CHILD CUSTODY IN A CHANGING WORLD: A STUDY OF POSTDIVORCE ARRANGEMENTS IN WISCONSIN

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Child custody law has changed dramatically over the past twenty-five years, but few have attempted to analyze the impact of these changes with real-world data. In this article, Professors Melli and Cancian and Ms. Brown present data on 9500 divorcing families in Wisconsin over the time period of 1980 to 1992. Based on these data, the authors report significant increases in the use of joint legal custody and shared physical custody. They find that a new custody arrangement, joint legal custody with mother physical custody, has become the norm in Wisconsin, accounting for 81% of the cases. They also find significant differences in shared physical custody depending on whether the time shared is equal or unequal and suggest further study. And, finally, they recommend consideration of legislation requiring specific visitation schedules.

It is an honor and a pleasure to be part of an endeavor to recognize the many contributions of Professor Harry D. Krause to the development of family law. Harry is one of those rare scholars with the ability to foresee the direction of social problems—and the law that follows them. He was one of the first to recognize the problems of the nonmarital child and his book, *Illegitimacy: Law and Social Policy* (1971), is a landmark. He was also an early advocate of more equitable child support laws. His book, *Child Support in America* (1981), is widely cited.

Harry Krause's contributions to the law also cover a wide variety of scholarly endeavors from numerous law review articles and a "Nut-

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shell" on Family Law to uniform laws (he was reporter for the Uniform Parentage Act) to a widely used casebook, *Family Law*.

He is a distinguished scholar and a valued colleague. It is a pleasure to help honor him.

Margo Melli

I. INTRODUCTION[1]

The past twenty-five years have seen enormous changes in the law that applies to the postdivorce custody of children. Those changes in the law have been the subject of much scholarly discussion and public policy debate, but there has been relatively little attention paid to the living arrangements that parents and courts make for children postdivorce or to the extent to which these living arrangements reflect the changes that have been made in the law.

This article attempts to provide some of that missing information on what actually happens in divorced families.[2] It analyzes data from Wisconsin that cover the period 1980-92 and provide information on custody arrangements as well as insights into the relationships between custody and the divorce process. The Wisconsin data are reported here not because Wisconsin is regarded as a typical or model state but because they provide some information, on the basis of a substantial number of cases, as to what actually happens in divorced families.

The data analyzed here were gathered from the court case histories and payment records of 9500 divorcing families with at least one minor child who entered the family court system in twenty-one counties in Wisconsin during the years 1980-92.[3] These data were collected

1. The data analyzed in this article were collected by the Institute for Research on Poverty of the University of Wisconsin-Madison under a contract with the Wisconsin Department of Health and Social Services. Views expressed in this article are those of the authors and not necessarily those of the Department or the Institute.

2. There is a paucity of large-scale studies of the custody decision process. The most famous is ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY (1992), *reviewed in* Lee E. Teitelbaum, *Divorce, Custody, Gender, and the Limits of Law: On* Dividing the Child, 92 MICH. L. REV. 1808 (1994). An analysis of 1087 Utah Divorce cases with at least one minor child covering the period between 1970 and 1993 was reported in Stephen J. Bahr et al., *Trends in Child Custody Awards: Has the Removal of the Maternal Preference Made a Difference?*, 28 FAM. L.Q. 247 (1994).

3. The Wisconsin Court Record Data (WCRD) includes demographic information on family members and information about results of court appearances (custody, support awards, wage withholding), as well as information about the parties at the time of the hearing (employment, income, legal representation, etc.). Because all child support and maintenance payments are supposed to be sent through and recorded by the Clerk of Courts in each county, the payment history for each case was collected as well. The court history was followed in each case for one to five years. Details of court appearances were collected for each return to court that was related to the issue of child support (change in award, enforcement wage withholding, custody change, etc.). These data were augmented with data from several other sources: a 1989 survey of a sample of parents selected from the WCRD, tax records from the Wisconsin Department of Industry, Labor, and Human Relations, and from AFDC administrative records.

by the Child Support Demonstration Project of the Institute for Research on Poverty at the University of Wisconsin-Madison.[4]

In order to study changes over time, the analysis reported here considers cases by "Cohort" numbers, which identify the annual time period when the parents first petitioned for divorce. For example, Cohort 1 cases cover petitions for divorce filed in the period mid-1980 to mid-1981, Cohort 2 cases cover petitions for divorce filed from mid-1981 to mid-1982. Cohort 12 cases cover petitions for divorces filed from mid-1991 to mid-1992. The divorces in a cohort may take varying amounts of time to reach final judgment, ranging from as little as several weeks from petition to final divorce judgment to as long as several years, but divorces are assigned to cohorts according to the original petition date, regardless of the length of time to final judgment.[5]

Part II of this article briefly reviews the changes that have been made in the law since the 1970s. Part III is an examination of trends in custody arrangements. It looks at both legal and physical custody. Parts IV, V, and VI examine only physical custody, i.e., the living arrangements for children. Part IV is a review of certain features of the divorce process and their relation to types of physical custody awards. Part V is an analysis of economic decisions in the divorce process and their relation to physical custody type. Part VI looks at postdivorce activity and its relation to physical custody type. Finally, part VII provides a summary and suggestions for policy initiatives and further research.

In the smaller counties, the project typically collected virtually all the eligible cases in a given time frame. In the larger counties, a sample of cases was collected and then weighted accordingly.

Data were collected at the courthouse and recorded on a questionnaire. The survey used a point-in-time concept for the data collection. Information filed in court for a court hearing (usually a Petition or Order to Show Cause) and the court's documents recording the hearing (an Order or Judgment) were the data collected for a court action or event. Transcripts and minute sheets of the court hearing and the court documents recording the judges decision/order were also used. Other pertinent documents which were collected included wage assignments to employers, blood test orders and results, waivers of first appearance in paternity cases, visitation/custody orders including mediation referrals, substitutions of attorney or judges, restraining orders, suspension of proceedings, appointments of a guardian ad litem, and bench warrants in contempt cases. Payment records were collected in all cases for the appropriate time period.

A rather detailed data collection decision manual was created to assist collectors and check-coders in gathering and capturing what is often quite complex data in the child support questionnaire. Data decisions were also documented by collectors at the courthouse to record how the team handled various county peculiarities.

Relying primarily on court records may limit the data because parties may change custodial arrangements without a return to court. *See* Bahr et al., *supra* note 2, at 266.

4. The Child Support Demonstration Project has collected data on divorcing families under contract with the Wisconsin Department of Health and Social Services (now the Department of Work Force Development) since 1980 for purposes of documenting the impact of various child support reforms.

5. Cohort 1, 1980-81; Cohort 2, 1981-82; Cohort 3, 1982-83; Cohort 4, 1983-84; Cohort 5, 1984-85; Cohort 6, 1985-86; Cohort 7, 1986-87; Cohort 8, 1987-88; Cohort 9, 1988-89; Cohort 10, 1989-90; Cohort 11, 1990-91; Cohort 12, 1991-92.

II. A Brief History of Child Custody Law in the Last Quarter of the Twentieth Century

For most of this century, the law that applied to postdivorce arrangements for the custody of children was unchanged. Prior to 1970 child custody law was built on a model of one custodial parent, i.e., sole custody. That parent was both decision maker and provider of residential care for the child.[6] The noncustodial parent had a very limited role, and the term used by most statutes to describe the rights and status of the noncustodial parent—visitation—was indicative of that limited role. The prevalent form of sole custody was mother custody. Although the guiding rule for the custody decision was then, as it is now, the best interest of the child, there was a presumption that the best interest of the child, particularly a young child, was served by awarding custody to the mother.[7]

Two significant changes to that pre-1970 law have substantially altered the legal structure for child custody. One is the demise of the mother preference or "tender years presumption," as the rule was sometimes called. In the period since the 1970s, it has disappeared from the formal law. Some states have abolished it by statute and others by judicial decision. In abolishing this presumption, some courts have held that a preference for the mother violates the Fourteenth Amendment of the U.S. Constitution or equal rights amendments of the state constitutions.[8]

The other change in the law has been the authorization for the courts to award parents joint custody of their children. Almost all states, either by statute or case law, now authorize an award of custody to both parents, commonly called joint custody.[9] Joint custody is not a precisely defined term and statutes and cases are often not clear

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6. The custodial parent was also assumed to be the primary support of the child. Prior to 1970 there was acceptance of the idea that the duty to support the child rested with the custodial parent. Child support awards were low and were not vigorously enforced. *See* Marygold S. Melli, *Constructing a Social Problem: The Post-Divorce Plight of Women and Children*, 1986 Am. B. Found. Res. J. 759, 760 n.3 (reviewing Lenore J. Weitzman, The Divorce Revolution: The Unexpected Social and Legal Consequences for Women and Children in America (1985)).

