

The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?

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THE DISPARITY BETWEEN MEN AND WOMEN IN CUSTODY DISPUTES: IS JOINT CUSTODY THE ANSWER TO EVERYONE'S PROBLEMS?

Over the past century, divorce has become commonplace within American society. Few individuals have not experienced the dissolution of marriage, either personally or through the trials and tribulations of acquaintances.¹ A couple's decision to divorce, however, is merely the first in a long line of important considerations they face at the end of a marriage. The most profound of these, perhaps, is deciding who will maintain custody of the children.² A traditional cultural and legal presumption currently standing is that, upon marital dissolution, children should remain in their mother's custody.³ This presumption creates a great disparity between the number of child custody awards to men and those to women.⁴ The legal basis for this presumption⁵

¹ See Richard A. WARSHAK, *THE CUSTODY REVOLUTION: THE FATHER FACTOR AND THE MOTHERHOOD MYSTIQUE* 17 (1992) (stating "[m]ost people have had their sense of security shaken by a divorce or the prospect of one—if not their own, then a relative's").

² Statistics suggest that by the end of the twentieth century "half of all children under [the age of] eighteen . . . will experience [a] divorce in their immediate families." Christine M. Durham, *Foreword to* CAROLE A. CHAMBERS, *CHILD SUPPORT: HOW TO GET WHAT YOUR CHILD NEEDS AND DESERVES* 13 (1991). In other words, there will be many decisions regarding custody of children and what is best, both for them and their parents. See WARSHAK, *supra* note 1, at 17.

³ See WARSHAK, *supra* note 1, at 33 (observing that "[s]ince 1920, it has been assumed that women, by nature, are better suited to love and care for children"); ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL & LEGAL DILEMMAS OF CUSTODY* 7 (1992) (asserting that "throughout most of the present century the mother was presumed to be the preferred custodian of the children").

⁴ See WARSHAK, *supra* note 1, at 33 (claiming that child custody decisions have been dictated through the years by stereotypes concerning men, women, and children).

⁵ Two related assumptions underlie this uniform approach to child custody. The first of these is that women are inherently better than men with respect to parenting. Secondly, it is believed that fathers are less important to children than mothers. See WARSHAK, *supra* note 1, at 18. These beliefs comprise the so-called "motherhood mystique," which some argue, lacks a rational basis. *Id.*

rests upon the traditional belief that children need their divorced fathers for financial, rather than emotional, contributions.⁶ This Note suggests the opposite; fathers play significant roles in their children's lives and continue to be important after a divorce. Therefore, to better their children's lives as well as their own, fathers should receive custody of their children more frequently after divorce.

The number of divorced men who fight for child custody is significant.⁷ Yet, there remain glaring discrepancies between the number of divorced mothers and fathers awarded custody.⁸ Over the past twenty-five years, the women's movement has been successful in eliminating many staunch sex-role stereotypes and in widening the sphere of behavior deemed appropriate for both women and men.⁹ Unfortunately, such progress has lagged in the realm of parenting, especially with regard to child-rearing after divorce.¹⁰ Fathers normally play significant roles in children's lives, yet, in nine out of ten divorced families, the mother retains sole custody of the children.¹¹ The belief that children belong with their mothers is firmly ingrained within this country's social and legal tenets.¹² Such mores need to change, how-

⁶ See MACCOBY & MNOOKIN, *supra* note 3, at 7; Jed H. Abraham, *Why Men Fight for Their Kids: How Bias in the System Puts Dads at a Disadvantage*, 17 FAM. ADVOC. 48, 48 (1994).

⁷ See MACCOBY & MNOOKIN, *supra* note 3, at 99-101. Furthermore, a substantial percentage of fathers who would prefer sole or joint custody do not actually request such custodial arrangements. *See id.* While over thirty percent of fathers want sole custody, fewer than forty percent of those men actually sought sole physical custody. *See id.* Likewise, roughly thirty-five percent of men would prefer joint custody. *See id.* at 99. Yet, over half of these men either request sole maternal custody, or make no request at all. *See id.* at 100.

⁸ *See id.* at 103, 300. In a study of 705 cases, an uncontested request for maternal physical custody was made in 500 cases. *See id.* The outcome matched the request for maternal custody in nearly 90% of such cases. *See id.* In contrast, paternal physical custody was awarded in only 75% of the 47 cases in which there was an *uncontested* request for sole paternal physical custody. *See id.*; *see also* Stephanie B. Goldberg, *Make Room for Daddy*, 83 A.B.A. J. 48, 49 (1997) (detailing the emerging fathers' rights movement).

⁹ *See* Diane Eisler, *What Do Men Really Want? The Men's Movement, Partnership, and Domination*, in WOMEN RESPOND TO THE MEN'S MOVEMENT: A FEMINIST COLLECTION 50 (Kay Leigh Hagan ed., 1992) (stating increasing recognition that men and women share same needs, goals, and responsibilities); WARSHAK, *supra* note 1, at 14.

¹⁰ *See* WARSHAK, *supra* note 1, at 14.

¹¹ *See id.* at 14-15.

¹² *See id.*; Goldberg, *supra* note 8, at 50 (explaining that the advent of the Industrial Revolution forced men off the land and into factories, and required them to

ever, to shield children from the heightened sense of grief and despair they experience when their parents divorce and they "lose" their fathers.¹³

This Note asserts that joint custody affords all those involved in a divorce a positive alternative, particularly for divorced fathers who gain greater involvement in their children's lives. Part I discusses divorce in general, presenting a brief history of divorce law and its modifications. Part II provides an overview of child custody, including an historical glance at the development of the present laws and standards employed, as well as definitions of the various types of custody. Part III addresses fathers after divorce, their visitation, and the custody awards to them. Part IV considers why fathers should have custody and the obstacles of sole custody agreements. Part V reviews joint custody in broad terms. Finally, Part VI examines joint custody with a critical eye, ultimately concluding that such custody arrangements are the most beneficial.

I. DIVORCE

Divorce rates have reached a record high in this country, as divorces have become increasingly available in the last twenty years.¹⁴ All married people have a right to obtain a dissolution of marriage by the state—the legal process that terminates the marriage.¹⁵ Divorce serves several purposes: it "frees the parties

spend long hours away from their children).

¹³ See WARSHAK, *supra* note 1, at 51-52.

