in which supervised access to children is expressly authorized by statute and/or rule involves family violence. A few of these provisions focus only on the conduct of the perpetrator of violence—that is, the statute authorizes an order of supervised access if a parent has engaged in certain acts of conduct irrespective of the relationship of that conduct to the child or to visitation.¹¹⁴ Most states condition the authority to order supervised access on the court's finding that the parent's violent conduct jeopardizes the health and safety of the child in some way.¹¹⁵ A

2006); R.I. GEN. LAWS § 15-5-16 (2006); TEX. FAM. CODE ANN. § 153.004 (Vernon 2006).

¹⁰⁸ See, e.g., IDAHO R. CIV. P. 16(o) (describing duties and obligations for providers of supervised visits).

¹⁰⁹ See, e.g., *Evans v. Terrell*, 665 So. 2d 648, 652 (La. Ct. App. 1996) (“The trial court has inherent power to determine a child’s best interest and to tailor custody orders, including visitation, in a manner that minimizes risk of harm to the child”); *Willis v. Willis*, 775 N.E. 2d 878, 886 (Ohio Ct. App. 2002) (pointing out that under Ohio law, in modifying visitation to require supervised access, “the trial court is granted discretion limited only by the child’s best interest”).

¹¹⁰ See, e.g., MICH. COMP. LAWS ANN. § 722.27a(8) (“A parenting time order may contain any reasonable terms or conditions that facilitate the orderly and meaningful exercise of parenting time by a parent, including 1 or more of the following: . . . f) Requirements that parenting time occur in the presence of a third person or agency; . . .”).

¹¹¹ See, e.g., ARIZ. REV. STAT. ANN. § 25-410(B); MINN. STAT. ANN. § 518.175 (West 2007); MONT. CODE ANN. § 40-4-218 (2).

¹¹² See, e.g., ARK. CODE ANN. § 9-13-406 (a).

¹¹³ See, e.g., 750 ILL. COMP. STAT. ANN. 5/607.1 (c); KAN. STAT. ANN. § 23-701(g).

¹¹⁴ For example, the Alaska statute provides: “If the court finds that a parent has a history of perpetuating domestic violence . . . , the court shall allow only supervised visitation by that parent with the child” ALASKA STAT. § 25.24.150(j).

¹¹⁵ See, e.g., DEL. CODE ANN., tit. 13 § 710A (“If the Court finds by a preponderance of the evidence that a parent has sexually abused a child, the Court shall

number of these states have incorporated a presumption against custody or visitation by a parent who has engaged in family violence or child abuse. Usually these presumptions can be rebutted by showing that visitation will not jeopardize the child's health and safety and authorizing supervised visitation to protect the child.¹¹⁶ Texas and Indiana go so far as to impose a presumption against unsupervised access in cases where the parent has engaged in domestic violence.¹¹⁷

The family violence statutes vary substantially regarding what type of conduct constitutes family violence and, consequently, provide little guidance to courts about when awards of supervised access to children are appropriate. The narrowest statutes require that a parent subject to supervised access be convicted of an offense that qualifies as family violence.¹¹⁸ Other states do not specifically define "family violence" or "domestic violence" for purposes of their supervised access provisions.¹¹⁹ These types of vague provisions have been criticized in the context of state statutes which establish a presumption against granting custody to perpetrators of domestic violence.¹²⁰ Without more

prohibit all visitation and contact between the abusive parent and the child until such time as the Court finds, after a hearing, that supervised visitation would not harm, endanger or impair the child's physical, psychological or emotional well-being"); MASS. GEN. LAWS ANN. ch. 208 § 31A ("If ordering visitation to the abusive parent, the court shall provide for the safety and well-being of the child and the safety of the abused parent. The court may consider . . . (b) ordering visitation supervised by an appropriate third part . . ."); N.D. CENT. CODE § 14-05-22(3) ("If the court finds that a person has perpetrated domestic violence and that parent does not have custody, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, the court shall allow only supervised visitation with that parent unless there is a showing by clear and convincing evidence that unsupervised visitation would not endanger the child's physical or emotional health").

