

TUNE IN TO THE  
SOUND OF DEMOCRACY

## Justice Talking Radio Transcript

**The Tug of War Over Children—Air Date: 1/23/06**

*With over 40% of marriages ending in divorce, the battle for child custody and support are among the most common and contentious disputes heard by our nation's courts. What do judges look at when making custody and child support decisions? Do moms get an unfair advantage? What happens when one parent snatches the kids and hides them from the other parent? Should teenagers get a say in where they live? On this edition of Justice Talking we take a look at family law and ask what happens to the kids when parents break up?*

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MARGOT ADLER: From NPR, this is Justice Talking. I'm Margot Adler. Today on Justice Talking: the tug of war over children. With over 40 percent of marriages ending in divorce, battles for child custody and support are among the most common and contentious disputes heard by our nation's courts. What do judges look at when making custody decisions? Do moms get an unfair advantage? And how is the law keeping up with changes in our understanding of what makes a family? Stay with us as we take a look at child custody law and what happens to the kids when parents break up. We'll hear from parents who have had to figure out how to stay close to their children despite the ending of their marriage. A family court judge tells us how he advises battling parents. And are disputes over child custody this decade's gender wars?

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. Everyone has heard a parent say something like: it's my night to have the kids, or this year the kids will be with their father for Christmas. For kids whose parents have split up, life can be a kind of juggling

act. Is this my night with my mom or dad? Or where did I leave my gym clothes? Or, when I'm at mom's house, I can stay up until 10.

Whether there are different rules in each household or a forgotten toothbrush, figuring out how to make a divorce work for kids can feel impossible. Most families work out custody arrangements before it becomes an ugly battle. But for some parents, the relationship is so polarized that the courts have to make decisions about what is in the best interest of the children.

What is interesting about family law is that even though so many of us know parents who have had some kind of custody dispute, most of don't really know how the law deals with these issues. So today, we will try to change that. We'll hear a fathers rights advocate make his case for dads in custody arrangements. And a domestic violence expert who says it's not that simple. Also a family court judge tells us how he approaches the thousands of custody cases he handles.

UNIDENTIFIED MALE: I try and tell people that their goal together, mom and dad, should be that when that child graduates high school, they are both sitting in the stands.

MARGOT ADLER: And we'll hear the story of a divorcing couple in Kansas who were among the first in the state to be awarded joint custody.

UNIDENTIFIED FEMALE: He was so devoted and involved as a father, I wouldn't even dream of fighting him for sole custody, because it would have been a huge fight.

UNIDENTIFIED MALE: Remembering back about that there was a huge scary feeling that I'm going to be visiting instead of having the children. And it was a realistic fear, because at that point of time, nobody had had joint custody in Kansas.

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MARGOT ADLER: To help us understand how the courts deal with child custody disputes, I have asked David Meyer to join me. He's a professor at the University of Illinois College of Law, where he teaches family law. David, thank you for joining me.

DAVID MEYER: Certainly.

MARGOT ADLER: What changes have we seen in child custody in the United States? Give us a mini-history.

DAVID MEYER: Well, we've gone through a complete revolution in custody law, going back to the early common law, which had a heavy presumption in favor of fathers. So fathers almost always won. And then that gave way in the early 1800s into the mid-1800s and sort of flipped completely into a rule that favored mothers until the second half of the 20<sup>th</sup> century. It strongly favored mothers under a rule called the "tender years doctrine," under which women would win custody battles unless they were found to be altogether

unfit to be a parent. And then in the 1960s, especially into the 1970s, that rule gave way to the rule that we presently have, which is a gender-neutral rule called the best interest of the child standard.

MARGOT ADLER: About half of all marriages end in divorce, and a comparable number of unmarried parents split up each year. How often do parents fight over child custody?

DAVID MEYER: Well, it depends on how you define fighting. In many cases, they may disagree, of course, and have strenuous discussions about how to resolve it. But only a very small fraction of cases actually end up being decided before a judge.

MARGOT ADLER: And the percentage that go to court?

DAVID MEYER: The percentage that goes to court is probably—in terms of custody—is certainly under half.

MARGOT ADLER: And the cases that get settled, how many go through mediation?

DAVID MEYER: That also varies a great deal from state to state. There are some states like California that require mediation first before it goes to trial. Many cases will be heard by a mediator.

MARGOT ADLER: Does the law treat parents going through divorce differently than parents who are never married?

DAVID MEYER: Not anymore.

MARGOT ADLER: Really?

DAVID MEYER: The law used to make very sharp and often painful distinctions between unmarried couples and married couples. Until the 1970s, unmarried fathers had very few legal rights to a relationship with their children. And would find it very difficult, almost impossible, to win a custody dispute with a mother. Now the law has moved to make very few distinctions between non-marital children and marital children with respect to the rights of parents.

