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PREVIEW

**JUDICIAL DECISION MAKING IN DIVORCE PROCEEDINGS
REGARDING THE VISITATION OF MINOR CHILDREN**

by

Barbara M. Harris

A Dissertation

Presented to the Faculty of

the Graduate College in the University of Nebraska

In Partial Fulfillment of Requirements

For the Degree of Doctor of Philosophy

Major: Interdepartmental Area of Community and Human Resources

Under the Supervision of Professor Steven A. Eggland
and Professor Ann Coyne

Lincoln, Nebraska

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DISSERTATION TITLE

Judicial Decision Making in Divorce Proceedings

Regarding the Visitation of Minor Children

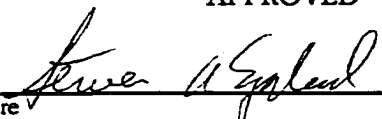
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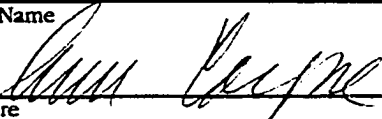
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DATE


Signature

4/25/95

Steven Egland, Ph.D.
Typed Name


Signature

4/25/95

Ann Coyne, Ph.D.
Typed Name


Signature

5/1/95

Bill Meredith, Ph.D.
Typed Name


Signature

4/25/95

Deanna Eversoll, Ph.D.
Typed Name

Signature

Typed Name

Signature

Typed Name



Judicial Decision Making In
Parent/Child Visitation in Divorce Proceedings

Barbara M. Harris, Ph.D.

University of Nebraska, 1995

Advisors: Steven A. Eggland, Ph.D.

Ann Coyne, Ph.D.

This study was concerned with the discovery and analysis of: (1) the factors that district court judges consider when deciding parent/child visitation in divorce proceedings; (2) the differences among judges' responses based on demographic characteristics; (3) the number of factors judges consider when deciding visitation; and (4) the use of the "tender years doctrine" in judicial decision making.

An instrument was designed specifically for this research. This study surveyed the population of district court judges in Nebraska during January 1993 with a response rate of 80%.

Several findings emerged from this study:

1. Judges exercised a wide range of discretion when deciding parent/child visitation in divorce proceedings.
2. Demographic characteristics of the judges did not usually predict their responses to questions regarding visitation or divorce, and there was great individual variability among the judges.

3. Family violence, specifically child abuse and spouse abuse, affected judges' decisions regarding visitation in divorce proceedings, although family violence did not surface in the literature as an important factor in judicial decision making in matters of custody.
4. Judges listened to the wishes of older children in regard to visitation.
5. The "tender years doctrine" is sometimes used in judicial decision making and custody but appears to be waning as a factor.
6. Judges expressed little interest in non-traditional philosophy and practice in the area of visitation.

PREVIEW

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To my best friend Mo, the "Girls in the Hood" and Mary Ann who remind me that the only limit is the sky,

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PREVIEW

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PREVIEW

CHAPTER 1

Introduction

In a 1930 article titled "Law and the Modern Mind" Jerome Frank observed:

As the word indicates, the judge in reaching a decision is making a judgment. And if we would understand what goes into the creating of that judgment, we must observe how ordinary men dealing with ordinary affairs arrive at their judgments (p.28).

One of the many "ordinary affairs" of the judicial day, and the subject of this study, is judicial decision making related to visitation by non-custodial parents after a divorce has taken place.

The judicial system serves an integral function in the disposition of families in the divorce process. Plumb and Lindley (1990) report:

More than any other aspect of custody, visitation disputes cause repetitive chronic litigation for the courts. Most judges have little patience with these chronic disputes, yet there is little they can do to resolve them. Judges are also human and have extreme difficulty in determining whom to believe and what to do, even if they do believe one party more than the other. In addition, if judges are to punish one party by reducing visitation for irresponsibility, is that not punishing the children for the sins of the parents (p. 58).

This passage characterizes the unenviable task of judges as they approach the issue of visitation in divorce cases. While judges are unable to regulate the relationships in post-marital life, they have the authority to establish guidelines that lay a foundation for shaping that experience.

In Nebraska, as in most jurisdictions, statutes require judges to make decisions regarding children based on the "best interests" of the children. However, what is in the child's "best interest" is not readily discernable. Judges have few guidelines and a significant amount of discretion in making decisions regarding parent/child visitation in divorce cases. The stakeholders in judicial decisions regarding matters of divorce are not only the individual family members but society at large.

