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Child Custody, Custodial Arrangements, and Financial Support in Late Nineteenth-Century Kansas

by Lyn Ellen Bennett

In 1870 Persis Webster Wilcox lived with Robert, her husband of two years, in rural Douglas County, Kansas, just north of Lawrence, where they had recently taken up a farm after their move from New York. That year's census indicated that the Wilcoxes held real estate valued just under $10,000 with an additional $600 in personal property—a secure nest egg with which to start the third year of their marriage. Two years later, their family expanded with the birth of Persis and Robert's first and only child, a boy they named George. By 1875 the seemingly good fortune of this young family ended abruptly when Persis filed for divorce.[1]

In her petition, Persis cited the grounds of cruelty, neglect of duty, and habitual drunkenness over a period of two years, each a legitimate ground for a Kansas divorce. Persis claimed that Robert threatened to "shoot and kill her" as well as physically beat her. Although there were no indications that Robert ever abused George physically or otherwise, Persis filed for sole custody of her son and made various requests for financial support, including alimony, maintenance, and the family's property.

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1. *Wilcox v. Wilcox*, Douglas County Civil Court Records, Case No. 3456, Spencer Research Library, University of Kansas, Lawrence, Kansas; U.S. Census, 1870, Kansas, Douglas County, Grant Township.

The court granted Persis her divorce. It also gave her sole custody of George after it determined that Robert was "not a proper person to have the care and custody of the small child George Wilcox" and that Persis was "competent and a proper person to have such care and custody." The court's ruling on the issue of physical custody, however, did not initially translate into a positive decision regarding Persis's requests for economic support in the form of alimony, maintenance, and property. In a separate decision, the district court responded to Persis's request for alimony by ordering Robert not only to pay monthly alimony from thereon, but to also pay back-alimony from the date Persis filed for divorce. The county court record's silence regarding most of Persis's financial requests would have troubled a newly divorced mother with no clear means of support. Five years later and 125 miles west of Douglas County, another marriage landed before a Kansas court with some strikingly different results.[2]

In 1863 Marcia and John Malin were joined in matrimony in the state of New York. By 1870 they were living in Sherman Township in Clay County, Kansas, with their three-year-old daughter Grace. At the time, John listed his occupation as farmer and claimed that he and Marcia had real estate valued at $850, a promising start for the young family. In 1880, however, after seventeen years of marriage, Marcia filed for divorce in the Clay County courthouse on the grounds of cruelty. Marcia claimed that John had threatened to take her and their four children's lives because he said "that it had to be done." In her petition, Marcia also sought custody of their children (Grace, thirteen; Maud, seven; Chester, ten; and Fred, eight years of age) and alimony. The court responded by granting Marcia her divorce, the custody of all four children, and the alimony she requested. The court went even further and barred John from interference with the children and ordered him to pay child support as well. The court also awarded Marcia the family's house and barred John from access to the property.[3]

By all accounts, it appears that the Clay County court, unlike the Douglas County court, took significant measures to ensure both Marcia's safety and her financial ability to raise her four children without further intervention from John. How might the different outcomes of the Kansas courts' rulings in the *Wilcox* and *Malin* cases be explained? Which of these cases was more typical of the custodial settlements in Kansas during the last decades of the nineteenth century? Were the custodial rulings in these county courts reflective of national trends or were the decisions unique? How might changing nineteenth-century ideas about gender, children, and the family have influenced these and other Kansas court rulings? A close examination of county-level divorce cases may provide insight into the different ways that late nineteenth-century Kansas courts navigated child custody and custodial settlements, and perhaps reveal the prevailing ideologies courts considered in making their decisions.[4]

This study draws on evidence from four Kansas counties (Cherokee, Clay, Douglas, and Ford) selected for their diverse economies (mining, agricultural, mixed agricultural and manufacturing, and the cattle industry respectively) and geographic location within the state (southeast, north central, northeast, and southwest respectively). A random sample of seventy-five divorce cases from each county between 1867 and 1896 was examined with the expectation that a close analysis of custody records might reveal information not available in the state and national statistics. The dates selected for this study parallel the earliest national statistical studies of divorce produced by the U.S. Bureau of the Census in 1891 and 1908. Use of these different levels of custody data helps provide context for decisions made by the Kansas courts.[5]

By the time the Wilcox and Malin cases appeared in Kansas courts, American courts emphasized child welfare in the settlement of custody disputes under the "best interests of the child" doctrine. Courts often

2. The author thanks Daniel Gresham for drawing her attention to this court order.

3. *Malin v. Malin,* Clay County Civil Court Records, Case No. 606, County Clerk's Office, Clay Center, Kansas. This focus on property perhaps stemmed from Marcia's claim that John committed fraud by convincing her to sign a deed of conveyance (to a boarding house) that she understood to be a "settlement and agreement under which they were to continue to live as husband and wife." In his cross complaint, John claimed that he intended "to sell the property to pay off the plaintiff's debts." Ultimately, the court set aside the fraudulent deed and awarded the property in question to Marcia.

4. For a discussion on diverging divorce legislation across state lines see Mary Somerville Jones, *An Historical Geography of the Changing Divorce Law in the United States* (New York: Garland Press, 1987). For a general overview of American divorce see Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, Mass.: Harvard University Press, 2000); Norma Basch, *Framing American Divorce: From the Revolutionary Generation to the Victorians* (Berkeley: University of California Press, 1999); and Glenda Riley, *Divorce: An American Tradition* (New York: Oxford University Press, 1991).

5. Carroll D. Wright, *A Report on Marriage and Divorce in the United States, 1867–1886,* rev. ed. (Washington, D.C.: Government Printing Office, 1891), and Carroll D. Wright, Special Reports: *Marriage and Divorce, 1867–1906, Parts I–II* (Washington, D.C.: Government Printing Office, 1908–1909).

determined these best interests by the demonstrated "fitness" of a parent. The concept of "fitness" incorporated gender prescriptions that valued women as sensitive and nurturing beings whose primary functions in society revolved around their supervision of home and family, but in particular their role in child rearing.

