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Growing Pains That Cannot Be Ignored: Automatic Reevaluation of Custody Arrangements at Child's Adolescence

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I. Introduction

Over 500,000 children under the age of six are affected by divorce each year.[1] This creates thousands of custody agreements, either privately negotiated or court-imposed. But what happens when those young children grow into young teenagers? The divorce process generally involves a period of separation, followed by a formal divorce, involving a child custody agreement or order. While custody arrangements are most often made when children are in their early childhood, arrangements are not automatically changed or revisited as children grow up. As an example, the current Pennsylvania approach to custody[2] does not acknowledge developmental changes as children progress into adolescence.[3] Custody arrangements made when a child is seven may remain in effect until the child reaches age eighteen.[4]

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1. Karen Turnage Boyd, *The Tale of Two Systems: How Integrated Divorce Laws Can Remedy the Unintended Effects of Pure No-Fault Divorce*, 12 CARDOZO J. LAW & GENDER 609, 609–10 (2006).

2. 23 PA. CONST. STAT. ANN. §§ 5301-5314 (2009). This paper uses Pennsylvania as a "case study" of sorts.

3. "Adolescence" will be used to refer to children between the ages of thirteen and seventeen years old, as there is a "notable shift in maturity after seventeen. The years between seventeen and approximately twenty appear to serve as a bridge between adolescence and young adulthood." NEIL KALTER, GROWING UP WITH DIVORCE: HELPING YOUR CHILD AVOID IMMEDIATE AND LATER EMOTIONAL PROBLEMS 309 (1990). "Adolescent" is used synonymously with "young teen."

4. *See* 23 PA. CONST. STAT. ANN. § 5301 (defining children as unemancipated individuals

Social science research extensively documents the changing needs, behaviors, and difficulties faced by children growing into young teens.[5] "[A] plan that works well for your four-year-old son may not be the best possible arrangement when he turns seven, twelve, or sixteen."[6] Initial custody arrangements are based on either the parents' or court's view of the best interests of the child, but the best interests of a *young* child often vary greatly from the best interests of an *adolescent*. Moreover, studies show that young teens generally *want* to change their custody arrangements as they grow[7] but have no formal recourse to do so.

I will first identify the problem in the lives of postdivorce adolescents by discussing their developmental changes, changes in the postdivorce lives of their parents, and the failure of the Pennsylvania custody approach to adapt custody arrangements. Next, I will examine possible solutions in light of four major concerns illuminated by this research: providing adaptability of custody agreements, reasonably encouraging adolescents' voices, allowing review without increasing conflict, and ensuring enforceability. Finally, I will propose the adoption of a periodic review of custody arrangements to address the best interests of young teens.

II. Getting to the Heart of the Problem: No Room for Change

Initial arrangements of custody (sole versus joint custody) are a topic of research and sociological and psychological study of the effects of the various custody arrangements on the behavioral, social, and educational development of children and adolescents.[8] Despite this plethora of

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under the age of eighteen). Custody arrangements remain unchanged unless modified through parental renegotiation or relitigation. *Id*. § 5310 (custody modifications).

5. These changes include a new social environment, awareness of their sexuality, desire for independence, need for greater stability, and natural separation from their parents.

6. ROBERT E. EMERY, THE TRUTH ABOUT CHILDREN AND DIVORCE 164 (2004) [hereinafter EMERY, TRUTH ABOUT CHILDREN] (recommending the creation of adaptable parenting plans in mediation of custody arrangements).

7. *See* Interview with Robert E. Emery, Ph.D., Professor of Psychology and Director of the Center for Children, Families, and the Law, University of Virginia (Sept. 30, 2009) [hereinafter Emery Sept. 30 Interview]; *see generally* Christy M. Buchanan, Eleanor E. Maccoby, & Sanford M. Dornbush, *Caught Between Parents: Adolescents' Experience in Divorced Homes*, 62 CHILD DEVEL. 1008, 1009–10 (1991) [hereinafter Buchanan, et al., *Caught Between Parents*] (adolescents feel caught between parents as they have difficulty adjusting in the postdivorce context).

8. *See, e.g.*, JUDITH WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 170 (1980) (noting that adolescents whose parents divorce suffer depression and may express doubt about the possibility of successful marriages); JUDITH S. WALLERSTEIN, JULIA M. LEWIS, & SANDRA BLAKESLEE, THE UNEXPECTED LEGACY OF DIVORCE: THE 25 YEAR LANDMARK STUDY (2001) (finding difficulties in maintaining friendships and in attaining success in school performance); KALTER, *supra* note 3, at 332 (lack of contact between a child and his or her father correlates with developmental issues regarding

research and commentary, it is difficult to find the effect of *unchanged* custody arrangements, entered during early childhood on now-adolescent children.[9] The focus is generally on initial custody determinations and modification petitions.[10] Courts will only consider a child or adolescent's preference as one factor in determining his or her best interests.[11]

The sections to follow will provide an overview of the relevant post-divorce experience. Specifically, the problem can be broken down into three main areas: (1) adolescents experience developmental changes which militate against static custody arrangements; (2) parents' post-divorce lives change, and arrangements should help the parties address those changes; and (3) the Pennsylvania custody system does not adequately address the need for change.

A. Developmental Changes in Adolescence: Growing Up Is Tough!

Adolescence is a tough "time of remarkable change"[12] for children—a period of awkward exploration and self-definition.[13] To understand why custody arrangements need to adapt as children grow, it is informative to examine how the postdivorce context implicates these developmental changes.[14] Social science scholars highlight that as children progress into their adolescent years, they face a new social environment, become aware of their sexuality, seek independence and become self-absorbed, develop a greater need for stability, and experience a natural separation from their parents. Each of these developmental areas can be negatively affected in the postdivorce context[15] while the question of how to adjust the approach

masculinity for boys and may detrimentally affect girls' interaction with males). *But see* E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 229 (2002) (noting only twenty to twenty-five percent of children with difficulties experience *serious* emotional, social, and/or behavioral problems). *See, e.g.,* Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 967-79 (2005) (discussing the social and legal biases often felt by divorced fathers and the resulting lack of paternal involvement in maternal sole custody arrangements); Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole Custody Arrangements: A Meta-Analytic Review*, 16 J. FAM. PSYCHOL. 91, 98–100 (2002) (finding the joint-custody arrangement most beneficial to a child's adjustment).

9. *See* EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 164 (devotes a portion of his recommendations for divorcing parents to the creation of a parenting plan that will be able to change as the child grows up).

10. *See* 23 PA. CONST. STAT. ANN. § 5310 (2009).

12. *See id.* § 5303(a).

12. KALTER, *supra* note 3, at 309.

13. *Id.*

14. *See* E. Mavis Hetherington & Margaret Stanley-Hagan, *The Adjustment of Children with Divorced Parents: A Risk and Resiliency Perspective*, 40 J. CHILD PSYCHOL. PSYCHIAT. 129, 131 (1999) (finding divorce makes adolescence more difficult).

15. Matt Isohanni et al., *Teenage Alcohol Drinking and Non-Standard Family Background*, 38 SOC. SCI. MED. 1565, 1573 (1994); HETHERINGTON & KELLY, *supra* note 8, at 208–13;

to custody to best serve the interests of adolescents without giving adolescents unreasonable power over their parents to change their custody arrangements. Parents must strike a balance between listening to adolescents and being overpowered by them.

