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CURING THE "EVERY-OTHER-WEEKEND SYNDROME": WHY VISITATION SHOULD BE CONSIDERED SEPARATE AND APART FROM CUSTODY

I. INTRODUCTION

Divorce affects hundreds of thousands of families.¹ In response to these divorces, state statutes determine the relationships that a large number of children have with a noncustodial parent. Even in those cases where, either through mediation or negotiation, the parents agree upon the relationships the children will have with each parent, social perceptions of what is appropriate and what the court will order should the parents fail to reach an agreement, drive the parents' perceptions of their respective bargaining positions in a custody contest.² The courts for custody and visitation matters, therefore, have tremendous effects on the relationships these children will have with their noncustodial parents.

Unfortunately, legislatures and courts have placed less emphasis on the relationship between the children and their noncustodial parents than on the determination of with whom the children should reside. When the state statutes use the same guidelines and standards for both "primary physical custody" and "visitation," the potential exists that the determination of "primary physical custody" will dominate the "custody" process, thereby ignoring the determination of "visitation."³ This problem is present to an even greater extent in jurisdictions where courts determine visitation without any statutory guidance.⁴

This Note explains why visitation needs a determination process similar to, yet separate from, primary physical custody. This Note focuses on the child's need for and the child's right to a relationship with both parents. It analyzes the needs of children of divorced parents, the current law regarding custody and visitation, and the reasons why the current state of the law does not meet those needs. Finally, this Note proposes and discusses a new visitation standard.

1. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 1 (1992).

2. See *infra* notes 100-02 and accompanying text.

3. See *infra* notes 154-75 and accompanying text (discussing states' statutory treatment of visitation and custody).

4. See *id.*

There are several issues that this Note does not attempt to resolve, including an analysis of custody determination standards and guidelines. In addition, this Note does not discuss reasons why visitation should be limited, supervised, or denied, because of circumstances such as abuse; nor will it discuss the modification of custody orders. This Note solely addresses visitation determinations between the child and the parents when both parents are fit; it does not address third party visitation, such as grandparent or stepparent visitation. Finally, this Note does not address the issues of gender-based decisions regarding custody and visitation because statistics pertaining to which gender receives custody more frequently are subject to the manipulation of the person or group commissioning the study and are misinterpreted too easily.⁵

Some terms used in this Note need defining at the outset because state statutes and court decisions vary in their use of terminology. For the purposes of this Note, the term "visitation" will refer to the time the child and noncustodial parent spend together, regardless of whether the custodial parent has sole or joint custody of the child. Despite the negative overtones that arise from referring to any time the child and noncustodial parent spend together as a mere "visit,"⁶ visitation is used instead of the terms "parenting time" or "access time" solely because of society's instant recognition and the courts' and statutes' widespread usage. Likewise, "custody" will be used to refer to "primary physical custody," which is the primary physical placement of the child with whom-ever is determined to be the custodial parent.⁷ "Custody" and

5. See generally Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891 (1998) (discussing the effects of gender stereotypes in custody battles).

6. See *Matter of Tate*, 797 S.W.2d 618, 622 (Tenn. Ct. App. 1990) (stating that "[i]n its generally accepted and utilized meaning, visitation implies a brief custody by the visiting relative."); *Heard v. Bell*, 434 S.W.2d 222, 224 (Tex. App. 1968) ("[U]nless definitely specified in the court's finding, visitation means that one parent may visit children who are in the custody of the other parent."); see also STEVEN H. GIFIS, *BARRON'S DICTIONARY OF LEGAL TERMS* 529 (3d ed. 1998) (defining visitation as "the right granted by a court to a parent or other relative who is deprived custody of a child to visit the child on a regular basis.").

7. See *Lerner v. Superior Court for San Mateo County*, 242 P.2d 321, 323 (Cal. 1952) ("The essence of custody is the companionship of the child and the right to make decisions regarding his care and control, education, health, and religion."); *McFadden v. McFadden*, 292 P.2d 795, 799 (Or. 1956).

Custody . . . connotes, among other things, the right of the legal custodian to establish the legal domicile for the child, whereas such right does not abide with the parent who enjoys only the occasional right of visitation, i.e., the right to visit the child wherever it is, at certain time, or to have the child visit the parent for stipulated periods.

Id. (citing *Allen v. Allen*, 268 P.2d 358, 361 (Or. 1954)); see also *J.M.S. v. H.A.*, 242 S.E.2d 696, 697 (W. Va. 1978) (relating "Custody" of a child to "care and keeping," while connoting

"visitation" are the two halves of "Custody;" therefore, the terms shall be used here to avoid confusion.

II. THE NEEDS OF CHILDREN OF DIVORCE

As a result of the disruption of their families, children of divorce face circumstances that are not always found with intact families. This section discusses the stresses divorce can place on children, the potential effects of those stresses, various coping techniques children develop in response to the stresses, and the benefits of maintaining the child's relationship with both parents.

Many different causes for divorce exist. In addition to the stress over the actual or perceived causes of the marital breakdown, the impending family dissolution causes a tremendous amount of stress for family members.⁸ People experience this stress in the forms of distress, depression, loneliness, regret, lack of control, anger, verbal fighting, shortened tempers, and even physical violence.⁹ This stress can occur during several different time periods: before the divorce; during the actual divorce proceedings, including custody/visitation determinations; and after the divorce, if the parents do not maintain the semblance of an amicable relationship.¹⁰ Divorce is not a point in time; it can be an extended process lasting over months or even years, thereby continuing the stresses in each party's life.¹¹

"visitation" as an "act or an instance of visiting," and noting that "custody confers more authority and power upon one in whom it is placed than does the privilege of visiting."); GIFIS, *supra* note 6, at 116 (describing custody as "[t]he care and control of minor children awarded by the court to one parent in a divorce proceeding.").

8. See generally MICHAEL R. STEVENSON & KATHRYN N. BLACK, *HOW DIVORCE AFFECTS OFFSPRING: A RESEARCH APPROACH* (1996) (detailing the effects of divorce on children); FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, *THE FAMILY AND PUBLIC POLICY* (1991); Michael E. Lamb et al., *The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment*, 35 FAM. CONCILIATION CTS. REV. 393 (1997) (discussing the ways divorce and custody arrangements affect children).

9. See Lamb, *supra* note 8, at 394.

10. See Cynthia R. Pfeffer, *Developmental Issues Among Children of Separation and Divorce*, in CHILDREN OF SEPARATION AND DIVORCE: MANAGEMENT AND TREATMENT 23 (Irving R. Stuart & Lawrence E. Abt eds., 1981). See generally NEIL KALTER, *GROWING UP WITH DIVORCE: HELPING YOUR CHILD AVOID IMMEDIATE AND LATER EMOTIONAL PROBLEMS* (1990) (discussing the divorce experience for children and offering coping strategies).

11. See MELINDA BLAU, *FAMILIES APART: TEN KEYS TO SUCCESSFUL CO-PARENTING* 35 (1993).

A. *Stresses of Divorce on Children*

While divorce causes stress for all family members, the children face special concerns.¹² Children are still developing their emotional maturity, cognitive skills, and social skills.¹³ Generally, they do not have the ability to comprehend and mentally digest what is happening around them; the only thing they know is that either mommy or daddy is not going to live with them anymore.¹⁴

Divorce can cause several types of stresses in children, including economic concerns, threats to the parent-child relationship, and potential negative effects from the parent-parent relationship. Generally, parents with custody experience a drop in their standard of living.¹⁵ While economic matters might not be of the greatest concern to younger children for whom the parents provide care, the decreased standard of living that generally accompanies divorce can have effects that are indirectly perceived by children, such as the parents fighting over the amount of support that a parent has paid.¹⁶ The child may subsequently view her relationship with either or both parents as being threatened.¹⁷ While this stress may be diminished once a court determines custody, the child feels anxiety until the court settles the matter, and she continues to feel anxiety over the relationship with the noncustodial parent.¹⁸

The interparental relationship is not always positive in divorces either. Unfortunately, parental conflict throughout divorce is a consistent predictor of maladjustment among children.¹⁹ Because children become sensitive to the relationship between their parents, they easily perceive negativity and outright hostility

12. See generally Pfeffer, *supra* note 10, at 20-33 (discussing the effects of divorce on children's developmental processes); STEVENSON & BLACK, *supra* note 8 (evaluating the effects of divorce on children).

13. See generally STEVENSON & BLACK, *supra* note 8, at 59-126 (addressing the specific types of problems experienced by children of divorce).

14. See BLAU, *supra* note 11, at 108 (describing the level of comprehension of children in a divorcing family).

15. See STEVENSON & BLACK, *supra* note 8, at 33; MACCOBY & MNOOKIN, *supra* note 1, at 127.

16. See STEVENSON & BLACK, *supra* note 8, at 33.

17. See Lamb, *supra* note 8, at 395.

18. See Pfeffer, *supra* note 10, at 30; Lamb, *supra* note 8, at 395-96. See generally W. Glenn Clingempeel & N. Dickson Reppucci, *Joint Custody After Divorce: Major Issues and Goals for Research*, 91 PSYCHOL. BULL. 102 (1982) (discussing the major issues involved in joint custody and its effects on children).

19. See ROBERT E. EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION* 217 (1994).

between parents, thereby causing fear and anxiety in the children.²⁰ This stress may even create a desire by the child to halt a relationship with the noncustodial parent, in order to avoid potential conflict when the parents are together.²¹

B. Effects of Stresses of Divorce on Children

The experiences of children during divorce vary widely, and children may react uniquely to identical experiences.²² Potentially, these stresses may have several effects on children. First, the separation of the child from at least one parent can cause a period of grieving similar to the death of the parent.²³ This grief occurs for several reasons. Primarily, the time spent between the parent and the child will be less than before the parents divorced. In addition, the home environment will be highly stressful due to the reordering and restructuring which accompanies the departure of one parent.²⁴ Finally, the child may feel responsible and subsequently experience guilt or a sense of abandonment.²⁵ However, this grieving experience is not exactly the same as grief experienced because of a death, and the effects may be ameliorated.²⁶ The parents may plan, discuss, and work through the family breakup, potentially including the child as well.²⁷ Each parent also has the possibility of maintaining involvement with the child.²⁸ While society generally condemns divorce, divorce may actually diffuse a negative or malevolent family environment, thus being healthier for the child than having the parents stay together.²⁹

Second, the varying degrees of conflict resolution may or may not subject the child to continual stress.³⁰ Some parents are able to behave amicably toward each other in front of the child, either because they are "faking it" or because they actually are able to

20. See JAMES A. TWAITE ET AL., CHILDREN OF DIVORCE: ADJUSTMENT, PARENTAL CONFLICT, CUSTODY, REMARRIAGE, AND RECOMMENDATIONS FOR CLINICIANS 35-39 (1998) (discussing why conflicts between parents serve as predictions of negative outcomes for children).