Statement of the Problem

While several aspects of post-divorce life merit study, the issue of parent/child visitation is a major and pressing aspect of post-divorce family life. There is limited empirical research on judicial decision making in divorce cases (Lowrey, 1980; Pearson & Luchesi-Ring, 1983; Sorenson & Goodman, 1989). The existing literature examines parent/child visitation in the context of custody, not as a separate issue in divorce cases. According to Plumb and Lindley, "More than any other aspect of custody evaluation, visitation guidelines serve as the breeding ground of continued and prolonged litigation long after the original custody dispute is resolved" (p. 57).

The research question at the heart of this study was: to what degree do district court judges, in the state of Nebraska, exercise discretion in considering a variety of factors when deciding the visitation of non-custodial parents in divorce proceedings? In addition, to what degree do demographic characteristics of the judges influence their choice of factors in deciding post-divorce visitation by non-custodial parents? Finally, a question arises as to what degree judges consider the "tender years" doctrine in their decision making and whether this is influenced by demographic characteristics.

Purpose of the Study

Decision makers are frequently confronted with articulating how they came to a decision. Research on decision making is a means by which to describe the many facets of the decision making process. Carroll & Johnson (1990) provides six criteria of the benefits and costs of decision research:

1. Discovery - having the power to uncover the new phenomena, surprise the researcher, and lead to creative insights.
2. Understanding - providing a cause-and-effect analysis that uncovers the mechanisms or processes by which decisions are made.
3. Prediction - having logical or mathematical rules that predict the judgement and decisions that will be made. These rules need not represent the actual decision processes.
4. Prescriptive Control - providing opportunities and techniques for changing the decision process, as in prescribing better decision rules or testing potential manipulations.

5. Confound Control - creating controlled situations so as to rule out other explanations of the results.
6. Ease of Use - taking less time and resources for the same progress toward other goals (p.12).

This study was interested in identifying the factors judges consider when making decisions with regards to visitation by non-custodial parents in divorce proceedings. This study was not concerned with the development of normative theory but with the discovery and analysis of the factors that go into the decision making process about post-divorce parent/child visitation.

A review of the literature established that, while instruments measuring judicial decision making in the area of custody existed, no instrument existed that specifically measured judicial decision making in the area of visitation. Therefore, a survey was developed to collect empirical data on the research topic. The primary reason for examining this topic was to understand judicial decision making in the area of parent/child visitation in divorce cases. Carroll & Johnson suggest that decision making can be improved if we understand the decision task and the decision makers (1990).

Research Questions

Research questions generated to examine the problem of the study were:

1. To what degree were District Court judges in Nebraska homogeneous in January 1993?

2. What factors do judges consider most important in making decisions about parental visitation in divorce cases? Do the most important factors differ by the judges' age, legal orientation, political orientation, marital status and parental status of the judge?
3. How many factors do judges consider in making decisions regarding visitation, and does the number differ by the judges' age, legal orientation, political orientation, marital status and parental status?
4. Which judges (by age, legal orientation, political orientation, marital and parental status) are more apt to use the "tender years doctrine" in their decision making in visitation cases?
5. What general beliefs do judges hold about divorce and parental visitation? Do the most important factors differ by the judges' age, legal orientation, political orientation, marital status and parental status?
6. To what degree do district court judges exercise discretion when deciding parent/child visitation in divorce proceedings?

Definition of Terms

District Court: is defined as a court with both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide (Constitution of the State of Nebraska, Article V, Section 9). All proceedings under section 42-347 to 42-379 of the Nebraska Revised Statutes (the dissolution of marriage statutes) shall be brought in the district court of the

county in which one of the parties resides. Proceedings may be transferred to a separate juvenile court or to a county court sitting as a juvenile court which has acquired jurisdiction pursuant to Neb. Rev. Stat. 43-2,113.

Divorce: is defined by the Nebraska statutes as the termination of a marriage by decree of a court of competent jurisdiction upon a finding that the marriage is irretrievably broken. The term dissolution of marriage shall be considered synonymous with divorce, and wherever the term divorce appears in the statutes it shall mean dissolution of marriage (Neb. Rev. Stats 42-347 (2)).