Children face a new social environment in adolescence as they go from "the relatively calm haven that elementary school has become to the more exciting and as yet unmastered worlds of junior high and high school."[16] Adapting to a new social environment is often more difficult in post-divorce context, as the young teen attempts to reconcile "two sets of significant changes in their lives: those that normally arise in this period of development, and those accompanying [post-divorce life]."[17] In addition, the new environment makes it particularly important for adolescents to maintain friendships, which may be difficult where the custody arrangement requires them to move between two households.[18]

After the age of thirteen, children become more aware of their bodies and their sexuality.[19] They begin to spend time with members of the opposite sex and bridge into the new social norm of romantic relationships.[20] In the postdivorce context, this often leads adolescents to form a preference for more time with the parent of the same sex,[21] suggesting that there may be a reason to shift the time allocations of custody between parents.

Adolescents attempt to form their own identity and seek independence from their parents which leads them to perceive themselves as the center of attention,[22] making it emotionally difficult for young teens to move back and forth between two parents' households in custody arrange-

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CHRISTY M. BUCHANAN, ELEANOR E. MACCOBY, & SANFORD M. DORNBUSH, ADOLESCENTS AFTER DIVORCE 149 (1996) [hereinafter BUCHANAN, ET AL, ADOLESCENTS AFTER DIVORCE] (recognizing that there are particular internal struggles experienced by adolescents in the post-divorce context that should be addressed, such as spending time alone with one parent versus being able to see both parents together or missing one parent).

16. KALTER, *supra* note 3, at 309–10.

17. *See id.* at 310 (finding frustration and feelings often expressed in negative ways, such as illegal substance abuse or sexual activities); *see also* Isohanni et al., *supra* note 15, at 1573 (noting increased risk of alcohol abuse in teens of divorced families).

18. EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 189–90 (discussing the need for flexibility in custody arrangements during adolescent years due to the need for flexibility to maintain their schedules and friendships).

19. *See* MICHAEL V. BLOOM, ADOLESCENT-PARENTAL SEPARATION 33 (1980) (discussing the cognitive development's effect on the individual's self-awareness).

20. KALTER, *supra* note 3, at 309 (parties, dating relationships, and friendships with members of the opposite sex).

21. EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 189 (finding adolescents may express a desire to live with the parent of the same sex, even though they previously lived primarily with the other); *cf.* HETHERINGTON & KELLY, *supra* note 8, at 208–13 (difficulties faced by adolescent girls in postdivorce situations based on sexuality and ways mothers can cope).

22. KALTER, *supra* note 3, at 309 (stating self-awareness of sexuality translates into the "quality of being self-absorbed.").

ments.[23] They will often want to change custody arrangements based on their desire for independence from their parents.[24]

Despite their often-expressed preferences to the contrary, adolescents develop a greater need for stability from their parents as they grow.[25] In fact, adolescents need more "emotional support, love, and firm guidance" from their parents while they seek to establish their independence.[26] This can be especially difficult to accommodate in the postdivorce context, because of the financial, social, and emotional stresses on parents; divorced parents generally have *less time* to parent or support their young teens, leaving the increased need for stability unmet.[27]

The need for greater stability is also relevant to adolescents' postdivorce residential arrangements. Adolescents seek stability by preferring "to have one house as a headquarters, even if they previously lived comfortably in joint physical custody."[28] A headquarters provides the stability they need to accommodate their busier schedules and desire for independence, and maintain friendships close to home.[29] They have busier schedules than they did during childhood, which requires greater flexibility in custody schedules.[30] Adolescents focus "on their own increasing independence, not on their family life," leading to a preference for one

23. *Cf.* EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 190.

24. *Cf.* Robert E. Emery et al., *Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years After Initial Dispute Resolution*, 69 J. CONSULTING AND CLINICAL PSYCHOL. 323, 331 (2001) [hereinafter Emery, *Child Custody Mediation*]; Emery Sept. 30 Interview, *supra* note 7.

25. KALTER, *supra* note 3, at 309 (cries for independence often mask the heightened need for emotional support and love of parents during this time of development). Many scholars cite the need for stability in the lives of adolescents. *See, e.g.*, BONNIE L. BARBER & DAVID H. DEMO, THE KIDS ARE ALRIGHT (AT LEAST, MOST OF THEM): LINKS BETWEEN DIVORCE AND DISSOLUTION AND CHILD WELL-BEING, *in* HANDBOOK OF DIVORCE AND RELATIONSHIP DISSOLUTION 292 (Mark A. Fine & John H. Harvey, eds. 2006); Claire Cartwright, *Life Stories of Young Adults Who Experienced Parental Divorce as Children and Adolescents* 5 (Austl. Inst. Fam. Stud., Working Paper, 2005).

26. KALTER, *supra* note 3, at 310; *see also* EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 304 (adolescents often express anger as they experience their own "identity crisis").

27. KALTER, *supra* note 3, at 310; *see also* BUCHANAN, ET AL., ADOLESCENTS AFTER DIVORCE, *supra* note 15, at 149 (some children express frustration during divorce because they are unable to spend time with both parents or because they miss one parent while visiting the other, but some children enjoy spending time alone with each parent); EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 63 (parents' failure to appreciate child's coping during divorce). This is especially problematic where one parent remains unmarried and functions as a single parent in the household.

28. EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 189; *see also* BUCHANAN ET AL., ADOLESCENTS AFTER DIVORCE, *supra* note 15, at 148 (finding distance and need to move between two households creates frustration for adolescents).

29. *See generally* EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 189.

30. *See* Emery Sept. 30 Interview, *supra* note 7 (managing friends and social activities); Buchanan, et al., *Caught Between Parents*, *supra* note 7, at 1009–10.

home without the need to move back and forth.[31] Robert Emery notes that "[a]dolescents require the integration of three schedules: Mom's, Dad's, and their own. Because teenagers have their own busy lives, parents should not be surprised if a complex schedule creates problems for them."[32] Young teens find support in their friends and community relationships, which this is especially true for teens in the postdivorce context,[33] but the need to move often from one parent's house to another makes maintaining friendships difficult.[34] Adolescents easily become frustrated and express anger when forced to move between two households.[35] Moreover, stability may be further diminished if a parent repartners or remarries and introduces a new person into the household.[36]

Young teens experience a natural separation from their parents as they transition from a child-parent relationship into an adult-adult relationship.[37] They must learn to function and rationalize their world *independent* of their parents; this change is often experienced with a sense of "bereavement" by the parents.[38] Parents may not recognize that the changes are a result of natural adolescent development, because parents may focus on the divorce and take the separation personally.

Finally, these developmental changes must be weighed against the potential for an inappropriate delegation of power to young teens in their custody arrangements. Adolescents will be more likely to express their preferences as they grow older,[39] but parents must strike a balance between listening and allowing adolescents to take parental responsibility.[40] Teens should not be made to feel that they have to choose between

31. EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 189.

32. *See id*. at 165.

33. Cartwright, *supra* note 25.

34. *See* BUCHANAN, ET AL., ADOLESCENTS AFTER DIVORCE, *supra* note 15, at 148 (finding that greater distance between households correlates with lower reported satisfaction, possibly because of the difficulty of transitions, lessened flexibility). "[D]ivorce may split one family into two separate family systems, [but] the child remains a part of each of those new families." *Id*. at 143.

35. *Id.* at 152 (some children enjoy having two groups of friends—one at each parent's house—while others do not); EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 189–90 (adolescents with preference for one residence, even if previously lived comfortably in joint custody, as their social lives, need for flexibility become important).