21. See *id.*; see also Pfeffer, *supra* note 10, at 20-33.

22. See STEVENSON & BLACK, *supra* note 8, at 8.

23. See Pfeffer, *supra* note 10, at 22.

24. See *id.* at 24-26 (discussing the effects of divorce upon the child's environment).

25. See Lamb, *supra* note 8, at 395.

26. See Pfeffer, *supra* note 10, at 22.

27. See *id.*

28. See *id.*

29. See *id.* at 23.

30. See *id.*

resolve their interpersonal conflicts.³¹ However, in some cases, conflicts persist. These conflicts may potentially involve the child, thereby exposing the child to hostility beyond the stereotypical negativity emanating from one parent towards the other because they are divorced.³² Thus, the same conflicts and negative relationships that existed before the divorce may continue, thereby harming the child.³³ In addition, one parent may co-opt the child to join her in undermining the other parent.³⁴ The child may also perceive an ability to manipulate the parents, either for a reunion or for a perpetuated conflict.³⁵ Finally, friends, family, and relatives may provoke conflict between the parents, thereby exposing the child to continued stress.³⁶

Third, divorce may be detrimental to a child's cognitive development, leading to problems in school performance and behavior.³⁷ Cognition is defined as thought, belief, and information processing.³⁸ One's ability to process information and remember things can be adversely affected by a highly upset and emotional state, such as divorce.³⁹ However, some studies have shown that there are "no lasting effects of divorce on child development."⁴⁰

Fourth, scholars found that the potential negative effects on children's emotional and social development are greater for children of divorce.⁴¹ Studies have demonstrated that children of divorce have more behavioral problems than do children with intact families.⁴² "Generally, parental conflict increases the likelihood of behavioral problems and adjustment difficulty for children."⁴³ In addition, children of divorce are more likely to use illicit substances and be juvenile delinquents.⁴⁴ Children of high conflict divorced

31. *See id.* at 22-26.

32. *See id.* at 23.

33. *See id.*

34. *See id.*

35. *See id.*

36. *See id.*

37. *See* STEVENSON & BLACK, *supra* note 8, at 59-72 (discussing the effects of divorce on a child's cognitive development).

38. *See id.* at 59.

39. *See id.*

40. WILLIAM F. HODGES, INTERVENTIONS FOR CHILDREN OF DIVORCE: CUSTODY, ACCESS, AND PSYCHOTHERAPY 36 (1986).

41. *See* STEVENSON & BLACK, *supra* note 8, at 73-112 (discussing the impact of divorce on gender roles, romantic relationships, and antisocial behavior).

42. *See id.* at 101.

43. *Id.* at 31.

44. *See id.* at 101-07.

couples who continually fight and litigate are also more likely to be emotionally disturbed.⁴⁵

C. *How Children Cope*

Divorce brings a need to cope with life changes. Children develop several coping mechanisms as a result of the various stresses and the effects of such stresses that they encounter. These coping responses may reflect the parents' adjustments to the situation and may mimic the behavior of the parents.⁴⁶ Some of these coping methods address changing belief systems, social support, social problem-solving skills, and avoidance.⁴⁷

During a divorce, children experience changes in beliefs that they hold about family life.⁴⁸ These changing beliefs influence the children's adjustments to divorce.⁴⁹ Moreover, this adjustment to divorce can be positively or negatively affected by the parents' adjustments.⁵⁰ The feelings of loss that occur may require the children to understand that families continue when apart and that children can have more than one home.⁵¹ A related part to this issue revolves around the children's needs to believe that they will continue to receive care.⁵²

Social support is also important to the child's adjustment to divorce.⁵³ Social support is "the existence of people and experiences that lead the individual to believe that he or she is cared for, loved, esteemed, and valued."⁵⁴ Children deal more effectively with stressful life events when they have social support, which is provided by a continued relationship with both parents.⁵⁵

Social problem-solving skills can be both affected and developed during a divorce.⁵⁶ An active approach in dealing with life's

45. See Lamb, *supra* note 8, at 396 (noting that children of divorce were more likely to be emotionally disturbed because the interparental struggle took precedence over the children's personal circumstances and developmental needs).

46. See STEVENSON & BLACK, *supra* note 8, at 35-38 (discussing various coping strategies); see also COMMITTEE ON THE FAMILY GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, DIVORCE, CHILD CUSTODY, AND THE FAMILY 64 (1980) [hereinafter COMMITTEE] (noting that a child's symptoms may mirror those of a parent).

47. See STEVENSON & BLACK, *supra* note 8, at 35-36.

48. See *id.* at 36.

49. See *id.*

50. See *id.*

51. See *id.*

52. See *id.*

53. See *id.* at 37.

54. *Id.*

55. See *id.*

56. See *id.*

frustrations should exist by considering and trying a variety of approaches in one's own life or seeking information from others.⁵⁷ This process is facilitated when both parents actively participate in the child's life during a divorce.⁵⁸

Avoidance is the fourth means of coping with the stresses of divorce.⁵⁹ It is characterized by avoiding stress, either actively or passively.⁶⁰ Developing a pattern of avoidance as a means of coping with the stresses of divorce, however, can lead to problems in present and future relationships for children.⁶¹ Feelings of loss or betrayal may cause the child to avoid future relationships which could expose her to similar betrayal again.⁶² This phenomenon may also lead to frustration for noncustodial parents when their access to their children causes more stress in the children, thus potentially causing the noncustodial parent to withdraw herself from the family, in order to reduce stress around the child.⁶³

D. Benefits of the Relationship Between the Child and the Noncustodial Parent

In light of the stresses of divorce, the effects of those stressors, and the potential methods of coping with those effects, several positive benefits result from maintaining the relationship between the child and the noncustodial parent. For instance, continued contact between the child and the noncustodial parent may lead to improved cognitive and social development for the child.⁶⁴ It will also help the child address negative feelings about the divorce.⁶⁵ Finally, it may improve or reinforce the noncustodial parent's willingness to contribute her financial support.

Maintaining the relationship between the child and the noncustodial parent may have significant positive effects on the cognitive and social development of the child. Although the frequency and predictability of visitation may not be determinative of the child's post-divorce adjustment, the quality of the relation-

57. *See id.*

58. *See id.* at 36.

59. *See id.* at 37.

60. *See id.*

61. *See id.* at 38.

62. *See id.*

63. *See HODGES, supra* note 40, at 151.

64. *See infra* notes 66-68 and accompanying text.

65. *See infra* notes 69-74 and accompanying text; *see also* COMMITTEE, *supra* note 46, at 66-68 (noting studies detailing the consequences of separation on children).

ship with the noncustodial parent is important.⁶⁶ Even under conditions of high interparental conflict, cognitive development is shown to improve with frequent contact between the child and the noncustodial parent.⁶⁷ In addition, the relationship between the child and the noncustodial parent may benefit the social development of the child. "Basic trust and self-esteem are maintained in the child by having predictable parents who care."⁶⁸

Moreover, the relationship may assist both the parents and the child when working through their negative feelings concerning the divorce.⁶⁹ The child may experience feelings of stress, guilt, loss, or inadequacy over the divorce.⁷⁰ Many children feel that the divorce is their fault, causing them to carry this emotional guilt for the rest of their lives, affecting every serious relationship they subsequently have.⁷¹ The child needs the emotional support of both parents for several reasons. Each parent then has the opportunity to show her "side of the story," potentially defusing negative comments and characterizations made by the other parent.⁷² Even if the parent does not affirmatively explain the other's negative statements, the parent is present to serve as an example and role model, thus counteracting untrue statements made by the other parent. Moreover, each parent may have something different to offer the child in terms of emotional support, thereby complementing each other.⁷³ The child will feel less guilt or inadequacy when she is able to maintain a stable, strong relationship with the noncustodial parent, rather than when the noncustodial parent and the child have a weak relationship or none at all.⁷⁴

Maintaining this relationship also has societal benefits. When noncustodial parents have meaningful relationships with their children, they are more willing and likely to contribute financial support.⁷⁵ This support ranges from paying court-ordered child support to paying willingly for other expenses. When noncustodial parents have a strong relationship with their children, the financial

66. See TWAITE, *supra* note 20, at 336.

67. See Rex Forehand et al., *Interparental Conflict and Paternal Visitation Following Divorce: The Interactive Effect on Adolescent Competence*, 20 CHILD STUDY J. 193, 199 (1990).

68. HODGES, *supra* note 40, at 151.

69. See Clingempeel & Reppucci, *supra* note 18, at 107.

70. See Pfeffer, *supra* note 10, at 23.

71. See *id.*

72. See Forehand, *supra* note 67, at 199.

73. See Clingempeel & Reppucci, *supra* note 18, at 109.

74. See *id.* at 107.

75. See JUDITH CASSETTY, *THE PARENTAL CHILD-SUPPORT OBLIGATION* 144-47 (1983) (noting a correlation between the frequency of parental visits with the child and the willingness to financially support the child).

burden of supporting the child is less likely to seem so onerous.⁷⁶ In addition, when noncustodial parents are supported by the courts in maintaining this strong relationship, they tend to pay child support more regularly.⁷⁷ This phenomenon upholds the child's economic interests, but also has important social implications in that it is far more effective and efficient to encourage and enforce visitation than to pursue noncustodial parents with child support enforcement services.⁷⁸ It takes fewer resources to make noncustodial parents feel as though they are part of their children's lives and thus willingly pay child support, than to focus upon a child support enforcement system which pursues garnishment of wages and other collection means without any connection to visitation.⁷⁹

In summary, due to the stresses, their effects, and coping mechanisms of children of divorce, these children are at a heightened risk for problematic development. However, these risks are ameliorated when the children have a strong relationship with their noncustodial parents.

III. WHY A VISITATION STANDARD IS NECESSARY

"In the best of all possible worlds, all parents would agree that their concern for their children's welfare is separate, apart from, and transcends any animosity, feelings of rejection or desire for revenge, or self-interest the parents may have with regard to each other."⁸⁰ However, any conflict between the parents may prevent the custodial parent from agreeing upon visitation. In order to counter the effects of these circumstances, the judicial system needs a visitation standard which will ensure that children and noncustodial parents are able to maintain the strong relationships with each other that are necessary for the healthy development of the child, both during and after the divorce.

Two basic policies behind visitation exist. The first policy involves the right of the child to the emotional, social, and educational benefits resulting from the most stable relationship possible with both parents.⁸¹ The second policy consists of the right of the

76. *See id.*

77. *See* JESSICA PEARSON & JEAN ANHALT, THE CENTER FOR POLICY RESEARCH, THE VISITATION ENFORCEMENT PROGRAM: IMPACT ON CHILD ACCESS AND CHILD SUPPORT 11 (1992) (noting a correlation between visitation and economic support).