¹⁴ See SUSAN NEIBURG TERKEL, UNDERSTANDING CHILD CUSTODY 27-28 (1991); WARSHAK, *supra* note 1, at 15. Divorces were less common years ago because of the difficulty in obtaining one. See TERKEL, *supra*, at 27 ("Today half the people who marry and say 'I do' later divorce and say 'I don't.'"); see also Barbara Stark, *Divorce Law, Feminism, and Psychoanalysis: In Dreams Begin Responsibilities*, 38 U.C.L.A. L. REV. 1483, 1488 (1991) ("Divorce has become widely available in the U.S. . . . over the last twenty years."). Stark suggests that the increase in the availability of divorce resulted from demands made by citizens on the states in the 1970's. See *id.*

¹⁵ See Stark, *supra* note 14, at 1488. A divorce is not legally binding unless the procedural requirements are followed. See *id.* at 1490-91. Stark suggests that the states' regulation of marriage and divorce defines the relationship existing between the state and family. See *id.* at 1488; see also THE NO FAULT DIVORCE GUIDE 5-6 (The Citizens Law Library 1979) [hereinafter NO FAULT GUIDE]. The state has a large stake in marriages as they promote the cohesion of family life; it has the power to control, regulate and govern in this area. See *id.* at 9; JAN ANDREW, DIVORCE AND THE AMERICAN FAMILY 44 (1978) (asserting that because divorce jeopardizes family stability, society is entitled to curb divorce trends); see also ALASKA STAT. § 25.24.010 (Michie 1996) (stating husbands or wives may maintain action for divorce against other spouse). Some legislators and judges even see divorce as valid

from the bonds of matrimony"¹⁶; it divides the couple's property between them; it arranges for support agreements; and it determines the parties' rights regarding their children.¹⁷ Typically, the terms of a couple's divorce are determined through "negotiation, mediation, and judicial intervention."¹⁸

Before the 1970s, "divorce laws required a party to assert [sufficient] grounds [for divorce] such as adultery, cruelty, or desertion."¹⁹ Such "fault divorce" laws required the acquiescence of the party who had not committed any acts comprising legal fault

only when it benefits the state. *See* ANDREW, *supra*, at 44-45. Grounds for divorce, residential requirements, and costs all vary greatly between states. *See id.* at 46. Some state laws are liberal, while others are quite stringent. *See id.*

¹⁶ Stark, *supra* note 14, at 1489.

¹⁷ *See id.* Determinations regarding a couple's children include decisions about custody, visitation, and child support. *See id.*; *see also* WARSHAK, *supra* note 1, at 17. Dr. Warshak states that while divorce does provide for such determinations, it is, unfortunately, rare that divorcing parents spend much time deciding where and with whom their children will live, and who will be legally responsible. *See id.* at 17. Instead, divorcing parents spend more time worrying about who will get the sofa and who will get the compact disc collection. *See id.* This is because most parents tend to follow the cultural presumption that the children will go to the mother, regardless of other factors. *See id.* at 17-18.

¹⁸ Stark, *supra* note 14, at 1489-90 (internal citations omitted). Typically, the final divorce decree incorporates the terms the parties agreed upon, as well as the specific divorce conditions. *See id.*

Mediation, a method gaining popularity, is one way of reaching a divorce agreement. A couple hires a "mediator," a person trained in facilitating agreements among parties. This is a non-adversarial process, as the mediator does not take sides. *See* TERKEL, *supra* note 14, at 39. A mediator tries to assist couples in avoiding disputes by forcing them to focus on the issues of their divorce. *See id.* Mediators cannot give legal advice, even if they have a legal degree. *See id.* Some argue that a mediator's inability to give legal advice actually hinders the divorce process by keeping parents from making necessary financial arrangements. *See id.* at 39-40. Agreements reached by the mediation process are written into a memorandum of understanding. *See id.* Attorneys receive and use such documents to produce the final legal divorce papers and submit them to the courts. *See id.* at 40.

Typically, divorce agreements are obtained through negotiated settlements. *See id.* at 38. In negotiation, attorneys from each side meet to outline the terms of the agreement. *See id.* Both parties must compromise when negotiating the terms of a divorce. *See id.* Such proceedings, unlike mediation, are adversarial and tend to leave the parties less amiable. *See id.* at 39.

¹⁹ Stark, *supra* note 14, at 1490. New York, for example, only permitted divorce if there was adultery "until 1966, when the law was changed to include mental cruelty, abandonment, imprisonment, and legal separation." ANDREW, *supra* note 15, at 47. Other grounds include drug addiction and frequent drunkenness. *See* TERKEL, *supra* note 14, at 27; *see also* NO FAULT GUIDE, *supra* note 15, at 9 (noting that a couple seeking divorce under fault divorce laws was required to prove the fault of one party and innocence of the other).

before a divorce could be granted.²⁰ This typically meant that the innocent spouse received a more beneficial divorce settlement than he or she might have otherwise.²¹ The stringency of these laws resulted in disrespect for both the law and lawyers, and contempt for judges and courts.²² Fault divorce laws also fostered widespread deception by men and women seeking divorces who were unable to find sufficient grounds upon which to base their requests.²³

The confining character of fault divorce laws led states to adopt "no fault divorce" statutes.²⁴ Virtually all states now possess some variation of such statutes, making divorces easier to obtain.²⁵ Couples must still state sufficient grounds for divorce

²⁰ See Stark, *supra* note 14, at 1490.

²¹ See *id.*

²² See NO FAULT GUIDE, *supra* note 15, at 10.

²³ See *id.* at 10-11. People were primarily distressed by the fact that these laws gave legislators and lawyers a hold over their personal marital relationships. See *id.* at 13. Currently, practicing attorneys can recount the various schemes feuding spouses developed to "catch" the other spouse in acts that were classified as fault grounds. See *id.* at 10-11. The laws were so burdensome upon couples who had no legal grounds but merely wanted to end a bad relationship, that they hired dubious investigators and specialists to assist them. See *id.* These people concocted schemes such as staged affairs to fabricate evidence so that there would be sufficient legal grounds to obtain a divorce. See *id.*; see also ANDREW, *supra* note 15, at 47 (noting that, in theory, a couple would have to have a state-imposed "ground" before a divorce would be granted); TERKEL, *supra* note 14, at 28 (stating that couples without a legislatively recognized reason for divorcing would often pretend fault existed at the expense of public embarrassment). Fault divorce laws left unhappily married couples with few alternatives and simply did not respond to the changing social standards of society. See Stark, *supra* note 14, at 1492.