7. The history of the mother preference rule is traced in Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 Cal. L. Rev. 335 (1982).

8. *See* cases and statutes cited in Homer H. Clark, Jr., The Law of Domestic Relations in the United States 799-800 & nn.19-22 (2d ed. 1988). The preference for mothers has been replaced in some states by a primary caretaker preference. *See, e.g.*, Ariz. Rev. Stat. Ann. § 25-403(A)(7) (West Supp. 1996). For a discussion of this aspect of custody law, see Phyllis T. Bookspan, *From a Tender Years Presumption to a Primary Parent Presumption: Has Anything Really Changed? . . . Should It?*, 8 B.Y.U. J. Pub. L. 75 (1993).

9. In 1995, the *Family Law Quarterly* listed 42 states with provisions dealing with joint custody. *See* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Children's Issues Take Spotlight*, 29 Fam. L.Q. 741, 771, app. tbl.2 (1996); *see also* Stephanie B. Goldberg, *Make Room for Daddy*, 83 A.B.A. J. 48, 50 (noting that 14 states now have a presumption of joint custody).

as to the way in which the term is being used.[10] However, in this article—and in practice in Wisconsin—joint custody is considered to have two possible forms: joint legal custody and joint physical custody.[11] These two types of joint custody are based on a separation of the two parental roles involved in custody: decision making and residential care.[12] Joint legal custody involves shared decision making by parents, although the child may reside with one parent who is said to have physical custody of the child. The other form of joint custody involves parents who share both legal custody and residential care of the child. This type of custody arrangement is what is usually denoted by the term joint custody, but is much less common than the more limited shared arrangement of joint legal custody with one parent given physical custody.

III. Trends in Postdivorce Custody Arrangements in Wisconsin: 1980-92

This section of the article examines the changes in child custody that have taken place over the last decade as the law governing custody arrangements has changed. It looks at legal custody, physical custody, and physical placement, a term used in the Wisconsin statute to describe parental visitation.[13]

Legal custody is used in this analysis to describe the decision-making role of parents without regard to where the child lives. Physical custody is used to refer to the parent with whom the child lives. The Wisconsin statute, however, does not use the term physical custody in this manner. Instead, it provides that, after the court orders sole or joint legal custody, it "shall allocate periods of physical placement between the parties."[14] The custody statute makes no distinctions based on the amount of physical placement. However, the child support formula or guideline provides for reduced child support in cases where a parent has 30% or more physical placement of the child.[15] If physical placement is with one parent for more than 70% of the time, that parent is usually considered to have physical custody.

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10. *See* Clark, *supra* note 8, at 816.

11. See explanation in Kimberly A. Harris & DaNece D. Koenigs, Comment, *Child Custody Arrangements: Say What You Mean, Mean What You Say*, 31 Land & Water L. Rev. 591 (1996).

12. A number of state statutes now distinguish between decision making and physical care. *See* Cal. Fam. Code §§ 3002-3007 (West 1994); D.C. Code Ann. § 16-911(a-2) (Supp. 1996); Me. Rev. Stat. Ann. tit. 19, § 752(2)(A) (West Supp. 1996); Mo. Ann. Stat. § 452.375(1) (West 1997); Wash. Rev. Code Ann. § 26.09.184(2), (4)(a), (5) (West Supp. 1997); Wis. Stat. Ann. § 767.24 (West 1993).

13. The Wisconsin statute uses the term "visitation" to cover visitation by grandparents, stepparents, and persons who have maintained a parent-child relationship with the child. *See* Wis. Stat. Ann. § 767.245 (West 1993).

14. Wis. Stat. Ann. § 767.24(4)(a). The Wisconsin statute is similar to a number of statutes that drop the terms "visitation" or "access" that have troubled noncustodial parents.

15. *See* Wis. Admin. Code HSS 80.02(25), 80.04 (LEXIS 1997).

This is the meaning in which the term physical custody is used here. If both parents have 30% or more time, they are considered to have shared physical custody in this analysis. The parent with less than 30% physical placement time is similar to a parent with parental visitation.

A. Legal Custody

The period covered by this study—1980 to 1992—has seen a revolutionary change in how legal custody is awarded in Wisconsin as shown in Table 1 below. In 1980 most legal custody awards were for mother sole legal custody; it accounted for 73.8% of the cases. By 1992 mother sole legal custody had dropped to 17.4%. Father sole legal custody also dropped, from 6.0% to 1.4%. Split legal custody, in which each parent is given sole legal custody of one or more children, virtually disappeared as a legal custody type, declining from 2.2% to 0.1%. Joint legal custody increased from 18% to 81% during that twelve-year time period to become the most prevalent arrangement for assigning parental responsibility for major decision making regarding children after divorce.

TABLE 1
CHANGES IN LEGAL CUSTODY IN DIVORCE FINAL JUDGMENTS: COHORTS 1-12

		Sole Legal Custody				
Cohort	N Cases	Mother	Father	Split Legal	Joint Legal	Total
1	856	73.8%	6.0%	2.2%	18.0%	100.0%
2	837	72.9	4.8	1.4	20.9	100.0
3	598	70.6	5.0	2.1	22.3	100.0
4	689	63.2	3.2	1.1	32.5	100.0
5	912	62.3	3.7	0.9	33.1	100.0
6	1074	60.5	5.0	1.4	33.1	100.0
7	874	58.7	4.9	1.1	35.3	100.0
8	803	47.9	5.4	0.9	45.8	100.0
9	723	31.8	3.9	0.2	64.1	100.0
10	719	31.5	3.1	0.1	65.3	100.0
11	699	26.0	0.9	0.0	73.1	100.0
12	667	17.4	1.4	0.1	81.1	100.0

Weighted data. Twenty-one counties.

B. Physical Custody

The period 1980-92 also saw changes in physical custody arrangements for children after divorce. These changes, shown in Table 2, are not of the same magnitude as those in legal custody, but they are changes in the same direction—toward greater involvement of both parents.

In this period, mother physical custody decreased from 85.7% to 73.3%, but it is still the most common type of physical custody. Therefore, the joint legal custody cases that are now the norm usually involve arrangements where the parents, as joint legal custodians, share decision making, but the child lives with the mother. Father physical custody and split physical custody remain at about the same levels as in the early 1980s—8.5% and 4.0%, respectively. The decrease in mother physical custody has therefore gone to shared physical custody. That custody form tripled from 2.2% in Cohort 1 (1980-81) to 7.3% in Cohort 7 (1986-87) and then doubled in the subsequent five years to 14.2% of the cases in Cohort 12 (1991-92). Because shared physical custody describes a day-to-day coparenting lifestyle for fathers, mothers, and children, the growth in shared physical custody arguably represents an even more dramatic change than the great increase in shared legal custody.

TABLE 2
CHANGES IN PHYSICAL CUSTODY PLACEMENT IN DIVORCE FINAL JUDGMENTS: COHORTS 1-12

Cohort	N Cases	Mother	Father	Split	Shared*	Total
1*	858	85.7%	8.3%	3.8%	2.2%	100.0%
2*	844	86.9	9.0	2.6	1.5	100.0
3*	599	84.2	9.9	3.5	2.4	100.0
4*	695	83.9	9.9	4.1	2.1	100.0
5*	913	85.2	9.1	2.6	3.1	100.0
6*	1078	84.1	10.3	3.1	2.5	100.0
7	877	79.8	9.8	3.1	7.3	100.0
8	812	78.5	9.4	2.3	9.8	100.0
9	737	77.6	12.2	2.1	8.1	100.0
10	733	77.4	9.8	2.9	9.9	100.0
11	679	73.9	9.5	4.1	12.5	100.0
12	676	73.3	8.5	4.0	14.2	100.0

Weighted data. Twenty-one counties.
*Unequal shared custody cases cannot be identified in data collected prior to Cohort 7. These cases would have been placed in the sole mother or sole father physical custody categories. Shared physical custody is defined as more than 30% time, in accordance with state of Wisconsin administrative guidelines. *See* WIS. ADMIN. CODE HSS ch. 80 (LEXIS 1997).