By the nineteenth century, the definition of an American family had diverged from its previous patriarchal and hierarchical structure to include a middle-class family unit that was ideally based upon an egalitarian and an interdependent relationship between husbands and wives. This conceptualization of family tempered male authority and increased one aspect of a woman's power by making the household her primary sphere of influence. A woman's responsibilities were now associated not only with home maintenance but also with childcare. Children were at the center of the household within this family structure. Parents, especially mothers, increasingly devoted more time, energy, and resources to the rearing of their children.[6]

Domestic law ultimately reflected these changes in parental roles and expectations. Traditional custody law firmly rooted in Roman law regarded children as economic resources or property under patriarchal control. But as women's roles and children's status in families changed, custody law no longer viewed children as property whose interests were left in the hands of their fathers. As society and the legal system acknowledged child rearing primarily as a mother's responsibility, nineteenth-century custody law gradually gave way to a new standard that aligned itself more closely with women's parental rights.[7]

The societal emphasis on the "cult of motherhood" worked in women's favor as judges' decisions took into consideration women's child rearing responsibilities. Further, supplemental guidelines, such as the "tender years" doctrine appeared in judicial rulings. The "tender years" policy declared that infants, preadolescents, and ailing children would receive better care from the mother unless she had been determined unfit. By the end of the nineteenth century, this court standard was expanded to include the use of both a parent's and a child's gender in the awarding of custody. Daughters, for example, were thought to need the care, influence, and role modeling that could only be provided by women, and especially by their mothers.[8] A mother's chances of obtaining custody greatly increased as court-established policy continued to lean towards this maternal preference. Nonetheless, courts tempered this leaning with a fitness test that developed in conjunction with maternal preference. This created two major problems for women seeking custody of their children, problems that continued to plague them in custody battles well into the twentieth century.

One of these problems arose from the issue of the "double standard" in society and consequently in the law. On the one hand, for example, a man who committed adultery did not automatically ruin his own, or his children's, standing within society. The children could still interact with and be educated by morally sound members of the community. A female adulterer, on the other hand, would have ruined herself in the eyes of the community and would be unable to reclaim her social position (hence "unfit"). Thus, she had sacrificed the children entrusted to her care.[9]

A second barrier to maternal custody was women's economic dependence upon men. Although changes throughout the nineteenth century created opportunities for female participation in the public sphere, the majority

6. Scholarly interpretations of childhood and child rearing have changed substantially over the last fifty years. For an overview of these changes, see the path-breaking work by Philippe Ariès, *Centuries of Childhood: A Social History of Family Life* (New York: Knopf, 1962) in which Ariès argued that the concept of childhood, non-existent in the Middle Ages, evolved over time; Linda A. Pollock's *Forgotten Children: Parent-Child Relations from 1500 to 1900* (Cambridge: Cambridge University Press, 1983) challenged Ariès' and other scholars' interpretations finding continuity in parenting and child rearing practices since the sixteenth century that focused on children's needs and the creation of loving relationships. More recently, Steven Mintz's *Huck's Raft: A History of American Childhood* (Cambridge, Mass.: Harvard University Press, 2004) dispelled notions of childhood as a period of innocence and simplicity and argued that for most of the United States' existence, children lived lives of uncertainty and danger that parents and families could not shield them from; James Marten, ed., *Children in Colonial America* (New York: New York University Press, 2007) and *Children and Youth in a New Nation* (New York: New York University Press, 2009), illuminated the diverse treatment of children in the colonial era, the symbolic role children played in the years after the creation of the republic, and how women's expanded role in child rearing evolved into a growing concern for child welfare.

7. Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985), 234–35; Carl N. Degler, *At Odds: Women and the Family in America from the Revolution to the Present* (New York: Oxford University Press, 1980), 8–9; and Steven Mintz and Susan Kellogg, *Domestic Revolutions: A Social History of American Family Life* (New York: The Free Press, 1988), 45–49, 52–55, 60.

8. Grossberg, *Governing the Hearth,* 248–49; and Marilyn Little, *Family Breakup: Understanding Marital Problems and the Mediating of Child Custody Decisions* (San Francisco, Calif.: Jossey-Bass Publishers, 1982), 7–10. See also Carole Shammas's discussion of this shift in judicial criteria in *A History of Household Government in America* (Charlottesville: University of Virginia Press, 2002), and Mary Ann Mason, *From Father's Property to Children's Rights: The History of Child Custody in the United States* (New York: Columbia University Press, 1994).

9. Little, *Family Breakup*, 7–9, and Grossberg, *Governing the Hearth,* 249–250.

Table 1. Divorces Granted between 1867 and 1896 Reporting Children on State and National Levels

	Kansas		United States	
	N	%	*N*	%
Total Cases	19309	100	680979	100
Total of Cases by Plaintiff's Gender				
Male	5905	31	233142	34
Female	13404	69	447837	66
Total of Cases Reporting Children[a]	8935	46	272760	40
Total of Cases Reporting Children by Plantiff's Gender[b]				
Male	1801	20	58826	22
Female	7134	80	213934	78

Sources: Department of Commerce and Labor, *Special Reports of the Census Office, Marriage and Divorce, 1867–1906, Part I,* p. 84 (nation) and *Part II,* p. 576 (state).

[a]Where the number and percentage are derived from the total number of cases.

