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# THE ELIMINATION OF CHILD “CUSTODY” LITIGATION: USING BUSINESS BRANDING TECHNIQUES TO TRANSFORM SOCIAL BEHAVIOR

ELENA B. LANGAN

## I. Introduction

Divorce negatively affects children;<sup>1</sup> no one claims otherwise.<sup>2</sup> Child custody litigation as part of a divorce action<sup>3</sup> is even more damaging.<sup>4</sup> Those seeking to modify parent behavior through amendments to custody statutes designed to lessen the acrimony often associated with child custody disputes, reduce the number of cases requiring judicial intervention, and encourage successful shared parenting post-divorce should consider how corporate branding principles can be applied to achieve these goals.

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1. Elena B. Langan, “*We Can Work it Out*: Using Cooperative Mediation – a Blend of Collaborative Law and Traditional Mediation – to Resolve Divorce Disputes,” 30 REV. LITIG. 245, 252 n.31 (2011).

2. There is some support, however, that undergoing a divorce is less damaging to children than being raised in an environment plagued with high levels of marital discord. See Sol R. Rappaport, *Deconstructing the Impact of Divorce on Children*, 47 FAM. L.Q. 353, 359 (2013).

3. Although “divorce” will be used throughout the article, the same concepts apply to paternity cases where parenting responsibility and the apportionment of a child’s time with each parent is contested.

4. Langan, *supra* note 1, at 252-53 nn.32-35. See also Linda D. Elrod, *Client-Directed Lawyers for Children: It is the “Right” Thing to Do*, 27 PACE L. REV. 869, 898 (2007).

“Branding” focuses on altering consumer behavior by creating favorable impressions regarding a product, service, or company, typically to increase sales.<sup>5</sup> An example of the impact branding can have is the rebranding of *Healthy Choice*, which enhanced public perception of the quality of the company and its products.<sup>6</sup> ConAgra’s frozen food entrees were originally known as *Diet Deluxe*, a name that conjured up negative images of tasteless, dietary deprivation accompanied by unfulfilled cravings.<sup>7</sup> The new name, *Healthy Choice*, and rebranding campaign projected a positive image suggesting the product offers a fit and healthy alternative as part of an active lifestyle, leading to increased longevity.<sup>8</sup> This is just one example of a successful name change and rebranding campaign in a business context.<sup>9</sup> The name change itself, without the accompanying efforts to alter the public perception about the product, however, would not have achieved the goal of increasing the company’s share of the frozen food market.<sup>10</sup>

Child “custody” litigation could similarly benefit from a rebranding. Several states have eliminated “custody” and

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5. James Heaton, *The Difference Between Marketing and Branding*, TRONVIG GROUP, <http://www.tronviggroup.com/the-difference-between-marketing-and-branding> (last visited Jan. 4, 2016).

6. Michael Rader, *Can Changing Your Company Name Save It?*, BRANDROOT (Sept. 29, 2014), <https://www.brandroot.com/resources/item/55-can-changing-your-company-name-save-it>.

7. *Id.*

8. *Id.*

9. Other examples include: 1) “Philip Morris Companies,” the owner of Kraft Foods and Miller Brewing company, in addition to the tobacco company bearing its name, became “Altria” in 2001 to distance itself from the negative perceptions associated with the tobacco industry; 2) “Quantum Computer Services” became the hallmark of online services after its name changed to “America Online” in 1991; and 3) “Andersen Consulting” became “Accenture” in 2001, after separating from the Arthur Andersen accounting firm, successfully avoiding being tainted by the Enron scandal that ruined the accounting firm’s brand as a premier financial consulting company a year later when it was found guilty of obstruction of justice in 2002. Kurt Eichenwald, *Enron’s Many Strands: The Investigation; Andersen Charged with Obstruction in Enron Inquiry*, N.Y. TIMES (Mar. 15, 2002), [www.nytimes.com/2002/03/15/business/enron-s-many-strands-investigation-andersen-charged-with-obstruction-enron.html?pagewanted=all](http://www.nytimes.com/2002/03/15/business/enron-s-many-strands-investigation-andersen-charged-with-obstruction-enron.html?pagewanted=all); *FAMOUS NAME CHANGES*, <http://www.famousnamechanges.net/html/corporate.htm> (last visited Jan. 4, 2016).

10. *See* Heaton, *supra* note 5.

"visitation" from their statutes, replacing them with the more neutral terms "parenting plans" and "parenting time."<sup>11</sup> In addition to changing the nomenclature, state legislatures have shifted the burden of resolving these conflicts to parents, requiring them either to develop, adopt, and abide by a parenting plan, or submit a proposed plan to the court if unable to agree to the plan's provisions themselves.<sup>12</sup> Proponents of these legislative changes aim to eliminate the perception that there is a "winner" when custody issues are litigated, reducing the incentive to compete for the award through judicial intervention and eliminating the animosity associated with those cases that are litigated. It is difficult to pronounce these endeavors a success. There is no evidence that the statutory revisions have achieved the desired decrease in acrimonious litigation between parents; instead, there are indications that the opposite has occurred.<sup>13</sup>

While the legislative goals are laudable, the lack of a social behavior rebranding campaign to create a favorable impression among "consumers," i.e. parents, about the benefits derived under the new statutory schemes may hamper efforts to achieve the objectives. In addition, mere changes in nomenclature are insufficient to accomplish the legislative purpose. Even where revised terminology has been accompanied by substantive changes in custody standards, there has been little change in parents' behavior.<sup>14</sup> In order to transform the tenor of custody disputes into a cooperative enterprise between parents, "custody" must be rebranded so that parents embrace the nomenclature changes and adopt behaviors designed to achieve the new goals. Rebranding efforts to achieve enhanced outcomes for parents and their children confronted with custody disputes in divorce cases should be geared towards modifying perceptions of "custody" by altering the underlying mission and value proposition<sup>15</sup> through: changes in the decision-making process; garnering support from internal constituencies<sup>16</sup> (lawyers and

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11. See discussion *infra* Section IV.B.

12. See discussion *infra* Section IV.B.1.

13. See *infra* note 94 and accompanying text.

14. See, e.g., *infra* note 178.

15. See discussion *infra* Section III.A.

16. See *infra* notes 46-47 and accompanying text.

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judges); harnessing continuity of the emotional response associated with “custody” awards to educate parents about the advantages of the new paradigm;<sup>17</sup> striking a balance so that innovations in custody standards do not surpass public understanding of those changes;<sup>18</sup> and consistently using the “brand” both in state statutes and throughout the litigation process.<sup>19</sup>

This article discusses how rebranding principles, already being used to alter social behavior in other non-consumer contexts,<sup>20</sup> could be utilized to accomplish the legislative goal to reduce litigation as well as diminish animosity in custody cases. Part II of this article discusses the impetus for a transformation in the way parents view custody disputes. Part III discusses basic branding principles and how companies establish a brand and can successfully change their branding. Part IV explores the evolution of the current custody brand, identifies eight states that have eliminated “custody” and, in some cases, “visitation” from their vernacular, and discusses, in detail, changes to Florida’s custody statutes as part of the rebranding of custody litigation. Part V examines Florida’s experience with statutory revisions by considering appellate cases and practitioner commentary since the amendments to the state’s custody statutes went into effect to identify areas that demonstrate a failure at successful rebranding. Lastly, Part VI analyzes the implications for a successful attempt to rebrand “custody” and suggests that capitalizing on the psychological and emotional responses to rebranding could aid in achieving the universal goal to reduce the animosity associated with custody litigation.

## II. The Impetus for Changes in “Custody” Litigation

Despite the collective efforts of legislators, judges, lawyers, legal scholars, and mental health experts, not to mention parents, legal disputes over children following divorce persist. While significant levels of stress for both parents and children

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17. See discussion *infra* Section VI.A.

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

19. See discussion *infra* Section VI.C.

20. See discussion *infra* Section III.C.

can be anticipated throughout the divorce process, recent studies suggest that within a few years after the divorce has been finalized, most children have adapted to their modified living arrangements and exhibit comparable psychological functioning to peers whose parents did not divorce.<sup>21</sup> The exception, however, may be for those children that experience high levels of parental conflict during the divorce process with disputes continuing in the years that follow.<sup>22</sup>

The number of high-conflict divorces is relatively small. The vast majority of divorcing couples exit the marriage with relatively little conflict and resolve their disputes without judicial intervention.<sup>23</sup> Cases that are litigated often involve high-conflict custody disputes.<sup>24</sup> In addition, the parents involved in these cases typically engage in post-decreetal recidivistic litigation, consuming the majority of judicial resources.<sup>25</sup> There is no universal agreement on the appropriate method for handling high conflict custody disputes. To date, while strides have been made in encouraging settlements through alternative dispute mechanisms (made mandatory in some jurisdictions),<sup>26</sup> custody litigation has not been eradicated, and its demise at any point in the future is unlikely. Experts remain undeterred, however, and new initiatives are regularly touted as the panacea designed to ameliorate the animosity associated with contentious battles.

One slowly evolving trend is to eliminate words such as "custody" and "visitation" from the nomenclature used in custody statutes. The thought is that different terminology may

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21. Rappaport, *supra* note 2, at 359.

22. *Id.* at 363.

23. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 137-38 (1992) (suggesting that 90% of divorce cases are settled without a trial).

24. Christine A. Coates et al., *Parenting Coordination for High-Conflict Families*, 42 FAM. CT. REV. 246, 246-47 (2004). It is estimated that 8-12% of divorce cases involve chronic high-conflict disputes between parents. *Id.*

25. See Robert E. Emery & Kimberly C. Emery, *Should Courts or Parents Make Child-Rearing Decisions?: Married Parents as a Paradigm for Parents Who Live Apart*, 43 WAKE FOREST L. REV. 365, 382 n.50 (2008); Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM. L.Q. 201, 214 (1998).

26. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.10 cmt. a (Am. Law Inst. 2002).

cause parents to behave differently. Despite the old adage that “a rose by any other name would still smell as sweet as a rose,” there is support for the argument that the labels ascribed have an impact on perceptions and influence behavior and attitudes.<sup>27</sup> A parental relationship with a child, however, is so fundamental that simply rebranding how that relationship is characterized through nomenclature changes is unlikely to shift attitudes towards custody litigation. States adopting the changed nomenclature have, in many instances, also altered the standards and process for making custody determinations.<sup>28</sup> These combined modifications in statutory provisions make the concept of “custody” litigation an appropriate “product” for application of rebranding efforts to revise parental perceptions to achieve the desired results.

The courts are the only purveyors of divorce and custody judgments, making branding interests less about successfully competing against rivals for a share of the market. Instead, the goal is to *reduce* “sales” by encouraging parents to settle their disputes, thus decreasing the level of animosity associated with custody litigation, and developing a positive perception of co-parenting roles post-divorce.

### III. Basic Branding Principles

Branding and marketing theories are typically the focus of business development strategies. Marketing professionals promote the importance of branding when developing the image projected to the public.<sup>29</sup> When companies strive to enhance their or their products’ public image, they often undergo a rebranding. They may change their name, logo, or product packaging, but rebranding goes beyond the visual symbols and name associated with a business or its products. The rebranding process involves building a new, positive perception about the business or its products, often by recasting the core mission and values of the company.<sup>30</sup>

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27. See *infra* note 205 and accompanying text.

28. See *infra* note 125 and accompanying text.

29. See Heaton, *supra* note 5.

30. Bill Merrilees & Dale Miller, *Principles of Corporate Rebranding*, 42 EUR. J. MARKETING 537, 541 (2008).

A. *An Overview of Branding Concepts*

A company's brand is the impression that the consumer develops about the quality of a product or service offered, as well as the reputation and reliability of the company.<sup>31</sup> A company's brand has been referred to as the "most valuable piece of real estate in the world" because it occupies "a corner of someone's mind."<sup>32</sup> In order to be successful, a brand must promote some benefit that the customer will receive. This is the "brand promise," often referred to as the "[v]alue [p]roposition" that "create[s] an emotional connection based on the consumer's perception, feelings, and expectations."<sup>33</sup> Because 75% of purchase decisions are emotionally-driven, creating this emotional connection is what causes consumers to buy a product or service and view the company positively.<sup>34</sup>

Branding, then, is the "*process* of building a positive collection of perceptions about [a] business in [the] customers' minds."<sup>35</sup> Once the value proposition the company seeks to offer has been satisfactorily defined, the process of branding begins with the aid of a marketing plan.<sup>36</sup> Consistency in the image projected is crucial, as is ensuring the consumer can relate to the value proposition and the image being created.<sup>37</sup>

Selecting the company name is often a critical step in the branding process. Because the name is one element of a company's brand that consumers use to evaluate the quality of the product, "a good brand name can enhance the brand image, perception, awareness, attributes, and benefits of the

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31. Heaton, *supra* note 5.

32. JOHN HEGARTY, HEGARTY ON ADVERTISING: TURNING INTELLIGENCE INTO MAGIC 555 (Thames & Hudson eds., Kindle ed. 2011).

33. JAY GRONLUND, BASICS OF BRANDING: A PRACTICAL GUIDE FOR MANAGERS 12 (2013).

34. Liz Papagni, *7 Fresh Ideas on How to Brand Your Business*, BUSINESS 2 COMMUNITY (Apr. 2, 2014), <http://www.business2community.com/branding/7-fresh-ideas-brand-business-0823233>.

35. *What Branding Is*, FOR DUMMIES, <http://www.dummies.com/how-to/content/what-branding-is.html> (emphasis added).

36. Heaton, *supra* note 5.

37. Papagni, *supra* note 34.



product[.]”<sup>38</sup> Psychological research suggests that the brand name itself can trigger a positive emotional response to the brand.<sup>39</sup>

Rebranding generally involves many of the same measures as the original branding and is designed to create a new image in order to enhance the company or product’s appeal to consumers or, in some cases, distance the company from a prior negative perception.<sup>40</sup> Rebranding begins with the recognition that modifications to the company or its products are required and the identification of what needs to be adjusted.<sup>41</sup> The emphasis is on the new image, not on the fact that a transformation is essential for a company to remain viable or to further develop.<sup>42</sup> Rebranding may be necessary if the brand promise is no longer sustainable or if the business has evolved so that the public image of the company must be realigned with its new goals.<sup>43</sup> If all that is being done is changing the name, however, rebranding will generally not be successful.<sup>44</sup> Success occurs when the name change is combined with a new brand promise, i.e. a new value proposition the company offers to the consumer.<sup>45</sup>

Necessary steps in the rebranding process include encouraging support from internal stakeholders, creating continuity between the old brand and the new brand so the consumer understands the transition, and taking the time

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38. Mei-chun Cheung et al., *Behavioral and Neural Investigation of Brand Names*, in *PSYCHOLOGY OF BRANDING* 111, 112 (W. Douglas Evans ed., 2013).

39. *Id.* at 126.

40. Laurent Muzellec & Mary Lambkin, *Corporate Rebranding: Destroying, Transferring or Creating Brand Equity?*, 40 *EUR. J. MARKETING* 803, 805 (2006).

41. Giselle Abramovich, *5 Strategic Considerations for a Successful Rebrand*, *CMO.COM* (Mar. 11, 2014),

[http://www.cmo.com/articles/2014/3/7/5\\_strategic\\_consider.html](http://www.cmo.com/articles/2014/3/7/5_strategic_consider.html).

42. *Id.*

43. *Id.*

44. Kim Lachance Shandrow, *The 8 Must-Follow Rules for Rebranding Your Company*, *ENTREPRENEUR* (Sept. 10, 2014), <http://www.entrepreneur.com/article/237296>.

45. Abramovich, *supra* note 41. ePrize underwent a successful rebranding when it changed its name to HelloWorld, after expanding its services beyond connecting consumers with online sweepstakes, and offered new product lines. *Id.*

necessary to accomplish the shift in consumer perceptions.<sup>46</sup> Although branding is externally focused on managing public perception, internal constituencies are a vital component in the rebranding process.<sup>47</sup> Unless employees embrace the new value proposition and promote it through their interactions with consumers, the consistency of message will be lost.<sup>48</sup> Similarly, the new branding efforts must remain cognizant of the old brand and purposefully strengthen the positive image that is desired.<sup>49</sup> If the goal is to distance the company from negative branding, efforts must be focused on demonstrating the departure from the prior unsuccessful or outdated branding and how the revised brand promise will benefit the consumer.<sup>50</sup> If the new branding is part of the evolution of the brand as the business grows, the consumer must be led to believe that there is further improvement or enhancement of an already desirable commodity.<sup>51</sup> Lastly, the time it takes to shift public perception must be considered to ensure consumers understand the new brand.<sup>52</sup>

One highly publicized "epic" rebranding failure involves JCPenney.<sup>53</sup> In a third attempt at rebranding in three years to boost sagging sales, the retail merchant eliminated its traditional sales and discount approach, familiar to consumers, and introduced new, lower everyday pricing, calling it "Fair and Square Pricing," and added month-long special deals and "best prices" days during the month.<sup>54</sup> These efforts drove away the company's loyal customer base, causing sales to drop by almost 20%.<sup>55</sup> The CEO acknowledged that the rebranding was confusing for consumers who did not comprehend the new

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46. Kristi Knight, *5 Tips on Rebranding from a Billion-Dollar Expert*, ENTREPRENEUR (Sept. 3, 2014), <http://www.entrepreneur.com/article/236942>.

47. *Id.*

48. *Id.* See also Merrilees & Miller, *supra* note 30, at 541.