There are still differences. Unmarried men need to jump through some additional hoops to establish paternity that married men don't have to do, because they benefit from the presumption of being the father. But once their paternity is established, the law is basically the same.

MARGOT ADLER: Now you talked about how custody issues have changed through the years, how we went through a period where men essentially were always awarded custody, and then we went to the tender years doctrine. And now you said it's the best interest of the child standard. But is there still a bias toward awarding the custody of children to moms, particularly if the children are young?

DAVID MEYER: Yes, there is still an awful lot of suspicion of gender bias going on under the best interest of the child standard. And the best interest standard is criticized by many people because of its indeterminacy and because it really does give so much discretion to judges to do whatever they think is right.

MARGOT ADLER: And do we know how many children end up with mom as opposed to dad?

DAVID MEYER: There is census data from the past couple of years that suggests that in single parent households, it's about a five to one ratio in favor of mothers.

MARGOT ADLER: Before we go any further, we need to pull apart the term "joint custody," which can be misleading. I'd like you to spell it out for us.

DAVID MEYER: Joint custody is a term that can mean several different things. It usually is understood to have two different components to it. One is generally called joint legal custody, and what that means is that both parents share equal decision making authority over the big questions of a child's upbringing. Now joint physical custody means that the parents are sharing on a roughly equal basis residential custody time with a child.

MARGOT ADLER: Now I know that all states permit joint legal custody and that 11 states, specifically, have enacted a presumption of joint custody. What does that mean, and how does that work in practice?

DAVID MEYER: Well, in those jurisdictions that favor joint custody, if a court is going to deviate from that and award sole custody to one parent, then the court has to make specific findings about why it is in this case that joint custody is not in the best interest of the child.

MARGOT ADLER: And that is physical custody, legal custody?

DAVID MEYER: Almost everywhere it's joint legal custody. There are a couple of states recently that have embraced a presumption in favor of joint physical custody as well, requiring courts to explain why that arrangement would not be best for children.

MARGOT ADLER: How much say does the child get in all of this? For example, teenage children, as you know, often have a mind of their own. It's hard to get them to do things that they don't want to do, even if a judge is involved. And having a bit of full disclosure here – I'm a child of divorced parents, and I know that I was put with one parent and decided that I wanted to be with the other parent. And there was a lot of going back and forth. There was no court involved in my case, but it occurs to me that I can't imagine how a judge could make that decision.

DAVID MEYER: Yes, it's extraordinarily difficult. The influence that a child has varies with the age of the child so that generally speaking, most courts will not ask a child his or her

view on the question when the child is very young. But when you get to the teenage years, most courts do consider it important to find out whether the child has a preference and to take that into account in making decisions.

MARGOT ADLER: We hear about custody cases where one parent accuses the other of domestic violence or sexual abuse of their children. In your experience, how often are these charges real?

DAVID MEYER: There is very often a basis for the charges. That is not to say that in some cases they might not be exaggerated or given greater weight in the context of a dispute for strategic reasons. There has been a real revolution in the way that legislators and courts have evaluated domestic violence in the context of custody for family generally.

MARGOT ADLER: How?

DAVID MEYER: Of course, originally, going back 20 or 30 years, law enforcement and judges often didn't give significant weight to concerns of domestic violence. It was often regarded as a problem within the family, something within the private confines of family life that was best left to private resolution. Since, for the past 20 or 25 years, courts and legislatures have become much more sensitive to the terrific problem of domestic violence and its impact, not only on the immediate victims of violence, but often children. And children can be powerfully affected, even when they are not directly the victims of violence, simply when they...

MARGOT ADLER: Are witnesses.

DAVID MEYER: Yes, are witnesses to violence. So courts once often gave little weight to domestic violence. You might remember this coming up in the OJ Simpson custody issue following the death of Nicole Simpson. There was an allegation of domestic violence, of course, and the court had to consider what weight to give that. And the court emphasized the importance of finding some direct impact on the child, and not weighing it as evidence that affected the children directly.

MARGOT ADLER: One of the things that I've heard you talk a lot about is that you see more and more of an intersection between family law and constitutional law. How so?

DAVID MEYER: Certainly there has been a big increase in the overlap between constitutional law and family law. It goes back at least to the 1920s when the U.S. Supreme Court recognized that parents have special constitutional rights with respect to childrearing. But it picked up a lot of steam after the 1960s with the Supreme Court's recognition of the right to privacy within the Constitution. Since then, the U.S. Supreme Court has found that parents have fundamental constitutional rights to make decisions about where their child will live, with whom their child will visit, what sort of education their child should have. And that sort of expanding realm of constitutional rights for parents has had a significant impact on the way custody cases are resolved.

MARGOT ADLER: Before we began this interview, you said that you yourself had come from a divorced family and that's why you had entered family law. With all your years, have you learned a lot from it?

