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IS "BIRD NESTING" IN THE BEST INTEREST OF CHILDREN?

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I. INTRODUCTION

AS divorce continues to infect the family dynamic at an alarming rate,¹ efforts by parents and courts to preserve a stable and nurturing family environment for children of divorce continue to ex-

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1. The rapid rise in the divorce rate began in the 1960s. E. Mavis Hetherington et al., *What Matters? What Does Not? Five Perspectives on the Association Between Marital Transitions and Children's Adjustment*, 53 AM. PSYCHOLOGIST 167, 167 (1998). In 1962, there were approximately 413,000 divorces. Marcia Lipman Lebowitz, *Divorce and the American Teenager*, 76 PEDIATRICS 695, 695 (1985). By 1972, this number had doubled, to 845,000. *Id.* In 1981, there were 1.2 million divorces, *see id.*, and this number remained consistent through the 1990s. *See* Charles L. Bryner, Jr., *Children of Divorce*, 14 J. AM. BD. FAM. PRACT. 201, 201 (2001). Today, almost half of all marriages end in divorce. Hetherington et al., *supra*, at 167.

More than 1.5 million children experience divorce each year in the United States. Sharlene A. Wolchik et al., *Six-Year Follow-Up of Preventive Interventions for Children of Divorce: A Randomized Controlled Trial*, 288 JAMA 1874 (2002). African American children are twice as likely as white children to experience one divorce. Hetherington et al., *supra*, at 167. In the 1960s, 90% of children in the United States grew up living in homes with both biological parents present. Bryner, *supra*, at 201. Today, only 40% of children live with both biological parents. *Id.* Three out of ten children born to married parents will experience marital dissolution before their sixteenth birthday. Marjorie Linder Gunnoe & Sanford L. Braver, *The Effects of Joint Legal Custody on Mothers, Fathers, and Children Controlling for Factors That Predispose A Sole Maternal Versus Joint Legal Award*, 25 LAW HUMAN BEHAV. 25, 25 (2001). One out of ten children will experience at least two divorces of residential parents before age sixteen (not accounting for cohabitation before and after marriage). Hetherington et al., *supra*, at 167. In 1985, there were more than twelve million children under age eighteen who had divorced parents. Lebowitz, *supra*, at 695. The proportion of children under age eighteen who lived in homes that were headed by a single female increased from 9.0% to 22.4% between 1959 and 1999. Stephen E. Gilman et al., *Family Disruption in Childhood and Risk of Adult Depression*, 160 AM. J. PSYCHIATRY 939, 939-46 (2003). Up to 60% of children born in the 1990s will live in single-parent families at some point in their lives. Hetherington et al., *supra*, at 167.

Although 75% of men and 66% of women still remarry, *see id.*, since the 1960s, the remarriage rate has declined, while the divorce rate has increased. *Id.* African American and Hispanic parents are less likely to separate, divorce, and then remarry, than are non-Hispanic Whites. *Id.* Couples with remarried wives are twice as likely to divorce as couples with remarried husbands. *Id.* There is a 10% higher rate of divorce in remarriages than first marriages. *Id.* There is a 50% higher rate of divorce in remarriages when one of the spouses continues to care for a child of the previous marriage. *Id.* The majority of parents who were divorcing in the 1990s had a child under age six during the divorce. Mary F. Whiteside & Betsy Jane Becker, *Parental Factors and the Young Child's Postdivorce Adjustment: A Meta-Analysis With Implications for Parenting Arrangements*, 14 J. FAM. PSYCHOLOGY 5, 5 (2000).

pand to include new methods of intervention for divorced families² and new alternatives for sharing custody.³ In considering custody alterna-

2. The most successful of new interventions are divorce education programs and divorce and custody mediation programs. Despite some controversy, see Joan B. Kelly, *Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research*, 39 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 963, 971-72 (2000) [hereinafter Kelly, *A Decade Review*] (asserting, in response to earlier claims by critics of mediation, that there is no empirical evidence to support the claim that women are disadvantaged by the mediation process in financial or custody outcomes), some states statutorily mandate these forms of intervention; see, e.g., 19 ME. REV. STAT. ANN. tit. x § 752 (West 1994) (mandating divorce mediation); MINN. STAT. § 518.157 (2001) (mandating divorce education classes). Some commentators advocate mandatory participation, especially for highly-conflicted divorcing parents, for whom the programs seem to be particularly effective. See, e.g., Kelly, *A Decade Review*, *supra*, at 970-72 (suggesting the importance of early and mandatory participation in education programs); Paige Thompson, *Adolescents From Families of Divorce: Vulnerability to Physiological and Psychological Disturbances*, 36 J. PSYCHOSOCIAL NURSING 34, 38-39 (1998) (advocating mandatory custody mediation in all states); Joan B. Kelly, *A Decade of Divorce Mediation Research: Some Answers and Questions*, 34 FAM. CONCILIATION CTS. REV. 373, 373-85 (1996) [hereinafter Kelly, *Answers and Questions*] (supporting mandatory custody mediation). For a discussion of the effectiveness of specific intervention programs for children of divorced parents, see Wolchik et al., *supra* note 1, at 1874-81. For a discussion of mandatory divorce education classes, see Solveig Erickson & Nancy Ver Steegh, *Mandatory Divorce Education Classes: What Do the Parents Say?*, 28 WM. MITCHELL L. REV. 889 (2001).

The number of court-related divorce education programs in the United States tripled between 1994 and 1998, from 541 to 1,516. See Margie J. Geasler & Karen R. Blaisure, *1998 Nationwide Survey of Court-Connected Divorce Education Programs*, 37 FAM. CONCILIATION CTS. REV. 36, 37 (1999). Studies show that parents who attend the programs—even under mandatory attendance—are highly satisfied with the results. See J. Arbuthnot & D.A. Gordon, *Does Mandatory Divorce Education For Parents Work? A Six Month Outcome Evaluation*, 34 FAM. CONCILIATION CTS. REV. 60, 60-81 (1996). One study revealed a significantly lower relitigation rate for parents who attended the education programs. See J. Arbuthnot et al., *Patterns of Relitigation Following Divorce Education*, 35 FAM. CONCILIATION CTS. REV. 269, 269-79 (1997). But see Nancy Thoennes & Jessica Pearson, *Parent Education in the Domestic Relations Court: A Multi-Site Assessment*, 37 FAM. CONCILIATION CTS. REV. 195, 213 (1999) (finding no association between program participation and litigation rate); L. Kramer & A. Kowal, *Long-Term Follow-Up of a Court-Based Intervention for Divorcing Parents*, 36 FAM. CONCILIATION CTS. REV. 452, 452-65 (1998) (finding no significant difference in relitigation rates for parents in education programs).

Private and court-related divorce and custody mediation has also increased since the 1990s. See Kelly, *A Decade Review*, *supra*, at 971. Satisfaction in the program is similarly high, even among couples who do not reach agreement. See *id.* Relitigation rates are also reportedly lower. See Kelly, *Answers and Questions*, *supra*, at 373-85. Custody mediation results in more joint custody agreements than the adversarial litigation process, as well as less conflict, more cooperation, and more child-focused communication between parents. See *id.* Studies also show that, compared with families who litigated custody, parents who mediated custody were more involved in their children's lives, maintained more contact with their children, effected more flexibility and cooperation in changing children's living arrangements, and maintained more long-term influence in co-parenting after the custody dispute had been resolved. See Robert E. Emery et al., *Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years After Initial Dispute Resolution*, 69 J. CONSULT. CLIN. PSYCHOLOGY 323, 325-31 (2001); Peter A. Dillon & Robert E. Emory, *Divorce Mediation and Resolution of Child Custody Disputes: Long-Term Effects*, 66 AM. J. ORTHOPSYCHIATRY 131, 136-40 (1996) (discussing the long-term benefits of the mediation process).

3. Custody alternatives typically might include: sole or joint legal and physical custody; a school year split, when a child will reside with one parent for the school year and the other parent for the summer; alternating years, when a child will live with each parent for a full year; splitting the year, when the child will live with each parent for half the year;

tives, the court faces numerous situations in which a child may derive the most benefit after divorce from a continuing relationship with both parents. To facilitate this goal, a typical post-divorce custody plan usually entails a child residing with one parent in a primary residence for the majority of custody time and then moving to a secondary residence to fulfill the secondary custody award or visitation schedule for the non-custodial parent.⁴ Historically, this type of custody arrangement has been thought to be draining, if not damaging, to a child because of the confusing and sometimes unequal tug-of-war between parents and the constant instability of relocating from one residence to another.⁵ In response to this negative effect on divorced children, courts have begun to closely consider a new concept of shared custody called "bird nesting."⁶ Under a bird nesting arrangement, a child remains in the marital home, and the parents move in and out of the home for their respective physical custody periods, thus affording the child the stability of "nesting" in a permanent residence.

Although social science research on the issue of the effects of divorce on children has grown considerably in the past two decades, there are no studies that address whether bird nesting is an effective resource for minimizing the negative effects of divorce on children and promoting positive adjustment. Nevertheless, bird nesting is becoming a popular alternative for parents and judges involved in post-divorce child custody determinations. However, the reported cases that employ a bird nesting arrangement reveal that, in determining the propriety of a bird nesting arrangement, few trial courts seem to accurately consider the available social science research on the interactive effects of divorce on children.⁷

alternating months, weeks, or days; splitting the week—usually this will consist of the normal split of primary residency with one parent and visitation with the other parent for every other weekend and, perhaps, one over-night visit per week; and free access, when the child decides how often and for how long he or she will reside with each parent (this tends to reek havoc on support calculations).

4. Typically, the child will reside with the primary custodian—usually the mother—during the week and every other weekend. The child will usually reside with the father every other weekend and, perhaps, for one over-night visit during the week. The child will then divide his or her holiday and summer vacation time between the parents, usually with the primary custodian enjoying the bulk of the summer with the child and the non-primary custodian enjoying only several weeks of vacation with the child.

5. See, e.g., Susan Steinman, *The Experience of Children in a Joint-Custody Arrangement: A Report of a Study*, 51 AM. J. ORTHOPSYCHIATRY 403, 408-14 (1981) (discussing awareness of differences in environments, loyalty conflicts, confusion, psychological difficulties, and reconciliation fantasies as typical reactions in children).

6. For a general discussion of bird nesting, which includes reference to this article, see Rachel Emma Silverman & Michelle Higgins, *When the Kids Get the House in a Divorce*, WALL ST. J., Sept. 17, 2003, at D1, col. 2.

7. See *Malafronte v. Westenburg*, No. FA000340629, 2002 WL 31818953, *1 (Conn. Super. Ct. Nov. 21, 2002); *Lester v. Lennane*, 101 Cal. Rptr. 2d 86 (Cal. Ct. App. 2000); *Lamont v. Lamont*, No. 0078-00-4, 2000 WL 758450, at *1 (Va. Ct. App. June 13, 2000); *Lakin v. Lakin*, No. FA9703277185, 1999 WL 1320464, at *1 (Conn. Super. Ct. Dec. 6, 1999); *Fiddelman v. Redmon*, 656 A.2d 234 (Conn. Ct. App. 1995); *Fiddelman v. Redmon*, 623 A.2d 1064 (Conn. App. Ct. 1993); *Fast v. Fast*, 787 P.2d 1288 (Okla. Ct. App. 1989); *Buckels v. Buckels*, 431 So. 2d 92 (La. Ct. App. 1983); *Rice v. Rice*, 603 P.2d 1125 (Okla. 1979); *In re Marriage of Burham*, 283 N.W.2d 269 (Iowa 1979).

Recent social science research on the effects of divorce on children now concludes that studies considering only isolated variables, without reviewing other variables that are now known to interact in the divorce dynamic, are limited in scope and application. Likewise, in considering the propriety of a bird nesting arrangement, to consider the effects of divorce on children and parents without also considering the effects of these variables on the custody decision-making process of parents and courts would be to make an uninformed decision about the probable success of a bird nesting arrangement in promoting positive adjustment for the child. Unfortunately, based on the reported cases in which a bird nesting arrangement has been employed, uninformed decisions are what takes place. That is, parents and courts implementing a bird nesting arrangement view one isolated effect or variable in the child's post-divorce development—instability—and perceive bird nesting as a custody alternative that is designed to address this variable without fully considering the interactive effect that the arrangement will have on other post-divorce variables that will also affect the child's adjustment. Before parents or courts can appropriately implement a bird nesting arrangement, however, it is critical that they consider the comprehensive and interactive effects of divorce on children.

The cases that address the issue of bird nesting show that it is almost never successful.⁸ When bird nesting is employed, it is usually short-lived, and it often adds negatively to the already harmful effects of the divorce on the family. Therefore, this article concludes that, in most cases, bird nesting fails to work for three main reasons: (1) the practical disadvantages of bird nesting far outweigh the advantages;⁹ (2) bird nesting is usually an inappropriate response to divorce;¹⁰ and (3) bird nesting is usually an unnecessary means of promoting child adjustment.¹¹ Bird nesting is usually unnecessary as an alternative form of child custody after divorce because: (a) children are not as negatively affected by divorce;¹² and (b) joint custody, itself, is usually sufficient to promote positive developmental adjustment.¹³ For these reasons, this article concludes that parents and courts should employ a bird nesting arrangement under very limited circumstances, under court supervision, and only after comprehensively considering the interactive effects of divorce on children.

8. Although the cases discussed herein involve some parents who agreed to attempt a bird nesting arrangement and trial courts that have either approved of or encouraged the arrangement, none of the cases discussed in this article resulted in successful bird nesting.

9. See discussion *infra* Part II.A.

10. See discussion *infra* Part II.B.

11. See discussion *infra* Part II.C.

12. There are three factors that support the conclusion that children are not as negatively affected by divorce: (1) compared to children of intact families, the long-term development of divorced children is nearly normal; (2) children are not as negatively affected by post-divorce variables as once thought; and (3) children are not as negatively affected by residential instability as generally thought. See discussion *infra* Part II.C.1.

13. See discussion *infra* Part II.C.2.

II. BIRD NESTING: WHY DOESN'T IT WORK?

A. THE DISADVANTAGES OF BIRD NESTING OUTWEIGH THE ADVANTAGES

It is evident from both a social science and a legal perspective that joint custody offers many benefits in dealing with the effects of divorce on children.¹⁴ Recent research on the effects of divorce on children shows that pre-divorce parental behaviors and family dynamics can be predictive of children's post-divorce adjustments or, at least, may be indicative of the type of families for which joint custody may be suitable as a post-divorce custody arrangement.¹⁵ Because bird nesting is now being considered as an alternative and perhaps quintessential form of joint custody, these same variables and causal relationships must be carefully considered by parents and courts before bird nesting is instituted as a custodial arrangement that serves the best interests of children. Given the nature of the post-divorce problems that children face, bird nesting would seem to be an extremely effective custody format for alleviating the significantly negative consequences of divorce, while still promoting the positive aspects of post-divorce, parent-child relationships that are so critical for appropriate child adjustment and development.

Why, then, does bird nesting almost always fail? To answer this question, parents and courts must carefully consider and compare the advantages and disadvantages of bird nesting. In doing so, it is usually the case that, given the needs and dynamics of divorcing families, the disadvantages of facilitating a bird nesting arrangement significantly outweigh the advantages.

1. *The Advantages of Bird Nesting*

The most obvious of the advantages of bird nesting—and the advantage that, unfortunately, most parents and courts consider in a vacuum—is that it offers children more stability in their home life. Perhaps most significantly in this respect, bird nesting affords children the opportunity to attend the same school. This, in itself, has several advantages for children. For example, it provides less opportunity for school absences because there is no change in school attendance, either geographically or routinely. The same school also nurtures consistent peer relationships.¹⁶ Often in divorce, children's support mechanisms (mainly peers) tend to withdraw from the relationship to avoid having to choose sides in the dissolution of the family, or they maintain polite distances to avoid the resulting increasing conflict.¹⁷ Bird nesting may help to alleviate this response by maintaining strong support resources for the divorcing chil-

14. See discussion *infra* Part II.C.2.

15. See discussion *infra* Part II.C.2.

16. The children in Steinman's study found the continuity of school life and the friendships associated with school to be significantly important. See Steinman, *supra* note 5, at 412.

17. See Bryner, *supra* note 1, at 209.

dren. This has been suggested as one of the factors demonstrating less significant differences between divorced children and non-divorced children.¹⁸

In providing a consistent school to attend, bird nesting may also afford greater ease and less conflict in planning after-school activities. Because children's schedules under a bird nesting arrangement are more constant, scheduling activities and planning for practical needs associated with after-school activities is easier for children and parents. This alleviates conflict and stress, and children are less likely to view custody switches or visitation periods as disruptive of their activities.¹⁹

This "same-school" effect benefits the parents as well as the child. For example, under a bird nesting arrangement, with the child attending the same school during both custody intervals, parents may split time with the child more easily and, perhaps, more consistently, and, thereby, may require less time planning joint activities and engaging in inflammatory discussions.²⁰

Additionally, for parents, bird nesting affords a more equal distribution of child-care responsibilities. This alleviates stress and affords more time for parents to establish new relationships. This aspect is productive for parents working toward remarriage, which has been shown to be positive for child development.²¹ Of course, remarriage and the addition of step-families is not conducive to a continued bird nesting arrangement between former spouses.²²

Bird nesting may also diminish the child's delineation between custodial and noncustodial parents. In divorce, children are almost always aware of animosity and mistrust between parents, even when the parents feel assured that their animosity is kept from the children.²³ It is common after a separation, therefore, for a child to withdraw from one parent—usually the noncustodial parent—in an effort to avoid the conflict between the two parents and to re-establish a stable, non-hostile relationship with one parent.²⁴ In this respect, the dynamics between a child and the custodial parent and a child and the noncustodial parent are different. If this withdrawal is a significant effect for the child, bird nesting might alleviate this result by less clearly delineating the distinction between the custodial and the noncustodial parent. This blurring of the line between the custodial and the noncustodial parent may help to alleviate the

18. *See id.*

19. *See id.* at 204.

20. Mary F. Whiteside, *The Parental Alliance Following Divorce: An Overview*, 24 J. MARITAL & FAM. THERAPY 3, 18 (1998).

21. *See* Thompson, *supra* note 2, at 35 (discussing studies showing that children in remarried families are significantly less depressed and less stressed than children in single-parent families). *But see* Bryner, *supra* note 1, at 206-07; Hetherington et al., *supra* note 1, at 171 (discussing the difficulties of remarriage on divorced children).

22. *See infra* text accompanying notes 41-45.

23. *See* Kenneth D. Herman, *A Child's Resistance/Refusal of Contact with the Noncustodial Parent*, 15 AM. J. FAM. L. 137, 137-39 (2001).

24. *See id.* at 137-45.

atrophic effect of the child sacrificing one parental relationship for the emotional safety and security of another. If the response in children to delineate between the custodial and the noncustodial parent is important and appropriate for post-divorce emotional development and adjustment, then bird nesting may be counter-productive to positive development in this regard, particularly if the arrangement exacerbates family conflict.

As with many of the advantages of bird nesting, it often serves as a double-edged sword. As will be shown, children's developmental framework is directly related to the collaborative relationship of the parents.²⁵ Children develop more effectively when a stable parental framework is available to them.²⁶ Bird nesting that adds to the hostility between parents will add to the instability in the child's perception of the parental relationship, and may have a further deleterious effect on the child's developmental framework.

Even in cases where there is no animosity between parents during the marriage, but acrimony arises during the separation and divorce, some children become so traumatized at the need to leave the custodial home to visit with the noncustodial parent, with whom the child feels he or she is betraying the custodial parent, that the child eventually abandons the desire to leave the home for the noncustodial parent.²⁷ Particularly in these instances, bird nesting may alleviate, or at least minimize, the crisis of a child who refuses to leave the stable home to accommodate secondary custody arrangements.²⁸

25. *See id.* at 137-38.

26. *See id.* at 138.

27. *See id.* Herman discusses the "attachment relationship," wherein a child receives signals of danger in the immediate environment from the attachment figure—usually the custodial parent. *Id.* at 138-39. In an effort to remain safe, the child naturally gravitates to the attachment figure, from whom he or she receives signals of danger. *Id.* When the attachment figure sends signals of danger in the presence of the non-custodial parent, the child naturally avoids the source of danger. *Id.* Herman reveals that the signals of danger cued by the attachment parent may be extremely subtle, and that a child may be receptive to the most covert warning from the attachment parent, even when playing in another part of the room. *Id.* The cues that even a distracted child might recognize may range from the stiffening of the body or distortion of facial features to a change in tone of voice. *Id.* at 139. While these reactions may still be at work during times of custodial switching in a bird nesting arrangement, they may not be as prominently cognizable to the child when the child is able to remain in the safety of a stable home.

28. At least for the child refusing to have contact with one parent, Herman recognizes several remedies: first, the court will order the custodial parent to comply with the visitation order, with the threat of contempt for noncompliance; second, the court will order the child to comply with the visitation order, with the threat of contempt for noncompliance; and third, the court will attempt to establish some intervention method that will positively affect the family dynamics and will remove the underlying obstacle to successful and healthy visitation. *See Herman, supra* note 23, at 143. Herman stresses that the remediation of visitation problems needs to stem from the underlying cause of the problem. *See id.* Therefore, if the problem is not so much that the child refuses to be with the non-custodial parent but, rather, the child refuses to be away from the custodial parent, then bird nesting will not do anything to alleviate the problem, since the "custodial" parent will still be out of the home. This effect may be less significant with an older child, who has a more stable and developmentally appropriate contact paradigm.