Although shared physical custody as a postdivorce custodial arrangement has been the subject of much debate,[16] little attention has

16. *See, e.g.*, Michael Benjamin & Howard H. Irving, *Shared Parenting: Critical Review of the Research Literature*, FAM. CONCILIATION CTS. REV., Dec. 1989, at 21; Sheila M. Holmes, *Imposed Joint Legal Custody: Children's Interests or Parental Rights?*, 45 U. TORONTO FAC. L. REV. 300 (1987); Nancy K. Lemon, *Joint Custody as a Statutory Presumption: California's New Civil Code Sections 4600 and 4600.5*, 11 GOLDEN GATE U. L. REV. 485 (1981); Nancy Polikoff, *Custody and Visitation: Their Relationship to Establishing and Enforcing Support*, 19 CLEARINGHOUSE REV. 274 (1985); Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U. L. REV. 539 (1982); Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455 (1984); Susan Steinman, *Joint Custody: What We Know, What We Have Yet to Learn,*

been devoted to the actual time arrangements that parents have made.[17] Shared physical custody actually covers two types of arrangements. One is equal shared custody which means the parents share their children's time 50/50. The other is unequal shared custody which involves a time division of less than 50/50 but more than 70/30, which in Wisconsin would be sole custody with ordinary visitation. Most studies of shared or joint custody lump these two categories together. Data for Cohorts 9-12 distinguish equal and unequal shared custody.[18] Shared custody awards are fairly evenly divided between equal (6.3%) and unequal (5.0%) cases.[19] Of the 5% of Cohort 9-12 cases with unequal shared custody, over 80% are mother-primary unequal shared awards, compared to less than 20% with father-primary unequal shared awards. The figure on the following page shows the percentage of time awarded to the nonprimary parent for both sole custody and unequal shared custody cases in Cohorts 9-12. The unequal shared custody cases are shown in black bars; sole custody cases are shown in white bars. The height of the bar indicates the number of cases in which a specific amount of time with the child was recorded in the divorce decree for the noncustodial parent or nonprimary parent. The absence of unequal shared custody cases at the high end of the graph suggests that parents who might want a 45/55 time share either agree to a 50/50 arrangement or agree to label their time-share arrangement as a 50/50 arrangement. The bulk of unequal shared custody cases are concentrated in the 30 to 39% range, just above the 30/70 visitation with sole custody arrangement, suggesting that unequal shared custody cases may be qualitatively different from equal shared custody cases, and more akin to sole custody cases with substantial noncustodial physical placement.

C. Physical Placement with Noncustodial Parent

The third area of custody arrangements that we investigated deals with physical placement or visitation in the category of sole physical

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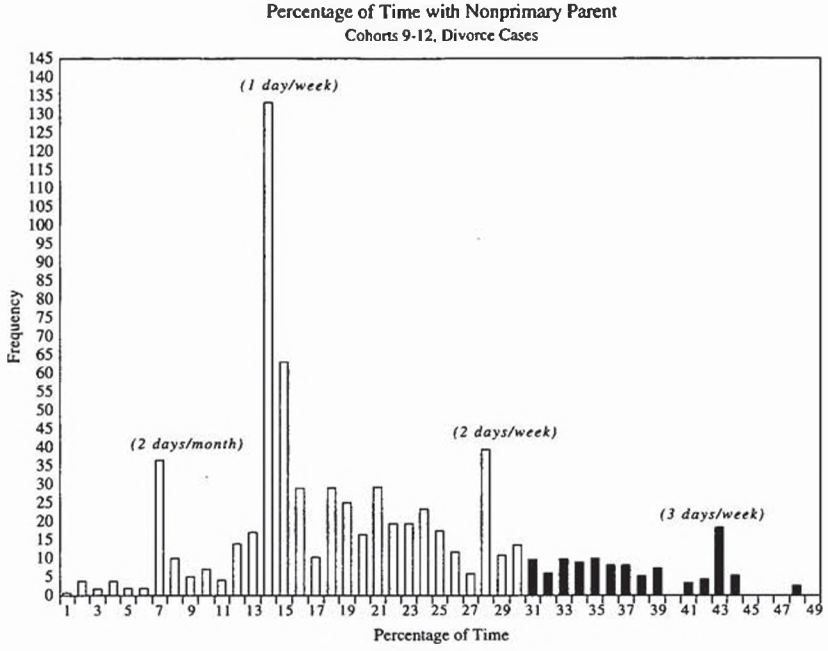
and the Judicial and Legislative Implications, 16 U.C. DAVIS L. REV. 739 (1983); J. Rainer Twiford, *Joint Custody: A Blind Leap of Faith?*, 4 BEHAV. SCI. & L. 157 (1986).

A thoughtful analysis of the feminist criticism of joint custody is in Katherine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9 (1986). For a criticism of shared custody by a joint custodial father, see David Sheff, *If It's Tuesday, It Must Be Dad's House*, N.Y. TIMES, Mar. 26, 1995, § 6 (Magazine), at 1.

17. Some state statutes recognize that joint physical custody requires allocations of time, but they approach the issue very differently. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-402 (West Supp. 1996) (child has substantially equal time and contact with both parents); COLO. REV. STAT. §§ 14-10-123.5(1), -124(1) (1987) (a joint custody order may "provide that one party shall have a longer period of physical custody of the child than the other party"); N.M. STAT. ANN. § 40-4-9.1(L)(3) (Michie Supp. 1994) ("[j]oint custody does not imply an equal division of the child's time").

18. Prior to Cohort 7, the data collection instrument did not record sufficient information to enable us to identify unequal shared time adequately and, therefore, those cases were recorded under the category of sole custody.

19. Data not shown.



custody. Our reason for doing so grows out of the recognition that the difference between sole custody and shared physical custody may be only a matter of degree, particularly given the current legal arrangement in which 81% of the cases involve joint legal custody. When parents share decision making, whether their coparenting takes the form of sole custody with visitation or dual residence may be difficult to distinguish. Therefore, the arrangements that parents make for physical placement in sole physical custody cases are important to an understanding of shared physical custody, particularly where the time spent with one of the parents is less than equal. Furthermore, because the great majority of custody arrangements involve joint legal custody but sole physical custody with one parent, the arrangements made for the noncustodial parent to spend time with the child, i.e., to have physical placement, are important to an understanding of postdivorce custody.

In an attempt to get a picture of this area of parental relations, we examined three things. The first was the language of the court order detailing the type of physical placement, shown in the first panel of Table 3. We divided the language in the orders into four groups: "vis-

itation not allowed,"[20] "reasonable visitation," "liberal visitation," and "detailed order that contained a time schedule."

Physical placement awards using the language "reasonable time upon reasonable notice" in the order were the predominant form of physical placement, appearing in 50% of all divorce cases, but significantly in 26.6% of the cases, there was specific language which detailed the days and times of physical placement with the noncustodial parent.

To investigate whether differences in the language of the order had any relation to parental behavior, we looked at the number of days that parents reported they spent with their children.[21] As the second panel of Table 3 shows, parents with "reasonable visitation" spent an average of thirty-six days with their children in the year after the divorce; parents with "liberal visitation" spent an average of forty-seven days with their children; and parents with specific and detailed physical placement schedules, with an average award of fifty-seven days, reported spending sixty-seven days of the first year after the divorce with their children. The pattern indicates that as the physical placement language in the divorce decree becomes more specific, the time spent with the children by the noncustodial parent increases. More specific language may be the result of noncustodial parents who wanted to be assured of time with their children and thus were motivated to get a more detailed physical placement award in the divorce decree rather than the traditional and vague "reasonable time upon reasonable notice" language. Alternatively, the more clearly specified dates and times in these orders may have reduced conflict and misunderstanding between the parents, or created greater expectations of

20. Visitation is generally regarded as a right, either of the parent or of the child, which must be awarded absent indications to the contrary. *See* 750 ILL. COMP. STAT. ANN. 5/607(a) (West Supp. 1996); KAN. STAT. ANN. § 60-1616(a) (1994); MO. ANN. STAT. § 452.400(1) (West 1997); R.I. GEN. LAWS § 15-5-16(d)(1) (1996); WIS. STAT. ANN. § 767.24(4)(b) ("A child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health.").