49. Knight, *supra* note 46.

50. *See id.*

51. *See id.*

52. *Id.*

53. Steve Olenski, *JC Penney's Epic Rebranding Fail*, FORBES (June 15, 2012), <http://www.forbes.com/sites/marketshare/2012/06/15/jc-penneys-epic-rebranding-fail/>.

54. *Id.*

55. *Id.*

nomenclature.<sup>56</sup> The rebranding failed because there was a lack of continuity between the old brand and the new, causing the innovative pricing approach to surpass the customer's understanding of the benefits that may have been associated with the changes.<sup>57</sup>

B. *Psychological Aspects of Branding*

Because branding creates an emotional response by the target audience, the psychology behind the effectiveness of branding is a particularly favorite topic for exploration and analysis. In his article *Branding and the Psychology of Consumer Behavior*, Bobby Calder discussed the dual thinking process that determines behavior; in one stage, referred to as System 1, individuals react reflexively, usually without conscious thought when confronted with specific cues, in a process called "priming."<sup>58</sup> Calder described one particular study that demonstrated the effects of priming: the study used word associations, where individuals were given a list of words, including ones associated with being elderly, and told to organize them into sentences; these individuals subsequently walked much slower after completing the task than another group that had the identical words, minus those with the elderly connotation.<sup>59</sup> The individuals' behavior was "primed" by being exposed to the words acting as cues.

The other stage of thinking, referred to as System 2, requires conscious thought and reasoning focused on resolving a problem.<sup>60</sup> A classic example would be a math problem solved in a systematic way.<sup>61</sup> This stage of thinking is used to resolve conflicts as new information and prior associations are processed.<sup>62</sup> When this thought process becomes explicit as a way of analyzing alternatives, those thoughts or associations

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56. *Id.*

57. *See id.*

58. Bobby J. Calder, *Branding and the Psychology of Consumer Behavior*, in *PSYCHOLOGY OF BRANDING* 3, 6 (W. Douglas Evans ed., 2013).

59. *Id.*

60. *Id.* at 7.

61. *Id.*

62. *Id.*

become beliefs.<sup>63</sup> Calder notes, however, that invoking System 2 thinking requires the individual to be motivated and involved in the process because of the effort required to scrutinize the information received.<sup>64</sup>

Influencing these two stages of thinking is the goal of branding. By appealing to both the automatic, reflexive responses as well as beliefs created through orderly processing of information, marketers can create an "attitude," defined as "evaluating something favorably or unfavorably."<sup>65</sup> Successful branding strives to persuade the individual through effective marketing that the product is favorable, creating a positive attitude that eventually leads to habitual, reflexive use of the product, even when exposed to other choices.<sup>66</sup>

### C. *Using Branding to Influence Social Behavior*

Branding principles are just now being viewed as effective tools to modify social behavior. The theory is that behaviors have similar characteristics to goods because they provide choices to consumers and can be couched in terms of costs (risks) and benefits.<sup>67</sup>

Although little sponsored research has been conducted, rebranding campaigns to modify risky health behavior are developing.<sup>68</sup> Public health researchers have begun to treat healthy behaviors, such as condom usage, smoking cessation, and substance abuse avoidance as "products" to be marketed to consumers.<sup>69</sup> The goal has been to brand such behaviors with positive images of a healthy, disease-free lifestyle, while at the same time rebranding risky behavior, such as combining alcohol and unprotected sex, with a negative image.<sup>70</sup> Smoking,

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63. *Id.*

64. *Id.* at 9.

65. *Id.* at 8.

66. *Id.* at 12.

67. W. Douglas Evans, *Branding Social and Health Behavior: An Education and Research Agenda*, in *PSYCHOLOGY OF BRANDING* 133, 134 (W. Douglas Evans ed., 2013).

68. *Id.* at 142.

69. *Id.* at 136.

70. *Id.* at 139.

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commercially glamorized through marketing images such as the rugged Marlboro man, is being rebranded successfully as a health risk, while living a tobacco-free lifestyle is touted for its health benefits that promote longevity.<sup>71</sup>

Branding campaigns targeting at-risk groups have the highest likelihood of success if they can create new beliefs and attitudes towards prevention and healthy alternatives.<sup>72</sup> The challenge, however, is in rebranding risky behavior because of the positive images that instigate such behavior in the first place.<sup>73</sup> To be successful, the branding/rebranding campaign must cause consumers to adopt a positive attitude towards the benefits of a healthy lifestyle and develop a negative view of risky behavior.<sup>74</sup>

#### IV. The Evolution of the “Custody” Brand

Unlike businesses that strive to differentiate themselves from competitors through their brand in order to develop a strong customer base, custody litigation does not involve the sale of goods or services that can be obtained from a variety of sources. Custody litigation is controlled by state governments through legislative action and judicial implementation, and judges and legislators are attempting to exit the business of resolving custody disputes, not increase their market share. Branding concepts, however, have application in the custody litigation arena. The legislature and courts are, in fact, “selling” the concept of avoiding litigation and ensuring better outcomes for children through the statutory schemes adopted that drive parties to make decisions concerning child placement and to do so civilly, respectfully, and without animosity. Now that the goal has been established, branding principles can be used to achieve that goal.

Just like healthy social behavior is a product that can be rebranded, custody litigation and parental behavior associated with it is capable of being effectively rebranded. Rebranding is

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71. *Id.* at 136.

72. *Id.* at 139.

73. *See id.*

74. *See id.*

necessary because the child custody standards continuum has progressed from one of clearly defined rules to discretionary factors designed to promote the best interests of the child.<sup>75</sup> As a result of this evolutionary process, the predictability associated with custody determinations has devolved into a system rife with uncertainty and conflict.<sup>76</sup>

#### A. *Shifts in Custody Standards*

Throughout ancient history and until the early 19<sup>th</sup> century, in the event of divorce, children were generally placed with the patriarch of the family.<sup>77</sup> More than 200 years ago, the custody pendulum began to swing in the opposite direction with the introduction of the "tender years" doctrine under English common law, which resulted in maternal preference based on women's primary caretaking roles.<sup>78</sup> The "tender years" doctrine continued as the prevailing standard in the United States until no-fault divorce concepts were introduced in the 1970s, heralding changes in custody laws as a preference for joint legal custody surfaced.<sup>79</sup> The "best interest of the child" standard

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75. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 233 (1975). See generally Heather Crosby, *The Irretrievable Breakdown of the Child: Minnesota's Move Toward Parenting Plans*, 21 HAMLINE J. PUB. L. & POL'Y 489, 492-499 (2000) (discussing the evolution of principles guiding child custody decision-making).

76. Critics of the current best interest of the child maintain that it creates uncertainty in custody determinations, leading to more parental disputes. See *infra* notes 79-85 and accompanying text.

77. See Ariel Ayanna, *From Children's Interests to Parental Responsibility: Degendering Parenthood through Custodial Obligation*, 19 UCLA WOMEN'S L.J. 1, 9-10 (2012).

78. Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule"*, 41 U. BALT. L. REV. 83, 90 (2011).

79. See Ayanna, *supra* note 77, at 11-12; Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1181 (1999). "Joint custody" can mean "joint legal custody," where parents share decision-making for major issues affecting the child (e.g. religion, schooling, health, etc.); "joint physical custody," where parents share the custodial residence of the child on a fairly equal basis; or a combination of both joint legal and physical custody. Maria P. Cagnetti & Nadya J. Chmil, *Shared Parenting – Have We Really Closed the GAP?: A Comment on AFCC's Think Tank Report*, 52 FAM. CT. REV. 181, 184

began to gain popularity during this time as courts balanced factors to determine which parent provided the optimal environment in which to raise a child.<sup>80</sup>

Although the best interest of the child standard has been favored for almost fifty years, its shortcomings and difficulties in application have been well-documented.<sup>81</sup> Without entirely eviscerating the standard, various rebuttable presumptions thought to advance the child's best interest have been proposed to ameliorate some of the uncertainty the standard brings.<sup>82</sup> Presumptions have included the primary caretaker preference,<sup>83</sup> the "approximation rule" endorsed by the American Law

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(2014). The distinction is not always made clear in statutes or by legal scholars.

80. Ayanna, *supra* note 77, at 12-13.

81. See, e.g., Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 11-28 (1987) (arguing that the best interest of the child standard is indeterminate, especially when judges are confronted with equally fit parents; it is unjust because it ignores parental rights; it is self-defeating because it encourages litigation, which is contrary to the child's best interest; and it can be sacrificed in favor of promoting a public policy consideration); Katherine Hunt Federle, *Looking for Rights in the all the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1540-43 (1994) (examining criticism of the best interest standard). The best interest standard is problematic from an adjudicatory perspective because it requires an assessment of individuals with a view towards predicting future events, unlike typical adversarial litigation that focuses on resolving disputes about past events. Jana B. Singer, *Bargaining in the Shadow of the Best-Interests Standard: The Close Connection Between Substance and Process in Resolving Divorce-Related Parenting Disputes*, 77 LAW & CONTEMP. PROBS. 177, 180 (2014).

82. Even these attempts to add certainty to the standards fall short. For example, surveys suggest that even if the approximation rule was the operative standard, litigants would dispute the amount of time each spent in caring for the children. See Mary Jean Dolan & Daniel J. Hynan, *Fighting Over Bedtime Stories: An Empirical Study of the Risks of Valuing Quantity over Quality in Child Custody Decisions*, 38 LAW & PSYCHOL. REV. 45, 62-66 (2013-2014); Warshak, *supra* note 78, at 126. See Mary Kate Kearney, *The New Paradigm in Custody Law: Looking at Parents with a Loving Eye*, 28 ARIZ. ST. L.J. 543, 552-63 (1996) (discussing a comprehensive comparison of the advantages and disadvantages of the best interest of the child standard, joint custody option, and primary caretaker preference).

83. Federle, *supra* note 81, at 1547.

Institute,<sup>84</sup> and joint physical custody.<sup>85</sup> These presumptions can be overcome, however, by a judicial finding that the presumptive arrangement is not in the child's best interest.<sup>86</sup>

With the adoption of the best interest standard there was also a declaration that children have rights that are to be protected.<sup>87</sup> More than twenty-five years ago it was observed that some reformers viewed the child's interests or rights as paramount, with the parents' interests being subservient.<sup>88</sup> Despite early reforms based on evidence that a child fares best when both parents are involved in the child's life, there was little effort to impose duties upon a parent, primarily the non-custodial parent, to assume more of the child-rearing responsibilities.<sup>89</sup> Even scholars promoting joint custody arrangements acknowledge that the lure of substantial involvement in decision-making and time-sharing may not "incentivize" a disinterested parent to participate in co-parenting.<sup>90</sup> This has started to change with the adoption of statutes requiring "parenting plans" to be agreed to by the parties, or absent agreement, ordered by the court. Whether

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84. The "approximation rule" provides:

Unless otherwise resolved by agreement of the parents . . . , the court should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation or, if the parents never lived together, before the filing of the action[.]

PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08(1) (Am. Law Inst. 2002).

85. See, e.g., IDAHO CODE ANN. § 32-717 (West 2015); N.M. STAT. ANN. § 40-4-9.1(A) (West 2015).

86. See, e.g., IDAHO CODE ANN. § 32-717(1)(a)-(g) (West 2015); N.M. STAT. ANN. § 40-4-9.1(A), (B) (West 2015).

87. See generally Elrod, *supra* note 4.

88. Karen Czapanskiy, *Volunteers and Drafters: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1442 (1991). Additionally, the supremacy of children's rights over their parents has been promoted more recently. James G. Dwyer, *Parents' Self-Determination and Children's Custody: A New Analytical Framework for State Structuring of Children's Family Life*, 54 ARIZ. L. REV. 79, 79 (2012).

89. Czapanskiy, *supra* note 88, at 1443.

90. Ayanna, *supra* note 77, at 48.



mandating participation in the decision-making process defining how the child will be raised will actually result in increased participation by both parents post-divorce is debatable.<sup>91</sup>

Current legislation mandating shared custodial and parental responsibility arrangements is often based on studies suggesting that the child and parents benefit when an ongoing relationship with both parents, characterized by frequent contact and joint parental involvement in child-rearing, is maintained.<sup>92</sup> Such activities promote the child's best interest and engaged parents comply with support obligations more regularly.<sup>93</sup> Theoretically, this because post-divorce adjustment is less should also reduce the animosity associated with custody disputes by reducing the unpredictability of litigation outcomes.<sup>94</sup> Opponents to shared parenting note that requiring frequent contact between the parents can exacerbate litigation rather than decrease it, causing detriment to the parents, as well as the child.<sup>95</sup>

It has been suggested that parents follow one of three co-parenting models when required to engage in shared parenting: "cooperative," "parallel," or "chronically conflicted."<sup>96</sup> Post-divorce, approximately 25% of parents cooperatively co-parent, freely exchanging information about the child and successfully

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91. Michael T. Flannery, *Is "Bird Nesting" in the Best Interest of Children?*, 57 SMU L. REV. 295, 348 n.333 (2004).

92. See Cynthia R. Mabry, *Indissoluble Nonresidential Parenthood: Making it More than Semantics When Parents Share Parenting Responsibilities*, 26 BYU J. PUB. L. 229, 236-38 (2012) (discussing advantages and disadvantages associated with shared parenting including lack of stability resulting from two homes, often with differing rules and expectations).

93. *Id.* at 236.

94. See Elrod, *supra* note 4, at 900 (suggesting that parents are more likely to hire experts and engage in protracted litigation because the stakes associated with custody disputes are so high and the outcomes are unpredictable).

95. See Mabry, *supra* note 92, at 238-41 (discussing the negative impact of forced shared parenting in high conflict divorces); Peter Jaffe, *A Presumption Against Shared Parenting for Family Court Litigants*, 52 FAM. CT. REV. 187, 187-88 (2014) (arguing that shared parenting should not be the presumption in high conflict cases, essentially those where the parents litigate issues relating to custody, especially when accompanied by a history of domestic violence, addictions, or mental health issues).

96. Matthew Sullivan, *Feature, Coparenting: A Lifelong Partnership*, 36 FAM. ADVOC. 18, 19 (2013).

negotiating conflicts that arise; another 40% adopt a parallel co-parenting style, interacting infrequently with little conflict, while still adhering to shared parenting concepts as needed; and the remaining 35% are chronically conflicted, exhibiting "insufficient problem-solving and decision-making skills."<sup>97</sup> Children parented by the latter group tend to have the most difficulty with post-divorce adjustment.<sup>98</sup>

### B. *The New Value Proposition in Custody Litigation*

The new terminology that has accompanied changes in custody standards and the process through which custody determinations are made represents an evolving trend to eliminate references to "custody" and "visitation." The terms "parenting plans" and "parenting time" have gained popularity among state legislators, suggesting a nationwide trend requiring the adoption of "parenting plans"<sup>99</sup> and the elimination of traditional awards of "custody" and "visitation" to parents in an effort to moderate the negative nomenclature thought to contribute to the contentiousness of custody litigation. These changes represent a shift in the "value proposition" that, in many cases is accompanied by both semantic changes, as well as more fundamental changes in custody standards and the process of determining custody. Unlike shifts in value propositions made by companies offering products and services, the changes in the value proposition offered in custody litigation has not been accompanied by intensive rebranding campaigns.

#### 1. Parenting Plans

The first reference to a "parenting plan" in a divorce statute dates back to at least 1987 with the adoption of the Washington State Parenting Act requiring parties in a divorce action to

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97. *Id.*

98. *Id.*

99. In 1990, it was suggested that the adoption of a "parenting plan" requirement in divorce statutes was a developing trend. Jane W. Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. MICH. J.L. REFORM 65, 73 (1990).

submit a proposed “parenting plan” to the court.<sup>100</sup> The adoption of the phrase to identify the terms governing the parent-child relationship when parents do not reside together has undergone a slow but steady progression.<sup>101</sup> During the 1990s, at least nine additional states amended statutes to adopt the new nomenclature.<sup>102</sup> Since 2000, the momentum has increased, so that currently at least thirty states and the District of Columbia include the term “parenting plan” in statutes or rules relating to child placement following divorce.<sup>103</sup>

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100. 1987 Wash. Sess. Laws 2016-29. Prior to Washington’s use of the term, several other states required that parties submit a “plan” that included details about the parents’ plans for a child’s care and upbringing, but the phrase “parenting plan” was not used as a legal term of art. For a discussion of the generic requirement to develop a custody “plan”. See Ellis, *supra* note 99, at 70.

101. During the 1989 Annual Meeting, the American Bar Association House of Delegates approved a Model Joint Custody Statute that required a “parenting plan” when the parents were to have joint custody or shared parental responsibility. The statute did not gain wide acceptance. Ellis, *supra* note 99, at 70.

102. Arizona, 1997 Ariz. Sess. Laws 1402-04; California, 1993 Cal. Stat. 1624; Colorado, 1997 Colo. Sess. Laws 973; Missouri, 1998 Mo. Laws A/4/5 Box 184 Folder 128; Montana, 1997 Mont. Laws 1567; New Mexico, 1999 N.M. Laws 1541; Ohio, 1990 Ohio Laws 112; Oregon, 1997 Or. Laws 1858; Tennessee, 1997 Tenn. Pub. Acts 1176.

