Interventions with Families in Conflict

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INTRODUCTION

For psychologists and other mental health professionals, testifying in court is one of those experiences that one either avoids, like trial by fire, or one thrives on. After many years of clinical practice, I found myself to be one of the latter. Much like the Tuesday afternoon case presentations we had in graduate school, one must face a critical audience and be prepared to articulate one's premises clearly and concisely, to justify one's conclusions with a mound of data, and to cite one's sources.

Forensic work requires an academic rigor that is not demanded by a general clinical practice. Over the years I have found myself doing literature reviews on special topics, preparing short summaries on these topics, or bringing to court textbooks with special selections flagged. Then a thought occurred to me: "Why not prepare a book that would be a literature review of the field on highly conflicted families of divorce?" Such a book could be a good single resource for the psychologist or guardian ad litem going into court. One could be prepared to answer questions such as "Are this child's symptoms congruent with parental alienation syndrome?" "What is the most likely explanation for why this child comes back from a visitation in a highly agitated state?" "What would be the best way for the parents to share custody of a 1-year-old? Why?" The field of child and family forensic psychology has matured over the past 20 years, I hope, from a field in which the expert is a clinician who espouses his or her personal opinions to a scientist-practitioner who can find some scientific basis for
his or her argument. Clearly we are moving in this direction, and the courts will expect the expert to be just that.

Such a book would be helpful, too, to attorneys who cross-examine expert witnesses in this field. For that reason, I have made the writing style straightforward and accessible—posing questions of interest and answering them with brief summaries of relevant studies. The busy attorney can go to the sections in each chapter titled “What the Research Shows” to get a sense of whether the material in the chapter will be useful to his or her case. Clinicians—those psychologists and social workers and other family therapists who do not go to court but who conduct therapy with children enmeshed in the conflict, or with adults who are distraught, angry, and not always acting in the child’s best interests—should find the book helpful, too. The chapters open with brief case studies and close with the outcome of the case. The case presentations are taken from my own work with families, although the names and other identifying information have been changed and, in some cases, two cases are merged. Each chapter concludes the review of research with a summary, followed by a section called “Guidelines for the Clinician.”

In organizing this material, I sought to arrange the chapters roughly in the order in which the divorce process and its aftermath take place. It was necessary, however, to first do some review of the divorce literature in general. Chapter 1 reviews the history of divorce in the United States and, in doing so, explains why divorces have become so contentious. All the external factors that might have been considered in determining custody (such as gender) are now disallowed. Custodial decisions must be made on the basis of subtle, psychological, and unobservable factors. Our attitudes about the children of divorce have changed also. Whereas in the 1970s we believed as a nation that divorce was good for children, we now know otherwise. The results of several longitudinal studies show that the impact on children persists into adolescence, into young adulthood, and even into the marriages of the adult children of divorce. Some may say that a backlash has set in.

Chapter 2 attempts to put the results of these longitudinal studies into perspective. Smaller scale studies have examined the adjustment of children in highly conflicted intact marriages and found that it is not divorce per se that results in poor outcomes for children but the level of conflict in the home—before, during, and after the divorce—that is crucial. This finding establishes the importance of this book. One quarter of divorces end in high levels of conflict, and it is the group of children in those marriages who experience the most adjustment problems. Another body of studies is summarized that pinpoint why this is: The years of interparental conflict and subsequent second and third divorces deteriorate the child’s relationship with both parents.
Chapters 3–8 follow roughly a chronological course. Chapter 3 explores the common avenues toward the failure and dissolution of marriages today. This provides a backdrop for those unresolved issues that become entrenched in postdivorce disputes. They reappear as part of children's psychopathology in Chapter 8 and parental psychopathology in Chapter 9.

Because mediation is still the best intervention for defusing hostilities in a pending divorce and avoiding litigation, this literature is reviewed in detail in Chapter 3. Information is provided not only for mental health practitioners who may mediate the child custody issues but also for attorneys who will want to know when mediation is most likely to succeed and when it is an exercise in futility.

