

2005

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Recommended Citation

39 Fam. L. Q. 247 (2005).

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Resolving Parental Custody Disputes— A Comparative Exploration

D. MARIANNE BLAIR* & MERLE H. WEINER**

I. Introduction

Virtually all nations are guided by the precept that the primary consideration underlying any custody decision must be the best interests of the child. The commitment to this principle coincides with these nations' international obligations under Article 3 of the Convention on the Rights of the Child (CRC)¹ and other international instruments.² The custody law in every state in the United States also embraces the "best interests" standard,³ even though

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1. Nov. 20, 1989, 1577 U.N.T.S. 3. Article 3 (1) provides as follows: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

2. See African Charter on the Rights and Welfare of the Child, July 1, 1990, OAU Doc. CAB/LEG/153 /Rev. 2 (1990), art. IV (1) ("In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration"); European Convention on the Exercise of Children's Rights, Jan. 25, 1996, Europ. T.S. No. 160, art. 6 ("In proceedings affecting a child, the judicial authority, before taking a decision, shall: (a) consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities; . . ."). *Accord Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally*, G.A. Res. 41/85, U.N. GAOR, 41st Sess., Supp. No. 53, at 265, U.N. Doc. A/Res/41/85 (1986), art. 5. ("In all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to continuing care, should be the paramount consideration.").

3. See Ira Mark Ellman, Chief Reporter's *Forward* to PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS xviii (2002).

the United States is one of the few nations that is not a party to the CRC or to the other treaties that embody the "best interests" concept.⁴

Despite worldwide fidelity to a "best interests" approach, the content and application of the concept differs across and, at times, within borders. Differences persist notwithstanding that many countries have experienced a dramatic shift over the last several decades in the types of custodial arrangements that are thought to best serve children's interests. Some of the variation between nations is undoubtedly attributable to societal beliefs concerning children's needs, which are shaped by differing economic systems, religious influences, political forces, and cultural expectations. Other differences are attributable to the political structure of these countries, including the various ways in which governments handle legal disputes generally. When one couples the variations in the substantive meaning of "best interests" with the differences in the sources of law, procedural mechanisms, and institutions used to resolve custody disputes, foreign law related to parental custody disputes can confound even the most experienced family law practitioner.

In this era of globalization, family law practitioners must increasingly understand the custody norms and procedures that exist abroad. For those whose practice includes transnational custody litigation, it is particularly important to develop an awareness of the substantive and procedural similarities and differences in foreign custody law that might assuage or fuel an initial custody dispute, influence forum selection, justify restrictions related to visitation conducted overseas, encourage the illegal removal of a child, and affect the enforceability of an American custody judgment abroad. Even lawyers without transnational practices, however, can benefit from learning about a foreign country's custody regime. Such study can offer all family law specialists sources of ideas for both domestic and international law reform efforts as well as for arguments on behalf of clients in purely domestic legal matters.

Although many areas of family law have been subjected to a comparative methodology,⁵ the topic of parental custody disputes has received relatively

4. A current list of States Parties to the CRC can be found on the Web site of the Office of the United Nations High Commissioner for Human Rights, at <http://www.ohchr.org/english/countries/ratification/11.htm>.

5. See, e.g., *Special Symposium on International Marriage and Divorce Regulation and Recognition*, 29 FAM. L.Q. 497 (1995) (Lynn Wardle, issue coordinator); *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS* (Robert Wintemute, et al. ed. 2002); D. Marianne Blair, *The Impact of Family Paradigms, Domestic Constitutions, and International Conventions on Disclosure of an Adopted Person's Identities and Heritage: A Comparative Examination*, 22 Mich. J. INT'L L. 587 (2001); Harry Willekens, *Rights and Duties of Underage Parents: A Comparative Approach*, 18 INT'L J.L. POL'Y & FAM. 355 (2004); Seymour Moskowitz, *Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective*, 86 MARQ. L. REV. 401 (2002).

little comparative analysis in the United States during the past decade, especially with regard to non-Western nations.⁶ We therefore chose to focus this comparative law issue of the *Family Law Quarterly* on that topic and solicited papers from many leading family law scholars around the world. The articles focus on the allocation of parental rights and responsibilities following parental separation or divorce and represent a cross-section of legal systems and geographic regions. Each paper is a valuable resource for U.S. lawyers who seek to understand how custody disputes are resolved abroad.

We invited the authors to address in some fashion the substantive and procedural norms in their home countries regulating the allocation of custodial rights and responsibilities following parental separation or divorce. We shared with the authors a list of procedural and substantive issues that could be addressed at their option. Several of the authors chose to address each of our questions very directly, while others took different approaches. Some focused on unique aspects of their laws, engaged in a historical analysis of forces that shaped their current regimes, or raised challenging issues that courts or legislatures are currently facing. The differences in the authors' approaches make the entire symposium, as well as each individual article, an interesting read.

We have decided to begin the symposium with Professor Nigel Lowe's essay, entitled *The Allocation of Parental Rights and Responsibilities—the Position in England and Wales*. While each author had enormous discretion in the format and content of his or her article, Professor Lowe chose to set forth our questions before each of his responses. Consequently, his essay conveys information about the questions we asked as well as provides detailed information about the situation in England and Wales. It serves as a useful starting point. We then proceed alphabetically through the other countries and continents.

6. While there have been some excellent comparative and foreign law articles on custody, we saw a need to examine the issue using a large number of countries from different parts of the world. We acknowledge, however, that seventeen countries out of approximately one hundred and ninety countries is still a very small number. For insightful comparative analysis see, e.g., Kirsti Kurki-Suonio, *Joint Custody as an Interpretation of the Best Interests of the Child in Critical and Comparative Perspective*, 14 INT'L J.L. POL'Y & FAM. 183 (2000) (focusing on joint custody in California, England, Germany, Sweden and Finland); Helen Rhoades & Susan B. Boyd, *Reforming Custody Laws: A Comparative Study*, 18 INT'L J.L. POL'Y & FAM. 119 (2004) (focusing on Australia and Canada). A useful source for a statement of the custody law in many foreign nations is ANNE-MARIE HUTCHINSON, RACHEL ROBERTS & HENRY SETRIGHT, *INTERNATIONAL PARENTAL ABDUCTION* (1998). For a broader review of the "best interests" concept, including some discussion of that concept in various national contexts, see *THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS* (Philip Alston ed., 1994). For a source with wide coverage of issues in comparative family law, including information on custody, see *THE CHANGING FAMILY: INTERNATIONAL PERSPECTIVES ON THE FAMILY AND FAMILY LAW* (John Eekelaar & Thandabantu Nhlapo eds., 1998).