36. HETHERINGTON & KELLY, *supra* note 8, at 229.

37. BLOOM, *supra* note 19, at 23 (noting that "The powerful child-parent relationship so necessary to child development must now die in order to allow the young adult to pursue independently his or her future").

38. *Id.*

39. EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 189.

40. *Id*. at 165; *see also* E-mail Interview with Robert E. Emery, Ph.D., Professor of Psychology and Director of the Center for Children, Families, and the Law, University of Virginia (Oct. 5, 2009) (on file with author) [hereinafter Emery Oct. 5 Interview] ("Of course, I want and hope PARENTS will listen to their teenagers," but adolescents should not be given

two parents[41] or have the opportunity to manipulate or overpower their parents.[42]

B. Postdivorce Lives of Parents: Parents Change, Too

Parents also experience changes in the years following the divorce and initial custody order. Custody arrangements entered around the time of the divorce cannot address unexpected changes in the parents' lives. Some parents remarry or repartner, bringing a new person into the home. This may create new families with stepchildren, accompanied by new dynamics and stresses.[43] Some parents relocate based on job opportunities, continuing education, or a desire to be closer to extended family.[44]

Parents adjusting to their own postdivorce lives, must also adjust to the fact that their child is growing up and will naturally separate from them. In the postdivorce context, an adolescent's natural separation from his or her parent(s) is especially difficult for a parent to understand.[45] The parent, acutely focused on the divorce, may fail to see that the major change of adolescence is also affecting the child.[46] As a result, a nonresidential parent who has a diminished amount of time with the child experiences a powerful feeling of rejection by the child.[47] If a custody arrangement was expected to adapt over the years, a parent's expectations might be better-

inappropriate power over their parents.).

41. EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 165.

42. *See* Telephone Interview with Jonathan Hoffman, Associate, Weber, Gallagher, Simpson, Stapleton, Fires & Newby LLP (Nov. 6, 2009) [hereinafter Hoffman Interview] (courts usually consider the preferences of children ten and older and base the weight to be given to the preference on the child's maturity).

43. HETHERINGTON & KELLY, *supra* note 8, at 164–70, 188–90 (discussing the necessary considerations and adjustments for divorced partners in second marriages) and that (over-eagerness to incorporate a stepfamily may produce negative consequences). *Id.* at 188–89.

44. D. KELLY WEISBERG & SUSAN FRENCH APPLETON, MODERN FAMILY LAW 822 (2006) (usual reasons for relocation include remarriage, new jobs or a loss of a job, educational opportunities, or moral or economic support from relatives). "[W]ithin four years of separation or divorce, seventy-five per cent of custodial mothers will relocate at least once, and half of these will relocate again." *Id.* (citing Sarah L. Gottfried, Note, *Virtual Visitation: The New Wave of Communication Between Children and Non-Custodial Parents in Relocation Cases*, 9 CARDOZO WOMEN'S L.J. 567–68 (2003)). S*ee, e.g.*, Gianvito v. Gianvito, 975 A.2d 1164, 1167–69 (Pa. Super. Ct. 2009) (after separation, mother moved to pursue her career, relocated a second time, and was planning to remarry).

45. *See* HETHERINGTON & KELLY, *supra* note 8, at 204–05 (divorced parents have particular difficulty coping with adolescent independence).

46. *Cf. id.* (conflict between children and parents increases during adolescence, and "the increase is especially marked in divorced and remarried families."). Moreover, divorced parents may not recognize that the initial custody arrangement *should be changed* based on changes during adolescence.

47. *See, e.g.*, EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 201 (nonresidential parent may feel "lost" about how to interact with the child or may grieve time spent together as a family).

informed. In other words, requiring arrangements to change as the years go by may force the parents to look at their adolescent's developmental changes and understand that separation is part of development and not the divorce.

C. The Current Pennsylvania Approach to Custody: Lack of Attention to Change

The Pennsylvania custody system provides a backdrop for understanding adolescents' postdivorce experience, including court-ordered custody arrangements, modification petitions, the consideration of a child's preference, the relocation doctrine, privately-negotiated custody agreements, and overarching policy concerns. The overarching standard in custody arrangements is the "best interests of the child."[48] A court may make an order granting sole custody to one parent with visitation to the other, or partial custody to the parents.[49] Although custody orders are not automatically reviewed at any point following the initial order,[50] modification is permitted when it is in the "best interests of the child."[51] The modification process begins when one or both parent(s) files a petition to modify custody with the court, but adolescents do not have a recognized right to modification.[52]

The child's preference is one of the factors that a court will consider in determining his or her best interests[53] where the child's "maturity and intelligence" make it appropriate.[54] In practice, judges consider the child's

48. 23 PA. CONST. STAT. ANN. § 5303 (2009) ("In making an order for custody, partial custody, the court shall consider the preference of the child as well as any other factor which legitimately impacts the child's physical, intellectual and emotional well-being."); § 5310 (modifications).

49. *Id.* § 5301 ("[W]hen it is in the best interest of the child, [it is Pennsylvania's state policy] to assure a reasonable and continuing contact of the child with both parents after a separation or dissolution of the marriage."); *id.* § 5302 (defining types of custody).

50. The Pennsylvania custody statute provides modification "at any time," *id.* § 5310, as long as the modification is in the "best interests" of the child. Karis v. Karis, 544 A.2d 1328, 1332 (Pa. 1998) (clarifying that the threshold showing of a substantial change did not need to be demonstrated before modification based on the child's best interest).

51. 23 PA. CONST. STAT. ANN. § 5310 (custody may be modified at any time to an order of shared custody); *see also* WEISBERG & APPLETON, *supra* note 44, at 822 (discussing the liberal "best interests" standard for modifications, as compared with the "substantial change in circumstances" standard of other jurisdictions).

52. The custody statute does not specify *who* may petition the court for modification. 23 PA. CONST. STAT. ANN. § 5310. It does, however discuss awards of custody by parental agreement or the discretion of the court. *Id.* § 5304 (award of shared custody). Grandparents have standing to petition for visitation rights and custody. *See id.* § 5313; *see, e.g.,* Martin v. Martin, 562 A.2d 1389, 1391 (Pa. Super. Ct. 1989) (modification petition); Gruber v. Gruber, 583 A.2d 434, 438–39 (Pa. Super. Ct. 1990) (three-factor test to permit parent to relocate).

53. 23 PA. CONST. STAT. ANN. § 5303 (2009).

54. McMillen v. McMillen, 602 A.2d 845, 847–48 (Pa. 1992) (eleven-year old child's pref-

preference only as a "tie-breaker" between two fit parents; it is "important," but not "controlling."[55]

Just as an initial custody arrangement may need to be tweaked based on the needs of the children, it, too, may need to be tweaked based on the changing lives of the parents. Pennsylvania case law provides the standard for allowing custodial parents to relocate.[56] The relocation doctrine focuses on ensuring that the best interests of the child are met and protecting the child's relationship with the noncustodial parent.[57] Under *Gruber v. Gruber*,[58] the court must evaluate "the potential economic or other advantages of the proposed move" for the parents and child, "the integrity of the motives of both the custodial and noncustodial parent in either seeking the move or seeking to prevent it," and "the availability of realistic, substitute visitation arrangements to adequately foster an ongoing relationship between the child and the noncustodial parent."[59] Cases show Pennsylvania courts have recognized the need to address the changing needs of *parents,* but have not made a similar effort to address the changing needs of *children*.