103. The following jurisdictions include “parenting plans” in their statutes or rules: Arizona, ARIZ. REV. STAT. ANN. § 25-403.02 (2015); California, CAL. FAM. CODE § 3040 (West 2015); Colorado, COLO. REV. STAT. § 14-10-124 (West 2015); Connecticut, CONN. GEN. STAT. ANN. § 25-30 (West 2015); District of Columbia, D.C. CODE ANN. § 16-914 (West 2015); Florida, FLA. STAT. § 61.13 (2015); Georgia, GA. CODE ANN. § 19-9-1 (West 2015); Hawaii, HAW. REV. STAT. ANN. § 571-46.5 (West 2015); Idaho, IDAHO CODE ANN. § 32-1402(4) (West 2015); Iowa, IOWA CODE ANN. § 598.41 (West 2015); Kansas, KAN. STAT. ANN. § 23-3211 (West 2014); Maine, ME. REV. STAT. ANN. tit. 19-A, § 1653 (2014); Minnesota, MINN. STAT. ANN. § 518.1705 (West 2015); Missouri, MO. ANN. STAT. § 452.310 (West 2015); Montana, MONT. CODE ANN. § 40-4-234 (West 2015); Nebraska, NEB. REV. STAT. ANN. § 42-364 (West 2015); New Hampshire, N.H. REV. STAT. ANN. § 461-A:1 (West 2015); New Mexico, N.M. STAT. ANN. § 40-4-9.1 (West 2015); North Carolina, N.C. GEN. STAT. ANN., R. REG. MEDIATION OF CHILD CUSTODY AND VISITATION DISP. 1, 12 (WEST 2015); North Dakota, N.D. CENT. CODE ANN. § 14-09-30 (West 2015); Ohio, OHIO REV. CODE ANN. § 3109.04 (West 2015); Oklahoma, OKLA. STAT. tit. 43, § 120.3 (West 2015); Oregon, OR. REV. STAT. ANN. § 107.102 (West 2015); Pennsylvania, 23 PA. CONS. STAT. ANN. § 5331 (West 2015); South Dakota, S.D. CODIFIED LAWS § 25-4A App. A Guideline 5 (West 2015); Tennessee, TENN. CODE ANN. § 36-6-402 (West 2015); Texas, TEX. FAM. CODE ANN. § 153.603 (West 2015); Utah, UTAH CODE ANN. § 30-3-10.8 (West 2015); Washington, WASH. REV. CODE ANN. § 26.09.184 (West 2015); West Virginia, W. VA. CODE ANN. § 48-9-205 (West 2015);

Not all states require the adoption of a parenting plan, however. At least six refer to a parenting plan only in passing as a generic term, rather than as a formal plan assigning parental rights and responsibility and delineating contact between a parent and a child.<sup>104</sup> Others require the parties to submit a proposed plan in procedural rules, but not do not detail what must be included in the proposal.<sup>105</sup> Several, however, mandate the filing of a parenting plan in each case and enumerate those terms that must be included in the plan, such as the schedule of parenting time between the parents and the child; where the child will attend school; doctors and healthcare facilities that will provide medical care for the child; religious affiliation; holiday and summer parenting time schedules; the method of communication between the parent and the child, including electronic communications; child-care arrangements; transportation; and methods to be used for resolving disputes between the parents, such as mediation or the retention of parenting coordinators.<sup>106</sup> Others require the filing of a parenting plan and offer suggestions of provisions to include, but do not require their inclusion.<sup>107</sup> Still other states give parents and courts the option of developing a general or detailed

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Wisconsin; WIS. STAT. ANN. § 767.41 (West 2015).

104. *See, e.g.*, California, CAL. FAM. CODE § 3040 (West 2015) (stating the court has wide discretion in choosing a parenting plan that is in the best interest of the child); Connecticut, CONN. GEN. STAT. ANN. § 46b-56d (West 2015) (requiring the court to consider the impact a parent's relocation would have on an "existing parenting plan"); Idaho, IDAHO CODE ANN. § 32-1402(4) (West 2015) (discussing the need for parenting plans in high conflict cases to help "peacefully resolve child custody and visitation issues," but does not mention the adoption of a plan in IDAHO CODE § 32-717 and 717b dealing with custody of children in divorce cases); Maine, ME. STAT. ANN. tit. 19-A, § 1653 (West 2015) (referring to a parenting plan only in connection with duties assigned to a parenting coordinator); Oklahoma, OKLA. STAT. ANN. tit. 43, § 120.3 (West 2015) (referring to a parenting plan only in connection with duties assigned to a parenting coordinator).

105. *See, e.g.*, Connecticut, CONN. R. SUPER. CT. FAM. § 25-30 (requiring parties in divorce cases to submit a detailed proposed order that includes a parenting plan).

106. *See, e.g.*, GA. CODE ANN. § 19-9-1 (West 2015); MO. ANN. STAT. § 452.310 (West 2015); N.D. CENT. CODE ANN. § 14-09-30 (West 2015); 23 PA. CONS. STAT. ANN. § 5331 (West 2015); WIS. STAT. ANN. § 767.41 (West 2015).

107. *See, e.g.*, MONT. CODE ANN. § 40-4-234 (West 2015); D.C. CODE ANN. § 16-914 (West 2015).

parenting plan.<sup>108</sup>

## 2. “Custody” and “Visitation”

Over the past twenty years, eight states have completely eliminated references to “custody” in statutory text governing the parent-child relationship after divorce. Texas was the first to adopt an alternative term in 1995;<sup>109</sup> Maine,<sup>110</sup> Montana,<sup>111</sup> and Colorado<sup>112</sup> followed suit in each of the subsequent three years, respectively. After a seven year lull New Hampshire extensively revised its statutes in 2005,<sup>113</sup> followed by Florida in 2008,<sup>114</sup> North Dakota in 2009,<sup>115</sup> and Arizona in 2012.<sup>116</sup> In lieu of “custody,” most states adopted some version of “parental rights and responsibilities.”<sup>117</sup> Texas adopted the terms “managing conservatorship” and “possessory

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108. See, e.g., OR. REV. STAT. ANN § 107.102 (West 2015) (allowing for a general parenting plan that lets parents set terms on an informal basis, but which sets forth the “minimum amount of parenting time and access a noncustodial parent is entitled to have,” or a detailed plan that may include provisions relating to: “(a) Residential schedule; (b) Holiday, birthday and vacation planning; (c) Weekends, including holidays, and school in-service days preceding or following weekends; (d) Decision-making and responsibility; (e) Information sharing and access; (f) Relocation of parents; (g) Telephone access; (h) Transportation; and (i) Methods for resolving disputes”); see also HAW. REV. STAT. ANN. § 571-46.5 (West 2015).

109. 1995 Tex. Gen. Laws 119, 123, 147-58 (using “managing conservatorship,” “possessory conservatorship,” and “access” instead of “custody” and “visitation”).

110. 1995 Me. Laws 1939 (substituting “parental responsibility” and “parent-child contact” for “custody” and “visitation”).

111. 1997 Mont. Laws 1570, 1572-73 (substituting “parenting” and “parental contact” for “custody” and “visitation,” respectively).

112. 1998 Colo. Sess. Laws 1376 (changing the term “custody” to “parental responsibility” and “visitation” to “parenting time”).

113. 2005 N.H. Laws 622-26 (adopting a new chapter referring to “parental rights and responsibilities” instead of parental “custody” and “visitation”).

114. See discussion *infra* Section IV.B.3.

115. 2005 N.D. Laws 609, 611-12, 619 (referring to “parental rights and responsibilities,” “parenting schedule,” and “residential responsibility” in lieu of “custody” and “visitation”).

116. 2012 Ariz. Sess. Laws 1816-18 (substituting “legal decision-making and parenting time” for custody and defining “visitation” as time the child spends with someone other than a parent).

117. See *supra* notes 110-116.

conservatorship.”<sup>118</sup>

These states also eliminated references to “visitation” when addressing a parent’s time with a child,<sup>119</sup> although several still use the term when providing for third-party rights of access to a child or in situations involving inappropriate parental conduct that results in limitations on contact with a child.<sup>120</sup> In addition, at least two states that still retain references to “custody” within statutory text have eliminated “visitation” when addressing the parent-child relationship.<sup>121</sup> The most popular alternatives to “visitation” include variations on “parenting” followed by “time,” “schedule,” or “contact.”<sup>122</sup>

In some states, it was evident whether the revisions in nomenclature were intended to substantively alter custody standards or were merely semantic.<sup>123</sup> The Colorado legislature

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118. *See supra* note 109 and accompanying text.

119. Although the statutory text has been amended in all eight jurisdictions to eliminate the references to “custody” and “visitation” when addressing parental rights and access, the terms still remain in the titles of statutes in two states. MONT. CODE ANN. § 40-4-201, *et seq.* (West 2015) (titled Title 40, Chapter 4 as “Termination of Marriage, Child Custody, Support,” with Part 2 of that Chapter titled “Support, Custody, Visitation, and Related Provisions”); N.D. CENT. CODE ANN. § 14-09-06.3 (West 2015) (permitting investigations into parenting rights and responsibilities in contested cases in a section titled Custody Investigations and Reports).

120. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-401(7) (2015) (defining “visitation” as “a schedule of time that occurs with a child by someone other than a legal parent”); ME. REV. STAT. tit. 19-A, § 1653(6)-(7) (2015) (restricting contact when there have been instances of domestic violence, conviction of sexual offenses, or prior violations of an order of contact and access); ME. REV. STAT. tit. 19-A, § 1801, *et seq.* (2015) (establishing grandparent visitation rights); MONT. CODE ANN. § 40-4-228 (West 2015) (addressing custody and visitation issues between a parent and a third-party); N.H. REV. STAT. ANN. § 461-A:13 (2015) (providing grandparent visitation rights); TEX. FAM. CODE ANN. § 153.014 (West 2015) (establishing visitation centers and visitation exchange facilities for use during periods of possession and access in cases requiring supervision or other monitoring).

121. In 1996, Michigan amended its Child Custody Act of 1970, MICH. COMP. LAWS ANN. § 722.21, *et seq.* (West 2015) to substitute “parenting time” in lieu of “visitation.” 1996 Mich. Pub. Acts 937. Similarly, the Kansas legislature eliminated “visitation” in favor of “parenting time” six years later. 2012 Kan. Sess. Laws 1577.

122. *See supra* notes 109-12, 115-16.

123. *But see infra* notes 172-74 and accompanying text (discussing the uncertainty created in Florida as a result of the nomenclature changes); *see also* Gary L. Crippen, *Minnesota’s Alternatives to Primary Caretaker Placements: Too Much of a Good Thing?*, 28 WM. MITCHELL L. REV. 677, 689-90

made it clear that the nomenclature changes did not impact the rights and responsibilities associated with traditional awards of “custody” or “visitation”:

On and after July 1, 1993, the term “visitation” has been changed to “parenting time.” It is not the intent of the general assembly to modify or change the meaning of the term “visitation” nor to alter the legal rights of a parent with respect to the child as a result of changing the term “visitation” to “parenting time.”

On and after February 1, 1999, the term “custody” and related terms such as “custodial” and “custodian” have been changed to “parental responsibilities”. It is not the intent of the general assembly to modify or change the meaning of the term “custody” nor to alter the legal rights of any custodial parent with respect to the child as a result of changing the term “custody” to “parental responsibilities.”<sup>124</sup>

In contrast, in other states the new terminology reflected extensive changes in how child placement and contact issues were resolved as entirely new code sections were adopted.<sup>125</sup>

The states eliminating custody and visitation still use the terms in connection with uniform laws adopted within the jurisdiction and in implementing legislation enacted to give

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(2001) (indicating there was uncertainty whether new authority was created for judges to impose parenting plans absent parental agreement following Minnesota’s adoption of statutes providing for plans that eliminated traditional custodial labels).

124. COLO. REV. STAT. ANN. § 14-10-103(3)-(4) (West 2015).

125. *See, e.g.*, New Hampshire, 2005 N.H. Laws 622-26 (adopting a new chapter referring to “parental rights and responsibilities” instead of parental “custody” and “visitation”); Texas, 1995 Tex. Gen. Laws 123-24 (developing a new statutory system providing for “managing conservatorship,” “possessory conservatorship,” and “access” instead of “custody” and “visitation”). *See infra* Section IV.B.3 for a detailed discussion of the extent of amendments to the Florida Statutes.

effect to federal statutes.<sup>126</sup> To ensure that orders not containing the term “custody” are properly interpreted for purposes of enforcement under statutes such as the Uniform Child Custody Jurisdiction and Enforcement Act and the Parental Kidnapping Prevention Act, some states have adopted provisions that make clear the legislative intent.<sup>127</sup> The language used in such statutes is similar to that adopted by New Hampshire:

[a]ny provision of law that refers to the “custody” of minor children shall mean the allocation of parental rights and responsibilities as provided in this chapter. Any provision of law which refers to a “custodial parent” shall mean a parent with 50 percent or more of the residential responsibility and any reference to a non-custodial parent shall mean a parent with less than 50 percent of the residential responsibility.<sup>128</sup>

In light of this growing trend to eliminate “custody” and “visitation,” and in some cases revise custody standards and the procedure for making custody determinations, an analysis of Florida’s experience gives some guidance on how branding principles could be applied to shift social behavior in the custody litigation arena as it has been used in issues involving public health concerns. The revisions to Florida’s statutes are in many ways typical of amendments adopted in other states and provide a reasonable framework to discuss the utility of branding principles in the context of custody litigation.

### 3. Florida’s Statutory Revisions

The revisions to the Florida Statutes illustrate how the value proposition associated with custody litigation has undergone major shifts. As a result, it presents a useful model

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126. *See, e.g.*, N.D. CENT. CODE § 14-09.3-01, *et seq.* (West 2015) (adopting the Uniform Deployed Parents Custody and Visitation Act); N.D. CENT. CODE § 14-14.1-01, *et seq.* (West 2015) (adopting the Uniform Child Custody Jurisdiction and Enforcement Act).

127. *See, e.g.*, N.D. CENT. CODE § 14-09-33 (West 2015).

128. N.H. REV. STAT. ANN. § 461-A:20 (West 2015).



to discuss how branding principles could be used to effectuate changes in parents' behavior during the litigation of their disputes. A review of the amendments that went into effect on October 1, 2008, is a helpful starting point.<sup>129</sup>

The word "custody" was not part of Florida's original divorce statutes, enacted in 1828.<sup>130</sup> Since major revisions in 1971 to the Florida Statutes governing divorce actions,<sup>131</sup> one thing remained constant – divorcing parties were required to agree to, or the court would adjudicate "custody" and "visitation" rights.<sup>132</sup> Presumably, because the terms "custody" and "visitation" were intended to have their everyday plain meaning, they were not defined in divorce statutes, unlike the term "primary residential parent," introduced and defined in the 1982 legislation, which marked the first major revision in custody standards.<sup>133</sup> In an attempt to reduce animosity associated with custody litigation, the term "primary residential parent" was adopted in the Shared Parental Responsibility Act in 1982 as a more neutral term to avoid references to the "care, custody, and control" of a child by parents.<sup>134</sup> Use of "primary residential parent" avoided references to custody and was defined as "the parent with whom the child maintains his or her primary residence."<sup>135</sup> Still, the term "custody" remained in the statute governing child placement decisions following divorce.<sup>136</sup>

The next major revisions occurred in 2008 when the word "custody" was completely eliminated from the divorce statutes, as were the phrases "primary residential parent" and "visitation rights"<sup>137</sup> in divorce<sup>138</sup> actions. The unstated (yet clear) goal of

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129. For ease of references, these statutory revisions are referred to as the "2008 amendments" throughout this article.

130. 1828 Fla. Laws 12.

131. 1971 Fla. Laws 1319 *et seq.*

132. FLA. STAT. § 61.13 (2007).

133. Renee Goldenberg, *Practical Aspects of Parenting Conflicts: Preparing Parents for Litigation*, 72 FLA. B.J. 54, 58 (1998).

134. *Id.* at 54.

135. FLA. STAT. § 61.046(3) (2007).

136. FLA. STAT. § 61.13 (1982).

137. *See generally* 2008 Fla. Laws 788-848.

138. Although the terminology in the Florida Statutes was changed from "divorce" to "dissolution of marriage," in 1971, 1971 Fla. Laws 1319, never, in twenty-five years of private practice, did clients tell this author that they wanted their marriage dissolved; instead, they wanted a divorce. The fact that

the 2008 legislative revisions of the terminology associated with custody proceedings in Florida<sup>139</sup> was the same goal that had previously resulted in the 1982 amendments – to reduce the animosity prevalent in custody litigation between parents because of the deleterious effect parent behavior has on a child.<sup>140</sup> When the word “custody” was stricken from the title of Chapter 61 of the Florida Statutes, which governs divorce cases,<sup>141</sup> “time-sharing” was inserted in its place.<sup>142</sup> This modification at the outset of the chapter foreshadows the significant changes promulgated by the 2008 Florida legislature. The different terminology and accompanying new definitions are coupled with a requirement imposed on both the parents and the court that final judgments in divorce actions involving a minor child must include a detailed “parenting plan” developed through agreement by the parents, or, if necessary, imposed by the judge.<sup>143</sup>

a. *Parenting Plans*

The term “parenting plan” first appeared in connection with

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the general public has not adopted the “new” nomenclature as part of everyday vernacular after almost 45 years have passed since the statutory change, suggests that it is questionable whether changes in statutory terminology in connection with custody cases will become part of everyday usage. For consistency, “divorce” is used throughout this article.

139. Ironically, the synopsis of the matters addressed in the 2008 statutory revisions starts with “[a]n act relating to child custody . . .” and then proceeds to eliminate the word “custody” from the Florida Statutes addressing the parent/child relationship. 2008 Fla. Laws 788.

140. Since 1971, FLA. STAT. § 61.001(2)(c) (2015) has stated: “[Chapter 61’s] purposes are: . . . To mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage.” See also Michael P. Sampson, *Home Court Advantage: Jurisdictional Disputes in Time-Sharing Cases*, in STRATEGIES FOR FAMILY LAW IN FLORIDA: LEADING LAWYERS ON EDUCATING CLIENTS, HANDLING DIVORCE CASES, AND NAVIGATING EMERGING ISSUES IN FAMILY LAW 83 (2011).