[b]Where the number and percentage are derived from the total number of cases reporting children.

of women did not have access to the means of support, property, and education that their male counterparts had. The judicial system would partially eliminate this economic bias before the end of the nineteenth century through legal avenues such as alimony, maintenance, child support, and married women's property rights. But the double standard of behavior and its entrenchment in the legal system continued into the twentieth century.[10]

Child custody cases may be one way to assess the changing relationships of children to parents and families across time. According to historian Nancy Cott, the more often children appeared in custody cases the more important their status appeared to be within the family. Surely parents would not struggle for control of children in custody cases unless their children had meaning, whether emotional or economic, in their lives. In her study of eighteenth-century Massachusetts divorce, Cott found that only one-third of the 229 petitions for divorce or separation between 1692 and 1786 mentioned children. Cott believed that a higher proportion of cases actually included children, but suggested that petitioners did not include information about children as they were considered "nonessential."[11] If one uses Cott's model of "inclusion" in divorce petitions to demonstrate the growing importance of parent-child relations, the increase in the importance of children across the nation is apparent by the mid-nineteenth century.

In the national data collected between 1867 and 1896, 40 percent of all divorce cases reported children (see table 1). An even higher percentage appeared in the Kansas data where 46 percent of divorce cases reported children. In three of the Kansas counties analyzed in this study, 50 percent or more of the total cases specifically mention children in divorce petitions (see table 2). This is substantially higher than on both the state and national levels. The fourth county (Cherokee) reported a similar percentage of cases as found at the state level (45 percent) slightly higher than the national average. If Cott's theory of inclusion does in fact mirror the rising importance of children in families and to parents, by the second half of the nineteenth century, families in these four Kansas counties, like families across the nation, were well on their way to becoming child-centered.[12]

Kansas's custody law first appeared in the 1855 territorial statutes where the issue of custody was covered in two sections of the "Divorce and Alimony Act." This act decreed that the courts

10. Grossberg, *Governing the Hearth,* 250–253, and Richard A. Gardner, *Family Evaluation in Child Custody Litigation* (Cresskill, N.J.: Creative Therapeutics, 1982), 4. For a discussion on the development and changes in married women's property rights, see Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986).

11. Nancy F. Cott, "Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records," *Journal of Social History* 10 (Fall 1976): 20–43.

12. Wright, *Special Reports: Marriage and Divorce, 1867–1906, Part II, General Tables* (Washington, D.C.: Government Printing Office, 1909), 658, 663.

Table 2. Cases Sampled Reporting Children by County								
	Clay		Cherokee		Douglas		Ford	
	N	%	*N*	%	*N*	%	*N*	%
Total Number of Cases Sampled	75	100	75	100	75	100	75	100
Total of Sampled Cases by Plantiff Gender								
Male	29	39	30	40	25	33	18	36
Female	46	61	45	60	50	67	32	64
Number of Cases Sampled Reporting Children[a]	39	52	34	45	43	57	26	52
Cases Sampled Reporting Children by Plantiff's Gender[b]								
Male	10	26	10	29	8	19	7	27
Female	29	74	24	71	35	81	19	73

Sources: Clay County Civil Court, Cherokee County Civil Court, Douglas County Civil Court, and Ford County Civil Court.

[a]Where the number and percentage are derived from the total number of cases.

[b]Where the number and percentage are derived from the total number of cases reporting children.

would determine the care, custody, and maintenance of children based on the circumstances and nature of the particular case. The very notion of court custodial control was heard in 1881 by the Kansas State Supreme Court where all justices concurred that in cases of child custody, the law must act in the best interest of the child even if that meant granting custody to a third party.[13]

In 1875 the Kansas State Supreme Court directly confronted the issue of fault and its relevance in the awarding of custody for the first time. In *Brandon v. Brandon,* John Brandon appealed to the higher court for the custody of his two children, ages three and one, the custody of whom a lower court had awarded to their mother. The settlement of the minors' custody in favor of the mother was typical of court policy. What was unusual about the *Brandon* case were the circumstances of the divorce. John was granted a divorce from his wife Mary Ann on grounds of her habitual drunkenness. In reviewing the case, the State Supreme Court noted Mary Ann's addiction to alcohol, but it also scrutinized John's character, his associations, and his "constant absence" from the home. The lower court's decision deemed it "unwise" to give John custody and therefore granted custody to Mary Ann as the "least of two evils." The Kansas Supreme Court did not find error in the lower court's decision and agreed that as the infants were of "tender years, and needed a mother's care," if Mary Ann was at all suitable, she should retain custody. The Court, however, reserved the power to change the custody ruling if Mary Ann continued her alcohol abuse once the children had passed the age which "demands a mother's care." No other major changes occurred in Kansas's provision for child custody throughout the duration of this study period.[14]

13. *Kansas Statutes* (1855), ch. 62; Petition of Frank B. Bort for a Writ of Habeas Corpus, *Kansas Reports* 25 (1881), 308–12.

14. *Brandon v. Brandon, Kansas Reports,* 14 (1875), 342–47. It is not clear in the court record why a third party was not considered to receive custody over Mary Ann Brandon. In 1859 judicial determination of custody was reaffirmed in Kansas's custody law in an attachment that continued the court's right to make changes in custody decisions when ". . . circumstances render them expedient." See Kansas *Laws* (1859), 385–86. Paula Petrik found similar results in her nineteenth-century Montana study, "If She Be Content: The Development of Montana Divorce Law, 1865–1907," *Western Historical Quarterly* 18 (July 1987): 281–82.