78. *See* CASSETTY, *supra* note 75, at 152-55.

79. *See id.*

80. FLORENCE W. KASLOW & LITA L. SCHWARTZ, THE DYNAMICS OF DIVORCE 116 (1987).

81. *See supra* notes 64-74 and accompanying text.

noncustodial parent to know and share the love of the child.⁸² Whereas a custody determination contains the standard for governing who shall have primary physical custody of the child as well as guidelines for making that determination, a visitation determination should contain the means for governing the access that the child and the noncustodial parent will have to each other and the guidelines for determining that access. By deciding on the access, the visitation standard offers several benefits in that: (1) it ensures that the child's and the noncustodial parent's rights of access to each other will be protected; (2) it ensures that the child's needs for a relationship with both parents will be protected; (3) it provides clear guidance for decision-makers in visitation disputes; and (4) it clarifies what the courts will order and enforce in the absence of an agreement on visitation between the parents, further reducing sources of arguments between parents.

A. *Rights of Access*

Children have a right of access to both parents, including the noncustodial parent.⁸³ The relationship between children and parents is a vital one that is accorded much protection by the courts.⁸⁴ This relationship, when disrupted by divorce, is subject to control by the state, due to the state's *parens patriae* interest in protecting children when their physical or mental health is jeopardized.⁸⁵ Children's rights of access to their noncustodial parents are important. "Sound public policy encourages the maintenance of the parent-child relationship."⁸⁶ When the courts protect that right of access on the child's behalf, rather than leaving the child in the position where the child must invoke it on her own behalf, the child, theoretically, is shielded from the conflict between the parents.⁸⁷

82. See *In re Marriage of Delf*, 528 P.2d 96, 99 (Or. Ct. App. 1974).

83. See *In re Welfare of J.D.N.*, 504 N.W.2d 54, 58 (Minn. Ct. App. 1993) ("Rights that flow to the child from the parent and child relationship certainly include visitation with the noncustodial parent.").

84. See *Davis v. Smith*, 583 S.W.2d 37, 40 (Ark. 1979) (en banc) ("[T]he rights of parents to the care, custody, and upbringing of their children are the subject of constitutional protection on both due process and equal protection standards.").

85. See *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979) ("[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.").

86. *In re Marriage of Campbell*, 633 N.E.2d 797, 804 (Ill. App. Ct. 1993) (affirming the principle that only in extreme cases may the court deprive parents of visitation).

87. See HODGES, *supra* note 40, at 151.

The custodial parent is often hurt and angry at the noncustodial parent. If the child is attached to the custodial parent, the wish to please that parent may place the child in a very rough position. Expression of a wish to see the other parent may invite upset and rejection. Clear visitation rules free the child from some of the psychological pressures of pleasing each parent.⁸⁸

Today, although courts focus predominately on the best interests of the child in most custody and visitation determinations, noncustodial parents also have rights of access to their children which are often overlooked in the best interests determination.⁸⁹ Noncustodial parents' visitation rights ensue from the fact that they are their children's parents.⁹⁰ This right is essential to the continuance and maintenance of their parent-child relationship.⁹¹ Even in the absence of an express order of visitation, the parent who does not have custody of a child has a legal right to visit the child. However, this right generally does not permit the parent to force the child to visit her against that child's wishes.⁹²

A clearly defined and easy-to-follow visitation standard satisfies the children's needs to have relationships with both parents. This need is great because of the increased stresses of divorce and their potential negative effects on the children.⁹³ Moreover, as stated previously, children have a greater risk of suffering from stress.⁹⁴ The negative effects of divorce can be ameliorated, however, when the child and the noncustodial parent maintain a strong personal relationship.⁹⁵ A visitation standard which promotes this parent-child relationship also protects children

88. *Id.*

89. See *infra* notes 117-22 and accompanying text (describing the use of the best interests standard in custody determinations).

90. See *Clarke v. Clarke*, 217 P.2d 401 (Cal. 1950) (en banc) (noting that in the absence of an express prohibition in the divorce decree, visitation rights ensue by right of parenthood).

91. See *Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978) ("[V]isitation is to be regarded as a parental right essential to the continuance and maintenance of a child-to-parent relationship between the child and noncustodial parent.").

92. See *In re Marriage of Brown*, 597 N.E.2d 1297 (1992) (stating that if a young adult is unwilling to visit the noncustodial parent, the trial court may not hold the custodial parent in contempt for violating a visitation decree).

93. See *supra* Parts II.A, II.B (discussing the various causes and effects of divorce).

94. See *supra* notes 12-14 and accompanying text (discussing the effect of divorce on children).

95. See *supra* Part II.D (discussing the positive effects of a strong relationship between a child and the non-custodial parent).

from the negative effects that could occur if that relationship were to be weakened or dissolved entirely.⁹⁶

B. Guidance for Decision-Makers

A visitation standard provides guidance for decision-makers, such as judges. This guidance is necessary because many of these decision-makers lack training or experience in addressing the needs of children of divorce.⁹⁷ Rather than forcing the decision-makers to use their discretion and rely solely upon their own judgment or lack of experience, a visitation standard provides guidelines for them.

C. Guidance for Parents

In addition to providing guidance for the decision-maker, an easily understood visitation standard allows parents to better predict what the decision-maker will order should the parents be unable to agree upon visitation. In certain states, the courts also allow parties to negotiate the custody and visitation arrangements and present them to the court for approval.⁹⁸ However, because of the parents' emotional involvement in the divorce proceedings, they may be unable to objectively decide what the children need. Furthermore, they may lack the knowledge to determine which judicial processes should govern custody and visitation. Moreover, in contentious divorces, an increased tendency for one or both parties to viciously litigate custody and visitation may exist.⁹⁹ Thus, parent-created visitation arrangements are frequently not successful.

A visitation standard provides the best alternative to a negotiated agreement, allowing a party to understand what the decision-maker would order so that the noncustodial parent does not have to settle for less than the decision-maker would grant. This provides tremendous leverage for noncustodial parents, as they neither lose time with the child nor bargain away other issues, such as spousal support or custody, in order to have more time with

96. See *supra* notes 8-45 (discussing the various causes and effects of divorce).

97. See Norman Scheresky, "Know Thy Judge," in *CONTEMPORARY MATRIMONIAL LAW ISSUES: A GUIDE TO DIVORCE ECONOMICS AND PRACTICE* 641 (Henry H. Foster, Jr. & Ronald L. Brown eds., 1985) ("It is not at all uncommon . . . that many judges adopt views based on their own marriage rather than on the laws they are obliged to follow.").

98. See ARIZ. REV. STAT. § 25-317 (1998); CAL. CIV. CODE § 4600.1 (West 1998).

99. See generally PEARSON & ANHALT, *supra* note 77 (discussing the relationship between child access and child support).

the child.¹⁰⁰ Consequently, the standard may reduce the number of disputes over visitation because the parties will know what to expect from the judge should they fail to reach an agreement.¹⁰¹ A visitation standard, therefore, is necessary to protect the children's rights of access with their noncustodial parents, to protect their relationships with their noncustodial parents, to provide guidance for decision-makers, and to reduce arguments that the visitation issue may elicit.

IV. THE CURRENT STATE OF CUSTODY AND VISITATION LAW

Custody and visitation law has developed within the last one hundred and fifty years. The history of custody law is "reflective of the greater social and economic forces that shape values and thus the law these values create[]."¹⁰² This section will analyze the interaction between custody and visitation by providing an historical overview (including the different theories of custody determination and the different societal views on the issue of custody), as well as the current state of the law (including how the states implement the prevalent custody and visitation standards).

A. *History of the Development of Custody and Visitation Law*

Over time, several different theories of custody determination have evolved.¹⁰³ In the mid- to late-nineteenth century, fathers were awarded custody of children on the presumption that they owned the children.¹⁰⁴ Gradually, in the early twentieth century, this view was replaced with the "tender years" doctrine, a maternal preference standard.¹⁰⁵ The tender years doctrine stated that children under a certain age (varying by state),¹⁰⁶ were more stable when placed in the custody of their mothers.¹⁰⁷ This was predicated

100. See MICHAEL WHEELER, *DIVIDED CHILDREN: A LEGAL GUIDE FOR DIVORCING PARENTS* 63 (1980).

101. See EMERY, *supra* note 19, at 67.

102. JAMES BLACK & DONALD CANTON, *CHILD CUSTODY* 15 (1989).

103. See generally MARY ANN MASON, *FROM FATHERS' PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* (1994) (tracing the historical development of legal rules determining who should have custody and control over a child).

104. See BLACK & CANTON, *supra* note 102, at 4.

105. See MACCOBY & MNOOKIN, *supra* note 1, at 7.

106. See COMMITTEE, *supra* note 46, at 29.

107. See THOMAS OAKLAND, *DIVORCED FATHERS* 106 (1984).

on the belief that women were more nurturing than men and were also more capable of meeting the needs of young children.¹⁰⁸

Gradually, the tender years doctrine eroded. The movement toward gender equality during the 1960s fostered the idea that men and women were equally capable of nurturing and taking care of children.¹⁰⁹ The greater movement of women into the workforce and out of their traditional roles of homemaker and caretaker spurred the break-up of gender stereotypes.¹¹⁰ During the 1970s, some courts also struck down gender-preference determinations under the Equal Protection Clause.¹¹¹

The primary caretaker doctrine replaced the tender years doctrine. The primary caretaker doctrine states that the child's welfare would be better served if the court placed the child with the parent who had been the child's primary caretaker before the divorce.¹¹² The premise behind the primary caretaker doctrine is the belief that the child would best survive the rigors of divorce and would best have her needs met by staying with the parent who had attended to her caretaking and needs the most.¹¹³ This doctrine was further based on the assumptions that the person who had attended to the child before the divorce was the most knowledgeable of the two parents as to the child's needs, and that the child had a greater emotional bond with that parent.¹¹⁴ The perceived advantages of this doctrine included that it was easily determinable and gender-neutral.¹¹⁵ However, in practice, this supposedly gender-neutral determination came to favor women far more than men because women were still more likely to have been the primary

108. See *Bradwell v. State*, 83 U.S. 130 (1872) (holding that a state's refusal to grant a woman a license to practice law did not violate the U.S. Constitution). Justice Bradley stated in his concurring opinion that "[t]he paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother." *Id.* at 141. See also Kathryn L. Mercer, *A Content Analysis of Judicial Decision-Making—How Judges Use the Primary Caretaker Standard to Make a Custody Determination*, 5 WM. & MARY J. WOMEN & LAW 1, 26 (1998).

109. See Leighton E. Stamps et al., *Judicial Attitudes Regarding Custody and Visitation Issues*, 25 J. DIVORCE & REMARRIAGE 23, 25 (1996).