Chapters 4 and 5 explore the ending of a marriage and the decisions that must be made. Chapter 4 begins with a review of trends in custodial arrangements since the divorce revolution and why mothers and fathers choose to pursue custody of the children. The review then moves into the various forms of child custody arrangements and their success rates. This material will be useful to the attorney who is consulting with a parent prior to litigating and will help the attorney with case strategy. The clinician–mediator–consultant will also find it useful in answering parents’ questions about various forms of custody.

If the couple has not settled out of court and the issue of custody is litigated, the next phase of the process will be the custody evaluation. Chapter 5 opens with a historical review of the legal basis used by the courts to award custody. The chapter then reviews research on that small subportion of parents who litigate and their reasons for doing so. There follows an overview of the theoretical and scientific basis for the custody evaluation—the goals, rationale, elements, and use of psychological tests. The selection of tests covered in this section will be especially useful to the clinician, who will want to avoid using tests that have a shaky empirical basis, and to the attorney, who will be able to vigorously cross-examine the expert who uses shoddy tests. There follows a discussion of the criteria judges use to determine custody, so that mental health practitioners can understand where the two fields diverge. The chapter ends with a discussion of some principles for organizing the conclusions of the evaluation and a consideration of whether to testify to the “ultimate issue.”

The custody evaluator or the expert in postdivorce disputes is often asked to propose a visitation plan. For this reason, Chapter 6 is next in the sequence. The bulk of the chapter reviews guidelines in the literature based primarily on age but also on how involved the two parents have been, how close they live to each other, and the child's temperament. There follows a discussion of the frequency of visitation conflicts and a summary of the controversial findings on whether children benefit from seeing their father when the visitations are hostile.
Chapters 7 and 8, which discuss child psychopathology, are next in the sequence, as they can be assumed to be the result of the failure of mediation, the custody recommendations, and the establishment of a good visitation plan to intervene in the children’s lives effectively. Chapter 7 opens with a review of research on the reactions of children to parental fighting, especially at visitation exchanges. The chapter then reviews the large body of research by Janet Johnston and other researchers on the varying reactions of children to divorce conflict at different ages. These reactions are modified by the child’s own internal resources, however, and the chapter closes with a review of the impact of the child’s temperament, coping skills, and cognitive style on adjustment in high-conflict divorces.

A small number of children with postdivorce adjustment problems will go on to develop a more severe and entrenched reaction called parental alienation syndrome (PAS). Chapter 7 thus provides a natural lead-in to Chapter 8. Expert witnesses will want to review this chapter carefully as attorneys have become more savvy at cross-examining experts on the validity of this behavior pattern. First there is a discussion of how the term arose and some of the theoretical background and research that has been done to date. There follows a short summary on the disorder folie à deux, which is very similar in nature. These two sections are combined, along with further research studies, to construct a cohesive formulation of how this disorder (PAS) arises. The chapter closes with a review of interventions and treatments that have been proposed and their relative effectiveness. The proposed list of 12 characteristics of children with PAS, found in the “Suggested Guidelines” section, may be especially useful for evaluators and clinicians who are trying to determine whether a child’s behavior fits this pattern.

Chapter 9 ties in naturally with Chapters 8 and 7 in that, in this chapter, we see the forms of parental psychopathology that are directly linked with child psychopathology. The chapter opens with a discussion of the observations of clinicians and researchers in the field about these parents: that they are individuals with personality disorders or subclinical levels of such. The origins of these disturbances are not clear; they may be due to losses in childhood or to characterological cognitive distortions. Research is reviewed that demonstrates that these parents are lacking in empathy and perspective-taking ability; that they engage in defensiveness and projection of blame; and that they have rigid thinking styles, interpersonal skills deficits, and are more self-oriented and less child-oriented. Two additional sections focus on the intensification of conflict that often arises with remarriage and the subgroup of highly disturbed parents who engage in child abductions.