141. Although the Chapter refers to dissolution of marriage, § 61.13 sets forth issues relating to child placement and contact and access between parties and their children that are applicable in paternity actions, see, e.g., *Stepp v. Stepp*, 520 So. 2d 314 (Fla. Dist. Ct. App. 1988), as well as actions seeking an “injunction for protection against domestic violence.” FLA. STAT. § 741.30(3)(b) (2015).

142. 2008 Fla. Laws 789-90.

143. FLA. STAT. § 61.046(13) (2008); FLA. STAT. § 61.13(2)(a)-(b) (2015).

Florida custody litigation in a 2001 report of the Florida Family Court Steering Committee submitted to the Florida Supreme Court.<sup>144</sup> The term was not defined and was used only once in the thirty-five page report in connection with a recommendation that case management commence with careful screening of the litigants to determine if there is a history of domestic violence, if referral to social service agencies is required, and if there is a “need to address emotional issues before the parties are expected to negotiate appropriate parenting plans[.]”<sup>145</sup> Following that report and prior to the 2008 statutory revisions, the phrase appeared in only six appellate cases.<sup>146</sup> In none of those opinions, however, did an appellate court utilize the term in its analysis. Rather, the phrase appeared in four appellate opinions only as direct quotations from the trial court’s order or final judgment,<sup>147</sup> in one case as direct quotations from the trial court’s order and a statement of the arguments raised by one of the parties,<sup>148</sup> and in one case as part of the analysis of an out-

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144. See *In re* Report of the Fam. Ct. Steering Comm., 794 So. 2d 518 (Fla. 2001).

145. *Id.* at 540.

146. See *Fredman v. Fredman*, 960 So. 2d 52, 58-59 (Fla. Dist. Ct. App. 2007); *Briscoe v. Briscoe*, 927 So. 2d 112, 113 (Fla. Dist. Ct. App. 2006); *Fredman v. Fredman*, 917 So. 2d 1038, 1041 (Fla. Dist. Ct. App. 2006); *Rao-Nagineni v. Rao*, 895 So. 2d 1160, 1160 (Fla. Dist. Ct. App. 2005); *Wade v. Hirschman*, 872 So. 2d 952, 954-55 (Fla. Dist. Ct. App. 2004), *overruled by*, *Wade v. Hirschman*, 903 So. 2d 928, 941 (Fla. 2005) (the Florida Supreme Court did not use the term in its opinion, but referred to a “parenting coordinator plan”); *Feger v. Feger*, 850 So. 2d 611, 614 (Fla. Dist. Ct. App. 2003). In addition, the terminology is found in the West syllabus and headnotes in *Watt v. Watt*, 966 So. 2d 455 (Fla. Dist. Ct. App. 2007), but does not appear in the opinion itself. The use of the terminology by West may be attributed to the growing trend among other states to use the phrase.

147. *Briscoe*, 927 So. 2d at 113 (“[t]he circuit court denied the supplemental petition, ruling in relevant part that . . . ‘the co-parenting split parenting plan . . . is not unworkable and doomed to failure’”); *Fredman*, 917 So. 2d at 1041 (“[a]dditionally, the trial court found that ‘the Mother’s move to Texas would certainly impede the parties [sic] ability to implement the parenting plan designed in the Marital Settlement Agreement’”); *Rao-Nagineni*, 895 So. 2d at 1160 (“[t]he court then rendered a ‘Final Judgment of Equitable Distribution, Parenting Plan and Child Support’”); *Feger*, 850 So. 2d at 614 (“the [trial] court stated that it ‘continues to believe and therefore finds that it did create a parenting plan’”).

148. In *Wade*, 872 So. 2d at 954-55, appellant argued that appellee’s failure to comply with the parenting plan was not a substantial change in circumstances, and the appellate court quoted from the trial court’s order: “[f]ailure to comply with the parenting plan may be considered contempt and

of-state appellate decision where that state uses the phrase “parenting plan” in its custody statutes.<sup>149</sup> The undefined term also appeared in pre-2008 Administrative Orders issued by at least two Florida circuit court chief judges addressing the appointment of parenting coordinators.<sup>150</sup>

The first definition of the term “parenting plan” appeared in the 2008 amendments to Chapter 61:

“Parenting plan” means a document created to govern the relationship between the parents relating to decisions that must be made regarding the minor child and must contain a time-sharing schedule for the parents and child. The issues concerning the minor child may include, but are not limited to, the child’s education, health care, and physical, social, and emotional well-being. In creating the plan, all circumstances between the parents, including their historic relationship, domestic violence, and other factors must be taken into consideration.<sup>151</sup>

The definition is broad and it appears that the typical final judgment or marital settlement agreement including general language that the parties will have shared parental

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could affect the parties' visitation and/or custody rights.”

149. In *Fredman*, 960 So. 2d at 57-59, “parenting plan” was used to discuss a New Mexico case, *Jaramillo v. Jaramillo*, 823 P.2d 299, 306 (N.M. 1991), which used the phrase found in New Mexico’s custody statutes.

150. See, e.g., In Re: Amending Administrative Order Re Parenting Coordination in Family Law Cases, No. 06-03 (Fla. Cir. Ct. 2007), [http://www.jud11.flcourts.org/documents/Administrative\\_Orders/1-06-03%20A1-](http://www.jud11.flcourts.org/documents/Administrative_Orders/1-06-03%20A1-Amend%20Parenting%20Coordination%20Family%20%20Law%20Cases.pdf)

[Amend%20Parenting%20Coordination%20Family%20%20Law%20Cases.pdf](http://www.jud11.flcourts.org/documents/Administrative_Orders/1-06-03%20A1-Amend%20Parenting%20Coordination%20Family%20%20Law%20Cases.pdf); In Re: Domestic Relations—Parenting Coordinators in High Conflict Family Law Cases, No. 05-39 (Fla. Cir. Ct. July 28, 2005), <http://flcourts18.org/PDF/05-39.pdf>.

151. FLA. STAT. § 61.046(13) (2008). Subsequent amendments to the definition consisted of punctuation, stylistic, and non-substantive changes that also resulted in a renumbering of the statute. FLA. STAT. § 61.046(14) (2013). The definition also requires that the parents develop and agree to the plan, which must be approved by the court to be effective; if the parents are unable to agree, then the court must establish the plan. *Id.*

responsibility<sup>152</sup> might be sufficient to qualify as a parenting plan. Additional 2008 legislative revisions indicate that this is not the case. An entirely new section requires that:

Any parenting plan approved by the court *must, at minimum*, describe in adequate detail how the parents will share and be responsible for the daily tasks associated with the upbringing of the child, the time-sharing schedule arrangements that specify the time that the minor child will spend with each parent, a designation of who will be responsible for any and all forms of health care, school-related matters, other activities, and the methods and technologies that the parents will use to communicate with the child.<sup>153</sup>

Although the definition of a parenting plan indicates that certain issues, such as education and health care *may* be addressed, this new section mandates that the parenting plan *must* identify which parent will be the decision-maker concerning many issues. The presumption that parents will have shared parental responsibility of their minor children subsequent to their divorce remains unchanged.<sup>154</sup> By requiring that there be a designation of *who* has responsibility for decisions relating to health care, undefined “school-related

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152. The definition for “shared parental responsibility” adopted in 1982 and which remains unchanged by the new legislation, states that “[s]hared parental responsibility’ means a court-ordered relationship in which both parents retain full parental rights and responsibilities with respect to their child and in which both parents confer with each other so that major decisions affecting the welfare of the child will be determined jointly.” FLA. STAT. § 61.046(16) (2007).

153. FLA. STAT. § 61.13(2)(b) (2008) (emphasis added). The 2008 version of the statute did not require that an address be designated for purposes of school boundary determinations. *Id.* Without the designation of a primary residential parent and primary residence of the child, corrective legislation was required in 2009 to determine school attendance. FLA. STAT. § 61.13 (2)(b) (2009) (stating that a parenting plan should “includ[e] the address to be used for school-boundary determination and registration”).

154. FLA. STAT. § 61.13(2)(b)(2) (2015) (reflecting that the court is required to order shared parental responsibility, unless there is evidence that doing so would be detrimental to the best interests of the minor child).

matters,"<sup>155</sup> and undefined "other activities," the language of the new statutory section intimates that one party *should* have sole parental responsibility,<sup>156</sup> at least with respect to those issues which *must* be included in the parenting plan.

While the court and the parties were always statutorily permitted to designate one party with ultimate decision-making authority over specific issues related to the child's welfare, notwithstanding the award of shared parental responsibility,<sup>157</sup> the requirement that a designation be made suggests a preference that one party be given such ultimate authority. Allowing one parent to make decisions affecting the child on certain issues may avoid post-divorce disagreements and reduce the need for judicial intervention when the parents cannot agree, but it runs afoul of the stated public policy "to encourage parents to share the rights and responsibilities, and joys, of childrearing."<sup>158</sup> Traditionally, the courts have found that evidence was insufficient to demonstrate that the presumption favoring shared parental responsibility with reference to all child welfare related issues was rebutted, absent a showing of great detriment to the child.<sup>159</sup>

The requirement that parents of young children decide at

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155. Whether the legislature intended there to be a difference between "education" issues, enumerated in the definitional statute, and "school-related matters," referred to in the section detailing the mandatory provisions that must be included in a parenting plan is not clear. Under strict statutory construction, the different word choices indicate that different meanings were intended. It could be argued that "education" is a broad term that refers to decisions affecting school selection, while "school-related matters" relate to decisions required on a daily basis, such as field trip attendance and extra-curricular activities. Trial courts will be required to determine what the "school-related matters" required to be addressed in the parenting plan actually include. *See, e.g., Fazzaro v. Fazzaro*, 110 So. 3d 49, 50-52 (Fla. Dist. Ct. App. 2013).

156. The definition of "sole parental responsibility" as a "court-ordered relationship in which one parent makes decisions regarding the minor child" remains unchanged by the 2008 statutory revisions. FLA. STAT. § 61.046(17) (2007).

157. FLA. STAT. § 61.13(2)(b)(2)(a) (2007); *see, e.g., Kasdorf v. Kasdorf*, 931 So. 2d 257, 258 (Fla. Dist. Ct. App. 2006); *Cruz v. Domenech*, 905 So. 2d 938, 940 (Fla. Dist. Ct. App. 2005); *Markham v. Markham*, 485 So. 2d 1299, 1300 (Fla. Dist. Ct. App. 1986).

158. FLA. STAT. § 61.13(2)(b)(1) (2007).

159. *See, e.g., Maslow v. Edwards*, 886 So. 2d 1027, 1028 (Fla. Dist. Ct. App. 2004).

the time of their divorce who will be responsible for certain child-related obligations during the minority of the child may be unrealistic and may result in exacerbated future litigation, rather than a reduction in recidivistic enforcement and modification actions.<sup>160</sup> The requirement that the parenting plan include “adequate detail[s]” about “how the parents will share and be responsible for the daily tasks associated with the upbringing of the child” invites one party (or the court) to micro-manage the childrearing decisions of the other party.<sup>161</sup> What constitutes “adequate details” for one trial court judge, may not suffice for another. Even more problematic, deviations from the detailed methodology for handling daily tasks associated with child-rearing may actually cause an increase in enforcement actions, rather than the anticipated decrease. Traditionally, the day-to-day tasks for the child have been the responsibility of the parent who has the child at any given moment.<sup>162</sup> Whether the judiciary should be involved in determining the daily parenting decisions of divorcing parents is not clear.

b. *Time-Sharing Schedules*

In place of “custody” and “visitation” schedules, parents are required to fashion a “time-sharing schedule.” A definition is included in the statute: “Time-sharing schedule” means a timetable that must be included in the parenting plan that specifies the time, including overnights and holidays, that a minor child will spend with each parent.<sup>163</sup>

The term “time-sharing” is not a new term in Florida divorce actions;<sup>164</sup> however, this is the first time it was statutorily defined. In addition, although time-sharing may have been used in the past, it has typically been used as a substitute for, or in conjunction with, the word “visitation” consistent with the

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160. See Mabry, *supra* note 92.

161. FLA. STAT. § 61.13(2)(b) (2008).

162. See *generally* Kuharcik v. Kuharcik, 629 So. 2d 224, 225 (Fla. Dist. Ct. App. 1993).

163. FLA. STAT. § 61.046(22) (2008).

164. “Time-sharing” first appeared in the Florida Supreme Court approved Family Court forms in 1998. In re Amendments to the Florida Family Law Rules, 713 So. 2d 1 (Fla. 1998).

parental relocation statutes<sup>165</sup> or when visitation is awarded to the non-custodial parent.<sup>166</sup>

*c. Factors to Be Considered in Developing a Parenting Plan that Includes a Time-Sharing Schedule*

The best interest of the minor child still controls the determination of how parental responsibilities will be divided between the parents and the time that each parent will spend with the minor child.<sup>167</sup> Previously, Florida courts were required to evaluate twelve specific factors to determine parental responsibility, primary residence, and visitation, plus were given the typical discretion to include any additional factors the court deemed relevant.<sup>168</sup> The 2008 amendments eliminated several factors,<sup>169</sup> but added others, bringing the total number of specified factors to nineteen (plus the catch-all anything else deemed relevant) "affecting the welfare and interests of the

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165. FLA. STAT. § 61.13001(7)(c) (2007).

166. Fla. Fam. L. Forms 12.905(a); Fla. Fam. L. Forms 12.993(a).

167. FLA. STAT. § 61.13(3) (2008).

168. FLA. STAT. § 61.13(3) (2007).

169. The factors that have been eliminated from FLA. STAT. § 61.13(3) (2007) are:

(a) The parent who is more likely to allow the child frequent and continuing contact with the nonresidential parent.

(b) The love, affection, and other emotional ties existing between the parents and the child.

(c) The capacity and disposition of the parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

(e) The permanence, as a family unit, of the existing or proposed custodial home.

(j) The willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.

(k) Evidence that any party has knowingly provided false information to the court regarding a domestic violence proceeding pursuant to s. 741.30.

(l) Evidence of domestic violence or child abuse.

(m) Any other fact considered by the court to be relevant.

FLA. STAT. § 61.13(3)(a)-(c), (e), (j)-(m) (2007).



[particular] child, [and the circumstances of that family]” that must be considered to determine the best interests of the child when formulating a parenting plan and time-sharing schedule.<sup>170</sup> The spirit and intent of the factors that were

170. The twenty factors listed under FLA. STAT. § 61.13(3) (2008) are:

- (a) The demonstrated capacity and disposition of each parent to facilitate and encourage a close and continuing parent-child relationship, to honor the time-sharing schedule, and to be reasonable when changes are required.
- (b) The anticipated division of parental responsibilities after the litigation, including the extent to which parental responsibilities will be delegated to third parties.
- (c) The demonstrated capacity and disposition of each parent to determine, consider, and act upon the needs of the child as opposed to the needs or desires of the parent.
- (d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
- (e) The geographic viability of the parenting plan, with special attention paid to the needs of school-age children and the amount of time to be spent traveling to effectuate the parenting plan. This factor does not create a presumption for or against relocation of either parent with a child.
- (f) The moral fitness of the parents.
- (g) The mental and physical health of the parents.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
- (j) The demonstrated knowledge, capacity, and disposition of each parent to be informed of the circumstances of the minor child, including, but not limited to, the child's friends, teachers, medical care providers, daily activities, and favorite things.
- (k) The demonstrated capacity and disposition of each parent to provide a consistent routine for the child, such as discipline, and daily schedules for homework, meals, and bedtime.
- (l) The demonstrated capacity of each parent to communicate with and keep the other parent informed of issues and activities regarding the minor child, and the willingness of each parent to adopt a unified front on all major issues when dealing with the child.
- (m) Evidence of domestic violence, sexual violence, child abuse, child abandonment, or child neglect, regardless of whether a prior or pending action relating to those issues has been brought.

eliminated, however, were incorporated in the revised listing of factors to be considered.<sup>171</sup>

- (n) Evidence that either parent has knowingly provided false information to the court regarding any prior or pending action regarding domestic violence, sexual violence, child abuse, child abandonment, or child neglect.
- (o) The particular parenting tasks customarily performed by each parent and the division of parental responsibilities before the institution of litigation and during the pending litigation, including the extent to which parenting responsibilities were undertaken by third parties.
- (p) The demonstrated capacity and disposition of each parent to participate and be involved in the child's school and extracurricular activities.
- (q) The demonstrated capacity and disposition of each parent to maintain an environment for the child which is free from substance abuse.
- (r) The capacity and disposition of each parent to protect the child from the ongoing litigation as demonstrated by not discussing the litigation with the child, not sharing documents or electronic media related to the litigation with the child, and refraining from disparaging comments about the other parent to the child.
- (s) The developmental stages and needs of the child and the demonstrated capacity and disposition of each parent to meet the child's developmental needs.
- (t) Any other factor that is relevant to the determination of a specific parenting plan, including the time-sharing schedule.

FLA. STAT. § 61.13(3)(a)-(t) (2008).