Judge: is defined as a public officer authorized to hear and determine causes in a court of law (Webster, 1992, p. 724). Nebraska statutes mandate that: No person shall be eligible to the office of district judge in any district unless he or she:

- (1) Is at least thirty years of age;
- (2) Is a citizen of the United States;
- (3) Has been engaged in the practice of law in the State of Nebraska for at least five years, which may include prior service as a judge;
- (4) Is currently admitted to practice before the Nebraska Supreme Court; and

- (5) Is, on the effective date of appointment, a resident of the district to be served, and remains a resident of such district during the period of service (Neb. Rev. Stats. 24-301 (1-5)).

Judicial Decision: is defined as the application by a court or tribunal exercising judicial authority of competent jurisdiction of the law to a state of facts proved, or admitted to be true, and a declaration of the consequences which follow (Black's Law Dictionary, 1990, p. 985).

Visitation: is defined by statute as the time that the non-custodial parent and child spend together with a purpose of continuing and fostering the normal parent relationship of the non-custodial parent with the minor child or children of the marriage (Neb. Rev. Stats. 43-2904 (10)).

Assumptions

The following assumptions were made with regard to this study:

1. Judges will apply the law to the facts.
2. The law recognizes the right of visitation.
3. An order of visitation can be enforced by the contempt powers of the court.
4. When the law is vague on the subject of visitation, judges are granted substantial discretion in deciding visitation.

5. Judges will make decisions based on "the best interests of the child."

Delimitations of the Study

The population of this study is limited to those judges serving at the district court level in Nebraska in during the month of January 1993

Limitations of the Study

1. This study is limited by the inability to make inferences about the decision-making process in parent/child visitation cases by judges in other jurisdictions for the following reasons:
 - a. The Nebraska judiciary is one of only six states in which the judges are selected and retained through the "Missouri Plan." This is a method by which lawyers are nominated for review by a preselected committee which forwards qualified applicants to the governor for appointments as judges. Under this plan the judges must run for retention every six years on a "yes" or "no" vote rather than the traditional person-to-person campaign. Such a method results in the great majority of judges being retained and promotes longevity on the bench.
 - b. Statutes and case law interpreting statutes vary from state to state.

2. The study is subject to weaknesses inherent in survey research where respondents are not interviewed on an individual basis.
3. The study is limited by gender; there was only one woman judge sitting on the district bench at the time of the study.
4. The study is limited by race; there was no racial diversity amongst the judges at the time of the study.

Significance of the Study

There is little research on the impact of the judiciary in the area of parent/child visitation in divorce proceedings. This study is significant for several reasons. First, the issue of post-divorce relationships established through visitation is relevant to the general healthy development of children. Second, the status of post-marital parent/child relationships have meaning for individual family members. Third, the post-divorce relationship between parents and children is important as it relates to the general state of the economy. Finally, the issue of post-divorce relationships established through visitation is relevant to preserving the state of the family as an institution.

The health of families is accepted by most observers as indicative of the well being of a society. The definition of family is debatable. However, Garbarino writes, "Families are the thread that holds the human race together (p. 64)." The family, as an enduring social institution, serves the essential function of preparing family members for life in society (Anderson & Sabatelli,

1995; Garbarino, 1982). Concern about the stability of the American family is evident as both the political left and political right debate the concept of "family values." Changes in the stability of the family as an institution typically become a matter of public policy concern.

Divorce is one of the most dynamic forces impacting the stability of the family as an institution and has caught the attention of social researchers in the fields of education, law, psychology, social work, and sociology. Skolnick & Skolnick (1992) point out that the family of the 50's has been held up as the model of a "traditional family," with low divorce rates and two parents in the home, with one parent in the role of breadwinner and the other in the distinct role as homemaker. These authors are in agreement with other social researchers who report that the "traditional" family of the 1950's was not an achievable model for families of color and working class families where the roles of breadwinner and homemaker were not as distinct. Furthermore, the "traditional" family model existed for a short time due to post war economic conditions that created a middle class that needed only one breadwinner.

The climate of American marital life is taken as an indicator of family stability. Historically, marriages served an economic function and were more enduring than today's marriages that are typically based primarily on meeting emotional needs. The result is a change in the marital patterns over the last three decades. While there is a limited consensus on a number of issues related to "the family," scholars agree that American family life has changed

dramatically over the last three decades (Anderson & Sabatelli, 1995; Preston, 1984; Skolnik & Skolnik, 1992).

The extent of divorce in the United States is evidenced by any number of social indicators. Divorce rates have tripled since the 1960's. For the first time in history a married couple is as likely to be separated by divorce as by death (Simon, Grossman, Weiner, 1990). DeWitt reports that one third of the divorces in 1988 occurred in the first four years (1992). Equally disconcerting is the data indicating that approximately 50% of American children will live in a single parent family at some point in their childhood (Bumpass, 1984; Huber & Spitze, 1980).