Chapter 10 explores the complex area of accusations of sexual abuse that arise in custody and visitation conflicts. A large body of research has
accumulated over the past 20 years on the sexual abuse of children, but I have made an effort to restrict the information to that which is needed by the clinician, especially one who is conducting an evaluation for the courts in a highly conflicted postdivorce case in which there are vague accusations of sexual abuse and little hard evidence. The material is organized around four areas in which the evaluator should gather information: the situation, the accuser, the accused, and the child. Information gathered on the child is organized under these headings: Physical Evidence, Mental State, Reports of Behavioral Symptoms, Behavioral Checklists, The Child’s Verbal Account, Projective Tests and Drawings, and Consistency Among Sources of Data. Attorneys will find this outline useful in cross-examining witnesses for thoroughness and for challenging weak testimony for which there is no empirical basis.

Such a book would not be complete without a section on ethical problems and pitfalls, and those are the subjects of Chapter 11. Ethical issues can be dry when presented in the form of legalistic formulations of dos and don’ts but quite fascinating in the form of real cases. For that reason I have organized the material around several case scenarios, drawn from my own experience or that of colleagues, that illustrate some of the most common problems: going beyond the data to make conclusions unsupported by the data; failure to clarify confidentiality; failure to clarify what your objective is, as well as what you can and cannot say in court; failure to distinguish clinical from forensic roles; the dangers of doing average work; and the dangers of working with noncustodial parents and children.

I have not proposed specific treatments for families in postdivorce conflict in this book. These families are served, in large part, by standard forms of individual, family, and play therapy. In addition, support groups for children and parents going through divorce have been in existence now in churches, schools, and community centers for more than 20 years. Instead, I have offered personal commentary in most chapters in the form of guidelines for the clinician. Chapter 12 addresses the newer forms of intervention for the specialized population of highly conflicted families, programs that have come into being just in the past 8–10 years. It opens with a discussion of the backlash against divorce and the movement in churches toward keeping marriages together. I then review attempts to introduce new legislation aimed at divorce prevention. From there, the chapter covers changes in the court system itself once the parents file for divorce: specialized family courts, parent education programs, and mediation. Next it reviews new roles for mental health professionals in postdivorce resolution: court psychologist, special master, coparenting coordinator, and arbitrator. The chapter closes with a review of new treatment programs for children and a look toward the future.

If there is any doubt as to the urgency of finding effective therapy
and counseling for conflicted families, consider this: Research shows that divorce doubles the risk of emotional and behavioral disorders in children. With the rate of divorce being what it is, the future emotional balance of a good portion of society depends on the kind of work reviewed in this book. I hope that the information and interventions I present here can be of service to other therapists, lawyers, and researchers who work with this ever-growing population of clients.
CASE STUDY

“It’s Davis,” the woman said on the telephone, “my 10-year-old son. He’s been talking about wanting to die.” Brooke went on to explain that she and her husband had separated 3 months previously. At first, Davis and his 7-year-old sister Beth Ann were shocked and angry. Then Davis became withdrawn. He would go off by himself more than usual and said that he only wanted to talk to God about his problems. He had lost interest in going places and no longer enjoyed riding his bike, playing computer games, or reading. He had been talking to his mother a little more lately but not to his father. Recently, he asked her if he could talk to somebody because he felt depressed and that his life was really bad.

I saw Brooke and her children together and asked Davis and Beth Ann to draw a picture of what the divorce felt like to them. Beth Ann drew a picture of a heart with two cracks running through it, dividing it into three sections, “Mom,” “Davis,” and “Beth Ann,” accordingly, by size. Planted in the “Mom” section was an ax named “Dad.”