¹¹⁶ See, e.g., HAW. REV. STAT. ANN. § 571-46(9)-(11); MISS. CODE ANN. § 93-5-24(9)(a)(i).

¹¹⁷ See, e.g., IND. CODE ANN. § 31-17-2-8.3(b); TEX. FAM. CODE ANN. § 153.004(e). For a general discussion of the Texas statute, see Scott A. Young, *A Presumption for Supervised Visitation in Texas: Understanding and Strengthening Family Code Section 153.004(E)*, 37 TEX. TECH. L. REV. 327 (2005).

¹¹⁸ For example, the Louisiana provision for supervised access to children defines "family violence" by reference to the state Criminal Code. LA. REV. STAT. ANN. § 9:362(3).

¹¹⁹ See, e.g., ALA. CODE § 30-3-135; ALASKA STAT. § 25.24.150; GA. CODE ANN. § 19-9-7.

¹²⁰ See Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403, 419-21 (2005); Nancy K.D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 603-10 (2001); see also Young, *supra* note 117, at 331-32 (describing the varying interpretations of Texas trial judges of the

specific guidance, experience indicates that domestic violence often goes unidentified and the protective provisions of these statutes are not triggered.¹²¹ In the context of supervised access, where courts might find that their power to restrict a parent's access to children is limited by such a statute, the failure to trigger the statute in the widest possible appropriate circumstances, limits the already narrow band of cases in which supervised access might be ordered.

In addition to the absence of substantive definitions in most supervised access provisions, the provisions do not contain guidance on a number of procedural issues that can arise in supervised access cases.¹²² First, not all of the provisions define supervised access. If a court order for supervised access is not specific in these jurisdictions, it may not be clear whether the supervisor must be present at all times during parent-child contact. Even "presence" can be ambiguous—is a family member supervising access to a child "present" if s/he is watching television while the supervised parent and child interact out of sight or earshot? In one case in which an ambiguous supervised access order was entered under Texas' presumption against unsupervised access to children for a perpetrator of domestic violence, three children were murdered while access was supervised. The supervisor designated by the court was the abuser's mother, and the order did not require her to be constantly present when the children were with the abuser.¹²³ Statutes and rules should establish default provisions defining supervised access. Certainly in any given case, these statutes should permit a court to fashion an order based on the specific facts of a particular case that might define levels of supervision not contemplated in the statute or rule; such deviations from the default, however, should be permitted based on specific court findings. Furthermore, if "supervision" is not clearly defined in a statute or rule, the order for supervised access should clarify the court's expectation as to the level of supervision in each case.

Most of the statutory provisions do not contain guidance as to who should supervise access to the child. Many jurisdictions have developed supervised access programs that make trained supervisors available. These trained supervisors vary widely in background and ability. Some are volunteers who

Texas statute imposing a presumption against unsupervised visitation when there is credible evidence of a history of abuse).

¹²¹ See *King v. King*, 50 P.3d 453 (Idaho 2002). In *King*, the wife fled the jurisdiction with the children after having previously obtained two domestic violence protection orders. *Id.* at 456. The husband introduced evidence that his prior violent outbreaks resulted from a psychiatric condition and his failure to take his medication. *Id.* at 458–59. Attributing the conduct to the psychiatric condition, the Idaho court found that the husband was not a "habitual perpetrator of domestic violence under the Idaho custody statute." *Id.*

¹²² The Supervised Visitation Network, an organization of professional providers of supervised access, has adopted guidelines and standards for supervised access providers. Straus et al., *supra* note 28.

¹²³ Young, *supra* note 117, at 330.

have merely completed a minimal training session of four to ten hours. Others have backgrounds in child development and demonstrated experience in the field of family relations.¹²⁴ Many of the statutory provisions however, do not even require the use of a minimally trained volunteer as a supervisor for visitation and instead permit family members, friends and neighbors to supervise access to children.¹²⁵ Even in jurisdictions that have implemented standards for child access supervisors, the rules may still permit the appointment of untrained individuals.¹²⁶ The sticking point for requiring at least superficially trained supervisors is cost; for many of the families in these cases, the requirement to cover the costs of a trained supervisor would mean that the parent being supervised would have no access to the children because she or he could not afford to pay the supervisor.¹²⁷ The safety benefit of supervised access may be seriously undermined if the access supervisor is not trained. He or she may be easily manipulated by an abuser or may not understand the importance of vigilantly safeguarding the child.