21. The source of this information was a telephone survey of parents in Cohorts 7 and 8. The survey was administered in 1989 to a sample of custodial and noncustodial parents involved in divorce and paternity court cases in the state of Wisconsin. An attempt was made to contact parents from all cases in Cohorts 7 and 8. The data collection instrument was a 105-page survey designed to be administered over the telephone. The survey consisted of 10 sections: (1) household roster, (2) marital history, (3) respondent's characteristics, (4) employment history, (5) other parent's characteristics, (6) children's well-being, (7) children's living situation (where children lived on a daily basis), (8) agreement characteristics, (9) support behavior, and (10) financial characteristics. The questions referred to the calendar year 1988.

In most cases the survey took 40 to 55 minutes to complete. It could be administered in a single session or divided into two or more sessions at the respondent's request. Approximately 50 students, trained specifically for the project, administered the questionnaires between April and September 1989. The interviewing resulted in 1981 complete or partial interviews. This represents 60.1% of the original court record sample. Mothers were more successfully located and interviewed (N=1092, 66.3%) than fathers (N=889, 54.0%).

TABLE 3
PHYSICAL PLACEMENT WITH THE NONCUSTODIAL PARENT IN SOLE CUSTODY DIVORCE CASES

Physical Placement Award	Cohorts 9-12
Visitation not allowed	3.9%
"Reasonable visitation"	50.2%
"Liberal visitation"	10.2%
Time scheduled	26.6%
Other[a]	9.1%
All cases	100.0%
N cases	2412

PHYSICAL PLACEMENT OF CHILDREN WITH NONCUSTODIAL PARENTS REPORTED IN THE FIRST YEAR AFTER DIVORCE[b] SOLE CUSTODY CASES: COHORTS 7 & 8

	N Cases	Mean Number of Days Child with NCP	Mean % of Year Child with NCP
By physical placement award type:			
"Reasonable visitation"	371		
Time spent with NCP		36	9.9
"Liberal visitation"	118		
Time spent with NCP		47	12.9
Specific schedule	176		
Time awarded to NCP		57	15.5
Time spent with NCP		67	18.3

TIME SCHEDULED PHYSICAL PLACEMENT AWARDS OVER TIME PHYSICAL PLACEMENT WITH THE NONCUSTODIAL PARENT: SOLE CUSTODY CASES

	Cohort					
	7	8	9	10	11	12
% of sole custody cases with specified time scheduled[c]	16.2%	13.1%	24.2%	22.8%	29.3%	30.2%
Mean number of days specified	58	56	63	64	62	64
Mean percent of year specified	15.8	15.2	17.1	17.4	16.9	17.3
N cases	124	94	152	136	151	158

Weighted data. Twenty-one counties.

[a] This includes several small categories of cases: physical placement was not mentioned in the divorce decree; physical placement was mentioned only as allowed "with notice"; missing information on physical placement.

[b] The Parents Survey II was conducted for reference year 1988 with parents from cases in Cohorts 7 and 8. The time spent in physical placement was taken from the response of the noncustodial parent. If the noncustodial parent did not respond to the survey, then the response given by the custodial parent was taken. Weighted data. Twenty counties only (Milwaukee County parents were not surveyed).

[c] Includes sole custody cases with the time specified from 1-30% time. This does not include cases with time specified as 0 days (visitation not allowed).

time with the children by the noncustodial parent, leading to greater contact between parent and child.[22]

Finally, we looked at trends in the use of specific language in divorce orders, shown in panel three of Table 3. We found that over time the percentage of cases that have specific physical placement schedules detailed in the divorce decree has increased substantially, from 13 to 16% in Cohorts 7 and 8, to 30% in Cohort 12.[23] The average amount of time awarded in those placement schedules has also increased slightly from fifty-six to fifty-eight days per year to sixty-four days per year. The increases in the number of days scheduled, in the cases with specific physical placement schedules and in shared custody awards, are all consistent with a trend toward fathers having greater responsibilities for direct physical care and support of their children after divorce. This is in keeping with the research that shows an increase during the late 1980s in the amount of time that divorced fathers spent with their children[24] and with other research that shows that an award of joint legal custody works to ensure a higher amount of father-child postdivorce contact, irrespective of predivorce conditions or family characteristics.[25]

IV. Physical Custody and the Process of Divorce

There are a number of issues related to the divorce process which provide a more complete picture of the custody decision that are available in court history documents. This section of the article analyzes data from the four most recent cohorts, Cohorts 9 through 12, on the legal representation of the father and mother, the length of time between the separation and final divorce decree, and the county and presiding judge where the decision was made.

A. Legal Representation

One issue that may be related to custody outcome is legal representation. Table 4 presents physical custody outcomes by categories of legal representation at the top of the first panel. In a majority of

22. For a discussion of research pointing to the desirability of specific language, see Jessica Pearson, *Ten Myths About Family Law*, 27 Fam. L.Q. 279, 291-92 (1993).

23. The study of Utah cases found that in the period 1990-93, 49% of the cases had a specific visitation schedule. *See* Bahr et al., *supra* note 2, at 262. Utah has "Uniform Visitation Guidelines" that require a minimum visitation schedule to be used by all Utah courts absent a contrary agreement between the parents regarding visitation. *See id.* at 264.

24. *See* Joan B. Kelly, *Current Research on Children's Postdivorce Adjustment: No Simple Answers*, 31 Fam. & Conciliation Cts. Rev. 29, 41 (1993) (citing seven studies for the proposition that "[r]ecent research indicates that the amount of time fathers spend with their children on a weekly/monthly basis after divorce has definitely increased in the past decade").

25. *See* Judith L. Seltzer, Father by Law: Effects of Joint Legal Custody on Nonresident Fathers' Involvement with Children, National Survey of Families and Households, Working Paper No. 75, Center for Demography and Ecology, University of Wisconsin-Madison (1997) (on file with authors).

cases, both parents were represented by legal counsel (53%). In cases where neither parent was represented, a higher than average percentage of cases were awarded as sole mother custody (82.2%). It is possible that in most of these cases, the parents were in agreement as to

TABLE 4
LEGAL REPRESENTATION AT THE FINAL DIVORCE HEARING: COHORTS 9-12

	Physical Custody Award					
	Father	Mother	Split	Unequal Shared	Equal Shared	All Cases
Legal Representation:						
Row Percentages						
Neither parent was represented (N=343)	7.9%	82.2%	2.5%	3.2%	4.2%	100.0%
Father only (N=263)	35.2	48.8	2.2	6.1	7.7	100.0
Mother only (N=689)	2.1	89.2	2.9	2.0	3.8	100.0
Both parents were represented (N=1510)	9.7	72.1	4.0	6.5	7.7	100.0
Column Percentages						
N Cases	281	2114	87	134	189	2805
Neither parent was represented	11.1%	15.3%	10.4%	9.0%	9.3%	14.0%
Father only	32.4	5.9	6.1	11.4	11.2	9.2
Mother only	5.0	28.2	20.6	9.5	14.6	23.8
Both parents were represented	51.5	50.6	62.9	70.1	64.9	53.0
All cases	100.0	100.0	100.0	100.0	100.0	100.0

	Legal Representation			
	Neither Parent Represented	Father Only	Mother Only	Both Parents Represented
Mother median income[a]	$977	$1093	$1245	$1223
N Cases	333	232	676	1475
Father median income[a]	$1590	$2003	$1729	$2277
N Cases	313	259	603	1485
No Issues Disputed at Final Judgment[b]	91.2%	71.6%	63.2%	35.4%
N Cases	167	100	241	528

Weighted data. Twenty-one counties.
[a] All dollars adjusted to 1993 dollars.
[b] Data is primarily from eight counties in which "Certificates of Readiness" are used extensively in the scheduling of divorce cases. Cases defined as "No Issues Disputed at Final Judgment" are cases in which the parents indicated full stipulation of all issues, or where one or the other parent did not appear at the final judgment hearing.

custody, as well as other matters such as property and support, and felt no need to obtain legal services. In cases where the father was represented, but the mother was not, the percentage of cases with an award of mother custody was substantially lower (only 48.8%), and the percentage of cases with an award of father custody was strikingly high (35.2%). In the reverse situation where the mother was represented, and the father was not, the father was rarely awarded custody

(2.1% to father, 89.2% to mother). The causal relationship between legal representation and custody award is not clear. It may be that the parent without legal representation lost custody for this reason. But an alternate explanation is that the party willing to relinquish custody felt no need for legal representation.