DAVID MEYER: Well, yes, I've certainly learned a lot from it. But the cases really don't get any easier because there is just no way to eliminate the disruption and the emotional costs in family breakup.

MARGOT ADLER: Thank you so much for talking with me, David.

DAVID MEYER: Thank you. It was my pleasure.

MARGOT ADLER: David Meyer teaches family law at the University of Illinois College of Law. To learn more about Professor Meyer and about child custody law, visit [justicetalking.org](http://justicetalking.org). Arguments over who gets the children – mom or dad – often become heated and so does our debate, which is just ahead. Don't go away.

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MARGOT ADLER: This is Justice Talking, and I'm Margot Adler. On today's Justice Talking, we've been discussing child custody. We've already talked about some of the laws around the country, but now we want to get into one of the really tough parts of this topic – who gets custody? Mom, dad, or both? This is a painful choice for many families. Most often, parents come to an agreement themselves, but sometimes they can't and they are forced to go to court. Although officially the courts no longer make the presumption that mothers should automatically get sole custody of children, some fathers say they think that they and their kids are being cheated by a system that still favors mom.

To help me tease out the complexities of mom versus dad in a custody battle, two passionate and opinionated parents join me. Dr. Ned Holstein is a clinical assistant professor at Mt. Sinai School of Medicine, but he's a guest on Justice Talking not as a doctor but as the founder and president of Fathers and Families. He joins me from Boston, Massachusetts. And Joan Meier is a professor at the George Washington University Law School. She is also the founder of the Domestic Violence Legal Empowerment and Appeals Project. She joins me from Washington, D.C. Joan, Ned, welcome to Justice Talking.

JOAN MEIER: Thank you.

NED HOLSTEIN: Thank you, Margot.

MARGOT ADLER: Let's get right to it. Ned, do you think there is a gender bias among judges?

NED HOLSTEIN: Well, they think that they are doing the right thing. But when you look at the outcome, the outcome is that in the vast majority of cases, physical custody of children is given to mothers. And that's even in cases where fathers have been the primary caretaker of the children, even in cases in dual earner families where both parents are taking care of the children. I don't like to use the word bias, because it sounds like it's something malevolent or malicious. It isn't that. They think that they are doing what's best for the children. The problem is that this is outmoded thought, living in the Dark Ages. They are not up-to-date on what the research is actually showing. So I think they are making mistakes, not being biased.

MARGOT ADLER: Joan, do you think there is gender bias among judges, and should there be?

JOAN MEIER: Actually, I don't think that there should be and I think the gender bias that we see among judges is in favor of fathers and against mothers. I think that Ned's perspective is very out-of-date. It's very much a unique perspective of fathers who feel that they didn't get what they were entitled to, or feel that they weren't treated rightly. But all of the research that has been done on what happens in custody courts is that fathers and mothers get joint custody the vast majority of the time. And the biggest study that has been done on this showed fathers getting primary physical custody 29 percent of the time and mothers getting that only 7 percent of the time. And that was over 10 years ago.

MARGOT ADLER: Joint custody is a big blanket term. There's physical custody, there's legal custody. And I want to talk about each of these. Do you see a problem with joint legal custody?

JOAN MEIER: I do, because so many of these cases involve a history of abuse. And there's really no debating that where there is history of abuse, joint custody is inappropriate, legal custody. That you shouldn't ask two parents to share decision power when one parent is abusive to the other and there has been no cooperation, because there is no capacity to cooperate. So to impose that requirement of cooperation in that setting is to subject children to an enormous amount of conflict, hostility and tension.

MARGOT ADLER: Now I want to go to Ned. How do you respond to that? How do you see joint legal custody?

NED HOLSTEIN: I see joint legal custody as being pretty worthless. There is really only one coin of the realm, and that's time with your children. You cannot make good decisions for your children, even if the law says you officially have the right to do so if you rarely see them. If you have them for two overnights in the course of a month, you really cannot make decisions for the well-being of your children. But beyond that, what I'm hearing here is gender wars, which we want to reject. We don't want gender wars. What we want is to have parents work together for the welfare of their children.

MARGOT ADLER: We sort of went from joint legal custody to physical custody. I think that's what you were mostly talking about Ned, correct?

NED HOLSTEIN: When I said the coin of the realm was time with your children, what I'm advocating for is some form of shared physical custody of the children so that the children are in a flexible arrangement that works for them, and get to spend a lot of time with both parents.

MARGOT ADLER: And do you think that parents should get a 50/50 physical custody agreement?

NED HOLSTEIN: Well, I think that's too rigid. After all, the situation of the person who works from 9 to 5 five days a week is very different from, let's say, the long-haul truck driver who is going to be away for perhaps ten days.

MARGOT ADLER: And Joan, what is your own problem with joint custody and with that kind of an arrangement?