110. See MACCOBY & MNOOKIN, *supra* note 1, at 8.

111. See U.S. CONST. amend. XIV; see also *State ex rel. Watts v. Watts*, 350 N.Y.S.2d 285 (1973); *Orr v. Orr*, 440 U.S. 268 (1979).

112. See *Garska v. McCoy*, 278 S.E.2d 357, 362 (W. Va. 1981) (creating a presumption in favor of the primary caretaker parent if she meets the minimum objective standard for being a fit parent); see also WEBSTER WATNIK, *CHILD CUSTODY MADE SIMPLE* 43 (1997) (listing the current primary caretaker, established residence, logistics, religion, remarriage, sex, drinking and drugs, abuse and violence, work and income, school, and children's issues as being the factors that influence custody determinations).

113. See *Garska*, 278 S.E.2d at 362-63.

114. See *id.* at 364; see also SCOTT E. FRIEDMAN, *THE LAW OF PARENT-CHILD RELATIONSHIPS* 155-56 (1992).

115. See EMERY, *supra* note 19, at 75.

caretakers during this time period, despite the advances toward gender equality.¹¹⁶

The latest standard is the "best interests of the child" standard. The best interests standard is designed to look at the totality of the circumstances surrounding the child and determine her placement with the parent who will best serve the child's interests.¹¹⁷ This standard has gained widespread acceptance among the states due to its goals.¹¹⁸ However, it has come under criticism for its vagueness because there is no standard definition of what constitutes the best interests of the child.¹¹⁹ This standard is generally accompanied by guidelines directing the decision-maker to look at certain factors to determine which home and parent would best serve the child's interests.¹²⁰ These factors include: the wishes of the child's parents as to her custody; the wishes of the child as to her custodian; the interaction and interrelationship of the child with her parents or other relevant persons; the child's adjustment to her home, school, and community; and the mental and physical health of all individuals involved.¹²¹ However, these six factors do not disclose all of the relevant information to show where the child's best interests are truly served. Thus, in almost all of the states, the custody determination is made according to the best interests of the child standard, accompanied by guidelines directing the decision-maker to look at several additional factors.¹²²

In addition to the aforementioned progression of custody determinations in state statutes, changes in how society views divorce and custody have also evolved.¹²³ In the past, society looked upon divorce as being the result of a failure to work, or a failure to want to keep the marriage intact, or as the result of a fault of one or both parties.¹²⁴ Society still tends to disfavor divorce.¹²⁵

116. See Cheryl Buehler & Jean M. Gerard, *Divorce Law in the United States: A Focus on Child Custody*, 44 FAM. REL. 439, 442 (1995).

117. See EMERY, *supra* note 19, at 74-75.

118. All states use the best interests of the child standard, with the exception of West Virginia, which uses the primary caretaker standard. See generally Garska, 278 S.E.2d 357.

119. See Buehler & Gerard, *supra* note 116, at 441; EMERY, *supra* note 19, at 74; see also WATNIK, *supra* note 112, at 42 (noting that some critics have argued that the best interests standard creates judicial bias resulting in decisions that vary by judge).

120. See, e.g., UNIFORM MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 282 (1998).

121. See *id.*

122. See *infra* notes 154-56 and accompanying text.

123. See generally LYNNE CAROL HALEM, *DIVORCE REFORM* (1980) (discussing the changes in divorce law and the changing attitudes towards divorce over time).

124. See ALLEN PARKMAN, *NO-FAULT DIVORCE: WHAT WENT WRONG?* 13 (1992).

125. See FURSTENBERG & CHERLIN, *supra* note 8, at 6-7 (discussing how attitudes against divorce have relaxed over time).

However, some people view divorce as a necessarily contentious situation. Frequent arguing may provide these individuals with some therapeutic benefit, allowing them to express their anger and hurt at the perceived reasons for the divorce, regardless of the true causes.¹²⁶ These parents may view every issue throughout the divorce proceeding, including custody, as a win or lose situation.¹²⁷ Members of society, when looking from the outside, tend to shape their views to conform to this combative stereotype.¹²⁸

It is no surprise that, given this stereotypical view of divorce as war, people view custody as a win or lose situation. Whoever gets custody of the child wins, and whoever does not get custody loses. The statutes tend to reflect this view.¹²⁹ Thus, for many years, "Custody" of the child meant that one parent was awarded "Sole Custody," thereby having physical possession of the child and having sole decision-making authority in her life. The noncustodial parent was awarded "Visitation," meaning that the noncustodial parent had scheduled time with the child.¹³⁰ This system reduced the noncustodial parent's status to less than that of a parent, as she had little or no authority to make decisions in the child's life. In a vicious cycle, this reinforced the stereotype that noncustodial parents were not important to their children's lives, resulting in others not treating them as the real parents of their children.¹³¹ Many noncustodial parents perceived from both society and the courts an attitude that they should be thankful for whatever time they had with their children. Other noncustodial parents also felt that they should be grateful that the court ordered any visitation or that the custodial parent agreed to it through negotiations or mediation.¹³²

126. See COMMITTEE, *supra* note 46, at 101-03.

127. See Christy L. Hendricks, Note, *The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview*, 16 U. LOUISVILLE J. FAM. L. 491, 494 (1994).

128. See STEVENSON & BLACK, *supra* note 8, at 2.

129. For example, the Alaska statute states "if there is a dispute over child custody . . . [t]he court shall award custody on the basis of the best interests of the child." ALASKA STAT. § 25.20.060(a) (Michie 1997) (emphasis added).

130. See generally MASON, *supra* note 103 (tracing the historical development of legal rules determining who shall have custody and control over a child).

131. See WHEELER, *supra* note 100, at 62 (discussing the stereotype of the lesser important non-custodial parent). But see generally GERALD SILVER & MYRNA SILVER, WEEKEND FATHERS (1981) (discussing the positive experiences of non-custodial fathers).

132. See Daniel C. Schuman, *Psychiatric Aspects of Custody Loss*, in CHILDREN OF SEPARATION AND DIVORCE: MANAGEMENT AND TREATMENT 54-75 (Irving R. Stuart & Lawrence E. Abt eds., 1981).

Some notions about divorce have changed slightly over the past few decades. The rise of no fault divorce has led the courts away from the traditional view of divorce that relied upon an adversarial system, dependent upon proof of fault.¹³³ In addition, divorce has become fairly common today, as compared to in the past.¹³⁴ Along with the rise in the number of divorces has also come an acceptance that marriages are dissolved, not because individuals are irresponsible or at fault, but because sometimes spouses simply cannot co-exist.¹³⁵

Legislatures introduced the concept of joint custody to allow both parents to have decision-making authority in their child's life and to be equally recognized as parents to their children.¹³⁶ Because a child simply cannot live with both parents at once, the court grants "primary physical custody" to one parent and "parenting time" or "access time" to the noncustodial parent.¹³⁷ The premise behind joint custody is that both parents can cooperate and parent their child together, regardless of the fact that they are no longer married.¹³⁸

Although initially courts only ordered joint custody in cases where the parents clearly were able and willing to cooperate with each other, in some states, courts order it even when one parent does not endorse it.¹³⁹ This phenomenon has evolved with the gradual recognition that a lack of primary physical custody does not, and should not, terminate a parent's ability or authority to be a parent to her children.¹⁴⁰ Today, the emerging view of custody is that joint custody permits both parents to remain active parents,

133. See PARKMAN, *supra* note 124, at 13.

134. See OAKLAND, *supra* note 107, at 107.

135. See *id.*

136. See FRIEDMAN, *supra* note 114, at 166.

[J]oint custody typically implies a situation following a divorce in which both parents continue to exercise shared responsibility for their child's upbringing. This responsibility typically addresses significant matters in a child's life It does not necessarily require joint physical custody . . . [where the] child may share relatively equal time with both parents A decision to award joint custody is generally based on the court's discretion that such a relationship would be in the best interests of the child.

Id.

137. See, e.g., MICH. COMP. LAWS ANN. §§ 722.26a, 722.27 (West 1993) (providing for custody grants to both the custodial and non-custodial parents).

138. See FRIEDMAN, *supra* note 114, at 166.

139. For example, some states allow joint custody when both parents want it or only one parent wants it. See, e.g., ALA. CODE § 30-3-1 (1989 & Supp. 1997); NEV. REV. STAT. ANN. § 125.490 (Michie 1997).

140. See *infra* notes 144-51 and accompanying text (describing the importance of a relationship between the child and a noncustodial parent).

even though the child cannot simultaneously live with both of them.¹⁴¹

B. Overview of Current Custody and Visitation Law

The current state of divorce law requires analysis. In order to understand how state legislatures have provided for the relationship between the child and parents after separation or divorce, it is important to study the various themes in this area of the law. This section will discuss public policy declarations behind custody and visitation law, the standards used for determining custody and visitation, and the factors included in the custody and visitation standards.

1. Declarations of Legislative Intent

A few states actually declare the legislative intent, or public policy determinations, behind their custody and visitation statutes.¹⁴² Most states, however, do not make any mention of the policy behind their custody and visitation determinations, beyond mentioning the "best interests" standard.¹⁴³

Of the states with express legislative declarations, the intent is expressed as twofold: to assure that the child has a meaningful relationship with both parents after the separation or dissolution of the marriage, and to encourage parents to share the rights and responsibilities of raising the child.¹⁴⁴ The relationship between the child and her parents is variously stated as: "frequent and continuing contact,"¹⁴⁵ "reasonable and continuing contact,"¹⁴⁶ "frequent associations and a continuing relationship,"¹⁴⁷ or "the opportunity for maximum continuing physical and emotional

141. See FRIEDMAN, *supra* note 114, at 166.

142. See COLO. REV. STAT. § 14-10-124 (1998); FLA. STAT. ANN. § 61.13 (West 1997); IOWA CODE ANN. § 598.41 (West Supp. 1998); NEV. REV. STAT. ANN. § 125-460 (Michie 1998); N.J. STAT. ANN. § 9:2-4 (West Supp. 1998); 23 PA. CONS. STAT. ANN. § 5301 (West 1991 & Supp. 1998) (providing declarations of policy by state legislatures).

143. See, e.g., N.C. GEN. STAT. § 50-13.2(b) (1995) ("Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child.").

144. While the language may differ, these declarations share the same intent. See *infra* notes 145-51 and accompanying text.

145. See COLO. REV. STAT. § 14-10-124 (1998); FLA. STAT. ANN. § 61.13 (West 1997); N.J. STAT. ANN. § 9:2-4 (West Supp. 1998) (mentioning frequent and continuing contact as being the goal of custody and visitation determinations).

146. 23 PA. CONS. STAT. ANN. § 5301 (West 1991 & Supp. 1998).