Table 3. Custody Requests and Court Decisions								
	Clay		Cherokee		Douglas		Ford	
	N	%	*N*	%	*N*	%	*N*	%
Plantiff Requested Custody								
Male	8	80	8	80	7	88	4	57
Female	27	93	22	92	32	91	15	79
Plantiff Requested / Granted Custody								
Male	3	37.5	5	62.5	4	57	1	25
Female	21	77.8	12	54.5	26	81.3	10	66.7
Plaintiff Requested Custody Granted to Defendant								
Male	2	25.0	1	12.5	1	14.3	1	25.0
Female	0	0	0	0	0	0	0	0
Plaintiff Requested Custody Granted to Third Party								
Male	1	12.5	0	0	0	0	0	0
Female	0	0	0	0	0	0	0	0
Plaintiff Requested Custody Granted Joint Custody								
Male	1	12.5	0	0	0	0	0	0
Female	1	3.7	1	4.6	1	3.1	0	0
Plaintiff Requested Custody Results Unknown								
Male	1	12.5	0	0	2	28.6	2	50.0
Female	5	18.5	1	4.6	5	15.6	5	33.3

Sources: Clay County Civil Court, Cherokee County Civil Court, Douglas County Civil Court, and Ford County Civil Court.

[a]Number and percentage derived from total of cases sampled reporting children.

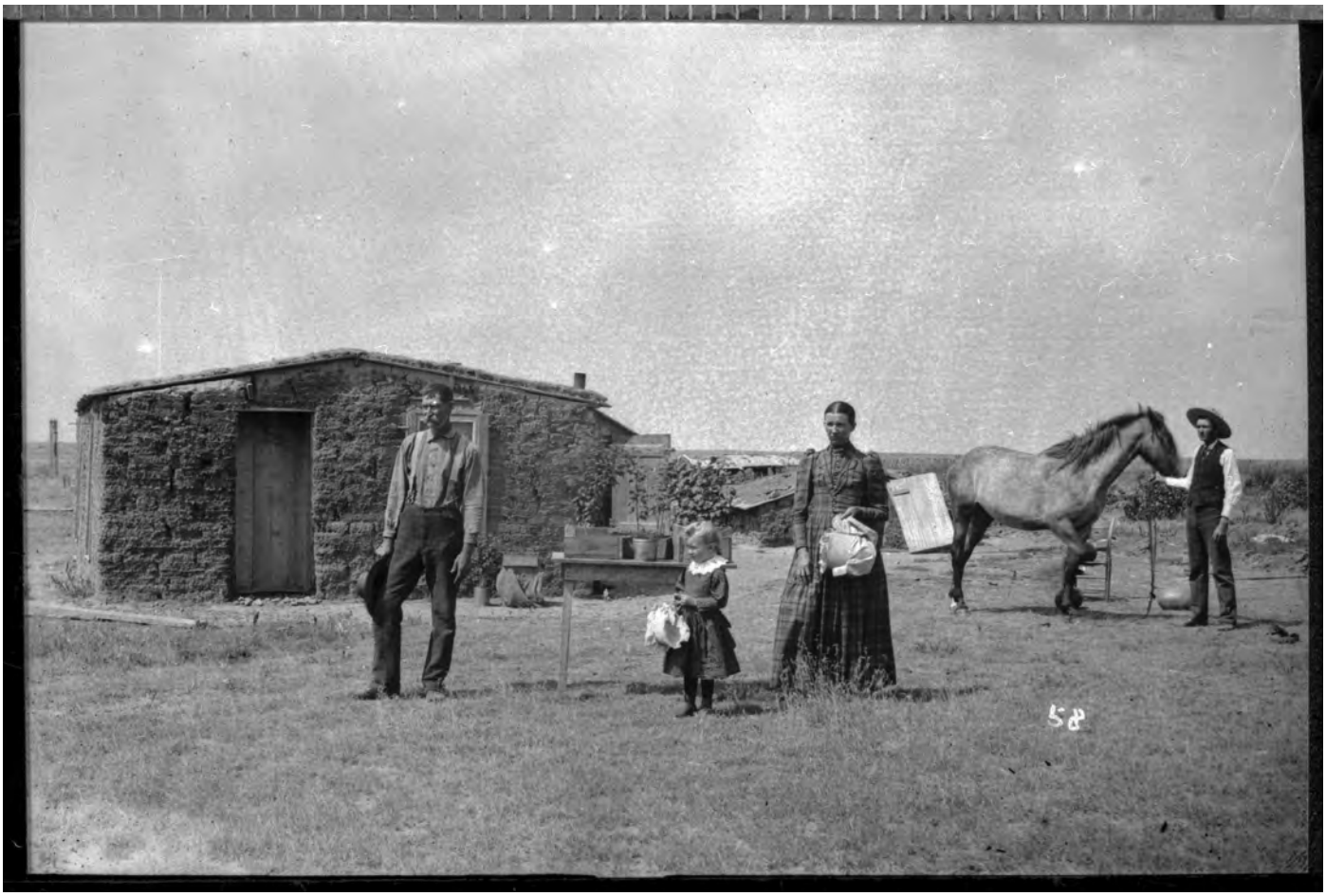
This study opened with two custody cases brought by female plaintiffs (mothers) who both requested and eventually received custody of their children. On all levels, county, state, and national, well over half of the divorces that mentioned children were brought to suit by women (see tables 1 and 2). This percentage reflected in part the fact that women filed the majority of divorce cases in the period under study. It may also reflect the changes in the parent-child relationship and the changing roles of both mothers and fathers. A closer examination of plaintiffs' gender and their success in gaining custody in the four counties provides insight into the courts' application of changing gender and parenting ideologies.

The state and national data do not include the actual percentages of plaintiffs who both requested and received custody of children. However, the county level data are far more revealing about custody outcomes (see table 3). In the four counties examined, the total percent of female plaintiffs who requested and received custody of children ranged between 67 and 81 percent of the cases. This range of percentages contrasted starkly with the frequency in which male plaintiffs requested and received custody (25 to 57 percent). The public record does not disclose the particular factors these courts used to make their decisions, but based on the statistics it appears that female plaintiffs were more successful in requesting and obtaining custody than their male counterparts.