Whenever a project of this nature is undertaken, there is a very real risk that critical nuances become lost in translation. Several of the articles were originally written in languages other than English and subsequently translated. We have worked extensively with many of the authors in an effort to clarify their intended meaning and minimize misunderstandings. Nevertheless, we have been humbled by the realization that any attempt to describe foreign legal concepts in American English, both for systems that are similar as well as very different from our own, is fraught with peril. Even the term “custody,” which we use in our symposium title because of its brevity and familiarity to American lawyers, is unknown in some countries. For example, Professor Khazova, in her article *Allocation of Parental Rights and Responsibilities after Separation and Divorce under Russian Law*, informs us that Russia has not historically known the term “custody,” although the term is entering the legal vernacular as more disputes in Russia about children involve Westerners.⁷ Even in places where the term is known, “custody” is rapidly being supplanted by terms like “parental responsibility” and “residence” and “contact” orders. Professor Lowe explains that in England and Wales this shift in nomenclature is meant to reflect a change from the concept that parents have possessory interests in children (conveyed by terms such as “parental rights”) to an understanding that parents have obligations and responsibilities for the proper care and upbringing of children.⁸ Professor Parkinson, in *The Law of Postseparation Parenting in Australia*, reports a similar phenomenon in Australia, where the terms “custody” and “access” were replaced with language that avoids the notion that one parent will exercise power and responsibility to the exclusion of the other after separation.⁹

Despite the risks involved in describing foreign law in American English, we are delighted by the outstanding contributions to this symposium, and we are eager to share some of our own observations that emerge from this collection of essays. We recognize at the outset, however, that our observations are broad generalizations, and that occasionally contrary examples may exist. Even our decision to describe a particular practice as similar or different among nations may prompt disagreement; most topics

7. Olga A. Khazova, *Allocation of Parental Rights and Responsibilities After Separation and Divorce under Russian Law*, 39 FAM. L.Q. 373, 376-77 (2005).

8. N.V. Lowe, *The Allocation of Parental Rights and Responsibilities—the Position in England and Wales*, 39 FAM. L.Q. 267, 268-69 (2005).

9. Patrick Parkinson, *The Law of Postseparation Parenting in Australia*, 39 FAM. L.Q. 507, 509 (2005). See also Nina Dethloff, *Parental Rights and Responsibilities in Germany*, 39 FAM. L.Q. 315, 316 (2005), who observes that a 1979 reform in Germany replaced “parental powers” with “parental care,” which encompasses both rights and responsibilities.

can be framed to produce the opposite conclusion, and ultimately these characterizations are judgment calls. We also acknowledge that one could make numerous other observations about these articles. In fact, we hope that our own observations serve as a starting point for discussion and encourage others also to plow this fertile body of work.

We begin by highlighting some similarities and trends that we have observed, discussing two—the notable role of the state and the increased emphasis on private ordering—in greater detail. We then explore a number of issues related to the importance of the child's opinion in custody proceedings. This topic provides a useful segway to our discussion of difference, because it illustrates how one issue can reflect both substantial consensus as well as substantial difference in the manner in which nations approach it. We conclude by examining some areas of difference that emerge from these articles, including substantive norms used to allocate custody between parents and approaches to joint custody.

II. Similarities Among Nations

Even a cursory review of the symposium articles suggests that all around the globe, the law related to parental rights and responsibilities is dynamic. Many of the authors chronicle reform efforts of the past decade. For example, in *The Parental Relationship in Brazilian Law: A Study of Custody*,¹⁰ Professor Pereira discusses the influence of the 1988 Constitution, international human rights conventions, and children's rights legislation on the new codification of custody standards in Brazil's 2002 Civil Code. The 2002 Code rejects the marital fault principles that formerly controlled Brazilian custody adjudications, and emphasizes instead the welfare of the child and the importance of emotional bonds. Professor Parkinson likewise describes a series of reforms in Australia, including institutional changes announced in 2004. These reforms will produce a new countrywide system of facilities (Family Relationship Centres) that offer information, advice and mediation services to couples who are separating, as well as expand mediation services and add more programs, such as contact centers, for high-conflict families. The Family Relationship Centres, in particular, are intended "to achieve a long-term cultural change in the ways people resolve disputes about parenting arrangements after separation."¹¹ These examples from Professor Pereira's and Parkinson's articles reflect the widespread and ongoing efforts worldwide to adopt substantive and procedural reforms.¹²

10. Rodrigo da Cunha Pereira, *The Parental Relationship in Brazilian Law: A Study of Custody*, 39 FAM. L.Q. 563, 565-70 (2005).

11. Parkinson, *supra* note 9, at 514.

12. See, e.g., Patricia Begné, *Parental Authority and Child Custody in Mexico*, 39 FAM. L.Q. 527, 536 (2005) (discussing 2004 reform of the Mexico City codes to allow intervention

In addition, the articles reveal that most countries operate on the premise that the parent-child relationship should endure following the breakup of the parents' relationship. As Professor Fulchiron stated in his article, *Custody and Separated Families: The Example of French Law*, "[R]egardless of what happens to the married couple, parents are still parents."¹³ Countries reflect this idea in various ways, including through the articulation of a child's right to contact with both parents subsequent to the demise of the parents' relationship,¹⁴ and through the adoption of penalties for a parent who tries to undermine the child's relationship with the other parent.¹⁵ The commitment by nations to the continuation of the parent-child relationship after the parents divorce or separate, however, is unfortunately