JOAN MEIER: There are a lot of things that were just raised. Ned talks about the idea of gender wars and I agree wholeheartedly. There shouldn't be a gender war. It should be about what children need. But what's interesting to me is that Ned responds by acting like this is all fantasy, the idea of abuse. So my question to Ned is do you believe that abuse happens? Do you believe that fathers are ever a danger to their children or to their wives? Do you believe it's ever appropriate to consider that in a custody case?

MARGOT ADLER: Ned?

NED HOLSTEIN: Of course it happens. And it also happens, by the way, that women are abusive, both to their husbands and to their children. In fact, we don't want to get into a war of studies here, but the federal and state data consistently show year after year that mothers beat up their kids more than fathers do. But that's not what we are here to talk about. I will be happy to acknowledge that there are dangerous fathers and dangerous mothers. And I do not believe in shared parenting for a person who is, in truth, a danger. So that takes somewhere between 5 and 10 percent of the people off the table.

JOAN MEIER: That is simply not correct.

NED HOLSTEIN: Let's talk about the 90 to 95 percent of the people...

JOAN MEIER: That is simply not correct.

NED HOLSTEIN: ...who are good, fit and loving parents.

JOAN MEIER: Margot, you can't discuss this without discussing studies because the whole debate centers on whether it's true that abuse is as rampant as we say it is, or as rare as he says it is. That's the whole debate right there.

NED HOLSTEIN: Let's make this very human. Who are all these batterers that we are talking about? I'm looking through the window here at our engineer – is he the batterer? I'm looking at the producer through the other window – is he another batterer?

JOAN MEIER: You can't tell. You can't tell by looking at them.

NED HOLSTEIN: Who's the batterer? These gender wars are very destructive and I think these accusations are being thrown around to really slander an entire gender. I think that when you do that, you are harming children.

JOAN MEIER: And when you deny the risks, you are harming children even more.

MARGOT ADLER: What should judges take into account when making decisions about the child's best interest? Let's start with you, Ned.

NED HOLSTEIN: I think the judges ought to take into account the fact that the child is, in the vast majority of cases, closely bonded to both parents. That child loves both of her parents. If you ask average children, which of your parents would you like to hardly ever see, that child is going to burst into tears. That child is going to be terrified. Now of course there are many other things that need to be taken into account too. Certainly practical matters like if they live 45 miles apart, it's not going to work. If one of the parents cannot afford adequate housing for the child, that's a serious problem. But the key factor is, let's not wound the child by tearing her away from a person who she is accustomed to seeing almost every day, and whom she loves.

MARGOT ADLER: Joan?

JOAN MEIER: Actually, I would subscribe to that final statement, but I think it would lead to very different results if we really took it seriously. What we do in joint custody, in forced joint custody cases where the father demands it and the mother rejects it because the history is that she has been the primary caretaker—which is still true in the vast majority of American families—we sacrifice children's sense of security and safety and bond with their primary caretaker by forcing them to split their time with the father. Every child does want a relationship with every parent, and I agree with Ned about that. And every child deserves two loving, caring parents, and I agree about that. But you can't create healthy relationships for kids by undermining and undercutting their primary secure bond. And most of the folks who work with kids recognize that children need a primary bond, particularly at the younger ends.

MARGOT ADLER: Lending another voice to this debate, Robert Emery is a clinical psychologist. He's also a family mediator and a researcher in custody cases, and the author of the recent book "The Truth About Children and Divorce." Thank you for coming on the show, Robert.

ROBERT EMERY: Happy to be here.

MARGOT ADLER: Robert, you've worked with families going through messy and clean breakups. How do children handle it? What factors contribute to whether children fare better or worse?

ROBERT EMERY: So far, as the debate has shown, precisely the problem with divorce and custody for kids is that the sort of argument that we have makes for interesting radio and interesting opportunities to push our agenda. But picture yourself as the two people we have in this debate now, and picture yourself as their child put in the middle of this argument between them. And this is what happens to kids, millions of kids—about a million kids every year in the United States today. I think we need to shift the debate to truly focus on kids. I'm tired of hearing about parents' rights. I want to start to hear about parents' responsibilities. And the kids that I've talked with in the 25 years of research that I've done – not just me, but hundreds of researchers – point to the fact that this sort of fighting is precisely what damages children in marriage and in divorce.

MARGOT ADLER: Now is there such a thing as a good divorce, and what is it?

ROBERT EMERY: Well, there is. I am not sure if there is a good divorce, but there are certainly better and worse divorces. Like many people, I believe that the happiest situation for kids is living in a happy two-parent family. A healthier divorce for kids is one where parents truly set aside their own emotions, where they take the long view about parenting and being parents to their kids, and mostly where they come to their own decisions. People think that there is going to be some magic out there and that judges have some special wisdom that is going to tell them what's right, or the psychologist does. And the best decisions that are made in the best interest of children are made by parents.

MARGOT ADLER: So do you think that people are divorcing better now than they used to?