The ripple effects of divorce are extensive, and the stakeholders in the divorce phenomenon are many. Specifically, policy makers are focused upon the relationship between child support in divorce cases and public welfare. Educators, in both theory and practice, are interested in the effects of divorce. Social workers, psychologists and other mental health professionals are interested in understanding the impact of divorce upon interpersonal, family and social development of their clients.

Divorce has political, social, economic, and emotional implications. The economic ramifications of divorce are significant and becoming a growing matter of national concern. In 90% of divorce cases mothers are awarded custody (Jacoby, 1994). Forty-five percent of children of divorced parents grow up in poverty as opposed to 7% of children in families with both parents in the

home (Dodd, 1992). Receiving child support can make the difference between a child living above or below the poverty line. A report on the status of children in the State of Nebraska documented that 15.4% of children in the state on any one day live in poverty; nearly 90% of children who require welfare assistance are poor due to insufficient child support (Report by the Nebraska Department of Social Services, 1992). There has been a growing emphasis on the responsibility fathers have for their children, particularly their fiscal responsibility. The 1987 Bureau of Census reported that close to two-thirds of all non-custodial fathers defaulted on their financial obligation either partially or fully. National and state legislation is currently under consideration to address this issue.

The fiscal impact is second only to the emotional impact of divorce on families. The available research has established that a strikingly high number of non-custodial fathers do not maintain contact with their children. Of those fathers who begin post-divorce life with visits, a significant number opt out of the parent/child relationship at some time within the first two to three years, and fewer than half of the divorced fathers see their children as frequently as once a week, even though they may live within close proximity to their child (Furstenburg, 1987; Heatherington, Cox & Cox, 1980; Seltzer, 1991). Wessberg (1990) reports that ten years after divorce two-thirds of non-custodial fathers will be entirely absent from their children's lives. According to David

Blankenhorn, "Fatherlessness is now approaching rough parity with fatherhood as a defining feature of American childhood" (p. 47).

As American culture becomes serially monogamous, divorce becomes a complex and multidimensional social condition. Research on families has tried to understand the relationship between family and society. According to Skolnik and Skolnik (1992)

. . . during the same years in which the family was becoming the object of public anxiety and political debate, a torrent of new research in the field of sociology, the study of the family, had come to excite the interest of scholars in a range of disciplines-history, demography, economics, law, psychology (p.3)

Visitation is receiving considerable attention from researchers and policy makers as an essential factor in post-divorce family life (Barnum, 1986; Wallerstein & Blakeslee, 1989; Braver, Wolchik, Sandler, Fogas & Avellina, 1991; Thompson; 1993). The Nebraska legislature recently adopted the "Parenting Plan" in an attempt to establish a model for addressing concerns about children that result from a divorce. In addressing this issue, District Judge Robert Hippe writes (1994):

Many studies have been conducted about the effect of divorce on children. It turns out that who receives custody is not as important to the welfare of children as one might think. Rather, two items consistently appear as causes of harm to children of divorce. The first cause is

continued conflict between the parents. The second is a sense of loss to the child because of limited access to the non-custodial parent (p. 1).

Practices are changing in the legal system because of concern about adversarial proceedings and their ineffectiveness in matters of family. Divorce mediation and parenting plans are two of the most recent changes in the judicial system which effect parental visitation. Effective September 15, 1994, the Nebraska Parenting Act, is intended to:

- A. promote voluntary development of parenting plans
- B. encourage the non-custodial parent's contact with children
- C. discourage litigation in resolving parental conflict (p. 1-2)

While this act is intended to guide parents through the process of planning for the family in post divorce life, case law in Nebraska imposes upon the court the responsibility of making its own determination concerning matters of visitation.

The court's responsibility cannot be "forestalled by agreements or stipulations of the parties" (Manual v. Manual, 220 Neb. 867, 374 N. W. 2d 39 (1985)).

Thus, the statutes have provided and continue to provide for judicial involvement in the visitation arrangement. However, the extent of judicial involvement in decisions regarding parent/child visitation after a divorce has not been assessed.

No quantitative or qualitative data exists about judicial decision making specifically in the area of visitation in divorce proceedings. All of the data on judicial decision making in domestic relations cases relates to the area of child