171. In many ways, the prior list of thirteen factors allowed more discretion to the trial judge because the factors were much more holistic and did not specify behaviors. The revised factors are detailed and may express value judgments about what "good" parenting practices are. For example, under the new list of factors, the court must consider which parent is more familiar with the child's "favorite things." FLA. STAT. § 61.13(3)(j) (2008). Pity the court that must determine the relative merit of the parents when one knows which morning cartoons the child prefers, but the other parent knows which major league pitcher is the child's favorite athlete. Similarly, the court is required to hear evidence about which parent has a "consistent routine . . . and daily schedules for homework, meals, and bedtime." FLA. STAT. § 61.13(3)(k) (2008). The unstated preference here is that the parent who is more regimented in adhering to a schedule may have an advantage. Unfortunately, the free-spirited, less schedule-driven parent is apparently viewed less favorably, notwithstanding that such parental traits are not necessarily deemed detrimental to a child. That judicial decisions concerning custody and child placement are influenced by a judge's personal biases and values has been noted in criticism of the best interest of the child standard. Daniel A. Krauss & Bruce D. Sales, *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases*, 6 PSYCHOL. PUB. POL'Y & L. 843,

The 2008 amendments represent not only nomenclature changes, but also revisions in the standards used to evaluate custody cases, representing a new value proposition for custody litigation. Those changes include, among other provisions, the requirement that parties develop an agreed-upon parenting plan, absent which the court makes the determination, a requirement that the plan indicate who has ultimate decision-making rights over certain issues affecting the child, a new obligation on both parties to actively participate in childrearing, and expanded factors for the court to consider in ordering a parenting plan. With this new value proposition placing the onus on parents to assume more responsibility for resolving parenting issues, a rebranding of custody litigation is necessary for the transition to succeed and for the goal of reduced acrimony to be achieved.

## V. The Florida Experience in Rebranding Custody Litigation

### A. *Reactions by Judges, Attorneys, and Litigants*

Now that seven years have passed since the 2008 amendments were adopted, a body of case law is developing that offers some perspective on whether the changes are achieving the goals of reduced acrimony during litigation and a shift in parents' perspective of their roles post-divorce. Following the October 1, 2008, effective date of the amendments, many courts struggled with adapting to the new nomenclature. The effect of the new value proposition was not clear to judges and lawyers, those who were charged with implementing the new brand promise of a less acrimonious divorce. Several early court decisions referred to the terms "parenting plan" and "time-sharing" as replacing "custody" and "visitation,"<sup>172</sup> but

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859-60 (2000).

172. *LiFleur v. Webster*, 138 So. 3d 570, 576 n.1 (Fla. Dist. Ct. App. 2014) (citation omitted) ("In October 2008, the Florida Legislature amended Chapter 61, Florida Statutes, and changed the term 'custody' to 'parental responsibility' and 'visitation' to 'timesharing.'"); *Mudafort v. Lee*, 62 So. 3d 1196, 1197 n.1 (Fla. Dist. Ct. App. 2011) (stating that "the concept of 'custody' was replaced with 'time-sharing'"); *Cobo v. Sierralta*, 13 So. 3d 493, 501 n.4 (Fla. Dist. Ct. App. 2009) (acknowledging that while the 2008 amendments eliminated references "to 'custody,' 'primary residence,' 'primary residential parent,' and

questioned the import of the statutory changes<sup>173</sup> and the applicability of prior case law, creating unresolved conflicts between the appellate courts.<sup>174</sup> Some courts, however, appeared to be uncertain whether the new terms were actual replacements and which words they replaced.<sup>175</sup> This suggests a rebranding failure from the inception.

Because "custody," "visitation," and the "primary residential

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'visitation' in favor of a 'parenting plan' that includes 'time sharing'" courts must still consider the best interests of the child); *Lombard v. Lombard*, 997 So. 2d 1188, 1189 n.1 (Fla. Dist. Ct. App. 2008) (citation omitted) ("We recognize that, effective October 1, 2008, [the statutory amendments], replaced the terms 'custody' and 'visitation' with the concept of a 'parenting plan' that includes 'time-sharing.'").

173. In the dissenting opinion in *Corey v. Corey*, a case considering the trial court's pre-2008 order on rotating custody, Senior Judge Alan Schwartz mused "[w]hile we need not consider the broad revision of the statutory family . . . which took effect on October 1, 2008, . . . I wonder whether the changes in form and nomenclature, with which it is mostly concerned, significantly affect the previously established substantive law." *Corey v. Corey*, 29 So. 3d 315, 321 n.5 (Fla. Dist. Ct. App. 2009).

174. See *Lombard*, 997 So. 2d at 1189 n.1 (finding that the 2008 amendments require that the parenting plan and time-sharing schedule be determined after consideration of the child's best interests and consequently "is consistent with prior law"). Cf. *Mudafort*, 62 So. 3d at 1197 n.1 (finding that the 2008 amendments eliminated the presumption against rotating custody, which the court found had been replaced by "equal time-sharing," and that the factors under *Mancuso v. Mancuso*, 789 So. 2d 1249 (Fla. Dist. Ct. App. 2001) that were to be considered to determine if the presumption had been overcome, were no longer relevant); *Bainbridge v. Pratt*, 68 So.3d 310, 314 (Fla. Dist. Ct. App. 2011) (acknowledging that the presumption against rotating custody no longer existed, but finding that the *Mancuso* factors were still applicable to determine whether an equal time-sharing plan was in a child's best interests).

175. "It appears that the trial court has confused the terms 'visitation' and 'time-sharing,' using visitation to mean what section 61.13(2)(c), Florida Statutes (2010), refers to as time-sharing and using the term 'majority time-sharing' when referring to the determination of which party will be the child's primary residential parent." *Mayo v. Mayo*, 87 So. 3d 820, 821 (Fla. Dist. Ct. App. 2012). In a footnote, the court went on to state, "[a] 2008 amendment to the statute removed the word 'visitation' from chapter 61 and replaced it in some instances with the term 'parenting plan' and in other places, such as section 61.13(2)(c), with the term 'time-sharing.'" *Id.* at n.1. (citation omitted). Similarly, in *Bainbridge v. Pratt*, the court stated that the 2008 amendments "abolished the concept of custody and replaced it with 'parenting plans' and 'time-sharing[.]'" *Bainbridge v. Pratt*, 68 So. 3d 310, 313 (Fla. Dist. Ct. App. 2011). In addressing whether a rotating schedule was in the child's best interest under the new statute, the court went on to refer to the schedule as "rotating custody," a "rotating parenting plan," and a "rotating time-sharing plan." *Id.* at 313-14.

parent” designation were eliminated prospectively, most appellate cases well into 2012<sup>176</sup> applied prior versions of the statute and still used the eliminated terms when reviewing trial court orders because the cases were filed before the effective date of the statutory amendments.<sup>177</sup> Many courts, both at the trial and appellate levels, however, attempted to incorporate the concepts of a parenting plan and time-sharing into the judgments entered and opinions issued, some even pre-dating the effective date of the amendments,<sup>178</sup> while still applying the prior statute, resulting in “custody,” “visitation,” “parenting plan,” “time-sharing,” and “primary residential parent” being muddled into the same case.<sup>179</sup>

In actions filed subsequent to the 2008 amendments, references to the prior designations, even when applying the new statutory scheme, continued to plague litigants,<sup>180</sup>

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176. Pursuant to directives from the Florida Supreme Court, contested family law cases should ideally be resolved at the trial court level within 6 months of filing. That appellate courts were still applying the prior statute in cases well into 2011 evidences that fact that litigation over child placement issues are not often resolved in the preferred time period. FLA. R. JUD. ADMIN. 2.250(a)(1)(C).

177. *See, e.g.*, Knowles v. Knowles, 79 So. 3d 870, 871 n.1 (Fla. Dist. Ct. App. 2012) (acknowledging that “the pre-2008 terminology” must be used in reviewing “custody” orders in cases filed before the effective date of the amendments).

178. *See, e.g.*, J.L.B. v. S.J.B., 135 So. 3d 468 (Fla. Dist. Ct. App. 2014) (reviewing an order modifying the parenting plan contained in a September 2008 final judgment, predating the October 1, 2008, effective date for the amendments); Justice v. Justice, 80 So. 3d 405 (Fla. Dist. Ct. App. 2012) (reversing and remanding an internally inconsistent final judgment in an action filed in 2007 that went to final hearing in 2009 and awarded the mother the “majority of timesharing” and the father “visitation” consistent with a temporary relief order entered pre-2008 that designated the mother the “primary residential parent”).

179. *See infra* notes 178-193 and accompanying text.

180. In *Sparks v. Sparks*, an action filed post-2008, two *pro se* litigants entered into a marital settlement agreement that provided for both “joint custody” and a “schedule of rotating physical custody.” *Sparks v. Sparks*, 75 So. 3d 861, 861 (Fla. Dist. Ct. App. 2011). In reversing the final judgment that incorporated the agreement for failure to consider the father’s claim that the agreement was contrary to the best interests of the child, the appellate court repeatedly referred to custody and visitation without mentioning “time-sharing,” although the action was filed after the effective date of the amendments and the court cited the 2010 version of the statute. *Id.* at 862. Similarly, in *Neuman v. Harper*, a post-2008 paternity action, the mother challenged a final judgment awarding the father majority time-sharing,

practitioners,<sup>181</sup> and judges.<sup>182</sup> When dealing with *pro se* litigants, trial courts were inclined to resort to the traditional vernacular and eschewed the statutory nomenclature changes because the parents themselves continued to use the terms "custody" and "visitation."<sup>183</sup> In addition, courts found it difficult

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claiming that the father did not seek designation as the primary residential parent in his petition and the judgment did not state "how it is in the best interest of the child to designate a Primary Residential Parent." *Neuman v. Harper*, 106 So. 3d 974, 976 (Fla. Dist. Ct. App. 2013). In finding the trial court did not abuse its discretion, the court stated, "[w]hile the final judgment does not specifically designate a 'primary residential parent,' the time-sharing schedule placed [the minor child] with the father in the role of what traditionally would have been considered the primary residential parent." *Id.* See also *Waybright v. Johnson-Smith*, 115 So. 3d 445 (Fla. Dist. Ct. App. 2013).

181. See, e.g., *Campbell v. Campbell*, 100 So. 3d 763, 764 (Fla. Dist. Ct. App. 2012) (where mother, through counsel, filed a "Motion to Maintain Primary Residential Custodianship"). Practitioners acknowledge that the term "custody" is still popularly used, despite the statutory changes. Bruce A. Christensen, *Divorce Case Challenges and Issues in Florida*, in STRATEGIES FOR FAMILY LAW IN FLORIDA: LEADING LAWYERS ON EDUCATING CLIENTS, HANDLING DIVORCE CASES, AND NAVIGATING EMERGING ISSUES IN FAMILY LAW 7 (2011).

182. See *Kelley v. Colston*, 32 So. 3d 186 (Fla. Dist. Ct. App. 2010) (finding that an order in a case filed after 2008 while initially appearing to grant liberal *time-sharing*, in fact, severely limits the former husband's *visitation*) (emphasis added); *Campbell*, 100 So. 3d 763 (reversing, on jurisdictional grounds, an order vacating an order that designated the former husband the "primary residential parent" after the father sought modification of the 2009 final judgment incorporating a parenting plan that provided the child would reside with the mother and would have timesharing with the child on alternating weekends). At least one court while ordering a time-sharing schedule, failed to comply with the obligation to establish a broader parenting plan incorporating the schedule consistent with the statutory mandate. *Munroe v. Olibrice*, 83 So. 3d 985 (Fla. Dist. Ct. App. 2012). See also *Pope v. Langowski*, 115 So. 3d 1076, 1077 (Fla. Dist. Ct. App. 2013) (finding that the trial court entered a final judgment "granting primary physical custody to the mother and allowing the father more liberal visitation over time," but remanding "for the court to correct . . . two typographical errors in the parenting plan"); *Fernandez v. Wright*, 111 So. 3d 229 (Fla. Dist. Ct. App. 2013) (referring to both time-sharing and custody); *Shiba v. Gabay*, 120 So. 3d 80 (Fla. Dist. Ct. App. 2013) (referring to custody, timesharing, and visitation); *Vazquez v. Vazquez-Robledo*, 150 So. 3d 855 (Fla. Dist. Ct. App. 2014) (using both "time-sharing" and "visitation").

183. In *Waybright v. Johnson-Smith*, a 2012 paternity action involving *pro se* parties, the father sought "sole physical custody" of the child with "supervised visitation" by the mother. *Waybright v. Johnson-Smith*, 115 So. 3d 445, 446 (Fla. Dist. Ct. App. 2013). The appellate court reversed the trial court's order awarding "rotating custody" because evidence of domestic violence was improperly excluded, finding that violence is probative conduct in a "child custody case" and there was insufficient evidence under the factors in

to avoid references to “custody” and “visitation” when discussing legal principles developed in prior case law that remain applicable under the amended statute.<sup>184</sup> Other courts continued to rely on model time-sharing and parenting plans adopted by their circuits, amended only to reflect cursory changes to nomenclature, while also referring to “visitation” and “primary residential parent designations.”<sup>185</sup> These struggles demonstrate that the consumers of the new custody litigation paradigm, as well as those executing the process designed to promote the new value proposition, did not develop the favorable perception that would allow them to reflexively apply the new standards. The positive “attitude” that is seen in successful

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the amended statute to “support the weekly rotating custody schedule” established by the court. *Id.* at 447. Although the action was filed after 2008, the appellate court never used the terms “parenting plan” or time-sharing.” *See also Sparks*, 75 So. 3d at 861; *Neuman*, 106 So. 3d at 976.

184. In *A.L.G. v. J.F.D.*, a post-2008 paternity action, the court addressed issues relating to time-sharing, but cited to pre-2008 case law as support for its statement specific findings of fact are not necessary to support a “custody decision.” *A.L.G. v. J.F.D.*, 85 So. 3d 527 (Fla. Dist. Ct. App. 2012). *See also AbouElSeoud v. ElBadrawi*, 133 So. 3d 1079 (Fla. Dist. Ct. App. 2014) (using “custody” when addressing the appellate court’s jurisdiction to hear temporary orders under the Florida Rules of Appellate Procedure).

185. For example, Florida’s 15<sup>th</sup> Circuit Court’s website has proposed timesharing schedules that incorporate the new statutory language in the title, but still refer to “visitation,” “primary residential parent,” and “secondary residential parent.” *Model Parental Timesharing Schedule (In-State Where the Parents Reside More than 45 Miles Apart)*, 15<sup>th</sup> JUDICIAL COURT OF FLORIDA (last visited Jan. 25, 2016), [http://www.palmbeachbar.org/Family/Model%20Parental%20Time%20Sharing%20Schedule%20Colin%20\\_In-state%20less%20than%2045\\_.pdf](http://www.palmbeachbar.org/Family/Model%20Parental%20Time%20Sharing%20Schedule%20Colin%20_In-state%20less%20than%2045_.pdf); *Model Parental Time-Sharing Schedule (Out-of-State)*, 15<sup>th</sup> JUDICIAL COURT OF FLORIDA (last visited Jan. 25, 2016), [https://15thcircuit.co.palm-beach.fl.us/documents/10179/23165/Model%20Parental%20Time%20Sharing%20Schedule%20\\_Out-of-state\\_.pdf](https://15thcircuit.co.palm-beach.fl.us/documents/10179/23165/Model%20Parental%20Time%20Sharing%20Schedule%20_Out-of-state_.pdf);

Florida’s 15<sup>th</sup> Circuit Court website also uses this language in their model orders for supervised visitation. *Order For Supervised Visitation at Family Nurturing Center*, 15<sup>th</sup> JUDICIAL COURT OF FLORIDA (last visited Jan. 25, 2016), [https://15thcircuit.co.palm-beach.fl.us/documents/10179/104452/UFC\\_OrderforSupervisedVisitationFNC.pdf](https://15thcircuit.co.palm-beach.fl.us/documents/10179/104452/UFC_OrderforSupervisedVisitationFNC.pdf).

Similarly, the time-sharing guidelines for the 7<sup>th</sup> Judicial Circuit in Florida, adopted by administrative order in 2010, refer to residential and non-residential parents. *Seventh Judicial Circuit of Florida Timesharing/Guidelines*, <http://www.circuit7.org/Administrative%20Orders/family/FM-2010-041-SC-attach.pdf>.

rebranding efforts is lacking.

The confusion as to the effect of the changes, whether they were merely semantic or substantive, and inconsistency in applying the appropriate terminology demonstrate a failure of two of the elements of rebranding necessary to effectively create positive impressions of the revisions.<sup>186</sup> There was a lack of understanding by the courts, attorneys, and litigants of the shift in the value proposition and a lack of continuity with the prior brand that provided for the designation of a primary residential parent to the new brand that places more of an emphasis on co-parenting and sharing of parenting time.

In discussing the expected benefit of the new terms "parenting plans" and "time-sharing," one Florida practitioner suggested that the introduction of the terms "primary residential parent" and "secondary residential parent" in 1982 in fact caused parents to ignore the best interests of their child.<sup>187</sup> Parents instead engage in protracted litigation in order to "win" the primary designation, which was viewed as "superior."<sup>188</sup> Just as there is scant empirical evidence that the rejection of the term "custodial parent" in favor of a more neutral term in 1982 with the adoption of the "primary residential parent designation" resulted in any decrease in litigation between warring parents,<sup>189</sup> it is questionable whether the latest nomenclature change will have a significant impact on the nature of custody litigation in Florida, a fact recognized by even those who were proponents of the legislative changes.<sup>190</sup>

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186. See *supra* notes 47 & 51 and accompanying text.

187. Elisha D. Roy, *The End of Custody in Florida: Finally Parents are Just Parents*, 82 FLA. B. J. 49, 49 (2008).

188. *Id.*

189. Several writers make the claim that the use of "custody" encourages the adversarial nature of the litigation involving children after divorce, but do not cite to authority for this claim. See, e.g., Michelle A. Tarnelli, Note, *Joint Custody Presumption in Vermont: A Proposal for Co-Parenting*, 36 VT. L. REV. 1015, 1024 (2012).