by the attorney general when a parent refuses to allow a child to live with the other parent); Sandra Burman, *Allocating Parental Rights and Responsibilities in South Africa*, 39 FAM. L.Q. 429, 431 nn. 11-12 (2005) (discussing 2001 reform that requires Family Court papers to be reviewed by Family Advocates, i.e., state officials who are to safeguard the interests of children when parents divorce); S.N. Ebrahimi, *Child Custody (Hizanat) under Iranian Law: An Analytical Discussion*, 39 FAM. L.Q. 459, 467-68 (2005) (discussing 2002 ratification of a Parliamentary Bill entrusting *hizanat* to the mother of children from their birth to the age of seven); Hugues Fulchiron, *Custody and Separated Families: The Example of French Law*, 39 FAM. L.Q. 301, 303-04 (2005) (discussing 2002 reform that allows separated parents to reach an agreement which is then approved by a judge); Cecilia P. Grosman & Ida Ariana Scherman, *Argentina: Criteria for Child Custody Decision-making upon Separation and Divorce*, 39 FAM. L.Q. 543, 554-55 (2005) (discussing courts' recognition of the legitimacy of joint custody); Khazova, *supra* note 7, at 375 (discussing revision of Family Code in 1995); Lowe, *supra* note 8, at 270-71 (discussing Adoption and Children Act 2002 and its mechanism for allowing unmarried fathers and step-parents to acquire parental responsibility in certain instances); Bolagi Owasanoye, *The Regulation of Child Custody and Access in Nigeria*, 39 FAM. L.Q. 405, 421-22, 424, 428 (2005) (discussing the adoption of the Children's Rights Act of 2003 and how, if it becomes effective, it will apply the best interests principle to all custody cases); Theofano Papazissi, *The Function of Parental Care and Custody and the Minor's Opinion in Greece*, 39 FAM. L.Q. 339, 349 (2005) (discussing 1997 reform that made family courts specific chambers of the civil courts); Eva Ryrstedt, *Custody of Children in Sweden*, 39 FAM. L.Q. 393, 394 (2005) (discussing 1998 amendment to joint custody law so that joint custody can be awarded against the will of one of the parents); Geoffrey Shannon, *Child Custody Law in the Republic of Ireland*, 39 FAM. L.Q. 353, 359, 367 (2005) (discussing the adoption of the Irish Children Act 1997, which, among other things, promoted the use of alternative dispute resolution in custody cases).

13. Fulchiron, *supra* note 12, at 302. See also Xia Yinlan, *The Legal System of Guardianship over Minors in the People's Republic of China*, 39 FAM. L.Q. 477, 481 (2005) ("The relationship between parents and their children does not end when the parents divorce.").

14. See Asha Bajpai, *Custody and Guardianship of Children in India*, 39 FAM. L.Q. 450-51, 456 (2005); Dethloff, *supra* note 9, at 328; Ebrahimi, *supra* note 12, at 473; Fulchiron, *supra* note 12, at 302; Grosman & Scherman, *supra* note 12, at 561; Khazova, *supra* note 7, at 381-82; Satoshi Minamikata, *Resolution of Disputes over Parental Rights and Duties in a Marital Dissolution Case in Japan: A Nonlitigious Approach in Chotei (Family Court Mediation)*, 39 FAM. L.Q. 489, 500-01 (2005); Pereira, *supra* note 10, at 570. Cf. Xia, *supra* note 13, at 486 (describing it as a right of the parent).

15. See Fulchiron, *supra* note 12, at 310; Ryrstedt, *supra* note 12, at 395, 399; Ebrahimi, *supra* note 12, at 473-74; Pereira, *supra* note 10, at 570. But see Lowe, *supra* note 8, at 284-85, 288 (noting that while it is "a very serious issue" if a parent denies contact between a child and a parent, only occasionally will preference be given to a parent who is best solely because he or she is able to facilitate contact).

not universal,¹⁶ and the extent to which the commitment exists with regard to nonmarital children is debatable.¹⁷

Another area of similarity that particularly fascinated us was the role of the state in resolving custody disputes. We observed both an expanding role for the state in resolving parental custody disputes and, simultaneously, a shrinking role. Professor Lynn Wardle recognized a similar paradox in his introduction to the *Family Law Quarterly* symposium on international marriage and divorce in 1995. He commented on the increasing dominance of state authority over religious authority in the area of divorce regulation, but noted the simultaneous decline in governmental regulation of divorce.¹⁸

That the "state," *i.e.* civil government, is becoming increasingly involved in resolving parental custody disputes is most evident in countries that formally rely upon customary or religious law, and sometimes customary or religious institutions, to resolve at least a portion of the custody disputes in that country. In some such places, state involvement and control is not new. Dr. Bajpai, in *Custody and Guardianship of Children in India*, explains that for matrimonial proceedings the government codified the application of personal law, which is religiously based, and allocated jurisdiction to the family and district courts, regardless of the personal law involved.¹⁹ For some issues, such as the appointment of a guardian pursuant to the Guardians and Wards Act 1890, personal law only applies to the extent that it is not in conflict with the Act.²⁰

A more recent expansion of state authority is evident in other nations. For example, Professor Burman reports in *Allocating Parental Rights and Responsibilities in South Africa*²¹ that custody issues arising upon disso-

16. See, e.g., Owasanoye, *supra* note 12, at 423 (comparing Islamic law in Nigeria, which has a commitment to access after separation and divorce, to customary law in Nigeria, which lacks a similar commitment).

17. In some countries, the commitment to the parent-child relationship appears to apply to nonmarital children after there is some legal recognition of parental status. See, e.g., Ryrstedt, *supra* note 12, at 394; Lowe, *supra* note 8, at 269-71; Grosman & Scherman, *supra* note 12, at 544; Papazissi, *supra* note 12, at 340-41; Khazova, *supra* note 7, at 377; Fulchiron, *supra* note 12, at 303, 306; Dethloff, *supra* note 9, at 318; Xia, *supra* note 13, at 480. Yet in other countries, and in some of these same countries that express a commitment to treating nonmarital children without discrimination, parents of nonmarital children may have a more difficult time than the marital parent in some circumstances in securing or maintaining parental authority. See, e.g., Burman, *supra* note 12, at 436; Papazissi, *supra* note 12, at 340-41; Fulchiron, *supra* note 12, at 306; Shannon, *supra* note 12, at 358-59; Owasanoye, *supra* note 12, at 423-25; Minamikata, *supra* note 14, at 492.

18. *International Marriage and Divorce*, *supra* note 5, at 497, 512, 514. Compare MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, & FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 197 (1989) (noting the state's increased involvement in the consequences of marriage dissolution at the same time as the state's involvement in marriage is "withering away").

19. Bajpai, *supra* note 14, at 445-46, 453-54.

20. *Id.* at 444.

21. Burman, *supra* note 12, at 430 (reporting that the Recognition of Customary Marriages Act 120 of 1998 now requires that customary law marriages be dissolved by civil law courts).

lution of customary marriages, which until recently were resolved by customary courts or tribal or religious leaders, must now be resolved by civil law courts. This transition, and the accompanying “clash of values,” may result in certain communities avoiding the civil courts for the resolution of their disputes.²² Professor Owasanoye observes in *The Regulation of Child Custody and Access in Nigeria*²³ that custody disputes arising in customary marriages in his country are still resolved in customary courts, but that these courts are now regulated by statute and increasingly subject to appellate oversight by civil courts and substantive norms imposed by civil law.²⁴ Although the Shi’a school of Islamic law has greatly influenced custody law in Iran, Dr. Ebrahimi notes in *Child Custody (Hizanat) Under Iranian Law: An Analytical Discussion*²⁵ that Iranian civil legislation now codifies this religious law and that civil courts resolve custody issues.²⁶ While civil control over custody appears to be growing in many places, religious courts do continue to have jurisdiction over custody issues in some parts of the world, but even in those nations, the jurisdiction of religious courts is sometimes concurrent with civil courts.²⁷

While one sees an expansion of the state’s authority with regard to custody disputes in many parts of the world, in other places the government is encouraging private ordering and thereby shifting responsibility for resolving custody disputes from itself to parents. In fact, in many nations, no court involvement is required at all if parents can reach an agreement on custody issues. In Japan, Professor Minamikata reports that if parents divorce by mutual consent and agree on matters concerning their children,

22. *Id.* at 433.