Furthermore, while fault divorce may have given the innocent spouse some bargaining leverage over an abusive or philandering spouse, it also often forced an innocent spouse to remain married to the guilty spouse until he or she agreed to a divorce on the innocent spouse's terms. See *id.* This was particularly restrictive for women, and the fault requirements created practical, moral, and psychological barriers to obtaining a divorce. See *id.*

²⁴ See NO FAULT GUIDE, *supra* note 15, at 11. The purposes of no-fault divorce laws are "to strengthen and preserve the integrity of marriage and safeguard family relationships." *Id.* at 6. Such laws are also meant to promote congenial settlement of disputes arising between the parties; to mitigate the potential harm to parents and children caused by the legal dissolution of marriage; to make reasonable provisions for spouses and children during and after litigation; and to make an effective law for the dissolution of marriage dealing with the realities of divorce. See *id.* at 180.

²⁵ See, e.g., UNIF. DISSOLUTION OF MARR. ACT (1970); ARIZ. REV. STAT. ANN. § 25-312 (West 1996); COLO. REV. STAT. ANN. § 14-10-106 (West 1996); N.Y. DOM. REL. LAW § 170 (West 1988); see also *Stanfill v. Stanfill*, 742 S.W.2d 267, 270 (Tenn. Ct. App. 1987) (holding that a court can grant divorce on grounds of cruel and inhumane treatment); TERKEL, *supra* note 14, at 28 (acknowledging that incompatibility or irreconcilable differences are sufficient grounds for divorce).

but, generally, these bases no longer require that one party be at fault.²⁶ Today, in most states, parties can mutually consent to divorce or may dissolve the marriage for cause.²⁷ Furthermore, some courts now grant unilateral divorces.²⁸ No fault laws recognize that parties seek divorce for reasons other than a specifically-cited iniquity of one spouse, reflecting contemporary societal ideals regarding divorce and permitting parties greater freedom in ending an unsuccessful marriage.²⁹ However, as divorces

²⁶ See TERKEL, *supra* note 14, at 28. Statutory grounds are generally stated as:

1. Those which provide for dissolution of marriage upon a finding of irreconcilable differences which have caused the irremedial breakdown of the marriage;
2. Those which allow dissolution without regard to fault if the marriage has become unsupportable because of discord or conflict of personalities which destroys the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation; and
3. Those which provide for the dissolution of marriage upon a finding that the marital relationship is irretrievably broken.

NO FAULT GUIDE, *supra* note 15, at 180-81; see also *Hychko v. Hychko*, No. FA 95-032-04-66-S, 1995 WL 681303, at *5 (Conn. Super. Ct. Nov. 2, 1995) (stating marriage may be dissolved on grounds of irretrievable breakdown).

²⁷ See Stark, *supra* note 14, at 1490. Conventional "fault" grounds still constitute sufficient reasons for seeking contemporary divorces for cause. Such grounds include, but are not limited to, cruelty, abandonment, and adultery. See *id.*; see also *supra* note 19 and accompanying text (discussing requirement of fault).

²⁸ See Stark, *supra* note 14, at 1490-91. Parties may obtain unilateral divorces at the request of one member, without the other's consent, or any showing of fault. See *id.* In comparing American and French laws regarding no-fault divorce, it is apparent that the United States permits a unilateral divorce after a much shorter time of separation than the six years required in France. See *id.*

²⁹ See TERKEL, *supra* note 14, at 28. Reasons for divorce now include separation (living apart), incompatibility (inability to get along), irreconcilable differences (having too little in common), and/or irretrievable breakdown of marriage. See *supra* note 26 and accompanying text (discussing grounds for divorce under no-fault system); NO FAULT GUIDE, *supra* note 15, at 43-70 (delineating grounds for divorce recognized in each of the 50 states); see also *Ritter v. Ritter*, 450 N.W.2d 204, 209 (Neb. 1990) (stating that court has discretion in dissolution of marriage proceedings); *Stanfill*, 742 S.W.2d at 270 (holding that adultery, cruel and inhumane treatment, and irreconcilable differences are grounds for divorce in Tennessee). No-fault laws eliminate the need for witnesses, detectives, and testimony, as were required under the fault divorce regime. See ANDREW, *supra* note 15, at 48.

Although no-fault divorce laws have primarily been viewed as an improvement in divorce proceedings, there are some critics. No-fault divorce has been condemned for depriving women of the only leverage they had in divorce proceedings, causing them to settle for less money. See Stark, *supra* note 14, at 1492. Such laws have also been criticized for treating men and women similarly in such proceedings, when, in reality, they are not treated the same, and finally for contributing to the "feminization of poverty." *Id.* Some say that this results from making divorce easier and cheaper for men to obtain. See *id.* at 1493. Stark asserts that divorce exaggerates the existing contrast between men and women's obligations in the family and

have become more easily obtainable, the corresponding child custody dilemma has become increasingly complex.

II. CHILD CUSTODY

Probably the most important decision that a divorcing couple must make concerns child custody. Involving facts and circumstances that are extremely emotional and personal, this is typically the most difficult divorce decision that courts must make as well.³⁰ Unfortunately, however, parents and courts rarely spend significant time contemplating what custody situation would best enable the children to thrive; they instead succumb to the traditional notion that children belong with their mothers.³¹

workplace, and increases their economic disparity. *See id.* She further suggests that this results from the typical grant of custody to women, along with the attendant circumstances of such custody and the impediments to their own career development and advancement, as well as financial independence. *See id.* Men, on the other hand, maintain some continuing financial responsibility to their children, which usually tapers off, and they are rarely expected to assume a significant role as a care-giver. *See id.* at 1494.