Custody arrangements are privately negotiated in the majority of cases, which means that the court's role is comparatively minimal.[60] However, privately-negotiated custody agreements are informed by the framework of the law. The parties are guided by the bounds of statutory and case law

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erence was appropriate to consider, based on his maturity and intelligence); *see also* Hoffman Interview, *supra* note 42. In *McMillen*, the Pennsylvania Supreme Court emphasized that "child's preference must be based on good reasons, and the child's maturity and intelligence must be considered"; the weight to be given to the preference is best determined by the judge in the specific case. *Id*. at 847 (child's reasons to prefer his father were valid where, unlike his father, his mother left him home alone often, did not take him to his sporting activities, and he did not get along with his mother's partner) (citing Commonwealth *ex rel.* Pierce v. Pierce, 426 A.2d 555, 557 (Pa. 1981)).

55. *McMillen*, 602 A.2d at 847 (child's preference "tip[ped] the scale" in favor of custody with his father where the parents were both fit parents with equally suitable households).

56. Gruber v. Gruber, 583 A.2d 434, 438–39 (Pa. Super. Ct. 1990). *See* Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L.Q. 105, 137 (2007) (discussing the relocation doctrine of various states).

57. *See Gruber*, 583 A.2d at 438 ("the interest of the non-custodial parent in sharing in the love and rearing of his or her children and . . . the state's interest in protecting the best interests of the children.").

58. *Id*. at 439.

59. *Id*. (custodial parent with burden to show relocation favored and noncustodial parent need only show integrity of motives).

60. Robert E. Emery, Randy K. Otto, & William T. O'Donohue, *Demographics of Family Structure, Custody Disputes & Custody Arrangements*, 6 PSYCHOL. SCI. 3, 3 (1999) ("[O]ver three quarters of custody arrangements were negotiated either by the parents themselves or through their lawyers.") (citing Maccoby and Mnookin's 1992 study of 1,124 divorcing families with children); Melvin Aron Eisenberg, *Private Ordering through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 637 (1975–76).

in creating their agreements, because "[legal rules regarding] custody give each parent certain claims based on what each would get if the case went to trial . . . [considering] the outcome that the law would impose if no agreement is reached."[61] Parents generally take an adversarial approach to private negotiation, and thereby create inflexible agreements.[62] "Divorcing parents may be persuaded by their own inclinations and by the advice of their counsel to decline a flexible approach from the out-set [, because] . . . either party might experience more difficulty if he or she agrees to a flexible arrangement and the other spouse breaks the agreement."[63] Increasingly, parents either voluntarily or by court order, mediate custody. Studies show that families who mediated custody arrangements were more likely to be flexible in their agreements to accommodate the changing needs of the parents and the children.[64] This suggests that adolescents may benefit from mediation of custody agreements.

Finally, there are significant policy concerns surrounding custody modifications. There is a negative public perception that modifying arrangements (i.e., filing a modification petition to create a new arrangement) is a sign of failure.[65] Instead of expecting that arrangements will grow stale as children grow and mature, the necessity of relitigating places a stigma on modification.[66] Parents may seek to spare children from the confusing and harmful effects of continuous negotiation and litigation, since the after-effects of divorce are already harmful to child development.[67] However, this desire to avoid harm caused by ensuing litigation results in

61. *Id*. Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 7 (1981) (internal citation omitted).

62. EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 169.

63. *Id*. The problem is that there will inevitably be a dispute if the parties are coming from such defensive positions. *Id*. at 165. Instead, parents should be encouraged to negotiate or mediate an agreement and "to 'own' their agreement, that is, to view it as a moral contract at least as much as a legal contract." *See* Emery Sept. 30 Interview, *supra* note 7. The New Model addresses the issue of private negotiations by providing training for attorneys to encourage a more flexible approach to custody agreements.

64. Emery Sept. 30 Interview, *supra* note 7; Emery, *Child Custody Mediation*, *supra* note 24, at 331.

65. *See* Hoffman Interview, *supra* note 42.

66. *Cf*. Linda Jellum, *Parental Custody Agreements*, 65 OHIO ST. L. REV. 615, 641 (2004) (advocating a parental deference standard to decrease the number of custody disputes that have to be litigated); MARY ANN MASON, THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE BATTLE AND WHAT WE CAN DO ABOUT IT, 37 (1999) (describing the extensive provisions taken in a five-year custody battle).

67. *See* King v. King, 889 A.2d 630 (Pa. Super. Ct. 2005) (family involved with the court at least eight times between 2000 and 2005; child subjected to five years of an undecided custody status). *See also* Hetherington & Stanley-Hagan, *supra* note 14, at 131 (adolescents who were functioning well before divorce often experience problems in their postdivorce lives); BARBER & DEMO, *supra* note 25, at 292 (describing the academic, psychological, externalizing/conduct effects on children of divorce).

avoidance of a change to the custody arrangement. In addition, judges are concerned with the potential for abuse of the modification process, since there is no limit to the number of petitions that can be filed.[68] There is an important distinction between *continuous relitigation* of a custody arrangement and providing a forum for the reassessment of an arrangement that may no longer be in the child's best interests based on developmental needs. This article recommends the latter.

III. Searching for a Solution

In light of the postdivorce context, adolescents' developmental changes show the need for adaptable custody arrangements to meet their best interests. Mindful of the foregoing research and the current lack of review of custody arrangements in Pennsylvania and other places, an appropriate solution must focus on (1) providing adaptability of custody arrangements, (2) reasonably encouraging adolescents' voices for change, (3) allowing review without increasing conflict, and (4) ensuring enforceability. In pursuing a solution, I solicited the recommendations of family law scholars and practitioners and looked outside the United States for possible foreign models. I focus on three recommendations: the first is by Dr. Robert Emery, Ph.D.,[69] a prominent scholar and mediator who assists divorcing couples through mediation and the creation of parenting plans that will best serve the needs of their children; a second one by family law practitioner Jonathan Hoffman, who proposes that custody orders should require automatic review to address the need for change; and the third is the Australian model, which emphasizes the importance of noncourt resolution of family disputes and the creation of parenting plans, devoting extensive government resources to alternative dispute resolution.

A. Providing Adaptability of Custody Arrangements

It should no longer be presumed that a custody agreement entered at the time of divorce will be beneficial for all of a child's years of minority; agreements must have the potential to adapt to change. "Parenting plans"[70] provide adaptability of custody arrangements. Parenting plans,

68. *See* Martin v. Martin, 562 A.2d 1389, 1391 (Pa. Super. Ct. 1989) (discussing the potential of one ex-spouse/parent using the process of modification petitions to harass the other ex-spouse/parent).

69. Dr. Robert Emery is a "psychologist, mediator, researcher, and college professor known for [his] twenty-five years of scientific studies and work on families and divorce." EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 2.

70. *Id.* at 163 (A parenting plan is a "legal agreement that spells out a clear, specific schedule for children as well as guidelines for each parent's coparenting responsibilities and role in decision making."); Family Law Act (1975), pt. VII div. 4 § 63B (Austl.) [hereinafter Family

nonbinding agreements created by parents through formal mediation or informal negotiation to allocate the scheduling and parental responsibilities that will be involved in custody,[71] can change as the child and family's needs change. Parents should *expect and plan for that change.*[72] A good parenting plan ensures adaptability of arrangements by instilling flexibility at the time of divorce. As the child grows into his or her adolescent years, the schedules of each parent and the young teen will need to be integrated. Parents should expect that complex schedules will create difficulties for these young teens and adjust accordingly.

