

PROTECTING THE PARENT-CHILD RELATIONSHIP

KRISTY HORVATH* AND MARGARET RYZNAR**

I. INTRODUCTION

Over the past twenty years, an increase in travel and globalization sparked a rise in the cross-cultural marriage rate. In 2010, for example, the number of marriages between Japanese nationals and foreigners doubled from a decade ago, increasing to approximately forty thousand a year, with over twenty thousand children born of those marriages.¹

When these international marriages succeed, cultural differences between spouses may be less important than if the marriage were to unravel; then, cultural norms concerning child custody become important.² This is especially true if one parent wants to return to a native country with the child, thereby jeopardizing the other parent's relationship with the child.³

In these situations, the 1980 Hague Convention on Civil Aspects of International Child Abduction (Convention or Hague Convention) provides a procedure by which to determine where the custody hearing should be held.⁴ Typically, signatory nations must

* Associate, Law Office of Thomas M. Green. Member, Indiana Bar. J.D. 2014, Indiana University Robert H. McKinney School of Law; B.A. 2011, DePaul University.

** Associate Professor of Law, Indiana University Robert H. McKinney School of Law. Member, District of Columbia Bar; Member, Illinois Bar. J.D. 2008, Notre Dame Law School; M.A. 2005, Jagiellonian University; B.A. 2004, University of Chicago. Many thanks to my colleague Emily Morris for her expert comments on the draft of this Article, as well as to Craig Martin and Colin P.A. Jones for their expertise.

1. Megan J. Reynolds, Note, *It Can Be Done: On Japan Becoming a Successful Signatory to the Hague Convention on the Civil Aspects of International Child Abduction*, 44 GEO. WASH. INT'L L. REV. 367, 378 (2012).

2. It is estimated that one out of every 2.9 marriages in Japan ends in divorce and one out of every 4.5 children will experience their parents' divorce before they become an adult. Takao Tanase, *Divorce and the Best Interest of the Child: Disputes over Visitation and the Japanese Family Courts*, 20 PAC. RIM L. & POL'Y J. 563, 564 (Matthew J. McCauley trans., 2011).

3. In 2008, there was an estimation of nineteen thousand divorces between Japanese and foreign nationals. Reynolds, *supra* note 1, at 378.

4. See Convention on the Civil Aspects of International Child Abduction art. 8, *done* Oct. 25, 1980, 1343 U.N.T.S. 89 [hereinafter *The Hague Child Abduction Convention*]. For a review of the success of the Convention in Australia, see Adiva Sifris, *The Hague Child Abduction Convention "Garnering" the Evidence: The Australian Experience*, 19 SW. J. INT'L L. 299 (2013). For background on the U.S. domestic legal framework addressing this topic, see

return children to their countries of habitual residence unless an enumerated exception exists.⁵ This approach offers a remedy for cases of international child abduction—whereby one parent moves with the child to another country without the other parent's consent—and protects both parents' rights to access their child.⁶

However, the Convention's primary concern with jurisdiction maintains the importance of signatories' custody laws in protecting children's relationships with both parents following a divorce. Japan became a signatory to this Convention in 2014,⁷ perhaps signaling a shift in its approach to child custody matters that, until recently, often negatively impacted children's relationships with one parent⁸ and resulted in the fact that many children in Japan did not have significant relationships with their foreign parents after divorce.⁹

Custody standards in the United States previously resembled those of modern Japan, with a preference for one parent—typically the mother.¹⁰ However, the United States has moved toward joint custody and specific guidelines for awarding custody and visitation, prompting the question of whether Japan will experience similar developments, particularly in light of Japan's recent ratification of the 1980 Hague Convention on Civil Aspects of International Child Abduction.

This Article uses the U.S. experience with child custody to examine the ways in which Japan can help protect both parents' rights in light of its recent commitment to the Hague Convention.¹¹ Part II of this Article explores the development of the

Rebecca Miller, Note, *The Parental Kidnapping Prevention Act: Thirty Years Later and of No Effect? Where Can the Unwed Father Turn?*, 40 PEPP. L. REV. 735 (2013).

5. The Hague Child Abduction Convention, *supra* note 4, art. 12; June Starr, *The Global Battlefield: Culture and International Child Custody Disputes at Century's End*, 15 ARIZ. J. INT'L & COMP. L. 791, 828–29 (1998).

6. See Starr, *supra* note 5, at 828.

7. *Status Table, 28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HAGUE CONF. ON PRIVATE INT'L L., http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last updated Apr. 4, 2014).

8. See Reynolds, *supra* note 1, at 379–81.

9. See *id.* at 368. For additional statistics and stories on this topic, see James B. Kildunne, Note, *The Difficulty of Enforcing American Family Law Judgments in Japan*, 36 HASTINGS INT'L & COMP. L. REV. 603, 603–04 (2013); Michelle Boykin, *A Comparison of Japanese and Moroccan Approaches in Adopting the Hague Convention on the Civil Aspects of International Child Abduction*, 46 FAM. L.Q. 451, 455–56 (2012).

10. See *infra* Parts II and III.

11. “Law inevitably is involved in the resolution of cultural conflicts.” Nancy E. Dowd, *Law, Culture, and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI-KENT L. REV. 785, 785 (2003). But of course, “[i]n the area of family law, law is consciously not neutral and heavily value-laden.” *Id.* at 786.

child's best interests standard and joint custody in the United States, while Part III examines the Japanese legal framework on custody. Part IV of this Article offers several ways in which Japan can move to protect both parents' rights to a child, especially where one parent is a foreigner.

II. THE EVOLUTION OF CHILD CUSTODY LAW IN THE UNITED STATES

Child custody is always a significant issue in divorce proceedings, especially when both parents are fit and each is asserting a custody claim. The process for determining child custody in the United States continues to evolve because the roles that parents are expected to play during marriage and after divorce continue to change both socially and legally. Further, each state has its own child custody laws because family law falls within the domain of the states.¹² Nonetheless, two major shifts can be identified that resulted in modern U.S. custody law: a shift from gendered to gender-neutral custody standards and a shift from sole to joint custody.

A. *The Custody Presumption Shift Based on Gender*

It is important to note at the outset that there are two types of child custody: legal and physical. Legal custody provides a parent the power to make major decisions for the child, while physical custody determines with which parent the child lives.¹³ The custody framework has evolved considerably throughout the years,

12. See Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1764, 1770 (2005) (noting that family law is currently in the domain of the states but that, historically, the federal government was not limited in this way). But Justice Antonin Scalia has expressed concern about the increasing federalization of family law:

I think it obvious . . . that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.

Troxel v. Granville, 530 U.S. 57, 93 (2000) (Scalia, J., dissenting); Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 200, 206, 239, 255 (1999) (arguing that there is no foundation for the view that family law belongs in the state domain).

13. Legal custody includes the "right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *McCarty v. McCarty*, 807 A.2d 1211, 1213 (Md. Ct. Spec. App. 2002) (quoting *Taylor v. Taylor*, 508 A.2d 964, 967 (Md. 1986)). Physical custody includes the "right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody." *Id.* (quoting *Taylor*, 508 A.2d at 967). These two types of custody may be awarded in differing combinations. See, e.g., *LaChapelle v. Mitten*, 607

undergoing several transformations in the relevant presumptions and standards.