147. NEV. REV. STAT. ANN. § 125-460 (Michie 1998).

contact."¹⁴⁸ The sharing of rights and responsibilities between the parents is variously stated as an encouragement,¹⁴⁹ an assurance,¹⁵⁰ or an urging.¹⁵¹

Thus, only the few aforementioned states clearly announce the objectives of their custody and visitation determinations. While others may state the intent of the determination within their statutes, the majority of the states do not offer any legislative purpose. For example, Arkansas states that "custody shall be awarded in such a way as to assure the frequent and continuing contact of the child with both parents."¹⁵² Of the states that have no explicit declaration of legislative intent or public policy, some have a stated purpose within their custody and visitation statutes.¹⁵³

2. *Custody and Visitation Standards*

Twenty states provide for visitation to be determined separately from custody.¹⁵⁴ Thirty states have no separate visitation provisions; they either provide for visitation to be determined along with custody in an overall "Custody" determination or make no mention of visitation at all.¹⁵⁵ All states but West Virginia use the

148. IOWA CODE ANN. § 598.41 (West Supp. 1998).

149. See IOWA CODE ANN. § 598.41 (West Supp. 1998); NEV. REV. STAT. ANN. § 125-460 (Michie 1998); N.J. STAT. ANN. § 9:2-4 (West Supp. 1998).

150. See 23 PA. CONS. STAT. ANN. § 5301 (West 1998) (declaring that the goal of the legislature is "to assure a reasonable and continuing contact of the child with both parents.").

151. See COLO. REV. STAT. § 14-10-124 (1998) (declaring that the legislature "urges parents to share the rights and responsibilities of child-rearing.").

152. ARK. CODE ANN. § 9-13-101 (Michie 1997).

153. See ARIZ. REV. STAT. ANN. § 25-408A (West Supp. 1998) (noting that "[a] parent not granted custody of the child is entitled to reasonable visitation rights to ensure that the minor child has frequent and continuing contact with the noncustodial parent.").

154. See ARIZ. REV. STAT. ANN. § 25-337 (West Supp. 1998); CAL. FAM. CODE § 3100 (West Supp. 1999); DEL. CODE ANN. tit. 13, § 728 (Supp. 1998); HAW. REV. STAT. ANN. § 571-46 (Michie Supp. 1997); 750 ILL. COMP. STAT. ANN. 5/607 (West Supp. 1998); IOWA CODE ANN. § 598.41 (West Supp. 1998); KY. REV. STAT. ANN. § 403.320 (Michie Supp. 1996); LA. CIV. CODE ANN. art. 136 (West Supp. 1999); MICH. COMP. LAWS ANN. § 722.27 (West Supp. 1998); MINN. STAT. ANN. § 518.175 (West Supp. 1999); MO. ANN. STAT. § 452.400 (West 1997); N.D. CENT. CODE § 14-05-22 (1997); OHIO REV. CODE ANN. § 3109.051 (West Supp. 1998); OKLA. STAT. ANN. tit. 43, § 112 (West Supp. 1999); 23 PA. CONS. STAT. ANN. § 5303 (West Supp. 1998); R.I. GEN. LAWS § 15-5-9 (1996 & Supp. 1998); TENN. CODE ANN. § 36-6-301 (Supp. 1998); TEX. FAM. CODE ANN. § 153.311 through § 153.317 (West 1996 & Supp. 1999); UTAH CODE ANN. § 30-3-5 (1998); WYO. STAT. ANN. § 20-2-113 (Michie 1997).

155. See ALA. CODE § 30-3-1 (1989 & Supp. 1997); ALASKA STAT. § 25.20.060 (Michie 1998); ARK. CODE ANN. § 9-13-101 (Michie 1998); COLO. REV. STAT. § 14-10-124 (1998); CONN. GEN. STAT. ANN. § 46b-56 (West Supp. 1997); FLA. STAT. ANN. § 61.13 (West 1997); GA. CODE ANN. § 19-9-1 (Supp. 1998); IDAHO CODE § 32-717B (1996); IND. CODE ANN. § 31-17-2-8 (Michie 1997); KAN. STAT. ANN. § 60-1610 (Supp. 1997); ME. REV. STAT. ANN. tit. 19-A, § 1653 (West

"best interests of the child" standard when determining custody.¹⁵⁶

Of the twenty states that have separate visitation provisions, the statutes range from providing no guidance, other than the mention of the term "visitation," to setting guidelines for the visitation time periods. Ten states direct the decision-maker to order visitation,¹⁵⁷ reasonable visitation,¹⁵⁸ reasonable visitation rights,¹⁵⁹ or liberal visitation where appropriate.¹⁶⁰ Two states direct the decision-maker to consider the child's best interests when determining visitation.¹⁶¹ Four states emphasize the maintenance of the parent-child relationship between the child and the noncustodial parent,¹⁶² and two states emphasize the maintenance of the parent-child relationship between the child and both parents.¹⁶³ Pennsylvania directs the decision-maker to consider "any other factor which legitimately impacts the child's physical, intellectual, and emotional wellbeing."¹⁶⁴ The Texas statute is unique because it has standardized time periods for the visitation, which are presumed to be in the best interests of the child.¹⁶⁵

1998); MD. CODE ANN., FAM. LAW § 5-203 (Supp. 1998); MASS. GEN. LAWS ANN. ch. 208, § 28 (West 1998); MISS. CODE ANN. § 93-5-24 (1994 & Supp. 1998); MONT. CODE ANN. § 40-4-212 (1998); NEB. REV. STAT. § 42-364 (Supp. 1997); NEV. REV. STAT. ANN. § 125.480 (Michie 1998); N.H. REV. STAT. ANN. § 458:17 (1992 & Supp. 1998); N.J. STAT. ANN. § 9:2-4 (West Supp. 1998); N.M. STAT. ANN. § 40-4-9 (Michie 1994 & Supp. 1998); N.Y. DOM. REL. LAW § 240 (Consol. Supp. 1998); N.C. GEN. STAT. § 50-13.2 (1995); OR. REV. STAT. § 107.137 (Supp. 1999); S.C. CODE ANN. § 20-3-160 (Law. Co-op. 1985 & Supp. 1998); S.D. CODIFIED LAWS § 25-4-45 (Michie Supp. 1998); VT. STAT. ANN. tit. 15, § 665 (1989 & Supp. 1998); VA. CODE ANN. § 20-124.2 (Michie Supp. 1998); WASH. REV. CODE ANN. § 26.09.184 (West 1997 & Supp. 1999); W. VA. CODE § 48-2-15 (1998); WIS. STAT. ANN. § 767.24 (West Supp. 1998).

156. See *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981) (establishing the use of the primary caretaker standard when determining custody).

157. See OKLA. STAT. ANN. tit. 43, § 112 (West Supp. 1999); WYO. STAT. ANN. § 20-2-113 (Michie 1997).

158. See HAW. REV. STAT. ANN. § 571-46 (Michie Supp. 1997).

159. See CAL. FAM. CODE § 3100 (West Supp. 1999); 750 ILL. COMP. STAT. ANN. 5/607 (West Supp. 1998); KY. REV. STAT. ANN. § 403.320 (Michie Supp. 1996); LA. CIV. CODE ANN. art. 136 (West Supp. 1999); MO. ANN. STAT. § 452.400 (West 1997); R.I. GEN. LAWS § 15-5-9 (1996 & Supp. 1998).

160. See IOWA CODE ANN. § 598.41 (West Supp. 1998).

161. See DEL. CODE ANN. tit. 13, § 728 (Supp. 1998) (stating that the court will determine custody and visitation according to the "child's best interests and maturity."); see also UTAH CODE ANN. § 30-3-5 (1998) (explaining that the court grants visitation rights after considering the child's best interests).

162. See ARIZ. REV. STAT. ANN. § 25-337 (West Supp. 1998); MINN. STAT. ANN. § 518.175 (West Supp. 1999); N.D. CENT. CODE § 14-05-22 (1997); TENN. CODE ANN. § 36-6-301 (Supp. 1998).

163. See MICH. COMP. LAWS ANN. § 722.27 (West Supp. 1998); OHIO REV. CODE ANN. § 3109.051 (West Supp. 1998).

164. 23 PA. CONS. STAT. ANN. § 5303 (West Supp. 1998).

165. See TEX. FAM. CODE ANN. § 153.311 through § 153.317 (West 1996 & Supp. 1999).

Of the twenty-nine states that do not have separate visitation provisions, courts use different methods to determine custody and visitation. Sixteen states use the word "Custody" as the sole determination to be made at the divorce, inclusive of both custody and visitation.¹⁶⁶ It is assumed that these statutes imply that "Custody" includes determinations of custody (physical placement with the custodial parent) and visitation. However, this interpretation is not explicitly stated in any of them. Of these, half of the statutes delineate factors to be used when determining "Custody."¹⁶⁷ Moreover, six states explicitly use the same "Custody" determination to determine both custody and visitation.¹⁶⁸ Four of those six states give a list of the factors considered by the court.¹⁶⁹ Two of those states direct the decision-maker to determine what shall be the parents' "parental rights and responsibilities," of which custody and visitation are each a part.¹⁷⁰ Two other states also mandate that the parents present a "parenting plan" before the court, whereby each parent's time with the child is arranged according to the plan's schedule.¹⁷¹ Two states focus almost solely on joint custody, and are almost completely silent on visitation.¹⁷² New York, which mentions that visitation may be brought as an action separate from custody, has no provisions for determining visitation.¹⁷³ The courts in all of these twenty-nine states base custody decisions on the best interests of the child.

166. See ARK. CODE ANN. § 9-13-101 (Michie 1998); COLO. REV. STAT. § 14-10-124 (1998); FLA. STAT. ANN. § 61.13 (West 1997); GA. CODE ANN. § 19-9-1 (Supp. 1998); IDAHO CODE § 32-717B (1996); IND. CODE ANN. § 31-17-2-8 (Michie 1997); KAN. STAT. ANN. § 60-1610 (Supp. 1997); MD. CODE ANN., FAM. LAW § 5-203 (Supp. 1998); MASS. GEN. LAWS ANN. ch.208, § 28 (West 1998); MISS. CODE ANN. § 93-5-24 (1994 & Supp. 1998); NEV. REV. STAT. ANN. § 125.480 (Michie 1998); N.H. REV. STAT. ANN. § 458:17 (1992 & Supp. 1998); N.M. STAT. ANN. § 40-4-9 (Michie 1994 & Supp. 1998); OR. REV. STAT. § 107.137 (Supp. 1998); S.C. CODE ANN. § 20-3-160 (Law. Co-op. 1985 & Supp. 1998); S.D. CODIFIED LAWS § 25-4-45 (Michie Supp. 1998).