Jonathan Hoffman proposes a two-year automatic review of custody agreements with a court-appointed mediator. Custody orders would include standard language requiring review with a court-appointed mediator, giving the family the opportunity to address whether the custody arrangement is no longer feasible for the child's needs.[73] At the review, parents who do not have any disagreements or are able to work out their own arrangements can each merely sign an affidavit, attesting that there is no disagreement, and mail the affidavit to the court.[74] Arrangements can be adapted to the needs of the particular adolescent, whether it is for more flexibility in the custody schedule or for having one residence as a headquarters.[75]

Law Act] ("(a) to agree about matters concerning the child; and (b) to take responsibility for their parenting arrangements and for resolving parental conflict; and (c) to use the legal system as a last resort. . . .").

71. EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 163. Family Law Act, pt. VII div. 4 § 63C; *Id.* pt. VII div. 4 § 63D (plan may be modified or revoked by agreement); E-mail Interview with Ian Goodhardt, Manager, Family Mediation Centre (Oct. 1, 2009) (on file with author) [hereinafter Goodhardt Interview] (Parenting plan "is not legally enforceable, but it is legally significant in that a court must ask if a parenting plan exists and, if so, take what it says into account when making orders, and a Parenting Plan will override an earlier court order insofar as the two contradict each other.").

72 EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 164 (recommending change "after a reasonable trial" of a few months to better meet the needs of the child and the parents); Family Law Act, *supra* note 70, (parenting plans may include "the process to be used for resolving disputes about the terms or operation of the plan; and the process to be used for changing the plan to take account of the changing needs or circumstances of the child or the parties to the plan."); *see also* Goodhardt Interview, *supra* note 71 ("The 2006 changes to Australian law recognise the need to change arrangements as children age. For this reason the concept of the Parenting Plan was reintroduced.").

73. Hoffman Interview, *supra* note 42.

74. *Id.* (If each parent does not respond with an affidavit, the family members must go to the mediator to work out their disagreements.).

75. Some adolescents become frustrated with inflexible arrangements that do not allow them to change visitation or custody time with one parent in order to participate in school or social activities, whereas others are frustrated with flexible arrangements that allow them to be pressured by one parent or the other to change the schedule and forgo time with the other parent. *See* BUCHANAN, ET AL., ADOLESCENTS AFTER DIVORCE, *supra* note 15, at 152; EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 304 (anger expressed as teens go through "identity crises"

B. Reasonably Encouraging Adolescents' Voices for Change

Adolescents living under custody arrangements entered during their early childhood should have *their best interests* evaluated in light of new developmental needs, especially because it may become difficult to force a teen to follow an arrangement that he or she opposes.[76] Young teens generally desire a change in their custody arrangements as they develop. However, while adolescents may have strong feelings about their custody arrangement, they should not be given power over their parents and usurp parental responsibility for major decisions.

One possible solution is to give adolescents of a particular age the right to petition the court for modification. Young teens would have the right to file a petition under the custody statute and compel their parents to a hearing to modify the arrangement. Although this solution would directly address the lack of change in custody arrangements, it has the potential to create dangerous risks. First, it gives adolescents of divorced families a right not given to children of intact families, because adolescents do not have the right to supersede the decisions of their parents by soliciting court intervention[77] unless they seek emancipation. Second, "[t]here is a general feeling with judges and practitioners that you should not empower children too much, because they are just that—*children*—and they can be manipulative."[78] There is a potential for abuse by young teens that may be emotional as they struggle to cope with their developmental changes further complicated by the postdivorce environment. Finally, parents might attempt to manipulate their adolescents to seek a custody change to cloak the parent's own need for change. Another potential negative would be to ask an adolescent to choose between his or her parents in court and to explain why that change is needed.[79] Addressing the problem head-on through the creation of an adolescent's right is not appropriate because of these risks.

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and grow frustrated with their schedules). *Id.* at 6.

76. EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 190.

77. Emery Oct. 5 Interview, *supra* note 40. It is problematic to give adolescents of divorced families rights not given to adolescents of intact families, because the Pennsylvania Supreme Court held that similarly situated children may not be treated differently under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Curtis v. Kline, 666 A.2d 265, 270 (Pa. 1995) (refusing to recognize the right of a young adult of a divorced family to postmajority educational support where young adults of intact families do not possess the right).

78. Hoffman Interview, *supra* note 42 ("I have had cases where the child doesn't like something the mother did, so he goes to his father, and then the parents are litigating over the child going back and forth. Now, what would happen if you give that child the power to call in the court?").

79. *See* KALTER, *supra* note 3, at 317 (In current custody disputes, young teens sometimes report a court-imposed feeling of being forced to choose between their parents, since courts gen-

In contrast to the right to petition for modification, Emery and the Australian models caution against allowing a child to work with an outside professional (e.g., mediator or therapist) to change the custody arrangement.[80] Parents should be the ones listening to their children; professionals should not independently listen and incorporate the preferences of the child as to custody, because it would usurp the general parent-child roles.[81] Moreover, the Australian model presumes that "children [need] to be children," and it is a sign of "dysfunction" if a child wants to change the arrangement.[82]

For perspective, Emery uses the example of parents in an intact family who are deciding whether or not to move when the father wants to move, but the mother does not. "Good parents" would consult the child about his or her preferences but take the ultimate responsibility for the decision to move. They likely would not take the child to a therapist or a mediator to find out what the child would want to do and mediate based on that preference.[83] The comparison to intact families is a compelling point, as it almost seems unreasonable to expect parents to engage a mediator or therapist to listen to a child's preferences when the parents may have significant reasons for the decision, such as a new employment opportunity. Parents will make a unified decision based on the family's needs and well-being. There *is* something significantly different about the context of divorce that makes the services of an independent professional beneficial in a way that might be unreasonable for intact families. When there is conflict between the parents, unified decisions may not be possible without an

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erally will hear and consider the preferences of adolescents in the placement of custody); BUCHANAN ET AL., ADOLESCENTS AFTER DIVORCE, *supra* note 15, at 214 (possibility of feeling caught between two parents in custody disputes). *See also* Hoffman Interview, *supra* note 42 (practitioners and judges have a general feeling that children should not be forced to choose between or manage pressure from their parents).

80. *See* Robert Emery, *Children's Voices*, 45 ARIZ. L. REV. 621, 626 (2003) (danger of children becoming "substitute parents"); Goodhardt Interview, *supra* note 71 (Adolescents should not be encouraged to attempt to change custody arrangements, because "it is important for parents to be parents and children to be children—it is a sign of dysfunction when children—even adolescents—begin taking on the role of parents. . . .").

81. *See* Emery, *Children's Voices*, *supra* note 80, at 626; Goodhardt Interview, *supra* note 71.

82. Goodhardt Interview, *supra* note 71.

83. Emery, *Children's Voices*, *supra* note 80 at 626. *Id.* Emery poses a series of questions to illuminate his concern with a mediator stepping in to listen to the child's preference if the parents were considering a move but could not agree: If the parents asked the child about his or her preferences:"Would [the parents] decide to move or stay depending upon [the child's wishes]? Would [they seek out a] therapist to find out what the child really wanted to do? If the parents went to a mediator. . . , would they expect to have their children involved in the process?" *Id*. The answer to these rhetorical questions is likely that "good parents" would not look outside their own parental authority to make these decisions. They would discuss the decision with each other and decide on their own.

independent professional. Each parent may want something quite different, therefore, the child's wishes should be solicited as part of the decision-making process.