³⁰ *See Horton v. Horton*, 519 P.2d 1131, 1132 (Alaska 1974) ("Child custody determinations are among the most difficult in the law."); *see also* TERKEL, *supra* note 14, at 15 (discussing difficulties associated with custody decisions). As a result of the numerous factors involved, most custody agreements take a long time to be developed—to reach a decision upon which both parents can agree and with which the court, if involved, feels comfortable. *See id.* The development of these agreements is prolonged because the parties frequently require assistance from attorneys or other professionals. At best, by the time the parties sign the custody agreement, they have thought a great deal about custody and visitation and believe that the agreement they have developed is best for all concerned. *See id.* Not all parents, however, are pleased with the final custody agreement. *See id.* Often, parents may only have entered into it because they wanted to end the arguing, or they felt guilty about the divorce, and as a result, believe that they are not worthy of receiving what they seek. *See id.* Others sign because they do not believe they will ever succeed in securing favorable terms, and thus simply surrender to the other's demands. *See id.* Some couples never agree on terms concerning the custody agreement because they are too upset or stubborn, or are simply ignorant about how to proceed. *See id.* These parents typically seek judicial assistance in deciding what is best for their children. *See id.* Fortunately, custody matters are always subject to judicial modification, both before and after the agreements are made. *See* ANDREW, *supra* note 15, at 49. However, courtrooms are not the best places for such arrangements to be made. These are private and personal matters about which judges are likely to know only what they read or hear from each party, voiced under trying circumstances. Judges are often unfamiliar with a particular family's structure and the various personalities of the parties involved. *See id.*

³¹ *See* WARSHAK, *supra* note 1, at 17. This traditional notion of the mother as superior care-giver may be the most influential reason why there exists such a disparity between custody awards to men and women. *See id.* Since parents typically subscribe to these notions, and believe that a court will award the children to the

Child custody disputes can often become tugs-of-war with innocent children caught in the middle. The term "custody battle" is frequently used to refer to the process whereby a couple reaches a decision regarding custody. Such disputes pit parent against parent to determine who is better fitted to raise the children. The fact that a court purports to "award" custody suggests that, in the end, there are winners and losers.³² Joint custody, however, eliminates these emotional struggles, allowing both parents to "win." Neither need demonstrate a higher degree of parenting skill than the other, and the children maintain significant contact with both—providing a more holistic life for them all.

The parent awarded custody of children upon divorce is charged with all responsibility and authority over them.³³ This parent presumably makes the majority of the "decisions regarding the child's upbringing, schooling and discipline."³⁴ Ideally, the two parents should continue making major decisions regarding their children, but the custodial parent alone addresses daily problems.³⁵ Often the couple agrees between themselves as to who will maintain custody of the children, eliminating the need for court proceedings. Due to traditional notions of parenting, however, it is generally the mother who retains custody.³⁶ Yet,

mother, many custody matters never make it to court. On the positive side, this tends to relieve the parents from spending a great deal of time and money. *See id.* at 17-18.

³² *See Beck v. Beck*, 432 A.2d 63, 65 (N.J. 1981) (acknowledging that winners and losers exist in such contests); TERKEL, *supra* note 14, at 23 (discussing how parents who do not receive custody feel like "losers"); *see also* WARSHAK, *supra* note 1, at 78 (discussing effects of labeling).

³³ *See* FORDEN ATHEARN, *HOW TO DIVORCE YOUR WIFE: THE MAN'S SIDE OF DIVORCE* 80 (1976); TERKEL, *supra* note 14, at 13; *see also* MACCOBY, *supra* note 3, at 2 (discussing expectation of the primary caregiver before divorce that he or she will retain sole responsibility after divorce).

³⁴ *See* ATHEARN, *supra* note 33, at 80.

³⁵ *See id.*; *see also* TERKEL, *supra* note 14, at 14 (noting responsibility and care must be shared). Property is not the only thing that is divided when a couple divorces. *See id.* The parenting of the couple's children is also split. *See id.* Although one parent may have done more of the actual work of raising the children during the couple's marriage, they both shared the overall responsibility for their children. *See id.* This responsibility does not cease, simply because the couple is no longer married. *See id.*

³⁶ *See* ADRIENNE RICH, *OF WOMEN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 12 (1976) (stating traditional notions of women include beliefs that they are "tenders and carers for the young, whether as sisters, aunts, nurses, teachers, foster-mothers, [or] stepmothers"); *see also* Janet L. Dolgin, *The Law Debates*

custody agreements are increasingly providing for shared custody and fathers are more frequently requesting sole custody of their children.³⁷

A. Standards Used in Awarding Child Custody

In early British and Roman times, fathers had complete control over their children.³⁸ Children were part of their father's property and performed services for him.³⁹ Upon divorce, fathers were automatically given custody of their children who, it was reasoned, continued to be property essential to their father's livelihood.⁴⁰

American society incorporated some of the antiquated ideals of these ancient societies such as the presumption that custodial parents maintain a possessory interest in their children through the common law.⁴¹ Since married women in the eighteenth century, however, did not yet rise to the status of separate legal entities and thus could not own property, parental custodial rights belonged solely to their husbands at that time.⁴² In addition, fathers had a duty, as their children's protectors, to support them, and because the father typically had the financial resources, he almost always received custody of his children after divorce.⁴³ Paternal support was premised upon the theory that in return for such support, the father received the children's labor, thereby

the Family: Reproductive Transformations, 7 YALE J.L. & FEMINISM 37, 38-39 (1995) (examining the changing roles of traditional assumptions regarding kinship); Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 377 (1996) (discussing maternal separation); Cheri L. Wood, *Childless Mothers?—The New Catch-22: You Can't Have Your Kids and Work for Them Too*, 29 LOY. L.A. L. REV. 383, 391 (1995) (asserting a standard examining previous patterns of care should be applied where divorcing parents cannot reach a custodial agreement).

³⁷ See Goldberg, *supra* note 8, at 49. Dr. Warshak states that only a small minority of parents actually seek judicial assistance in custody matters because they ordinarily succumb to the cultural belief that mothers should automatically get the children after a divorce. See WARSHAK, *supra* note 1, at 17.

³⁸ See WARSHAK, *supra* note 1, at 28-29.

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See Mary Kate Kearney, *The New Paradigm in Custody Law: Looking at Parents with a Loving Eye*, 28 ARIZ. ST. L.J. 543, 547 (1996).

⁴² See WARSHAK, *supra* note 1, at 28-29 (stating that the wages married women earned at a job belonged not to them, but to their husbands); Kearney, *supra* note 41, at 547 (noting that married women were unable to act as witnesses or sign binding agreements).