In examining legal representation from another perspective, the lower part of the first panel in Table 4 shows types of legal representation for each category of custody outcome. The greatest degree of legal representation is found in cases which result in unequal shared custody: in 70.1% of these cases both parties were represented by counsel. This high degree of legal representation could be the result of the need to make complicated arrangements of time schedules or complex calculations of child support. In addition, shared custody mothers and fathers are on average better off financially; higher rates of legal representation may reflect, in part, their greater ability to pay the fees of a lawyer. But the high rate of legal representation in cases where the result is an unequal shared custody award may indicate that these are cases of highly conflicted parents who could not agree on custody, retained legal counsel, and eventually reached an unequal shared custody award as a compromise.[26]

Both sole mother and sole father custody show the lowest rates of legal representation. More agreement about custody or perhaps poorer economic circumstances may characterize these cases.

To investigate the relationship of income to legal representation, we examined in the second panel of Table 4 mother and father median incomes and divorce judgment disputes by categories of legal representation. The lowest median incomes for mothers and fathers is found in the category of cases where neither parent is represented. These parents also have the highest rates of agreement on all divorce issues. In 91.2% of the cases where neither parent has legal representation, the parents stipulated to all divorce issues, including custody. In cases where both parents have legal representation, only 35.4% of them have stipulated to all issues at the time of the divorce hearing. Poor parents may formally agree to divorce awards that, in reality, they are not happy with, but feel they cannot dispute due to lack of resources for legal fees. The relationship between income, legal representation, and divorce disputes is complex.

B. Length of Time Between Separation and Final Divorce Decree and Kinds of Disputes

The amount of time required to obtain a divorce varies widely. Lengthy periods of time and a large number of court appearances are

26. Maccoby and Mnookin suggest that judges in their California study awarded shared (without distinguishing between unequal and equal shared) custody as a compromise between disputing parents. *See* MACCOBY & MNOOKIN, *supra* note 2, at 151.

often considered to be indications of more conflict between the parties. Therefore, we analyzed the timing and number of disputes in the divorce to determine their relationship to custody outcomes. The first panel of Table 5 shows the number of days between the petition for divorce and the final divorce hearing and the number of court appearances that predate the final divorce hearing. Divorces resulting in unequal shared physical custody require the longest time period to resolve. These cases also took longer than all other categories of cases in terms of the number of days between the petition and the final divorce hearing (320 days as opposed to 252 median days). In addition, cases that result in split custody or unequal shared custody required the greatest number of appearances before a judge. Equal shared custody cases, on the other hand, have the least number of prior court appearances before the final divorce hearing. These findings suggest that unequal and split custody outcomes may result from more highly contentious cases. The low number of prior court appearances in equal shared custody cases suggests, in contrast, that these may be the result of more cooperative agreements between the parties.

TABLE 5
ISSUES CHARACTERIZING THE PROCESS OF DIVORCE BY PHYSICAL CUSTODY OUTCOME: COHORTS 9-12

	Father	Mother	Split	Unequal Shared	Equal Shared	All Cases
Between the Petition for Divorce and the Final Divorce Judgment:						
Mean number of days	309	295	311	364	305	301
Median number of days	237	250	252	320	267	252
Number of court appearances	1.1	1.1	1.3	1.2	0.9	1.1
Percent of Cases with Disputed Issues of:						
Physical placement[a]	18.0%	16.3%	17.2%	34.0%	6.4%	18.0%
Property or debt	20.0	12.1	23.5	24.5	21.5	19.7
Maintenance	10.6	6.9	11.8	10.6	9.1	10.2
Child support	11.7	8.7	26.5	19.0	8.8	12.1
Other issues[b]	25.3	21.4	38.4	27.4	9.4	24.5
N cases[c]	96	788	35	59	66	1004

Weighted data. Twenty-one counties.
[a] Inlcudes all physical placement issues including "visitation" disagreements.
[b] Includes disagreements over health or life insurance, guardian ad litem, or attorney's fees.
[c] Data is primarily from eight counties in which "Certificates of Readiness" are used extensively in the scheduling of divorce hearings.

The bottom panel of Table 5 examines the kinds of disputes that divorcing parents have. The data presented are from a subset of cases in which a "Certificate of Readiness" was filed with the court indicat-

ing sources of dispute.[27] These data indicate that cases that resulted in an unequal shared custody award had the highest percentage of parents in disagreement over physical custody (34.0%). In contrast, the lowest percentage of disputes over physical custody was in cases with an equal shared custody award (6.4%).

Further examination of this panel shows that parents with unequal shared custody or split custody awards are also the most contentious in the other areas of divorce dispute as well: property and debt, maintenance, child support, and other issues. The two least contentious groups are those with mother custody and equal shared custody outcomes.

Comparing the two types of shared physical custody shows an interesting contrast. Cases where the outcome is equal shared custody had generally low levels of dispute, while those with an unequal shared custody award were the most contentious. This suggests that parents with equal shared time are very different from those who negotiate or are given an unequal shared custody award.

C. The Role of County and Judge

There is substantial variation in the prevalence of shared custody awards (both equal and unequal) by county and judge. Although there is general consensus that relatively few custody decisions are, in fact, made by a judge because nearly all custody decisions are settled by the parents at some point in the divorce process,[28] the breakdown of custody awards by judge in Table 6 indicates that the climate for a shared custody award may differ substantially from courtroom to courtroom across the state. Among judges who presided over at least fifteen divorce cases in the data sample, two made no shared custody awards, while one judge had 30% of the cases with that outcome.

Counties varied as well, and these data are shown in Table 7. The range for counties, based on an average of all the judges in the county where there was more than one judge, was from 2.2% of the cases to 19.5% with shared custody outcomes. There seemed to be no pattern of urban counties being different from rural counties because both the highest and the lowest percentages of shared custody cases, as noted above, were from counties classified by the census as in metropolitan areas (SMSAs). Whether these variations are related to differences in the make-up of the cases or to institutional factors is not clear, but the data suggest further study is needed.

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27. The "Certificate of Readiness" is a document used in some Wisconsin counties to facilitate the scheduling of divorce hearings. Because parents may dispute multiple issues, the total of these categories may add up to more than 100%.

28. *See* MACCOBY & MNOOKIN, *supra* note 2, at 137; Marygold S. Melli et al., *The Process of Negotiation: An Exploratory Investigation in the Context of No Fault Divorce*, 40 RUTGERS L. REV. 1133, 1142 (1988) (of 349 divorces filed, only 32 involved a dispute that had to be settled by a judge).

TABLE 6
PERCENTAGE OF SHARED CUSTODY AWARDS[a] BY PRESIDING JUDGE[b] IN DIVORCE FINAL JUDGMENTS: COHORTS 9-12

Number of Judges	Shared Custody Awards (Equal and Unequal) As a Percentage of All Divorces Granted in Cohorts 9-12
2	0%
7	1-5%
19	6-10%
19	11-15%
7	16-20%
6	21-25%
1	26-30%

Unweighted data. Twenty-one counties.

[a] These awards include not only those resulting from a decision by the judge but also stipulated awards in which the parents arrived at an agreed upon custody arrangement through their lawyers, mediation, or on their own.

[b] Judges who had presided over at least 15 divorce cases in our sample of cases in Cohorts 9-12.