1. Presumption Favoring Fathers

Common law in the United States included the presumption that a father was entitled to the control and custody of his legitimate minor children.¹⁴ Parental rights were viewed synonymously with property rights, which vested in the father¹⁵ unless it could be shown that he was wholly “unfit” or “monstrously and cruelly” abusing his parental power.¹⁶ Therefore, when the parents’ marriage dissolved or a dispute erupted concerning living arrangements, the father’s proprietary rights and interests were the only ones afforded legal protection.¹⁷ A mother received reverence and respect, but not power over her children.¹⁸

Throughout the course of the nineteenth century, this controlling presumption began to crumble as judges expressed a newfound concern for the interests of young children in divorce proceedings.¹⁹ Indeed, this judicial concern facilitated a new, presumptive theory supporting maternal preference.²⁰ Not only would this new theory support the mother’s unique role in a young child’s development, but the maternal presumption also replaced the paternalistic ideals inherent in the common law standard.²¹

2. Tender Years Doctrine Favoring Mothers

Beginning in the early nineteenth century, the tender years doctrine—under which the mother is the preferred custodian for young children—developed.²² The term “tender years” was histori-

N.W.2d 151, 168 (Minn. Ct. App. 2000) (affirming one parent’s sole physical custody and shared legal custody with another parent and granting a third parent a particular right).

14. MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 50, 53 (1994).

15. WILLIAM BLACKSTONE, COMMENTARIES 196 (Bernard C. Gavit ed., Wash. Law Book Co. 1941) (1892). The father’s power over his minor child could continue even after his death, if he appointed a guardian to his children. Furthermore, a father could elect to delegate some of his parental rights during his life with a tutor or schoolmaster, but none of these options provide more power for a mother.

16. Prather v. Prather, 4 S.C. Eq. (4 Des. Eq.) 33, 39 (1809).

17. *Id.* at 35–36.

18. *Id.* at 39; see also BLACKSTONE, *supra* note 15, at 196.

19. David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 35 HOFSTRA L. REV. 1461, 1467–68 (2006).

20. *Id.* at 1468.

21. *Id.*

22. Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CALIF. L. REV. 335, 340 (1982).

cally used in English law to describe a child deemed too young to express his or her discretion in the choice of the custodial parent.²³ The tender years doctrine replaced the previously paternalistic child custody laws by creating a maternal preference in custody disputes over young children.²⁴ Under this new legal framework, the father would likely not receive custody unless the mother was unfit.²⁵ The doctrine operated on two societal assumptions about the child's best interests.²⁶ The first was based on the child's need for care and affection from the mother.²⁷ The second was that a mother was better suited than a father to provide care and attention to young children.²⁸

The tender years doctrine received sharp criticism from multiple sources, with its opponents contending that both parents, not merely the mother, were capable to care for children.²⁹ Critics also argued that the doctrine perpetuated out-of-date stereotypes regarding fathers³⁰ and undercut their rights.³¹ In the mid- to late-twentieth century, often both parents worked outside of the home and mothers no longer served as the default primary parent in every household.³² These changing social realities and parenting roles put pressure on the tender years doctrine³³ and, despite the doctrine's simplicity and ease of application, the time arrived for a more gender-neutral approach.

3. The Facially Gender-Neutral Primary Caretaker Presumption

The primary caretaker presumption, which is facially gender-neutral, held that the parent who maintained the majority of the responsibility for the care and nurture of a young child should be

23. *Id.* at 353.

24. Cynthia Starnes, *Swords in the Hands of Babes: Rethinking Custody Interviews After Troxel*, 2003 Wis. L. Rev. 115, 120. It could, however, be argued that the tender years doctrine in fact created a preference for the primary caregiver of the child. If a mother's role is seen historically as the caregiving parent, this doctrine helped to reinforce the social premise that a child should not be separated from the primary caregiver—the mother.

25. Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 465 (1984).

26. Klaff, *supra* note 22, at 343.

27. *Washburn v. Washburn*, 122 P.2d 96, 100 (Cal. Dist. Ct. App. 1942).

28. *Sheehan v. Sheehan*, 143 A.2d 874, 882 (N.J. Super. Ct. App. Div. 1958). The preference for the mother is based on an assumption that the mother is able to take better and more experienced care of the children than the father.

29. Klaff, *supra* note 22, at 343–44.

30. *Id.*

31. See Scott & Derdeyn, *supra* note 25.

32. See *id.* at 460–61.

33. See *id.*

awarded custody in order to help shelter the child from drastic changes after a divorce.³⁴ Postulating that the child was more closely attached to a primary caretaking parent, this presumption aimed to protect the intimate bond formed between a caretaker parent and child by maintaining the status quo of such a developed relationship.³⁵

The cultural changes that occurred in the second half of the twentieth century facilitated the move to a gender-neutral presumption. Specifically, beginning in the late 1960s, societal views on gender began to shift.³⁶ As more women entered the workforce, the maternal preference for child custody began to seem inconsistent with the changing times.³⁷ Additionally, parental roles began to blur as mothers took wage-earning roles and fathers nurtured their children.³⁸ Finally, constitutional concerns regarding gender inequality arose.³⁹

The shift toward gender-neutrality helped promote the child's best interests in custody disputes.⁴⁰ Instead of determining child custody based on gender biases and social stereotypes, judges

34. See MARTIN R. GARDNER, *UNDERSTANDING JUVENILE LAW* 43 (3d ed. 2009).

35. See *Garska v. McCoy*, 278 S.E.2d 357, 362 (W. Va. 1981).

36. For example, President Kennedy signed into law The Equal Pay Act of 1963, which for the first time made it illegal to pay women less than men for the same work. Marianne DelPo Kulow, *Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws—A Necessary Tool for Closing the Residual Gender Wage Gap*, 50 HARV. J. ON LEGIS. 385, 392 (2013). See generally Linda C. McClain, *The Other Marriage Equality Problem*, 93 B.U. L. REV. 921 (2013) (summarizing a survey revealing the shift in women's attitudes on marriage, family, and career from 1960 to 2010).

37. See Joyce P. Jacobsen & Laurence M. Levin, *Effects of Intermittent Labor Force Attachment on Women's Earnings*, 118 MONTHLY LAB. REV. 14, 16 (1995) ("Women who leave the work force are more likely to be married and to have children than are their counterparts who remain in the work force."). But see, e.g., ALEX M. DAVID, *New York City Bar, Corporate Law Department Diversity Benchmarking Report: 2006 Report to Signatories of the Statement of Diversity Principles*, in BEYOND DIVERSITY 101: NAVIGATING THE NEW OPPORTUNITIES 259, 278, 285 (2008) (determining that nearly eight percent of New York City women attorneys work flexibly compared to about one percent of men); Marin Clarkberg & Phyllis Moen, *Understanding the Time Squeeze: Married Couples' Preferred and Actual Work-Hour Strategies*, 44 AM. BEHAV. SCIENTIST 1115, 1133 (2001) (noting that women, not men, typically prefer part-time work); Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 3 (2007) ("[The term 'Opt-Out Revolution'] is used to describe highly educated professional women who have chosen to leave their jobs to care for their children or to arrange reduced work hours to have more time at home."); Marianne Bertrand et al., *Dynamics of the Gender Gap for Young Professionals in the Corporate and Financial Sectors* 2–4 (Nat'l Bureau of Econ. Research, Working Paper No. 14681, 2009), available at <http://www.nber.org/papers/w14681.pdf> (finding that many women curtail their work after having children).