ROBERT EMERY: Well, they are trying to. And more and more professionals are trying to help people do that. But the one thing that we can't solve completely, and this is why we need to recognize this and bring in a new perspective, is it's emotionally wrenching no matter what. And we can't make that go away.

MARGOT ADLER: Thank you so much for speaking with us.

ROBERT EMERY: Thank you.

MARGOT ADLER: I think I should ask you, Joan and Ned, how you would respond to what he said.

NED HOLSTEIN: Actually, I've read Professor Emery's work and one of the things that he describes eloquently in his research is the profound sense of mourning and loss that children express well into adulthood. And the mourning and loss that they express is the

loss of having an intimate relationship in their childhood with their fathers. And he has written about that quite eloquently.

MARGOT ADLER: Joan?

JOAN MEIER: Oh, I was really appreciative of Professor Emery's comments, and I would like to underline the comment that fighting is what damages children. And that is one of the reasons that joint custody and equal shared custody is such a problem, because those cases that go to court, which is a small percentage of the total, are those where the parents cannot get along.

MARGOT ADLER: We're talking about loving parents; we're talking about joint custody. But when I think back over the way women are, despite the changes over the last couple of decades, in most families, still the ones who cook, clean and take care of the children. And this is even true when the women work outside the home. So Ned, can men expect to have equality in child custody disputes when they don't participate as much in child rearing?

NED HOLSTEIN: Absolutely. First of all, the studies in dual earner households show that men and women are now almost down to parity in terms of the time they spend with their children. And dual earner households predominate, particularly in the younger childbearing ages...

MARGOT ADLER: Are you saying that in your father's group—how many of those dads were getting up in the middle of the night to change diapers and give the baby a bottle?

NED HOLSTEIN: Well, I was, and lots more of them were too. And I'm just talking about what the data is showing. Dual earner families – I'm older, but in the younger families with dual earners, it's almost to parity now.

MARGOT ADLER: Joan, do you believe that there is this kind of parity as far as childcare?

JOAN MEIER: No, and the research that I've been reviewing is quite contrary to what Ned is saying. In fact, what it's finding is that mothers spend at least three times or more hours a week on childcare than fathers. But interestingly, both mothers and fathers claim equality of co-parenting to a much higher degree than is actually happening. So I think we tend to want to believe we are doing it. Fathers in particular tend to overstate. But I think both partners, when there is some degree of co-parenting, want to believe it's really equal when in fact, it's not.

MARGOT ADLER: Now when I look at the various custody arrangements around me, when I see the kids in my son's school and so forth, some kids have such complicated child custody arrangements that they have to constantly look at the calendar to figure out whose house they are to be at that night, which parent or step-parent is to pick them up from school, what clothes or books they should bring to school so that they have it the

next day. And one parent may complain, but isn't there a value, Ned, and a stability of having the kids live in one place most of the time?

NED HOLSTEIN: Look, if you have kids going back and forth for what is called visitation, they are going back and forth just as much as if they are going back and forth to stay for a little while. It's easier for them to make a trip over to dad's house and then to stay there for a few days than it is to go over there for 18 hours and then come back again. So there is just as much going back and forth in a visitation arrangement as there is in a shared custody arrangement. And I think that once you have two equally empowered parents who both love and care for their child, if they perceive that the arrangement is one that is really hard for their child, they will change it voluntarily. No court is going to have to tell him to change it.

JOAN MEIER: I just wanted to say a word about whether visitation is really the same as shared custody with respect to what it does with children and their schedules. It's true that it's possible for there to be a court order for a visitation that looks like a joint custody schedule. But typically, visitation is on weekends and therefore children don't have to deal with school schedules and different locations for all of the things that they do during the week. They just have to deal with changes on weekends, which is very different and much less burdensome to children.

MARGOT ADLER: The experts that are brought in—like psychologists or child advocates—are they valuable, or do they mess up an already complex situation?

JOAN MEIER: Again, my experience focuses primarily on cases where abuse is alleged, which as I've said, is the majority of cases that wind up in court and in trial. And I'm seeing a very troubling pattern of mental health evaluators dismissing abuse claims, or attributing them to the mom's desire to alienate the child from the father. There's a false notion of parental alienation that is being bandied about and used against moms who are simply trying to protect their children.

MARGOT ADLER: The experience with psychologists or child advocates – are they valuable, or do they just mess things up, Ned?

NED HOLSTEIN: I think there is some area of common ground here between me and Joan Meier on this. We see a pattern in this discussion today, and I think that the experts you've asked me about reflect the same pattern. What we've heard on the one side is that fathers just simply want to love and care for and be involved in the lives of their children, even if a divorce occurs. What we've heard on the other side is that fathers don't provide care for their children.

JOAN MEIER: That's not what I've said.

NED HOLSTEIN: They are batterers. They are engaged in child abuse. They only care about the money. They foment conflict...