190. Roy acknowledges that it is unlikely that the nomenclature changes would have an impact on the nature of custody cases that were tried, but opined that the number of custody trials would decline. Roy, *supra* note 187, at 50. See also Alexa Welzien, Note & Comment, *Life, Liberty, and the Pursuit of Parental Equality: Florida's New Parenting Plan Remains Overshadowed by Lingering Gender Bias*, 33 NOVA L. REV. 509, 519 (2009) (quoting Florida Board Certified in Marital and Family Law practitioner and then President-Elect of the American Academy of Matrimonial Lawyers, Roberta G. Stanley, as she



This skepticism may be well-placed given the behavior of litigants, practitioners, and judges. Regardless of what terms are used, parents are cognizant that typically one parent is receiving more time with the child, and will refer to their time with the child as having “custody” of the child.<sup>191</sup> Courts acknowledge that there is still a difference in the amount of time one parent is awarded using the new “time-sharing” vernacular; because of the elimination of the “primary residential parent” designation, many judges now award “majority time-sharing” to one parent.<sup>192</sup> Parents still litigate over who will have more overnights with the child because of the financial impact on child support.<sup>193</sup> The amount of child support still remains linked to the amount of time each parent spends with the child.<sup>194</sup>

By eliminating the definition of primary residential parent the legislature also eliminated any definition of a “primary residence” for the child.<sup>195</sup> Notwithstanding the lack of a definition, however, the child either “primarily” resides at one parent’s residence, meaning more overnights are spent in that parent’s home, or the child truly has no “primary” residence and rotates equal amounts of time between the parents’ residences in a joint physical custody arrangement.<sup>196</sup> This fact will not be changed by revisions in nomenclature. Without the designation of a primary residential parent, neither parent then has

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questioned whether the legislative changes would accomplish the goal of reducing animosity and noted that parents already inclined to cooperate would develop reasonable parenting plans, while those engaged in high conflict litigation would likely experience increased conflict).

191. See *supra* note 178 & 181 and accompanying text.

192. See *supra* note 176.

193. Christensen, *supra* note 181.

194. FLA. STAT. § 61.30 (2015). Until the amount of time a parent spends with a child can be divorced from the amount of child support a parent is expected to pay, mere changes in nomenclature are unlikely to have an impact on parents’ behavior in custody matters.

195. The definition of the “principal residence of a child” “mean[ing] the home of the designated primary residential parent” was stricken. 2008 Fla. Laws 803. Perhaps an additional amendment should have been included requiring that the minor child be instructed that, if questioned about where he lives, he is to answer that he doesn’t live anywhere – he just shares time with his parents.

196. Although FLA. STAT. § 61.121 (2007), which stated that the court was permitted to order rotating custody, if found to be in the child’s best interest, was repealed, it would appear that the repeal of the statute was related more to the usage of the word “custody.” 2008 Fla. Laws 792.

"visitation" with the child. Instead, there is a schedule of "time-sharing" between each parent and the child as established in the newly-created "parenting plan."<sup>197</sup> What is further significant about the legislation is that parenting is now considered a duty, rather than a privilege,<sup>198</sup> a growing trend developing in the United States addressed earlier.<sup>199</sup>

Even more complex difficulties exemplifying the lack of continuity between the old brand and the new have arisen in enforcement and modification actions in cases resolved under the pre-2008 statute where one party was designated the primary residential parent, with the non-residential parent receiving a specified schedule of visitation.<sup>200</sup> Supplemental actions for enforcement or modification of judgments affecting the placement of or contact with a child continues with those designations, although the courts occasionally incorporate the new nomenclature.<sup>201</sup> In contrast, those parents whose initial actions relating to a minor child were filed subsequent to the effective date of the amendments no longer can be designated the primary residential parent or awarded visitation.<sup>202</sup>

Similarly, in actions to enforce or modify out-of-state orders

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197. FLA. STAT. §§ 61.046, 61.13 (2008).

198. FLA. STAT. § 61.45 (2008).

199. See *supra* notes 88-90 and accompanying text.

200. See *Lombard v. Lombard*, 997 So. 2d 1188, 1189-90 (Fla. Dist. Ct. App. 2008) (visitation is awarded to the non-custodial parent, when a primary residential parent is designated; the primary residential parent does not have visitation with the child; by definition, the child spends less time with the non-custodial parent).

201. See, e.g., *Ginnell v. Pacetti*, 31 So. 3d 217 (Fla. Dist. Ct. App. 2010) (referring to both "time-sharing" and supervised "visitation" in a final order following contempt hearings in September 2008 (pre-amendment) and January 2009 (post-amendment) based on a January 2008 final judgment); *Rossmann v. Profera*, 67 So. 3d 363 (Fla. Dist. Ct. App. 2011) (affirming modification of "custody" of a minor child initially awarded to the mother pursuant to a mediated settlement agreement in a 2004 divorce and designating the father as the primary residential parent); *Kershaw v. Kershaw*, 141 So. 3d 642 (Fla. Dist. Ct. App. 2014) (considering modification of a "parenting plan" that awarded "primary custody" to the mother and "visitation" to the father); *LiFleur v. Webster*, 138 So. 3d 570, 571 n.1 (Fla. Dist. Ct. App. 2014) ("[b]ecause the relevant facts of this case took place both before and after the amendments to Chapter 61, this opinion sets forth the history of this case using the terms as they were used by the parties and the court during the course of the proceedings below").

202. FLA. STAT. § 61.13 (2008).

or judgments domesticated in Florida, courts have incorporated references to time-sharing while also referring to the custody and visitation provisions of the sister state's order.<sup>203</sup> When dealing with parties divorced pursuant to a foreign country's jurisdiction, however, there appears to be less of an interest in using the new language.<sup>204</sup>

Because the prospective application of the amendments does not eliminate the rights (and responsibilities) created under judgments based on the prior statutory language<sup>205</sup> a dual system of "parenting" has been created. Those whose actions pre-dated 2008 typically having a primary residential or custodial parent for their child, a designation that continues even if there have been subsequent modification actions, while no parent whose action was initiated post-2008 has custody of their child. If judges and lawyers are confused about the differences in standards as evidenced in court opinions and court filings, laypersons must be even more perplexed given that their

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203. See, e.g., *Cheek v. Hesik*, 73 So. 3d 340 (Fla. Dist. Ct. App. 2011) (ordering make-up "time-sharing" where the father's "visitation" rights under an Illinois divorce decree domesticated in Florida had been violated by the mother who was awarded custody); *Crittendon v. Davis*, 89 So. 3d 1098 (Fla. Dist. Ct. App. 2012) (reversing an order modifying a New Jersey judgment that awarded the father "legal custody," which the appellate court found was the equivalent of sole parental responsibility under FLA. STAT. § 61.13(2)(c), (3) (2010), by awarding the parties shared parental responsibility and denying the father holiday timesharing, which the court referred to as "visitation"); *Edgar v. Firuta*, 100 So. 3d 255 (Fla. Dist. Ct. App. 2012).

204. In *Maguire v. Wright*, the parties were divorced in the United Kingdom in 2003 pursuant to a judgment that did not address child support or time-sharing issues. The parties adopted an informal time-sharing schedule not submitted to any court for approval. After both parties independently relocated to Florida, the mother domesticated the foreign judgment and filed a petition requesting the court to establish a parenting plan and award her "primary time-sharing" with the children. The father requested equal time-sharing, as well as additional relief. After the father failed to return the parties' youngest child following a trip to England, the mother sought "immediate return and custody" of the child. The trial court's order awarding the mother "immediate . . . physical custody," was affirmed and the case was remanded for further proceedings on issues relating to parental responsibility and "temporary time-sharing." 157 So. 3d 493, 495 (Fla. Dist. Ct. App. 2015).

205. *Hahn v. Hahn*, 42 So. 3d 945, 947 (Fla. Dist. Ct. App. 2010) (finding that applying the post-2008 statute in a modification action of a pre-2008 judgment would impermissibly impair mother's rights as primary residential parent); see also *Bachman v. McLinn*, 65 So. 3d 71 (Fla. Dist. Ct. App. 2011).

understanding is based on their perception of reality<sup>206</sup> influenced by results in their friends' divorces, not on the theoretical underpinnings of the law.

The skeptical reaction of practitioners in Florida to the nomenclature changes is not unique. Similar observations followed the enactment of the Washington State Parenting Act, one of the first state statutes to modify nomenclature associated with custody actions and attempt to require parents to assume responsibilities following a divorce.<sup>207</sup> In analyzing the effect statutory changes had following the adoption of the Washington State Parenting Act, one scholar noted a wide divergence in the perception of practitioners. Those who embraced the new nomenclature perceived that elimination of the term "custody" had a positive impact on reducing animosity between parents, while others less inclined to use the new terminology insisted that there had been no change in client behavior.<sup>208</sup> The reticence to embrace the changes is akin to employees who do not adopt modified value propositions by a corporation, making it difficult for the company to succeed in its rebranding efforts.<sup>209</sup> Without creating the appropriate perception in practitioners and judges that the new nomenclature and process provide an enhanced benefit for divorcing families, the rebranding of the process and post-divorce relationships between parents and their child is unlikely to succeed.

One legal scholar, relying on surveys that indicate that only 5% of single mothers reported that fathers had a "great deal" of

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206. *See supra* note 274 and accompanying text.

207. The public policy behind the act was expressed as follows: "Parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children." WASH. REV. CODE ANN. § 26.09.002 (West 2015). In discussing a social experiment that required individuals to define the term "parent" when they were not advised what role they would assume in a new society that included children, Czapanskiy suggested the new definition would be: "a parent is the person who, by procreation, conduct or adoption, enters into two commitments: [f]irst, a commitment to a dependent human being to provide all the nurturance, whether financial or nonfinancial, of which the person is capable; and second, a commitment to deal respectfully and supportively with another person or persons who are in a parental relationship with the same child." Karen Czapanskiy, *Volunteers and Drafters: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1464 (1991).

208. Ellis, *supra* note 99, at 140-41, 178.

209. *See supra* note 47 and accompanying text.

influence” over decisions concerning child-rearing and only 4% stated that the fathers provided “a great deal of help” raising the children, has questioned whether laws can positively influence parental behavior by requiring divorcing parents to work cooperatively to parent children.<sup>210</sup> She does note, however, that where statutes presume an award of joint physical custody, more joint-parenting occurs and children perceive they have a better relationship with each parent.<sup>211</sup> Joint physical custody typically is awarded where the parents tend to earn greater incomes, have higher levels of education, and are predisposed to co-parenting.<sup>212</sup> With such small numbers of parents being involved in parenting subsequent to divorce, such laws, at best, will only impact a small number of parties, primarily those already inclined to maintain a positive relationship after separation. Although many states permit joint custody arrangements, some states mandate, it and others now require the adoption of “parenting plans,” surveys indicate that cooperative co-parenting levels remain low.<sup>213</sup> Practical considerations, such a work schedules, geographic proximity, time constraints and financial impact have an influence on the success of co-parenting attempts.<sup>214</sup>

B. “Custody”<sup>215</sup> Has Not Been Totally Eliminated in Florida<sup>216</sup>

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210. Marsha Garrison, *Promoting Cooperative Parenting: Programs and Prospects*, 9 J.L. & FAM. STUD. 265, 268 (2007).

211. *Id.* at 269.

212. *Id.*

213. *Id.* at 270.

214. *Id.* at 271.

215. The continued use of the term “custody” in criminal or delinquency cases when referring to a minor child is beyond the scope of this article.

216. The problem with inconsistent or conflicting provisions in Florida’s statutes dealing with children’s issues has been recognized in the past. In 1989, during a Special Session, the state legislature created the Commission on Child Welfare to study specific child-related statutes, although Chapter 61 was not included in that list. 1990 Fla. Laws 12-13. In 1999, the Florida Bar established the Commission on the Legal Needs of Children to study the legal needs of children appearing in all state court divisions. *Commission on the Legal Needs of Children*, THE FLORIDA BAR, <http://www.floridabar.org/tfb/TFBComm.nsf/840090c16eedaf0085256b61000928dc/3ed599427239920385256ee70064e689!OpenDocument> (last visited August 20, 2015).

The rebranding of custody litigation has not been successful because the former terminology, with its layperson’s understanding, continues to be used in the Florida Statutes. Absent consistent use of the new branding throughout statutes and the litigation process, it is difficult for the consumers, i.e. parents, to embrace the new terminology and value proposition. There is still meaning ascribed to being the custodial parent and certain rights and obligations, separate from those that may be designated in a parenting plan at the time of divorce, are dependent upon that designation and denied to those who lack it.

Although the term “custody” has been eliminated from those statutes affecting disputes between parents for divorce actions originating in Florida, it is still well-entrenched in the Florida Statutes in connection with actions between parents and third parties, dependency proceedings, rights and obligations that flow from having “custody,” procedural matters, court and bar rules, and statutes implicated federal and uniform laws. This would not be an issue if there was some distinction of what “custody” meant in those circumstances. Although several statutes refer to “legal custody,”<sup>217</sup> “actual custody,”<sup>218</sup> or “actual physical custody,”<sup>219</sup> in most instances the terms remain undefined. Whether these nomenclature differences in the statutes have any significance is often difficult to determine. Applying strict statutory construction principles, the presumption is that the legislature *did* intend for the differences to be legally significant;<sup>220</sup> as a practical matter, however, absent a specific definition within the statute, it is likely the differences across chapters does not imply the language differences *are* legally significant.

#### 1. “Custody” Remains in the Chapter 61 Divorce Statutes

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217. See, e.g., FLA. STAT. § 622.55 (2015); FLA. STAT. § 743.067 (2015); FLA. STAT. § 744.616 (2015); FLA. STAT. § 937.025 (2015).

218. See, e.g., FLA. STAT. § 383.50 (2015); FLA. STAT. § 402.17 (2015); FLA. STAT. § 409.408 (2015); FLA. STAT. § 743.045 (2015); FLA. STAT. § 743.046 (2015); FLA. STAT. § 768.19 (2015).

219. See, e.g., FLA. STAT. § 39.01 (2015); FLA. STAT. § 1003.20 (2015); FLA. STAT. § 1012.22 (2015); FLA. STAT. § 937.025 (2015).

220. See *Atlantis at Perdido Ass’n v. Warner*, 932 So. 2d 1206, 1213 (Fla. Dist. Ct. App. 2006).

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Although “custody” was eliminated in connection with child placement issues arising in a divorce action, it still remains in Chapter 61. The term can be found in sections addressing jurisdiction issues,<sup>221</sup> safeguards for the return of a child after the exercise of time-sharing,<sup>222</sup> temporary modifications resulting from military service,<sup>223</sup> and electronic communication between a parent and a child.<sup>224</sup> In each of these statutes, rights and obligations are assigned to the person who has “custody” of the child or is entitled to “visitation.”

## 2. Parents Cannot Have “Custody” of Their Child, but Others Can

Although no parent in a divorce action filed after the effective date of the 2008 amendments will be entitled to claim “custody” of a child born to the parties,<sup>225</sup> non-parent third

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221. *See, e.g.*, FLA. STAT. §§ 751.02 & 61.501 *et seq.* (2015).

222. When there is sufficient risk that a parent may remove a child from the state or the country after the adoption of a parenting plan and time-sharing schedule, the court may enter an order, prohibiting the parent from “removing or retaining the child in violation of a child custody determination.” FLA. STAT. § 61.45(3)(b)(2) (2015). The statute also permits the court to condition travel outside the country upon a requirement that the party planning to travel with the child obtain an order from the “foreign country containing terms identical to the child custody determination issued in this country.” FLA. STAT. § 61.45(7) (2015). Unlike FLA. STAT. § 61.13 where “parents” was substituted for “parties,” FLA. STAT. § 61.45 continues to refer to the litigants in proceedings involving parenting plans and time-sharing as the “parties.” *Id.*

223. Where a parent’s military service requires special consideration of the time-sharing schedule, parents are required to mutually exchange information and cooperate in resolving issues relating to “custody, visitation, [and] delegation of visitation[.]” FLA. STAT. § 61.13002(3) (2015). In addition, during a dissolution of marriage or “child custody” proceeding, courts can delegate time-sharing privileges to a third-party when it is anticipated that military service will interfere with the parent’s ability to exercise time-sharing.

224. Without proving that there has been a substantial change in circumstances, required to modify a court order establishing a parenting plan or time-sharing schedule, a “party to a child custody order” may seek an order providing for electronic communication with the child if there is no prohibition on such communication. FLA. STAT. § 61.13003(5) (2015).

225. This may raise constitutional equal protection claims, the consideration of which are beyond the scope of this article.

parties may still be awarded “custody” of that child.<sup>226</sup> In addition, temporary “custody” may be awarded to extended family members,<sup>227</sup> “custody” is assigned in child dependency actions to protect a child’s health, safety and welfare,<sup>228</sup> and “custody” is awarded in adoption cases.<sup>229</sup>

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226. “The term “custody” was retained in Chapter 61 when used in the context of awarding custody to a non-parent. *See* FLA. STAT. § 751.01 *et seq.* (2013).” *LiFleur v. Webster*, 138 So. 3d 570, 576 n.1 (Fla. Dist. Ct. App. 2014).