Mothers' success in custody can also be seen in the complete absence of cases where a male defendant was

Initially, the legislative assembly of Kansas Territory had jurisdiction in divorce cases as well as custody determinations. Such was the case in a special session of the legislature in 1860 that, among other laws, passed forty-three acts of individual divorce, three of which specifically referred to child custody. Gertrude Siever not only was divorced from her husband William, but she was also declared the legal guardian of her two daughters, Louisa and Amelia, through their minority. Nor was this an isolated case, as the assembly granted both Lydia W. Peck and Sarah L. Lenker the "exclusive control and custody" of their children. Once Kansas achieved statehood in 1861, the legislature no longer determined child custody. As with divorce, the lower court system assumed this authority.[15]

15. Kansas *Laws* (1860), ch. 121, 128, and 134.



The more often children appeared in custody cases the more important their status appeared to be within the family. By the second half of the nineteenth century, families in Cherokee, Douglas, Ford, and Clay counties, like families across the nation, were well on their way to becoming child-centered. The unidentified family pictured here stands in front of their sod home during the 1890s in Finney County, Kansas.

awarded custody over a female plaintiff. There were several cases, in fact, where a male plaintiff's request for custody was denied in favor of female defendant or even a third party. This denial of a male plaintiff's custody request occurred once in each of three of the counties (Cherokee, Douglas and Ford), and three times in Clay County (see table 3). In one of the Clay County cases, *Regester v. Regester*, James Regester filed for divorce on the grounds of neglect of duty, from his wife of twenty-two years, Mary. In his petition, James requested the custody of their three minor children (Juliette, fourteen years; Franklin, twelve years; and Lulu, five years of age).[16] The court granted James's request for divorce but denied him custody, giving Mary custodial care of their children. It is not clear what influenced this particular court's decision, but in this study, no female plaintiff was denied custody in favor of a male defendant, a statistical reality that their male counterparts faced (see table 3).

There was only one case among the counties sampled in which the court granted custody to a third party. In this 1890 Clay County case, F. Tripp petitioned for divorce after his wife Abigail had deserted him and their two sons, Harvey age five and Albert age three, for more than a year. Tripp received his divorce but custody was granted to his mother, Ann Tripp, until further order of the court. In the record, the court determined that F. Tripp's occupation as a day laborer was not conducive to full-time guardianship. This example is instructive on at least two counts. First, it repeats the pattern found in the county level samples in which a female plaintiff was never denied custody in favor of a male defendant, indicating

16. *Regester v. Regester,* Clay County Civil Court Records, Case No. 298.

perhaps that county courts embraced the principle that mothers were the most "fit" parent to oversee the care and the custody of children (see table 3). Second, both Abigail and F. Tripp were denied custody of their children (Abigail probably as a result of her desertion and F. Tripp because of his work-related absences from the home) when the court decided that a third party was more fit. The court not only applied the fitness and the best interests doctrines as determinants of custody but also followed Kansas judicial practice that affirmed the court's ability to grant custody to a third party when it found parental fitness was non-existent.[17]

This Kansas county data are similar to the data historian Robert Griswold found in his nineteenth-century study of California divorce. Griswold noted that only one male defendant, as compared to ten female defendants, ever received custody of his children. He concluded that California courts gave more credence to a mother's ability to raise the children than to a father's. Still, it is clear that men were interested in their children as demonstrated by those who, when they sought a divorce from their wives, also desired custody of their children.[18]

The actual determination of custody in Kansas cases demonstrates how key legal principles, such as tender years and fitness doctrines, were followed in cases where one parent was awarded sole custody. But not all custody cases were that cut and dried. The appearance of a "divided" custody arrangement, wherein the court granted the plaintiff and the defendant custody of specific children, was relatively rare in the county samples (only four total cases in study), but it did occur. An examination of these four cases demonstrates how the courts tempered their responses to custodial law with their own scrutiny of each case.

The division of custody based on the children's gender appeared in two of the Kansas county cases. In 1886, for instance, the Douglas County court granted Mary E. Atkinson custody of her two minor daughters, while her ex-husband, Erastus, received custody of their three minor sons. Although the judge's deliberations do not appear in the public record, it appears that gender was a factor. It should be noted that this court also divided the couple's property between the parties and barred both parties from future access to the other's court-awarded property. The court essentially divided both children and assets equally among the divorcing parties, perhaps to ensure that both parties had an opportunity to raise and to provide for the dependents in their care.[19]

In direct contrast to the *Atkinson* decision was the 1887 Clay County divorce of *Ferguson v. Ferguson.* In this particular case, Mary Ferguson filed for divorce from her common-law husband of twenty-four years, Reuben, on grounds of physical abuse and neglect of duty, and she requested custody of the four children (all under the age of eighteen) living at home. What the Clay County judge handed down was a decree that awarded Mary custody of the three youngest children (two daughters, age thirteen and ten years; and one four-year-old son) and awarded Reuben custody of their seventeen-year-old son. In this case it appears the court applied the tender years doctrine in its determination of divided custody. The court decision made no reference to Mary's allegation of child abuse and whether or not it affected the custody outcome. But given the court's ability under the law to determine the fitness of any parent that appeared before it, most likely she was unable to substantiate her claim.[20]

The settlements in these previous cases are intriguing in light of another Clay County case decided sixteen years earlier. In 1871 Henry Shouse sued for divorce from his wife of seventeen years, Mary, on the grounds that she had deserted the marriage and family three years earlier. In his petition, Henry filed for custody of one of their four children, their five-year-old son Henry, Jr. The court granted Henry Shouse his request for a divorce and the custody of his five-year-old son, but awarded custody of the three other children (between the ages of nine and fourteen years; two daughters and one son) to their mother. It is possible that Henry, the plaintiff in the divorce proceedings, was deemed the "fittest" parent because his ex-wife supposedly deserted the family. But such an interpretation does not take into account that Mary was awarded custody of the three remaining children. This particular case seems to subvert all the legal principles of maternal preference or age found in the other cases. Perhaps clues found in the sparse court records are instructive.