Developmentally, children must secure a firm and trusted relationship with the custodial parent before being able to leave for extended visits without feeling that the relationship with the custodial parent is threatened.²⁹ To implement a visitation schedule prematurely would not only negatively affect the normal development of an attachment relationship with the primary custodial parent, but it may preclude it.³⁰ Arguably, bird nesting might tend to produce two positive attachment relationships, particularly if the custodial time is equal.

A child's development also requires balancing the need to be with the parent and the need to autonomously investigate and explore the world outside the family.³¹ This is particularly true of the latency years, or the years of elementary school.³² For the parent who is not with the child on a regular basis to observe and understand the child's balancing needs, this process may be particularly confusing and frustrating.³³ Bird nesting might afford both parents the ability to be present for and to better understand and participate in the child's balancing needs. Relatedly, there is an added difficulty in a noncustodial parent not being able to adjust to the child's shift from depending on physical closeness to psychological closeness.³⁴ "The experience of divorce for many noncustodial parents makes appreciation of the changing developmental tasks of the child more difficult"³⁵ The noncustodial parent who does not regularly relate closely with the child physically will pursue physical closeness at a time when the child is searching to move to psychological closeness and physical detachment.³⁶ By allowing consistent physical contact between the parent and the child, bird nesting may orient the parent to the appropriate psychological needs of the child at the appropriate times.

Bird nesting may also serve to temper the natural effects of court-awarded temporary custody arrangements. Some contend that primary/secondary custodial splits irrevocably damage the secondary caretaker's chances for permanent physical custody by creating an invidious status quo, which courts feel obliged to maintain on the grounds of "stability." Courts might consider that bird nesting could minimize this effect in cases where both parents are effective and suitable caretakers for the child.³⁷

It is risky at least to conclude that these advantages are applicable in all cases in which bird nesting is considered. As is demonstrated throughout this article, all children respond to divorce differently, in multiple stages and to varying degrees, based on complex variables. Clearly, many of the advantages of bird nesting are postured on theoretical premises that may

29. See *id.* at 141.

30. See *id.*

31. See *id.* at 142.

32. See *id.*

33. See *id.*

34. See *id.* at 142-43.

35. *Id.* at 143.

36. See *id.* at 142-43.

37. This reasoning was argued by the father in *Lester v. Lennane*, but it was not persuasive to the court. 101 Cal. Rptr. 2d 86, 110 (Cal. Ct. App. 2000).

not be factors at work in most cases. In connection with the "same school" effect, the single most practical advantage to a bird nesting arrangement is the simple consistency and predictability for the child in performing the necessary tasks of his or her daily routine. Children naturally feel emotionally safer, more comfortable, and less stressed in the familiar environment of their own neighborhood, their own home, and even their own room. This sense of security and consistency is not only beneficial for the child in general, but it is particularly poignant at a time when children are experiencing the confusion, stress, and instability of parental separation, which naturally and negatively affects the child on so many different levels.

2. *The Disadvantages of Bird Nesting*

Just as there are obvious advantages to bird nesting, there are equally obvious disadvantages. The clearest of these is that bird nesting is not financially feasible for many, if not most, couples. In a normal post-divorce joint custody arrangement, the parents maintain two households—one for each respective parent. However, bird nesting requires that the parties maintain three separate residences—one for the child and one for each parent when they are not living with the child.³⁸ Therefore, bird nesting is most likely only feasible for upper or upper-middle class families. Considering the additional negative economic impact of divorce,³⁹ the socioeconomic considerations in divorce are magnified in the bird nesting context, and the pool of upper and upper-middle class families that could still afford to bird nest for an extended period of time is likely very small.

Diminishing the possible bird nesting pool even further are those parents who remarry after divorce or who have previous families. Bird nesting typically is designed to allow individual spouses to move in and out of the marital home. When not residing in the marital home, the individual spouses reside in their own respective residences. However, bird nesting arrangements normally are not meant to accommodate additional children or spouses from previous or subsequent marriages, for whom a bird nesting arrangement would interrupt their own family stability.⁴⁰ For example, in *Lester v. Lennane*, the court considered a bird nesting arrangement that was proposed by the father of a newborn child.⁴¹ Financial

38. Of course, it is possible that parents could still maintain only two houses under a bird nesting arrangement by each moving in and out of the same two homes during their custodial and non-custodial periods, but this option is highly unlikely and only exacerbates the disadvantages of bird nesting that are enumerated here.

39. See *infra* note 233.

40. Remarriage is particularly likely, especially as the separation period of the parties becomes longer and essentially precludes the facilitation or continuation of a bird nesting arrangement.

41. 101 Cal. Rptr. 2d 86 (Cal. Ct. App. 2000). In *Lester*, the father lived in Florida with his second wife and their eight-year-old daughter. *Id.* at 89. The mother lived in California with her ten-year-old daughter from a previous marriage. *Id.* The parties had a baby after a brief sexual encounter while the father was traveling on business in California.

considerations were not an issue for the parties because the father's net worth was between \$30 and \$45 million.⁴² Nevertheless, the court rejected the bird nesting arrangement.⁴³ First, the court determined that the parents were equally capable of caring for the newborn child. But with respect to the bird nesting arrangement, the court held that, because the mother was already raising a ten year-old daughter from a previous marriage, the bird nesting arrangement was simply not feasible.⁴⁴ Were bird nesting to have been employed, the arrangement would have caused the ten-year-old child to have to move in and out of the bird nesting house with the mother to facilitate the arrangement for the subject child, thus inflicting on the ten-year-old child the very instability sought to be eliminated for the subject child by employing the arrangement. The court held that, in this situation, the stability of a primary caretaker arrangement outweighed the stability of a bird nesting arrangement.⁴⁵ This was

Id. The father in the case requested that a bird nesting arrangement be implemented in which the parties would secure a separate residence for the newborn while maintaining respective personal residences elsewhere. *Id.* at 91.

42. *Id.* at 90 n.1.

43. In support of his request, the father offered a declaration by forensic psychologist Frank Dougherty, Ph.D. *Id.* at 91 n.3. At the hearing on the motion to consider the bird nesting arrangement, the court refused to consider Dr. Dougherty's declaration for several reasons. First, the court considered his declaration to be hearsay. *Id.* at 91 nn.3 & 110. Second, rather than rely on an expert who was being paid by one of the parties, the court preferred to rely on an existing expert who was appointed by the court. *Id.* at 91 n.3. Third, Dr. Dougherty had not seen the parties and did not attend the hearing, whereas the other expert had seen the parties twice. *Id.* at 113. The court determined that Dr. Dougherty's declaration "ruminated abstractly on the theoretical advantages of 'birdnesting' but made no reference to the facts of the case." *Id.* Fourth, although not specifically stated as a reason for rejecting the bird nesting arrangement, per se, the court found the parents' relationship to be increasingly acrimonious; thus, the court opted for a solution that would "serve [the child's] best interests while keeping the peace between the parties so far as possible." *Id.* at 110. Finally, the court found as a "facially plausible" reason for rejecting a bird nesting arrangement the fact that it could not work because the mother had another daughter to raise. *Id.* at 113. The court noted that Dr. Dougherty did not testify in response to this proposition. *Id.*

44. *Id.* at 110, 113. The father also had several other children who would be affected by the bird nesting arrangement. *See id.* at 109. Additionally, the court opted for primary physical custody with the mother because the mother was breast feeding the child and, thus, the child would require daily access to the mother. *Id.* at 113.

45. Although the court found that the instability raised in the step-child's life was sufficient cause to find the bird nesting arrangement unfeasible, the court further held, notwithstanding the issue of the step-child, that, when both parents are capable of parenting sufficiently to provide for the best interests of the child, stability for the subject child is the tie-breaking factor with respect to the issue of an equal versus a primary/secondary custody split. *Id.* at 125-26. Here, the court opted for primary physical custody with the mother as being more stable for the infant child than a bird nesting arrangement or a joint physical custody arrangement that provided for an equal physical custody split. *Id.* On this point, however, the court was considering the arrangement in which the father was visiting the child in the mother's home, where the child always remained with the mother; the child was not relocating to the father's residence to fulfill his visitation time, nor was the father moving into the home. The stability for the child in this arrangement is quite different from the stability the child would have experienced if she were moving from the mother's home to the father's residence to fulfill the father's visitation time. *Id.* at 124-25. It is unclear from the opinion whether the court would have held the same way on the issue of an equal physical custody split if the child were moving back and forth to facilitate the secondary custody award.

particularly so in *Lester* because the parties lived more than 3,000 miles apart.⁴⁶

Geographic distance is often a factor in considering the propriety of bird nesting arrangements because it is often the case that, upon divorce, parents move apart in facilitating their new, separate lives. It is not often the case that divorced spouses become “neighbors.” This is not to say that bird nesting arrangements cannot be implemented when there is some geographic distance between the parties or that bird nesting requires parents to be “neighbors.” However, a significant portion of the pool of potential bird nesting candidates is likely eliminated in the instances where divorcing spouses place geographic distance between themselves after the divorce and when either spouse has a previous or subsequent family that is affected by the logistics of the arrangement.

Although the reasons for divorce are varied, and it is not always the inability to live together that causes couples to separate, bird nesting requires that divorcing spouses, who, by the nature of their separation, have decided that they are no longer able to live together in the same household, maintain and share the same household in which to continue raising their children. Because of this, as a practical matter, when a bird nesting arrangement is implemented, it often precludes the parties from completing the distribution of property upon divorce.⁴⁷ Assuming that the marital home is going to be the home in which the bird nesting arrangement takes place (as opposed to selling the marital home and then purchasing another home to facilitate the bird nesting arrangement—plus purchasing two other homes for the parents), the marital home cannot usually be distributed as part of the final distribution of property award in the divorce decree because the home must still be maintained by both parties. To remedy this, in attempting to implement a bird nesting arrangement, the court in *Buckels v. Buckels* awarded “custody of the community home to the four minor children,” with the husband and wife to take turns living in the home with the children on alternate weeks.⁴⁸ On appeal, the court reversed the award of the marital home to the children as violative of state law, which required that the marital home be awarded to one of the two spouses pending the partition of community property.⁴⁹ In addition to the limitations placed on the disposition of the marital home itself, naturally there are limitations placed on the disposition of the marital property within the home as well.⁵⁰

46. See *id.* at 121. In *Lester*, the father lived in Florida, and the mother resided in Sacramento, California. *Id.* at 89.

47. See, e.g., *In re Marriage of Burham*, 283 N.W.2d 269, 277 (Iowa 1979).

48. 431 So. 2d 92, 93 (La. Ct. App. 1983).

49. *Id.* at 95 (citing LA. REV. STAT. ANN. § 9:308 (West 1983)).

50. See, e.g., *Fiddelman v. Redmon*, 1993 WL 119743, at *4 (1993) (“Memorandum of Decision [Regarding]: [Plaintiff’s] Motion for Temporary Exclusive Possession . . . Plaintiff’s Motion for Modification of Parenting Time . . . [and] Defendant’s Motion for Modification of Custody” directed that no personal property was to be removed from the home in the presence of the children and that the parties were to resolve all issues of furniture and household items or be subject to judicial resolution).

Finally, of course, even in situations where divorcing parents have no previous or subsequent families to consider and they are economically and geographically suited for a possible bird nesting arrangement, bird nesting often adds to the already existing conflict between the divorced parents. Particularly with respect to the property remaining within the home, bird nesting inherently exacerbates the occasions for already disagreeable parents to argue further about the maintenance of the home, the future decor of the home, the use and maintenance of furniture within the home, the condition and cleanliness of the home upon residency "switches," and the provisions that are left in the home for the in-coming parent. While these considerations may seem petty, these are the insignificant subjects that overshadow issues involving the children and so often serve as the conduit for disagreement and continuing litigation between ex-spouses. Thus, before considering bird nesting arrangements as promotive of the best interests of children, it is of critical import to fully consider the nature of the relationship between the parents and their ability to function as co-parents, who also must now share, separately, the rights and responsibilities for the same household.

B. BIRD NESTING IS USUALLY NOT AN APPROPRIATE RESPONSE TO DIVORCE

In response to the growing body of knowledge of how divorce negatively affects children who are caught in the throes of parental separation or divorce, some parents and courts have begun to implement bird nesting plans as an available custody alternative for providing stability in the child's daily routine.⁵¹ Unfortunately, too many parents and courts view the divorce as simply affecting the child in typical, one-dimensional ways—for example, simply emotionally, physically, or socially. Often, parents and courts seem to approach bird nesting as a panacea for an entire, albeit individual, dimension of the divorce, as if to say, "If we provide stability by affording the opportunity to continue to reside in the same home, we will have addressed and successfully averted the dimension of the divorce that causes instability." In taking this approach, courts have failed to consider the effects that a bird nesting arrangement might have on the future dynamics of the divorce. If bird nesting negatively affects the divorce and the divorce, in turn, negatively affects the child, then, despite its advantages with respect to residential stability, bird

51. One report suggests that only 1% of divorced people with children are currently attempting a bird nesting arrangement. See Silverman and Higgins, *supra* note 6, at D4. Another 2% reported that the arrangement failed. *Id.* Despite its failure rate, of 1,776 respondents in the poll, 32% said they would consider trying the arrangement. *Id.* Although there are only a handful of reported cases that substantively address bird nesting as a viable custody arrangement, see cases cited *supra* note 7; see also text accompanying notes 3-13, and the inherent restrictions of the arrangement described in this article significantly limit the pool of bird nesting candidates, see *supra* text accompanying notes 9-13, bird nesting is clearly becoming a more popular alternative for parents and courts when considering viable custody alternatives.

nesting could negatively affect the child's continuing adjustment to the divorce.

One of the problems with how parents and courts determine whether to employ a bird nesting arrangement is that bird nesting is so closely connected to the concept of joint custody. Unfortunately, parents and courts often incorrectly perceive bird nesting to be the quintessential form of joint custody. So, if parents prefer joint custody, or if joint custody is statutorily recommended or even mandated, then parents and courts may inappropriately opt for bird nesting as the epitome of that preference, recommendation, or mandate, when it is otherwise an inappropriate response. However, the converse of this reasoning is not true. If joint custody is warranted, it is not necessarily true that bird nesting is warranted. In fact, for the reasons presented throughout this article, it is very rarely the case that bird nesting is the appropriate form of joint custody to be employed. This is usually based on one of two reasons: (1) either the logistics of the post-divorce family's daily routines are not conducive to bird nesting,⁵² or (2) the relationship between the parents is so negatively ensconced in conflict that bird nesting is an inappropriate format for co-parenting (if co-parenting is even appropriate).

Indicative of the impropriety of bird nesting is the language of the court in *Lakin v. Lakin*, which, among other issues, dealt with a simple custody determination between divorcing parties.⁵³ In describing the history of the parties' custody arrangements, the court noted that the parties had briefly attempted a bird nesting arrangement.⁵⁴ With regard to that arrangement, the court stated: "The parties' separation occurred, they tried a brief bird nesting arrangement in May of 1997; those are destined to fail and this one did too."⁵⁵ Although not within the specific context of the bird nesting arrangement, in describing the factors that led to the parties' divorce, the court clearly identified many of the characteristics described in many other bird nesting cases as indicative of unsuccessful joint custody or bird nesting scenarios.⁵⁶ The court's observations about the parties' relationship, both during and after their marriage, correlate quite consistently with the conclusion that bird nesting arrangements—at least

52. This could be due to work schedules, geographic distance between the parties, or previously- or subsequently-existing families, all of which might make bird nesting an impractical option.

53. No. FA 9703277185, 1999 WL 1320464, at *1 (Conn. Super. Ct. Dec. 6, 1999).

54. *Id.* at *9.

55. *Id.*

56. See *id.* at *5-10 (the parties put their own financial excessiveness above the needs of the children, they were both psychologically troubled, each blamed the other for the family's difficulties, there was a child from a previous marriage involved, the custodial arrangements were stressful on the caretaker, the mother suffered from emotional problems that affected her ability to perform the functions of daily living, during which time the father did not assume the added burdens and responsibilities of the children, the parties were unable to afford multiple houses, the parties were minimally able to identify the children's needs or the needs of each other, one of the children had a learning disability, and the parties were inattentive to each other's scheduling needs and did not function as a marital unit).

under these circumstances—"are destined to fail" as inappropriate responses to the effects of divorce on children.

Examples of these misperceptions by parents and courts are found even in the earliest cases that considered the concept of bird nesting. In *In re Marriage of Burham*,⁵⁷ when the husband and wife were divorced, their divorce decree awarded them joint physical custody of their two minor daughters; legal custody was awarded to the County Department of Social Services pending a permanent decree of custody.⁵⁸ During the pendency of the case, both parents resided in the home together with the children.⁵⁹ Initially, each parent occupied separate personal areas of the home.⁶⁰ Subsequently, both parents agreed that the joint custody arrangement was untenable, and each requested that sole custody be awarded to one parent, with visitation rights afforded to the non-custodial parent.⁶¹ The court interviewed the children and determined that, although the arrangement needed to be modified, joint custody was still in the best interests of the children.⁶² Accordingly, the trial court implemented what, in effect, was a bird nesting arrangement—the court ordered that the children were to continue to reside in the home, but the father was to assume primary parental responsibility for the children for three months in the home. Then, for the subsequent three months, the mother was to assume primary parental responsibility of the children in the home.⁶³ The party not having primary responsibility for the children was to leave the home with visitation prescribed.⁶⁴ This series of quarterly rotations was ordered to continue until the youngest child graduated from high school, at which time the home was to be sold with the net proceeds divided between the parents.⁶⁵ Both parents appealed the order to continue the bird nesting arrangement.⁶⁶

In considering the appropriateness of the joint custody arrangement and the bird nesting arrangement, the appellate court recognized that the court must look at what is in the best interest of the child.⁶⁷ In doing so, the appellate court enumerated several tests to determine if any joint custody arrangements were viable.⁶⁸ The court held that the parties' agree-

57. 283 N.W.2d 269 (Iowa 1979).

58. *Id.* at 270.

59. *Id.*

60. *Id.* at 271 n.1.

61. *Id.* at 271, 275.

62. *Burham*, 283 N.W.2d at 271.

63. The term "bird nesting" was not actually used to describe the arrangement, but, in effect, it was a bird nesting arrangement. *See id.* at 270-71.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 271.

68. The court considered the following factors:

- (1) Is each parent fit and suitable as a custodial parent?
- (2) Do the parents agree to joint custody, or is one or both opposed?
- (3) Have the parents demonstrated that they are able to communicate and give priority to the child's welfare such that they are capable of reaching shared decisions in the child's best interests?

ment to employ a joint custody arrangement and their ability to communicate and give priority to the child's well-being is imperative.⁶⁹ In applying tests to determine the propriety of the bird nesting arrangement that was in effect, the appellate court recognized that, in ordering the bird nesting arrangement, the "trial court was attempting to salvage from the marital chaos some stability for the children and also afford them the benefit of the companionship and aid of both parents However, the home atmosphere . . . had . . . 'taken on the flavor of an 'armed camp.'"⁷⁰ As a result of the situation at home, both parties and the court rejected the feasibility of the arrangement.⁷¹ The court agreed that "[a]s a court-ordered arrangement imposed upon already embattled and embittered parents . . . (joint custody) can only enhance familial chaos."⁷² Consequently, the court awarded custody of the children and the occupation of the home to the father.⁷³

Other cases that have considered a bird nesting arrangement reveal that, even if joint custody is appropriate, bird nesting is rarely the appropriate response as a joint custody alternative. For example, in *Rice v. Rice*, there was no bird nesting arrangement employed or considered by the court.⁷⁴ Rather, the court simply considered whether joint custody was an appropriate arrangement for the divorced parties.⁷⁵ In considering the propriety of joint custody, the court recognized bird nesting as one alternative form of joint custody that is a viable option under appro-

(4) Is there geographical proximity such that there will be no substantial disruption of the child's schooling, association with friends, religious training, or other routines?

(5) Is there similarity in the environment of each parent's home, or will the child be confronted with vastly different or potentially disruptive environmental changes?

(6) Is there any indication that the psychological and emotional needs and development of the child will suffer due to a particular joint custodial arrangement?

(7) Are the work hours and routines of both parents such that child care will be suitable with either parent?

(8) Is joint custody in accord with the child's wishes and does he or she not have strong opposition to such an arrangement?

Burnham, 283 N.W.2d at 274.

69. *Id.* at 275.

70. The court noted the trial court's observation that:

It becomes apparent that these fine young daughters need the full devotion of both parents to their best interests for the next six years. It is very doubtful that either parent can supply the emotional support the children need, afflicted as both parents are with myopia so severe as to disable these persons, at least temporarily, in their several roles as father and mother of the children. In this Court's view, [the children] need the shared strength they get from each other in their familiar community among friends of longstanding in order to nurture and complete their development into good citizens during these next few years.

Id.

71. *Id.*

72. *Id.*

73. *Id.* at 276-77.

74. 603 P.2d 1125, 1125-30 (Okla. 1979).