167. See COLO. REV. STAT. § 14-10-124 (1998); FLA. STAT. ANN. § 61.13 (West 1997); IDAHO CODE § 32-717B (1996); IND. CODE ANN. § 31-17-2-8 (Michie 1997); KAN. STAT. ANN. § 60-1610 (Supp. 1997); NEV. REV. STAT. ANN. § 125.480 (Michie 1998); N.M. STAT. ANN. § 40-4-9 (Michie 1994 & Supp. 1998); OR. REV. STAT. § 107.137 (Supp. 1998).

168. See ALASKA STAT. § 25.20.060 (Michie 1998); NEB. REV. STAT. § 42-364 (Supp. 1997); N.J. STAT. ANN. § 9:2-4 (West Supp. 1998); N.C. GEN. STAT. § 50-13.2 (1995); VA. CODE ANN. § 20-124.2 (Michie Supp. 1998); WIS. STAT. ANN. § 767.24 (West Supp. 1998).

169. See ALASKA STAT. § 25.20.060 (Michie 1998); NEB. REV. STAT. § 42-364 (Supp. 1997); N.J. STAT. ANN. § 9:2-4 (West Supp. 1998); WIS. STAT. ANN. § 767.24 (West Supp. 1998).

170. See ME. REV. STAT. ANN. tit. 19-A, § 1653 (West 1998); VT. STAT. ANN. tit. 15, § 665 (1989 & Supp. 1998).

171. See MONT. CODE ANN. § 40-4-212 (1998); WASH. REV. CODE ANN. § 26.09.184 (West 1997 & Supp. 1999).

172. Alabama provides for sole custody in cases of domestic abuse, with the other parent having visitation, but it is mentioned only in passing. See ALA. CODE § 30-3-1 (1989 & Supp. 1997); see also CONN. GEN. STAT. ANN. § 46b-56 (West Supp. 1999).

173. See N.Y. DOM. REL. § 240 (Consol. Supp. 1998).

V. HOW THE LAW IS TRANSLATED INTO PRACTICE

States are not translating current visitation law into a practice that addresses the necessities and goals of a visitation standard. As discussed in the previous section, the states that incorporate the visitation determination into the "Custody" determination rarely explicitly guide the courts to determine visitation every bit as thoroughly as custody.¹⁷⁴ In addition, the states that make the visitation determinations separately from the custody determinations usually provide a vague standard and rarely give clear guidelines as to how to meet that standard.¹⁷⁵ As a result, there is a great potential for visitation determinations to be given much less attention than custody determinations. Coupled with the lingering societal attitude that noncustodial parents are unnecessary and have little authority in their children's lives,¹⁷⁶ it is no surprise that visitation determinations are perceived as being made almost as an afterthought.

This lack of clear guidance in state statutes arises from several factors. Many statutes do not give visitation determinations the same emphasis that custody determinations receive.¹⁷⁷ As mentioned before, visitation determinations fall into one of two categories: those that are a part of a "Custody" determination, where visitation is determined together with custody, and those that determine visitation separately. In the former category, the intent to treat visitation the same as custody is lost; in the latter category, there is no expressed intent to treat visitation the same as custody. In both categories, visitation usually is treated as being of lesser importance than custody.

When states incorporate both the custody and visitation determinations into the "Custody" determination, the legislative intent to place the child in the custody of the parent who will be best able to meet the child's needs is clear. The standard is the best interests of the child, and the guidelines present factors to determine with whom that interest will best be met. However, the statutes generally lack legislative guidance that explicitly points out that the "Custody" determination also includes a visitation determination that is subject to the same standard and

174. See *supra* notes 166, 170-73.

175. See *supra* notes 157-65.

176. See *supra* notes 130-32 and accompanying text.

177. See *supra* notes 154-73.

guidelines.¹⁷⁸ Indeed, a general lack of expressed legislative intent that parent-child relationships outside of the custodial parent-child relationship should remain intact exists.¹⁷⁹

When states treat custody and visitation separately, custody determinations have a specific standard, usually the best interests of the child, as well as guidelines to determine how the courts best meet those interests. However, visitation statutes usually have a one-sentence standard and few or no guidelines.¹⁸⁰ The same problems arise in the "Custody" determinations. Commonly, the statutes will have language discussing the necessity of meeting the child's best interests, but rarely will the statutes define what the best interests of the child include.¹⁸¹ Rather, the statutes will contain extensive language and treatment of the need for a strong relationship with the custodial parent and for a stable home life, but will neglect to discuss the relationship between the noncustodial parent and the child.¹⁸²

In light of this lack of emphasis on visitation, how is visitation usually determined? Visitation usually follows several patterns, with several justifications. By far, the most prevalent pattern consists of having the child visit the noncustodial parent every other weekend, usually overnight from Friday evening until Sunday evening.¹⁸³ The pattern usually includes alternating holidays between parents, such as Christmas, Easter, and the child's birthday.¹⁸⁴ It can also include blocks of time with the noncustodial parent over summers or spending one evening per week with the noncustodial parent.¹⁸⁵

In joint custody situations, where both parents share parenting authority, the child spends some time with the noncustodial parent and some time with the custodial parent, whose only unique characteristic is that the child primarily resides with that parent. This time that the child spends with the noncustodial parent is supposed to be family time, equivalent to the time the child spends in the care of the custodial parent. However, most people generally

178. *See supra* note 143.

179. *See id.*

180. *See id.*

181. *See id.*; *see also* VA. CODE ANN. § 20-124.2B (Michie Supp. 1998) (providing no definition of the best interests of the child).

182. *See* OKLA. STAT. ANN. tit. 43, § 111.1 (West 1990 & 1999).

183. *See* A REPORT ON CIRCUIT COURT STANDARD VISITATION SCHEDULES, STAFF OF THE FLORIDA SENATE COMMITTEE ON THE JUDICIARY 5 (1995).

184. *See* WATNIK, *supra* note 112, 87-96 (discussing issues that should be considered when creating a schedule for the child's living arrangements).

185. *See id.*

perceive it as a brief interlude from the care, dominion, and control of the custodial parent.¹⁸⁶ This misperception is exacerbated when the jurisdiction continues to refer both to this time as "visitation," which carries the sole custody connotations, and to refer to the time spent with the noncustodial parent as an "award," which carries the negative win/lose connotations.¹⁸⁷ In addition, this phenomenon propagates the notion that visitation is a privilege granted to the noncustodial parent, rather than an enforcement of the parental right to see the child.

Other visitation determinations can include trying to equalize the time spent with each parent; continually switching primary physical custody according to a prearranged schedule,¹⁸⁸ or, in some extreme cases, leaving the children in one house and having the parents move in and out according to a prearranged schedule.¹⁸⁹ Decision-makers are reluctant to order or approve such schedules because they perceive such constant "shuttling" of the child from home to home as depriving the child of the stability, security, and comfort associated with one home.¹⁹⁰ The perceived need for "stability" in the child's life leads decision-makers to favor leaving the child in one home continuously.¹⁹¹

Such need for stability is one of the primary justifications for the every-other-weekend pattern, especially as society perceives children as having a definite need for stability during their developmental years.¹⁹² Some understand this stability as being best achieved when the child has one home.¹⁹³ Some scholars have even advocated the extreme position that the child should never leave the home to spend any time with the noncustodial parent.¹⁹⁴

186. See *Shriver v. Shriver*, 219 N.E.2d 300, 302 (Ohio Ct. App. 1966) ("Visitation rights are limitations or restrictions upon child custody, and the only provision for such limitation is that contained in the statute with respect only to the divorced parent deprived of custody.").

187. See, e.g., NEV. REV. STAT. ANN. § 125.480(3) (Michie 1998) (stating that "[t]he court shall award custody."). This language typifies how a court makes a custody determination.

188. See BLAU, *supra* note 11, at 163.

189. See *id.* at 162.

190. See *Elebash v. Elebash*, 450 So. 2d 1268, 1270 (Fla. Dist. Ct. App. 1984) (upholding the trial court's finding that moving the children between residences to achieve a nearly equal division of time between the parents deprived the children of stability, security, and comfort); *Wilking v. Reiford*, 582 So. 2d 717, 719 (Fla. Dist. Ct. App. 1991) ("Generally, rotating custody is presumptively not in the best interests of the child.").

191. See BLAU, *supra* note 11, at 163.

192. See generally JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1979) (stressing the importance of continuity in the relationship between the child and the custodial parent).

193. See *id.*

194. See *id.*

This argument completely ignores the other detrimental effects the child faces from never having a relationship with both parents.¹⁹⁵ A subterfuge for the primary caretaker doctrine, the stability argument, maintains that too much time away from the de facto primary caretaker, the custodial parent, is not in the child's best interests. Those who make this argument also incorrectly presume that time away from the custodial parent would be as detrimental to the child as if her primary caretaker were no longer raising her.¹⁹⁶

A second justification for the every-other-weekend pattern includes its inception as the de facto visitation standard and guideline. This circular argument asserts that because every-other-weekend has been in use for so long, and has become so common, it should continue to be used.¹⁹⁷

A third justification for the every-other-weekend pattern is that the pattern is in the best interests of the child, despite any inconvenience it poses for the custodial parent. According to this argument, having to deliver the child to the noncustodial parent frequently inconveniences the custodial parent.¹⁹⁸ Having to give up three or four weekends a month leaves the custodial parent with no weekends to spend with the child. However, this argument ignores the fact that the focus of custody and visitation should be on the best interests of the child, not the parents.¹⁹⁹ It also ignores the fact that the custodial parent still has the child for the majority of the time, and that the weekends may be the most convenient time for the child to spend with the noncustodial parent. The child's interests are best met when the child is able to spend enough time

195. See COMMITTEE, *supra* note 46, at 80; see also MACCOBY & MNOOKIN, *supra* note 1, at 3.

196. See *In re Marriage of Jarman*, 752 P.2d 1068, 1069 (Colo. Ct. App. 1988) ("While the stability of the environment is a valid consideration in awarding custody, instability alone is not sufficient to support a restriction on visitation.") (citation omitted).

197. See HODGES, *supra* note 40, at 147.

Attempts on the part of parents to alter patterns of visitations based on the quality of bonding or needs of the child were met by strong resistance. . . . Attorneys (and judges) have been excessively influenced by case law, where the past determines the future. Thus, every other weekend is the best pattern because there is ample precedence [sic], that is, "that is the way it has always been done."

Id.

198. See MARGARET JASPER, *THE LAW OF CHILD CUSTODY* 11-14 (1997); see also WATNIK, *supra* note 112, at 91-94 (suggesting alternatives to the every-other-weekend model).

199. See HODGES, *supra* note 40, at 171 ("One trouble with 'frequent and liberal' visitation without specifying the pattern of visitation is that visitation is often set with the needs of the parents in mind rather than the needs of the child.")

with the noncustodial parent, in order to develop a significant parent-child relationship.²⁰⁰

Thus, the law implements a visitation determination that receives much less analysis than the custody determination does. This determination most often results in the every-other-weekend pattern and because this pattern has weak justifications, it deserves to be replaced.