JOAN MEIER: This is precisely the hyperbole that makes this discussion so difficult.

NED HOLSTEIN: But these are your words – how many times have you used those words?

JOAN MEIER: May I please respond? I would never say that men are batterers or abusers. I would never say that divorcing men are batterers or abusers. The vast majority of men and the vast majority of divorcing men are loving parents. The vast majority of them do not litigate in court. It is a small minority of fathers and mothers who take their cases to court. In that small proportion of those cases, dysfunction is quite common and abuse is quite common.

MARGOT ADLER: That will have to be the last word for today's debate. The conversation can continue, however, on our website, [justicetalking.org](http://justicetalking.org). Joan Meier is a professor at the George Washington University Law School and Dr. Ned Holstein is the founder and president of Fathers and Families. Thank you both for talking with me.

JOAN MEIER: Thank you.

NED HOLSTEIN: Thank you.

MARGOT ADLER: Just ahead on Justice Talking, my conversation with a divorced couple and their daughter about how they slowly created a reasonably good divorce by putting their daughter first. Also, a family court judge tells us what he has learned from 15,000 divorce cases.

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. Even in the best divorces, the issues around who raises the children are painful. By definition, the child no longer lives full-time with both parents. Deciding where the child lives and how much time he or she spends with the other parent can be a wrenching process. And yet there are millions of parents who have had to make these choices.

I met with one such couple in a Manhattan restaurant. Jane Shomonish and Danny Flamberg have been separated for 13 years and divorced for 10. They had always seemed from a distance to be that couple whose divorce had worked well. They were friendly with each other, both parents attended school events, and the mom had even gone into business with her ex-husband's new wife. I asked them and their teenage daughter Allison, if they had always had such an easy time with each other.

JANE SHOMONISH: Not a chance, never.

DANNY FLAMBERG: Started out like the North and South Koreans and it stayed that way for...

JANE SHOMONISH: Two and a half years. No, more. When we started out divorcing, it was nasty and nastier, because when you take two type A personalities and you put them in a divorce, throw in a lot of money and a couple of high-end fighting issues, that leads to a very expensive and extremely long divorce.

MARGOT ADLER: Did you use outside help, like mediators or therapists?

JANE SHOMONISH: We don't like any of them. We uniformly hate all of them.

DANNY FLAMBERG: Uniformly hate all of those people.

MARGOT ADLER: How was the experience of going through this divorce?

ALLISON: I was oblivious, so fine. I don't remember thinking about it all that much. I was thinking about other junk. Who knows?

JANE SHOMONISH: A lot of it has to do with your age of consciousness and the point at which you go through it. Allison was very young and I actually mistakenly assumed that because she was young that she would get over it fast. And the point in fact is that it's not that you get over it or not. It's an issue in your life, like many things, that continues to rise up and go away.

MARGOT ADLER: Now let me just ask you a basic question. When the divorce happened, when you were discussing things like who got custody, legal custody and physical custody and all of that, was that just assumed from the beginning, or did you fight over it?

JANE SHOMONISH: No, that was just extremely nasty and horrible. I spent a fortune and Danny spent half a fortune.

DANNY FLAMBERG: We had explored joint custody and then at some point that came off the table and it became that Jane was the primary parent, but I had all these rights. And we actually moved at that time and consciously moved four blocks away so that we could have as close a nuclear family as we could.

JANE SHOMONISH: I got some advice early on which was if two people can't agree that water is clear, how could you possibly agree about raising a child? And while joint custody is a lovely theoretical concept, it's actually nonsense because it's impossible to figure out where you're going with it, and so one person has to be the one to be a decision maker. So that became the fundamental basis upon which I structured things.

MARGOT ADLER: For you, Allison, this whole thing has sort of worked out?

ALLISON: More or less.

JANE SHOMONISH: But it did. As I said before, I think there were some pivotal points that made a critical difference.

DANNY FLAMBERG: There were the practical things about Allison. We had to decide where to send her to preschool. We had to decide what to do with her in the summer. We had to decide, should we let her go with her grandmother or grandfather to do that. We had to decide should we take her on a vacation. I mean, all these kinds of things had to be decided, so it forced us to kind of come together.

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MARGOT ADLER: Deciding where Allison would live was not the main contention in Danny and Jane's divorce. But for some parents, a trip to family court is the only way to settle a child custody dispute. Tom Zampino has been a family court judge in New Jersey for 16 years. He's a member of the National Council of Juvenile and Family Court Judges. Judge Zampino, thank you for joining us on Justice Talking.

TOM ZAMPINO: Thank you Margot.

MARGOT ADLER: In 16 years, how many couples have you divorced?

TOM ZAMPINO: Without exaggeration, there are 30,000 people, about 15,000 couples. I do about 1,000 divorces a year. So there are quite a few people out there.