75. *Id.* at 1128-29.

prate conditions.⁷⁶ The court enumerated favorable circumstances that may be conducive to joint custody.⁷⁷ It expressly recognized one particular set of circumstances as including a bird nesting arrangement: where the logistics of the post-divorce physical custody split manifest "no substantial disruption of the child's routine, schooling, association with friends, religious training, etc."⁷⁸

In *Rice*, the parties shared a joint custody arrangement under which the mother was vested with custody from Monday through Friday for the first week, and from Monday through Wednesday during the second week, and the father was vested with custody on the remaining days of each week.⁷⁹ The mother (who was appealing this custody arrangement to arrange for the father to have exclusive custody of the child) testified that she did not believe that the existing arrangement was in the child's best interest because of the child constantly moving back and forth to different environments and interchanging her activities from week to week, which offered her no regularity in her life.⁸⁰ The court agreed, finding that the custody split on a weekly basis was impractical and logistically and emotionally impossible.⁸¹ Consequently, because of the negative effects that the joint custody arrangement was having on the child, the court affirmed the modification of custody from joint custody between the parties to sole custody with the father.⁸² Although the court did not order that the parties employ a bird nesting arrangement to alleviate the detrimental hardships of the joint custody arrangement, it did recognize bird nesting as a viable option, were it not for the impossible logistics of the parties' lifestyles.⁸³ Had bird nesting been possible logistically, it may

76. *Id.* at 1129 n.9.

77. The favorable circumstances for joint custody recognized by the court were:

- a) The parties have agreed to joint custody or there has been a prior order for joint custody and experience has shown that the benefits to the child exceed any detriments.
- b) The parties have demonstrated that they are capable of reaching shared decisions in the child's best interests and are able to communicate and to give priority to the child's welfare.
- c) The logistics are such that there is no substantial disruption of the child's routine, schooling, association with friends, religious training, etc. Ordinarily this means close geographical proximity of both parents or a "bird nest" arrangement.
- d) There is no indication that the psychological and emotional needs and development of the child will suffer due to the particular joint custodial arrangement.
- e) The work hours and routine of both parents are such that child care will be suitable at both homes.
- f) Joint custody is in accord with the child's wishes and he does not have a strong opposition to such an arrangement.

Id.

78. *Id.*

79. *Id.* at 1128 n.3.

80. *Rice*, 603 P.2d at 1129 n.10.

81. *Id.* at 1129.

82. *Id.* at 1128-29.

83. *Id.* at 1129. Because of the parents' living arrangements and routines, and the frequent custody switches, the child had to attend different nurseries several different

have alleviated the need to vest exclusive custody in only one parent. However, the court found bird nesting to be insufficient to remedy the natural instability associated with that particular joint custody arrangement.

In *Fast v. Fast*, the court also recognized bird nesting as conducive to conditions suitable for joint custody.⁸⁴ In addition to the circumstances enumerated in *Rice*, the *Fast* court suggested that other conditions that are suitable to joint custody are: "the likelihood of parental cooperation in matters affecting the child; a capacity to provide equally beneficial home environments; and that the situation will not be unduly disruptive of other important aspects of the child's life."⁸⁵ "Equally beneficial home environments" is a particularly relevant condition with respect to bird nesting. Although bird nesting was not employed by the parties in *Fast*, they were subject to an order of joint custody under which they rotated physical custody on a three-month basis.⁸⁶ The mother sought to modify the arrangement as a result of the negative effects that the parents' relationship was having on the child because of their inability to communicate and cooperate under the joint arrangement.⁸⁷ The parties presented testimony demonstrating that there was a total loss of communication between the parties, an atmosphere of hostility and uncooperative behavior, a lack of agreement between the parties as to proper discipline and behavior of the child, and fiscal irresponsibility.⁸⁸ The court accepted these circumstances as a textbook example of "the antithesis of the concept of joint custody."⁸⁹ The court reversed the lower court's decision to continue under a joint custody arrangement and ordered that sole custody of the child be vested in the mother.⁹⁰

Thus, unlike the circumstances in *Rice*, where bird nesting was an inappropriate alternative because of the inconvenient logistics for the parents,⁹¹ in *Fast*, even if the logistics of the custody arrangement were perfectly in accord with the parents' lifestyles and daily routines, the court found that bird nesting would be categorically inappropriate because of the negative effect that the parents' relationship was having on the child.⁹² As the court did in *Burham*, the *Fast* court not only recognized that "[r]eligious and philosophical differences [may] exacerbate the already schismatic relationship" between the parents, but that the exacerbated schism may negatively affect the child.⁹³ In all three cases, the dis-

times a week, which the mother and the court determined not to be in the child's best interest. *Id.* at 1129 n.10.

84. 787 P.2d 1288, 1290 n.5 (Okla. Ct. App. 1989) (citing *Rice v. Rice*, 603 P.2d 1125, 1129 (Okla. 1979)).

85. *Id.* at 1290.

86. *Id.* at 1289.

87. *Id.*

88. *Id.*

89. *Fast*, 787 P.2d at 1290.

90. *Id.* at 1291.

91. See *Rice v. Rice*, 603 P.2d 1125, 1125-30 (Okla. 1979).

92. See *Fast v. Fast*, 787 P.2d 1288, 1289-90 (Okla. Ct. App. 1989).

93. *Id.* at 1290.

solution of the parties' marriage negatively affected the child.⁹⁴ Where, as in *Rice*, the effect on the child stemmed from the unavoidable instability for the child that accompanies divorce, bird nesting was recognized as a viable but insufficient option.⁹⁵ But where the effect of the divorce on the child stemmed from the parents' inability to cooperate and communicate with each other, particularly with regard to issues involving the interests of the child, bird nesting was viewed not only as inappropriate, but antithetical to that end.⁹⁶

The outcome was no different for the parties in *Lamont v. Lamont*, in which the parties attempted to reside together in the marital home through the initial stages of the divorce proceedings.⁹⁷ Eventually, however, the guardian ad litem for the children had to file an emergency motion for a Pendente Lite order that the parties implement a bird nesting arrangement for the mother to reside with the children during the week and for the father to reside with the children on the weekends.⁹⁸ The court recognized that the long-term stress of the parties' marriage and divorce significantly compromised the parties' ability to focus on the children's needs rather than on their own needs or to cooperate with each other in making decisions involving the children's interests.⁹⁹ Consequently, the court awarded joint legal custody, with sole physical custody to the mother.¹⁰⁰ Statutorily, the court was bound by a presumption that the best interests of the children require active participation by both parents and that joint custody was the best means to ensure that participation.¹⁰¹ However, with regard to physical custody, the disposition of the parties with respect to their relationship with each other warranted the dissolution of the bird nesting arrangement.¹⁰²

The case of *Fiddleman v. Redmon* demonstrates that it is not just the divorce and its resulting effects that can affect the child, but the resolution of the custody arrangement itself—particularly a bird nesting arrangement—can have additional effects on the child.¹⁰³ In that case, the father, Fiddleman,¹⁰⁴ and the mother, Redmon, were married in 1984.¹⁰⁵ In 1989, the father filed for divorce, and both parties sought sole custody

94. See *In re Marriage of Burham*, 283 N.W.2d 269, 274-75 (Iowa 1979); *Rice*, 603 P.2d at 1129; *Fast*, 787 P.2d at 1290.

95. See *Rice*, 603 P.2d at 1129 n.9.

96. See *Burham*, 283 N.W.2d at 274-75; *Fast*, 787 P.2d at 1290.

97. No. 0078-00-4, 2000 WL 758450, at *1 (Va. Ct. App. June 13, 2000).

98. *Id.*

99. *Id.* at *1-2.

100. *Id.* at *2.

101. *Id.*

102. *Lamont*, 200 WL 758450, at *1-2.

103. 623 A.2d 1064 (Conn. App. Ct. 1993).

104. In addition to its substantive inconsistencies, the names of the parties are spelled differently in the various reported cases. In a 1993 Memorandum, the plaintiff's name is reported as "Fiddleman," 1993 WL 119743, at *1, but in all subsequent cases, it is reported as "Fiddelman." In another Memorandum, the defendant's name is reported as "Redman," 1995 WL 80031, at *1, but in all other cases it is reported as "Redmon."

105. *Fiddleman*, 623 A.2d at 1066.

of their two children.¹⁰⁶ The parties obtained a divorce in June 1991.¹⁰⁷ Although sole legal custody was awarded to the father, the parties implemented a bird nesting arrangement in which the children would remain in the marital home with the father for five days during the week, then the father would leave, and the mother would move into the house for the weekend.¹⁰⁸ The trial court's order provided that this arrangement would remain in effect "[u]ntil the sale and closing on the . . . [marital] property, or until the [mother] elects to vacate said premises, whichever event shall first occur. . . ."¹⁰⁹ The father appealed the decision,¹¹⁰ and the mother cross-appealed.¹¹¹ On appeal, the father asserted that the trial court improperly ordered the parties to continue the bird nesting arrangement.¹¹²

While this appeal was pending, both parties agreed that the bird nesting arrangement was not working because the parties were unable to agree on issues involving the children's education, health, or extra-curricular activities.¹¹³ More importantly, the parents were not able to agree on how their inability to resolve these issues was affecting the children.¹¹⁴ The father filed a motion to obtain exclusive possession of the home, claiming that the bird nesting arrangement was having such a negative effect on the oldest child that the child required psychiatric care.¹¹⁵ However, the mother claimed that the children were doing well, both educationally and socially, and she requested that no decision be made on the father's motion for exclusive possession of the home until the appellate court rendered a decision on the pending appeal.¹¹⁶ The court heard evidence on the father's motion.¹¹⁷ Despite the inconsistent testimony presented by the parties, the experts involved in the case agreed that the bird nesting arrangement should be discontinued and that the children should reside exclusively with the father.¹¹⁸

106. *Id.* at 1066.

107. *Id.*

108. *Id.* at 1066 n.1; *see also* Fiddelman v. Redmon, No. FA89 0103262S, 1993 WL 119743, at *1 (Conn. Super. Ct. Apr. 13, 1993).

109. *Fiddelman*, 623 A.2d at 1067.

110. There is an inconsistency in the reported cases regarding the nature of the issues on appeal. In the Memorandum of Decision Re: [Plaintiff's] Motion for Temporary Exclusive Possession (#160) [Plaintiff's] Motion for Modification of Parenting Time (#224) [and] [Defendant's] Motion for Modification of Custody (#226), Judge Novack reported that the father "appealed the judgment of the trial court raising issues that do not affect the custody orders of the court. The [mother] filed a cross appeal that possibly could impact on the decisions concerning custody." *Fiddelman*, 1993 WL 119743, at *1. However, the opinion of Judge Schaller, decided May 4, 1993, indicates that, on appeal, the father "claim[ed] that the trial court improperly entered [an] order[] regarding . . . an allegedly indefinite custody arrangement," explaining that the father "specifically challenge[d] a custody order that the parties have stated a 'birdnesting arrangement.'" *Fiddelman*, 623 A.2d at 1066.

111. *Fiddelman*, 623 A.2d at 1068-70.

112. *See id.* at 1067.

113. *See Fiddelman*, 1993 WL 119743, at *1-2.

114. *Id.*

115. *See Fiddelman v. Redmon*, 656 A.2d 234, 235-36 (Conn. App. Ct. 1995).

116. *See Fiddelman*, 1993 WL 119743, at *1.

117. *See id.*

118. *See id.*

Accordingly, on April 13, 1993, the trial court modified the existing custody order and specifically terminated the bird nesting arrangement by awarding exclusive possession of the marital home to the father and ordering the mother to vacate the premises.¹¹⁹ Further, the trial court specifically held that, "[b]ecause the welfare of children is at stake, this order will not become automatically moot when the [a]ppellate [c]ourt issues its decision. These orders impact on parenting time and will continue until further order of this court or the [a]ppellate [c]ourt."¹²⁰

Subsequently, on May 4, 1993, the appellate court issued its opinion on the original appeal.¹²¹ In that appeal, the father asserted that the trial court improperly ordered the parties to continue the bird nesting arrangement.¹²² His appeal was based on two assertions: (1) that the temporary continuation of the bird nesting arrangement was indefinite in nature, and (2) that the bird nesting arrangement was against public policy.¹²³ The appellate court held that neither claim was valid.¹²⁴ First, the court held that, although the bird nesting arrangement was contingent on the sale of the marital property, which could not be determined to a specific date, it was sufficient that the arrangement was certain to be short-lived because of the inevitable sale of the marital home.¹²⁵ Regarding the father's public policy argument, he asserted that it was against public policy for the court to order a bird nesting arrangement that would force the parties to remain "together," when it had already been determined, based on the valid dissolution of the marriage, that the parties "[were] happier, and so better citizens, separate, than if compelled to remain together."¹²⁶ The court simply found this argument to be specious, concluding that the parties would not be residing in the same residence together, but rather, each had exclusive possession of the home.¹²⁷

Subsequent to the appellate court's order in the original appeal, the mother's appeal of the trial court's award of exclusive possession of the home was decided by the appellate court.¹²⁸ The mother argued that, by terminating the bird nesting arrangement and awarding the marital home exclusively to the father, the lower court had effectively modified the property distribution award that had been ordered upon the dissolution of the marriage, which was nonmodifiable.¹²⁹ However, the appellate court affirmed the trial court's finding that the termination of the bird

119. See *id.* at *2-4.

120. See *id.* at *4. The mother appealed this decision, claiming that the award of exclusive possession of the marital home to the father as a result of the failure of the bird nesting arrangement was an inappropriate form of property assignment. See *Fiddelman v. Redman*, 1995 WL 80031, at *1 (Conn. Super. Ct. Feb. 7, 1995).

121. See *Fiddelman*, 623 A.2d at 1064-71.

122. See *id.* at 1067.

123. See *id.* at 1068.

124. See *id.*

125. See *id.*

126. See *Fiddelman*, 623 A.2d at 1068.

127. See *id.*

128. See *Fiddelman*, 656 A.2d at 234.

129. *Id.* at 236.

nesting arrangement was a modification of the modifiable custody award, not the nonmodifiable property distribution award.¹³⁰ The court said that it was as if the marital home had been awarded to the possession of the children and that each parent had been given a right to occupy the home with the children, exclusive of the other parent, until the house was sold.¹³¹

Interestingly, on the day of oral argument in the appeal, the court received a fax transmission from the attorney for the guardian ad litem of the children that stated:

The issue being argued today is a purely legal issue which does not have any bearing on the question of custody or the best interests of the children. Neither I nor the Guardian have taken a position on the question before the court today; we both feel that it has been expertly briefed by both of the parties' attorneys. Both of the parties' attorneys have been notified and consulted, and both have agreed that the presence of the children's attorney and guardian is unnecessary. Among the attorneys, our presence was never expected.¹³²

The court specifically disagreed with the assessment that the appeal did not deal with issues regarding the children's best interests.¹³³

Thus, in each of these bird nesting cases, there developed a pattern of viewing bird nesting as dependent on whether the negative effects on the children of the divorce were a natural result of the dissolution of the marriage, or if the effects were symptomatic of the deteriorating relationship between the parents. Under the former circumstance, bird nesting may be viewed as a viable option, although not necessarily sufficient to remedy the problematic effects of the divorce on the child. Under the latter circumstance, bird nesting is clearly not an appropriate custody alternative.

Notwithstanding this pattern, the most recently reported bird nesting case—*Malafronte v. Westenburg*¹³⁴—epitomizes all that is problematic in the employment of inappropriate bird nesting arrangements. In *Malafronte*, the parties were married in 1985 in New York and they had two children.¹³⁵ As of the time of the opinion, the mother was 51 years old and the father was 70 years old.¹³⁶ Both parents are well-educated—the mother was an opera singer and had obtained credits for a Ph.D. in Musicology from Stanford; the father also had credits toward a doctorate, was the director of Choral Conducting at the Juilliard School in New York City, and was a visiting professor at Rutgers University.¹³⁷ Two cus-

130. *Id.* at 237.

131. *Id.* But see *Buckels v. Buckels*, 431 So. 2d 92, 95 (La. Ct. App. 1983) (invalidating the award of the marital home to the children).

132. *Fiddelman*, 656 A.2d at 238 n.1.

133. *Id.*

134. No. FA000340629, 2002 WL 31818953, at *1 (Conn. Super. Ct. Nov. 21, 2002).

135. *Id.* at *1.

136. *Id.* at *1-2.

137. *Id.*

tody evaluations were conducted during the pendency of the case.¹³⁸ The parents continued to live together in the same residence during the first custody evaluation.¹³⁹ The first custody evaluation revealed that, originally, the children did not prefer a 50/50 custody split with the parents.¹⁴⁰ Originally, the eleven-year-old daughter wished to reside with the mother, but still wished to see the father.¹⁴¹ The fourteen-year-old boy wanted to remain in the marital home with the father but wished his sister to reside elsewhere; he was not as definitive about seeing the mother as the daughter was about seeing the father.¹⁴² Furthermore, the custody evaluator in the case determined that "communication between the parents was very strained and the additional transfer of the children would require a greater degree of communication, which would give the parties greater opportunities for additional conflict."¹⁴³ The evaluator specifically testified that the children were polarized with the parent of the same sex¹⁴⁴ and that the children "needed some predictability and structure in their lives to make them feel more secure and stable."¹⁴⁵ Thus, she recommended the typical primary/secondary physical custody arrangement—that the mother have primary physical custody of the children, with parenting time to the father on alternate weekends and dinner one night per week.¹⁴⁶

At approximately the same time that the first custody evaluation was completed, the mother moved out of the marital home and established a separate residence, located approximately three miles from the marital home.¹⁴⁷ The court commended the mother for doing so because it found that this "significantly eased the tension and stress the minor children were living in."¹⁴⁸

A second evaluation of custody was conducted by a Dr. Steven Herman, who made a recommendation to have the children live three days with the mother and three days with the father.¹⁴⁹ Admittedly, Dr. Herman made this recommendation at the suggestion of the eleven-year-old daughter.¹⁵⁰ The father supported this plan.¹⁵¹ However, the court rec-

138. *Id.* at *3.

139. *Malefronte*, 2002 WL 31818953, at *3.

140. *Id.* The children later stated a preference for a 50/50 custody split, but the court opted to order an alternative to such an arrangement. *Id.* at *7.

141. *Id.* at *3.

142. *Id.*

143. *Id.*

144. *Id.*; see *infra* note 329 (discussing polarization as an effect of conflict).

145. *Malefronte*, 2002 WL 31818953, at *3.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at *3-4. The validity of Dr. Herman's recommendations were undermined with the court because he spent very little time with the family, testified laboriously from his notes at trial, and failed to prepare a written report for the court, despite three months advance notice. *Id.* at *3. The court also called into question the procedure of Dr. Herman's evaluation of the children. *Id.* at *4.

150. *Malefronte*, 2002 WL 31818953, at *4.

151. *Id.*

ognized that, under this arrangement, “the children would never be in the same home the same day of the week and would be literally forced to live like gypsies dragging their belongings from one house to the other.”¹⁵² Testimony from the mother that “the children had a problem keeping track of their school supplies, sports equipment, clothing and other belongings since the shared parenting arrangement had been ordered” further supported the court’s and the mother’s rejection of Dr. Herman’s recommendation.¹⁵³

Eventually, the court indicated that the father became more and more disdainful of the mother and expressed this disdain in front of the children, which the court found contributed to the polarization of the respective children with the same-sex parent.¹⁵⁴ Even the children described the parents’ behavior with each other as “childish” and “immature.”¹⁵⁵

The court also noted that, even when the children were with the father, the mother continued to make all of the children’s after-school arrangements, such as transportation and activities.¹⁵⁶ Because of the mother’s superiority with the “nuts and bolts of parenting,” the court held that it would be in the best interests of the children to be in the care of their mother during the bulk of the school week.¹⁵⁷

Therefore, the court ordered that:

The Husband and Wife shall each have exclusive occupancy of the marital residence . . . during his or her parenting time with the minor children. They shall never occupy the home at the same time. The Husband and Wife shall be equally responsible for and pay 50% of all liabilities associated with [the] residence including but not limited to the first mortgage, taxes, insurance, routine maintenance costs and utilities. Neither the Husband nor the Wife shall permit waste or damage to the property. The minor children shall remain in the family home regardless of which parent has sole occupancy of the family home. Neither party shall entertain an unrelated guest of the opposite sex overnight while he/she has sole occupancy of the marital home.¹⁵⁸

The court added that “[t]he court has carefully examined the financial resources available to the parties and the need to provide the minor children with stability.”¹⁵⁹

The court determined that the bird nesting arrangement was in the best interests of the children, specifically because it would enable the children

152. *Id.*

153. *Id.*

154. *Id.* at *5; see *infra* note 329 (discussing polarization as an effect of conflict).

155. *Malafronte*, 2002 WL 31818953, at *5.

156. *Id.* at *6. Even under a bird nesting arrangement, the skills, resources, and parenting styles of each parent may be so different and have such different effects on the children that this may also result in instability for the children with respect to parenting.

157. *Id.*

158. *Id.* at *15.

159. *Id.* at *15.

to complete their education in their current schools.¹⁶⁰ The court stated that the bird nesting arrangement would make the shared parenting arrangement, which was insisted on by the father, less burdensome to the children.¹⁶¹ The court also felt that the bird nesting arrangement eliminated the advantage of one parent's sole occupancy of the marital home, which might make the primary occupant's parenting time more attractive to the children than the other's parenting time.¹⁶² This would include the absence of stress on the children to have to remember the location of and transportation for their school supplies and sports equipment, etc.¹⁶³ However, the court placed on the parents the full burden of finding respective secondary housing when not occupying the marital residence.¹⁶⁴

With respect to the home, specifically, the court ordered the home to be owned by the parties, as tenants in common, until sold, which was to be when the youngest child reached the age of eighteen or graduated from high school, whichever occurred last.¹⁶⁵ Because the marital residence could not be sold as a result of the bird nesting arrangement, the court was unable to divide the couple's personal property.¹⁶⁶ Therefore, the parties had to arrive at a mutually satisfactory division of personal property or be subject to mediation.¹⁶⁷ Finally, the court ordered that the parties immediately enroll in "high conflict" counseling to improve the parties' parenting and communication skills.¹⁶⁸

In making its custody award, the court held that neither party, alone, could financially maintain the marital home.¹⁶⁹ The father suggested that he could maintain the home himself if he did not have to pay alimony and only had to pay minimal child support, but the court rejected this proposal.¹⁷⁰ With respect to alimony and child support, the court held that, for the shared parenting agreement to work, it would be vital that the parties have equal resources and income to provide an equivalent home environment for the minor children.¹⁷¹ Thus, the court essentially equalized the

160. *Malafronte*, 2002 WL 31818953, at *16.