Davis, a serious-looking, awkward preadolescent with thick glasses, asked me to help him draw a world map. I roughed out the continents for him, and he set to work with great intensity. He drew spiral shapes in all the oceans, indicating the formation of hurricanes. The spiral shape in the
Atlantic Ocean, he explained, was gaining in strength and was creating spin-off tornadoes on the Eastern seaboard. The spiral shape in the Pacific Ocean merged into a larger shape in red and a still larger spiral in purple that overshadowed the West coast. I asked him to draw where he would be in the picture. Without hesitating, he drew a red dot on Antarctica. “There,” he said. “There in Antarctica. I’m a scientist. I live alone in a little hut, taking weather measurements.”

Brooke explained in a later meeting that she and her husband Walker had always had a turbulent marriage. Both were subject to mood swings, and there was frequent fighting. There had been many threats and vicious things said between them, even some slapping and shoving. One time Walker had retreated to the closet with a gun to his head, threatening suicide. She knew the behavior was wrong but did not know how to stop it. She was not shocked when Walker left. He had done so before. She was unhappy, too, but she would have stayed in the marriage.

In a subsequent meeting, Davis again came in and, without speaking, sat down to work on his picture. He drew furiously, making lines running the length of North and South America, then throughout all the major continents. “These are earthquakes starting, fissures in the earth. They’re occurring all over the earth.” Then he made green dots around all the earthquake lines, then red xs over the green dots. “These are the earthquake sites. They’re everywhere. The world is disintegrating.” Davis went on to say that he felt his happiness was the family, and if the family is broken then his happiness is broken. “I will be sad for eternity,” he said.

A month later, Brooke announced that the divorce was final. Walker was seeing the children erratically. He still did not have an address or telephone number, and his whereabouts were secret. She and Walker had argued about this when he came to get the children. Davis was very distracted in the office. His affect was flat. He announced, “The cracks are lessening, but the storms are widening. The end is coming. The end of life.” He set to work drawing again. “Five asteroids the size of earth are coming into the sun. Boom! Everything is pitch black. The earth is smashed into bits. Antarctica is at first getting smaller and smaller due to global warming. Then it is broken off completely and goes flying through space.”

What does the future hold for Davis and Beth Ann? Can we make reasoned predictions about how this divorce will affect children this age? Are their reactions typical? Are boys and girls affected by divorce in different ways? Will Brooke and Walker continue their conflict? If so, how will this affect their children?

THE BEGINNING OF THE DIVORCE REVOLUTION

To address these issues, we must go back to the beginning of the divorce revolution in the United States. In the late 1960s, American so-
ciety began a great experiment with the structure and foundation of the family that has been unprecedented in modern times. In 1969 California passed the first “no-fault” divorce law, precipitating a surge in the divorce rate that moved eastward throughout the 1970s. Frank Furstenberg (1994) noted that the actual incidence of divorce had been steadily increasing up to that time since the mid-1800s. Studies show that the incidence of divorce after the Civil War, roughly 5%, had increased to an estimated 36% in 1964 (these are lifetime rates). Nevertheless, there was a sharp increase in the divorce rate from the mid-1960s to the late 1970s. Demographer Paul Glick (1979) noted that the proportion of children living with only one parent doubled between 1960 and 1978, from 9% to 18.6%. He predicted that the number would increase to 25% by 1990 at those rates. Although some of this increase was due to the rise in unmarried mothers raising their children alone, most of it was due to the increased divorce rate. Glick estimated that about 28% of all children younger than age 18 in 1976 had parents who would divorce during their childhood, as compared with 12.6% in 1960. He further predicted that this figure would increase to about 33% by 1990.

How do we account for this increase in the divorce rate? Furstenberg, of the University of Pennsylvania, and Andrew Cherlin, of Johns Hopkins University (1991), suggested that the roots of the divorce revolution can be found in what historian Lawrence Stone (1977) labeled the rise of affective individualism in early modern England. By this, Stone was referring to the greater valuing of emotional love in relationships and the pursuit of personal happiness. Americans have always prized personal fulfillment more highly than the bonds of kinship as compared with people in European societies. Family relationships in American society likewise focus more on emotional closeness and expressions of love than on the carrying out of sharply defined social roles.