23. Owasanoye, *supra* note 12, at 409-10, 419, 421-22.

24. Professor Owasanoye notes that *Sharia* law, applied by *Sharia* courts operating in the northern part of the country, currently governs custody disputes involving children of an Islamic marriage in Nigeria. However, model federal legislation, the 2003 Children’s Rights Act, if it is passed by the state legislatures, will oblige Islamic courts to take the Act’s principles into account in issuing custody awards. Owasanoye, *supra* note 12, at 407, 421-22.

25. Ebrahimi, *supra* note 12, at 459-63.

26. Egypt has also now integrated its *Sharia* courts into a national court system, and adjudicates family law matters in its civil courts by judges trained in *Sharia* law. There is a separate chamber of the civil court for family law issues affecting the Coptic Christian minority. See Islamic Family Law, <http://www.law.emory.edu/ifl/index2.html>. Tunisia, like Iran, has also created civil legislation based on Islamic family law principles, and granted jurisdiction over family law matters to civil rather than religious courts. *Id.*

27. In Israel, for example, *Sharia* courts have exclusive jurisdiction, conferred by civil statute, to determine child custody issues between Muslims, but Rabbinical courts share concurrent jurisdiction with civil courts over child custody issues arising between Jewish parents. Edwin Freedman, *Religious Divorce in Israel*, INT’L FAM. L. 19, 21 (2000). An effort was made to include a paper regarding Israeli custody regulation in this symposium, but regrettably an unforeseen family emergency and publication time constraints hampered participation by our Israeli authors.

their divorce may be registered with the local authority without any judicial or administrative intervention whatsoever in the divorce process.²⁸ In Iran, courts only need allocate *hizanat* if the parents themselves fail to reach an agreement.²⁹

One way countries are fostering this shift in responsibility is by disconnecting the issue of custody from the divorce action.³⁰ For example, Professor Dethloff observes in *Parental Rights and Responsibilities in Germany*³¹ that divorce decrees no longer require a court ruling on custody unless a parent specifically requests court involvement. Similarly, in England and Wales, neither divorce nor parental separation affects the allocation of parental responsibility automatically, and no court involvement in the allocation of custody is required unless the parents apply to the court for a residence order. In fact, the 1989 Children's Act incorporates a Non-intervention Principle, directing courts to make no order unless doing so "would be better for the child than making no order at all." Professor Lowe suggests that this language was adopted to discourage the practice of routinely entering residence orders following divorce when parents are in agreement.³² Similarly, in France, Professor Fulchiron reports that the allocation of parental authority is a "separate issue from the dissolution of the marriage" and parents are encouraged to reach their own agreements "which they can have approved by the court independently of the divorce proceedings."³³ Yet, as mentioned above, there are sometimes exceptions, and Russia reformed its law in 1995 so that courts must resolve child-related questions before granting a divorce decree.³⁴

Another part of the effort to shift responsibility for custodial arrangements from the government to parents is the development of procedures

28. Minamikata, *supra* note 14, at 490-91.

29. Ebrahimi, *supra* note 12, at 466.

30. In some places, parents are de facto encouraged to reach an agreement, even if not *de jure*. For example, in Nigeria, the "high cost of litigation and the slow process" discourage most people from seeking a resolution in court. Owasanoye, *supra* note 12, at 412. In many places the resolution of custody disputes is marked by a high degree of flexibility, and one might opine that the indeterminate nature of the "best interests" inquiry itself encourages settlement. As to the individualized nature of the process, see, e.g., Pereira, *supra* note 10, at 569-71; Grosman & Scherman, *supra* note 12, at 549; Bajpai, *supra* note 14, at 456; Minamikata, *supra* note 14, at 495, 498-99; Ryrstedt, *supra* note 12, at 395, 402; Owasanoye, *supra* note 12, at 410-13, 417; Lowe, *supra* note 8, at 280-81; Xia, *supra* note 13 at 482-83. Some commentators believe, however, that indeterminacy fosters litigation. The Reporter to the ALI Principles of the Law of Family Dissolution does an excellent job of citing and summarizing the literature on this point. See Principles of the Law of Family Dissolution, *supra* note 3, § 2.02, Reporter's Notes cmt. c.

31. Dethloff, *supra* note 9, at 319.

32. Lowe, *supra* note 8, at 268, 273.

33. Fulchiron, *supra* note 12, at 305. See also Parkinson, *supra* note 9, at 510 (private ordering is "strongly encouraged"); Bégné, *supra* note 12, at 538.

34. Khazova, *supra* note 7, at 383.

and conciliation mechanisms to facilitate agreement.³⁵ For some countries, these types of mechanisms are very well established. In *Custody of Children in Sweden*,³⁶ Professor Ryrstedt discusses a service that municipalities are required to provide for facilitating cooperation talks, a form of voluntary mediation used in Sweden for over thirty years. For other countries, however, the focus on mediation has been more recent. Professor Begné, in *Parental Authority and Child Custody in Mexico*, mentions the role of the Desarrollo Integral de la Familia (DIF), a public entity, in facilitating agreements, and also reports that “the most important change in the last two years is the possibility of submitting a case to a public or private conciliation and mediation service.”³⁷

Author after author mentioned these types of alternatives to litigation. Geoffrey Shannon, author of *Child Custody Law of the Republic of Ireland*,³⁸ notes that the Irish Children Act of 1997 introduced a variety of measures to promote alternative dispute resolution, including requiring solicitors (1) to discuss with their clients the possibility of agreement, the availability of counseling to assist in reaching an agreement, and the option of mediation, and (2) to furnish clients with names and addresses of qualified counselors and mediators. Professor Fulchiron describes how France encourages mediation as part of its effort to have parents reach their own consensus on the exercise of parental authority,³⁹ and how judges can order parties into a preliminary session.⁴⁰ Professor Khazova explains that Russia has a custody and guardianship body, which parents can use to help them resolve their disputes before they apply to the courts.⁴¹ Other examples of such alternative dispute mechanisms include the Family Court Mediation Service and the new Family Resource Centres in Australia⁴² and the required conciliation services in section 8 cases in England and Wales.⁴³

In East Asia, one also sees a similar effort by the state to provide a process that may encourage parental agreement. In *The Legal System of Guardianship over Minors in the People's Republic of China*,⁴⁴ Professor Xia reports that spouses who believe that they can reach an agreement

35. Arguably the encouragement of private ordering is consistent with nations' international obligations. Article 18 of the Convention on the Rights of the Child reads, in part, “Parents . . . have the primary responsibility for the upbringing and development of the child.”