161. *Id.*

162. *Id.*; see *supra* text accompanying note 19 (observing children's view of custody transitions as disruptive of routine).

163. *Malafronte*, 2002 WL 31818953, at *16.

164. *Id.*

165. *Id.*

166. *Id.* at *19; see *supra* text accompanying notes 47-50 (discussing the effect of bird nesting on the distribution of property upon divorce).

167. *Malafronte*, 2002 WL 31818953, at *19.

168. *Id.* at *17.

169. *Id.* at *16; see *supra* text accompanying notes 38-39 (discussing the necessity of maintaining three separate residences under a bird nesting arrangement).

170. *Malafronte*, 2002 WL 31818953, at *16. Another reason the court did not want to force the marital home to be sold was that the father had convinced the children that the marital home represented the children's college funds and that, if the home were sold, they would not have sufficient funds to go to college. *Id.* at *4. The court held that this was particularly inappropriate behavior by the father and, as a result, if the home were sold, the children would likely blame their mother, who opposed the 50/50 split in custody, and the relationship between the children and the mother would suffer irreparable harm as a result. *Id.* at *16.

171. *Id.* at *10.

income of the parties by making its award of alimony and child support.¹⁷²

The court noted that, during the custody developments in the case, the father discussed with the children many of the issues in the case, including those regarding the issue of custody.¹⁷³ As part of these disclosures, the father inappropriately told the children that the family home was to be their “college fund,” and that, if the home were sold, it would jeopardize their future schooling.¹⁷⁴ Additionally, there was continued disagreement between the parents over the nature of the custody arrangements.¹⁷⁵ The differences between the parents included an inability or refusal to effectively communicate with each other regarding the care of the children.¹⁷⁶

Over time, the father grew increasingly bitter about the mother and he discussed these feelings openly with the children, which planted in the son seeds of hostility toward the mother.¹⁷⁷ Additionally, the son’s schoolwork suffered.¹⁷⁸ The mother was more involved than the father in responding to this aspect of the son’s adjustment to the divorce.¹⁷⁹ The children admitted that the parents administered oversight of their homework quite differently¹⁸⁰ and that their relationship with the father tended to be built on doing more “fun” things, like going shopping or attending batting cages; they perceived the father as more of a “pal” than as a disciplining parent.¹⁸¹ The court described the father as “the epitome of the ‘Disneyland Dad’ . . . allow[ing] the children essentially to do as they please[d].”¹⁸²

The court recognized the parents as highly conflicted.¹⁸³ The mother testified at trial that the father constantly interfered with her parenting time by arranging other special events for the children during her allotted custody time without telling her; if she objected to the plans and insisted on her rightful custody time, the children naturally viewed her as “the bad guy” for depriving them of participating in these events.¹⁸⁴ The court also observed that the parents were constantly conflicted about fi-

172. *Id.* at *15. The father was to pay the mother \$600.00 per week as alimony, with added stipulations, and \$460.00 per week as child support for the two children. *Id.* at *14-15.

173. *Id.* at *5.

174. *Id.* at *4.

175. *Malafronte*, 2002 WL 31818953, at *4.

176. *Id.* at *5. For example, it was revealed during the trial that the father would often leave the eleven-year-old daughter at home, alone, for hours at a time, or would leave her with unfamiliar neighbors, before first contacting the mother to care for her in his absence. *Id.*

177. *Id.*

178. *Id.*; see *infra* note 231 (discussing the effect of divorce on academic performance).

179. *Malafronte*, 2002 WL 31818953, at *6.

180. *Id.* at *5.

181. *Id.* at *5; see *infra* note 310 (discussing typical dynamics of father visitation).

182. *Malafronte*, 2002 WL 31818953, at *6.

183. *Id.*

184. *Id.*

nances.¹⁸⁵ The court noted that the father spent approximately \$8,000 on inventory for a recording business, but at the same time contended that he could not afford necessary orthodontic work for his daughter.¹⁸⁶

Based on all of the evidence, the court rejected a 50/50 custody split.¹⁸⁷ The court "refuse[d] to count the days, hours or minutes in fashioning a parenting plan."¹⁸⁸ The court held that "insistence on surgical precision in dividing the children's school days [was] not in the best interest of the . . . children."¹⁸⁹ Notwithstanding this, the court still ordered a joint custody arrangement and still implemented a bird nesting plan.¹⁹⁰ As is demonstrated below, however, an order for bird nesting under the cir-

185. *Id.* at *6-7.

186. *Id.* at *7.

187. *Malafrente*, 2002 WL 31818953, at *9.

188. *Id.*

189. *Id.*

190. Specifically, the court ordered that:

The [mother] and [father] shall have joint legal and physical custody of the . . . children.

3. PARENTING ACCESS:

The parties shall have the following parenting time and access to the . . . children to include the following:

A. 5 WEEK SCHEDULE FOR SCHOOL YEAR:

The parenting plan was designed to have the children with their mother during the week days during the school year.

12. MARITAL RESIDENCE:

The [father] and [the mother] shall each have exclusive occupancy of the marital residence . . . during his or her parenting time with the . . . children. They shall never occupy the home at the same time. [They] shall be equally responsible for and pay 50% of all liabilities associated with [the] residence including but not limited to the first mortgage, taxes, insurance, routine maintenance costs and utilities. Neither . . . shall permit waste or damage to the property. The . . . children shall remain in the family home regardless of which parent has sole occupancy of the family home. Neither party shall entertain an unrelated guest of the opposite sex overnight while he/she has sole occupancy of the marital home. The court has carefully examined the financial resources available to the parties and the need to provide the minor children with stability.

It is also the court's opinion that if the family home were to be sold the minor children would suffer irreparable harm as a result of the husband telling the children that the home represents their college fund and if sold they would not have the funds to attend college. As a direct result of the husband's particularly inappropriate behavior, it is the court's opinion that the minor children would blame their mother, and the damage to that relationship would be insurmountable.

The court specifically finds that the order for "bird nesting" is in the best interest of the minor children, as it will enable them to complete their education in their current schools. Additionally, it will make the shared parenting arrangement, insisted on by the [father], less burdensome to the innocent parties in this matter, the . . . children. . . . The children will not be required to remember the location of, or transport, their sports equipment, computer games, clothing or homework. Nor will either parent have the advantage of sole occupancy of the family home, making their parenting time with the children more attractive than the other.

cumstances described by the court in this case is completely contradictory in every respect to the conclusions reached by the most recent social science research regarding the effects of divorce on children, insofar as they correspond, as argued here, to the impropriety of bird nesting arrangements. Simply put, the *Malafronte* case is the antithesis for successful bird nesting.

Accordingly, I contacted the attorney for the mother in *Malafronte* to inquire on the status of the bird nesting arrangement, which the court ordered in its opinion of November 21, 2002.¹⁹¹ Counsel for the mother disclosed that the bird nesting arrangement was “a disaster,” both financially and with respect to the children.¹⁹² Immediately after the court’s November 2002 order, the parents experienced conflict with respect to the bird nesting arrangement and returned to court in December 2002.¹⁹³ The court again ordered the parents to facilitate the bird nesting arrangement.¹⁹⁴ Counsel for the mother indicated (consistent with the court’s own opinion) that the court was insistent on the bird nesting arrangement seemingly because of its primary concern regarding the effect of the father’s inappropriate suggestion to the children that if the house were sold, it would affect their future education.¹⁹⁵ However, the conflict between the parents over the arrangement escalated and negatively affected the children.¹⁹⁶ By February 2003, the court vacated the bird nesting arrangement, and the house was sold.¹⁹⁷

In light of the obvious disadvantages of bird nesting arrangements that have already been discussed and which were clearly relevant in

The . . . home shall be owned by the parties, as tenants in common . . . While occupying the house, they shall also be responsible for paying 50% for all minor repairs to the property . . .

. . .
The parties shall immediately enroll in [a] . . . high conflict clinic . . . or a similar program, which shall be selected by the Guardian Ad Litem, within 30 days . . . for a minimum of 15 sessions . . . so as to improve the parties’ parenting, communication and the lives of their children. . . . The [father] shall also undertake additional counseling for himself.

Id. at *10-17.

191. In June 2003, I also attempted to contact counsel for the father and the Guardian Ad Litem for the children. Correspondence with all counsel specifically acknowledged any possible issues of privilege or confidentiality and specified that the purpose of any future discussion would not be to disclose any additional details of the case beyond those disclosed in the court’s opinion but, rather, would simply be to confirm the success or failure of the bird nesting arrangement. Counsel for the father did not respond to my initial correspondence. The Guardian Ad Litem responded via e-mail, without substantive discussion, and invited future contact to discuss the scope of appropriate disclosure about the case and to discuss the status of the bird nesting arrangement. Because counsel for the mother contacted me after my initial correspondence and confirmed that the bird nesting arrangement had failed and had been quickly terminated, there was no need to pursue further contact with counsel for the father or the Guardian Ad Litem.

192. Telephone interview with Diane M. Andersen, counsel for Judith A. Malafronte (June 1999).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

Malafronte, and in light of the social science reasons set out below, this article suggests that the unfortunate results in *Malafronte* were quite predictable and could have been avoided.

C. BIRD NESTING IS AN UNNECESSARY RESPONSE TO DIVORCE

There are two main reasons why bird nesting is not necessary to promote children's positive developmental adjustments after divorce. First, children are not as negatively affected by divorce as has been generally thought. Second, joint custody, alone, is sufficient to promote positive developmental adjustment in children under circumstances in which bird nesting would otherwise be considered.

1. *Children Are Not as Negatively Affected by Divorce as Generally Thought*

Research suggests that children are not as negatively affected by divorce as generally thought. First, social science research indicates that the statistical significance of long-term developmental differences between divorced children and children of intact families is decreasing, particularly in the recent trend of more complex and sophisticated research regarding the effects of divorce on children.¹⁹⁸ Second, children are not as negatively affected by post-divorce variables. Instead, social science now suggests that the negative effects of divorce stem from pre-divorce parental relationship variables; the negative effects of divorce are more predictive of post-divorce adjustment problems than they are the cause of them.¹⁹⁹ Third, children are not as negatively affected by the residential insecurity of post-divorce joint custody arrangements as was once thought.²⁰⁰ Accordingly, because bird nesting arrangements are employed as a specific response to this effect, bird nesting arrangements may be ineffectual in promoting better-adjusted children after divorce.

- a. Compared with that of children of intact families, the long-term development of divorced children is comparatively normal.

Historically, studies dealing with the effects of divorce focused on individual variables, such as age, gender, academic performance, the parent-child relationship, etc. Bird nesting, as an example, is a response to the isolated variable of residential instability, which is presumed to manifest in negative child adjustment. However, the most recent social science research dealing with the effects of divorce on children concludes that the effects of divorce on children manifest through numerous and complex variables, not simply isolated ones.²⁰¹ Recent multi-variable studies sug-

198. See Kelly, *A Decade Review*, *supra* note 2, at 963-72 (summarizing the research in this area over the past decade).

199. See *id.*

200. See, e.g., Steinman, *supra* note 5, at 413-14.

201. See, e.g., Thompson, *supra* note 2, at 34-39.

gest that children's adjustment is affected by the interrelationship of many complex variables and that divorced children have proven to be significantly comparable in developmental achievement to non-divorced children.²⁰² Thus, responses to isolated variables of divorce, such as bird nesting as a response to residential instability, are most likely ineffectual in promoting better-adjusted children after divorce.

Despite advancements in the field, however, one thing is consistent in all of the studies: certain aspects of the divorce clearly increase the adjustment risks for many children²⁰³ and they affect children in various ways, according to many complex variables.²⁰⁴ Conclusions about the effects of divorce on children continue to vary.²⁰⁵ For example, some studies conclude that divorce is more difficult on boys than on girls.²⁰⁶ Others report that it is more difficult on girls than on boys.²⁰⁷ Some studies support joint custody as the most beneficial of custody arrangements, while others disagree.²⁰⁸ It is evident that even research that focuses on the complex dynamics of the effects of the pre-divorce parental relationship on the children is limited,²⁰⁹ and many other areas of research are yet to be de-

202. See, e.g., Kelly, *A Decade Review*, *supra* note 2, at 966.

203. *Id.* at 966-68.

204. There are multiple factors that contribute to both the short-term and long-term effects of divorce on children. See Thompson, *supra* note 2, at 34-39.

205. See Kelly, *A Decade Review*, *supra* note 2, at 963-64. Compare E. Vandewater & J. Lansford, *Influences of Family Structure and Parental Conflict on Children's Well-Being*, 47 FAM. RELAT. 323, 323-30 (1998) (concluding that there are no gender differences with respect to how divorce affects children), with E.M. HETHERINGTON, COPING WITH DIVORCE, SINGLE PARENTING, AND REMARRIAGE: A RISK AND RESILIENCY PERSPECTIVE (E.M. Hetherington ed., 1999) (concluding that there are gender differences resulting from the effects of divorce).

206. L. Franke, N.Y. TIMES MAGAZINE, May 22, 1983, at 40-57, *cited in* Lebowitz, *supra* note 1, at 695. Previous research shows that boys' post-divorce adjustments tends to be more problematic than that of girls, particularly in new single-mother homes. D.S. DeGarmo et al., *Parenting of Divorced Mothers as a Link Between Social Status and Boys' Academic Outcomes: Unpacking the Effects of Socioeconomic Status*, 70 CHILD DEV. 1231, 1231-45 (1999).

207. N. Kelter, USA TODAY, Dec. 5, 1983 at 4D, *cited in* Lebowitz, *supra* note 1, at 695.

208. See discussion *infra* Part II.C.2 (discussing the advantages and disadvantages of joint custody).

209. Studies about the effects of divorce on children have increased in number and scope since they began to become popular in the 1980s, but they are still woefully inadequate with respect to the specific benefits and harms associated with the various forms of custody arrangements that are available as options. Some suggest that early research was limited because samples were small (divorce was less commonplace and custody arrangements were not as dynamic) and because researchers failed to consider the variables of age, sex, parental behavior, and family environment, among others, with respect to how these affected children after the divorce. See Gunnoe & Braver, *supra* note 1, at 26-28. Findings from comparisons of joint and sole custody families that do not control for other pre-divorce variables, like demographic and family dynamic differences, which may predispose families to opt for or be awarded joint custody, are of limited applicability to general populations because these differences may be attributable to any combination of variables that were not accounted for. See *id.* at 25. Group design that accounts for the effect of individual variables is limited. Instead, new research shows "partial" pre-existing differences that may serve as predisposition factors. See *id.* at 27-28. Gunnoe and Braver reported on four studies that included variables likely to mediate the effects of custody, which included: post-divorce financial factors, post-divorce parental adjustment, post-divorce parental cooperation, and post-divorce father-child visitation. See *id.* These four

veloped. Although there are no available studies that address the effects of bird nesting, there is one early study that specifically assesses the effects of relocating from a primary residence to a secondary residence in a typical divorce custody arrangement, *per se*.²¹⁰ Even this study suggests that, with respect to the instability of relocating from a primary residence to a secondary residence, although there are clearly aspects of such an arrangement that negatively affect the child, children experiencing these arrangements are overall quite resilient and are not as negatively affected long-term as might otherwise be supposed.²¹¹ Other more recent studies support the conclusion that there is less of a difference between divorced and never-divorced children than previously thought.²¹² Recent studies have shown that the majority of divorced children fall within the average range of adjustment on standardized measures of both psychological and cognitive functioning.²¹³ Although the differences may be statistically significant in some studies, they are extremely small.²¹⁴

One reason for this shift in thinking about the effects of divorce on children is the advancement and sophistication of more recent studies, which mediate for complex variables.²¹⁵ Another reason may be that divorce is more accepted now and, as a result, there is a more open support system for divorced children, which has helped children's adjustment.²¹⁶ Additionally, and particularly with respect to children's adjustment to parental conflict, there has been an increased focus not just on the risk of stress and adjustment problems in children, but also on supportive coping.²¹⁷ Recent studies have shown that specific factors may "buffer" the adjustment risks experienced by divorced children.²¹⁸ The most important of these include a good relationship with at least one parent or care giver, parental warmth, the support of siblings, and, for adolescents, having good self-esteem and peer support.²¹⁹ Researchers agree that when custodial parents provide appropriate emotional support, adequately monitor children's activities, discipline authoritatively, and maintain age-appropriate expectations of children, adolescents are better adjusted compared with divorced children experiencing less appropriate parenting.²²⁰ Studies such as these, which now mediate for broader sample

studies showed minimal or no association between custody (sole or joint) and parenting, or child adjustment; it could not be concluded whether there really were associations that were not revealed because of over-partialing. *See id.*

210. *See* Steinman, *supra* note 5, at 403-14.

211. *Id.* at 413-14; *see also* Kelly, *A Decade Review*, *supra* note 2, at 968.

212. *See, e.g.,* Kelly, *A Decade Review*, *supra* note 2, at 966-68; Bryner, *supra* note 1, at 205.

213. Whiteside, *supra* note 20, at 6.

214. Bryner, *supra* note 1, at 205.

215. *See supra* note 208 (discussing mediation in various studies).

216. *See* Bryner, *supra* note 1, at 205.

217. *See* Whiteside & Becker, *supra* note 1, at 21.

218. *See* Kelly, *A Decade Review*, *supra* note 2, at 964-65.

219. *See id.* Parental warmth significantly diminished the negative effects of high conflict divorce for girls, but it did not have the same significant effect for boys. Instead, for boys, it had the same positive outcome, independent of marital conflict levels. *Id.* at 965.

220. *See* Kelly, *A Decade Review*, *supra* note 2, at 968.

comparisons and multiple variables, increasingly show less difference between divorced and never-divorced children.²²¹ Future research on the effects of divorce on children may suggest that, with the cessation of family conflict and appropriate buffering, divorce, itself, could be a positive variable for appropriate child adjustment.²²²

- b. Divorced children are not as negatively affected by post-divorce variables.

In considering the effects of divorce and the correlation of the many divorce variables experienced by children and parents, more recent and sophisticated studies that have addressed the dynamics of the pre-divorce parental relationship suggest that a child's post-divorce development is associated less with the direct, causal consequences of the crisis of divorce and the transition to a new, post-divorce family structure than with the actual pre-divorce family dynamics, especially those involving the relationship of the parents.²²³ That is to say that the pre-divorce parental relationship is most predictive of children's post-divorce adjustments and that children's well-being is premised on the continuation or cessation of conflict within the pre-divorce parental relationship. Therefore, with respect to post-divorce adjustment, children are not as negatively affected by the post-divorce variables that bird nesting would otherwise be employed to counteract.

It is clear that divorce has negative effects on both divorced children²²⁴ and on divorced parents.²²⁵ Historically, divorce was not as commonplace as it is today, and couples tended to stay married despite high levels of conflict, especially "for the sake of the children." Thus, when divorce did occur, research on the effects of divorce focused on the divorcing couple. In the 1980s, research began to shift to a focus on the divorced children. Until that time, divorce was viewed as a family crisis that oc-

221. See, e.g., Bryner, *supra* note 1, at 205.

222. See Gilman et al., *supra* note 1, at 939-46; see also P.R. Amato, *Children's Adjustment to Divorce: Theories, Hypotheses, and Empirical Support*, 55 J. MARRIAGE FAM. 23 (1993).

223. In the past ten to fifteen years, there have been an increase in studies assessing the complex variables within the marriage that affect the child's adjustment to the divorce, including marital conflict and related parenting behaviors. See Kelly, *A Decade Review*, *supra* note 2, at 963. Some report that the comparative effects between divorced and never-divorced children are relatively modest, have become smaller as marital transition becomes more common, and are considerably reduced when children variables preceding marital transition are controlled. *Id.* at 966-68. Others note that 25% of divorced children and only 10% of non-divorced children have these problems. See Hetherington et al., *supra* note 1, at 169-70.

224. Some commentators take issue with the very term "children of divorce," asserting that the phrase, itself, carries with it subtle and negative connotations of an association with difficulties and failure. See Lebowitz, *supra* note 1, at 697-98. Some suggest that the impact of the connotations within the term could be as significant as the impact of the divorce, itself. See *id.* The term "divorced children" has become the accepted shorthand term in the marital and divorce research literature. See Kelly, *A Decade Review*, *supra* note 2, at 964.

225. Most commonly, divorce involves negative emotion and disruption of everyday structures and routines for both children and parents. See Whiteside, *supra* note 20, at 3-4.

curred at a specific point in time (that is, at the time of separation) and that created a wide variety of negative consequences and adjustment problems for the child that originated from the divorce.