⁴³ See WARSHAK, *supra* note 1, at 29.

assisting him in making a living.⁴⁴ In the rare instance where a father was denied custody of his children, courts and society relieved him of his duty to support, since he would not receive consideration for doing so.⁴⁵

Absolute paternal rights to child custody after divorce began to diminish, however, in the nineteenth century.⁴⁶ During this period, society began to recognize mothers as more capable of meeting the "special needs" of their young children, as well as the unique importance a mother plays in the early stages of a child's life.⁴⁷ This sentiment became known as the "tender years doctrine," which courts increasingly adopted and employed in custody decisions.

The tender years doctrine suggests that "where a child is of such tender age as to require the care and attention that a mother is especially fitted [sic] to bestow upon it, the mother, rather than the father, is presumed to be the proper custodian, unless for some reason she is unfit for the trust."⁴⁸ This pre-

⁴⁴ See *id.*; Christian Reichel Van Deusen, *The Best Interests of the Child and the Law*, 18 PEPP. L. REV. 417, 417 (1991); see also Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce And The Child As Property, 33 WM. & MARY L. REV. 995, 1037-38 (1992) (discussing the theory of parental control).

⁴⁵ See WARSHAK, *supra* note 1, at 29. The common law assumed that, because fathers had a continuing responsibility to raise and support their children, they should retain rights to the children if the marriage ended. See Abraham, *supra* note 6, at 48. This rule was criticized, because it had the effect of permitting men to leave their wives, but requiring them to maintain their responsibilities to support their children. See *id.* This perspective also suggested to women that, although they may want to divorce their husbands for numerous reasons, they could not do so without also giving up their children. See *id.*

⁴⁶ See WARSHAK, *supra* note 1, at 29.

⁴⁷ See *id.* In *Clark v. Bayer*, the court noted that as a general rule, mothers are entitled to custody of their children:

[T]he father is, *prima facie*, entitled to [custody of his minor children], and where he is a suitable person, able and willing to support and care for them, his right is paramount to that of all other persons, except that of the mother in cases where the infant child is of such tender years as to require her present care

32 Ohio St. 299, 310 (Ohio 1877).

⁴⁸ *Devine v. Devine*, 398 So. 2d 684, 685 (Ala. Civ. App. 1980), *rev'd on other grounds*, 398 So. 2d 686 (Ala. 1981). Numerous ways to define the tender years doctrine exist. See, e.g., *Wetzler v. Wetzler*, 570 P.2d 741, 742 (Alaska 1977) (stating that under the tender years doctrine "a mother will generally be given preference for custody if the other factors are evenly balanced") (citation omitted); see also *Weaver v. Weaver*, 261 S.W.2d 145, 148 (Tenn. Ct. App. 1953) (holding that "[a] mother, except in extraordinary circumstances should be with her child of tender years" and "such a child will not be taken away from its mother unless it is demonstrated that to leave the child with its mother would jeopardize its welfare").

sumption ultimately established a maternal preference in the twentieth century, where, absent a showing of unfitness, the mother automatically received custody of children below a certain age. This policy eventually surpassed the paternal preference in child custody awards.⁴⁹

The tender years presumption was originally intended to provide the mother only temporary custody of her very young children, who needed a mother's special care during early stages of development.⁵⁰ Once the children reached the age of four or five, fathers regained custody.⁵¹ The doctrine was eventually expanded to include older children, and mothers gained permanent custody based upon the assumption that children of all ages needed to be with their mothers.⁵² One explanation for this change was the Industrial Revolution; family life changed dramatically when men began to work in urban factories and no longer needed their children to work for them on their farms.⁵³ Furthermore, as fathers began working away from home and women, who were generally not permitted to work, became increasingly unable to contribute significantly to the family's finances, a distinction arose between the roles of men and women—namely that of men as “breadwinners” and women as “nurturers.”⁵⁴ Concurrently, courts began expressing adulation for motherhood in their judicial opinions, and increasingly

⁴⁹ See Kearney, *supra* note 41, at 548. Kearney suggests that the tender years doctrine was premised upon two basic assumptions, and that “a child's most basic need is for a mother's love and care,” and that mothers can care for their children better than fathers. See *id.* Kearney further argues that the tender years doctrine makes mothers' rights the focus of custody awards. See *id.* Mothers have the right to raise their children because they have “an obligation to nurture [their] child[ren] and [are] in the best position to do so.” *Id.* at 549.

⁵⁰ See WARSHAK, *supra* note 1, at 29.

⁵¹ See *id.* This form of the doctrine also took into account something other than the parent's gender for the very first time. See *id.* It is unfortunate that courts today do not continue to recognize changes in circumstances and children's needs. Some children might actually benefit from living with one parent during one stage of their lives, and the other parent during another stage. See *id.* at 30.

⁵² See *id.* By the 1920's, the traditional preference for awarding child custody to fathers had unquestionably changed to a preference for mothers. See *id.*

⁵³ See *id.* At this time children were deemed less of an economic asset to fathers and became more of a financial liability; as a result, fathers became more eager to give custody of their children to the mothers. See *id.*

⁵⁴ See *id.* at 31. Mothers stayed home with the children during these times, while their husbands worked elsewhere. See *id.* Also during this period, a large following developed for Freud's theories of psychoanalysis, which proposed that mothers contributed in unique ways to children's psychological well-being. See *id.*

awarded children to the custody of their mothers.⁵⁵

Initially, the tender years doctrine was accepted by courts. A West Virginia court held, in *J.B. v. A.B.*,⁵⁶ that the tender years presumption did not violate the Equal Protection clause of the Constitution, and found a compelling governmental interest based on the "sociological, biological and evidentiary" benefits of a presumption favoring women in custody disputes.⁵⁷ The court further reasoned that the primary responsibility for maintaining a home and caring for children rested with women, and therefore pronounced mothers as better suited for retaining custody of their children after a divorce.⁵⁸

Many courts and state legislatures, however, ultimately rejected the rigid, gender-biased, and typically unfair tender years doctrine, in favor of more gender-neutral policies.⁵⁹ The doctrine

⁵⁵ *See id.*

⁵⁶ 242 S.E.2d 248 (W. Va. 1978).