TABLE 7
PERCENTAGE OF SHARED CUSTODY AWARDS BY COUNTY IN DIVORCE FINAL JUDGMENTS: COHORTS 9-12

County (Metropolitan*)	Shared Custody Awards (Equal and Unequal) as a Percentage of Divorce Cases in that County in Cohorts 9-12
A*	2.2%
B*	3.7
C	3.9
D*	8.8
E*	10.3
F	10.4
G	10.6
H	11.5
I*	11.6
J*	12.1
K	12.3
L*	13.4
M	13.5
N	14.0
O	14.1
P	15.1
Q	16.4
R*	16.6
S*	18.4
T	18.8
U*	19.5
All counties	11.3
N cases	2824

Weighted data. Twenty-one counties.

* Metropolitan counties are defined by SMSA status (Standard Metropolitan Statistical Area).

V. Physical Custody and Economic Decisions on Divorce

Custody is not a decision that is made in a vacuum. There are many other decisions related to postdivorce economics that are made at the same time in the final divorce judgment: child support, maintenance, property settlement, including the marital home, and health insurance for the children. The data in Tables 8, 9, and 10 provide information regarding some of these issues.

A. The Marital Home

In Table 8 the award of the marital home is broken down by physical custody status over three time periods in order to detect changes

Table 8
Marital Home Award in the Final Divorce Judgment by Physical Custody Type

	Physical Custody					
	Father	Mother	Split	Unequal Shared	Equal Shared	All Cases
Settlement of Marital Home						
Cohorts 1-3						
% of cases with a house award	64.2%	51.4%	69.0%	—	69.3%	53.4%
Of cases with a house award:						
N cases	151	1062	64	—	30	1309
% of cases where:						
House goes to mother	1.7%	49.5%	18.3%	—	28.7%	42.7%
House goes to father	73.5	16.1	34.5	—	27.7	23.2
House is sold	24.8	34.4	47.2	—	43.6	34.1
All cases	100.0	100.0	100.0	100.0	100.0	100.0
Cohorts 7-8						
% of cases with a house award	49.3%	44.6%	67.4%	57.8%	62.3%	47.0%
Of cases with a house award:						
N cases	88	581	35	37	46	787
% of cases where:						
House goes to mother	3.3%	55.8%	19.8%	31.4%	20.2%	45.8%
House goes to father	80.7	19.9	52.7	47.8	59.8	31.0
House is sold	16.0	24.3	27.5	20.8	20.0	23.2
All cases	100.0	100.0	100.0	100.0	100.0	100.0
Cohorts 9-12						
% of cases with a house award	53.8%	47.7%	50.3%	64.1	71.4%	50.7%
Of cases with a house award:						
N cases	163	1046	43	84	132	1468
% of cases where:						
House goes to mother	7.2%	54.7%	19.8%	37.8%	26.3%	44.9%
House goes to father	78.6	21.3	53.4	39.2	57.6	32.7
House is sold	14.2	24.1	26.8	23.0	16.1	22.4
All cases	100.0	100.0	100.0	100.0	100.0	100.0

over the course of the decade. These three time periods are 1980-83 (Cohorts 1 through 3), 1987-88 (Cohorts 7 and 8), and 1989-92 (Cohorts 9 through 12). The percentage of cases where there was an award of the marital home has remained about the same over the three time periods, ranging from 47 to 53.4%. However, changes in the disposition of the marital home have taken place. In the first time period, 34.1% of the homes were sold. Since 1987, however, only 22 to 23% of the homes have been sold after divorce. Instead, these homes are retained by one of the parents. Mothers are most likely to be awarded the home, but the data show an increase in every custody category of the percentage of fathers who keep the marital home. In the most recent time period, 1989-92, it appears that the marital home is kept most often in father custody and equal shared custody cases; only 14 to 16% of the homes in these cases are sold at the time of divorce. There has been a slight increase over time in the percentage of cases where the home is kept by a custodial mother, from 49.5% in the earliest cohorts, compared to 54 and 55% in the later cohorts.

B. Child Support

The data show substantial changes over time and substantial differences between categories of cases in support awards at the time of divorce. Table 9 examines child support awards, automatic wage withholding orders, maintenance awards, and health care awards for children over the same three time periods as in Table 8: 1980-83, 1987-88, and 1989-92.

During the period in which these data were collected, Wisconsin law changed considerably with regard to child support and wage withholding. In 1987 the use of a percentage standard guideline to determine the amount of child support was made mandatory,[29] and immediate wage withholding was required.[30]

Table 9 shows that the percentage of cases with child support awards has changed over time. The percentage of awards in sole custody cases has increased substantially: in mother custody cases, from 86.4 to 94.5%; in father custody cases, from 19.3 to 41.9%. The percentage of father custody cases with child support awards remains relatively low, however, with more than 58% of the cases not having an award.[31] In addition, in contrast to the increase in child support

29. *See* WIS. STAT. ANN. § 767.25(1j) (West 1993).

30. *See* WIS. STAT. ANN. § 767.265(1). Prior to this time, wage withholding was ordered only in response to delinquency.

31. The low level of child support awards to custodial fathers is similar to national figures which show 59.1% of custodial fathers without child support awards. But the award level for custodial mothers in Wisconsin is much higher than national figures. As stated in the text, only 5.5% of custodial mothers in the period 1989-92 were without child support awards; national figures for divorced women showed 44% without child support awards. *See* U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P60-187, CHILD SUPPORT FOR CUSTODIAL MOTHERS AND FATHERS: 1991, at 5-6 (1995).

TABLE 9
SUPPORT AWARDS IN THE FINAL DIVORCE JUDGMENT BY PHYSICAL CUSTODY TYPE

	Physical Custody					
	Father	Mother	Split	Unequal Shared	Equal Shared	All Cases
Support Awards						
Cohorts 1-3						
Child Support	19.3%	86.4%	71.7%	*	48.5%	79.2%
Imm. wage withholding	25.0%	21.5%	20.8%	*	11.5%	21.5%
Maintenance[a]	7.0%	4.4%	6.2%	*	2.4%	4.7%
Health insurance for children[b]	81.3%	79.1%	80.7%	*	97.5%	79.6%
N cases	226	1939	89		41	2301
Cohorts 7-8						
Child Support	34.2%	89.8%	70.0%	69.8%	42.6%	81.1%
%-expressed order	19.2%	38.9%	35.9%	25.5%	9.1%	33.7%
Imm. wage withholding	72.1%	77.7%	76.4%	65.2%	77.6%	77.0%
Maintenance[a]	10.9%	8.4%	16.0%	9.1%	3.4%	8.7%
Health insurance for children[b]	83.2%	91.0%	98.1%	95.4%	96.3%	90.9%
N cases	169	1334	52	65	69	1689
Cohorts 9-12						
Child Support	41.9%	94.5%	61.1%	80.4%	37.9%	83.9%
%-expressed order	27.3%	58.6%	24.6%	40.7%	11.6%	50.5%
Imm. wage withholding	74.7%	77.6%	78.0%	78.4%	74.1%	77.4%
Maintenance[a]	10.2%	18.5%	19.3%	16.6%	13.1%	17.3%
Health insurance for children[b]	86.6%	92.4%	92.3%	97.7%	95.6%	92.3%
N cases	282	2130	87	135	190	2824

Weighted data. Twenty-one counties.
* Too few identified cases to report (N < 10).
[a] This category shows the award of maintenance by custody type. In almost all cases it is an award to the mother, even in those cases where the father is the custodial parent. Maintenance was paid by the father to the mother in 96% of the custodial father cases in Cohorts 9-12, and in 100% of the cases in Cohorts 1 through 3 and 7 through 8.
[b] Includes acknowledgement by the court that the children are covered by Medicaid.

awards in sole custody cases, there is a decline in the percentage of split custody and equal shared custody cases with support awards.