However, Judith S. Wallerstein, one of the leading psychologists studying the family dynamics of divorce, proposed the theory that, for a child, divorce was not an isolated point in time at which crisis occurred, problems set in, and adjustments manifested. Rather, divorce created a continuum of adjustments that the child experienced over time.²²⁶ Another leading expert in the field, E. Marvis Hetherington, also advocates this theory and has contributed much to this area of study. Although Wallerstein and Hetherington both agree that divorce and the child's developmental adjustments to the effects of the divorce are a process, Wallerstein believes that divorced children will necessarily experience disordered development.²²⁷ Hetherington, on the other hand, believes that the majority of divorced children are adjusting reasonably well six years after divorce.²²⁸ Hetherington supports the view that many eventually develop into reasonably competent individuals functioning within the normal range of adjustment and that children are not permanently

226. See JUDITH WALLERSTEIN, *THE UNEXPECTED LEGACY OF DIVORCE* (2000); Bryner, *supra* note 1, at 203 (referring to a 1989 study by Wallerstein and Blakeslee); see also George J. Cohen & Committee on Psychosocial Aspects of Child and Family Health, *Helping Children and Families Deal with Divorce and Separation*, 110 *PEDIATRICS* 1019, 1019-23 (2002) [hereinafter Cohen & Committee]. Other studies reveal that up to half of all children show a symptomatic response during the first year after their parents' divorce. See *id.* Continuing parental discord is a risk factor for this effect to be ongoing. See *id.* Separate studies suggest that significant parental conflicts can continue from pre-separation to two or three years after divorce. See Whiteside, *supra* note 20, at 4 (citing E.E. MACCOBY & R.H. MNOOKIN, *DIVIDING THE CHILD: DILEMMAS OF CUSTODY* (Harvard U. Press, 1992); J. M. Tschann et al., *Resources, Stressors, and Attachment as Predictors of Adult Adjustment After Divorce: A Longitudinal Study*, 51 *J. MARRIAGE & FAM.* 1033, 1033-46 (1989)). "The first two years following separation are a time of personal crisis and family reorganization, when parents experience a great deal of psychological and economic stress and many children show symptoms of regression. Conflict between parents is highest at this time." Whiteside, *supra* note 20, at 6. It is during the two years following separation that the family learns to stabilize by decreasing hostility and increasing cooperation. *Id.*

After the first two years of separation, when tension, hostility, and disagreement generally begin to subside, parents are better able to create more identifiable boundaries for themselves over time. See *id.* at 13. Parents who are able to stabilize without these effects during the first two years are a minority. See *id.* Comparatively, couples who are disengaged immediately after the separation show a better chance of becoming cooperative over time than those who were conflicted from the outset. *Id.* at 13-14. There is evidence to support the proposition that the timing of an intervention may be critical because the effectiveness of interventions are related to a couple's readiness to move toward cooperation. If a couple is prematurely forced to communicate cooperatively, it may lead to increased conflict. *Id.* at 15. More research is needed to determine which families are best suited to develop a timely and constructive parenting environment for the children. *Id.* The strongest negative effects of a father's departure on children's adjustment occur in the first one to two years after separation, particularly for boys. See Kelly, *Answers and Questions*, *supra* note 2, at 373-85.

227. See Glenn H. Miller, *For Better or For Worse: Divorce Reconsidered*, 160 *AM. J. PSYCHIATRY* 601-02 (2003) (book review of Hetherington and Kelly's book by same title; review compares and contrasts the works of Hetherington and Wallerstein).

228. *Id.*

blighted by their parents' marital transition.²²⁹ She concludes that the effects of divorce on parents and children are complex, but that divorced children experience problems that are not significantly different than those of children from intact families.²³⁰ There are recent empirical studies to support Hetherington's view.²³¹ Although Wallerstein and Hetherington differ on the long-term effects of divorce on the child, their individual work in this area has led to significant developments in the way researchers study the effects of divorce on children.

Despite even Hetherington's positive long-term outlook for divorced children, however, she recognizes that divorced children exhibit more problem behaviors and lower psychological well-being than non-divorced children.²³² And there is little agreement about the extent, severity, and duration of these problems, with some disagreement about how the interplay of variables undermines or enhances the well-being of children.²³³ However, most researchers agree that children are less affected by post-divorce variables than by pre-divorce variables, particularly the conflict associated with the pre-divorce parental relationship.²³⁴

Almost all studies of divorced children confirm that divorced children experience negative reactions to divorce and subsequent adjustment problems. Typically, these reactions involve psychological problems,²³⁵ developmental delays in academic performance,²³⁶ behavioral reactions,

229. *Id.*

230. *See id.*

231. *See Kelly, A Decade Review, supra* note 2, at 966-68; Bryner, *supra* note 1, at 205.

232. *See Hetherington et al., supra* note 1, at 168.

233. *Id.*

234. *E.g., Kelly, A Decade Review, supra* note 2, at 963.

235. For example, divorced children are three times more likely to receive psychological treatment than never-divorced children. Kelly, *A Decade Review, supra* note 2, at 967. When parents divorce, and children are confronted with changes in the home, extended family, school, peers, financial status, and custodial schedules, the children often categorize these changes as loss—much like that associated with a death. *See Cohen, supra* note 225, at 1019-23. Guilt, anger, sadness, and perceived loss of love are common reactions to these changes. *Id.* Feelings of anger and aggression may be stimulated because of the anger at being abandoned or rejected by the parent who is no longer in the home, which is of particular import because children learn this hostility as a means of problem solving. *See Thompson, supra* note 2, at 36 (citing N. Kalter, *Long-Term Effects of Divorce on Children: A Developmental Vulnerability Model*, 57 AM. J. ORTHOPSYCHIATRY, 587-600 (1987)).

Parental divorce in early childhood was associated with higher lifetime risk of depression. *See Gilman et al., supra* note 1, at 939-46. The effects were more pronounced when accompanied by high levels of parental conflict; however, research on depressive effects may be in doubt because it is unclear whether the risk for subsequent depression is caused by the disruption of the divorce, itself, or from the attendant parental conflict. *See id.*

236. Divorced children exhibit lower academic achievement, with three of four children showing a deterioration from their previous school performance. *See Bryner, supra* note 1, at 205; *see also Cohen, supra* note 225, at 1019-23. This result is more so with children who experience divorce at a younger age. *See Bryner, supra* note 1, at 205. Children living in custodial arrangements with the parent of the same gender demonstrate less problems because they rely on the parent of similar gender for certain skills and development. *See id.*; Thompson, *supra* note 2, at 34.

Children of divorced parents have poorer school attendance, watch more television, do less homework, and have less parental supervision of their school work than children of non-divorced parents. *See Kelly, A Decade Review, supra* note 2, at 967. This is primarily attributable to family disruption. *Id.* (citing S.S. McLanahan, *Father Absence and Chil-*

including antisocial behavior,²³⁷ socioeconomic difficulties,²³⁸ stressed re-

dren's Welfare, in *COPING WITH DIVORCE, SINGLE PARENTING, AND REMARRIAGE: A RISK AND RESILIENCY PERSPECTIVE* (E.M. Hetherington ed., 1999)).

Although divorce has been associated with lower academic performance and test scores, recent studies have shown that the differences between children of divorced parents and children of never-divorced parents is minimal, especially when socio-economic factors are considered. *Id.* at 966-68; *see also infra* note 236. The school drop-out rate for children of divorced parents, particularly for Whites, compared to African Americans and Hispanics, is more than twice that of children of never-divorced parents. *Id.* at 967. Children of divorced parents, generally, are less likely to earn a college degree, partly because parental aspirations for educational attainment increases in never-divorced families and decreases in divorced families. *Id.* This also may be accounted for by reduced resources and decreased parental monitoring. *Id.*

237. Although divorce has been associated with children's psychological difficulties and internalizing problems, divorced children are primarily at risk for externalizing problems. *See Wolchik et al., supra* note 1, at 1874-81. For example, children with divorced parents are twice as likely to face teen pregnancy than children with never-divorced parents or children who have lost a parent to death. *See Kelly, A Decade Review, supra* note 2, at 967; *see also Wolchik et al., supra* note 1, at 1874-81.

Children with divorced parents tend to exhibit more aggressive and impulsive behavior. *See Bryner, supra* note 1, at 204-05. Older school-age children are typically angrier, more hostile, and more embarrassed about the divorce. *Id.* at 206. They also participate in more delinquent behavior, including stealing, lying, and manipulation. *Id.*

Children with divorced parents are shown to have higher levels of drug use. *See Wolchik et al., supra* note 1, at 1874-81. Substance abuse by boys in disrupted families was significantly greater than substance abuse by boys in intact families and girls in disrupted families. *See Thompson, supra* note 2, at 36 (citing William J. Doherty & Richard H. Needle, *Psychological Adjustment and Substance Use Among Adolescents Before and After a Parental Divorce*, 62 *CHILD DEV.* 328-37 (1991)); *see also id.* at 37 (a significant relationship exists between marital disruption and adolescent reports of antisocial behaviors such as cigarette smoking, marijuana smoking, alcohol and drugs, and appearances in juvenile court) (citing A. K. Frost and B. Pakiz, *The Effects of Marital Disruption on Adolescents: Time As a Dynamic*, 60 *AM. J. ORTHOPSYCHIATRY* 544-55 (1990)). Increased likelihood of alcohol, cigarettes, and marijuana use may be attributed to increased reliance on friends and peer groups that use substances, less effective coping skills, and impaired parental monitoring and parenting practices. *See Kelly, A Decade Review, supra* note 2, at 967. Also, divorced parents use more drugs and alcohol than do parents of intact families. *Id.* Children with divorced parents also tend to be less socially responsible and competent and demonstrate lower self esteem. *See Hetherington et al., supra* note 1, at 169.

The socially significant negative effects of divorce, such as conduct disorder, school drop-out, substance use, high-risk sexual behaviors, and depression, are rare during childhood and tend to manifest in later developmental stages. *See Wolchik et al., supra* note 1, at 1874-81. Despite the negative behavioral responses, children with divorced parents also have shown less stereotyped sex behavior, greater maturity, and greater independence. *See Bryner, supra* note 1, at 205. Results such as these supplement the theory that divorce not only promotes resilience in children, but may be a positive transition when the divorce results in decreased family conflict. *See Gilman et al., supra* note 1, at 939-46; *see also Kelly, A Decade Review, supra* note 2, at 968.

238. *See Hetherington et al., supra* note 1, at 168 (suggesting that marital transition triggers a series of negative social and economic changes, stresses, and practical problems for children and adults, including socioeconomic disadvantage); *see also DeGarmo, supra* note 206, at 24-25 (recognizing that one factor commonly associated with poorer post-divorce outcomes in both children and the remaining caretaker is the drastic drop in socioeconomic status and family resources as a result of divorce). The economic problems of divorced households account for as much as half of the adjustment problems seen in divorced children. *See Kelly, A Decade Review, supra* note 2, at 967. Children often experience a substantial decline in standard of living in the custodial home after divorce. *Id.* This leads to greater economic instability and less access to better schools and neighborhoods than never-divorced children. *Id.* Attributing to this is the need, after divorce, to maintain two households, with often inadequate child support and weak enforcement poli-

lationships,²³⁹ and even physical reactions.²⁴⁰ Children experience these reactions differently throughout their developmental stages, including in-

cies. *See id.* Two-thirds of teenagers experiencing divorce are cut-off, financially, when they turn eighteen. *See Bryner, supra* note 1, at 206.

In 1992, 14% of White and nearly 50% of African American households were below the poverty level after divorce, which was found to be more a consequence of the divorce than a cause of the divorce. *See Kelly, A Decade Review, supra* note 2, at 967. Both African American and White children with divorced parents are less likely to be employed as young adults, although the rate of unemployment is higher for African American children with divorced parents. *See id.* Low socioeconomic attainment extends across diverse ethnic groups, but the effect has proven to be stronger for females than for males. *See Hetherington et al., supra* note 1, at 169.

Children in single-parent homes with economic stresses were more susceptible to depression than children in two-parent homes with economic stresses. Thompson, *supra* note 2, at 35. Children with divorced parents have more difficulty when multiple stresses are involved. *Id.*

However, because, arguably, the long-term outcome of divorce for the majority of children is resiliency rather than dysfunction, the lingering effects of divorce in adulthood are more in the realm of educational attainment, which may affect the occupation and socioeconomic security of those children with divorced parents who drop out of school and enter early marriages and parenthood. *See Kelly, A Decade Review, supra* note 2, at 968. The consequences of pregnancy outside of marriage, earlier marriages (which is also a risk factor for later divorce), poorer marital relationships, increased propensity to divorce, and poorer socioeconomic status are statistically higher for young adults whose parents divorced during childhood, compared with children whose parents did not divorce. *See id.* at 967. Socioeconomic status of divorced children is also associated closely with academic performance, which, in itself, is equally affected by divorce. *See id.*

The socioeconomic status of the parents facilitating the divorce is equally significant in this respect. One study demonstrated that socioeconomic status was associated with better parenting, which, in turn, indirectly affected achievement through home skill-building activities and school behavior. *See DeGarmo et al., supra* note 206, at 24-25. This effect was associated directly with maternal education, but not maternal occupation or income. *See id.* In and of itself, socioeconomic status is likely to be less explanatory than has been previously assumed. *Id.* Instead, socioeconomic status might serve as a marker for more causal factors, such as effective parenting practices, which appear to be the best predictors of academic outcomes. *Id.* Given these findings, the role of family economic support might not be expected to directly benefit academic outcomes.

239. Divorce may limit or delay children's capacity for intimacy and commitment as young adults. *See Cohen & Committee, supra* note 226, at 1019-23. Divorced children tend to have more problematic relationships with parents and siblings, and have more trouble forming their own marital relationships. *See Bryner, supra* note 1, at 204-05. Adult children with divorced parents show less affection for their parents, have less contact with them, and engage in fewer inter-generational exchanges of assistance, compared with adult children whose parents did not divorce. *See Kelly, A Decade Review, supra* note 2, at 967. This is particularly so for the non-custodial parent. *Id.*

In their own marriages, children with divorced parents have greater instability, which results, in part, from the presence of risk factors for divorce, including early sexual activity, adolescent childbearing and marriage, and cohabitation. *See Hetherington et al., supra* note 1, at 169. Additionally, however, marital interactions for adult divorced children tend to include more reciprocated, escalating, negative exchanges, including denial, belligerence, criticism, and contempt, which, in turn, leads to less effective problem solving. *Id.* Adult women who experienced their parents' divorce are 70% more likely to divorce in the first five years of marriage than children of non-divorced parents. *Id.*

240. Children with divorced parents have more illnesses, medical problems, and physician visits than non-divorced children. *See Kelly, A Decade Review, supra* note 2, at 967. Sustained stress in children following divorce pre-disposes children to increased illness resulting in absences from school and lack of participation in school activities, which can exacerbate feelings of social isolation. *See Thompson, supra* note 2, at 36 (citing S.E. Delaney, *Divorce Mediation and Children's Adjustment to Parental Divorce*, 21 *PEDIATRIC NURSING* 434-37 (1995)).

fancy,²⁴¹ early childhood,²⁴² adolescence (teenage years),²⁴³ and even

241. For toddlers and infants, a significant risk factor of divorce is decreased contact with the noncustodial parent. *See* Bryner, *supra* note 1, at 205. One study showed that one-fifth of the children living with their mothers after divorce or separation had not seen their fathers at all in the previous year. *Id.* at 204. Wallerstein found that three of four children felt rejected by the noncustodial parent ten years after divorce. *Id.* Infant children benefit from frequent, short visits with the noncustodial parents that are designed not to disrupt the stable daily routine and secure attachment to the custodial parent. *Id.* at 205. But there is often the concern that non-custodial parents (usually fathers) may lack the daily experience to appropriately care for infants. *See id.* If noncustodial visits are increased, however, infants and toddlers may be at equal risk of insecure attachment with the divorced primary care giver. *See* Whiteside & Becker, *supra* note 1, at 5-6 ("When sensitive care giving is disrupted for infants, they become difficult to soothe, eating and sleeping patterns are disrupted, and delays in language development and gross-motor development may become evident.").

Families with young children experience the realities of divorce more harshly than families with older children, likely because of increased demographic, social, and economic changes. *Id.* at 5. However, studies of young children in highly cooperative joint custody arrangements have reported children doing very well. *Id.* at 6. "Positive, supportive cooperative co-parenting behaviors are part of a pattern associated with positive child coping. Negative, hostile behaviors are part of a problematic, destructive pattern that leaves children at risk." *Id.* at 21.

242. Preschoolers generally understand that their parents no longer live together. *See* Bryner, *supra* note 1, at 205. Feeling abandoned by the parent who leaves the home, however, preschoolers most commonly react with fear of further abandonment by the custodial parent. *Id.* Therefore, they act up, cling, demonstrate heightened sexual and erotic play, regress to temper tantrums, require security objects, and resort to bed-wetting and causing scenes at daycare. *Id.*

Young school-age children grapple more with conflicting loyalties. *Id.* They rely on gifts as signs of love and, therefore, play on the guilt of the noncustodial parent. *Id.* They also fantasize more about parent reunification. *Id.* It is suggested that the common practice of forgetting things at respective houses during custody switches may be a sign of an attempt to reunite the parents by forcing parental interaction. *See id.*

243. Hetherington reports that adolescents and young adults experiencing divorce tend to have problems with normative developmental tasks, such as attaining intimate relationships and increasing social and economic autonomy. Hetherington et al., *supra* note 1, at 169. They are also more likely to drop out of school, be unemployed, become sexually active at an earlier age, and to have children out of wedlock. *Id.* Young adults of divorce are also more likely to be involved in delinquent activities and substance abuse and to associate with antisocial peers. *Id.* Reactions in teenagers that warrant considerable attention include attempted suicide, substance abuse, and antisocial behavior. Lebowitz, *supra* note 1, at 697. Most reactions in teenagers, however, are less drastic. *Id.* These commonly include changes in school performance, changes in peer relations, changes in eating patterns, moodiness, restlessness, and physical complaints. *Id.*

Teenage adolescents require a stable home base, even if they are dissatisfied with the home environment and the parents in it. *See* Bryner, *supra* note 1, at 206. Because teenagers have to deal with the inherent problems of adolescence, they feel they have no time to attend to the daily disruptions of their parents' divorce. *Id.* Teenagers do not need as much visitation time. *Id.* One common phenomenon is that teenagers may want to switch homes, and then switch back, more than once during this period. *Id.* Switching back and forth can be difficult when there are definitive custody and support arrangements in place. *See id.*

Impulsive risk-taking is also common during the teenage years. *Id.* Although teenagers cognitively understand the consequences of their parents' divorce, they are still emotionally divided. *Id.* They are sad, angry, protective, depressed, and anxious. *Id.* They experience more school absences and illnesses and are more likely to abuse substances, break the law, or appear in juvenile court. *Id.*

Research shows that the emotional impact of divorce on college students is comparable to the impact of divorce on younger children. *See* Lebowitz, *supra* note 1, at 697. Studies show that college students who live far away from parents who are divorcing have greater

adulthood.²⁴⁴

Although pre-divorce behavior cannot always predict post-divorce behavior,²⁴⁵ some research reveals that many behavioral and achievement problems experienced by divorced children are clearly detectable in the years prior to parental separation.²⁴⁶ Many newer studies support the theory that children's post-divorce adjustment is associated with pre-divorce parental conduct, especially with respect to parental conflict.²⁴⁷

Parental conflict has been shown to stimulate anger and anxiety in children because, by fighting, parents are role modeling aggressive behavior as a way of resolving conflict.²⁴⁸ Research further suggests that the fre-

anxiety, depression, and hostility than college students who live closer to the divorcing parents. *See id.* College studies do show, however, that the feeling of loss of family is particularly heightened in college students when the family home in which they grew up is sold. *See id.*

244. As adults, children with divorced parents confront more adjustment problems, are less satisfied with their lives, reach lower socioeconomic attainment, and are more likely to be on welfare. *See* Hetherington et al., *supra* note 1, at 169. Mental health problems, especially, persist into adulthood. *See* Wolchik et al., *supra* note 1, at 1874-81. In one study of adult depression in children with divorced parents (although not representative of the entire United States population), respondents who experienced parental divorce by age seven were at twice the risk of adult depression than those whose families remained intact during their childhood. *See* Gilman et al., *supra* note 1, at 939-46. Adult children with divorced parents also are less likely to attend college and are more likely to be unemployed. *See* Bryner, *supra* note 1, at 206.

245. Gunnoe & Braver, *supra* note 1, at 37.

246. *See* Bryner, *supra* note 1, at 207 (finding that one-half of the behavioral, academic, and achievement problems of school-age boys are detectable in the four years before parents separate); *see also* Kelly, *A Decade Review*, *supra* note 2, at 963 (finding that many of the psychological symptoms seen in divorced children can be accounted for in the years before divorce). There is ample evidence suggesting that a child's individual risk may be associated with poor adjustment to inept parenting and dysfunctional family relationships prior to the separation or divorce. *See* Hetherington et al., *supra* note 1, at 170. However, researchers cannot discount the theory that one of the risk factors leading to the separation or divorce may be the result of dealing with a difficult child. *See id.* at 170-71; *see also* Whiteside & Becker, *supra* note 1, at 21-22 (suggesting that child variables have a strong influence on parental variables; i.e., if the child is difficult, the father may spend less time with the child, or the parents may be more likely to argue about the difficult child). Added to this concept is the theory that a child's adjustment difficulties may be genetically linked. Hetherington et al., *supra* note 1, at 171. Children who have easy temperaments are intelligent, socially mature, and responsible; those who exhibit fewer behavior problems are better able to cope with family crisis and transition. *Id.* Children with difficult temperaments and behavior problems may elicit negative responses from parents trying to deal with the stresses of divorce. *Id.* These children may be less able to cope with the negative responses from parents and may be less adept at gaining support from others. *Id.* Children with social skills and attractive personal characteristics, such as easy temperament and sense of humor, are more likely to evoke positive responses and support and to maximize the use of available supportive resources that help them to negotiate stressful experiences. *Id.* Gender and developmental status are most commonly researched in this context, but results vary. *Id.*

247. *See, e.g.,* Hetherington et al., *supra* note 1, at 170-71 (discussing pre-separation dynamics that affect post-separation adjustment).