38. See Scott & Derdeyn, *supra* note 25, at 458, 461.

39. See *id.* at 466 n.49, 482; Meyer, *supra* note 19, at 1468.

40. See Meyer, *supra* note 19, at 1468.

began to employ the presumption in favor of the child's primary caretaker, as long as that parent met minimum objective standards for being a fit parent.⁴¹

Nevertheless, the primary caretaker presumption also received criticism. Opponents argued that the presumption both failed to accurately account for the child's welfare⁴² and constituted "a 'the tender years' presumption in disguise" because it was the mother who frequently performed the caretaking function.⁴³ Furthermore, opponents argued that it allotted too much weight to traditional gender roles within society.⁴⁴ Although this criticism led to the abrogation of the primary caretaker presumption, many courts still utilize similar principles in resolving child custody disputes.⁴⁵

4. Child's Best Interests Standard

Modern determinations of child custody are made using the best interests of the child standard.⁴⁶ This standard allows for judicial

41. See, e.g., *Garska v. McCoy*, 278 S.E.2d 357, 363 (W. Va. 1981). According to the *Garska* Court:

In establishing which natural or adoptive parent is the primary caretaker, the trial court shall determine which parent has taken primary responsibility for, inter alia, the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interactions among peers after school, i. e. [sic] transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i. e. [sic] babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i. e. [sic] teaching general manners and toilet training; (9) educating, i. e. [sic] religious, cultural, social, etc.; and, (10) teaching elementary skills, i. e. [sic], reading, writing and arithmetic.

Id.

42. Jo-Ellen Paradise, *The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?*, 72 ST. JOHN'S L. REV. 517, 535-36 (1998). Paradise notes the following:

The primary caretaker standard also assumes that there is a primary caretaker, which may not always be true in modern society where both parents frequently work outside the home and contribute equally to child-rearing responsibilities. This standard also fails to account for the child's relationship with the other parent, which may actually be stronger than that with the primary caretaker. Furthermore, the amount of time that a parent spends with his or her children does not necessarily indicate the quality of the children's relationship with that parent.

Id.

43. ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* 560 (6th ed. 2009).

44. See, e.g., Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291, 292-93 (1992).

45. GARDNER, *supra* note 34.

46. MNOOKIN & WEISBERG, *supra* note 43, at 562. There are several factors a court may use when determining the best interests of the child, which such factors include: 1) age, health, and sex of the child; 2) determination of the parent that had the continuity of care

discretion in individualized determinations as to which parent would best serve the child's needs, regardless of the parent's gender.⁴⁷ The standard is flexible and all disputes are determined on a case-by-case basis, balancing the child's interests.⁴⁸

Unlike the tender years doctrine, the best interests standard promotes fairness and equality between the parents by acknowledging that both parents have rights to their children.⁴⁹ By creating a standard that minimizes the relevance of gender, courts are able to focus on the child's welfare.

Modern day custody law therefore no longer centers on the parents and instead employs the child's best interests standard, concentrating entirely on the question of what custody arrangement is in the child's best interests.⁵⁰ The factors a court considers may be established by statute or previous court decisions.

In Indiana, for example, courts determining the child's best interests are to consider: (1) the age and gender of the child, (2) the wishes of the child's parents, (3) the wishes of the child, with more weight given to a child of at least fourteen years of age, (4) the connection of the child with the parents, siblings, and any other person who may significantly affect the child's best interests, (5) the child's adjustment to home, school, and community, (6) the mental and physical health of all individuals involved, and (7) evidence of a pattern of domestic abuse by either parent.⁵¹ The

prior to the separation; 3) determination of the parent who has the best parenting skills and the willingness and capacity to provide primary child care; 4) the employment of the parent and responsibilities of that employment; 5) physical and mental health and age of the parents; 6) emotional ties of parent and child; 7) moral fitness of parents; 8) the home, school and community record of the child; 9) the preference of the child at the age sufficient to express a preference by law; 10) stability of home environment and employment of each parent; and 11) other factors relevant to the parent-child relationship. Furthermore, marital fault should not be used as a sanction in custody awards. *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983). For a useful background on the U.S. best interests standard, see John C. Lore III, *Protecting Abused, Neglected, and Abandoned Children: A Proposal for Provisional Out-of-State Kinship Placements Pursuant to the Interstate Compact on the Placement of Children*, 40 U. MICH. J.L. REFORM 57, 64 n.23 (2006).

47. Scott & Derdeyn, *supra* note 25, at 466.

48. Paradise, *supra* note 42, at 532; see also Michael J. Waxman, *Children's Voices and Fathers' Hearts: Challenges Faced in Implementing the "Best Interests" Standard*, 26 ME. B.J. 71 (2011) (noting the difficulties in applying the standard).

49. Paradise, *supra* note 42, at 532.

50. *Reno v. Flores*, 507 U.S. 292, 303–04 (1993) (“‘The best interests of the child,’ a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody.”). “Europe, on the other hand, takes a much more parent-friendly approach to its ‘best interests of the child’ application.” Erin Bajackson, *Best Interests of the Child—A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIMONIAL L. 311, 351 (2013).

51. IND. CODE ANN. § 31-14-13-2 (West 2008).

Indiana statute explicitly rejects a presumption favoring either parent.⁵² This is typical for a best interests analysis and is similar to that used in other states today.⁵³

B. *The Custody Presumption Shift from Sole to Joint*

Custody presumptions such as the primary caretaker presumption were important in the context of sole custody, wherein one parent received custody and the other received visitation rights. However, the overwhelming popularity of sole custody arrangements diminished as courts started to grant joint custody, allowing both parents to share custody despite separation.⁵⁴

1. Philosophy of Sole Custody

Although there had been several shifts in the cultural and social assumptions underlying the various presumptions courts used to determine child custody, support for sole custody remained the constant factor.⁵⁵ Sole custody allowed the court to designate a single custodial parent to legally determine the child's education, religious upbringing, and medical treatment, while attending to the child's day-to-day activities and care.⁵⁶ The second parent or the noncustodial parent assumed a secondary position in the child's life, removed from decision-making authority and limited to visitation rights with the child. Sole custody rested on a bifurcated view of the paternal/maternal relationship with the child—specifically, the idea that one parent should be the essential parent while the other parent should provide financial assistance.⁵⁷

Traditional custody disputes were therefore often regarded as “custody battles,” tug-of-war processes in which both parents fought each other in courts for sole custody.⁵⁸ The fact that courts

52. *Id.*

53. *See, e.g.*, VA. CODE ANN. § 20-124.3 (2014); MICH. COMP. LAWS ANN. § 722.23 (West 2011).

54. Joint custody has been emerging in other legal systems as well. *See, e.g.*, Robert Emery, Editorial Note, 51 FAM. CT. REV. 520, 521 (2013) (“Joint custody is also on the rise in Italy, mostly joint *legal* custody, a relatively new concept in Italian law.”). *But see* Sol R. Rappaport, *Deconstructing the Impact of Divorce on Children*, 47 FAM. L.Q. 353, 377 (2013) (arguing for the rejection of “sole” and “joint” terminology because it increases conflict between parents).