MARGOT ADLER: Wow. And out of these, how many have turned into custody battles?

TOM ZAMPINO: Well, as years have progressed, fewer. We have been very fortunate. I think the courts got smarter as we went along with the high conflict custody cases. And as the case law developed, we realized that there were tools outside the courtroom that were much more effective than judicial decisions. Most of our courts now have built-in programs that are accessible to all members of the public, such as parenting classes and mediation that litigants or parents are required to go to first if children are involved and custody is an issue.

MARGOT ADLER: Do the courts deal with fathers differently now than they used to?

TOM ZAMPINO: Oh, absolutely. I think it's fair to say that in the past, even cases talked about the tender years doctrine, it was referred to—that children under 7 should not be with anyone but their mother. But today I think it's clear in many statutes in many states that both parents begin with equal rights of custody. They are gender neutral. There is no parent preference from either side. And I think there's a recognition that society has changed, that most families now, when they are intact, have both parents working outside the home. So I think even the traditional roles of parents have evolved over the last decade that brought about this change, just in society.

MARGOT ADLER: And do you think it's best for a child to in general be with the mother, with the father, with both?

TOM ZAMPINO: I think with both. I try and tell people that depending on the age of their children, that their goal together, mom and dad, should be that when that child graduates high school, that they are both sitting in the stands and the child isn't afraid of with whom he'll take a picture. This has to be something that they make the goal from the very beginning.

MARGOT ADLER: Does joint custody work?

TOM ZAMPINO: Absolutely. Now understand, as many people as we have in the room, that's going to be how many different definitions there will be of joint custody. The traditional resolution of a case today I think would be as follows—let me give you an illustrative example, but this is not to say that this is the balance of cases. Be aware that probably over 90 percent of all cases end up with an agreement by the parties as to the custody arrangement. We don't use the word "visitation" any longer, we call it parenting time. What will happen is you'll have a designation, most commonly, of joint legal custody designating one parent as the primary residential parent. That is usually for the purposes of school, location, and it will depend on the geographies of how far away each parent lives from the other. And then you do a parenting time division.

MARGOT ADLER: Now what role do children play in the custody decisions?

TOM ZAMPINO: That's an interesting question.

MARGOT ADLER: At what age do you think that the child's opinion matters?

TOM ZAMPINO: It does, but you can't enable the child to believe that they are in control. And very often my experience has been that children don't want this decision. They want you to make the decision for them. But their preference isn't to be the decision maker nor should it be. And a judge should make sure that he or she tells the child that they are very brave for talking to a stranger, especially one who wears a black dress, meaning the robe.

MARGOT ADLER: [laughing] I got that.

TOM ZAMPINO: That's how we describe ourselves sometimes... And the judge will be making the decision. However, because they are an important part of this, the judge wants to speak to them. So the young person knows their role, that they are not the decision maker. Judges will very often schedule an intervening event before any custody decision is in fact made. I remember a judge once—we were teaching how to interview children. And he was in his late 60s, and he is now passed, so I can tell this story. He came up and he said, you know, I never interviewed children before because when I was a child, my parents were getting divorced and the judge interviewed me, and right after the interview, he separated my sister and me. Here it is, 50 or 60 years later and he's

telling the story. And he thought that he was responsible. So you really have to recognize what impact you are having on a young person in that interview. And that's why, I think, sometimes it's better suited for the mental health professionals.

MARGOT ADLER: One of the things that parents fight about is how to raise the kids. One parent may be deeply religious, the other couldn't care less. They may be of different religions. They may have different views of where the kids should go to school or what sports they play. I'm sure that these issues have come up hundreds of times in your cases. How do you resolve them?

TOM ZAMPINO: Well, very often when people get divorced, there is usually some type of custody agreement. But you're correct. Years after the divorce, they come back to the court for issues similar to the ones that you just voiced. And we call them post-judgment applications. But they are usually single issues, and what we will try to do again is use the tool of sending the parties to mediation to see if they can resolve amongst themselves, because I always think it's best that the parents participate in this decision making. And if they aren't able to resolve the problem, then it becomes a hearing where the judge hears both sides and has to make the determination by a decision. So for the most part after that, parties are compliant with the judge's decision, and that is very important. You can choose the access to the court for the decision to be made, but then you have to comply with the decision you've chosen to seek.

MARGOT ADLER: Thank you so much for talking with me today.

TOM ZAMPINO: You're welcome Margot, and I hope that parents listening recognize their responsibilities to their children.

MARGOT ADLER: Tom Zampino has been a family court judge in New Jersey for 16 years.

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MARGOT ADLER: Today it's not uncommon for divorced parents to have joint custody of their children. But when Sara Lerner's parents got divorced, joint custody was unheard of.

UNIDENTIFIED MALE: [movie clip] My wife says she loves Billy and I believe she does. But I'd like to know what law is it that says a woman is a better parent simply by virtue of her sex?