36. Ryrstedt, *supra* note 12, at 397.

37. Begné, *supra* note 12, at 539.

38. Shannon, *supra* note 12, at 359.

39. Fulchiron, *supra* note 12, at 304.

40. *Id.*

41. Khazova, *supra* note 7, at 382. These bodies are local authorities whose purpose is the “protection of property and personal nonproperty rights of underage children.” *Id.*

42. Parkinson, *supra* note 9, at 511, 513-14.

43. Lowe, *supra* note 8, at 276.

44. Xia, *supra* note 13, at 482.

often choose an administrative divorce procedure so that they can receive mediation assistance from a governmental body. Even those who choose to divorce through the People's Court, however, will receive some encouragement to settle custody issues. The judge, before ruling, will first attempt to mediate the issue. In Japan as well, parents who fail to reach agreement on the residential arrangements for their children are required to go through the process of *Chotei*, which involves private sessions with a committee composed of a family court judge and two lay commissioners. In *Resolution of Disputes over Parental Rights and Duties in a Marital Dissolution Case in Japan: A Nonlitigious Approach in Chotei (Family Court Mediation)*,⁴⁵ Professor Minamikata describes and critiques this process in detail, noting that its high success rate signals both its strengths and perhaps some of its inherent weaknesses.

The last similarity we note here serves as our transition to our discussion of some notable differences among nations. The law of many countries recognizes that decision-makers should hear from children who are capable of forming their own views,⁴⁶ a principle reflected in Article 12 of the Convention on the Rights of the Child.⁴⁷ Yet there is tremendous variation in the extent and manner in which this happens, as well as the impact of the child's opinion on the decision. On the one hand, for example, Professors Grosman and Scherman⁴⁸ note that following the incorporation of Article 12's language into the Argentinean Constitution, custody judgments were rendered void if the trial judge failed to listen to the child express his or her opinion. In *Argentina: Criteria for Child Custody Decision-making upon Separation and Divorce*, the authors critique judges' implementation of this requirement, noting both judicial accomplishments and shortcomings. In contrast, only children over the age of fourteen must be heard in German proceedings, although courts can choose to hear from a younger child in person.⁴⁹ Similarly, the law in Japan only requires that the family

45. Minamikata, *supra* note 14, at 491, 493.

46. See, e.g., Ryrstedt, *supra* note 12, at 399; Khazova, *supra* note 7, at 386; Grosman & Scherman, *supra* note 12, at 555-56; Shannon, *supra* note 12, at 360; Burman, *supra* note 12, at 434; Parkinson, *supra* note 9, at 511; Lowe, *supra* note 8, at 278-79; Papazissi, *supra* note 12, at 346-47.

47. Article 12 provides:

- (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
- (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

See CRC, *supra* note 1.

48. Grosman & Scherman, *supra* note 12, at 556.

49. Dethloff, *supra* note 9, at 323.

court listen to a minor who is fifteen years old or older, although family courts typically hear from children ten years and older.⁵⁰

The methods by which judges receive the children's views also vary tremendously. In England, for example, the court typically does not interview children in chambers, but rather relies upon the reports of court-affiliated officers or local authorities for relevant information.⁵¹ A similar situation exists in Australia,⁵² Sweden,⁵³ and Ireland.⁵⁴ Geoffrey Shannon notes that the Irish courts have frequently avoided a child's personal appearance by soliciting the child's opinion through social workers or experts even though the right of a child to be heard in judicial proceedings has constitutional support.⁵⁵ By contrast, Professor Papazissi informs us in *The Function of Parental Care and Custody and the Minor's Opinion in Greece* that the Civil Procedure Code imposes an obligation on the court to meet and discuss the issue with the minor. This meeting is informal,⁵⁶ and typically occurs after the trial or hearing.⁵⁷ Professor Papazissi suggests that judges often feel that they are ill-equipped for such meetings since they lack the training possessed by psychologists and therapists.⁵⁸ Relatedly, in Argentina, the child must be seen by the judge, although there the judge often hears the testimony of the child in the presence of social workers and mental health professionals who assess and interpret the child's needs and words.⁵⁹

The impact of the child's opinion is yet another difference that emerges. For instance, Professor Ebrahimi notes that in Iran, the view of a girl of nine lunar years or a boy of fifteen lunar years is decisive.⁶⁰ At these ages, the youth is considered mature, and *hizanat* ends, although parents typically care for their children for an additional period of time.⁶¹ In Sweden, a court cannot enforce a judgment against the will of a child age twelve or older.⁶² Some courts in Argentina have held that the child's preference

50. Minamikata, *supra* note 14, at 499.

51. Lowe, *supra* note 8, at 278.

52. Parkinson, *supra* note 9, at 512.

53. Ryrstedt, *supra* note 12, at 401. In Sweden, the child's opinion is normally presented as part of the social welfare board's investigation, and the child is not heard in court directly.

54. Shannon, *supra* note 12, at 361, 371.

55. *Id.* at 360-61.

56. Papazissi, *supra* note 12, at 347.

57. *Id.*

58. *Id.* at 348.

59. Grosman & Scherman, *supra* note 12, at 557. It is interesting that the child has a due process right to information from court officers regarding the significance of his or her opinion. *Id.* See also Khazova, *supra* note 7, at 386 (explaining that questioning of a child under fourteen years old by the judge is performed in the presence of a teacher).

60. Ebrahimi, *supra* note 12, at 475.

61. *Id.* at 474-75.