55. Meyer, *supra* note 19, at 1469.

56. *Id.* at 1469–70.

57. Paradise, *supra* note 42, at 518.

58. *Id.* at 524.

“awarded” custody further suggested that there were clear winners in custody arrangements.⁵⁹

However, sole custody led to a gap in the noncustodial parent’s relationship with the child, even though the U.S. Supreme Court has repeatedly recognized parental rights under the Constitution.⁶⁰ In fact, a parent’s right to determine the care, custody, and control of his or her children is “perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court]” and protected by the Fourteenth Amendment.⁶¹ Nonetheless, the concept of sole custody leaves the noncustodial parent the right to visitation only, and even though visitation does not extinguish parental rights, it alters them.⁶²

The complete denial of visitation has an impact on the child’s growth, health, and mental state.⁶³ Research suggests, for exam-

59. *Id.*

60. *Lehr v. Robertson*, 463 U.S. 248, 257–59 (1983) (recognizing a constitutional protection afforded to a parent in regards to the custody, care, and upbringing of his or her child); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”).

61. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”); *see also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (noting that the freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 510 (1925) (noting that the parents’ right to choose private education over public education is a fundamental liberty interest protected by the Fourteenth Amendment); *Meyer v. Nebraska*, 262 U.S. 390, 390–91 (1923) (noting that the parents’ right to hire a teacher to teach their child a foreign language is a fundamental liberty interest protected by the Fourteenth Amendment). Such protection has also been called the “parental liberty interest,” which permits parents to direct the upbringing of their children. *See, e.g., Kandice K. Johnson, Crime or Punishment: The Parental Corporal Punishment Defense—Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413, 425 (1998) (noting that the parent-child relationship creates a Fourteenth Amendment “liberty interest” that allows parents to direct the upbringing of their children).

62. *See Paradise, supra* note 42, at 542. “Due to this fundamental liberty interest, advocates for fathers’ rights began pushing for courts to award joint custody beginning in the late 1970s.” *Bajackson, supra* note 50, at 323. But John Pollock states as follows:

[W]hile parents losing their custody case will likely retain some vestige of the parent/child relationship (visitation), the fact remains that going from full custody to joint custody or visitation is a drastic reduction in parental rights and significantly reduces the parent’s ability to raise the child as that parent sees fit.

John Pollock, *The Case Against Case-by-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 *DRAKE L. REV.* 763, 788 (2013). Certain states offer guidelines for visitation time, such as Indiana’s Parenting Guidelines. *INDIANA RULES OF COURT: INDIANA PARENTING TIME GUIDELINES* (2013), available at <http://www.in.gov/judiciary/rules/parenting>.

63. Michael J. Lewinski, Note, *Visitation Beyond the Traditional Limitations*, 60 *IND. L.J.* 191, 194 (1985).

ple, that children in sole custody homes have a harder time developing intimate relationships and suffer from depression and anxiety at a higher rate than those living with both parents.⁶⁴ Joint custody and visitation may ease these concerns, emerging as popular alternatives to sole custody.

2. Emergence of Joint Custody

Almost every state in the United States currently permits joint custody or has a presumption of joint custody,⁶⁵ compared to in 1975 when only one state permitted joint custody.⁶⁶ Unlike the “all or nothing” tone set by sole custody decisions, joint custody allows the custody of children to be shared between divorcing parents.⁶⁷ Both parents can therefore maintain significant contact with their children.⁶⁸ The joint custody paradigm may also further the

64. Paradise, *supra* note 42, at 555.

65. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Working Toward More Uniformity in Laws Relating to Families*, 44 FAM. L.Q. 469, 511 (2011); *see, e.g.*, IDAHO CODE ANN. § 32-717B(4) (2006) (“[A]bsent a preponderance of the evidence to the contrary, there shall be a presumption that joint custody is in the best interests of a minor child or children.”); OR. REV. STAT. § 107.169(3) (2011) (presuming joint custody is preferable when “both parents agree to the terms and conditions of the order”). Critics have pointed out that this is undesirable in cases of domestic abuse. Janet R. Johnston & Nancy Ver Steegh, *Historical Trends in Family Court Response to Intimate Partner Violence: Perspectives of Critics and Proponents of Current Practices*, 51 FAM. CT. REV. 63, 68 (2013).

66. *But see* Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 497–98 (1988) (arguing that the rise in joint custody is not desirable).

67. *See* Scott & Derdeyn, *supra* note 25, at 455. “Joint legal custody means that both parents have an equal voice in making those decisions, and neither parent’s rights are superior to the other[’s].” Dorothy R. Fait et al., *The Merits of and Problems with Presumptions for Joint Custody*, MD. B.J., Jan. 2012, at 12, 14 (2012) (citing *Taylor v. Taylor*, 508 A.2d 964, 974 (Md. 1986)). By contrast, sole legal custody means that only one parent has the right to make the significant long-term decisions. *Id.* “‘Joint physical custody’ refers to the child’s being in the physical care of both parents; however . . . there is no fixed formula or number of days as to when ‘joint physical custody’ begins.” *Id.* *But see* Janet R. Jeske, *Issues in Joint Custody & Shared Parenting: Lessons from Australia*, BENCH & B. MINN., Dec. 2011, at 20, 21 (2011) (reviewing the results of an Australian study finding that even in a country whose laws presume equal or near-equal shared care, most parents revert to a pattern of single parent primary care); Douglas W. Allen & Margaret Brinig, *Do Joint Parenting Laws Make Any Difference?*, 8 J. EMPIRICAL LEGAL STUD. 304, 313 tbl.1 (2011) (finding that after Oregon’s enactment of a presumption of joint custody, mothers were awarded sole custody fifty-nine percent of the time, fathers were awarded sole custody ten percent of the time, and the remainder were joint custody awards); Suzanne Reynolds et al., *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1669 (2007) (finding that in a survey of North Carolina divorces, mothers received primary custody in seventy-two percent of cases, fathers were awarded primary custody in thirteen percent of cases, with the remainder being joint custody).

68. Scott & Derdeyn, *supra* note 25, at 460. Cynthia Starnes states the following: The notion that parents could share custody had great appeal to a variety of parties. Judges could avoid the difficult task of choosing between two fit parents, family law could reduce or eliminate the acrimony inspired by the traditional

child's best interests, assuming that such interests require significant contact with each parent.⁶⁹

The introduction of joint custody has been influenced by evolving social norms, including an emphasis on gender equality and the best interests of the child.⁷⁰ The development of joint custody has also resolved several practical problems. Specifically, as the divorce rate increased, more children were impacted by the loss of their relationship with their noncustodial parent.⁷¹ Under the approach of sole custody, noncustodial parents—typically fathers—were limited to visitation rights, while custodial parents—typically mothers—were faced with the hardships of all the related responsibilities of child care as a single parent.⁷² Moreover, children under traditional custody arrangements had to cope with the difficult adjustment period associated with the absence of their noncustodial parent.⁷³

Joint custody allows elements of the family structure to be preserved after divorce by allowing both parents frequent contact with their children. In turn, it relieves one parent of full child care responsibilities.⁷⁴

Additionally, traditional parental roles may have begun to disappear.⁷⁵ Mothers now commonly accept wage-earning roles while fathers care for their children, making the parenting function as important to the father as to the mother.⁷⁶ These shifting parental

winner/loser custody model, both parents would be respected and encouraged to spend significant time with their children, and children would benefit from the continuing involvement of both parents.

Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 ARIZ. L. REV. 197, 222 (2012).

69. "Joint custody became the new standard of what was considered 'in the best interests' of the child." Mary Ann Mason, *The Roller Coaster of Child Custody Law over the Last Half Century*, 24 J. AM. ACAD. MATRIMONIAL L. 451, 453 (2012).

70. Scott & Derdeyn, *supra* note 25, at 458. *But see* John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MATRIMONIAL L. 411, 412 (2011) ("Although no-fault divorce, joint custody, and domestic violence laws have generally been quite appropriate as reflections of social norms and ideals of fairness, they often require difficult decisions using much vaguer legal standards than in the past.")

71. Scott & Derdeyn, *supra* note 25, at 455. In the United States alone, it is estimated that "one million children live with parents who are in the midst of a divorce each year." Rebecca Love Kourlis et al., *IAALS' Honoring Families Initiative: Courts and Communities Helping Families in Transition Arising from Separation or Divorce*, 51 FAM. CT. REV. 351, 356 (2013).

72. Scott & Derdeyn, *supra* note 25, at 459–60.

73. *Id.* at 460.

74. *Id.*

75. *Id.*

76. *Id.* at 461. Although women have become an important part of the U.S. workforce, they continue to devote more time to household duties than men and suffer from pay inequalities in the workplace. *See, e.g.*, Bertrand et al., *supra* note 37; DAVID, *supra*

roles within marriage prompted the argument that shared parenting should not end just because the marriage ended.⁷⁷ Accordingly, joint custody has emerged as a popular form of custody in the United States today,⁷⁸ although it is not without criticism.⁷⁹

III. CHILD CUSTODY IN JAPAN

Child custody is a difficult problem for couples of the same nationality in a divorce proceeding, but the issue is especially difficult when international marriages unravel and both parents are asserting a custody claim. If a parent seeks a custody determination in Japan, Japan's custody law is implicated.

A. Japan's Enforcement of Sole Custody

The principal source for determining child custody in Japan is the Civil Code. The Code did not explore joint custody or visitation until a 2011 amendment, which allowed divorcing couples to determine their children's custody and visitation issues.⁸⁰ Without

note 37; Clarkberg & Moen, *supra* note 37; see also Eileen Patten, *On Equal Pay Day, Key Facts About the Gender Pay Gap*, PEW RES. CENTER (2014), <http://www.pewresearch.org/fact-tank/2014/04/08/on-equal-pay-day-everything-you-need-to-know-about-the-gender-pay-gap> (noting that full-time working women earn seventy-seven percent of what their male counterparts earn).

77. Scott & Derdeyn, *supra* note 25, at 461.

78. "[L]egislators tend to favor presumptions toward joint custody (not necessarily equal custody) in custody determinations absent evidence that joint custody would be detrimental to the child." Elizabeth A. Pfenson, Note, *Too Many Cooks in the Kitchen?: The Potential Concerns of Finding More Parents and Fewer Legal Strangers in California's Recently-Proposed Multiple-Parents Bill*, 88 NOTRE DAME L. REV. 2023, 2040 (2013). Karen S. Adam and Stacey N. Brady also state as follows:

[O]ver the past two decades, the prevailing custody paradigm in regards to decision making and parenting-time schedules has shifted from sole custody to post-separation co-parenting. Joint custody has become more prevalent, in part because recent findings in social science supported changes in legislation and, on other occasions, the testimony of expert witnesses in favor of joint custody assisted judges to find that joint custody was in the best interest of each child. A primary benefit of joint custody is that it provides "a way of giving children access to both parents while allowing parents freedom of divorce."

Karen S. Adam & Stacey N. Brady, *Fifty Years of Judging in Family Law: The Cleavers Have Left the Building*, 51 FAM. CT. REV. 28, 31 (2013).

79. Jo-Ellen Paradise states the following:

[S]ome argue that joint legal custody permits parents to continue arguing, which negatively impacts the children who are subjected to, and often the subject of, those arguments. Still others contend, joint custody affords an unreasonable parent too much authority, and the opportunity to regulate the children and the other parent.

Paradise, *supra* note 42, at 566-67.

80. Colin P.A. Jones, *In the Best Interests of the Court: What American Lawyers Need to Know About Child Custody and Visitation in Japan*, 8 ASIAN-PAC. L. & POL'Y J. 166, 172, 201 (2007) [hereinafter Jones, *In the Best Interests of the Court*]; Colin P.A. Jones, *Upcoming Legal Reforms:*

an agreement, the family court intervenes, and Japanese custody proceedings have often shown a maternal preference and a preference for that parent who would maintain the child's Japanese identity,⁸¹ which leaves many foreign parents without custody.⁸²

To better understand Japan's approach to custody determinations, it is helpful to examine the Japanese family law system as well as the critical cultural norms that influence Japanese child custody decisions.

1. *Koseki* System

The *Koseki* System or the Family Registration Law is a household registration system first created for security purposes in Kyoto, when it was the imperial capital.⁸³ The system provides that every family has a registry called *koseki*.⁸⁴ The *koseki* sets forth the births, marriages, and legal custody of children after divorce, and as a result it has been referred to as the core source of identity for people in Japan.⁸⁵

The *koseki* tracks marriage and divorce. When two Japanese people marry, they form their own *koseki*, creating "their own legal status as a family."⁸⁶ If they divorce, the woman can revert back to her maiden name or keep her married name if she notifies the government within three months after the divorce.⁸⁷

Children born into the marriage are assigned to only one parent's family because there is no provision for shared parenting under the *koseki* system.⁸⁸ Generally, a child will keep his or her surname after a divorce, unless one parent changes it.⁸⁹ If the

A Plus for Children or Plus ca Change?, JAPAN TIMES (Aug. 9, 2011), <http://www.japantimes.co.jp/community/2011/08/09/issues/upcoming-legal-reforms-a-plus-for-children-or-plus-ca-change/#.VMWXbC7IhME>.

81. Jones, *In the Best Interests of the Court*, *supra* note 80, at 226–27.

82. *Id.*

83. *Id.* at 202. Although the *koseki* is based on Kyoto-era practice, it was not enacted into a generally applicable law until 1872, during the Meiji Restoration. The *honseki* is another type of family registry. For further information on the family registry system, see Taimie L. Bryant, *For the Sake of the Country, for the Sake of the Family: The Oppressive Impact of Family Registration on Women and Minorities in Japan*, 39 UCLA L. REV. 109 (1991).

84. Reynolds, *supra* note 1, at 380.

85. Jones, *In the Best Interests of the Court*, *supra* note 80, at 202. However, a *koseki* is not a completely private document, for the submission of full or abbreviated copies may be required in certain public and private inquiries and, in some instances, might lead to social discrimination. *Id.* at 202–03.

86. Reynolds, *supra* note 1, at 380.

87. Boykin, *supra* note 9, at 457–58.

88. Reynolds, *supra* note 1, at 380.

89. Boykin, *supra* note 9, at 458.

mother changes the child's surname to match her maiden name, the child's name is placed on the mother's register and taken off of the father's register,⁹⁰ potentially hindering the father's relationship with the child.⁹¹

Additionally, older Japanese views on divorce may have some influence today.⁹² This—along with the effect of the *koseki* system on the parent-child's relationship—may contribute to the tradition of sole custody in Japan.