SARA LERNER: Remember the movie, "Kramer vs. Kramer?" It came out in 1979. Well, that was my dad's story. He was the good dad that demanded custody of his kids. But his story was different than Dustin Hoffman's in the movie. My mom agreed with him. They both had to fight for joint custody. Thankfully, they got it. I had a single mom half of the week, and a single dad the other half of the week.

GARY LERNER: Sara was three and Jack was seven and I was pretty young. I always thought that of all those years taking care of Sarah, the worst part was getting her hair done right when she was three, which I didn't know anything about.

SARA LERNER: In Kansas City in 1978, before the movie came out, nobody had ever heard of joint custody and my parents had to struggle to get it. A few weeks ago, 27 years after they got divorced, I sat down with them and had them tell me the whole story.

GAIL LERNER CONAHAN: Once we decided to get a divorce, I really didn't even consider sole custody. Gary was so involved and devoted as a father, I wouldn't even dream of fighting him for sole custody, because it would have been a huge fight. He would have fought to the death.

GARY LERNER: It was really super scary, because remembering back about that there was a huge scary feeling that I'm going to be visiting, instead of having, the children. And it was a realistic fear, because at that point in time, nobody had had joint custody in Kansas. Part of the good thing was that Gail acquiesced, or came up with the idea of joint custody.

GAIL LERNER CONAHAN: I don't even know where I heard of it.

GARY LERNER: We went to one lawyer, Andy Lyons, and he was a friend of both of ours. So we made a phone call from Andy Lyons' office together. He called the judge herself and he said, Judge, we're going to have a divorce and they want to share the custody of the children, joint custody. And as I recall, she said well, if the child is real young, one could move out of town, I'm not sure, but that she would go along with it. That set the stage for us to go and do it.

GAIL LERNER CONAHAN: I remember being nervous and excited both. Like okay, this is going to be final, things are moving along. I really wasn't an emotional wreck, but really it was a traumatic time.

GARY LERNER: It was kind of a scary day. You're going in there and we go in there and what do you know, the judge is ill that day and won't be there.

GAIL LERNER CONAHAN: I really don't remember what the judge looked like, a middle-aged man. And we knew there might be some problems, so we had a letter from a psychologist or two.

GARY LERNER: We got all the way through it and we get down to the end and he says, okay, I'll grant you everything you want except joint custody.

GAIL LERNER CONOHAN: The judge said that this is a psychologist' pipe dream and threw it out.

GARY LERNER: I about jumped out of the chair, and Andy said wait, wait. And I remember him holding me back, because I was just – oh, man. So Andy gets up and asks if we can just put the decision on hold for awhile before you make a decision judge. He said okay and away we go.

GAIL LERNER CONAHAN: This judge was just narrow-minded. This judge didn't think that children could go back and forth to two houses and that it would ever work. It was just so new and so radical.

GARY LERNER: But we ended up going to the next trial with the woman. And we go through it and she grants everything and then we're getting ready to leave and as we're getting ready to leave she says to Gail—I remember her saying almost word for word: Well, Gail, if it doesn't work out, give me a call.

GAIL LERNER CONAHAN: I don't remember that at all. But I don't doubt it. And of course, I could have had it reversed. In 1978 the mother of the kids had the power and the dad – you've seen it in the movies and in stories and things – the dad was kind of out in the storm.

SARA LERNER: That was my mom, Gail Lerner Conahan, and my dad, Gary Lerner.

MARGOT ADLER: That was Sara Lerner. She's a reporter at KUOW in Seattle.

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MARGOT ADLER: Before we wrap up the show, I want to give you an update on several issues we discussed on Justice Talking this past fall. In late September, we broadcast a program on *Gonzalez vs. Oregon*, a right to die case that was pending before the United States Supreme Court. The State of Oregon challenged former Attorney General John Ashcroft's decision to prosecute doctors who prescribe lethal drugs under Oregon's Death With Dignity Act. The Attorney General claimed that the Federal Controlled Substances Act gave him authority to prosecute the doctors because assisted dying was not legitimate medical care. But on January 17<sup>th</sup>, by a six to three vote, the Supreme Court ruled that the Attorney General had no authority to prosecute Oregon doctors. As a result, states maintain the power to regulate assisted suicide and appropriate end-of-life care.

The Supreme Court also decided an abortion case, which we discussed on our show in November. In *Ayotte vs. Planned Parenthood*, abortion providers challenged a New Hampshire law that required a young woman to tell one of her parents about her abortion decision. In a unanimous decision written by Justice O'Connor, the Supreme Court sent the case back to the lower court to issue a more limited remedy. It did not change the law and explicitly said that there must be an exception for medical emergencies. Both decisions can be read in full on our website, [justicetalking.org](http://justicetalking.org).

Thanks for listening. I hope you'll join me next week. I'm Margot Adler.

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