In searching for an explanation for this variance in child support awards, a support award was calculated, based on the guideline formula,[32] for cases with no award. Table 10 shows that a substantial percentage of no-award cases would have had an award amount of under $50. Over 44% of split custody no-award cases, 33.8% of no-award mother custody cases, and 33% of equal shared custody situations would have had an award of child support of less than $50. The bottom row on Table 10 shows that for cases with support awards, very few, in fact, were ordered at levels of less than $50 per month. Perhaps parents and their attorneys, after calculating a guideline-appropriate award level which is a very small dollar amount per month,

32. WIS. ADMIN. CODE HSS 80.03 (LEXIS 1997) sets out the percentages to be applied.

TABLE 10
CHILD SUPPORT AWARDS IN DIVORCE CASES LOW AWARDS AND NO AWARDS: COHORTS 9-12

	Physical Custody				
	Father	Mother	Split	Unequal Shared	Equal Shared
% of Cases with no child support award	58.1%	5.5%	38.9%	19.6%	62.1%
Of those cases without a child support award: N cases	170	113	35	28	115
% of cases, with known income, in which award would have been less than $50/month	13.8%	33.8%	44.4%	*	33.0%[a]
Of those cases with a child support award, % of cases with an award of less than $50/month	2.2%	0.6%	0.0%	0.0%	1.3%

Unweighted data. Twenty-one counties.
* There were insufficient no-award cases with the full information to report; percentage of time with the child as well as income is necessary in order to calculate child support in these cases.
[a] The child support guidelines in effect at the time that these cases came to court did not mention equal shared physical custody. The formula used here to approximate an "Appropriate" award is the guideline currently in effect in Wisconsin which does include equal shared custody cases.

decide that the difficulties associated with a child support order outweigh the benefits of receiving very small amounts of child support. The rarity of awards under $50 per month supports this idea.

Table 9 also contains information regarding wage withholding. When wage withholding was primarily in response to delinquency (see Cohorts 1 through 3), only about 21% of the cases included a wage withholding order in the final judgment. Since immediate wage withholding became required in 1987, the percentage of cases with wage withholding has risen to about 77%. In Cohorts 9 through 12, the percentage of cases with immediate wage withholding is about the same in all types of custody cases at 74 to 78%.

In contrast to the use of immediate wage withholding, the use of percentage-expressed orders[33] differs substantially between custody types. Its use is relatively frequent in mother-custody cases, where 58.6% of child support awards in these cases are expressed as a percentage amount. It is used least often, 11.6% of the time, in equal shared custody cases.

The data in Table 9 also show the award of maintenance (alimony) by custody type. In almost all cases, the award of maintenance

33. A percentage-expressed order is one in which the amount is set as a percentage of income, not as a dollar amount. It is authorized by statute. *See* WIS. STAT. ANN. § 767.25(1)(a). For research finding that percentage-expressed orders increase payments, see Daniel R. Meyer et al., *Child Support Reform: Lessons from Wisconsin*, 45 FAM. RELATIONS 11 (1996).

is to the mother, even in cases where the father is the custodial parent. Table 9 shows a trend to increased use of maintenance awards.[34] This is interesting and unexpected. Maintenance awards were relatively rare in the early 1980s. Although nationwide the incidence of alimony awards has not increased noticeably over time,[35] our data show that in child support cases in Wisconsin, the incidence of maintenance awards has increased from 4.7% of the cases in Cohorts 1 through 3 to 17.3% of the cases in Cohorts 9 through 12.[36]

Health care expense awards have received more attention in recent years perhaps as a result of the increased costs of health care. In 1987 legislation was adopted that required courts to provide for the payment of health care in addition to ordering child support.[37] Equal shared custody cases had very high rates of health care expense awards, even in the early 1980s. Health care expense orders have increased substantially in mother custody and split custody cases over the period studied, reaching 92% in the most recent cohorts.

VI. Postdivorce Activity and Physical Custody Type

This section covers two issues that can be documented from court records and other data sources that add to our knowledge of postdivorce parents and their children. The two issues explored here are child support compliance and postdivorce returns to court.

A. Child Support Compliance

The receipt of child support is an important element of postdivorce life for custodial families. To examine the issue of compliance with child support orders, we constructed pay-to-owe ratios for all cases in Cohorts 7 through 12 (1986-92) that had a child support award and for which we had two years of payment history after divorce, shown in Table 11. We then calculated a mean compliance rate over the three-year period.[38] We found that shared custody cases

34. *See* Wis. Stat. Ann. § 767.26 (authorizing maintenance payment orders).

35. National figures for maintenance—without regard to whether there are children—have remained constant over the period studied here. In 1978 maintenance was awarded in 14.3% of cases; in 1989 the number was 15.5% of divorces. *See* U.S. Bureau of the Census, Current Population Reports, Series P-23, No. 112, Child Support and Alimony: 1978, at 10 (1981); U.S. Bureau of the Census, Current Population Reports, Series P-60, No. 173, Child Support and Alimony: 1989, at 12-13 (1991).

36. One explanation for this trend may be related to the mandatory use of the percentage standard child support guidelines beginning in 1987. Prior to that time, divorce judgments frequently contained a family support award that included both child support and maintenance and was so structured in the expectation that the payment would be tax deductible by the parent who was required to pay it.

37. *See* Wis. Stat. Ann. § 767.25(4m)(a), (b).

38. Year 0, the calendar year of the final divorce decree, shows somewhat lower mean child support compliance levels than the year following divorce in most categories. This may be an artificial depression in pay-to-owe ratios due to timing in payments (made at the end of the month for which they are owed) or for the recording of payments (a several day delay between

TABLE 11
CHILD SUPPORT COMPLIANCE TWO YEARS AFTER THE DIVORCE: COHORTS 7-12 CASES WITH FINAL DIVORCE JUDGMENTS 1985-1992 AND TWO YEARS OF CHILD SUPPORT COMPLIANCE HISTORY AFTER DIVORCE

	Physical Custody at Final Judgment					
Child Support Compliance	Father	Mother	Split	Unequal Shared	Equal Shared	All Cases
Mean compliance (percent of owed that was paid)						
Year 0*	56.3%	70.9%	75.1%	79.9%	77.3%	70.7%
Year 1	51.9%	75.3%	69.7%	87.0%	85.5%	74.8%
Year 2	53.7%	73.7%	71.1%	78.8%	82.5%	73.2%

Weighted data. Twenty-one counties.
* Year 0 is the calendar year of the divorce decree. Year 1 is the first full calendar year after the divorce. Year 2 is the second full calendar year after the divorce.

have the highest child support compliance rates in all three years with a 79 to 82% mean compliance in the last year shown. Split custody and mother custody have mean compliance rates of 71 to 73%. Father custody cases have the lowest mean child support compliance rate with 53.7%. The explanation for these differences in compliance rates is not clear. Shared custody cases may have greater compliance because the relationship between the paying parent and the child is better. Alternatively, the greater compliance rates of parents with shared custody may reflect differences in the characteristics of parents who participate in shared custody. For example, parents with shared custody have higher average income, a factor known to contribute generally to increased compliance in the payment of child support.[39]

Table 12 shows compliance rates for mother custody cases only, broken down into categories according to the physical placement language in the divorce decree. As we discussed previously, average time spent by the noncustodial parents with children increases as they move from "reasonable visitation" to "liberal visitation" and then to a specific visitation schedule.[40] Fathers with the least assurance of physical placement with their children after divorce, those with "reasonable time upon reasonable notice," appear to have the lowest mean child support compliance rates of 72.6% in the second full calendar year after divorce. Fathers with "liberal" physical placement language have higher mean compliance rates at 79.0%. Fathers with "specified"

payment and record of receipt). By the first full calendar year after the divorce (Year 1), these timing issues have been evened out over the course of the year, and this year shows a generally greater average compliance record. The second full calendar year after the divorce (Year 2) shows an overall slight decline in mean compliance rates.

39. *See* Daniel R. Meyer & Judi Bartfeld, *Compliance with Child Support Orders in Divorce Cases*, 58 J. MARRIAGE & FAM. 201 (1996).

40. *See* discussion *supra* Part III.C.

TABLE 12
CHILD SUPPORT COMPLIANCE TWO YEARS AFTER THE DIVORCE IN SOLE MOTHER CUSTODY CASES COHORTS 7-12 CASES WITH FINAL DIVORCE JUDGMENTS 1986-1992 AND TWO YEARS OF CHILD SUPPORT COMPLIANCE HISTORY AFTER DIVORCE

	Physical Placement Award				
Child Support Compliance	"Reasonable"	"Liberal"	"Specified"	Specified 1-16% of Year	Specified 17-30% of Year
Mean compliance (percent of owned that was paid)					
Year 0*	71.6%	73.9%	75.5%	73.0%	80.4%
Year 1	74.6%	79.2%	82.2%	80.4%	86.0%
Year 2	72.6%	79.0%	81.3%	78.7%	84.0%
N cases	1021	239	556	297	200

Weighted data. Twenty-one counties.
* Year 0 is the calendar year of the divorce decree. Year 1 is the first full calendar year after the divorce. Year 2 is the second full calendar year after the divorce.

physical placement schedules have the highest mean child support compliance rates at 81.3%. The direction of causality is not clear. It may be that fathers who are going to be better payors of child support are also those who are interested in securing a better guarantee of child access and therefore negotiate a specified child placement schedule. On the other hand, it may be that the fathers who have greater access to their children after divorce are more willing to pay child support. Or it is possible that specified schedules may tend to prevent conflict between parents and lead to more child support compliance.