2. Parental Authority and Types of Custody in Japan

The Japanese Civil Code made no provision for visitation until 2011,⁹³ making previous judicial determinations of child custody in Japan an “all-or-nothing affair.”⁹⁴ One parent was often given sole custody or parental authority of the child following a divorce, and the child resided with that parent.⁹⁵

Parental authority⁹⁶ can be viewed as taking two forms of child custody: *shinken* and *kangoken*.⁹⁷ *Shinken*, which is translated as

90. *Id.*

91. *Id.*

92. Tanase, *supra* note 2, at 576.

93. Reynolds, *supra* note 1, at 380; *see also supra* note 80 and accompanying text.

94. Jones, *In the Best Interests of the Court*, *supra* note 80, at 213.

95. MINPŌ [MINPŌ] [CIVIL C.] art. 819 (Japan). Article 819 of Japanese Civil Code, vests custody rights in only one parent as it states:

(1) If parents divorce by agreement, they may agree upon which parent shall have parental authority in relation to a child. (2) In the case of judicial divorce, the court shall determine which parent shall have parental authority. (3) In the case where parents divorce before the birth of a child, the mother shall exercise parental rights and duties; provided that the parties may agree that the father shall have parental authority after the child is born. (4) A father shall only exercise parental authority with regard to a child of his that he has affiliated if both parents agree that he shall have parental authority. (5) When the parents do not, or cannot, make the agreements referred to in paragraph (1), paragraph (3), and the preceding paragraph, the family court may, at the request of the father or the mother, make a ruling in lieu of agreement. (6) The family court may, at the request of any relative of the child, rule that the other parent shall have parental authority in relation to the child if it finds it necessary for the interest of the child.

Id.

96. *Compare supra* Part II, with *supra* note 80 and accompanying text. Article 818 of Japanese Civil Code states:

(1) A child who has not attained the age of majority shall be subject to the parental authority of his/her parents. (2) If a child is an adopted child, he/she shall be subject to the parental authority of his/her adoptive parents. (3) Parental authority shall be exercised jointly by married parents; provided that if either parent is incapable of exercising parental authority, the other parent shall do so.

MINPŌ [MINPŌ] [CIVIL C.] art. 818 (Japan).

97. Reynolds, *supra* note 1, at 380.

“parental power,” is most closely described as “legal custody,” while *kangoken* correlates to the U.S. concept of “physical custody.”⁹⁸

Shinken consists of two elements: “(1) the ability to conduct legal acts and manage property on behalf of a child, and (2) the rights and obligations associated with raising a child, including the right to decide his or her education and place of residence.”⁹⁹ The authority of *shinken* continues until it is terminated through either divorce, the child’s attainment of an age of majority of twenty, or judicial proceedings due to child abuse.¹⁰⁰ *Shinken*, unlike physical custody, is recorded in the family register, making it readily discernible for public knowledge and third parties.¹⁰¹

While a couple is married, *shinken* and *kangoken* vest in both parents, allowing them to jointly and severally exercise their rights.¹⁰² Upon divorce, both *shinken* and *kangoken* are typically awarded to only one parent, bestowing that parent with complete parental authority.¹⁰³

It is rare for a formal separation of *shinken* and *kangoken*, resulting in *shinken* being referred to as “full custody—[both] legal and physical.”¹⁰⁴ Additionally, because *shinken* and *kangoken* are rarely separated, one parent is empowered to exclude the noncustodial parent from any and all aspects of the child’s daily life.¹⁰⁵

The concepts of *shinken* and *kangoken* were previously separated by Japanese courts in the pre-war Civil Code era of Japan, as part of an attempt to lessen the impact of divorce.¹⁰⁶ The father’s paternal rights were preserved by giving him legal custody, while the courts spared him the burden of child rearing by allowing the mother to still act as the caregiver.¹⁰⁷ However, such formal separation has not been necessary since the time when women were allowed to be legal custodians.¹⁰⁸

It should be noted that while the 2011 amendments to the Code allow divorcing parents to agree on visitation,¹⁰⁹ courts may also set visitation under the authority of Article 766 of the Japanese Civil

98. Jones, *In the Best Interests of the Court*, *supra* note 80, at 213.

99. *Id.* at 215–16.

100. *Id.* at 213.

101. Reynolds, *supra* note 1, at 380.

102. *Id.*

103. *Id.*

104. Jones, *In the Best Interests of the Court*, *supra* note 80, at 214.

105. *Id.*

106. *Id.* at 216.

107. *Id.*

108. *Id.*

109. *See supra* note 80 and accompanying text.

Code, which states that a court may order such dispositions for the custody of children as may be appropriate.¹¹⁰ Nevertheless, unlike in the United States, visitation is not necessarily protected.¹¹¹

The infrequency of visitation can be attributed to the older judicial view of visitation¹¹² as preserving only sporadic contact in a parent-child relationship.¹¹³ Also, court orders for visitation are largely unenforceable because the courts have no “equitable or enforcement powers” and the Japanese police avoid family disputes.¹¹⁴ Therefore, visitation is not completely viewed as a right inherently vested in the parents—as in the United States.¹¹⁵

3. Standards for Determining Child Custody

Parents in Japan may choose to reach a child custody arrangement by agreement.¹¹⁶ Article 766 of the Japanese Civil Code provides that such parental agreements are effective.¹¹⁷ However, enforceability may become an issue.¹¹⁸

When there is no agreement between the parents, a judge must become involved. In Japan, there are no precisely defined statutory guidelines or legally mandated criteria for the court to follow in child custody disputes.¹¹⁹ As a result, child custody disputes are almost entirely resolved by the discretion of the family court judges, with assistance from family court investigators and mediators, who aim to protect the child’s best interests.¹²⁰ None-

110. *Id.* at 229; MINPŌ [MINPŌ] [CIVIL C.] art. 766-1, -2 (Japan).

111. Jones, *In the Best Interests of the Court*, *supra* note 80, at 228; *see also infra* note 112.

112. Jones, *In the Best Interests of the Court*, *supra* note 80, at 235. However, compare this with the U.S. protections of visitation at Edward B. Borris, *Interference with Parental Rights of Noncustodial Parent as Grounds for Modification of Child Custody*, DIVORCE LITIG., Jan. 1997, at 1, 1–2 (1997) (finding that most states consider interference with visitation as grounds for a change in primary custody); Celia Guzaldo Gamrath, *Visitation Abuse v Unlawful Visitation Interference—Is There Comfort for Noncustodial Parents?*, 91 ILL. B.J. 450, 468 (2003) (“Illinois courts clearly acknowledge the importance of the problem of visitation interference and other forms of parental alienation and have demonstrated the willingness to transfer custody to the other parent when the behavior becomes detrimental to the best interest of the child.”).

113. Jones, *In the Best Interests of the Court*, *supra* note 80, at 240.

114. Robin S. Lee, *Bringing Our Kids Home: International Parental Child Abduction & Japan’s Refusal to Return Our Children*, 17 CARDOZO J.L. & GENDER 109, 115 (2010).