Understanding that adolescents' needs should be reflected in custody arrangements, the proper forum to hear those voices is a balance between the two poles of a right to petition the court and a comparison to married families. A mediation session with the parents and adolescent would allow the adolescent to express his or her preferences in a welcoming setting. Parents should listen to their children's input about scheduling, and consider the preferences in terms of reasonableness and practicability and make changes that will be best for the family.[84] Even divorced parents must work together, communicate, set "clear rules, and present[ ] a united front . . . remind[ing] themselves—and it takes a conscious effort to do so—that balancing autonomy and relatedness is the goal of parenting the adolescent."[85] A professional may be needed to help families make this united front: coming together to discuss the best options, since the divorce context often prevents opportunities for cooperation. Hoffman's automatic review with a mediator would enable the young teen to express any existing frustration and suggest a new arrangement—or even just a small change to the schedule—to relieve the frustration. The opportunity to be heard may, in and of itself, relieve some of the young teen's frustration.

C. Allowing Review without Increasing Conflict

Since emotions surrounding divorce are intense, creating the opportunity to change arrangements invites the possibility of creating conflict between parents. Review of custody arrangements must strike the delicate balance between encouraging productive review and inviting conflict. Parenting plans, premised on enabling parents to agree on the best interests of their children require parental cooperation and are unlikely to be viable for high-conflict families.[86] Research, however, indicates that

84. EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 165, 189 ("There is a good reason why society only gradually gives adolescents increasing citizen rights—to drive, to vote, to purchase alcohol—and parents need to issue revocable 'learner's permits' as teenagers test their own and their parents' limits in virtually every area of their life."); *see also* Emery, *Children's Voices*, *supra* note 80, at 627 (parents should listen to a child's preferences in child custody arrangements but must make the "ultimate custody decision").

85. EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 190 (noting that while teenagers may want more independence, they really also "want and need relationships with their parents, though [the] adolescent may be unwilling to admit this.").

86. "High-conflict families" generally refers to those families in which there are "frequent arguments, undermining and sabotage of each other's roles as parents" and "low communication and high discord" among parents. *See* Janet R. Johnston, *The Future of Children*, 4 CHILDREN AND DIVORCE 165, 166–67 (Spr. 1994).

mediation encourages cooperation and coparenting and may be beneficial even for high-conflict families.[87]

Hoffman's automatic review has the potential to *invite* litigation, as it presumes that the automatic review will be effective in creating new agreements. Requiring a review brings together two potentially conflicted ex-spouses to air their grievances, which may create conflict that otherwise might have gone unaddressed. In turn, adolescents will be exposed to more conflict. In addition, it may increase the number of cases filed, exacerbating court congestion. If a mediator identifies that the family is likely to continue a conflict, the mediator should recommend counseling to teach parents how to effectively coparent. With regard to court congestion, not all families will need to participate in the formal review process with a mediator, as there is the option to submit an affidavit to attest to a lack of disagreements and bypass the mediation session.[88]

D. Ensuring Enforceability

Most states, including Pennsylvania, have a passive approach to custody modification, and a parent must act. Adolescents cannot legally change their arrangements without persuading a parent to file a modification petition. The parenting plans encouraged by Emery and the Australian model do not effectively alleviate this problem, because they also are initiated by parental action. Divorced parents might not recognize that change is needed.[89] While parents are encouraged to listen to their children, it may be difficult or impossible for a child to convince his or her parent of the need for change.[90] In contrast, Hoffman's automatic review is court-mandated and thereby provides an automatic opportunity for parents to listen to their children. Alternatively, if the parties made the custody agreement through private negotiations, they would be guided by the framework of the law in creating the agreement and should provide for review based on this expectation.

The Australian model also provides a potentially effective enforceability tool. The Australian Family Law Act requires that families attend Family Dispute Resolution (FDR) before filing a petition in family court.[91] Parents must attend FDR and obtain a certificate from a FDR

87. *See generally* Emery, *Child Custody Mediation*, *supra* note 24, at 324–38.

88. Hoffman Interview, *supra* note 42.

89. *See* HETHERINGTON & KELLY, *supra* note 8, at 204–05 (noting divorced parents' difficulties parenting adolescents and coping with the natural separation).

90. In response to this concern, Emery looks to the dynamic of married families: children are not able to appeal to outside professionals "when their parents make good or bad decisions." Emery Oct. 5 Interview, *supra* note 40.

91. "Family dispute resolution is a process (other than a judicial process): (a) in which a

practitioner to attest to the "genuine effort"[92] to resolve the matter and its outcome.[93] Requiring mediation as a prerequisite to litigation provides an opportunity to discuss the need for change. However, FDR does not require mediation of agreements unless parents want to instigate litigation, and FDR does not require discussion of necessary changes in light of children's developmental needs.[94]

E. Summary

The recommendations of Robert Emery and Jonathan Hoffman and the Australian model provide useful lessons to inform the creation of a solution. They each address the need for adaptability in custody agreements by incorporating mediation. Mediation is especially effective in custody dispute resolution, "because it can increase the self-determination of participants and their ability to communicate, promote the best interests of children, and reduce the economic and emotional costs associated with the resolution of family disputes."[95] However, an appropriate solution should not depend on the parents initiating the process of change in nonmandatory mediation or parenting plans, because parents may not recognize the need for change[96] or may be deterred by the stigma surrounding modification. Moreover, review of agreements should be tied to court jurisdiction in order to best ensure that the review takes place.

Automatic review poses the most effective solution to reasonably encourage adolescent's voices because it is *automatic* and does not depend on parent initiative. There will be significant limitations for high-

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family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and (b) in which the practitioner is independent of all of the parties involved in the process." Family Law Act, *supra* note 70, pt. 2 div. 1 § 10G. *Id*. pt. V div. 1 § 60I (court may not hear an application relating to a child unless the parents undergo FDR and the FDR practitioner submits a certificate as to attendance and participation).

92. *Id*. pt. VII div. 1 § 60I. The Family Law Act does not define a "genuine effort," but case law and incorporation of other laws by reference suggest that a proper definition would include: "attending family dispute resolution, . . . willingness to consider options put forward, . . . willingness to consider putting forward options for the resolution of the dispute, and willingness to focus on the needs and interests of the children, to the best of the parties' ability." Hillary Astor, *Making a Genuine Effort in Mediation: What Does It Mean?* 6-8 (Univ. Sydney, Sydney L. Sch., Working Paper No. 08/132, 2008).

93. Goodhardt Interview, *supra* note 71 (Litigation in family law issues is only appropriate where parents are "completely intransigent, or have engaged in violent or abusive behavior.").

94. Family Law Act, *supra* note 70, pt. VII div. 1 § 60I.

95. ANDREW I. SHEPARD, CHILDREN, COURTS AND CUSTODY 59 (2004) (quoting Association of Family and Conciliatory Courts, "The Model Standards of Practice for Family and Divorce Mediation, August 2000.").

96. *See* HETHERINGTON & KELLY, *supra* note 8, at 204–05; *supra* notes 45–46 and accompanying text.

conflict families, but automatic review may be the most perfect solution in an imperfect world, because it requires the parents to come together in mediation and gives the mediator the option to refer them to coparenting counseling before proceeding to litigation. While divorce inherently involves intense emotions and conflict, adolescents should not be overlooked based on the potential for increased litigation. Instead, judges and practitioners should encourage cooperative behavior in the negotiation of agreements and execution of court orders.