248. *See* Thompson, *supra* note 2, at 35; *see also* Kelly, *A Decade Review*, *supra* note 2, at 965 (providing that parents in high-conflict divorces typically provide poor examples of discussion, compromise, and resolution of conflicts; thus, children do not learn social skills and the appropriate control of aggression necessary for successful peer relationships). There are direct and indirect effects of marital conflict on child adjustment, both of which manifest through quality of parenting and the parent-child relationship. *See id.* Direct

quency and severity of the conflict correlates with the magnitude of its effect on the child.²⁴⁹ The subject and content of the conflict may be even more significant than the amount of conflict.²⁵⁰ Additionally, children are affected more strongly over conflict involving parenting issues than non-parenting issues.²⁵¹

Much of the effect of parental conflict, whether it is pre-divorce conflict or conflict that continues post-divorce, is related to the effect that the continuing separation and divorce process has on the parental relation-

negative effects typically manifest through children's modeling of parental behavior, resulting in a failure to learn appropriate social interaction skills. *Id.* Children adopt angry, impulsive, and violent behaviors by seeing their parents' reaction to frustration and rage in their own relationship. *Id.* Conflict, of course, is a relative term. Families have different styles of resolving problems, and there are different thresholds of risk for the child in any family conflict.

249. See Bryner, *supra* note 1, at 207. A high frequency of conflicts has been linked to more negative effects on children, compared to a moderate or a low frequency of conflicts. Kelly, *A Decade Review*, *supra* note 2, at 964. High-intensity fighting is associated with more insecure attachments and anxiety in infants and toddlers. *Id.* In older children and adolescents, the severity of conflict had the largest and most consistent impact on children's adjustment, with intense conflict leading to more externalizing (disobedience, aggression, delinquency) and internalizing (depression, anxiety, poor self-esteem) symptoms in both boys and girls, compared with children experiencing low-intensity conflict. See *id.* The scope and severity of adjustment problems of the children of high-conflict marriages are strikingly similar to those reported for divorced children. See Bryner, *supra* note 1, at 207.

"Young adults whose high-conflict parents divorced before they were adolescents were significantly better-adjusted 10 years later than were young adults whose high-conflict parents did not divorce." Kelly, *A Decade Review*, *supra* note 2, at 968. But surprisingly, "young adults from low-conflict families whose parents divorced earlier were less well-adjusted than youngsters from high-conflict families whose parents divorced." *Id.* This may be attributed to severe economic loss with no corresponding positive gain of diminished conflict. See *id.*

250. See Gunnoe & Braver, *supra* note 1, at 38. Covert conflict styles were linked to more internalizing symptoms in children, such as depression, anxiety, and withdrawal. Kelly, *A Decade Review*, *supra* note 2, at 964. Overtly hostile conflict styles (such as physical and verbal gestures and behaviors such as slapping, screaming, contempt, and derision) were more strongly associated with externalizing and internalizing behaviors in children than either covert conflict styles (such as passive-aggressive behaviors, resentment, and unspoken tension) or frequency of conflict. *Id.* The negative impact of overtly hostile conflict styles was found in boys and girls, and in married and divorced families. *Id.*

Violence is likely to co-occur in high conflict marriages, has an independent effect, and is significantly more potent than marital conflict on a child's adjustment. *Id.* at 966. "Repeated exposure to violence is predictive of post-traumatic stress disorder in children, particularly when combined with other risk factors," such as poverty, abuse, or parental psychiatric illness. *Id.* Children of violent or repetitive severe parental conflict also experience problems with regulation or emotional arousal, which results in anger and physical aggression when the child becomes emotionally aroused. *Id.* at 965. This happens because, when children experience parental violence or high conflict, they respond with increases in heart rate and blood pressure, facial expressions of fear, anxiety, crying, postural freezing, and sometimes flight. *Id.* These responses cause a repeated negative arousal of the physiological stress system in other emotional situations. *Id.*

251. See Kelly, *A Decade Review*, *supra* note 2, at 964; see also Whiteside, *supra* note 20, at 13; Kathleen A. Camara & Gary Resnick, *Styles of Conflict Resolution and Cooperation Between Divorced Parents: Effects on Child Behavior and Adjustment*, 59 AM. J. ORTHOPSYCHIATRY 560, 572-73 (1989) (discussing effect of parental conflict and cooperation). When conflict is child-centered, children express more fear of being drawn into the conflict, feel shame, and inflict self-blame. Kelly, *A Decade Review*, *supra* note 2, at 964.

ship.²⁵² Although the marital parental relationship seems to be most predictive of children's post-divorce adjustment and well-being, the post-divorce family process is clearly affected by the added stresses of the divorce and changes in post-divorce custodial responsibilities. Because all of these variables continue to interact to affect children's continuing adjustment after the divorce and because the parental relationship is so significantly related to positive adjustment through buffering and coping skills, it is equally critical in the assessment of the effect of divorce on children to account for the effect of the divorce process on the parental relationship, particularly with respect to the effect of the parental relationship on post-divorce co-parenting.

Regardless of the type of custody that is awarded, there are obvious effects of the divorce and custody determination on each of the parent's ability to effectively parent. In a primary/secondary custody arrangement, children's needs are highest immediately after the divorce or separation, but, at the same time, the primary custodian is confronted with the emotional drain of the separation and the added burden of primarily providing for the child's daily needs. Thus, the ability to tend to the child's increased needs when it is most necessary is diminished.²⁵³

Just as parental conflict most significantly impacts a child's post-divorce adjustment, conflict also significantly affects the parental relationship very specifically for mothers²⁵⁴ and for fathers.²⁵⁵ The manner in which parents resolve high conflict affects a child's post-divorce adjustment as well.²⁵⁶ The effects of divorce and conflict for mothers and fathers are equally interrelated,²⁵⁷ and, in considering the effects of divorce on par-

252. Many problems for parents and children existed before the transition from divorce. Hetherington et al., *supra* note 1, at 170. "Although psychological distress and disorders may increase after divorce, parents who later divorce are more likely preceding divorce to be neurotic, depressed, antisocial or alcoholic; to have economic problems, and to have dysfunctional beliefs about relationships." *Id.* (citations omitted). During marriage, they exhibit poor problem solving and conflict resolution skills. *Id.* In relationships with their children, parents who will later experience disruption in their marriage are more irritable, erratic, and non-authoritative as much as eight to twelve years prior to divorce. *Id.*

253. See Cohen & Committee, *supra* note 226, at 1019-23. Because bird nesting (when employed as an equal custody split) more equitably distributes parental responsibilities, it would appear to be a timely resource to address this negative consequence immediately after the separation, especially since its duration is usually brief.

254. Compared with mothers in low-conflict marriages, "[m]others in high conflict marriages are less warm and empathic, are more rejecting, are more erratic and harsh in discipline, and use more guilt and anxiety-inducing disciplinary techniques." Kelly, *A Decade Review*, *supra* note 2, at 965. These result in poorer social awareness and more social withdrawal in children. *Id.*

255. Fathers in high conflict marriages tend to withdraw from their parenting role. *Id.* They are also more often excluded from their parenting role by the mother. *Id.*

256. See *id.* at 965-66. Fear, distress, and other negative symptoms are diminished when parents resolve their significant conflicts and use more compromise and negotiation methods rather than verbal attacks. *Id.* These beneficial effects of resolution-oriented behaviors have been reported whether they occur in front of the children or not. *Id.*

257. For example, parents in high conflict marriages tend to be more depressed than those in low conflict marriages, and this is significantly linked to more impaired family functioning. See *id.* at 965; Whiteside & Becker, *supra* note 1, at 22.

ents, as with the effects on children, these individual variables must not be considered in isolation, but rather as collectively affecting the child's post-divorce adjustment.²⁵⁸

Because the most common custody arrangement after divorce is primary physical custody with the mother, this is the most common arrangement that is studied in considering the effects of divorce on children and parents and when considering the interplay between maternal and paternal variables.²⁵⁹ A significant aspect of this interplay with respect to child adjustment, naturally, regards the secondary custody arrangement (or visitation) with respect to fathers.²⁶⁰ Researchers agree that cooperative parenting is beneficial for the child after the divorce because cooperative parenting diminishes the post-divorce parental conflict that negatively af-

[L]ow self-esteem, high anxiety, and high personal stress for [parents] individually not only make it more difficult to be available and effective as parents, but also make it more difficult to muster the effort and self-control that it takes to collaborate with a former spouse. Moreover, poor parenting skills on the part of the less experienced parent can also contribute to higher conflict between parents.

Id. It is expected that parenting after a divorce becomes erratic and inconsistent, however, some parents become dysfunctional after the divorce, and it affects their parenting. Bryner, *supra* note 1, at 203. For example, "some parents become overly close, inappropriately elevating the child to the role of companion to replace the lost spouse." *Id.* Others become harsh and distant, redirecting their anger and hostility to the child. *Id.* Further, added burdens can lead to disruptions in affection, discipline, and daily household routines, such as meals and bedtimes. *Id.* Indirectly, high marital conflict also affects the quality of parenting with respect to discipline and parent-child aggression, especially between parents and their cross-sex children. See Kelly, *A Decade Review*, *supra* note 2, at 965.

258. More recent research reveals that the maternal variables are affected by the paternal variables, as well as by the parental alliance, and vice-versa. See Whiteside & Becker, *supra* note 1, at 22. For example, a mother's hostility at the beginning of divorce has been shown to be predictive of less father visitation, including fewer overnight visits. Kelly, *A Decade Review*, *supra* note 2, at 969. In fact, some studies suggest that a mother's attitude about the father's parenting role affects the extent of the father's parenting, even more so than the father's own attitude. *Id.* at 965. Mothers are more likely to be satisfied when the father is highly involved in the child's life. *Id.* at 969. Maternal dissatisfaction with a father's visits was found to be a greater predictor of well-being than conflict. *Id.* If mothers are dissatisfied with high father contact (whether because of father's behavior or mother's anger over the divorce), the child is usually less well-adjusted, regardless of the level of conflict. *Id.* Mothers sabotage visits between 25% (mothers report) and 35% (fathers report) of the time. *Id.* In studies where mothers and fathers are interviewed about father contact, mothers almost always under-report and fathers almost always over-report. *Id.* Most studies used mothers as reporters and involve "mother-custody" homes. See Whiteside & Becker, *supra* note 1, at 9.

259. Research over the past decade has focused on fathers as nonresidential parents because the number of nonresidential mothers has been extremely small. See Kelly, *A Decade Review*, *supra* note 2, at 964; see also Whiteside & Becker, *supra* note 1, at 23 (disclosing that the group of young children in dual-residency arrangements, having the highest frequency of contact with their fathers, was under represented in the study). Compared with nonresidential fathers, however, nonresidential mothers visit more frequently, assume more parenting functions, and are less likely to discontinue seeing their children over time. Kelly, *A Decade Review*, *supra* note 2, at 968.

260. See Kelly, *A Decade Review*, *supra* note 2, at 969 (providing that the extent to which father involvement will effect child adjustment is complexly linked to the degree of conflict between the parents, the type of paternal involvement, the maternal acceptance of the paternal involvement, and the regular payment of child support).

fects both the children and the parents, interrelatedly.²⁶¹

It is clear from recent studies that the relationship between parenting styles and the quality of the marital relationship is more closely affected by the father than the mother.²⁶² Likewise, when parental conflict is low, children's post-divorce adjustment proves to be more positive with higher father contact.²⁶³ However, when parental conflict is high, frequent father contact results in poor adjustment in boys, although not significantly in girls.²⁶⁴

The quality of father parenting (closeness and active parenting) is more strongly associated with positive child outcomes than frequency of contact.²⁶⁵ Compared to low-conflict fathers, the quality of parenting diminishes for high-conflict fathers who tend to withdraw more from their

261. See *id.* at 970; see also Whiteside, *supra* note 20, at 8 (citing M. O'Leary et al., *Divorcing Parents: Factors Related to Coping and Adjustment*, 25 J. DIVORCE & REMARRIAGE 85-103 (1996) (concluding that a sense of well-being in children correlates with a good relationship with the former spouse, confidence in one's own parenting ability, and satisfaction with child support arrangements)); Whiteside & Becker, *supra* note 1, at 21 (identifying information exchange, coordinated discipline policies, supporting each other's attempts to handle separation reactions, etc., as important indicators); Whiteside, *supra* note 20, at 3 (noting that the quality of the parental alliance affects the child's adjustment).

Only a small percentage of parents have extremely cooperative and friendly post-divorce relationships, and approximately half of divorcing parents manage to be at least "cooperative colleagues." Whiteside, *supra* note 20, at 8. Cooperative colleagues communicate about the children frequently and "are able to attend special occasions together, but might not plan joint activities. They have some areas of conflict, but either have resolved controversial issues or can successfully avoid them. They can compartmentalize their relationship and successfully manage anger." *Id.*

262. See Kelly, *A Decade Review*, *supra* note 2, at 965. Parental conflict has been shown to be increased slightly with higher levels of father involvement. *Id.* at 969. Nevertheless, "[m]ore than half of the mothers reporting continuing conflict with the father were still satisfied with the level of fathers' contacts with the children, suggesting that some conflict is seen as a normative part of the ongoing activity of co-parenting after divorce." *Id.* Still, fathers in deteriorating marriages are more negative and intrusive with children than are mothers in deteriorating marriages or fathers in satisfactory marriages. *Id.* at 965.

263. *Id.* at 969. There was no significant difference in school performance and achievement between divorced children with more involved fathers and children in married families. *Id.* at 967. The important assessment with respect to bird nesting is whether bird nesting necessarily encourages more consistent and quality involvement by the noncustodial parent. If noncustodial parents in normal joint custody arrangements stay involved in their children's lives, the positive effects of such involvement may be attained without the need for bird nesting.

264. *Id.* at 969. Conflict between mothers and sons increased more after divorce than did conflict between mothers and daughters. *Id.* This result suggests that more frequent contact for boys in a high-conflict secondary home with fathers may create even higher turmoil for boys in the custodial home with mothers. *Id.*

265. See *id.*; see also Whiteside & Becker, *supra* note 1, at 21 (contending that warm, authoritative fathering is most likely associated with better child functioning). There has been no study documenting a relationship between frequency of father contact and child adjustment, *per se*, except for one study of adolescent adjustment. See Kelly, *A Decade Review*, *supra* note 2, at 968 (citing unpublished study); see also Hetherington et al., *supra* note 1, at 172-73 (contending that there is very little support for the theory that sheer frequency of contact leads to positive adjustment in children, but that low inter-parental conflict and contact with a competent and supportive, authoritative, noncustodial parent can be beneficial, especially for parents and children of the same sex).

parenting role and from the children in an effort to avoid conflict.²⁶⁶ Thus, for high-conflict-marriage children, the indirect effect is not only less involvement by the father, but more negative interactions with and feelings of rejection by the father.²⁶⁷

If the quality of the child's adjustment is positively affected by the quality of the noncustodial relationship and not necessarily the quantity of visitations in the noncustodial relationship, and if joint custody promotes higher quality contact with the non-custodial parent, then joint custody ought to promote child adjustment, and bird nesting ought to be an effective resource for maximizing child adjustment. But contact with non-custodial parents tends to diminish rapidly after divorce.²⁶⁸ If this is the case, then joint custody—more specifically, bird nesting—should be employed not just as a response to a single post-divorce variable, such as residential instability, but as a response to the more comprehensive and more predictive pre-divorce variables of the parental relationship. If the propriety of bird nesting is considered in this more expansive context, courts will employ it more appropriately and, perhaps, more successfully.

266. See Kelly, *A Decade Review*, *supra* note 2, at 965; see also Bryner, *supra* note 1, at 207 (finding parents in high conflict relationships are distracted from their roles as parents; fathers, particularly, withdraw from children as they retreat from conflict).

267. Kelly, *A Decade Review*, *supra* note 2, at 965.

268. See Hetherington et al., *supra* note 1, at 172. "Higher levels of paternal involvement in the married family in the past two decades has led divorcing fathers to seek more time with their children after separation . . ." Kelly, *A Decade Review*, *supra* note 2, at 969 (citations omitted). Adding to this has been more gender-neutral legal statutes and judicial decision-making. See *id.* As a result, 35% of children see their fathers at least once per week, with some visiting several times per week. *Id.* A significant amount of children under three years of age spend at least four overnights per two-week period with their fathers, even if their primary residence is with their mothers. Whiteside & Becker, *supra* note 1, at 5-6. However, contacts between fathers and children decrease over time as a result of the marital and post-divorce conflict, relocation, remarriage, and the progressive erosion of the quality of the father-child relationship. Kelly, *A Decade Review*, *supra* note 2, at 969; see also Hetherington et al., *supra* note 1, at 172 (reporting that decreases in paternal involvement is related to residential distance, low socioeconomic status, and parental remarriage). The influence of the visiting father also diminishes over time as a factor in the child's adjustment and development after divorce. Kelly, *A Decade of Review*, *supra* note 2, at 968. Although research on fathers has recently become broader and has evidenced a stronger impact of fathers on child adjustment, it is important to note that there has been little research conducted about the nature and extent of the continuing influence of the father in shared physical custody situations, *per se*. See *id.* "More than 20% of children have no contact with their non-custodial fathers or see them only a few times a year." Hetherington et al., *supra* note 1, at 172. Only about 25% of children have weekly visits with noncustodial fathers. *Id.* African American noncustodial fathers have higher rates of regular contact and no contact than do non-Hispanic White noncustodial fathers. *Id.* Particularly for boys, the strongest negative effects on children of fathers who leave the residence occur in the first one to two years after separation. See Kelly, *A Decade Review*, *supra* note 2, at 968. Nevertheless, between 8% and 25% of children have no contact with their fathers by two to three years after divorce. *Id.* at 968-69. This is a substantial decrease in percentage since the 1980s. See *id.*

Noncustodial mothers are more likely to facilitate visits than noncustodial fathers. Hetherington et al., *supra* note 1, at 172. Noncustodial mothers maintain about twice as much contact as noncustodial fathers and are less likely to decrease or discontinue visits after remarriage. *Id.* Although fathers' contacts with sons is more likely than mothers' contacts with sons, mothers and fathers are both more likely to maintain contact with sons than with daughters. *Id.*

In doing so, therefore, parents and courts must more comprehensively consider the interactive effects of divorce on both children and parents and view the appropriateness of bird nesting arrangements not within the isolated context of a single variable, but as a variable, itself, in assessing which custody arrangement will most fully promote the child's positive development after divorce.

Generally, although it is clear that children's well-being and post-divorce adjustment are affected by the parents' post-divorce behavior, attitude, discipline and conflict level,²⁶⁹ there is ample evidence to suggest that "[m]arital conflict is a more important predictor of child adjustment than . . . [either] divorce itself, or post[-]divorce conflict."²⁷⁰ Consequently, bird nesting should be employed only if it alleviates for the child the negative effects of a conflicted marriage and promotes positive adjustment to the continuing and, often, escalating post-divorce conflict between the parents.

- c. Divorced children are not as negatively affected by residential insecurity.

One consequence of joint custody is that children must relocate to and from each parent's residence to facilitate custody. This is thought to negatively affect children because of the instability in their daily routines.²⁷¹ Bird nesting is a direct response to this potential negative consequence. Although there are obvious consequences to the instability of relocating on a regular basis, social science research, although limited, suggests that children are more adaptive to the changes in post-divorce family struc-

269. Positive adjustment results in children stem from "authoritative parenting, supportive co-parenting, low conflict between parents, and better personal adjustment of both parents." Whiteside & Becker, *supra* note 1, at 6. Difficulties in cognitive, social, and emotional contexts are associated with "disagreement and inconsistency between parents, continued anger between spouses, poor parental adjustment, and authoritarian or neglectful parental styles." *Id.* (referencing studies by Wallerstein and Hetherington); see also Thompson, *supra* note 1, at 35 (pointing out that "children's well-being is inversely correlated with the level of post-divorce conflict that exists between the biological parents." (citing P. R. Amato & B. Keith, *Parental Divorce and the Well-Being of Children: A Meta-Analysis*, 110 PSYCHOLOGICAL BULL. 26, 26-46 (1991))).

270. See Kelly, *A Decade Review*, *supra* note 2, at 964; see also Cohen & Committee, *supra* note 226, at 1019-23 (finding that pre-separation parental conflict leads to internalizing and externalizing behavior problems for children—even pre-schoolers); Bryner, *supra* note 1, at 207 (noting that long-term effect of divorce depends on the level of marital conflict before the divorce and the level of ongoing conflict after the divorce). *But see* Gilman et al., *supra* note 1, at 939-46 (noting that the high conflict that associates with added disorders could not be related to either pre-divorce conflict or post-divorce conflict). For further support for the theory that children's behavioral adjustments are affected by the pre-divorce dynamics of the family, see Jeanne H. Block et al., *The Personality of Children Prior to Divorce: A Prospective Study*, 57 CHILD DEV. 827, 835 (1986) which observes this behavior as early as eleven years prior to divorce.