115. Jones, *In the Best Interests of the Court*, *supra* note 80, at 245; *see also supra* note 112.

116. Lee, *supra* note 114, at 118.

117. MINPŌ [MINPŌ] [CIVIL C.] art. 766-1, -2 (Japan). Nonetheless, if the Japanese family court finds it necessary for the benefit of the child, the court may change or alter the custody arrangement.

118. Lee, *supra* note 114, at 118.

119. *Id.* at 117–18.

120. *Id.* at 117.

theless, custody may be awarded without any evaluation of a parent's fitness.¹²¹

While there are no mandatory judicial criteria by which to award child custody, courts have shown a preference for awarding custody to the mother.¹²² Similar to the U.S. tender years presumption, there may be an assumption that a mother's care is irreplaceable in the life of a young child and even when the child is past "tender years."¹²³ As fathers generally work outside of the home, it may be viewed to be in the child's best interests to remain with the mother.¹²⁴

Another consideration that holds importance in child custody is which parent will protect and preserve the child's Japanese identity.¹²⁵ The thought is that if a child is a Japanese national, that child deserves the right to be raised in Japan.¹²⁶ This notion is rooted in the idea that it is unfair to deprive the child of the opportunity to live in Japan, home of the child's national origin.¹²⁷ Accordingly, Japanese family courts have not traditionally granted custody to foreign parents, which incentivizes divorcing Japanese parents to return to Japan with their children, although this incentive may now be offset by the Hague Convention.¹²⁸

B. *Impact of the Hague Convention*

The purpose of the 1980 Hague Convention on the Civil Aspects of International Child Abduction is to allow for the "prompt return of children wrongfully removed to or retained in any Contracting State; and to ensure that rights of . . . access under the law of one Contracting State are effectively respected in the other Contracting States."¹²⁹ In other words, the Convention aims to remedy a parent's abduction of a child during divorce proceedings or custody

121. *Id.*

122. Reynolds, *supra* note 1, at 382.

123. Jones, *In the Best Interests of the Court*, *supra* note 80, at 221.

124. *Id.*

125. *Id.* at 226–27.

126. Boykin, *supra* note 9, at 455.

127. *Id.*

128. *Id.*

129. The Hague Child Abduction Convention, *supra* note 4, art. 1. For an extensive background on the Convention, see generally Melissa S. Wills, Note, *Interpreting the Hague Convention on International Child Abduction: Why American Courts Need to Reconcile the Rights of Non-Custodial Parents, the Best Interests of Abducted Children, and the Underlying Objectives of the Hague Convention*, 25 REV. LITIG. 423, 430–37 (2006) (discussing the history, underlying policies, and structure of the Hague Child Abduction Convention).

disputes.¹³⁰ The Convention also protects the rights of parents' access to their children.¹³¹

Prior to the Hague Convention, there was no international treaty that addressed the issue of parental abductions.¹³² Without the Hague Convention in place, the left-behind parent of the abducted child relied on the foreign court system of the country where the child was removed.¹³³ Under this approach, the chance that the left-behind parent would recover the child might have been smaller, and the chance of a lengthy courtroom battle that did not necessarily protect the child's best interests might have been consequently higher.¹³⁴

The Convention is jurisdictional, meaning that any substantive legal issues between parents must be decided by the court system in the place of the child's habitual residence.¹³⁵ The Hague Convention therefore prevents international forum-shopping by denying abducting parents the advantages of their countries of origin and forcing the prompt return of children to their habitual residence for child custody proceedings.¹³⁶

There are three requirements that must be met in order for the Hague Convention to apply between contracting states: (1) the removal or retention of the child must have been "wrongful,"¹³⁷ (2) the child must have been removed or retained from the place of habitual residence, and (3) the child must be under sixteen

130. The Hague Child Abduction Convention, *supra* note 4.

131. *Id.* The Convention's terms have been litigated recently in the U.S. Supreme Court. See *Chafin v. Chafin*, 133 S. Ct. 1017, 1022 (2013); *Lozano v. Alvarez*, 134 S. Ct. 1224, at 1228–29 (2014).

132. Reynolds, *supra* note 1, at 371. Currently, if a child is abducted to a non-Hague state, "[c]riminal prosecution may be initiated under the International Parental Kidnapping Act, but there is no civil remedy." Barbara Stark, *The Internationalization of American Family Law*, 24 J. AM. ACAD. MATRIMONIAL L. 467, 473 (2012) (citations omitted).

133. Reynolds, *supra* note 1, at 371.

134. *Id.* Courts place significant emphasis on preventing the delay of the child's permanent placement. For example, Lady Justice Arden opined:

Delay is always to be regarded as in some degree likely to prejudice the child's welfare: see subs (3) [of the Adoption and Children Act 2002]. Parliament has here made a value judgement about the likely impact of delay and it is not open to the court or the adoption agency to quarrel with that basic value judgement.

C (A Child) v. XYZ Cnty. Council, [2007] EWCA (Civ) 1206, [17], [2008] Fam. 54 (Eng.). Justice Ginsburg also urged speed in the Hague Convention on the Civil Aspects of International Child Abduction cases in order to facilitate efficient child custody determinations. *Chafin*, 133 S. Ct. at 1028–31.

135. Reynolds, *supra* note 1, at 372.

136. Brian Quillen, *The New Face of International Child Abduction: Domestic-Violence Victims and Their Treatment Under the Hague Convention on the Civil Aspects of International Abduction*, 49 TEX. INT'L L.J. 621, 633 (2014).

137. The Hague Child Abduction Convention, *supra* note 4, art. 1.

years of age.¹³⁸ If these requirements are not met, then proceeding with a claim under the Hague Convention is untenable.¹³⁹

The first requirement of “wrongful removal” is met when a child is removed from the other parent without the right to do so.¹⁴⁰ Meanwhile, “wrongful retention” occurs when one parent removes a child from the child’s habitual place of residence with the other parent’s permission and then ultimately refuses to return the child according to the prior arrangement.¹⁴¹

The second requirement stipulates that the child must have been removed from a “habitual residence.” Habitual residence is not defined under the Hague Convention,¹⁴² but a court will look to several factors, including the child’s birth country, the country from which the child was taken without the other parent’s permission, and the existence of any coercion by one parent on the other into the exchange.¹⁴³

Finally, the third requirement mandates that the child be under the age of sixteen before a Hague Convention claim can proceed.¹⁴⁴ It should be noted that if a child turns sixteen before a Hague Convention proceeding can be initiated, the Convention does not apply despite the wrongfulness of the removal.¹⁴⁵

The Hague Convention is the only international tool protecting parents whose children have been wrongfully removed from their care and it has been critical for countries to sign onto the Hague Convention.¹⁴⁶ Recognizing this, the twenty-three countries that

138. *Id.* art. 4.

139. *Id.*

140. Reynolds, *supra* note 1, at 372–73.

141. *Id.* at 373.

142. *Id.*

143. See Kathleen A. McKee, *A Primer on International Parental Abduction*, 6 REGENT J. INT’L L. REV. 37, 49–51 (2008); see also Jeff Atkinson, *The Meaning of “Habitual Residence” Under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children*, 63 OKLA. L. REV. 647, 654–57 (2011) (discussing factors courts use to determine habitual residence); Stephen I. Winter, Note, *Home Is Where the Heart Is: Determining “Habitual Residence” Under the Hague Convention on the Civil Aspects of International Child Abduction*, 33 WASH. U. J.L. & POL’Y 351, 357–75 (2010) (discussing varying approaches taken by courts to determine habitual residence); Gadi Zohar, Note, *Habitual Residence: An Alternative to the Common Law Concept of Domicile?*, 9 WHITTIER J. CHILD & FAM. ADVOC. 169, 177–89 (2009) (discussing factors courts examine when determining habitual residence).