Finally, I must recognize the differences between the U.S. and Australian legal systems. The Australian model promotes alternative dispute resolution for family law issues and discourages litigation,[97] but its usefulness may be limited in the United States. The Australian model is premised on the idea that family issues are not appropriate for the litigation setting, because of litigation's costs, inflexibility, potential to increase conflict between parents, and low level of satisfaction overall.[98] Moreover, the Australian Government devotes a significant amount of resources to family law,[99] including sixty-five Family Relationship Centres.[100] Family Relationship Centres offer family counseling[101] and FDR, focusing on assisting families "to reach agreements [regarding custody arrangements] without having to go to court."[102] These government-funded noncourt services can be used by individuals or families on a voluntary basis, but courts have the power to order families to participate as well.[103] The U.S. family court system is built on the adversarial model and

97. Astor, *supra* note 92, at 1–2.

98. Goodhardt Interview, *supra* note 71; *cf.* Family Law Act, *supra* note 70, pt. VII div. 4 § 63B; *supra* note 70.

99. *See, e.g.*, Australian Institute of Family Studies, http://www.aifs.gov.au/ (last visited Nov. 19, 2009) ("The Institute is a Commonwealth government research and information agency established in 1980 to promote the identification and understanding of factors affecting marital and family stability in Australia."); Family Law Council, http://www.ag.gov.au/flc (last visited Nov. 19, 2009) (Council reports to the Attorney General with recommendation regarding the Act and family law, prepares an index of available government-funded family services); Law Council of Australia: Family Law Section, http://www.familylawsection.org.au/default.asp (last visited Nov. 19, 2009) (features Australian family law lawyers and allows the public to find family law lawyers as well as to dispute resolution practitioners based on the area of expertise).

100. Family Relationships Online, Family Relationship Services, http://www.ag.gov.au (follow the "More Information About Family Relationship Services" hyperlink) [hereinafter Family Relationships Website].

101. Family Law Act, *supra* note 70, pt. 2 div. 1 §10B (family counselor helps people deal with issues relating to marriage or helps people "including children, who are affected or likely to be affected, by separation or divorce to deal with . . . personal and interpersonal issues [and/or] issues relating to the care of children.").

102. Family Relationships Website, *supra* note 100 (follow "About Family Relationship Centres").

103. Family Law Act, *supra* note 70, pt. IIIB div. 3 § 13C (court with jurisdiction under the

does not provide comparable funding for noncourt services.[104]

IV. Proposal: The New Model

My proposal (New Model) combines some of the effective elements of the recommendations outlined above and addresses the major concerns of providing for adaptability of custody agreements, reasonably encouraging adolescents' voices, allowing review without increasing conflict, and ensuring enforceability.

A. Nuts and Bolts of a New Model

The New Model incorporates automatic review and mandatory alternative dispute resolution guided by the flexible and adaptable parenting plans that are intended to expect change in the future as the child grows and forms different needs. The New Model requires court custody orders to incorporate standard language requiring families to attend a Periodic Review[105] of the custody arrangement every five years with a court-appointed mediator. Parents will work with the court-appointed mediator during the Periodic Review to determine whether the custody arrangement remains in the best interests of the child (i.e., adolescent).[106] Periodic Review is a prerequisite to filing a modification petition, as parents must obtain a certificate of completion signed by a court-appointed mediator before proceeding to litigation.

Act may order family counseling, family dispute resolution, or order participate in "an appropriate course, program or other service."). There is a note in the provision that "[b]efore making an order under this section, the court must consider seeking the advice of a family consultant about the services appropriate to the parties' needs." *Id.*

104. *See* Bill Ezzell, Comment, *Inside the Minds of America's Family Law Courts: The Psychology of Mediation versus Litigation in Domestic Disputes*, 25 LAW & PSYCHOL. REV. 119, 132 (2001). Although a shift in focus to noncourt services may be appropriate and beneficial for resolution of family law issues, the change to the Australian model would require drastic changes. These extensive changes would be difficult to implement. A more realistic solution involves small steps.

105. In the current custody system, courts retain jurisdiction even after entering the order. *See* 28 U.S.C.S. § 1738A (2008) (issuing court's jurisdiction "continues as long [the court has jurisdiction under state law] . . . and such State remains the residence of the child or of any contestant."); *see also* Kassam v. Kassam, 811 A.2d 1023, 1025 (Pa. Super. Ct. 2002) ("Custody orders are temporary . . . The Commonwealth has a duty of paramount importance, to protect the child's best interests and welfare. To that end, it may always entertain an application for modification and adjustment of custodial rights."). Courts can use the continuing jurisdiction to require Periodic Review.

106. I refer to children and adolescents synonymously in this section, since review will occur every five years. For example, if an arrangement is made when a child is four, review will occur when the child is nine and still not qualified as an "adolescent." The nine-year-old child's needs should be considered at that review, and adjustments should be made as necessary. In another five years, when the child is fourteen (i.e., now an adolescent), another review would occur, allowing the parents to evaluate the needs of the adolescent.

In order to make the New Model effective, it would be codified in the relevant statute. For example, the Pennsylvania custody statute would provide "Periodic Review of Custody Orders:"

> (a) In any order for the custody or partial custody of a child, the court shall include a provision to require a review of the custody arrangement with a court-appointed mediator in 5 year periods from the date of the order, beginning 5 years after the initial order, until the child reaches the age of 18 years. Review shall include:
>
> (1) an examination of the custody arrangement to determine whether the arrangement remains in the best interests of the child, considering the factors under § 5303 of this chapter and the child's developmental needs and preferences; and
>
> (2) discussion of any disputed custody matters raised by the parents.
>
> If the arrangement is no longer in the best interests of the child, the parents and the mediator shall amend the order to meet the best interests of the child.
>
> (b) The parents may submit separate, signed affidavits attesting to the desire to forgo the review due to a lack of custody-related disagreements. The parents and child must then meet with a court-appointed mediator, who will perform an evaluation to ensure that the arrangement is still in the best interests of the child, with special attention to discerning the child's preference.
>
> (c) Local rules—The court shall adopt local rules to require the review in periods of 5 years from the date of the order and disseminate affidavits upon request of the parents. The court shall create language to incorporate the Periodic Review in custody orders and maintain a list of available mediators to perform the Periodic Reviews.
>
> (d) In order to submit a petition to modify custody under § 5310 of this chapter, parents must file an application to attend a review and follow the requirements of subsection § 5315(a) and submit a certificate to the court from a court-appointed mediator to attest to the attendance and general outcome of the session.

Under the New Model, the cost of Periodic Review mediation must be at least partly borne by the participants; otherwise, state resources would be significantly depleted, because it is proposed as a statewide initiative. Parents will be required to pay for the mediation session on a sliding scale based on their income level. The minimum and maximum fees will be fixed by the county and based on the general demographic needs of the population. The New Model requires only a five-year review, thereby reducing the higher cost associated with Hoffman's two-year review. While this will require increased spending by Pennsylvania counties, it will reduce court congestion by requiring mediation as a prerequisite to litigation. Parents may choose to forgo litigation.