VI. A PROPOSED STANDARD

Clearly, given the need for children to maintain strong relationships with their noncustodial parents, the current visitation standards are substandard. A better means exists to ensure that children of divorce can survive the stresses and effects of divorce without missing the beneficial effects of having both parents in their lives. This section will discuss the reasons why the current visitation standards have failed, why the visitation standard should have its own separate analysis, and will also propose a new visitation standard.

A. *Why the Current Visitation Standards Have Failed*

The current visitation standards have failed for several reasons. First, they fail to protect the children's rights of access to their noncustodial parents and the parents' rights of access to their children. Second, they fail to satisfy the children of divorce's needs to maintain a strong relationship with their noncustodial parents. Third, they fail to provide clear guidance for decision-makers. Finally, they fail to clarify what visitation the decision-makers will order and enforce.

The current visitation standards fail to protect the children's rights of access to their noncustodial parents because the standards do not adequately provide for an analysis of the family situation. The courts should consider the entire family situation to ensure that the child has full access to the parenting, nurturing, and care-taking that each parent can provide. Currently, few statutes explicitly provide for an analysis of the various factors and circumstances surrounding the parents and child.²⁰¹ Fewer still reflect any legislative intent to help provide the child access to both

200. See *supra* notes 64-79 and accompanying text.

201. See *supra* notes 157-73 and accompanying text.

parents.²⁰² In addition, the current visitation standards do not adequately protect the noncustodial parent's right of access to her child. While the focus of the custody standards revolve around the best interests of the child, not parental rights, the focus of the visitation standards continue to remain undefined; therefore, a noncustodial parent's right of access to her child still requires a certain amount of safeguarding.

The current visitation standards fail to satisfy the need for children of divorce to maintain strong relationships with their noncustodial parents. The standards do not sufficiently analyze the family situation in order to determine how the amount of time spent with each other will adequately allow both the child and the noncustodial parent to promote and maintain a necessary, strong relationship,²⁰³ in order to prevent the potential negative consequences of the unique stresses that children of divorce face.

The current visitation standards also fail to provide clear guidance for decision-makers because they fail to explicitly set forth a defined standard accompanied by guidelines for meeting that standard. The majority of visitation standards are either subsumed into the custody determination or exist in a separate, weak, vague form. Moreover, the visitation provisions do not provide a clearly defined and easy-to-follow standard, so they are little help to decision-makers. As such, the decision-makers make a determination that is either almost totally based upon their discretion, or as more often happens, they resort to the every-other-weekend pattern.

As the current visitation standards fail to provide clear guidance to the decision-maker, they also fail to provide a clear understanding of what the decision-maker will order should the parents be unable to agree upon or negotiate the visitation. The parents usually have even less of an understanding of what the children need than do the decision-makers, and can be at a loss when trying to understand what process should govern for determining custody and visitation. As a result, nothing mitigates a party's tendency to viciously litigate both custody and visitation determinations.

The failings of the current visitation standards may have undesirable effects. They may lead to a lack of a strong relationship between the child and the noncustodial parent, frustration and/or alienation of the noncustodial parent, and a belief on the part of the

202. *See id.*

203. *See supra* notes 154-200 and accompanying text.

custodial parent that she, and not the actual decision-maker, is in charge of determining what time the child should spend with the noncustodial parent.²⁰⁴ Lack of a strong relationship between the child and the noncustodial parent can lead to all of the harmful effects described earlier.²⁰⁵ The non-custodial parent's frustration or alienation can also lead to a lack of a strong relationship between the child and the noncustodial parent, as well as to the nonpayment of financial support obligations. Vague visitation provisions essentially allow the custodial parent to dictate visitation, reinforcing the custodial parent's belief that the custodial parent is in charge of visitation.²⁰⁶ These efforts can be devastating to both the child and to the noncustodial parent, resulting in repeated visitation interference, the child's low self-esteem, and recurrent litigation.²⁰⁷

B. Why Visitation Should Have Its Own Separate Analysis

I propose that visitation should receive its own separate analysis, distinct from a custody determination, with a clearly defined and easy-to-follow standard, as well as specific guidelines for the decision-maker to consider. Unlike the custodial relationship, the relationship between the child and the noncustodial parent is more attenuated and intermittent. Thus, the noncustodial parent's relationship with the child has a potentially weaker effect on the child. Moreover, the lack of time the noncustodial parent spends with the child undermines a strong relationship between the child and the noncustodial parent, which has potentially negative effects upon the child. Visitation needs to be determined through an analysis that takes into account all of the concerns previously discussed so that the appropriate amount of time is accorded for the relationship between the child and the noncustodial parent to develop.

C. The Proposed Standard

The proposed visitation standard should consist of several elements: a declaration of legislative intent; a standard for

204. See generally OAKLAND, *supra* note 107 (discussing traditional custody arrangements).

205. See *supra* notes 12-45 and accompanying text.

206. See OAKLAND, *supra* note 107, at 153.

207. See generally Clingempeel & Reppucci, *supra* note 18 (exploring issues of joint custody after divorce).

determination; a set of guidelines detailing factors to consider in meeting that standard; and provisions for terms and conditions to facilitate the visitation. My analysis focuses on how to best meet the needs of the children of divorce, which means that it focuses on how best to preserve, promote, and maintain the relationship between the child and the noncustodial parent, thereby maintaining the child's mental and emotional health.

1. Declaration of Legislative Intent

In order to keep the parties and the decision-maker focused on the purpose of the visitation, a declaration of legislative intent would be an essential part of the visitation standard. The declaration should state that the intent of the visitation standard is to ensure that children have a meaningful relationship with both parents after a separation or after a dissolution of the marriage, as well as to encourage parents to share the rights and responsibilities of raising the children. It would also ensure that the parents understand that they are both still parents, with the rights and responsibilities of parents, and that the law recognizes and protects equally the child's relationship with the noncustodial parent.

2. The Standard for Determination

The same standard should be used for both visitation and custody determinations: the best interests of the child. This standard places the focus on the rights and interests of the child, not the noncustodial parent. Hence, it provides the proper context for the determination, i.e. what this child needs in order to grow up healthy and well adjusted, rather than focusing on the noncustodial parent's rights to see the child. Although the noncustodial parent's rights are important and should not be infringed, the parties to the action are more likely to remain objective and limit their emotional responses when the focus is on the good of the child. The primary concern is not the noncustodial parent's adjustment to the changed family structure, but rather the child's development and well being. Into this context, a greater chance exists that, when determining how much time the child will spend with the noncustodial parent, the noncustodial parent will also obtain the visitation she wants.

How should the best interests of the child be defined? Barring abuse or other negative factors which would be grounds for limiting or denying visitation, and assuming two reasonably fit parents, the best interests of the child clearly dictate that the child have the

opportunity for a strong meaningful relationship with the non-custodial parent. The standard should thereby preserve, promote, and protect the relationship between the child and the noncustodial parent.

3. *The Guidelines for Determination*

Guidelines must also be developed to use when determining how to meet the best interests of the child. The guidelines should direct the decision-maker to consider certain factors and circumstances surrounding the parents and child. The Ohio statute²⁰⁸ provides a large list of factors to take into consideration. That statute provides a basis for the following factors:

1. The prior interaction and interrelationships of the child with the child's parents, siblings, and other related persons;
2. The geographical location of the residence of each parent and the distance between those residences;
3. The child's and parents' available time, including, but not limited to, each parent's employment schedule, the child's school schedule, and the child's and parents' holiday and vacation schedule;
4. The age of the child;
5. The child's adjustment to home, school, and community;
6. The wishes and concerns of the child;
7. The health and safety of the child;
8. The amount of time that will be available for the child to spend with siblings;
9. The mental and physical health of all parties;
10. Each parent's willingness to reschedule missed visitation and to facilitate the other parent's visitation rights;
11. Whether either parent has been convicted of crimes related to child abuse;
12. Whether the custodial parent has continuously and willfully denied the noncustodial parent's right to visitation;
13. Any other factor in the best interests of the child.

Taking these factors into consideration should allow the decision-maker to account for all of the circumstances in the environment surrounding the parents and the child.

208. See OHIO REV. CODE ANN. § 3109.051(D) (West Supp. 1998).

4. *Terminology*

As mentioned at the beginning of this Note, the term "visitation" is laden with legal and emotional baggage. In order to dispel the stigma of characterizing the time spent between the parent and the child as a mere visit, a new term should be used. An example would be the term "parenting time," used in the Michigan statute.²⁰⁹ "Parenting time" characterizes the time spent between the parent and the child as an opportunity for the parent to continue in her role and function as parent to her child, a right to which the parent is entitled. "Parenting time" also recognizes the child's entitlement to spend time with her noncustodial parent. Use of this new term will hopefully begin to destroy the perception that the noncustodial parent has a secondary quality and importance to the custodial parent.

5. *Terms and Conditions to Facilitate Parenting Time*

Defining the terms and conditions under which parenting time shall take place eliminates confusion and ambiguity. It also serves to reduce potential points of contention between the parents. The Michigan statute takes the approach that the visitation order "may contain any reasonable terms or conditions that facilitate the orderly and meaningful exercise of parenting time by a parent."²¹⁰ The visitation standard should be analogous to the Michigan standard, in order to avoid misunderstanding or conflict. Similar to the Michigan statute, the standard should also provide for any reasonable terms or conditions that become necessary to facilitate the orderly and meaningful exercise of parenting time by the noncustodial parent, to include but not limited to the following:

1. Division of the responsibility to transport the child;
2. Division of the cost of transporting the child;
3. Restrictions on the presence of third persons during parenting time or at the pickup and return of the child;
4. Requirements that the child be ready for parenting time at a specific time;
5. Requirements that the parent arrive for parenting time and return the child from parenting time at specific times;

209. See MICH. COMP. LAWS ANN. § 722.27 (West 1998).

210. *Id.*

6. Requirements that parenting time occur in the presence of a third person or agency when necessary;
7. Requirements of reasonable notice when parenting time will not occur; and
8. Any other reasonable condition determined to be appropriate in the particular case.

6. *Summary*

Thus, the proposed visitation standard preserves, promotes, and protects the relationship between the child and the noncustodial parent in accordance with the best interests of the child standard, which dictates a strong continuing relationship. It includes a declaration of legislative intent to grant parenting time in a frequency, duration, and type calculated to promote a strong relationship between the child and the noncustodial parent. Further, it determines parenting time by considering several listed factors and provides for determining reasonable terms and conditions to facilitate parenting time. This standard should provide enough flexibility to adequately determine visitation for any situation. While this proposed visitation standard seems extremely similar to custody determination standards, and would thus seem to be redundant in cases where the "Custody" determination includes both primary physical custody and visitation, the danger still exists that the visitation might be subsumed into the custody determination and therefore neglected.