144. Reynolds, *supra* note 1, at 373.

145. *Id.* at 373–74.

146. *Id.* at 371. Beginning in the 1970s, due to the convenience of global travel, advanced technology and new formations of communication, international marriages became ubiquitous; however, along with increasing international marriages comes increasing international divorces. Japan is not immune from such statistics. In 2008, approxi-

met in 1980 in the Hague promptly became signatories and the United States followed eight years later.¹⁴⁷ Many signatory countries then enacted legislation to provide support for the enforcement of the Convention.¹⁴⁸

There had been significant pressure for Japan to become a signatory to the Hague Convention.¹⁴⁹ In 2007, the United States enacted the Openness Promotes Effectiveness in Our National Government Act to prompt Japan to address international parental abduction.¹⁵⁰ In 2009, New Jersey Congressman Christopher Smith introduced the International Child Abduction Act of 2009 for left-behind parents to pursue child abduction matters in Japan more aggressively.¹⁵¹ This proposed legislation would attempt to promote the United States' "'denial, withdrawal, suspension or limitation of benefits' provided to" any nation that was found to have "engaged in a pattern of noncooperation regarding international child abduction."¹⁵² Further, it would prohibit the United States from making loans or providing credit to any government engaged in noncooperation.¹⁵³

In 2014, Japan alleviated international concern and became a signatory to the 1980 Hague Convention on the Civil Aspects of International Child Abduction.¹⁵⁴ The country had long resisted ratification, citing protection of women and children who have escaped abusive foreign relationships as the justification.¹⁵⁵

mately 726,000 couples married in Japan and approximately 251,000 of those couples separated. While not all of these couples are international, the divorce rate is about thirty-five percent. Tanase, *supra* note 2, at 563–64.

147. Reynolds, *supra* note 1, at 371; *see also* Merle H. Weiner, *Codification, Cooperation, and Concern for Children: The Internationalization of Family Law in the United States over the Last Fifty Years*, 42 FAM. L.Q. 619, 628 (2008) (noting that U.S. family law has become internationalized due to concern for children).

148. Reynolds, *supra* note 1, at 372; *see also* Nigel V. Lowe & Victoria Stephens, *Global Trends in the Operation of the 1980 Hague Abduction Convention*, 46 FAM. L.Q. 41 (2012) (generally noting global trends on the Convention).

149. *See, e.g.*, Misty McDonald, *Dear Japan: International Parental Child Abduction Is a Problem*, 33 Hous. J. INT'L L. 221, 223 (2010).

150. Boykin, *supra* note 9, at 458.

151. Lee, *supra* note 114, at 129.

152. *Id.* at 130.

153. *Id.* at 131.

154. *Status Table*, 28, *supra* note 7.

155. Boykin, *supra* note 9, at 456.

IV. FUTURE OF THE CUSTODY FRAMEWORK IN JAPAN

Although perhaps not indicative of drastic change,¹⁵⁶ Japan's commitment to the Hague Convention may signal some change in the direction of its family law. Child custody law in the United States has already undergone similar change.¹⁵⁷

A. *Emergence of Joint Custody and Visitation*

Japan might eventually decide to adopt the more modern trend of joint custody and enforced visitation,¹⁵⁸ given that an increasing number of Japanese citizens believe that both parents should continue playing a role in child-rearing after a divorce.¹⁵⁹ Additionally, many noncustodial parents contend that they should be allowed visitation rights, not only to continue their parent-child relationship, but also to benefit the child's health and development.¹⁶⁰

Due to these changing sentiments regarding postdivorce parental roles, Japan's framework could provide additional legal recognition for a noncustodial parent. To do so, Japan could modify the division of parental authority between divorcing couples. In a situation where two fit parents compete for custody, rather than allowing *shinken* and *kangoken* to vest in only one parent after divorce, an option could exist for them to vest in both parents—as in marriage.

Additionally, the Japanese registry ideally would not divest a child of both parents' lineage because of a divorce. When parents divorce, the children could be placed on both parents' registers to preserve their lineal ties.

Yet, if one parent is to maintain sole custody of the children, an award of visitation should be considered for the noncustodial parent. Visitation should be seen as an important opportunity for noncustodial parents to keep their relationships with their children.

156. See Jennifer Costa, Note, *If Japan Signs the Hague Convention on the Civil Aspects of International Child Abduction: Real Change or Political Maneuvering?*, 12 OR. REV. INT'L L. 369, 374–79 (2010) (predicting that family law changes in Japan will occur slowly despite the Hague Child Abduction Convention); Dowd, *supra* note 11, at 785–86 (“In the area of family law, law is consciously not neutral and heavily value-laden.”).

157. See Costa, *supra* note 156, at 379–85.

158. See Reynolds, *supra* note 1, at 379–80.

159. See *id.* at 386.

160. See *id.*

B. *Implementation of Guidelines for Child Custody Determinations*

There are no precisely defined statutory guidelines in Japan by which family law courts determine child custody disputes, leaving custody determinations to judicial discretion. Therefore, biases may appear. The result is that the child's welfare may suffer if there is no articulation of the importance of maintaining contact between a child and a parent after the dissolution of a couple's marriage.

To protect a child's relationship with each parent, Japan could adopt a clear standard for determining custody. While Japanese courts consider the child's best interests generally,¹⁶¹ a more precise standard¹⁶² could be set forth. In some Hague Convention states, a clearly articulated best interests standard promotes fairness and equality between the parents. It also acknowledges that both parents have rights in their children and should be given the opportunity to maintain their relationship. Finally, because the best interests standard provides flexibility, judges have the opportunity to balance the interests of the child, ultimately promoting the welfare of the child.

If not a more specific best interests standard, Japan could implement some other guidelines and criteria to guide judges in making custody rulings. Certain guidelines that could be implemented in Japan might include: (1) consideration of the emotional ties of the parent and child, (2) stability of the home environment of each parent, and (3) even the preferences of the child, if the child is of a sufficiently mature age. Such measures may better protect a child's relationship with each parent.

V. CONCLUSION

In 2014, after much anticipation, Japan signed the Hague Convention on Civil Aspects of International Child Abduction to provide relief when divorced parents return with their children to Japan, which often jeopardizes the other parents' relationship with the children. The Hague Convention serves as an international tool for the left-behind parents to challenge this result.

However, Japan's ratification of the Hague Convention may not suffice to resolve every issue because the treaty dictates only jurisdictional parameters. In order to provide adequate relief to parents and to protect the parent-child relationship, Japan should

161. See Costa, *supra* note 156, at 375.

162. See Reynolds, *supra* note 1, at 371-75.

modify its approach to custody, further considering visitation, joint custody, and implementation of relevant guidelines. These developments would track those in the U.S. custody law, which resulted in the current modern framework on custody. Nonetheless, Japan's ratification of the Hague Convention is an important first step to preserving the child's relationship with both parents.