⁵⁷ *Id.* at 252. The court discussed various biological factors supporting the presumption for maternal custody during the child's "tender years." *See id.* at 253. The primary factor discussed was the infant's "suckling stage," which the court found created both an emotional and physical dependency upon the mother by the infant. *See id.* The court rationalized that while the presumption affording mothers custody is not perfect, neither is the use of expert testimony, an evaluation of the parties' demeanor, or one of counsel's competence. *See id.* at 254.

⁵⁸ *See id.* at 252-53. The court stated that although societal values may be changing, and women may be working outside the home in increasing numbers, there still exists an indispensable physical relationship between women and their children. *See id.* The court then claimed that, when the societal roles of men and women were reversed with greater frequency, it would then also change its decisions regarding child custody. *See id.* at 253. Finally, the court stated that the presumption provided a "definitive standard," which was more reliable and mechanical. *See id.* at 255.

Courts, however, have more recently stated that child custody laws should not be applied in such an uncompromising and mechanical fashion. *See Riddle v. Riddle*, 775 S.W.2d 513, 516 (Ark. Ct. App. 1989); *see also Thompson v. Thompson*, 511 N.E.2d 412, 415 (Ohio Ct. App. 1987) (finding that trial courts must analyze who is the primary caregiver); *Commonwealth ex rel. Jordan v. Jordan*, 448 A.2d 1113, 1115 (Pa. Super. Ct. 1982) (holding that courts must give substantial weight to the primary caregiver, but "without regard to the sex of the parent").

⁵⁹ *See* ARK. CODE ANN. § 9-13-101 (Michie 1995) (stating that custody of children shall be made without reference to sex of parent); CAL. FAM. CODE § 3040(a)(1) (Deering 1994) (requiring that a court not favor one parent over another because of the parent's sex); FLA. STAT. ANN. § 61.13(2)(b)(1) (West Supp. 1998) (giving fathers same considerations as mothers in determining custody of children, regardless of age or sex); S.C. CODE ANN. § 20-7-1555 (West Supp. 1997) (abolishing tender years doctrine custody preference for mothers); TENN. CODE ANN. § 36-6-101(d) (1996) (stating gender shall neither give rise to a presumption of parental fitness nor a presumption against a party seeking custody, and granting court's discretion); WASH. REV. CODE ANN. § 26.09.004 (West 1997) (defining "parenting functions" by

is no longer followed in most states because its basis in stereotypical, traditional notions of men, women, and parenting inequitably disqualified men from fair consideration as potential custodial parents.⁶⁰ In addition, women's changing and emerging roles in society also has had a substantial effect upon the abolishment of the tender years doctrine. Women are no longer the only parent at home with the children, and men have begun to play a greater role in child-rearing.⁶¹ Some courts do, however, continue to recognize the tender years doctrine as a factor to consider in determining child custody matters.⁶² Any continued

tasks and duties performed, rather than by gender); *Devine v. Devine*, 398 So. 2d 686, 695 (Ala. 1981) (declaring tender years presumption unconstitutional); *Riddle*, 775 S.W.2d at 516 (holding that the tender years doctrine is no longer recognized in Arkansas); *Sullivan v. Sullivan*, 668 So. 2d 329, 329 (Fla. Dist. Ct. App. 1996) (finding that the tender years presumption was abolished by statute); *Kuutti v. Kuutti*, 645 So. 2d 80, 82-83 (Fla. Dist. Ct. App. 1994) (rejecting tender years doctrine); *Vance v. Vance*, 436 N.W.2d 177, 178 (Neb. 1989) (finding tender years doctrine is not controlling in custody matters); *State ex rel. Watts v. Watts*, 350 N.Y.S.2d 285, 289 (N.Y. Sup. Ct. 1973) (announcing that "[t]he simple fact of being a mother does not, by itself, indicate a capacity or willingness to render a quality of care different from that which the father can provide"); *In re Maxwell*, 456 N.E.2d 1218, 1220 (Ohio Ct. App. 1982) (holding mothers in custody proceedings should not be given preference simply because of tender years doctrine); *Miller v. Miller*, 474 A.2d 1165, 1166 (Pa. Super. Ct. 1984) (noting that the trial court erred in employing tender years doctrine); *Woodall v. Woodall*, 471 S.E.2d 154, 157 (S.C. 1996) (stating that the tender years doctrine was abolished by statute); *Murray v. Murray*, 622 P.2d 1288, 1290-91 (Wash. Ct. App. 1981) (finding tender years doctrine undermines statutory scheme).

⁶⁰ See Kearney, *supra* note 41, at 549. This doctrine is criticized by feminists because it unfairly classifies women as "natural caregivers," incapable of performing other duties. See *id.*

⁶¹ See TERKEL, *supra* note 14, at 52; see also WARSHAK, *supra* note 1, at 31-34. (asserting that the rigidity of the tender years doctrine caused courts to treat all families the same, when in reality they are highly varied; this resulted in inequitable results in custody hearings and family situations).

⁶² See *Howard v. Howard*, 608 So. 2d 753, 754 (Ala. Civ. App. 1992) (noting tender years doctrine was abolished but can still be considered if the child's age is a relevant factor); *Moye v. Moye*, 627 P.2d 799, 801 (Idaho 1981) (limiting presumption of tender years doctrine to only circumstances where all other considerations are equal); *Duran v. Weaver*, 495 So. 2d 1355, 1357 (Miss. 1986) (stating reliance by party upon tender years doctrine was misplaced); *Seibert v. Seibert*, 584 N.E.2d 41, 43 (Ohio Ct. App. 1990) (finding that the tender years doctrine, while no longer a presumption, could still be a consideration); *Shainwald v. Shainwald*, 395 S.E.2d 441, 445 (S.C. Ct. App. 1990) (stating tender years doctrine is "one of a panoply of factors to be considered" in awarding custody); *Jones v. Jones*, 348 S.E.2d 178, 179 (S.C. Ct. App. 1986) (stating that the tender years doctrine is simply one factor to consider in custody determinations); *Ruyle v. Ruyle*, 928 S.W.2d 439, 442 (Tenn. Ct. App. 1996); (holding that the tender years doctrine is but one of many factors to examine); *Bah v. Bah*, 668 S.W.2d 663, 666-67 (Tenn. Ct. App. 1983) (noting that ten-

use of the tender years doctrine, even as only one factor, however, allows gender to be considered in awarding custody. Moreover, when child custody decisions rest in part upon gender, fathers may unfairly lose custody battles as a result of firmly held traditional notions.⁶³

The rejection of the tender years doctrine led to the development of the "best interests of the child" standard.⁶⁴ This stan-

der years doctrine is one factor courts should consider in overall determination of child custody).