271. Most commonly, children subject to joint physical custody relocations complain of the regular interruption of their daily routines. In many instances, despite relocating between parents, the child can continue to attend the same school, but this is not always the case. Even if the same school is accessible, relocations during the school year often lead to forgetting school books, homework, clothes, athletic equipment, etc., which adds to the tension and chaos already experienced by school-aged children.

ture than has been historically thought.²⁷² In fact, one of the positive effects of divorce in children is resilience to their personal and social environments.²⁷³

In the one study available that specifically addressed the effects of residential instability associated with joint custody arrangements, researchers concluded that the negative effects of residential instability are not as significant in the child's overall adjustment as was once thought.²⁷⁴ In 1981, Susan Steinman conducted the first study that assessed the effect of joint custody on children, specifically with regard to the disruption of relocating between houses.²⁷⁵ In 1997, the court in *Mosley v. Figliuzzi* relied on this study to uphold a joint custody arrangement because it was in the best interest of the child.²⁷⁶ The court acknowledged that a child's need to relocate back and forth in joint custody arrangements naturally leads to concern about disruption in the child's life and that this concern may be sufficient to outweigh the interest of maintaining a continuing relationship with both parents.²⁷⁷ However, in its opinion, the court relied on the Steinman study to dismiss this concern and supported a joint custody award.²⁷⁸ The court held that the study "resolved this debate, for the present," for the social sciences²⁷⁹ and that, although it may not be conclusive on the question, the study "provide[s] strong evidence that joint custody does not have the degree of adverse impact on children that

272. See Steinman, *supra* note 5, at 413-14.

273. See Kelly, *A Decade Review*, *supra* note 2, at 968; Steinman, *supra* note 5, at 413-14.

274. See Steinman, *supra* note 5, at 413-14.

275. *Id.*

276. See 930 P.2d 1110, 1112 n.1 (Nev. 1997).

277. *Id.* In the study, Steinman clearly acknowledged that there was some conflict and confusion for some of the children in adapting to two parental homes. Steinman, *supra* note 5, at 409. The study also revealed that "where the parents were in conflict over child-rearing values or had major philosophical differences that involved the children, the children were greatly troubled by it." *Id.* The children also particularly worried about the security of the parent who was left alone. *Id.* In the study, 25% of the children experienced confusion and anxiety about their schedules and switching houses. *Id.* at 410. All of the children experienced anxiety and expressed hostility in answering questions about where they lived. *Id.* Some of the children struggled to keep track of where they were supposed to be at times, which caused them worry, frustration, and unhappiness with themselves. *Id.* Geographical distance between the parents' homes was a practical concern for the parents and a psychological concern for the children. *Id.* at 411-12. Several of the children found negotiating the distance between houses to be a frightening and stressful experience. *Id.* at 411. For the adolescent children in the study, continuity of school life and friendships were of key importance. *Id.* at 412. The study found that school became "an anchoring place" for the children and that their school-based social activities caused them to want to remain in one house. *Id.* Some adolescents felt that the joint custody arrangement interfered with their friendships. *Id.* Steinman suggested that switching between parental homes may be antithetical to the particular needs of adolescents at that stage of social and emotional development. *Id.* at 412-13. Ultimately, Steinman concluded that, although most of the children adapted to the practical inconveniences of joint custody, some still felt overburdened by the demands and requirements of maintaining a strong presence in two homes. *Id.* at 414. She suggested that, before embracing joint custody, much more research needs to be done in this specific area. *Id.*

278. *Mosley*, 930 P.2d at 1112 n.1.

279. *Id.*

is predicted by its critics.”²⁸⁰ The court further provided that “joint physical custody, of itself, probably will not make life more difficult for most children than the traditional mother-custody/father-visitation arrangements of the past.”²⁸¹ Recent studies, showing more adaptive changes and positive adjustments in children with appropriate pre- and post-divorce parenting, support the conclusion that children are less negatively affected by post-divorce residential instability. This obviates the need for bird nesting arrangements to promote developmental adjustment.

2. *Joint Custody Sufficiently Promotes Positive Developmental Adjustment to Divorce*

Although custody and visitation policies in different jurisdictions may vary, the concept of custody is generally divided into two types—legal custody and physical custody. Generally, legal custody gives a parent the right to make primary decisions about significant aspects of the child’s life, such as education, medical treatment, and religion.²⁸² Physical custody gives a parent the right to have physical control of and responsibility for the child for a specific period of time.²⁸³ In divorce cases, each of these forms of custody is usually awarded in one of two formats: sole custody (when legal or physical custody is awarded to one parent only) or joint custody (when legal or physical custody is awarded to both parents).²⁸⁴ Thus, each parent in a divorce may be awarded either sole or joint legal custody and either sole or joint physical custody. If bird nesting is to be employed, the court must award joint physical custody in some form.

The child-centered change in the way social science research of the 1980s viewed the effects of divorce led to a change in the way parents and courts viewed and determined post-divorce custody. In response to the new outlook on the effects of divorce, parents and courts no longer viewed sole custody as the only appropriate option but, instead, viewed joint custody as most effective in promoting positive childhood adjustment to divorce. Because of its necessary connection to joint custody, bird nesting is often perceived as the quintessential application of joint custody. Since bird nesting provides residential stability, it is too often accepted as an effective tool for positive adjustment when, in fact, it is not necessary to that end and, as evidenced by its inherent disadvantages, is often counter productive to that end.

280. *Id.*

281. *Id.*

282. Each state specifically defines its own concept of legal custody. *See, e.g.*, 23 PA. CON. STAT. § 5302 (2003) (defining “legal custody” as “[t]he legal right to make major decisions affecting the best interest of a minor child, including, but not limited to, medical, religious and educational decisions”).

283. Each state specifically defines its own concept of physical custody. *See, e.g., id.* (defining “physical custody” as “[t]he actual physical possession and control of a child”).

284. In some jurisdictions, joint custody is also referred to as “shared” custody. *See, e.g.*, 23 PA. CON. STAT. §§ 5302, 5304 (2003). But the terms are synonymous and may be used interchangeably. *See Smith v. Smith*, 453 A.2d 1020, 1022 n.3 (Pa. Super. Ct. 1982).

Although children remain in the sole or primary physical custody of mothers in 90% of divorced families,²⁸⁵ in most child custody disputes, joint custody is regarded as a viable custody alternative. The most common form of joint custody is the arrangement in which parents share legal custody equally and share some percentage of physical custody time, with the child alternating or dividing his or her time between each parent by relocating or "moving-in" with each respective parent on an alternating, albeit not necessarily an equal, basis.²⁸⁶ Joint residential decrees, specifying that children reside equally with each parent, are awarded in less than 5% of cases, except in California, where it is estimated to be about 20%.²⁸⁷ Despite this higher rate of equal joint custody in California, 68.8% of judges in one California study rated joint custody arrangements as resulting in mixed or worse results.²⁸⁸ One of the noted causes of this was the instability created by the child moving from one residence to the other.²⁸⁹ Only 35.3% of the judges preferred a joint custody arrangement above any other arrangement.²⁹⁰ Nevertheless, California became the first of many states to statutorily provide for a presumption that joint custody is in the best interest of the child.²⁹¹

Although there remains much debate over the propriety of such statutory mandates,²⁹² joint custody has clearly become a more commonly prescribed physical custody arrangement for divorced families. Some commentators suggest that joint custody may be becoming more popular because, even though it may not fully consider the best interests of the child, it satisfies the needs of the parents.²⁹³ Some reason that societal changes, such as the increase in the divorce rate and the increase of women in the work force, have led to the need for a more even distribution

285. Bryner, *supra* note 1, at 204; see also Gunnoe & Braver, *supra* note 1, at 26 (providing that the most common type of custody awarded is sole maternal legal and physical custody, followed by joint legal custody and primary maternal physical custody).

286. The most commonly understood alternating custody scenario is one in which the parents share legal custody—usually equally—and one parent has primary physical custody, consisting of weekdays and every other weekend, while the noncustodial parent enjoys partial custody (what some might otherwise consider "visitation") every other weekend and, perhaps, one overnight per week, with an allowance for holidays and summer vacations.

287. See Gunnoe & Braver, *supra* note 1, at 26.

288. See Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM. L.Q. 201, 201 (1998).

289. See *id.*

290. See *id.* at 202 (citing Thomas J. Reidy et al., *Child Custody Decisions: A Survey of Judges*, 23 FAM. L.Q. 75, 80 (1989)).

291. For the current statutory provision of a presumption of joint custody in California, see CAL. FAM. CODE ANN. § 3080 (West 2003), which provides that joint custody will be presumed to be in the best interest of the child when both parents agree to joint custody.

292. See, e.g., Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 518 (1988) (noting that "presumptive joint custody is an idea whose time has come and gone").

293. See, e.g., C.S. Bruch, *And How Are the Children?: The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States*, 30 FAM. & CONCILIATION CTS. REV. 112-34 (1992) (agreeing that there has been a preoccupation with parental rights over children's needs).

of responsibilities of child rearing.²⁹⁴ Still other theories are that parents may be predisposed to opt for joint custody based on pre-existing variables, such as effective communication and cooperation,²⁹⁵ or that parents and judges simply have a lack of desire to work toward another more suitable but less complicated alternative.²⁹⁶

Whatever the reasons for its popularity, under a typical joint custody arrangement, the child will reside with each parent, separately, in each parent's respective home. There is ample research suggesting that this common form of custody arrangement may have deleterious effects on the child's adjustment to the divorce, which, in turn, negatively affects the child's development on several levels. Naturally, joint custody children are confronted with the instability of the residence, such as the comforts and privacy of their own bedroom or bathroom and the simple constancy of daily routine, which is so emotionally critical for children of young ages and, often, so socially important for teenagers. Dual residences also force upon the child the psychological and emotional burden of loyalty conflict as the child tries to adjust to the separation of his or her parents.²⁹⁷

Despite evidence that children are not as negatively affected by moving back and forth in joint custody arrangements, more empirical research is needed on the topic of joint custody and the success of the arrangement in post-divorce custody dispositions with respect to producing better-adjusted children.²⁹⁸ Historically, judicial interpretations of the consequences of joint custody have been less than definitive.²⁹⁹ Although

294. See Steinman, *supra* note 5, at 403-04.

295. See Gunnoe & Braver, *supra* note 1, at 27. Most commentators agree that parental cooperation is closely associated with, and is critical in predicting, the likely success of joint custody arrangements. *Id.* at 26.

296. See Hardcastle, *supra* note 288, at 206. These may be factors contributing to the high application of equal joint custody in California, despite judges' views that joint custody is less effective in promoting the best interests of the children.

297. See Steinman, *supra* note 5, at 409-10.

298. See Hardcastle, *supra* note 288, at 207 (citing Denise Donnelly & David Finkelhor, *Does Equality in Custody Arrangement Improve the Parent-Child Relationship?*, 54 J. MARRIAGE FAM. 837, 837 (1992)); see also Beverly W. Ferreiro, *Presumption of Joint Custody: A Family Policy Dilemma*, 39 FAM. REL. 420, 421 (1990) (determining that research on this point is inconclusive).

299. Some cases did not support joint custody. See, e.g., *Maron v. Maron*, 28 N.W.2d 17, 19 (Iowa 1947) (finding that divided custody is destructive of discipline); *Hoston v. Hoston*, 122 N.W.2d 892, 898 (1963) (noting that joint custody tends to induce a feeling of not belonging to either parent), *overruled by Phillips v. Iowa Dist. Ct. for Johnson County*, 380 N.W.2d 706 (Iowa 1986); *Bennett v. Bennett*, 203 N.W. 26, 27 (Iowa 1925) (noting that joint custody permits one parent to sow seeds of discontent concerning the other, which can result in a spirit of dissatisfaction in the children and their rebellion against authority); *Utlely v. Utlely*, 364 A.2d 1167, 1170 (D.C. 1976) (finding that divided custody is a frustrating experience, especially when, in the process, the child is shifted from home to home, from city to city, or from one family environment to another); *Lewis v. Lewis*, 537 P.2d 204, 209 (Kan. 1975) (noting that the "frequent shifting from one home environment to another could easily be detrimental to the emotional and physical well-being of any child"); *Knight v. Knight*, 419 S.W.2d 159, 159 (Ky. 1967) (joint custody is "greatly to the detriment of the children, because it would give them no fixed or permanent home, but rather keep them unsettled and on the move."); *Dunavant v. Dunavant*, 219 S.W.2d 910, 915 (Tenn. Ct. App. 1949) (noting that "there will probably be bickerings and disputes and a natural tendency on the part of the child to play one against the other, as well as for the claimants to seek by

greater legislative and judicial consideration of the arrangement has prompted further research, there is still much to be studied regarding the effectiveness of joint custody arrangements in satisfying the many interests involved in the custody disposition, the most important of which is the best interest of the child.³⁰⁰ It is argued here, however, that joint custody is as sufficient in promoting positive developmental adjustment in children as bird nesting. In considering the propriety of joint custody arrangements, with the exception of the advantage of alleviating residential instability, there are no significant advantages derived from bird nesting that joint custody does not already offer, and even this advantage has been shown to be of minimal consequence. In fact, bird nesting is not an extension or quintessential version of joint custody; rather, it is merely a narrower, more limited application of it. Bird nesting should be considered more limiting because, under a bird nesting arrangement, the family is forced to negotiate the future dynamics of the dissolving family unit, which includes separate parent-child relationships, independent parental relationships, diverse discipline and parenting styles, and, possibly, new step-family relationships. All of these must be negotiated within the confines and restrictions of the same, shared household, which is often further limited by the misperception that the custody split should be equal. Joint custody arrangements that are not limited in these respects are more flexible and more conducive to parental focus on the child's developmental adjustment needs, in each parent's respective household, according to the individual dynamics of each new and separate, but co-parenting family unit.

Joint custody has proven to produce both successful and dysfunctional co-parenting across a variety of legal and residential arrangements.³⁰¹

indulgences to curry favor with the child, if not to prejudice it against the other."); Rickard v. Rickard, 503 P.2d 763, 766 (Wash. Ct. App. 1972) (finding that divided custody can have "serious detrimental effects to the welfare of children"); *In re Marriage of Burham*, 283 N.W.2d 269, 272-73 (Iowa 1979) (noting that "change and discontinuity threaten the child's emotional well-being; that joint custody requires the 'shuttling back and forth' of children, leading to lack of stability in home environment; that children may become prey to severe and crippling loyalty conflicts" (citing *Dodd v. Dodd*, 403 N.Y.S.2d 401, 404 (N.Y. Sup. Ct. 1978))); *Johnson v. Johnson*, 526 S.W.2d 33 (Mo. Ct. App. 1975) (noting that frequent shifts of custody is detrimental to a child's stability). *But see* *Mullen v. Mullen*, 49 S.E.2d 349, 355 (Va. 1948) (noting that joint custody gives recognition for prior performance of the parental duties and prevents the termination of gratifying interpersonal relationships, without which his or her right to and desire for the continuing contacts may result in eventual loss of interest in the children); *Braiman v. Braiman*, 378 N.E.2d 1019, 1022 (N.Y. 1978); *Dodd*, 403 N.Y.S.2d at 404 n.4 (noting that joint custody may mitigate the loss of security and feelings of rejection normally accompanying dissolution by approximating as closely as possible the former family relationship).

300. *Hardcastle*, *supra* note 288, at 219 (quoting *Donnelly & Finkelhor*, *supra* note 298, at 844). *Hardcastle* includes parental satisfaction, the maintenance of the parental relationship, the impact on the child, the effect on child support payments, and the relationship of conflicted parents as five important issues related to joint custody arrangements. *See id.* at 208.

301. *Whiteside*, *supra* note 20, at 5 (citing *Marsha Kline et al., Children's Adjustment in Joint and Sole Physical Custody Families*, 25 DEVELOPMENTAL PSYCHOL. 430, 430-38 (1989); *Maccoby & Mnookin*, *supra* note 226; *Susan B. Steinman et al., A Study of Parents Who Sought Joint Custody Following Divorce: Who Reaches Agreement and Sustains Joint*

Despite the research debate, most commentators agree that, generally, children benefit from continued contact with both parents after a divorce.³⁰² This is especially so when the joint arrangement is void of any conflict between the parents or when the conflict is at least minimized.³⁰³ Where conflict exists, however, the joint custody arrangement may be harmful, especially when the joint nature of the custody arrangement, itself, may be a source of conflict.³⁰⁴

Two considerations for assessing the success of joint custody arrangements are the satisfaction of the parties and the relitigation rate of the parties. Studies vary with respect to whether parents are satisfied with joint custody arrangements. Some studies reveal that parents are satisfied with the arrangement.³⁰⁵ However, most show that mothers are dissatisfied with joint custody.³⁰⁶ In a comparison of joint and sole custody scenarios, one study revealed that, generally, mothers are more satisfied with sole custody arrangements, while fathers are more satisfied with joint custody arrangements, even if the time shared is not equal.³⁰⁷ In another study, although mothers with joint custody were shown to be less satisfied with their custody arrangements than sole custody mothers, the specific custody arrangement *per se* did not appear to affect their perceptions of their relationships with either their children or their ex-spouses.³⁰⁸ This was not the case with fathers, however. In the study, fathers' relationships with the children proved to be affected by the custody arrangement in place.³⁰⁹ However, at least for parents who agree on joint custody arrangements, the post-divorce relitigation rates tend to

Custody and Who Returns to Court, 24 J. AM. ACAD. CHILD PSYCHIATRY 554, 554-62 (1985)).

302. See Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 488 (1984).

303. Kelly, *A Decade Review*, *supra* note 2, at 964-66.

304. See *id.* at 964.

305. See Steinman, *supra* note 5, at 413. This response may be partly due to the fact that, in most studies of joint custody, the arrangement is agreed upon by the parents, as opposed to being court-ordered against the wishes of one of the parents.

306. See, e.g., Gunnoe & Braver, *supra* note 1, at 33-34 (reporting lower maternal satisfaction with joint custody arrangements and preference for sole custody).

307. See Joyce A. Arditti & Debra Madden-Derdich, *Joint and Sole Custody Mothers: Implications for Research and Practice*, 78 FAM. SOC'Y: J. CONTEMP. HUM. SERVS. 36, 37 (1997). This study found that, despite lower levels of parenting stress, mothers reported less satisfaction and similar feelings of burden as sole custody moms. *Id.* This was attributed to the feeling that their perceived legal role was out of proportion with their perceived care giving responsibilities, especially since joint fathers have been found to be no more likely to pay support than sole custody fathers. *Id.* Earlier studies reveal that, generally, joint custody fathers feel less depressed, more attached to their children, and more satisfied with their familial relationships, including the amount of physical time spent with their children, than other fathers. See Susan Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739, 741 (1983); Joyce A. Arditti, *Differences Between Fathers with Joint Custody and Noncustodial Fathers*, 62 AM. ORTHOPSYCHIATRIC ASS'N 186 (1992).

308. See Gunnoe & Braver, *supra* note 1, at 33-34.

309. See *id.*

support the assertion that parents are satisfied with the arrangement.³¹⁰ In cases in which the court has mandated a joint custody arrangement, the post-divorce relitigation rate is about the same as that in sole custody cases.³¹¹ Research also concludes that joint custody, alone, does not increase child support payments.³¹² However, the nature of the custody arrangement does correlate with the relitigation rate for child support enforcement, with joint custody arrangements resulting in a lower rate of relitigation.³¹³ Research also shows that the nature of the relationship between the parents, including the ability to communicate and work together, does directly affect the volume of post-decree litigation.³¹⁴

Joint custody advocates contend that, because fathers are awarded more involvement under joint custody arrangements, they will stay more involved, to the benefit of all family members.³¹⁵ As reported by fathers,

310. See Ferreiro, *supra* note 298, at 420. Studies have shown that the rate of post-decree relitigation for parents working under a voluntary joint custody agreement is significantly less than those with sole custody. E.g., Irene M. Cohen, *Postdecree Litigation: Is Joint Custody to Blame?*, 36 FAM. & CONCILIATION. CTS. REV. 41, 45-46 (1998). One study of 414 custody cases in Los Angeles evidenced a 50% less rate of relitigation for parents employing a joint custody agreement. See *id.* at 45 (citing F. Ilfeld, H. Ilfeld & J. Alexander, *Does Joint Custody Work?: A First Look at Outcome Data of Relitigation*, 139 AM. J. PSYCH. 62 (1982)). In another study in Massachusetts involving 500 custody cases, there emerged a 19% relitigation rate over financial matters for parents employing both joint and sole custody agreements. See *id.* In contrast to the Los Angeles study, however, the most recent 200 cases in the Massachusetts study revealed an 11% relitigation rate for joint custody parents and only a 3% rate for sole custody parents. See *id.*

311. See Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 718 (1985); Scott & Derdeyn, *supra* note 302, at 487; Ferreiro, *supra* note 298, at 422.

312. See Cohen, *supra* note 310, at 43.

313. A 1990 study revealed that 20% of the sole custody study pool returned to court for the enforcement of a child support order, whereas only 8 to 10% of joint custody parents relitigated on that basis. See *id.* at 45 (citing Jessica Pearson & Nancy Thoennes, *Custody After Divorce: Demographic and Attitudinal Patterns*, 60 AM. J. ORTHOPSYCH. 233-49 (1990)). This correlated with a 1985 study in which 20% of sole custody mothers relitigated for nonpayment of child support, while only 10% of joint custody parents relied on the same process. See *id.* (citing Jessica Pearson & Nancy Thoennes, *Child Custody, Child Support Arrangements and Child Support Payment Patterns*, 36 JUV. & FAM. CT. J. 49-57 (1985)).