227. An extended family member may be awarded temporary custody of a child with the consent of the parents or if the family member is acting as a substitute parent caring for the child on a full-time basis. FLA. STAT. § 751.02(1) (2015); *see, e.g.*, *Seigler v. Bell*, 148 So. 3d 473 (Fla. Dist. Ct. App. 2014); *D.M.M. v. J.M.M.*, 63 So. 3d 910 (Fla. Dist. Ct. App. 2011). As an alternative, an extended family member that has had “physical custody” of the child for a specified period of time, although not currently caring for the child on a full-time basis, can be awarded concurrent custody. FLA. STAT. § 751.02(2) (2015). If there is no objection from the parents to the award of custody to the extended family member, the court applies the same standard used to establish a parenting plan and time-sharing schedule for parents to award temporary or concurrent custody – the best interests of the child. FLA. STAT. § 751.05(2) (2015). If either parent does object, then the court cannot award concurrent custody and must use a more stringent standard and find that there is clear and convincing evidence that the child has been abused, abandoned, or neglected as defined under FLA. STAT. Chapter 39 before making an award of temporary custody. FLA. STAT. § 751.05(3) (2015). In those situations where the court awards concurrent custody, then such award “may not eliminate or diminish the custodial rights of the child’s parent or parents” and either or both parents may obtain physical custody of the child. FLA. STAT. § 751.05(4) (2015).

228. When a child is taken into state care to protect the child’s health, safety, and welfare, the state agency responsible for the care is deemed to have removed the child from “parental custody.” *See generally* FLA. STAT. § 39.001, *et seq.* (2015); *see also* FLA. STAT. § 39.001(1)(f) (2015). In addressing permanency goals for a child that had been removed, if reunification is not possible and parental rights are terminated, alternatives if adoption does not occur with one year include “custody” to a relative or to a foster parent on a permanent basis. FLA. STAT. § 39.001(1)(j) (2015). In addition, under the statute, to determine who has certain obligations to the child and due process rights, the state looks to the person with “legal custody,” which is defined as “a legal status created by a court which vests in a custodian of the person or guardian . . . the right to have physical custody of the child” as well as other defined rights and duties. FLA. STAT. § 39.01(34) (2015).

229. Adoptive parents receive custodial rights to a child and have a constitutionally protected interest in retaining such rights. FLA. STAT. § 63.022(1)(d) (2015). Adoption considerations are governed by the best interests of the child. FLA. STAT. § 63.022(2) (2015). Similarly, those requiring to consent to the adoption include anyone who may claim to have rights to “custody” or have “physical custody” or “lawful custody.” FLA. STAT. § 63.062 (2015); *see also* FLA. STAT. § 63.082 (2015) (providing for execution or revocation of consent by



### 3. Rights and Obligations Are Reserved for the Parent Who Has “Custody”

Under Florida law, the parents, jointly, are the natural guardians for a child.<sup>230</sup> Prior to July 1, 2012, if the parents divorced, the natural guardianship was vested in the parent awarded custody; if joint custody was ordered, then both parents continued to share natural guardianship.<sup>231</sup> Despite changes to Chapter 61 eliminating the designation of a custodial parent in 2008, it was not until 2012 that statutory amendments were adopted revising the natural guardianship language to provide that divorced parents with shared parental responsibility continue as joint natural guardians; if one parent has been awarded sole parental responsibility, that parent becomes the natural guardian.<sup>232</sup> Although the 2012 amendments struck references to “custody” when dealing with divorcing parents, it left intact the custodial parent designation for the mother of a child born out of wedlock who is deemed the natural guardian of the child and is entitled to “primary residential care and custody of the child,” absent court order to the contrary.<sup>233</sup>

Certain rights and obligations are reserved for those designated as the “custodial parent,” including the right to name the child,<sup>234</sup> the allocation of health insurance benefits on behalf of the child,<sup>235</sup> the obligation to present the child for paternity

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the person having “custody” of the child).

230. FLA. STAT. § 744.301(1) (2015).

231. 2012 Fla. Laws 654.

232. *Id.*; FLA. STAT. § 744.301(1) (2012).

233. FLA. STAT. § 744.301(1) 2012.

234. The right to designate the given name and surname of the child is reserved to the mother and father who are listed on the birth certificate, when the mother is married, or both parents have “custody” of the child, or the parent who has “custody” if it is not jointly held by the parents; or whoever will have custody of the child, if the mother was unmarried when the child was born. FLA. STAT. § 382.013(3)(a)-(c) (2015).

235. The allocation of health insurance benefits for a child covered under two or more policies when the child’s parents are divorced is based upon which parent has “custody” of the child, with that parent’s policy providing coverage first, that parent’s current spouse’s policy providing coverage next, and the non-custodial parent’s policy being considered last. FLA. STAT. § 627.4235(4)(c) (2015); FLA. STAT. § 627.6415(4) (2015). No changes have been made to the statutes since the 2008 amendments to Chapter 61.

testing,<sup>236</sup> the right to obtain medical treatment for the child,<sup>237</sup> and the ability to enroll a child in a school readiness program.<sup>238</sup>

#### 4. "Custody" is Still Relevant in Procedural Matters

Aside from issues relating to statutes that use the terms "custody" or "visitation," Florida's procedural and bar rules continue to use the term in connection with offering legal services to military personnel,<sup>239</sup> informational filing when an action is initiated,<sup>240</sup> the use of alternative dispute resolution methods to resolve custody disputes,<sup>241</sup> the offer of settlement rule,<sup>242</sup> and the obligation to appear for jury duty.<sup>243</sup>

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236. In administrative proceedings to establish paternity for purposes of collecting child support, the mother or putative father who has "custody" of the minor child must present the child for genetic testing as scheduled by the state's Department of Revenue. FLA. STAT. § 409.256(6)(a) (2015).

237. An individual who is an "unaccompanied homeless youth," unmarried, and the parent of a child with "actual custody" of the child can consent to medical treatment of the child. FLA. STAT. § 743.067(3)(b)(2) (2015).

238. Children eligible for benefits under the School Readiness Program include those who are in the "custody" of a homeless parent or a parent who is the victim of domestic violence and is residing in a domestic violence center. FLA. STAT. § 1002.81(1)(e) & (f) (2015).

239. In order to expand the availability of legal services to military personnel in the state, military personnel licensed to practice in another state are permitted to practice before Florida courts to provide representation in domestic relations matters that include "child custody" actions. FLA. BAR REG. R. 18-1.4(C)(3) (2015).

240. For case management purposes, petitioners must file a notice of related cases in family cases, which include matters related to "custodial care and access to children." FLA. R. JUD. ADMIN. 2.545.

241. Disputes relating to "child custody" or "visitation" cannot be resolved through voluntary binding arbitration or voluntary trial resolution. FLA. STAT. § 44.104(14) (2015). This was further emphasized in 2013, years after the effective date of the 2008 amendments, when a new section was added to the state arbitration code providing that the code does not apply to matters relating to "child custody" or "visitation." FLA. STAT. § 682.25 (2015). *See also* FLA. STAT. § 682.014(3)(k) (2015) (providing that parties cannot waive the exclusion from arbitration of disputes involving child custody or visitation). Although arbitration is not an available dispute resolution mechanism, family mediation can be used to resolve matters concerning "child custody" or "visitation." FLA. STAT. § 44.1011(2)(d) (2015).

242. The offer of settlement rule does not apply to matters relating to "child custody." FLA. STAT. § 45.061 (2015).

243. Individuals who have "custody" of a child can also be excused from

## 5. Designation of Custodial Parent Referenced in Uniform Law, Federal Statutes, and International Conventions

Because most other states and countries continue to use “custody” and “visitation” in their statutes, those references are prevalent in uniform laws, federal statutes, and international treaties and conventions. Florida has adopted a number of uniform laws relating to children that ascribe rights and responsibilities to parents. These statutes refer to “custody,” “visitation,” “custodial parent,” or some variation. In order to invoke the relief available under these statutes, some designation or understanding of who is the custodial parent is typically required. Some of these statutes include the Uniform Child Custody Jurisdiction and Enforcement Act,<sup>244</sup> the Interstate Compact on the Placement of Children,<sup>245</sup> the Uniform Interstate Family Support Act,<sup>246</sup> and compliance with the Federal Parent Locator Service.<sup>247</sup>

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jury duty; those with “custody” who provide care at home for a child under the age of ten can be relieved of federal petit and grand jury duty, M.D. FLA. JURY PLAN 7.05(a)(2), while a parent who is not employed full-time and has “custody” of a child under the age of six can be excused from serving on a state jury. FLA. STAT. § 40.013(4) (2015).

244. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), amended in 2002, controls jurisdiction in matters relating to “child custody” and “visitation” proceedings. FLA. STAT. § 61.501, *et seq.* (2015). No amendments have been made to the UCCJEA since its original adoption. *Id.* The 2008 amendments require that all jurisdictional issues under the UCCJEA must be addressed in the parenting plan and provides that a parenting plan incorporated in a judgment or order is a custody determination for purposes of the act. FLA. STAT. § 61.046(13)(a)-(b) (2008).

245. The Interstate Compact on the Placement of Children, adopted in 2009, includes definitions of a “non-custodial parent” and references “custody” throughout the statute. FLA. STAT. § 409.401, *et seq.* (2015). No amendments to revise references to the “custody” or “visitation” have been made since its original adoption.

246. The Uniform Interstate Family Support Act (UIFSA) was originally adopted in 1996. Despite amendments in 2011, which became effective in 2014, the act still provides that exercise of the remedies for support enforcement available under the act does not give a court jurisdiction to issue orders relating to “child custody or visitation.” FLA. STAT. § 88.1031(2)(b) (2015).

247. In actions brought to release information pursuant to the Federal Parent Locator Service, notwithstanding family violence indicators, location disclosure is permitted to state agents or attorneys and judges who can bring

There are also a number of federal statutes that reference rights and obligations imposed upon custodial and non-custodial parents, including the Parental Kidnapping Prevention Act,<sup>248</sup> the Servicemembers Civil Relief Act,<sup>249</sup> the Indian Child Welfare Act,<sup>250</sup> Veterans' benefits for dependents,<sup>251</sup> and the Internal Revenue Code.<sup>252</sup> "Custody" also continues to be used in international treaties and conventions, most notably the Hague Convention on the Civil Aspects of International Child

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or hear actions to "enforce a child custody or visitation determination or order establishing a parenting plan." FLA. FAM. L.R.P. 12.650(b)(1) & (2). The Committee Note to the rule explains that the 2008 amendments:

[E]liminated such terms as 'custodial parent,' 'noncustodial parent,' and 'visitation' from Chapter 61, Florida Statutes. Instead, the court adopts or establishes a parenting plan that includes, among other things, a time-sharing schedule for the minor children. These statutory changes are reflected in the amendments to the definitions in this rule. However, because 42 U.S.C. § 653 includes the terms 'custody' and 'visitation,' these terms have not been excised from the remainder of the rule.

*Id.*

248. The Parental Kidnapping Prevention Act (PKPA) refers exclusively to custody and visitation. *See* 28 U.S.C. § 1738A (2012); 42 U.S.C. § 633 (2012). The 2008 amendments require that the parenting plan agreed to by the parties or adopted by the court must address jurisdictional issues under the PKPA. FLA. STAT. § 61.046(13)(a) (2008).

249. Under the Servicemembers Civil Relief Act, there are certain restrictions on a court's power to act in custody actions involving a servicemember who is being deployed. *See* 50 U.S.C. § 3938 (2012).

250. The Indian Child Welfare Act addresses the policy that Indian children removed from their families should be placed in the custody of individuals that will support and promote values inherent in the Indian culture. 25 U.S.C. § 1902, *et seq.* (2012).

251. Life insurance coverage and benefits available to children of veterans are dependent upon which parent has "legal custody" of the child. 38 U.S.C. § 1967(a)(4)(B) (2012).

252. Under the Internal Revenue Code, the entitlement to claim a personal exemption of a child on federal tax returns following the parents' divorce hinges on which parent has "custody," and whether that parent has executed the appropriate forms to allow the "noncustodial" to claim the dependent child. I.R.C. §§ 151(c)-152(e)(1)-(2) (2012). The "custodial parent" is "the parent having custody for the greater portion of the calendar year," while the "noncustodial parent" is "the parent who is not the custodial parent." I.R.C. § 152(e)(4)(A)-(B) (2012).

Abduction.<sup>253</sup> For example, the International Child Abduction Remedies Act (ICARA),<sup>254</sup> implementing the Hague Convention, refers to “custody” and “visitation.”<sup>255</sup>

## VI. “Custody” Rebranding Implications and Suggestions for Implementation

An examination of Florida’s experience in rebranding “custody” litigation suggests that such efforts have not been wholly successful. The new “custody” brand, characterized by revised nomenclature, including “parenting plans” and “parenting time,” has a commendable value proposition to reduce animosity between parents throughout the divorce process and as they co-parent after divorce. This is a worthy goal based on research indicating that children in families who continue to experience a high level of conflict after divorce fare poorly in terms of health, behavior, and educational achievement.<sup>256</sup> On the other hand, children who experiences cooperative co-parenting enjoy a higher level of contact with each parent and more positive relationships.<sup>257</sup>

The new standards developed to reduce the animosity associated with custody litigation fundamentally alter custody dispute resolution by requiring parents to assume the primary

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253. Hague Conven. on the Civil Aspects of International Child Abduction (1980) T.I.A.S. No. 11670; 1343 U.N.T.S. 89.

254. 22 U.S.C. § 9001 (2012).

255. ICARA defines “rights of access” under the Convention as “visitation rights.” 22 U.S.C. § 9002(7) (2012). The act also defines “rights of custody” maintained by “an individual or legal custodian” as “rights of care and custody of a child, including the right to determine the place of residence of a child, under the laws of the country in which the child is a habitual resident” that are awarded through “operation of law,” court order, or the parties’ agreement. 22 U.S.C. § 9101(21) (2012). In addition, relief under the act after a child has been wrongfully removed to another country is invoked by the “left-behind parent,” who is “an individual or legal custodian who alleges that an abduction has occurred that is in breach of rights of custody attributed to such individual.” 22 U.S.C. § 9101(15) (2012). In order to allow for invocation of the relief afforded under the Hague Convention, the definitions adopted at the time of the 2008 amendments provide that “custody” rights under the convention are determined by the parenting plan agreed to by the parties or adopted by the court. FLA. STAT. § 61.046(13)(c) (2008).

256. Garrison, *supra* note 210 at 265.

257. *Id.* at 267-68.

responsibility for resolving their disputes through the creation of a parenting plan.<sup>258</sup> These revised standards and the modified verbiage replacing "custody" and "visitation" are the equivalent of a company's new value proposition.<sup>259</sup> The brand promise being offered by the "sellers" (the state legislators, judges, and lawyers) is that the "consumers" (parents and their children) will experience a less contentious divorce and post-divorce, co-parenting relationship if the new standards are implemented.

The import of changes in terminology, however, are often lost by parents. Terms associated with child custody determinations have been repeatedly modified and include: custody, visitation, parental responsibility, shared parenting, legal custody, physical custody, primary residence, primary residential parent, secondary residential parent, non-residential parent, and the list goes on. These terms themselves are often ill-defined.<sup>260</sup> As new terminology has been adopted by state legislatures, those "selling" custody determinations—lawyers and judges—have adapted better than parents,<sup>261</sup> the ultimate "consumers" who must abide by the decisions. Parents continue to speak in terms of "custody" and "visitation," regardless of the nomenclature du jour.<sup>262</sup> In addition, there is at least anecdotal evidence that use of the new terminology requiring the development of parenting plans has the opposite of the intended effect, increasing acrimony between parents forced to resolve detailed minutiae relating to parenting decisions.<sup>263</sup>

Those responsible for child custody reform have done a poor job educating the public about the benefits to be gained by not

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258. Singer, *supra* note 81, at 184. Singer argues that the adoption of parenting plan requirements has shifted the focus of custody litigation from "allocating custodial rights and obligations" to "planning' for children's future needs." *Id.* at 186-87. See also Elizabeth S. Scott, *Planning for Children and Resolving Custodial Disputes: A Comment on the Think Tank Report*, 52 FAM. CT. REV. 200, 200 (2014) (praising the Association of Family and Conciliation Courts' Think Tank on Research, Policy, Practice, and Shared Parenting for maintaining that family decisions should be made by parents, not the courts).

259. See GRONLUND, *supra* note 33.

260. See *supra* note 76 and accompanying text.

261. See *supra* note 176 and accompanying text.

262. See *supra* note 181 and accompanying text.

263. Jane W. Ellis, Book Review, 22 N.Y.U. REV. L & SOC. CHANGE 253, 261 (1996) (reviewing CARLA B. GARRITY & MITCHELL A. BARIS, *CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH CONFLICT DIVORCE* (1994)).

thinking in terms of “custody” and “visitation,” and “winning” and “losing” custody, after a divorce.<sup>264</sup> There has been no attempt to rebrand “custody” that would allow consumers to form a favorable impression of terms such as “parenting plans” and “parenting time” because, in most instances, the first time parents are exposed to such concepts is when they are in the divorce lawyer’s office, a time when they are often in a highly agitated emotional state. While the promise of an amicable divorce may be appealing, parents’ perception of “custody” has been ingrained through, literally, hundreds of years of conditioning that “losing custody” implies the existence of negative character traits that led to such a result.<sup>265</sup> In many instances, those in the process of divorcing now were the children of divorce in the 1970s and later years, when having a primary caretaking parent, typically the mother, was the norm.<sup>266</sup> Having personally lived through that experience, it is not surprising that adaptation to new standards and terminology is slow to occur when what is demanded is a fundamental change in culture.<sup>267</sup> Changing the nomenclature may cause some parents to “feel better” about their continued status as parents after divorce, but underlying emotional responses to custody disputes still remain.<sup>268</sup> Despite the demise

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264. Parenting education classes, required in some jurisdictions, address the impact divorce has on children and encourage less adversarial conflict resolution. Singer, *supra* note 81, at 188. A four-hour class, however, cannot be expected to undo deeply-ingrained beliefs about custody, visitation, and parental rights. Given the claim that 35% of parents have chronically conflicted co-parenting styles, the efficacy of these classes is questionable. See Sullivan, *supra* note 96, at 19.