⁶³ See RICH, *supra* note 36, at 12 (discussing traditional notions of women as nurturers and mothers).

⁶⁴ See CAL. FAM. CODE § 3040 (West 1996); 750 ILL. COMP. STAT. 5/602(a) (West Supp. 1998); IOWA CODE ANN. § 598.41(1)(a) (West Supp. 1998); LA. CIV. CODE ANN. art. 131 (West Supp. 1998); MISS. CODE ANN. § 93-5-24(1) (1996); MO. ANN. STAT. § 452.375(2)(2) (West 1997); MONT. CODE ANN. § 40-4-224(2)(a) (1995); NEV. REV. STAT. § 125.480(1) (Michie 1995); N.M. STAT. ANN. § 40-4-9(A) (Michie 1997); OHIO REV. CODE ANN. § 3109.04(B)(1) (Michie Supp. 1997); WYO. STAT. ANN. § 20-2-113(a) (Michie 1997); R.W. v. D.W.W., No. 2950648, 1997 WL 37010, at *1 (Ala. Civ. App. Jan. 31, 1997) (addressing best interests of child), *rev'd on other grounds sub nom. Ex parte D.W.W.*, No. 1961022, 1998 WL 81615 (Ala. Feb. 27, 1998); Wetzler v. Wetzler 570 P.2d 741, 743 (Alaska 1977); *Riddle*, 775 S.W.2d at 515; Wagler v. Wagler, 593 So. 2d 602, 604 (Fla. Dist. Ct. App. 1992) (stating that the primary consideration is the best interest of the child); *Moye*, 627 P.2d at 800; *In re Marriage of Hefer*, 667 N.E.2d 1094, 1097 (Ill. App. Ct. 1996) (examining best interest of child); *Matthews v. Matthews*, 633 So. 2d 342, 345 (La. Ct. App. 1993) (noting that best interest of child is paramount consideration in custody matters); *Wellman v. Wellman*, 512 N.W.2d 68, 70 (Mich. Ct. App. 1994) (finding that it was in the child's best interest to grant joint legal custody, but not joint physical custody); *Duran* 495 So. 2d at 1357 (reversing lower court for using the tender years presumption and not applying the best interest of the child test); *Hankins v. Hankins*, 920 S.W.2d 182, 186 (Mo. Ct. App. 1996) (stating that the basis for determining child custody is the best interests of child); *Beran v. Beran*, 450 N.W.2d 688, 692-93 (Neb. 1990) (examining child's best interests); *Risman v. Linke*, 652 N.Y.S.2d 832, 833 (N.Y. App. Div. 1997) (holding the best interests of children are served by joint physical custody); *Thompson v. Thompson*, 511 N.E.2d 412, 413 (Ohio Ct. App. 1987) (employing the best interest of child standard); *Meigs v. Meigs*, 920 P.2d 1077, 1078 (Okla. Ct. App. 1996) (placing child solely based upon child's best interest); *In re Marriage of Banier*, 556 P.2d 1377, 1378 (Or. Ct. App. 1976) (employing best interest of child standard); *Haag v. Haag*, 485 A.2d 1189, 1191 (Pa. Super. Ct. 1984) (stating all other considerations are subordinate to child's best interest); *Woodall*, 471 S.E.2d at 157 (holding best interests of child are paramount to other considerations in custody determinations); *Anderson v. Anderson*, 472 N.W.2d 519, 520 (S.D. 1991) (holding that a party requesting a change in custody must prove that such change is in the "best interest and welfare of the children"); *Murray*, 622 P.2d at 1290 (finding that trial judge properly was concerned with child's best interest); *Gurney v. Gurney*, 899 P.2d 52, 55 (Wyo. 1995) (stating best interests of child are the most important factor); see also WARSHAK, *supra* note 1, at 31; Abraham, *supra* note 6, at 48; Kearney, *supra* note 41, at 549; Alan M. Levy, *Fathers and Custody Determination*, 12 NO. 9 FAIR\$HARE 3, 3 (1992); J. David Roellgen, *The New Indiana Child Custody Modification Standard*, 38 RES GESTAE 44, 44 (1994); Van Deusen, *supra* note 44, at 419-

dard considers numerous factors in attempting to ascertain which parent will be the best caregiver for the children.⁶⁵ Theoretically, the court must put the interests of the children before those of the parents, and in making a decision, disregard the gender of the parents.⁶⁶ Some of the elements courts examine to determine the best interests of the child include: "(1) the emotional, social, moral, material, and educational needs of the child; (2) the home environment that each parent offers; (3) the characteristics of each parent, including age, stability, and mental and physical health; (4) the child's preference; and (5) the expert's recommendations."⁶⁷ As previously noted, some courts also

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⁶⁵ See WARSHAK, *supra* note 1, at 31-32. See also *infra* note 67 and accompanying text (enumerating factors considered in best interests of child test).

⁶⁶ See Kearney, *supra* note 41, at 549-50. See also TENN. CODE ANN. § 36-6-101(d) (stating gender of party seeking custody does not create presumption of parental fitness or favor custody award of one parent over other); *supra* note 64 and accompanying text (presenting case law and statutes regulating use of the best interest of the child standard and rejection of the use of gender as a factor).