The civil rights and women’s movements further focused the nation on the principle that it was within the American birthright to pursue individual interests so as to maximize our potential as persons. The human potential movement, as it came to be called, was held to be as much in keeping with the American spirit as life, liberty, and the pursuit of happiness. With this newfound campaign to develop one’s potential to the fullest came a succession of new ideas: that pregnant teenagers should be allowed to bear their children without shame and to keep and raise them, that mothers should be allowed to work if they so chose, and that people who have been chronically unhappy in a marriage should be allowed to end the marriage and pursue their happiness without the social stigma that had been previously attached to divorce.

Before 1969, in all 50 states one could be granted a divorce only if he or she could establish that one party was at fault through one of the following: adultery, desertion, physical or mental abuse, drunkenness or...
drug addiction, imprisonment, or insanity (see Furstenberg & Cherlin, 1991, for a good summary). Before this time, it was common for a man to allow one of these shameful labels to be applied to him in order to obtain the legal grounds for a divorce, even if it may not have been true. Once divorced, a wife was referred to as “a divorcée,” and children were said to be “from broken homes.” Of course, husbands tried to make new lives and live down their reputations as adulterers, deserters, wife beaters, and so on. Such falseness and shame did not fit into the new society of tolerance.

These changes in divorce laws reflected many changes already going on in U.S. society. Families had become smaller, with only one, two, or three children. Americans had moved off the farms and into the cities. Americans were much more affluent than our ancestors and had more education and leisure time. People were more educated and more informed about the world. Television had broadened our knowledge about segments of society whose lives differed from ours.

HISTORY OF DIVORCE AND PARENTHOOD IN THE UNITED STATES

In the late 1800s, the United States was an agricultural society. Men married to have someone to bear their children, and women married to be economically supported during their childbearing years. Children, many of them, were born to run the family farm and to inherit the land. Boys were often sent away as apprentices or to work on farms or in factories. Girls were sent away to work as household help at the home of a relative. Fathers died in wars, mothers died in childbirth, and the extended family had a great part in raising children. Family relationships were not the intense emotional bonds that exist in families today (Furstenberg & Cherlin, 1991; Stone, 1977).

The families of the late 20th century are smaller, more stable, and more intimate. Parents have children to feel fulfilled, to give love to them, and to devote a newfound affluence and leisure time to them. The vast majority of children now live past infancy, and parents become deeply attached to them. If the purpose of having children has changed, the purpose of marriage has changed as well. Americans now view marriage as based on mutual love, companionship, and compatibility. We marry to find happiness, to fulfill ourselves. If we are not happy and not fulfilled, then what is the point of staying married?

With the passage of no-fault divorce laws in nearly every state, married couples can now divorce without the rancorous, stigmatizing, and even false accusations of the past. Mutual unhappiness, written into law as “irreconcilable differences” or statements that “the marriage is irretrievably broken,” now provides a way out for thousands of unhappy couples.
Changes in social attitudes are a circular process. As no-fault laws permitted more divorces, the increasing frequency of divorce made it more acceptable. The growing acceptability of divorce eased the way out for still greater numbers of couples.

With this increased tolerance, the old language of divorce has been replaced by the new language of acceptance. A “divorced woman” now conjures up images of strength and independence. Children are not from “broken homes” but have “binuclear homes.” Single fathers are considered virtuous and self-sacrificing. We seldom hear the terms “adulterer” or “deserter.” The new language now stigmatizes those whose behavior is unacceptable after the divorce, for example, “deadbeat dads” and “absent fathers.”

As Americans embarked on this experiment of no-fault divorce, few people anticipated what was down the road. At first, the process was straightforward: Parents separated as amicably as possible, the mother took custody of the children, and the father gave generous financial support and consented to playing a secondary role in the children’s lives.