This visitation standard, as with custody determinations, should be applied on a case-by-case basis. It should not express what amount or type of visitation is appropriate for certain ages or circumstances because not all family situations are alike, not all children are identical, nor do all children develop at the same rate. I reject the Texas approach of making statutory determinations about visitation in all cases because of its inherent inflexibility.²¹¹

211. The Texas Family Code provides for specific times of possession of the child by the noncustodial parent (termed "possessory conservator"). For example, for a noncustodial parent who lives less than 100 miles from the primary residence of the child, the law defines which weekends of the month that parent shall have the child (first, third, and fifth weekends), how long those weekends shall last (from 6:00 p.m. Friday until 6:00 p.m. the following Sunday), when they would have the child during spring vacations from school (in even-numbered years from 6:00 p.m. on the day the child is dismissed from school until 6:00 p.m. on the day before school resumes after that vacation), and so forth. See TEX. FAM. CODE ANN. § 153.312 (West 1996 & Supp. 1999).

Flexibility is vital to visitation standards because of the need to account for different situations and circumstances.²¹²

This proposed visitation standard should adequately preserve, promote, and protect the relationship between the child and the noncustodial parent so that the child's well being, development, and health are maximized. It ensures that the visitation ordered is the result of careful thought and takes into account the entire situation and all of the circumstances surrounding the child and parents.

VII. CONCLUSION

The current visitation system does not work as well as it should. It generally places little or no emphasis on protecting the relationship between children of divorce and their noncustodial parents. In order to promote, preserve, and protect that relationship, the system must employ a visitation standard that encompasses an analysis of the complete family situation. The proposed visitation standard achieves this goal because it provides a statement of the purpose for visitation; promotes, preserves, and protects the relationship between the child and the noncustodial parent; provides guidelines for the determination of visitation; allows the decision-maker to set conditions to facilitate the visitation; and applies in either sole or joint custody applications.

212. See WHEELER, *supra* note 100, at 58-59.

**APPENDIX A: STATES WITH NO SEPARATE VISITATION PROVISIONS
(EITHER IT IS NOT MENTIONED OR "CUSTODY" INCLUDES
"CUSTODY" AND "VISITATION")**

STATE	TERMS USED	HOW?	FACTORS	VISITATION GUIDANCE
"Custody" determination is assumed to include a determination of the custodial parent and a provision for visitation.				
AR	C(v)	BIC to ensure frequent contact	No	No
CO	C(v)	BIC	Yes	No
FL	C(v)	BIC	Yes	Yes
GA	C(v)	BIC	No	Yes
ID	C(v)	BIC	Yes	No
IN	C(v)	BIC	Yes	No
KS	C(v)	BIC	Yes	No
MA	C(v)	BIC	No	No
MD	C(v)	None given	No	No
MS	C(v)	BIC	No	No
NH	C(v)	Most conducive to the benefit of the child	No	Later in the statute
NM	C(v)	BIC	Yes	No
NV	C(v)	BIC	Yes	No
OR	C(v)	Best interests and welfare of the child	Yes	No
SC	C(v)	None given	No	No
SD	C(v)	BIC	No	No
"Custody" and "visitation" are both mentioned, but are determined together in the same "Custody" process.				
AK	C & V	C: BIC	Yes	No
NC	C & V	Best interests & welfare of the child	No	Yes
NE	C & time spent	BIC	Yes	Yes—time spent with each parent
NJ	C & parenting	C: BIC	Yes	Yes—parenting time
VA	C & V	C: BIC	No	Yes
WI	Legal custody and physical placement	BIC	Yes	No
WV	C & V	Primary caretaker	No	No

"Custody" and "visitation" are equal parts of a determination of "Parental Rights and Responsibilities."				
ME	Parental rights & responsibilities	BIC	Yes	No
VT	Parental rights & responsibilities	BIC	Yes	No
"Custody" and "visitation" are equal parts of a determination of a "Parenting Plan."				
MT	Parenting Plan	BIC	Yes	No
WA	Parenting Plan	Several objectives	Yes	Parenting time
Joint Custody				
AL	JC (unless SC)	JC: BIC	Yes	Only in the context of SC
CT	JC	Silent	No	No
No standard given				
NY	No standard given			

Legend:**BIC:** Best Interests of the Child**C(v):** "Custody" determination is assumed to include both physical placement with the custodial parent and the visitation for the noncustodial parent.**C & V:** The terms "custody," meaning physical placement with the custodial parent, and "visitation," meaning time spent with the noncustodial parent, are both mentioned, but one "Custody" determination will determine provisions for each.**JC:** Joint Custody**SC:** Sole Custody**Code provisions for the various states:**

AL ALA. CODE § 30-3-1 (1989 & Supp. 1997)

AK ALASKA STAT. § 25.20.060 (Michie 1998)

AR ARK. CODE ANN. § 9-13-101 (Michie 1998)

CO COLO. REV. STAT. § 14-10-124 (1998)

CT CONN. GEN. STAT. ANN. § 46b-56 (West Supp. 1999)

FL FLA. STAT. ANN. § 61.13 (West 1997)

GA GA. CODE ANN. § 19-9-1 (Supp. 1998)

ID IDAHO CODE § 32-717B (1996)

IN IND. CODE ANN. § 31-17-2-8 (Michie 1997)

KS KAN. STAT. ANN. § 60-1610 (Supp. 1997)

ME ME. REV. STAT. ANN. tit. 19-A, § 1653 (West 1998)

MD MD. CODE ANN., FAM. LAW § 5-203 (Supp. 1998)

MA MASS. GEN. LAWS ANN. ch. 208, § 28 (West 1998)

- MS MISS. CODE ANN. § 93-5-24 (1994 & Supp. 1998)
- MT MONT. CODE ANN. § 40-4-212 (1998)
- NE NEB. REV. STAT. § 42-364 (Supp. 1997)
- NV NEV. REV. STAT. ANN. § 125.480 (Michie 1998)
- NH N.H. REV. STAT. ANN. § 458:17 (1992 & Supp. 1998)
- NJ N.J. STAT. ANN. § 9:2-4 (West Supp. 1998)
- NM N.M. STAT. ANN. § 40-4-9 (Michie 1994 & Supp. 1998)
- NY N.Y. DOM. REL. LAW § 240 (Consol. Supp. 1998)
- NC N.C. GEN. STAT. § 50-13.2 (1995)
- OR OR. REV. STAT. § 107.137 (Supp. 1999)
- SC S.C. CODE ANN. § 20-3-160 (Law. Co-op. 1985 & Supp. 1998)
- SD S.D. CODIFIED LAWS § 25-4-45 (Michie Supp. 1998)
- VT VT. STAT. ANN. tit. 15, § 665 (1989 & Supp. 1998)
- VA VA. CODE ANN. § 20-124.2 (Michie Supp. 1998)
- WA WASH. REV. CODE ANN. § 26.09.184 (West 1997 & Supp. 1999)
- WV W. VA. CODE § 48-2-15 (1998)
- WI WIS. STAT. ANN. § 767.24 (West Supp. 1998)

APPENDIX B: STATES WITH SEPARATE VISITATION PROVISIONS

State **Standard or factors used**Visitation, Reasonable Visitation, Liberal Visitation

CA	Reasonable visitation rights
HI	Reasonable visitation
IA	Liberal visitation where appropriate
IL	Reasonable visitation rights
KY	Reasonable visitation rights
LA	Reasonable visitation rights
MO	Reasonable visitation rights
OK	Visitation
RI	Reasonable right of visitation
WY	Visitation

Best Interests of the Child Standard

DE	A schedule of visitation with the other parent, consistent with the child's best interests and maturity.
UT	In determining visitation rights . . . the court shall consider the best interests of the child.

Maintenance of the Parent-Child Relationship Between the Child and the Noncustodial Parent

AZ	Reasonable visitation rights to ensure that the minor child has frequent and continuing contact with the noncustodial parent.
MN	Rights of visitation on behalf of the child and noncustodial parent as will enable the child and noncustodial parent to maintain a parent-child relationship that will be in the best interests of the child.
ND	Such rights of visitation as will enable the child and non-custodial parent to maintain a parent-child relationship that will be beneficial to the child.
TN	Such rights of visitation as will enable the child and non-custodial parent to maintain a parent-child relationship.

Maintenance of the Parent-Child Relationship Between the Child and Both Parents

MI	Reasonable parenting time, which is further defined as being granted in accordance with the best interests of the child. It is presumed to be in the best interests of the child for the child to have a strong relationship with both parents. . . . [P]arenting time shall be granted to a parent in a frequency, duration, type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.
OH	A just and reasonable order or decree permitting [the non-custodial parent] to visit the child at the time and under the conditions that the court directs Whenever possible, the order or decree permitting the visitation shall ensure the

opportunity for both parents to have frequent and continuing contact with the child.

Any Factors Affecting the Child

PA Any factor which legitimately impacts the child's physical, intellectual, or emotional well-being.

Statutory Standardized Visitation Provisions

TX Terms of standard possessory order as given in the statute.

Code provisions for the various states:

AZ ARIZ. REV. STAT. ANN. § 25-337 (West Supp. 1998)
 CA CAL. FAM. CODE § 3100 (West Supp. 1999)
 DE DEL. CODE ANN. tit. 13, § 728 (Supp. 1998)
 HI HAW. REV. STAT. ANN. § 571-46 (Michie Supp. 1997)
 IL 750 ILL. COMP. STAT. ANN. 5/607 (West Supp. 1998)
 IA IOWA CODE ANN. § 598.41 (West Supp. 1998)
 KY KY. REV. STAT. ANN. § 403.320 (Michie Supp. 1998)
 LA LA. CIV. CODE ANN. art. 136 (West Supp. 1999)
 MI MICH. COMP. LAWS ANN. § 722.27 (West Supp. 1998)
 MN MINN. STAT. ANN. § 518.175 (West Supp. 1999)
 MO MO. ANN. STAT. § 452.400 (West 1997)
 ND N.D. CENT. CODE § 14-05-22 (1997)
 OH OHIO REV. CODE ANN. § 3109.051 (West Supp. 1998)
 OK OKLA. STAT. ANN. tit. 43, § 112 (West Supp. 1999)
 PA 23 PA. CONS. STAT. ANN. § 5303 (West Supp. 1998)
 RI R.I. GEN. LAWS § 15-5-9 (1996 & Supp. 1998)
 TN TENN. CODE ANN. § 36-6-301 (Supp. 1998)
 TX TEX. FAM. CODE ANN. §§ 153.311 through 153.317
 (West 1996 & Supp. 1999)
 UT UTAH CODE ANN. § 30-3-5 (1998)
 WV W. VA. CODE § 48-2-15 (1998)
 WY WYO. STAT. ANN. § 20-2-113 (Michie 1997)

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