62. Ryrstedt, *supra* note 12, at 399-401.

gives rise to a rebuttable presumption regarding custody.⁶³ Yet in other countries, such as China, the child's opinion is merely considered as one factor among many others, and the judge has discretion as to how much weight it should receive.⁶⁴

In this era of private ordering, countries differ in how, or even whether, they give effect to the child's right to be heard if the relevant context is a conciliation or mediation session. Some countries try to include children in the negotiations of their parents. For example, in England and Wales, children nine years old and older are "generally expected to attend the conciliation hearing."⁶⁵ Yet Professor Ryrstedt explains that children in Sweden often do not have their opinions considered or heard while their parents negotiate an agreement, regardless of whether their parents reach that agreement through formal cooperation talks or through informal conversation.⁶⁶ She notes, therefore, a gap in Sweden between the vision of the children's role and the reality. Professor Minamikata expresses a similar concern and notes that children in Japan are unrepresented and thus "legally vulnerable" during the dispute resolution process of *Chotei*.⁶⁷

III. Differences Among Nations

The differences mentioned above regarding the child's opinion are indicative of the diversity that continues to exist in the regulation of child custody disputes around the world. Many variations among countries reflect fundamental distinctions in the ways in which family disputes in general are usually handled. As a result, countries differ regarding whether the topic of custody is regulated at the state or federal level or both,⁶⁸ whether custody law is fleshed out primarily by the legislature or courts,⁶⁹ whether the rules are significantly influenced by a constitution⁷⁰ or international

63. Grosman & Scherman, *supra* note 12, at 557.

64. Xia, *supra* note 13, at 483-84. See also Papazissi, *supra* note 12, at 347.

65. Lowe, *supra* note 8, at 277. Although this may be the practice, Professor Lowe notes that "outside the context of court proceedings the child has no right to be heard." *Id.* at 278.

66. Ryrstedt, *supra* note 12, at 400, 402-03.

67. Minamikata, *supra* note 14, at 506.

68. In Mexico, each of the thirty-one states has a separate code that contains provisions on parental authority. See Begné, *supra* note 12, at 527. In Germany, another federation, the law of parental responsibility is governed by the German Civil Code, which, due to its civil law heritage, regulates these matters in great statutory detail. See Dethloff, *supra* note 9, at 316-21. In Argentina, federal law regulates substantive standards, but provincial law regulates procedural matters. See Grosman & Scherman, *supra* note 12, at 558-59.

69. In India, case law appears to be very significant in defining the content of the standard. See Bajpai, *supra* note 14, at 447-56. In China, in contrast, the detailed opinions of the Supreme People's Court do not have the status and effect of law. Xia, *supra* note 13, at 487.

70. In Ireland, the Constitution has had a significant impact on Irish custody law, due in part to the constitutional elevation of the marital family. Geoffrey Shannon explores the many ways in which various constitutional provisions affect not only parental disputes, but also the custody rights of third parties as well. Shannon, *supra* note 12, at 353-56, 371.

law,⁷¹ and whether the substantive rules are formally defined, at least in part, by religion or custom.

For example, while many nations regulate custody through a unitary legal system, others have adopted systems of personal law that vary the substantive law and procedures depending upon the characteristics of the parents or their marriage. Of the nations included in this symposium, India, Iran, South Africa, and Nigeria all fall within this category. Professor Owasanoye's description of child custody regulation in Nigeria illustrates the complexity that can arise in such a system. There federal and state statutory provisions, derived in part from English law, regulate custody in the High Courts; general principles of customary law are applied by customary courts, which vary somewhat from region to region depending on the customs of the area; and two different schools of Islamic law, the Maliki and the Hanafi, are applied by Shari'a courts in the northern part of the country. Which legal regime applies to a dispute depends upon the form of marriage entered by the parents (statutory, customary, or Islamic), and numerous considerations influence the classification of the marriage for choice-of-law purposes.⁷²

Yet apart from these sorts of structural differences, the substantive norms employed across nations are also somewhat diverse. Parental gender, historically an important factor in most areas of the world, is reported by many authors to be losing its significance "on paper,"⁷³ although some have observed that in reality, when one considers both uncontested and contested cases together, mothers still appear to assume a significant share of the custodial responsibility after parental separation or divorce.⁷⁴ Some

71. In several nations, the terms of international human rights documents, and in particular, the CRC, have been incorporated directly into domestic constitutions or statutory law. *See, e.g.*, Pereira, *supra* note 10, at 567-68. *See also* Grosman & Scherman, *supra* note 12, at 544; Burman, *supra* note 12, at 432-33; Begné, *supra* note 12, at 537.

72. Owasanoye, *supra* note 12, at 406-10.

73. *See* Dethloff, *supra* note 9, at 322; Pereira, *supra* note 10, at 570; Ryrstedt, *supra* note 12, at 395. Fulchiron, *supra* note 12, at 303; Begné, *supra* note 12, at 538; Parkinson, *supra* note 9, at 516; Papazissi, *supra* note 12, at 345; Owasanoye, *supra* note 12, at 411-12.

74. *See, e.g.*, Minamikata, *supra* note 14, at 499 (observing that many *Chotei* commissioners still support a maternal-preference approach); Dethloff, *supra* note 9, at 324 (noting that although joint custody is conferred in most cases, mothers are still given precedence when sole responsibility is awarded); Khazova, *supra* note 7, at 386 (noting that mothers receive residence of children in 90% of the cases); Parkinson, *supra* note 9, at 517 (noting that mothers receive residence most of the time, although the number of fathers receiving primary care is increasing, especially in litigated cases); Burman, *supra* note 12, at 434 (noting that in practice most children are with their mothers after separation or divorce); Grosman & Scherman, *supra* note 12, at 546-47 (commenting that in 85-90% of the cases, the parents agree or the court decides to award physical custody and the exercise of *patria potestad* to mothers); Ryrstedt, *supra* note 12, at 395-96 (noting that for those cases in which sole custody was allocated, most children are in the sole custody of their mothers).

nations, however, still retain specific gender preferences, particularly for young children. In China, a nursing mother of a child under the age of two is entitled to be the direct guardian of the child.⁷⁵ Islamic law awards a type of guardianship over children to their father, but provides that mothers shall have a preference for the physical custody of young children, although the ages vary within different Islamic schools.⁷⁶ In Hindu law, the mother is the preferred custodian of children under five years old.⁷⁷ Mothers in Argentina benefit from a rebuttable presumption that they should be awarded custody of children under the age of five.⁷⁸ Case law in England and Wales similarly includes a rebuttable presumption that babies should live with their mothers.⁷⁹

Gender preferences do not always favor the mother, however. In Nigeria, while young children are often awarded to the mother if the child was born into a statutory marriage,⁸⁰ the opposite may be true if the marriage was formed under customary law.⁸¹ Customary law in Nigeria has traditionally tied custody to the patrilineal system of inheritance and the dowry process (also called bride price).⁸² Fathers are entitled to the custody of their children following parental separation if the dowry has been paid. In Iran, fathers receive *hizanat* for children over the age of seven.⁸³

A variety of other factors take on special significance in some countries during the adjudication of these disputes. Under Islamic law, for instance, a non-Muslim would not be entitled to custody of a Muslim child,⁸⁴ and mothers can lose their right to custody upon remarriage.⁸⁵ Ireland also attaches special significance to the preservation of the child's religious upbringing,⁸⁶ as does Nigeria, where a child will generally adopt the father's religion.⁸⁷ In China, sterility of one of the parents, and a history of grand-

75. Xia, *supra* note 13, at 483.

76. See Ebrahimi, *supra* note 12, at 467 (mothers have preference for *hizanat* of sons and daughters until the age of seven); Owasanoye, *supra* note 12, at 422-23 (under the Maliki school, mothers have a preference for custody of sons until the age of seven, and of daughters until puberty, and under the Hanafi school, mothers have custody of sons until age seven and girls until age nine). See also Bajpai, *supra* note 14, at 443, 445.