Even in the early 1970s, however, further changes were taking place in U.S. society. Women were working in larger numbers—some because it was more acceptable, some because of economics. In the workplace, women were demanding equality. Equality before the law and the easing of sex role stereotypes for women were buzzwords in the 1970s. Furstenberg (1994) suggested that the erosion of gender roles has played a large part in the increasing divorce rate. The increasing focus in society on emotional and personal fulfillment in marriage has occurred concurrently with the opening of opportunities for women to support themselves economically in the workplace. Thus, while marriage has become increasingly disappointing for women, the prospect of raising a child or children alone has become a more viable alternative.

Sex role stereotypes have been easing for men as well. In the 1970s, men were allowed in the delivery room and invited to care for infants. Many men began to participate in the physical care of young children and found that they liked it. Men discovered that the mutual love and sharing of fatherhood was satisfying and began to see it as part of their basic right to fulfill their potential as persons. Dual-career couples became increasingly egalitarian, with more men than in the 1960s acquiring the domestic skills of running a household. Thus, men came to view divorce as more palatable as they were no longer so reliant on the domestic services of wives. Even being the primary custodial parent of the children became increasingly acceptable and doable, thus making the option of divorce more attractive for men as well.

By the mid-1970s, the first judicial opinions began to be handed down in regard to gender equity—that is, the regarding of mothers and fathers as equal before the law in their petition for custody of their children fol-
lowing a divorce (Derdeyn, 1976). A 1974 Illinois opinion stated “Equality of the sexes has entered this field. The fact that a mother is fit is only one facet of the situation, and standing by itself, it does not authorize a denial of custody to the father.” (Marcus v. Marcus, 1974)

By the mid-1980s, gender equity laws had been passed in most states (Wyer, Gaylord, & Grove, 1987). Again, Americans had embarked on a bold new experiment with the family, with unforeseeable consequences. A wave of litigation that began in the mid-1980s still has not begun to abate. Now that fathers are able to assert in court their rights to custody of their children, with some confidence that they will not be rejected outright because of their gender, approximately 15%-25% of couples divorcing with children now engage in bitter emotional disputes over who will obtain the right to raise the children and to make the most important decisions about their well-being (Maccoby & Mnookin, 1992). More than one third of these divorced parents are going back to court years after the divorce to reconsider the custody issues—many of them fathers seeking to reverse custody, to share custody, to alter the decision-making arrangements, or to alter the visitation plan (Foster & Freed, 1973; Scott & Emery, 1987). Father support groups have sprung up around the country to provide information, education, legal advice and referrals, and validation for men who want an enhanced role in their children’s lives.

Fathers’ Right to Custody

Although we Americans think of ourselves as progressive in terms of honoring fathers’ rights to be parents, few people realize how the views of mothers’ and fathers’ rights and responsibilities have changed over the centuries (see Derdeyn, 1976; Warshak, 1992). Most American and English jurisprudence traces its origins to Roman law. In Rome, the father had absolute control over the family, including the children, and they were regarded as the property of the father. The father had the right to sell his children and, under some conditions, even to kill them.

This acceptance of absolute paternal supremacy continued through the Middle Ages. Children were valued as economic assets to the family in much the same way as were servants. Children provided free labor to the family and were put to work by age 7. Because the father was obligated to support the children financially, he was seen as having the right to their labor and their economic value.

It was not until the 16th and 17th centuries that children began to be seen as people who deserved love and affection and some measure of protection. The English courts began to adopt the position that the government had a vested interest in seeing to it that children were protected from harm if the parents failed to do so. Fathers began to be seen as having
the obligation to provide education and training as well as some level of appropriate care and concern.

However, as long as mothers were completely dependent on husbands economically and had few to no legal rights, custody was still automatically awarded to fathers through the 19th century. Children were still valued through the 1800s as a financial asset and as laborers to whose services the father had the rights.

In 1817, the case of poet Percy Bysshe Shelley shocked Great Britain because he was one of the first fathers to lose custody of his children. Viewed as a radical in his day, the court cited his “vicious and immoral” atheistic beliefs as just cause for awarding custody to the children’s mother.