314. See Cohen, *supra* note 310, at 43 (citing Jessica Pearson & Nancy Thoennes, *Supporting Children After Divorce: The Influence of Custody on Support Levels and Payments*, 22 FAM. L.Q. 319, 319-39 (1988)). Although another study in 1985 by Pearson and Thoennes correlated parental cooperation (and other factors) to child support collection, the effect of the nature of the custody arrangement was apparent—joint residential parents evidenced a 75% compliance rate with child support payments; mothers under a joint legal custody arrangement where mothers were the primary residential parent experienced a 64% compliance rate; mothers who had sole custody witnessed only a 46% compliance rate. See *id.* at 45 (citing Pearson & Thoennes, *supra* note 313, at 49-57). The study also showed that, in addition to child support payments, joint residential parents more readily directly contribute to child-rearing costs, such as medical, household, and luxury expenses. See *id.* (citing Pearson & Thoennes, *supra* note 313, at 53).

315. See Kelly, *A Decade Review*, *supra* note 2, at 969-70. Some argue, however, that any increase in participation is short-lived; over time, many shared physical custody arrangements drift toward more traditional mother custody patterns. *Id.* Many visiting fathers retreat to weekend entertainment as the main activity with their children, which diminishes the long-term importance of the father's role in the child's life. *Id.* at 969. Visiting schedules that permit both school week and leisure time involvement, including over-

joint custody produces an increase in father visitation.³¹⁶ In turn, this results in greater repartnering by mothers.³¹⁷ Advocates of joint custody further contend that there is greater father compliance with support awards under a joint custody arrangement because, in joint custody arrangements, parents tend to be more agreeable, more educated, and, consequently, more economically stable.³¹⁸ Joint custody advocates also argue that children get higher quality custodial parenting by both parents, experience richer relationships with non-custodial parents, experience more cooperative parenting, and manifest better adjustment to the divorce.³¹⁹ However, all of these factors come into play regardless of the employment of a bird nesting arrangement. If anything, a bird nesting arrangement tends to discourage or interrupt these dynamics by providing further opportunity for conflict and by restricting the flexibility of the children to integrate themselves fully into the respective new lives of the separated parents.

Opponents of joint custody further argue that joint custody produces a loyalty conflict for children, particularly for high-conflict families, and discontinuity in residence, psychological parent contact, and peer rela-

night visits, enable sufficient time for parents to engage in "real" activities that maintain meaning and attachment in the parent-child relationship. *Id.*

316. Joint custody was associated with greater father-child visitation, but not with increased child support payments. See Gunnoe & Braver, *supra* note 1, at 34-35; see also Kelly, *A Decade Review*, *supra* note 2, at 969-70 (noting that fathers with joint decision making are likely to see pre-adolescent children at least weekly and have them for more overnight visits than non-joint fathers). But see Maccoby & Mnookin, *supra* note 226 (finding little difference in visitation rates for sole and joint custody families). However, most studies are based on reports by mothers. Kelly, *A Decade Review*, *supra* note 2, at 969. Mothers' and fathers' reports on visitation and support are quite discrepant. *Id.* For example, noncustodial fathers report having greater commitment to the parenting role than custodial mothers. Gunnoe & Braver, *supra* note 1, at 34. Of course, these results may be influenced by mere perceptual biases on the part of the respective parents. *Id.* at 33.

317. Mothers who shared legal responsibility with the fathers were three times more likely to be living with a new partner than sole legal mothers. Gunnoe & Braver, *supra* note 1, at 34. Repartnering by parents is indirectly tied to child adjustment. Marital status is one of the best predictors of adult mental health, which is a significant factor in promoting positive child adjustment. *Id.* at 36. By providing more visitation with fathers, joint custody provides a more equal distribution of responsibility for the child and, thus, affords the mother greater opportunity for establishing relationships. The majority of divorced single mothers do repartner while their children are still residing in their home. *Id.* Children of mothers who quickly enter new relationships "exhibit higher rates of social competence and direct less negative behaviors to the residential parents than children of mothers who postpone courtship following marital disruption." *Id.* Also, repartnering means divorced children will spend less time suffering the socioeconomic consequences of the divorce. *Id.* For socioeconomic consequences of divorce, see *supra* note 238.

318. See Hardcastle, *supra* note 288, at 212. But see *id.* at 213 (citing Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 514-15 (1988) (noting that custody type is not predictive of payment of child support)); Arditti, *supra* note 307, at 188 (asserting that joint custody fathers pay less child support, relative to income, than non-custodial fathers). Singer and Reynolds conclude that joint custody fathers pay approximately 14% of their net income toward child support, while sole custody fathers are required to pay 26% of their net income. See Hardcastle, *supra* note 288, at 213 (citing Singer & Reynolds, *supra*, at 514-15).

319. Gunnoe & Braver, *supra* note 1, at 26.

tionships.³²⁰ Opponents of joint custody also contend that a parent who is not particularly involved with or committed to the child may unfairly claim (or unfairly get, in cases of presumptions) equal custody of the child. Therefore, a committed parent may be subject to the whim of an uncommitted parent. All of these factors are only exacerbated under a bird nesting arrangement.

Additionally, joint custody is more expensive, arguably, because both parents must maintain suitable housing for the child, with extra food, clothing, toys, etc. Thus, joint custody may not always be economically feasible for low-income families. Studies show that the trend toward joint custody has not spread as quickly to lower socio-economic populations.³²¹ Bird nesting only adds the financial burden of a third residence. A presumption favoring joint custody would force parents unsuited for such an arrangement into an even more expensive and more volatile custodial arrangement.

The strongest argument against joint custody is that it allows for sustained family conflicts from extended contact in coordinating child care.³²² Under a bird nesting arrangement, this same effect is magnified under the microscope of a shared household. Conflict is generally considered the main risk factor for joint custody.³²³ In cases of conflict, the best interests of children may be served by more sole parental control.³²⁴ Thus, in cases of high conflict, bird nesting is no better than joint custody because neither would be employed in this context. One large-scale study reported that, when post-divorce conflict was low, adolescents in joint physical custody arrangements were better adjusted, but this was not the result in high conflict post-divorce families.³²⁵ Another study showed that "[i]n families with extreme and continuing high conflict after divorce, children with more frequent transitions and shared access were found to have more emotional and behavioral problems, particularly the girls, than children in sole custody situations."³²⁶ Yet another study found that conflict between divorcing parents did not worsen as a result of the increased demand for inter-parental cooperation and communication in joint custody. Rather, the greatest deterioration in parental relationships oc-

320. *Id.*

321. *See* Hardcastle, *supra* note 288, at 213.

322. Gunnoe & Braver, *supra* note 1, at 26. Divorced parents who are in frequent contact with each other have more opportunities to engage in conflict than do those who avoid one another. Whiteside, *supra* note 20, at 11.

323. Gunnoe & Braver, *supra* note 1, at 32-33.

324. *See* Hardcastle, *supra* note 288, at 216.

325. *See* Kelly, *A Decade Review*, *supra* note 2, at 970.

326. *Id.* (citing J.R. Johnston, *Research Update: Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making*, 33 FAM. & CONCILIATION CTS. REV. 415-25 (1995)). However, in a separate study in which twenty-eight pre-divorce variables, including conflict, were controlled, joint custody predicted fewer child adjustment problems, compared with sole legal custody. *See id.* The study suggests that parents who reported frequent disagreement during marriage were more likely to have joint legal custody (an atypical result), perhaps because they both wanted a legal forum to protect their respective interests. *Id.*

curred in the sole maternal custody cases.³²⁷

Thus, with respect to whether joint custody best promotes child adjustment, conclusions vary.³²⁸ In most cases, however, continued contact with a competent, non-custodial parent enhances the adjustment of children, especially for children of the same sex as the non-custodial parent.³²⁹ But assuring consistent parenting by one or each parent is a very different thing than assuring consistency of parenting across households.³³⁰ To facilitate this consistency within a joint custody arrangement, most researchers agree that parents must shift their focus from a preoccupation with an equal distribution of visits and overnights to a much more complicated assessment of the parenting environment.³³¹ Again, these factors are relevant to joint custody arrangements as equally as they are to bird nesting arrangements, but only without the disadvantages inherent in sharing a residence.

In focusing on a positive post-divorce co-parental environment, research suggests that courts look to the interaction of variables affecting the child's developmental adjustment. In assessing these variables and formulating an appropriate custody arrangement, the goal should be to maximize the possibility that a child has two good parents, rather than engaging in a debate over who is the better parent.³³² Expanding research in the area of divorce dynamics suggests that there are a number

327. Whiteside, *supra* note 20, at 11.

328. See Gunnoe & Braver, *supra* note 1, at 35 (noting that their study shows more benefits than risks in joint custody, with no evidence of adverse effects of joint custody on children's adjustment). A study by Bauserman concluded that children in joint residential custody scored better than children in sole custody on a wide variety of adjustment/interpersonal measures. See *id.* (citing R. Bauserman, Presentation, *Child Adjustment in Joint Custody Versus Sole Custody Arrangements: A Meta-Analytic Review* (October 1997) (11th Annual Conference of the Children's Rights Council, Arlington, Virginia)). But see J. R. Johnson, *Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making*, 33 FAM. CONCILIATION CTS. REV. 415-25 (1995) (concluding that joint custody was neither beneficial nor detrimental to children). Note that the Bauserman and Johnson studies focused on residential, not legal, custody, whereas the Gunnoe and Braver study focused specifically on joint legal custody. Gunnoe and Braver concluded that a presumption of joint legal custody would at least not be harmful. Gunnoe & Braver, *supra* note 1, at 38. Other more recent studies demonstrate few advantages of joint custody over sole custody arrangements. See Hetherington et al., *supra* note 1, at 173 (referring to a California study evidencing a higher rate of delinquency in children in shared custody when in the custody of fathers); Kelly, *A Decade Review*, *supra* note 2, at 970 (noting few differences in adjustment between children in sole versus joint physical custody other than higher parental income and education and more regular child support payments among joint custody children). Studies showing better adjustment in joint custody arrangements have been criticized in more recent studies for basing conclusions on small, nonrepresentative study samples. See *id.*

329. Joint legal custody has been linked, more recently, to children's well-being. Kelly, *A Decade Review*, *supra* note 2, at 969-70; see also Hardcastle, *supra* note 288, at 210 (suggesting that it is not critical that children maintain equal or even significant contact with both parents in order to have a sufficiently close relationship or to adequately adjust to divorce (citing Eleanor E. Maccoby et al., *Postdivorce Roles of Mothers and Fathers in the Lives of Their Children*, 7 J. FAM. PSYCHOL. 24, 25, 32-33 (1993))). Hardcastle notes that, in terms of contact, sole custody may offer the same benefits as joint custody. See *id.*

330. See Whiteside, *supra* note 20, at 11.

331. Whiteside & Becker, *supra* note 1, at 21.

332. Whiteside, *supra* note 20, at 8.

of predictive factors within the parental alliance that lead to positive child adjustment. These factors include effective communication, low marital conflict, effective post-divorce conflict resolution,³³³ parental satisfaction (with the custody arrangement and with the other parent),³³⁴ psychological stability,³³⁵ receptivity to intervention, and consistent discipline. Studies suggest that the families who were functioning more effectively in these areas prior to the divorce are more likely to eventually be awarded joint custody.³³⁶ But none of these factors are necessarily enhanced by bird nesting.

An effective parental alliance leading to positive child adjustment includes frequent, cordial, and effective communication. Communication should reflect to the other parent that positive parenting is occurring.³³⁷

333. "[P]arents' ability to compromise and to resolve disputes is related to a higher level of cooperation and increased closeness between parents." *Id.* at 11. Failure to effectively resolve arguments without incidents of blame, physical attack, denigration, and sabotage of the other parent's relationship with the child are factors that are commonly seen in dysfunctional families. *Id.* at 10-11.

334. It is important that parents are satisfied with both the custody arrangement itself and the parenting abilities of the other parent. One aspect of parental satisfaction with joint custody arrangements, specifically, is close geographic proximity that correlates positively with increased child contact. Cohen, *supra* note 310, at 44.

Satisfaction with the parenting abilities of the other parent includes respecting the other parent as a competent care giver. Whiteside, *supra* note 20, at 12. High levels of respect for competency has correlated with low levels of child conflict. *Id.* at 13. Whiteside observed that mothers viewed fathers as incompetent more than vice-versa. *Id.* Parents who question each other's competence are more likely to have a high level of legal conflict. *Id.* This high conflict polarizes the two households as each parent tries to correct the perceived deficiencies of the other parent. *Id.* Typically, high-conflict parents "exchange less information, have more discrepant views of self and other, and experience more dysfunction in parent-child relationships." *Id.* Satisfaction with and respect for the other parent should also include encouraging and enforcing the child's relationship with the extended families of both parents. It has been shown that lower frequency of contact with noncustodial parents' families is associated with higher conflict between the parents. *Id.* at 9.

335. Many studies offer the psychological health of the parents and the quality of the parent-child relationship as the best predictors of child adjustment. See Kelly, *A Decade Review*, *supra* note 2, at 970. Part of psychological health is the ability of a parent to separate feelings about the divorce and the former spouse from ongoing parental interactions on behalf of the child. Whiteside, *supra* note 20, at 12. Parents who cannot "let go" have problems adjusting to changes in the family structure. *Id.* Signs include strong feelings, the inability to simultaneously acknowledge good and bad aspects of the other spouse, preoccupation with the divorce, and a strong desire to be taken care of. *Id.*

336. Gunnoe & Braver, *supra* note 1, at 31. Many experts agree that the dynamic of the custody arrangement is not the most critical factor in effecting child development; rather, the parenting alliance, the parent-child relationship, and consistent and effective discipline styles determine whether a child will be well-adjusted or cognitively and socially underdeveloped. See Whiteside & Becker, *supra* note 1, at 23-24 (noting that a wide variety of two-household parenting arrangements can potentially be successful for children age five and younger); see also Whiteside, *supra* note 20, at 18 (noting that shared legal and physical parenting arrangements are likely to work well for well-functioning divorcing couples who continue a successful parenting alliance post-divorce). The same is true of dysfunctional families. Dysfunctional families prior to divorce are most likely going to deteriorate after divorce and will likely require intervention to limit further dysfunction. See *id.* at 19.

337. Whiteside, *supra* note 20, at 8. Research shows that those who saw themselves as good parents were more likely to see the former spouse as being a good parent as well. See *id.* (citing M. O'Leary et al., *Divorcing Parents: Factors Related to Coping and Adjustment*, 25 J. DIVORCE AND REMARRIAGE 85-103 (1996)).

It should also include cooperative negotiations that focus on the child's needs rather than the parents' needs.³³⁸ A large part of effective negotiations and communication involves keeping the child out of the divorce process, especially those aspects of the process that involve contested child issues.³³⁹ Again, none of these factors are resolved by a bird nesting arrangement.

One of the more difficult factors in a positive parental alliance is the sharing of responsibilities for child-rearing tasks, which includes the logistics of child's movement between households.³⁴⁰ Here, theoretically, bird nesting may be of some advantage, but, as argued previously, probably not when the disadvantages of bird nesting are factored into the equation. Courts should also look for parents who have similar opinions about parenting and similar value systems that will continue, despite changes in the family structure.³⁴¹ Still, value systems are as effectual with a normal joint custody system as they would be within a bird nesting arrangement.

Therefore, it is imperative to view bird nesting not simply as a quintessential joint custody arrangement that maximizes the opportunity to provide stability in the child's life, but rather as an alternative that addresses one very isolated and, according to social science research, otherwise quite controllable variable, but that still involves and, in fact, magnifies so many of the other variables at play in the divorce dynamics, especially those existing between the parents prior to divorce. If, when considering a bird nesting arrangement, parents and courts can view the effects of pre-divorce variables on post-divorce variables as predictive of child adjustment, then parents and courts may be better able to more comprehensively assess how the divorce may affect their decision-making process with respect to whether a joint custody arrangement is sufficient to promote the child's best interests and whether a bird nesting arrangement will produce better adjustment.

III. WHEN SHOULD BIRD NESTING BE EMPLOYED?

Given all that is known about the effects of divorce on children and the nature of post-divorce family dynamics, there are several criteria that should be present before any bird nesting arrangement is employed. First, and most important to the success of a bird nesting arrangement, is

338. See Whiteside, *supra* note 20, at 8. Often, conflicts are left unresolved because parents have no insight into how their conflicts affect the children. Frequent visitations and interactions between these parents are not usually in the best interest of the child because unresolved conflicts lead to ongoing hostility that escalates with each contact, to which the child is often exposed. See Bryner, *supra* note 1, at 208. The most conflicted families need "custody arrangements that allow parents to disengage from one another and are backed by explicit legal parenting agreements, which clearly specify regular time with each parent with a minimum of shared decision-making, coordination, and direct communication." Whiteside, *supra* note 20, at 19. Transitions for these families should be minimized.

339. Kelly, *A Decade Review*, *supra* note 2, at 964.

340. Whiteside, *supra* note 20, at 7.

341. *Id.* at 8.

the consent of both parents. It is not always the case, of course, but, ideally, parents' knowledge of their own children makes them more qualified than outsiders, including attorneys and judges in the legal system, to develop and implement an effective custody plan.³⁴² If parents cannot agree on a custody plan, this disagreement, by definition, is antithetical to effective and successful joint custody. Bird nesting is no different. If parents cannot agree on the employment of bird nesting as a necessary and sufficient custody arrangement to begin with, all evidence suggests that they will not be able to effectively negotiate and resolve the detailed issues that are associated with the arrangement. Ideally, the very purpose of a joint custody or, particularly, a bird nesting arrangement is to facilitate the environment in which the details to be negotiated are focused on the child. Thus, if parents cannot agree on the nature of the arrangement, they likely will not agree on the issues that facilitate the arrangement, which are in the best interests of the child. Usually, if parents do not agree on a bird nesting arrangement, it is because one or both parents prioritize their own personal needs, such as the need to provide for a previous or subsequent family, the need to relocate geographically, the need to establish new relationships, the need for autonomy, or even the need to disassociate with the former spouse, over the child's need for residential stability. Because research has shown that the needs of the parents are significantly relevant to the developmental adjustments of the child and the child's need for residential stability is much less significant than previously thought, the balance of reasonable needs ought to be weighted in favor of bird nesting only when the parents both choose to do so. Otherwise, reasonable but unfulfilled parental needs negatively affect the parent, the parental alliance, and, ultimately, the child. This is of particular import for jurisdictions that prefer and, more significantly, mandate joint custody.

The fundamental obligation of the court in any custody determination is to identify the best interest of the child. Whether bird nesting or joint custody serves that end is a determination that should be made on an ad hoc basis. Even in cases in which parents agree to bird nesting, the court should consider the comprehensive and interrelated effects of the inherent variables on the parents and the child within this arrangement. Because the court's obligation is to maximize the best interests of the child, it should have jurisdiction to refuse a bird nesting arrangement, despite the parents' agreement, if it determines that the arrangement is not in the child's best interest.

Second, parents should be able to communicate civilly about the child's needs and should be able to negotiate about the child's needs, reasonably and realistically, with the child in mind. Both parents must be able to do this while disassociating themselves from the divorce.

342. See Cohen & Committee, *supra* note 226, at 1019-23.

Third, to successfully employ a bird nesting arrangement, parents should be able to effectively parent within the restrictions of the arrangement. This is closely related to focusing on the child's needs. If, because of the proximity to the other parent, a parent is unable to bond appropriately with the child, recognize or participate in the changing psychological needs of the child, overcome negative reactions in the child, nurture and facilitate a positive relationship between the child and the other parent, and still coordinate shared but separate residential rights and responsibilities with a former spouse, then primary or secondary custody, perhaps with appropriate interventions, may be more effective than bird nesting to promote positive child adjustment.

Fourth, bird nesting should be economically feasible. Parents should be prepared to maintain three houses while still confronting the decrease in socioeconomic stability that naturally results from divorce. Additionally, parents must do this while accommodating the residential needs of the child separately from the residential needs of a new and completely autonomous parent-child relationship. The residential aspects of that relationship will always be connected to the child's residential relationship with the other equally autonomous, yet equally connected parent-child relationship.

Fifth, bird nesting should be employed by parents who are not remarried and do not have previous or subsequent minor children. Although parents who face these circumstances are not likely to agree on a bird nesting arrangement, parents and courts must not facilitate residential stability for one family at the expense of another.

IV. CONCLUSION

As divorce continues to become commonplace and divorced children continue to be affected by the consequences of divorce, parents and courts must facilitate opportunities for positive adjustment. Bird nesting normally does not afford such opportunities. Although bird nesting is advantageous for alleviating the residential instability that accompanies divorce, the disadvantages of the arrangement far outweigh this isolated benefit. Indeed, social science studies indicate that children are not as negatively affected by this aspect of divorce as has been traditionally thought. Instead, if postured in an appropriate parental alliance and nurtured with effective buffers to the negative consequences of divorce the long-term consequences for divorced children can be resilience, maturity, and independence. A typical joint custody arrangement that does not incorporate the disadvantages of a shared household upon divorce is sufficient and effective for promoting these positive factors. Bird nesting only tends to magnify the pre-separation conflict between the parents, which has already placed the children at risk of poor developmental adjustment. Thus, bird nesting is usually counterproductive to post-divorce, positive child adjustment.

If parents or courts are to consider a bird nesting arrangement, they should do so only after fully assessing the interrelationship of the comprehensive variables that affect children's adjustment after divorce. Most indicative of these variables is the pre-divorce parental relationship. If, after considering all of the interrelated variables that affect children's adjustment after divorce, parents or courts do facilitate a bird nesting arrangement, they should do so only upon the agreement of both parties. Even then, courts should ensure that the arrangement is in the best interests of the children and should maintain focused oversight of the arrangement upon its implementation. As the respective family dynamics change over time, so too will the effect of the bird nesting arrangement on the developmental adjustment of the children.