77. Bajpai, *supra* note 14, at 444.

78. Grosman & Scherman, *supra* note 12, at 548-49.

79. Lowe, *supra* note 8, at 283.

80. Owasanoye, *supra* note 12, at 414. However, the views that developed under customary law at times impact adjudications under the civil law system. See Owasanoye, *supra* note 12, at 411-12.

81. *Id.* at 420-21.

82. See *id.* at 419-21, for a detailed description of the dowry system.

83. Ebrahimi, *supra* note 12, at 467.

84. *Id.* at 466; Owasanoye, *supra* note 12, at 423.

85. Ebrahimi, *supra* note 12, at 472; Owasanoye, *supra* note 12, at 422-23.

86. Shannon, *supra* note 12, at 363.

87. Owasanoye, *supra* note 12, at 412 n.25, 416.

parental assistance in caring for the children during the marriage, are independent factors that may carry weight.⁸⁸

Countries also vary on the weight they give to a number of factors commonly discussed in the United States, including the importance of keeping siblings together,⁸⁹ a parent's superior financial position,⁹⁰ and domestic violence. For example, Professor Parkinson reports that in Australia, domestic violence is an important consideration: "[I]n practice, if a case reaches a final hearing, then a proven history of violence is likely to weigh heavily in the court's discretion about primary residence and may lead to the restriction or denial of contact."⁹¹ In contrast, Professor Burman reports that there is a disappointing lack of attention to domestic violence in custody and access decisions in South Africa.⁹²

The authors gave substantial attention to the ability of their legal systems to confer joint decision-making authority and joint residential care following divorce. Although total unanimity may not exist,⁹³ there appears to be widespread support for the concept that both parents should continue to play a role in their child's life following a divorce. This view may have driven the adoption of, or may in fact be driven by, Article 18 of the Convention on the Rights of the Child, which requires that states ensure that "both parents have common responsibilities for the upbringing and development of the child."⁹⁴ Yet countries vary in the extent to which joint decision-making authority and joint residential care are essential components of this commitment; they also vary in how any such joint authority or care is established.

Many nations do not even require a court to explicitly confer joint decision-making authority in a court order following divorce; rather, both parents automatically retain such authority by operation of law. This is the situation in Russia, and Professor Khazova attributes it to the fact that the right to raise one's own child is a personal inalienable right of every parent under Russian legal doctrine.⁹⁵ Parents are encouraged to make decisions together,

88. Xia, *supra* note 13, at 484.

89. Compare Papazissi, *supra* note 12, at 345; Minamikata, *supra* note 14, at 500; Owasanoye, *supra* note 12, at 416, with Grosman & Scherman, *supra* note 12, at 550-51.

90. In England and Mexico, a parent's superior financial position is irrelevant. See Lowe, *supra* note 8, at 289; Begné, *supra* note 12, at 538. In other countries, however, it is relevant. In Nigeria, for example, it is a "paramount consideration." Owasanoye, *supra* note 12, at 415. In Russia, it is a consideration, but financial superiority cannot itself be determinative. See Khazova, *supra* note 7, at 385. See also Bajpai, *supra* note 14, at 449, 456; Dethloff, *supra* note 9, at 322; Minamikata, *supra* note 14, at 498. Cf. Xia, *supra* note 13, at 483 (discussing financial stability).

91. Parkinson, *supra* note 9, at 522-23. See also Lowe, *supra* note 8, at 286 (domestic violence is a "highly relevant factor").

92. Burman, *supra* note 12, at 435.

93. See *supra* note 16 and accompanying text.

94. Convention on the Rights of the Child, *supra* note 35, at art. 18.

95. Khazova, *supra* note 7, at 378-79. This right arises for unmarried fathers once legal parentage is established. *Id.* at 377.

and the courts typically only need to resolve disputes regarding the child's place of residence.⁹⁶ A similar background rule is seen in Germany,⁹⁷ England and Wales,⁹⁸ Sweden,⁹⁹ and Australia, where what we might term legal custody continues generally to be exercised jointly, although the courts can make orders about residence, contact, and specific issues.¹⁰⁰

Several nations have terms for the parental authority that attaches to parenthood itself, and this authority similarly survives the separation or divorce of the parents. Although these countries do not call this shared authority "joint legal custody," a functional analysis suggests that it is similar. As explained by Professor Begné, *patria potestad* imposes an obligation "to provide assistance, care and protection to minor children."¹⁰¹ As Professors Grosman and Scherman explain, *patria potestad* is generally a doctrine that gives both parents an important role in raising the child, even when the child lives with only one parent.¹⁰² The notion of joint guardianship in Ireland is similar. Every parent is a joint guardian; this entails decision-making authority and responsibility to ensure his or her child is protected, guided, and supported. Both parents will have guardianship after a divorce, even though only one may have physical custody.¹⁰³

In other nations, courts must confer joint decision-making authority following dissolution.¹⁰⁴ In some of these countries, joint decision-making is becoming the norm. In France, the joint exercise of parental authority is "the rule." Parents "must exercise their parental function jointly and equally, as they did during the marriage. Only under unusual circumstances may parental authority be exercised by only one of the parents, or the child entrusted to a third party."¹⁰⁵ Professor Begné indicates that joint parental authority is the preferred resolution in Mexico.¹⁰⁶ Countries vary on the extent to which parental cooperation is a prerequisite to such an award.¹⁰⁷

96. *Id.* at 377.

97. Dethloff, *supra* note 9, at 318-19. Professor Dethloff observes that joint parental responsibility exists in almost 70% of divorced families in Germany that include children. *Id.* at 324.