17. *Tripp v. Tripp,* Case No. 3205, Clay County Civil Court Records; Petition of Frank B. Bort for a Writ of Habeas Corpus, *Kansas Reports 25* (1881), 308–12.

18. See Robert L. Griswold, *Family and Divorce in California, 1850–1890: Victorian Illusions and Everyday Realities* (Albany: State University of New York Press, 1982), 153–54.

19. *Atkinson v. Atkinson,* Case No. 5760, Douglas County Civil Court Records. In the other case, *Chamberlain v. Chamberlain,* the plaintiff, Mary Chamberlain, requested only the custody of her one-year-old daughter allowing her ex-husband the custody of their two sons, ages six and four; Case No. 879, Cherokee County Civil Court Records, Columbus, Kansas.

20. *Ferguson v. Ferguson,* Case No. 2031, Clay County Civil Court Records.

According to Henry's petition, his wife Mary lived out of state. The same file contained a cross-petition for divorce and custody filed by Mary, which provided an explanation for her alleged desertion. Mary claimed that the couple agreed to a twelve-month trial separation, a separation she attributed to Henry's cruelty, physical abuse, and habitual drunkenness. If the separation was mutually agreed upon, then perhaps one explanation for the division that defied custody practices at the time was that the decision reflected where each child resided at the time of Henry's petition.[21]

As custody policy played out in Kansas county courtrooms, judges expanded their power over custodial decisions to include the prevention of parental interference. Beginning in the 1870s, judges in Clay County attached a phrase to custody settlements that "enjoined a particular party from interfering with or disturbing the care, custody, control, and education of children" in divorce actions. Such was the case of *Brenner v. Brenner* (1872), where William Brenner was barred from interfering with his ex-wife Rachel's raising of their four children.[22] Judges not only decided who obtained custody of a child, but now they had the power to bar either party from interfering with child rearing.

It appears that these county judges believed it was their responsibility to act as mediators for families in conflict. Judges no longer needed plaintiffs' specific requests to bar defendants from interference in child rearing. They took action based on their own review of individual cases. In the nineteen Clay County cases where the custody decree included barring a party from interference, only four plaintiffs formally requested this pronouncement. Douglas County had no formal requests for barring from interference, yet there were eleven cases where this action was decreed by the court. Only Ford County had more plaintiff requests for barring from interference than actual decrees. It is not clear why Ford County judges were less willing to bar parents from involvement in their children's lives, but other county justices did so even without explicit requests (see table 4).

Table 4. Number of Cases Citing Interference with Care/Custody of Child

	Clay	Cherokee	Douglas	Ford
Plaintiff Requested Defendant Barred from Interference				
Male	0	0	0	0
Female	4	0	0	3
Defendant Barred from Interference by Court				
Male	2	0	1	0
Female	13	4	9	2
Plaintiff Barred from Interference by Court				
Male	2	0	1	0
Female	0	0	0	0
Plaintiff Requested Custody Granted to Third Party				
Male	1	0	0	0
Female	0	0	0	0
Plaintiff and Defendant Barred from Interference by Court[a]				
Male	1	0	0	0
Female	1	0	0	0

Sources: Clay County Civil Court, Cherokee County Civil Court, Douglas County Civil Court, and Ford County Civil Court.

[a]Refers to cases of joint custody where each party was enjoined by the Court from interfering with the other's custody rights.

Although some judges took action to exclude particular parents from their children's lives, other judges sought to ensure parental involvement through court ordered visitations. Even though there were only seven cases of court-ordered visitation among the counties sampled, the significance of this type of decree is two-fold (see table 5). First, although the courts had the power to award or deny custody, they tempered this right by including, when possible, both parents in the process of child rearing. Second, these early cases established the basis for a custody doctrine that would become every parent's right in the twentieth century. In 1879, when George Potter filed for divorce from his wife Marnie, he specifically requested that she retain custody of their two-year-old son Daniel. However, George did not want to be deprived of Daniel's

21. *Shouse v. Shouse,* Case Nos. 78 and 2031, Clay County Civil Court Records.

22. *Brenner v. Brenner,* Case No. 128, Clay County Civil Court Records.

Table 5. Number of Cases with Court-Granted Visitation				
	Clay	Cherokee	Douglas	Ford
Court Granted Plaintiff Visitation Rights[a]				
Male	0	0	1	1
Female	1	0	0	0
Court Granted Defendant Visitation Rights[b]				
Male	1	0	0	0
Female	1	0	0	2

Sources: Clay County Civil Court, Cherokee County Civil Court, Douglas County Civil Court, and Ford County Civil Court.

[a]Means that the defendant or a third party has custody of the children, so the Court ensures plaintiff's access to children by granting plaintiff visitation rights.

[b]Means plaintiff has custody of children, so the Court ensures defendant's access to children by granting defendant visitation rights.

companionship or affections. Perhaps with this in mind, the Ford County court awarded Marnie Potter custody of Daniel and attached a provision that gave George visitation rights.[23]

Even though no specific visitation guidelines appeared in the Potters' suit, other courts set rigid guidelines for parents granted visitation rights. In 1883 Wade Day was allowed one visit per week with his children, Albert and Winnifred, at the discretion of his ex-wife Helen, plus "exclusive control" of Winnifred and Albert on the first and second day of each month. Six years later, Josephine Stillman received visitation rights to her nine-year-old daughter Lottie for up to thirty days at a time, but not to exceed ninety days in any year.[24] Even as the Potters, Wades, and Stillmans acknowledged their inability to live together as husbands and wives, their children's interests remained a priority in the judicial decisions. Kansas courts established custody arrangements that allowed these divorced parents continued contact with their children.