None of the statutory provisions for supervised access establish a mechanism for reviewing or re-evaluating an order of supervised access over time. Certainly, review of the order can be obtained through the general process of modifying custody and/or visitation, but the involvement of a third party in a family on a continuing basis suggests that it might be useful to have some more accessible method of evaluation.¹²⁸ Regular review usually is not

¹²⁴ Theonnes & Pearson, *supra* note 2, at 464–65.

¹²⁵ For example, Montana’s provision simply states that “[i]f both parents or all contestants agree to the order or if the court finds that in the absence of the order the child’s physical health would be endangered or the child’s emotional development significantly impaired, the court may order supervised visitation by the noncustodial parent. The court may not order the department of public health and human services to supervise the visitation.” MONT. CODE ANN. § 40-4-218(2).

¹²⁶ The Idaho Rule governing supervised access is typical. While establishing detailed requirements for therapeutic and professional supervisors, the rule does not foreclose the use of untrained family members as supervisors. *See* IDAHO R. CIV. P. 16(o)(f) (requiring providers of supervised access to be trained, “unless otherwise ordered by the court or stipulated to by the parties . . .”); *see also* Straus et al., *supra* note 28, at 97 (noting that “[t]he pressure resulting from a general absence of funding for supervised visitation has also promoted diversity as programs struggle to function, using volunteers, borrowing space, and making alliances with supportive entities ranging from shelters for battered women to societies for the prevention of cruelty to children and court-appointed special advocates.”).

¹²⁷ *See* Young, *supra* note 117, at 347–49 (discussing in detail the issues around the cost of supervised access).

¹²⁸ In many states the modification of a prior custody order is a cumbersome process. *See, e.g.,* Joel R. Brandes & Bari B. Brandes, *The Ultimate Matrimonial Motion Practice Primer*, 15 *TOURO L. REV.* 1577 (1998) (detailing the complex motion practice process for family law matters in New York).

even provided for in those instances where supervised access is anticipated from the beginning to be temporary. Without provisions for accessible review, supervised access orders can extend long past their useful life—interfering with the relationship between a child and a parent who no longer requires supervision.¹²⁹ More importantly, supervised access may continue even in the face of negative impacts on the child because the barriers to modification are simply too high.

IV. CONCLUSION

While supervised access is an important tool for protecting children, its use must be scrutinized and effective guidelines for its implementation should be established. Supervised access should not be used as a mechanism by which courts fail to address fundamental questions regarding whether the continuation of parent-child contact is in a child's best interests. In addition, clear guidelines must be formulated for the implementation of supervised access in order to assure that the safety of children will be protected. Supervised access provisions should clearly define the substantive standards for the use of supervised access. The provisions should define what is meant by supervised access, and who can be considered an appropriate supervisor. The provisions should also establish a mechanism for regular review of supervised access orders to ensure that the child's safety is being protected and that the supervised access is not perpetuating an unproductive parent-child relationship. Finally, further social science research relevant to supervised access should be undertaken. A better understanding of when parent/child relationships should be preserved by supervised access is necessary. Research on children's experience of supervised access is also necessary.

¹²⁹ See, e.g., *Little v. Smith*, 2006 WL 3114376 (Conn. Super. Ct. 2006) (recognizing that supervised visits continued long after mother had successfully completed treatment and therapy for psychiatric disorder that may have previously endangered child); *Brown v. Brown*, 925 So. 2d 662 (La. Ct. App. 2006) (finding that the trial court abused its discretion when it attempted to provide for interim review of the custody order despite the fact that the mother had successfully completed substance abuse treatment and had been drug free for three years).