To further alleviate cost concerns, attorneys qualified as mediators

under the Pennsylvania Rules of Civil Procedure can donate their time to Periodic Review through pro bono services. Some states permit attorneys who represent pro bono clients to earn Continuing Legal Education (CLE) credits.[107] Allowing credit would be an effective way to alleviate the costs of mediation and allow attorneys to fulfill license requirements. Private mediators should also be encouraged to donate their time.

B. Mediation Guidelines

The Periodic Review will consist of a three-hour session with a court-appointed mediator, qualified under the minimum standards of the local court rules. The mediation guidelines of the New Model will utilize many of the mediation rules for custody actions. Most states have a relevant statute or court rule to specify the minimum qualifications of a mediator, compensation to be provided, and the duties of the mediator in voluntary mediation of custody actions. Local courts should be guided by these minimum standards in establishing the qualifications for their mediators but should *recommend* rather than merely *permit* that the child be present during the mediation. In most states, with the consent of the parties, the mediators may meet with the parties' children or invite other persons to participate in the mediation. Children should be present for at least part of the mediation session to express their preferences. Mediators should also be permitted and encouraged to meet with the child's teachers, guidance counselors, and other people with insight into the child's developmental needs. During the session, the mediator will discuss the existing custody arrangement with the parents and adolescent and assist the parents in adjusting the arrangement as necessary.[108] If the parents are unable to come to an agreement, the mediator should recommend coparenting counseling to help them cooperate in their postdivorce relationship for the benefit of their child.[109]

C. Addressing the Major Concerns

The New Model addresses the four major concerns: providing adaptability of custody arrangements, reasonably encouraging adolescents,

107. American Bar Association, Continuing Legal Education (CLE)/Pro Bono State Rules, http://www.abanet.org/legalservices/probono/clerules.html (last visited Nov. 19, 2009) (New York, Delaware, Minnesota, Tennessee, Colorado, Washington, Wyoming allow, whereas Arizona and Vermont rejected the proposal). Pennsylvania does not yet allow CLE credit for pro bono.

108. The periodic review may be a good opportunity to review and adjust the existing child support award to ensure that it meets the child's needs and is appropriated properly based on each parents' income level. Child support is not the focus of this paper, but the periodic review would provide an available forum to address the issue.

109. *See generally* Emery, *Child Custody Mediation*, *supra* note 24, at 324–38 (discussing

allowing review without increasing conflict, and ensuring enforceability. The New Model will provide adaptability of custody arrangements by bringing parents and children together to evaluate whether the arrangement remains in the best interests of the child. The New Model does not include Hoffman's proposed affidavits, which would allow parents to attest to the lack of disagreement in order to bypass the review. If parents are able to bypass the review by signing affidavits, they may have the opportunity to evaluate the adolescent's preferences and needs. This goes directly against the problem that custody arrangements are currently not modified based on the growing child's needs. If parents can bypass the review, the arrangement may not be evaluated. Under the New Model, while parents may sign such affidavits, they will still be required to check in with the mediator by attending a mediation session.

The New Model will ensure that adolescents are reasonably encouraged to express their preferences through the Periodic Review mediation session. To prevent adolescents from becoming "substitute parents," mediators and parents are not required to give effect to adolescents' preferences during the review. Instead, we must rely on parents to listen to their children's wishes. The review will provide the opportunity, not a mandate, for change based on a child's expressed wishes.[110]

Although the New Model may not decrease conflict, it will give adolescents an opportunity to be heard. If there is a strong likelihood of conflict, an adolescent is presumably even less likely to ask his or her parents for a change to the arrangement, possibly making formal recourse the only solution. Dismissal of the review based on the potential of litigation will sacrifice those cases that *can resolve* through an automatic review and mediation with the parents, especially because mediation has been found to encourage cooperation even for high-conflict families.[111] The New Model also may make initial custody determinations less adversarial, if parents know that they will have another opportunity to discuss the arrangement during a Periodic Review within five years. Moreover, Periodic Review may potentially eliminate or decrease the stigma of modifying custody arrangements, since the review will be automatic (i.e., expected for everyone so that review is not a negative reflection on the family). Where parents are unable to agree during the Periodic Review mediation session, the mediator can recommend coparenting counseling. By giving the family members tools to resolve their disagreements, courts

the potential of mediation to increase parental cooperation even in high-conflict families).

110. Consideration of the adolescent's preferences should be based on the current guidelines, which direct courts to consider the child's preference based on age and maturity. *See supra* note 54; Hoffman Interview, *supra* note 42. Parents should consider the adolescent's preferences in terms of reasonableness and practicability and make changes that will be best for the family.

111. *See generally* Emery, *Child Custody Mediation*, *supra* note 24, at 324–38.

and mediators would enable families to address the real issues underlying their conflicts.[112]

Enforceability will be ensured because families will be required to attend Periodic Review and address the potential for change. Local courts will send letters to notify families of the upcoming reviews. Periodic Review will occur at mediation centers established in each county. Court-mandated attendance is necessary to guard against the risk that parents will not seek out the services of mediation centers.

D. How to Make the Change

In addition to statutory changes, the New Model involves recommendations for family law judges and practitioners, because any effective change will require a new way of approaching custody determinations. Training for judges and practitioners should be integrated into CLE courses or disseminated in a pamphlet or electronic document summarizing the changes and providing guidance for implementation. Judges should be educated regarding more adaptable and realistic ways of viewing custody agreements to understand that custody arrangements should plan for adaptation in the future. Similar to the rationale of Emery's parenting plans, judges should be mindful that parents should make custody arrangements premised on working together to ensure the best quality of life for their children.[113] Arrangements should be changed as children grow and the needs of the family change.[114] This is not to suggest that judges should create orders that are too flexible to be enforced; instead, they should keep in the background of their decisions the idea that a custody order set today will not necessarily be in the best interests of the child until he or she turns eighteen. Judges should impart this guidance on the parents and advise them of what to expect at the Periodic Review.

Practitioners are essential in the change to the New Model, especially because the majority of families do not go to court to create the initial custody arrangement and instead devise them through private agreements with a practitioner's help or representation.[115] Practitioners should be guided by the requirement of Periodic Review, since the law provides the framework for private negotiations. Practitioners should be trained in a new way to approach custody agreements, focusing on incorporating Periodic Review into private agreements.

112. Hoffman, *supra* note 42 ("We keep putting on more and more Band-Aids when what we really need to do is heal the wound . . . or at least give the parties the tools to heal it on their own.").

113. EMERY, TRUTH ABOUT CHILDREN, *supra* note 6, at 163; Goodhardt Interview, *supra* note 71 (discussing Australia's parenting plans).

114. *See id.* (parenting plans should adapt as the child grows).

115. *See* Emery, Otto & O'Donohue, *supra* note 60, at 3.

V. Conclusion

Custody orders are made early in the postdivorce life of the family and cannot predict the changing developmental needs of the child or changes in the parents' lives. As a child grows into adolescence and attempts to form his or her own identity, a custody arrangement implemented at the time of divorce may no longer serve the child's *developed* best interests. The Pennsylvania custody statute neither provides a forum for parents to address children's changing needs, nor encourages review of arrangements as the years pass.

Drawing on the recommendations of Robert Emery and Jonathan Hoffman and the Australian model, the New Model presents an adaptable approach to custody arrangements to address the changing needs of the adolescent and parents. To be effective, the New Model requires statutory changes at the state and local levels as well as training for family court judges and practitioners. It is a foundational change to the way we approach custody arrangements: assuming the necessity of review to account for adolescent development.