In the *Wilcox* and *Malin* cases, mothers who sought the sole custody of their children also requested from the courts various types of financial support that would aid them in raising their children. As custody policy became increasingly institutionalized, courts began to address the economic burden custody could place on parents. Most courts attempted to handle this through awards of financial support. Types of financial support during the period under study varied from alimony ("the sustenance or support of the wife by her divorced husband"), to maintenance ("furnishing by one person to another, for his or her support, of the means of living, or food, clothing, shelter"), to child support ("legal obligation of parents to contribute to the economic maintenance, including education, of their children") depending upon the individual judge's and court's practices.[25] All three types of financial support need to be analyzed concurrently to clearly assess the nature of financial assistance awarded to individuals by the court. In all cases where alimony, maintenance, or child support was formally requested by the plaintiff or later attached by the court, the plaintiff was female. No male plaintiffs within the county samples requested or received court-ordered financial support (see table 6).

In cases that involved children, such as the *Wilcox* and *Malin* cases, plaintiffs' most often requested form of court-ordered financial assistance was alimony. Of the 142 cases from the four counties sampled that mentioned children in the public record, forty-six (about one-third) of the cases specifically requested alimony in their petitions. Sometimes alimony requests appeared in conjunction with other forms of financial assistance. Dual requests of alimony and maintenance appeared in six cases demonstrating that these two kinds of request were not automatically viewed as the same. There was one case in Cherokee County of requested maintenance and child support without an attendant alimony request (in this case it appears maintenance was requested in lieu of alimony). Only one case (Clay County) contained a request for both alimony and child support (see table 6).

These requests for multiple forms of financial awards may have reflected the plaintiffs' real financial situations or may have been part of a strategy to gain court-ordered financial assistance. If this was the intended strategy, it appeared to be successful. Of the eight cases citing

23. *Potter v. Potter,* Case No. 3523, Ford County Civil Court Records, County Clerk's Office, Dodge City, Kansas.

24. *Day v. Day* and *Stillman v. Stillman,* Case Nos. 1020 and 2757 respectively, Clay County Civil Court Records.

25. See "Alimony," "Maintenance," and "Child Support" in *Black's Law Dictionary,* 6th ed. (St. Paul, Minn.: West Publishing Co., 1990), 73, 239, 953–54.

multiple requests for financial support, six plaintiffs were granted at least part of their initial requests. Overall, however, the county-level data appear less optimistic in regards to actual court-awarded financial assistance. Of the forty-six requests for court-ordered alimony, only sixteen (about 35 percent) were granted. Only one of the seven requests for maintenance was awarded. No requests for child support were granted (see table 6). Although it appeared that county courts acted upon some plaintiffs' financial requests, the majority of plaintiffs left the county courts without financial support.

Table 6. Number of Cases with Requests for Financial Support*

	Clay	Cherokee	Douglas	Ford
Alimony				
Requested	10	10	20	6
Awarded	2	2	11	1
Child Support				
Requested	1	1	0	0
Awarded	0	0	0	0
Maintenance				
Requested	1	1	5	5
Awarded	0	0	1	0
Multiple Types of Support				
Requested[a]	2	1	5	0
Awarded[b]	0	0	0	0

Sources: Clay County Civil Court, Cherokee County Civil Court, Douglas County Civil Court, and Ford County Civil Court.

*Only female plaintiffs requested.

[a] Plaintiff requested more than one type of financial assistance.

[b] The court awarded plaintiff more than one type of financial assistance requested in petition.

In the Kansas state-level data, approximately 19 percent of all divorces granted contained specific requests for alimony within the petitions. Of these 19 percent of cases, about 16 percent were granted alimony with the other 3 percent denied or not indicated in the public record.[26] These figures are similar to those historian Paula Petrik found in her Montana study, where women rarely sought alimony (13 percent of cases) and even fewer were granted alimony (10 percent of cases).[27] The percentages found at the Kansas county and state levels are echoed in the national findings. Nationally, the percentage of successful divorce cases that included requests for alimony was about 13 percent; approximately 9 percent of these requests were actually granted.[28] Unfortunately, alimony rates for women were not compared with the number of cases that mentioned children so these figures are tentative at best. But the Kansas county data under study do provide specific information about child custody cases involving alimony requests. Approximately one-third (*N*=46) of the total number of cases with children present (*N*=142) contained alimony requests, and of these 35 percent (16) were granted (see table 6).

The third type of court-ordered financial assistance for divorced mothers with dependents was child support, which steadily gained legal standing throughout the nineteenth century. The appearance of child support in early nineteenth-century American law represented a distinctive break from the English common law upon which both American divorce and child custody policies had been based.

In his study of the evolution of American child support, Drew Hansen found that state courts began to frame a new dialogue about divorce and parental responsibility for children. This dialogue contained the idea of an implied contract on the part of the father to legally provide for his children if he ignored his "natural duty" of supporting them.[29] Hansen found this child

26. Wright, *Special Reports: Marriage and Divorce, 1867–1906, Part I, Summary, Laws, and Foreign Statistics, 99*. Note that alimony in the state and national census statistics refers to only permanent alimony and does not include maintenance or child support. The figures reported by the census are drawn from data covering the period 1887–1906. Although these dates exceed the limits of this study, no earlier state or national data were reported. Nor is the data from 1887 to 1906 calculated by individual year.

27. Petrik, "If She Be Content," 280. Petrik found that before 1890, these women rarely relied upon the support of family, friends, or neighbors. Instead they sought employment for the first time or returned to the jobs they worked prior to their marriages. After 1890 Petrik noted in the two mining towns she studied (Butte and Helena) that divorcing women relied more heavily upon the charity of others, a change she speculated in part was the result of a down turn in the economy.

28. Wright, *Special Reports: Marriage and Divorce, 1867–1906, Part I*, 77.

29. Drew D. Hansen, "The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law," *Yale Law Journal* 108 (March 1999): 1135.