The last two columns of Table 12 subdivide the sole mother custody "specified" child placement awards and those with above average placement awards. Those fathers with above average specified placement awards have a higher compliance rate than fathers with less time awarded. Those fathers with lower than average, but specified, placement time have about the same compliance rate as fathers with "liberal" placement language. This finding is consistent with our explanation advanced above that the lack of conflict between the parents, accomplished by a well-specified placement schedule to which each parent can refer, is an important factor in achieving high child support compliance levels.

B. Returns to Court

The reasons that families return to court after divorce vary, but frequency of returns is regarded as a measure of conflict. The data in Table 13 explore the relationship between returns to court and custody type.

TABLE 13
RETURNS TO COURT WITHIN TWO YEARS AFTER DIVORCE: COHORTS 9-12

% of Cases in Which There is a Petition* for a Return to Court for:	Physical Custody at Final Judgment					
	Father	Mother	Split	Unequal Shared	Equal Shared	All Cases
A change in legal custody**	3.6%	1.3%	1.1%	0.3%	2.6%	1.6%
A change in physical placement**	13.6	8.8	21.5	22.4	10.5	10.3
Enforcement of visitation/ placement	0.2	2.3	0.0	4.6	0.0	2.0
Permission to move the children out of state	0.6	1.3	0.0	2.5	0.3	1.2
Change in child support amount	21.9	23.5	34.3	36.7	24.3	24.2
Enforcement of child support	6.6	11.5	4.0	5.9	3.3	10.1
Any of the above reasons	29.9	33.7	42.6	44.5	26.7	33.6
N cases	205	1611	63	86	136	2101

Weighted data. Twenty-one counties.
* This table counts petitions to court, whether or not they resulted in a change in judgment. Petitions are counted irrespective of sequence and timing, i.e., a petition for enforcement of child support could occur after a change in physical placement.
** WIS. STAT. ANN. § 767.325 (West 1993) prohibits modification of legal custody or physical placement for two years after an order is entered except under limited circumstances.

The main reason for a return to court in the two years subsequent to the divorce was for a change in the child support award. The second most common reason was for enforcement of a child support award. Mother custody cases are those most likely to return to court for child support enforcement issues at 11.5%, and equal shared custody cases are those least likely to return to court for child support enforcement at 3.3%. The types of cases which most commonly return to court for a change in child support amount are split custody and unequal shared custody cases at 34.3% and 36.7%, respectively. Father, mother, and equal shared custody cases are substantially less likely to return to court for a change in the child support amount at 21.9%, 23.5%, and 24.3%, respectively.

It should be noted that a return to court need not be an adversarial event; for example, parties can be expected to return to court for a revised child support award if income changes substantially. Though returns to court do not necessarily indicate contentious parents, it should be noted that parents in both split custody and unequal shared custody cases were the most likely to be legally represented[41] and to have conflict prior to the divorce. This pattern of contention between the parents appears to continue in the two years after the divorce because parents in split custody and unequal shared custody cases are the most likely to return to court in that period. Combining all of the six listed reasons for a return to court, 42 to 45% of split

41. *See* discussion *supra* Part IV.A.

custody cases and unequal shared custody cases return to court in this period. Parents in equal shared custody cases are the least likely, at 26.7%, to return to court.

VII. Conclusion

This paper has examined data from the court records of Wisconsin divorce cases in twenty-one counties for a period of twelve years from 1980 through 1992 to document how child custody is being handled postdivorce. In this conclusion, we highlight some of the findings we consider significant.

A. Custody Trends

Probably the most striking feature of the data is the changes that have taken place in the use of joint legal custody and shared physical custody. Joint legal custody with mother physical custody has become the norm. Eighty-one percent of the cases in the last cohort studied (1991-92) had joint legal custody, but mother physical custody remains high at 73%.

There is also a clear trend to increased involvement by both parents. Joint legal custody increased from 18 to 81% during the twelve years covered by the study. During the same period, shared physical custody, i.e., cases where the child resided with both parents more than 30% of the time, showed a steady increase from 2.2 to 14.2%. Although sole mother physical custody remains the dominant form of postdivorce custody, it has decreased from almost 86 to 73% over the twelve years studied.

Another indication of increased involvement by both parents is found in the sole physical custody cases, where there has been a marked increase in more specific arrangements for physical placement, i.e., parental visitation. Although physical placement awards for "reasonable time upon reasonable notice" remain the predominant form in Wisconsin divorce cases, accounting for over 50%, 26.6% of the cases contain specific language detailing the days and times of physical placement with the noncustodial parent.

These findings are significant for public policy makers and suggest at least two areas for further legislative action and further study. First, there is a need for clarification of current legislation that does not explicitly define the difference between legal custody, i.e., parental decision making, and physical custody, i.e., residential care. Second, the prevalence of joint legal custody with physical residence with the mother points to the emergence of a new type of custody arrangement. We recommend further study of parenting roles under joint legal custody where physical care is primarily with only one parent.

B. Unequal Shared Custody

Most studies of shared custody fail to distinguish unequal and equal shared custody cases. The results reported here suggest that these types of cases may be quite different in may respects. Unequal shared custody may be more similar to sole physical custody with one parent, particularly when there is joint legal custody. The unequal shared custody cases in these data tend to cluster at the 30 to 39% time share, close to the under 30% time for a noncustodial parent. Additionally, the vast majority of unequal shared custody are mother-primary parent awards.

Unequal shared custody cases also may be the result of more conflict between parents. Of the unequal shared custody cases, 34% had parents who were in dispute about custody, while only 6.4% of those with the outcome of equal shared custody were in dispute. Although only 51.5% of the divorcing parents were both represented by legal counsel in the divorce, 70.1% of the cases with an unequal shared custody outcome involved legal representation for both parents. Unequal shared custody cases also required the longest time to reach resolution (320 days as compared to 252 days) and, along with split custody cases, showed the greatest number of appearances before a judge.

These findings raise the issue of whether public policy ought to treat equal and unequal shared physical custody differently. As noted above, unequal shared physical custody may be more like sole physical custody, particularly where there is joint legal custody.[42]

C. Specific Physical Placement Orders

In the majority of cases in which one parent, usually the mother, is awarded sole physical custody, the findings from this study point to the importance of specificity in the physical placement or visitation orders. Specific physical placement language is important because the findings show that it results in more time being spent with the children by the noncustodial parent: parents with reasonable visitation spent an average of thirty-six days with their children in the year after divorce; parents with specific physical placement schedules reported spending sixty-seven days with their children in the first year after divorce. Specific physical placement language is also important because it is associated with higher child support pay-to-owe ratios and may become significant in the search for increasing child support compliance.

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42. The current Wisconsin child support guidelines set different support amounts for shared custody parents with 31 to 40% time and those with 41 to 50% time with their children, based on differences in the sharing of child-raising costs between parents at that amount of time. The finding in this study may provide additional support for the distinction between these two types of shared physical custody. *See* WIS. ADMIN. CODE HSS 80.04(2) (LEXIS 1997).

The importance of specific visitation language prompts us to recommend that states consider legislation requiring parents to have specific visitation schedules or providing, as some states have done, that a particular visitation schedule be incorporated in the divorce decree in the absence of parental agreement on a schedule.[43]

43. *See* TEX. FAM. CODE ANN. § 153.311 (West 1996); UTAH CODE ANN. §§ 30-3-34, 30-3-35 (1995); Bahr et al., *supra* note 3, at 264. A few states, most notably Washington, require parents to file a parenting plan. *See* Robert Tompkins, *Parenting Plans: A Concept Whose Time Has Come*, 33 FAM. & CONCILIATION CTS. REV. 286 (1995).