265. See Barbara Bennett Woodhouse, *Child Custody in the Age of Children’s Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 816 (1999) (suggesting that concepts of “custody” were traditionally based on social status hierarchy with possessory interest being vested in the family patriarch).

266. Warshak, *supra* note 78, at 92-93.

267. See generally J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 225-26 (2014).

268. Mabry, *supra* note 92, at 242. See also GITLIN ON DIVORCE: A GUIDE TO ILLINOIS MATRIMONIAL LAW § 1.4 (LexisNexis 2012) (suggesting that nomenclature changes in the Illinois Marriage and Dissolution of Marriage Act are “cosmetic” and “do not in any way eliminate the acrimony from matrimonial law proceedings . . . The acrimonious nature of most matrimonial law proceedings should be recognized as a reality that will not change.”).

of the "tender years" doctrine and legislative shifts to shared parenting standards, popular culture still often views the mother as the person who should, and typically does, receive custody of a minor child.<sup>269</sup>

During the emotional upheaval of a divorce, parents' conduct is susceptible to influences from third parties, including their lawyers. Their expectations of outcomes are colored by lawyers' representations and generally are much higher at the outset of the case and ebb towards settlements reached through compromise as the case progresses.<sup>270</sup> In many instances, the lawyers responsible for managing client expectations have themselves not adapted to the new terminology mandated by statutory changes.<sup>271</sup>

The rebranding of custody litigation is also hampered by the slow adoption of nomenclature changes by the courts and practitioners because the substantive import of the changes is not always clear<sup>272</sup> and there is a lack of consistency in terminology across statutory provisions affecting children.<sup>273</sup> In addition, there is little evidence that these changes have any significant impact on the decisions ultimately rendered by courts or through settlements.<sup>274</sup> In fact, some experts posit that

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269. The lyrics in *I'm So Happy I Can't Stop Crying*, a song penned by Sting and recorded as a duet with Toby Keith in 1997, state:

Saw my lawyer, Mr Good News  
 He got me joint custody and legal separation  
 \* \* \*  
 The park is full of Sunday fathers and melted ice cream  
 We try to do the best within the given time  
 A kid should be with his mother  
 Everybody knows that  
 What can a father do but baby-sit sometimes??"

STING, *I'm So Happy I Can't Stop Crying*, on DREAM WALKIN' (Mercury 1997). Similarly, the 2008 Zac Brown Band song, *Highway 20 Ride*, written by Wyatt Durrette and lead singer, Zachary Brown, describes a divorced father driving on the highway every other Friday to visit his son in a different state.

270. Gary Skoloff & Robert J. Levy, *Custody Doctrines and Custody Practice: A Divorce Practitioner's View*, 36 FAM. L.Q. 79, 81-82 (2002).

271. Christensen, *supra* note 181, at 4.

272. *See supra* notes 170-73 and accompanying text.

273. *See discussion supra* Section V.B.

274. Skoloff & Levy, *supra* note 270, at 84-85; Robert Mnookin, *Child*



settlement terms are often not grounded on the legal principles contained in statutes governing custody cases.<sup>275</sup> Consequently, the statutory principles and nomenclature may have little bearing on strategies employed by practitioners and parents' assessment of the ultimate goals to be achieved.

Rebranding is necessary if changes in custody standards are to be successful because clients and their lawyers do not speak the same language and do not share similar motivations.

Clients bring to their interactions with lawyers . . . a 'natural attitude' or an 'attitude of everyday life.' In this attitude the way the world appears is accepted as the way the world really is. The self is perceived to be at the center of society and events are interpreted in terms of their impact on the self. Lawyers, on the other hand, might be expected to think of motives and actions in . . . 'rational-purposive' terms in which technical rules and a problem-solving orientation are more important than emotional reactions and justifications of self.<sup>276</sup>

This disconnect is fueled throughout the professional relationship as lawyers focus on the legal aspects of the divorce governed by rules and statutes, a language that is foreign to clients, and clients focus on the emotional and social impact of divorce, facets that are meaningless to the lawyer.<sup>277</sup> The shift in attitude, then, is where the rebranding of custody must focus.

Achieving the goal of reducing the number of custody cases

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*Custody Revisited*, 77 LAW & CONTEMP. PROBS. 249, 263 (2014).

275. See Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1352 (1994); Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979); Skoloff & Levy, *supra* note 271, at 89-90 (discussing views that lawyers who act as "counselors" in divorce cases promote compromise, while "advocates" strive for the most favorable outcome).

276. Austin Sarat & William L. F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 LAW & SOC'Y REV. 737, 739-40 (1988).

277. *Id.* at 764.

that are litigated and decreasing the level of animosity in those cases has been elusive. This is a cautionary tale for those states contemplating changes in nomenclature, including eliminating the recognized "custody" brand, to consider some of the challenges faced in Florida. When the new nomenclature and parenting plan design were introduced, there were no efforts to modify parental social behavior to embrace the new terminology and the new paradigm for resolving custody disputes through rebranding. Successful corporate rebranding typically involves extensive market analysis as symbols of the new brand and the value proposition itself are developed and test-marketed.<sup>278</sup> The modifications to the "custody" brand did not undergo any such testing. Although legislators, jurists, practitioners, and mental health professionals were involved in the process as statutory amendments were proposed,<sup>279</sup> the ultimate consumers, the parents affected by the new legislation, generally were not consulted. Instead, the new paradigm was foisted upon them with little attention being given to the need to introduce the new concepts and develop strategies to gain the favorable public impression needed for a successful rebranding. As a result, parents continue to use the terms "custody" and "visitation," while practitioners and judges give at least an attempt to utilize the new terminology, although not convinced that it has any effect on the course of litigation or the ultimate outcomes achieved.<sup>280</sup> In short, there was no attempt to develop a new "attitude" consistent with the new brand.<sup>281</sup>

For those states contemplating a new brand that eschews "custody" and "visitation," implementing the following four proposals could make the rebranding goal attainable and provide for an acceptance of the new value proposition as one that provides significant benefits for a family following a divorce: 1) create a marketing campaign that explains the benefits under the new paradigm; 2) allow for a period of transition as parents acclimate to the new nomenclature and co-parenting

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278. Jim Makos, *SWOT Analysis to Help with Branding and Marketing*, PESTLEANALYSIS (Mar. 6, 2015), <http://pestleanalysis.com/swot-analysis-in-branding-marketing/>.

279. Roy, *supra* note 187.

280. *See supra* note 190; *see also* notes 174-176 and accompanying text.

281. *See* note 65 and accompanying text.

expectations; 3) use the new nomenclature consistently throughout state statutes; and 4) invest in developing “buy-in” from stakeholders, primarily lawyers and judges, early in the process.

#### A. *Marketing Campaign*

Despite the revisions to the Florida Statutes adopting “parenting plans” and “time-sharing,” *pro se* litigants continue to use the words “custody” and “visitation” in their court filings.<sup>282</sup> These are terms familiar to parents and ones used throughout history. The general public is unaware of the shifts in nomenclature and standards used in custody determinations, although litigants are exposed to the different terminology when they retain counsel and attend parenting classes required in many states afford opportunities to introduce the new concepts.<sup>283</sup> By then, however, social behavior and perceptions of what is involved in divorce and custody litigation have already been ingrained through the priming process discussed by Calder when explaining behavior reactions to branding.<sup>284</sup> Expecting these social norms to change during the divorce process when emotions run high is unrealistic.

As seen in the ineffective rebranding of JC Penney, changes in the value proposition that exceed the understanding of the public are unlikely to gain acceptance.<sup>285</sup> In that situation, education of the consumer was required before the new pricing strategy could have been successful. Similarly, if rebranding of custody litigation is to succeed, parents must be afforded an opportunity to develop familiarity with the new terms and the import of the process of custody determinations before the new value proposition can be expected to receive favorable acceptance.

To effectuate change, then, there must be a cultural shift

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282. *See supra* note 181 and accompanying text. This is similar to the continued use of “divorce,” although the terminology was changed to “dissolution of marriage” in 1971. *See supra* note 142.

283. *See* Francis J. Catania, *Learning from the Process of Decision: The Parenting Plan*, 2001 BYU L. REV. 857, 884 n.167 (2001).

284. Goldenberg, *supra* note 133.

285. *See supra* notes 53-57 and accompanying text.

that occurs *before* parents are in the process of divorcing and resolving issues relating to shared parenting. Just as public health officials now use marketing campaigns to effectuate change in social behavior, exposing the general public to changes in co-parenting expectations post-divorce can be a viable vehicle for change. Public health announcements targeting smokers have proven to be effective, although directed at a much smaller audience<sup>286</sup> than the approximately 36% of married adults who will eventually divorce.<sup>287</sup> Managing expectations before parents enter the divorce process can ease the rebranding procedure.

Although most divorces cases settle without judicial intervention, as noted earlier, a small percentage of divorcing couples engage in high-conflict litigation, especially over issues affecting custody of a minor child.<sup>288</sup> A small percentage of this group continue in their acrimonious conduct, to the detriment of their children, long after the divorce decree has been entered, but others do settle into a relative state of calm within a few years after the divorce.<sup>289</sup> Perhaps it is this latter group that can be targeted and will benefit the most from social behavior marketing. The truly highly conflicted parents will be unlikely to respond, just as some consumers will never form a positive image of a product, no matter how successful the branding campaign may otherwise be.<sup>290</sup>

#### B. *Transition Period*

Consideration needs to be given to the transition in both nomenclature and custody standards to allow parents the

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286. In 2013, 17.8% of U.S. adults reportedly smoked. Bahar Gholipour, *Smoking US Declines to All-Time Low*, LIVESCIENCE (Nov. 26, 2014), <http://www.livescience.com/48923-usa-smoking-declines-to-lowest.html>.

287. According to the Centers for Disease Control and Prevention, the average United States divorce rate for the forty-four states and the District of Columbia that reported data is 36%. *FastStats Marriage and Divorce*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/fastats/marriage-divorce.htm> (last updated June 19, 2014).

288. See *supra* notes 23-24 and accompanying text.

289. See *supra* notes 23-24 and accompanying text.

290. Calder, *supra* note 58 at 12.

opportunity to recognize the benefits afforded by the new value proposition. In Florida, the change from a parent's right to be designated the "primary residential parent" to instead having "time-sharing" with a child occurred overnight. For actions filed on September 30, 2008 the prior statute using the familiar vernacular of "custody," "visitation," and "primary residential parent" governed, regardless of when the case was resolved through settlement or judicial decree; for those who filed their action the following day, October 1, 2008, an entirely new scheme involving parenting plans and a time-sharing schedule was required.<sup>291</sup> Explaining the difference in rights and obligations in a fundamental relationship like that of parent-child caused by the difference of one day placed practitioners in a difficult position. These problems may have been further exacerbated and will continue into the future because those who were divorced under the old regime still have the prior statute applied in modification and enforcement cases; these cases continue to use "custody," and "visitation," although some courts toss in the new terms for extra measure.<sup>292</sup> This dichotomy can conceivably continue until 2026, when infants born in 2008 whose parents filed for divorce before October 1 of that year will finally turn eighteen and the court will lose jurisdiction over their parenting issues.<sup>293</sup>

Although the enforcement and modification of pre-2008 amendment cases in Florida justify using the former terminology under the theory that rights once granted should not be removed by subsequent litigation, that argument should be discounted. Its effect is to create a class of persons with "custodial" rights that are denied to another class of persons as a result of an arbitrary effective date selected by the legislature.

Given that parenting is a fundamental right under the U.S. Constitution,<sup>294</sup> there should be no divergence in parental rights.

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291. *See supra* notes 173-75 and accompanying text.

292. *See supra* notes 200-01 and accompanying text.

293. The age of majority in Florida is eighteen. FLA. STAT. § 743.07(1) (2015). Actions could still continue for another year, however, because the child support obligation can continue beyond the child's eighteenth birthday if the child is still enrolled in high school with an expectation of graduating by the child's nineteenth birthday. FLA. STAT. § 743.07(2) (2015).

294. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

For actions that come before the court for enforcement, and especially for modification subsequent to the enactment of statutes rebranding custody litigation, consideration should be given to requiring compliance with the new statutory provisions. In addition, rather than requiring the mandates of the statute to have prospective application to actions filed subsequent to the effective date of the modification, consideration should be given to make the revisions control all cases resolved subsequent to the effective date. If the goal is the reduction of litigation and post-decretal animosity, then the purported benefits of the statutory revisions should not be denied to those who filed for divorce prior to the statute's enactment. This method of application will, to some extent, avoid the cliff effect that a filing date demarcation has, ease the transition to the new nomenclature, and ensure that all cases heard subsequent to the effective date apply the same standard, reducing confusion for parents, lawyers, and judges.

### C. Consistency

Florida's statutes provide a good example of the problems of lack of consistency in branding for the public to understand the brand.<sup>295</sup> The statutes are replete with references to "custody" as a right afforded to parents in certain circumstances and to third parties in other. The term "custody" carries with it legal significance because it provides to the designee rights to indicia of parenthood, such as naming a child and providing medical care.<sup>296</sup> When the custodial parent is the one responsible for providing medical insurance, but neither parent is named the custodial parent, confusion and the likelihood of future litigation can be increased rather than lessened. At best, the words themselves can be rendered meaningless if they are viewed simply as nomenclature changes and not a shift in the value proposition.<sup>297</sup> In addition, under uniform, federal, and

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295. See *supra* note 37 and accompanying text (discussing the importance of consistency in branding).

296. See discussion *supra* Section V.B.3.

297. See *supra* note 190. Although the *primary* residential parent designation was eliminated, judges now refer to one parent having *majority* time-sharing. See, e.g., *Mayo v. Mayo*, 87 So. 3d 820, 821 (Fla. Dist. Ct. App.

international laws, certain rights are reserved for the “custodial” parent. Introducing foreign terms such as “parenting plan” and “time-sharing,” while prohibiting an award of custody, creates confusion and a justifiable concern that parental rights are being lost, despite the adoption of statutes to allow for implementation of relief afforded under those laws referring to “custody.”

#### D. *Stakeholder Buy-In*

Marketing experts recommend bringing employees into the rebranding process early so their support for changes in the value proposition can be developed making them its ardent spokespersons.<sup>298</sup> The weak acceptance of nomenclature changes and shifts in the custody standards in Florida is not atypical of attorney reaction to attempts to rebrand custody litigation.<sup>299</sup> This may be a function of the System 2 thinking process discussed by Calder that requires “work” to change perceptions by considering the proposal, evaluating alternatives, and then favorably accepting the new value proposition.<sup>300</sup> Adapting to changes in nomenclature and a process that had been in place for over a quarter of a century in Florida proved to be a slow transformation for attorneys and judges.<sup>301</sup>

Aside from the behavioral science behind the difficulties individuals experience with change, is the educational underpinnings of most divorce lawyers. Legal education is only now becoming more interdisciplinary and looking to social science and psychology as fields with which attorneys must have more than a casual acquaintance.<sup>302</sup> As lawyers are expected to

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2012). While *primary* and *majority* may not be true synonyms, neither term can be viewed as neutral because they both clearly imply that one parent has more time with the child than the other. This fact will continue to cause litigation, especially because of the child support implications. See *supra* notes 193-194 and accompanying text.

298. See *supra* notes 47-48 and accompanying text.

299. See *supra* note 190, 205187 and accompanying text..

300. See Calder, *supra* note 58.

301. See *supra* notes 183-86 and accompanying text.

302. See generally Joan B. Kelly & Mary Kay Kisthardt, *Helping Parents Tell Their Children about Separation and Divorce: Social Science Frameworks and the Lawyer's Counseling Responsibility*, 22 J. AM. ACAD. MATRIM. LAW 315

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assume more of a counseling role, they must assume the task of convincing clients of the efficacy of the new nomenclature and co-parenting expectations. Unfortunately, they themselves may not be inclined to endorse the new paradigms as capable of delivering on the value proposition that custody disputes can be resolved with less acrimony. Education of lawyers and judges then would be vital to success in the rebranding process.

### VII. Conclusion

The promise of a less contentious divorce is a value proposition that most, if not all, would embrace. With the current trend in custody litigation that has resulted in nomenclature changes and revisions in custody standards, efforts to achieve that brand promise could benefit from implementation of business branding principles. In order to shift the focus away from "winning custody" to a paradigm that promotes co-parenting and eschew labels, all of the participants in custody disputes, including lawyers and judges, but most importantly parents, must view the changes as providing a favorable benefit.

Rebranding concepts that focus on promoting an understanding of the new value proposition through social behavior marketing, allowing for an orderly transition to the new paradigm, using consistent branding across all statutes, and encouraging adoption by all stakeholders can be implemented to foster acceptance of the new value proposition. Simply adopting significant statutory revisions results in confusion by the courts, attorneys, and litigants, making it unlikely that the goals sought will be reached. Successfully rebranding custody litigation as a system to establish parenting plans and apportion parenting time without acrimony or judicial intervention can become the "*Healthy Choice*" of divorcing parents.

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(2009); see also Catherine J. Ross, *Choosing a Text for the Family Law Curriculum of the Twenty-First Century*, 44 FAM. CT. REV. 584 (2006), for discussions on the need to reform legal education in the family law arena.