Postcard of an Unidentified Family in Front of Their Home in Florence or Peabody, 1900 to 1905.

support doctrine was not justified by state courts using legal precepts, but by a growing sense of public policy, a policy that he argued had an agenda: the prevention of dependency among women with children.[30] This public policy specifically focused upon the prevention of poverty as well as the potential for drain on public coffers. According to Hansen, state courts became concerned about the future of children in divorce cases as they began to acknowledge the diminished financial conditions these children now faced. The absence of a law did not prevent American courts from framing the idea that a father's "moral obligation had been converted into a legal one" when determining child support awards.[31]

It is striking in the Kansas data that no parental requests for child support were granted. However, one county court did see fit to award child support in three custody cases without formal requests. In 1874, when the Clay County court granted Mary Ann Carson custody of her five children, it also ordered her ex-husband Benjamin to pay child support.[32] It was in this same county that two other similar cases of child support were awarded, *Malin v. Malin* and *Best v. Best*.[33] It is not clear from the legal records why the Clay County court system settled these cases in this manner, denying formal requests for child support yet granting non-requested child support. It may have been that the plaintiffs in all three cases were indigent so that the welfare of the children came into question and merited a court-ordered solution.

30. The development of nineteenth-century child support applied only to white families. See Hansen's discussion of enslaved black children who *legally* had no fathers and therefore no grounds on which to make child support claims. Instead, slave owners were legally responsible for these children (their property). Even after emancipation, black fathers were not necessarily held legally responsible for support of their children. Hansen, "The American Invention of Child Support," 1142–44.

31. Ibid., 1137.

32. *Carson v. Carson*, Case No. 218, Clay County Civil Court Records.

33. *Best v. Best* and *Malin v. Malin*, Case Nos. 46 and 606 respectively, Clay County Civil Court Records. In *Best v. Best*, Charlotte Best sought custody and "equitable relief" in her divorce petition and the court responded by ordering her spouse to pay both maintenance and child support.

Table 7. Number of Cases Where Non-Requested Court-Ordered Financial Support Granted				
	Clay	Cherokee	Douglas	Ford
Alimony	1	0	0	0
Child Support	3	0	0	0
Maintenance	1	0	0	0

Sources: Clay County Civil Court, Cherokee County Civil Court, Douglas County Civil Court, and Ford County Civil Court.

This county court's character cannot be overlooked either, as Clay County judges awarded other forms of financial support (maintenance and alimony) in two of these cases without formal requests from plaintiffs.[34] It appears, then, that in at least Clay County, judges closely scrutinized the economic status of the custodial parents to determine if they needed court-ordered monetary augmentation in order to keep their children out of poverty and off the list of indigents who, by Kansas law, each county was bound to support with either "outdoor" relief or at the county poor farm (see table 7).

For mothers facing potentially devastating economic losses upon their divorces, child support seemed to provide them with the answer to avoiding poverty. However, once the courts had established the legal precedence of child support, the actual award amounts may not have covered the true costs of raising a child. In fact, Hansen found that single mothers just barely stayed above the poverty level and off public relief.[35]

A critical effect of divorce within a family was its impact upon the children. Child custody policy underwent a change in the nineteenth century as a direct result of an increase in divorce cases and changes in gender, parent-child, and familial ideologies. American courts began to determine who should receive the care and custody of the children based initially upon a parent's fitness, which by the mid-nineteenth century meant the parent's gender, not necessarily the parent's behavior. The maternal preference and tender years doctrines both were based on changing ideas about motherhood, ideas rooted in the notion that the mother was a natural nurturer and thus the best choice as a parent. In cases such as *Brandon v. Brandon* (1874) and *Regester v. Regester* (1876), the Kansas county courts believed that the children were better off with the natural nurturer despite these women's behavior.[36]

By the 1880s Kansas courts started applying two more standards to determine custody: a child's gender and a child's age. In *Atkinson v. Atkinson* (1886) the courts used gender to determine which parents retained control over the five children; Mary Atkinson was awarded custody of her two daughters and Erastus Atkinson gained custody of his three sons. It seems courts adhered to the notion that children needed same-sex models in their lives. The importance of a child's age as a determinant of custody was seen in *Ferguson v. Ferguson* (1887) where Mary Ferguson was awarded custody of three children under the age of fourteen, while her ex-husband received custody of an older child. For infants, courts considered mothers the most "fit" parent, but after this stage of maturation, the child's gender became a factor, as evident at the county level.

By the early 1870s, Kansas courts determined both the physical custody of children as well as the kind of relationship divorced parents would have with their children. In *Brenner v. Brenner* (1872) the judge barred the father from interfering with the mother's care and custody of their children. Another example of the courts' construction of post-divorce familial relations, one routinely considered in modern divorce cases, was the awarding of visitation rights. Initially, court-ordered visitation guidelines in the Kansas counties' samples were not specifically outlined, but by the 1880s county court decrees included detailed visitation provisions.[37]

Court policy was not limited solely to the physical custody of children. Courts exerted their control over family finances under the provisions of alimony, maintenance, and child support. Courts gradually began to consider a parent's financial standing in custody cases so that by the 1870s as evidenced in the Kansas counties' samples, courts were specifically allocating financial resources to parents for children in the form of child support. Clearly the court system wanted to ensure the care of children as well as the ability of parents to raise children placed within their custody. Although the frequency of awarded child support was low in the counties' samples throughout the period under study, custodial history since 1896 demonstrates how important the courts have deemed this type of award. KH

34. *Best v. Best* and *Malin v. Malin,* Case Nos. 46 and 606, respectively, Clay County Civil Court Records.

35. Hansen, "The American Invention of Child Support," 1141–42.

36. In *Brandon v. Brandon,* the mother was an alleged habitual drunkard, and in *Regester v. Regester,* the mother had been accused of neglect of duty.

37. See, for example, *Potter v. Potter* (1879); and *Day v. Day* (1883) or *Stillman v. Stillman* (1889).