Few of us appreciate the different society that existed 100 years ago with regard to parents’ roles. In 1857 a New York judge found that, although a husband was abusive to his wife, this did not justify a divorce, and added

The only difficulty, if any, in the present case, in regard to the right of the father to retain the child, arises from the child being of tender age, and deriving its sustenance, in part, from the breasts of the mother. But, upon the evidence, I think these circumstances form no obstacle to the father’s rights. (People v. Humphries, 1857)

The rights of fathers to custody of their children were unquestioned throughout the 1800s. Women had few to no rights before the law, and children’s rights were nonexistent. An 1881 Arkansas opinion held that

It is one of the cardinal principles of nature and of law that, as against strangers, the father, however poor and humble, if able to support the child in his own life style, and of good moral character, cannot, without the most shocking injustice, be deprived of the privilege by anyone whatever, however brilliant the advantage he may offer. It is not enough to consider the interests of the child alone. (Verser v. Ford, 1881)

Mothers’ Right to Custody

By the 1900s an entirely new conception of childhood had evolved in American society. As the country became industrialized, fathers left the home to go into the cities to work. Mothers stayed in the home. Their roles diverged so sharply as to be mutually exclusive. Whereas childhood used to be seen as a limited time in which the child was nursed, weaned, toilet trained, and sent to work, childhood in the 20th century came to be seen as a special time of innocence and freedom; of vulnerability and protection; and of playing, exploring, and learning. Children’s toys were first mass marketed around this time, as were children’s furniture, children’s clothing, even children’s literature.
“Childhood” as we know it today had arrived. Child labor laws were enacted to banish children from the mills and factories, and educational laws were passed to keep them in the classroom. Now that childhood had been “invented”—and extended from birth to age 16—a specialized role had to be developed for the nurturance, protection, education, training, and guiding of children for those years, and that was motherhood (Ellis, 1995).

The idea of motherhood, as it was developed in the early 20th century, was elevated to a level comparable to sainthood (see Kagan, 1984, for an overview). Mothers were viewed as selfless, tender hearted, honest, gentle, devoted, protective, sympathetic, religious, and so on. One writer went to sentimental extremes in this 1938 opinion:

There is but a twilight zone between a mother’s love and the atmosphere of heaven, and all things being equal, no child should be deprived of that maternal influence unless it be shown there are special or extraordinary reasons for so doing. (Tuter v. Tuter, 1938)

Although Americans are somewhat embarrassed by sentimental soliloquies on the virtues of motherhood today, we were not in the 1920s. A 1921 legal opinion reads,

For a boy of such tender years nothing can be an adequate substitute for mother love—for that constant ministration required during the period of nurture that only a mother can give because in her alone is duty swallowed up in desire: in her alone is service expressed in terms of love. She alone has the patience and sympathy required to mold and soothe the infant mind in its adjustment to its environment. The difference between fatherhood and motherhood in this respect is fundamental. (Jenkins v. Jenkins, 1921)

In the legal opinions that were handed down in the late 1800s and early 1900s, the term tender years was used often. This term referred to the period of a child’s intense vulnerability and dependence on the mother, specifically thought to be from birth to about age 7 or 8. The courts took the position that society had a compelling interest in seeing to it that children were well cared for during this time. Because mothers were seen as the parent who was specialized in addressing the needs of children of tender years, this legal position became synonymous with the preference for mother custody (Derdeyn, 1976; Warshak, 1992; Wyer et al., 1987).

Two legal opinions of this era, Chapsky v. Wood in 1881 and Finlay v. Finlay in 1925, laid the groundwork for the concept of “the best interests of the child.” In these opinions, the court took the position that the state should look out for the children’s best interests rather than assume that fathers ought to be granted custody automatically. Although in some ways these were radical opinions at the time, they also became synonymous with mother custody. Because mothers were considered uniquely qualified to care