98. Lowe, *supra* note 8, at 281.

99. Ryrstedt, *supra* note 12, at 394.

100. Parkinson, *supra* note 9, at 509.

101. Begné, *supra* note 12, at 528. See generally Begné, *supra* note 12, at 529-35.

102. Grosman & Scherman, *supra* note 12, at 544-45.

103. Shannon, *supra* note 12, at 354, 356-58, 359.

104. See, e.g., Bajpai, *supra* note 14, at 452-53 (reporting that a court in India can order both parents to continue as joint guardians if to do so is in the best interest of the child).

105. Fulchiron, *supra* note 12, at 302.

106. Begné, *supra* note 12, at 538. This gives a parent "the right to oversee the rearing of the child and to live with the child." *Id.*

107. Compare Owasanoye, *supra* note 12, at 417 (discussing need for a reasonable chance that parents of statutory marriage will cooperate in the future); Dethloff, *supra* note 9, at 321; with Ryrstedt, *supra* note 12, at 394, 398-99; Papazissi, *supra* note 12, at 344.

Regardless of whether joint decision-making is conferred by operation of law or court order, nations differ regarding how much precise decision-making authority a recipient actually acquires, especially if that person lacks significant residential custody. In some countries, such as Sweden, joint custody gives a parent the power to participate in all those decisions falling within a parent's authority generally.¹⁰⁸ The scope of decision-making is similarly broad in France, Russia, and Mexico.¹⁰⁹ Joint decision-making authority may have a narrower scope, however, in other countries. In Germany, it covers acts of "considerable importance," *e.g.*, those that are permanent or can only be modified with difficulty.¹¹⁰ In Argentina, the doctrine similarly requires joint consent for important decisions, including, for example, whether a child leaves the country.¹¹¹

The differences mentioned in the preceding paragraph may lose some importance, however, since many countries that recognize broad joint decision-making authority do not actually require joint consent for many decisions. Professor Lowe explains that in England joint decision-making is only needed when a statute or case law requires it, such as for major decisions like the child's removal from the country, the child's adoption, the child's schooling, the child's name, and certain medical issues. For other decisions, each parent may act alone.¹¹² In France, each parent is considered to act with the consent of the other parent for ordinary acts.¹¹³ Professor Khazova notes that the lack of a precise allocation of parental rights and responsibilities in Russia often means that the person with whom the child resides has "de facto 'custody' over the child, or at least much more power or 'much more custody.'"¹¹⁴ Sweden stands out as a possible exception. While everyday decisions can be made by either parent alone, there appears to be a need to obtain agreement for issues that fall in between those that are mundane and those of "considerable importance."¹¹⁵

There is greater disparity between countries with regard to the availability and utilization of what we might describe in American parlance as joint physical custody, *i.e.*, the allocation to both parents of substantial periods of residential custody. In Sweden, typically parents take turns caring for the child, a result of shared legal custody.¹¹⁶ In France, while alternating

108. Ryrstedt, *supra* note 12, at 398.

109. Khazova, *supra* note 7, at 379-80; Begné, *supra* note 12, at 538; Fulchiron, *supra* note 12, at 307.

110. Dethloff, *supra* note 9, at 319.

111. Grosman & Scherman, *supra* note 12, at 546.

112. Lowe, *supra* note 8, at 281-82; *See also* Parkinson, *supra* note 9, at 509 (saying the law of Australia in this regard was modeled on the law of England and Wales).

113. Fulchiron, *supra* note 12, at 307.

114. Khazova, *supra* note 7, at 379; *See also* Fulchiron, *supra* note 12, at 307.

115. Ryrstedt, *supra* note 12, at 398, 402.

116. *Id.* at 396.

residences has yet to become common, it currently appears to be a favored disposition in the law. In fact, France's Court of Cassation condemned the dissociation of legal and physical custody, and the law in 2002 accepted the legality and, arguably preferences, alternating residences.¹¹⁷

Other nations, however, have not yet recognized the option for joint-custody arrangements in their legislation. Professors Pereira,¹¹⁸ Grosman, and Scherman¹¹⁹ report that joint custody is under consideration in Brazil and Argentina, but it has not yet been formally recognized in either nation by statute.¹²⁰ Professor Minamikata explains that the Japanese Civil Code does not recognize joint custody, although a court can allocate physical custody to one parent and legal custody to the other.¹²¹ Professor Burman reports that South Africa has the option of a joint physical custody award, but that it is "mistrusted" and "uncommon."¹²² Other countries, such as England, Wales, India, Australia, and China recognize the possibility of alternating residences,¹²³ but in those countries its use still appears rare, although in several it may be on the increase.¹²⁴

IV. Conclusion

We hope that readers will be intrigued by the differences that exist in our diverse world regarding the substantive norms and procedural mechanisms used to resolve disputes between parents regarding the custody of their marital children. We expect, however, that readers simultaneously will marvel at the remarkable overlap that exists between nations on this topic.

We have discovered that the articles convey the following general similarities: the dominance of civil regulation, a clear emphasis on private ordering, a widespread use of conciliation and mediation procedures, and attention to the child's role in the decision-making process. There is also a strong consensus within diverse legal systems that both parents should continue to play a role in their child's life following their separation or divorce. Some of the differences are undoubtedly linked to qualities that give each society its unique character. To what extent children's lives around the world would be improved by changing some of these differ-

117. Fulchiron, *supra* note 12, at 308.

118. Pereira, *supra* note 10, at 570.

119. Grosman & Scherman, *supra* note 12, at 546-47, 552-55, 562.

120. *Id.* at 547, 553-55, 562 (relating that recent court decisions have supported the arrangement, even when parents demonstrate a high level of conflict, and advocating legislative reform that would formally recognize such an option).

121. Minamikata, *supra* note 14, at 490, 492.

122. Burman, *supra* note 12, at 435.

123. Lowe, *supra* note 8, at 283; Bajpai, *supra* note 14, at 452-53; Parkinson, *supra* note 9, at 518; Xia, *supra* note 13, at 484-85.

124. Lowe, *supra* note 8, at 283; Parkinson, *supra* note 9, at 518.

ences or unifying further the approaches is an issue for discussion and debate. The next comparative project may want to address these important philosophical and empirical questions.

The influence of international instruments undoubtedly receives much credit for the convergence among countries represented in this volume, but probably credit also goes to international travel and the World Wide Web. The airplane and the computer have aided the cross-fertilization of ideas among lawyers, scholars, and politicians from various nations. These same mechanisms will undoubtedly help disseminate the contents of this symposium, and one can only speculate at this point about the impact these seventeen articles will have on worldwide trends and various countries' laws, including our own, as readers learn from the observations and criticisms of these insightful authors.