⁶⁷ Kearney, *supra* note 41, at 550; see also IDAHO CODE § 32-717 (Michie 1996); 750 ILL. COMP. STAT. 5/602(a)(4) (West Supp. 1997); MICH. STAT. ANN. § 25.312(3) (Law Co-op. Supp. 1997) (enumerating twelve factors to consider in determining the best interests of the child); OHIO REV. CODE ANN. § 3109.04(C) (Michie Supp. 1997); WASH. REV. CODE ANN. § 26.09.010 (West 1996); *Speakman v. Speakman*, 627 So. 2d 963, 964 (Ala. Civ. App. 1993) (articulating several factors relating to the child's needs and the parent's abilities); *Wetzler*, 570 P.2d at 743 (finding that the facts of each case must be considered in determining the child's best interest); *Moye*, 627 P.2d at 801 n.1 (reviewing several statutory factors such as the wishes of the child and parents, the parent-child relationship, the stability of the child's environment, and the well-being of all the parties involved); *Hefer*, 667 N.E.2d at 1097 (stating child's adjustment to home, school, and environment are factors to consider); *Matthews*, 633 So. 2d at 345 n.3 (listing statutory factors such as emotional ties, capacity, and disposition of the parties, continuity of the child's environment, and the moral fitness and physical health of the parents); *Wellman*, 512 N.W.2d at 70-71 (listing eleven statutory factors to consider in determining the child's best interests); *Ritter v. Ritter*, 450 N.W.2d 204, 211 (Neb. 1990) (noting several factors to employ, including the moral fitness and physical health of the parents, the continuity of relationships, the child's own preference, and the ability of each parent to provide for the educational and emotional needs of the child) (citing *Christen v. Christen*, 422 N.W.2d 92, 95 (Neb. 1988)); *Seibert*, 584 N.E.2d at 42 (stating court should consider all relevant factors); *Haag*, 485 A.2d at 1192-94 (applying several considerations to the factual record to determine the child's best interests); *Woodall*, 471 S.E.2d at 157 ("The family court must consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child."); *Anderson*, 472 N.W.2d at 520 (stating that all factors regarding the mental and moral well-being of the child must be considered); *Ruyle*, 928 S.W.2d at 442 (noting that there are many factors to consider); *Murray*, 622 P.2d at 1290 (cautioning courts not to overlook any relevant factors in making a custody determination); *Gurney*, 899 P.2d at 55 (finding the trial court properly considered which parent was the primary

continue to use the tender years doctrine as a factor in determining the child's best interests.⁶⁸ Judges possess a great deal of discretion when examining these criteria, and it is ultimately the totality of the circumstances that prescribes the award of child custody.⁶⁹

The best interests of the child standard appears to make the gender of the parents immaterial, and seems to require that courts more carefully scrutinize the welfare of the children.⁷⁰ Such a standard is more flexible than the rigid tender years doctrine and employs a case-by-case analysis.⁷¹ It balances each child's particular needs against each parent's ability to provide for them. However, this standard is subject to the individual prejudices of judges and mandates that decision-makers rely upon their own values and ideals or those of "experts," in determining which parent should receive custody.⁷²

Another problem with the best interests of the child standard is that its subjective nature produces unpredictable results.⁷³ Because judges tend to rely on precedent as well as their own beliefs about the roles of men and women regarding parenting, women still receive custody in greater numbers than men. This judgment reflects the fact that society continues to view women as the traditional, proper caregivers for children.⁷⁴ As a

caretaker, the abilities of each parent, and the relationships between each parent and the child).

⁶⁸ See *supra* note 62 and accompanying text (discussing courts' present use of tender years doctrine).

⁶⁹ See Kearney, *supra* note 41, at 550.

⁷⁰ See *id.* at 552.

⁷¹ See *id.*; see also *Chorum v. Chorum*, 959 S.W.2d 900 (Mo. Ct. App. 1997).

⁷² See Kearney, *supra* note 41, at 553 (explaining that judges may rely too heavily on their own biases, or those of experts, in applying the best interests standard).

⁷³ See *id.* at 554. This makes it difficult for people to rely on prior decisions when preparing and presenting their own cases. See *id.* Because there are few concrete requirements, the danger exists that one's fate lies in the hands of the judge, who may make seemingly arbitrary decisions or possess traditional notions of the proper roles of men and women. See *id.* at 553. While child custody is a difficult and emotional area, and one where it is important to examine each case on its own merits, there may be some apprehension in leaving such a fateful determination in the hands of one who knows the parties solely based on their appearances and testimony in court. This may lead to a possibly fabricated and somewhat artificial impression given to the court. It is, of course, important to leave room for judicial discretion, but too much room can be detrimental to all participants.

⁷⁴ See *supra* note 50-55 and accompanying text (discussing traditional notions of women in society); see also Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 622 (1992).

result of this misconception, sole paternal custody remains the rarest form of custody award in this country.⁷⁵

Courts may, and in some cases must, also consider the child's preferences when making decisions regarding child custody.⁷⁶ Children of sufficient age may testify in court as to their preferences for custody,⁷⁷ and in many states such preferences possess great weight and must be considered in making custody decisions.⁷⁸ Generally, such preferences are not controlling, but

⁷⁵ See MACCOBY & MNOOKIN, *supra* note 3, at 74 tbl.4.1 (pronouncing that in a 1992 study of 1,124 divorced families, 67.6% of children lived with their mothers; 15% lived with both parents on a joint custody basis; and only 9.5% lived with their fathers); see also *Howard v. Howard*, 608 So. 2d 753, 755 (Ala. Civ. App. 1992) (affirming award of custody to mother, despite findings of her "lifestyle of immorality and misconduct"); *Wheeler v. Wheeler*, 574 So. 2d 832, 833 (Ala. Civ. App. 1990) (awarding mother custody although both parents were fit); *Milum v. Milum*, 894 S.W.2d 611, 613 (Ark. Ct. App. 1995) (denying father custody, after weighing factors); *In re Marriage of Dunkerson*, 485 N.W.2d 483, 485 (Iowa Ct. App. 1992) (awarding sole physical custody to mother, despite her financial and emotional problems); *Hankins v. Hankins*, 920 S.W.2d 182, 186-87 (Mo. Ct. App. 1996) (awarding sole custody to mother instead of joint custody where parents could not get along); *Wheeler v. Gill*, 413 S.E.2d 860, 864 (S.C. Ct. App. 1992) (stating tender years doctrine may be employed to "tip the scale" in the mother's favor, when both parents are equally fit); *Ruyle v. Ruyle*, 928 S.W.2d 439, 441 (Tenn. Ct. App. 1996) (holding lower court did not improperly award primary custody to mother in a joint custody award, after weighing several factors). *But see La Valley v. La Valley*, 606 N.Y.S.2d 349, 350-51 (App. Div. 1993) (affirming award of custody to father, as he was more involved and devoted to children).

⁷⁶ See Sean P. Lafferty, *Family: Review of Selected 1994 California Legislation*, 26 PAC. L.J. 565, 565 (1995) (discussing California's requirement to consider child preferences in custody determinations).

⁷⁷ The age at which a child may testify in court about his or her preference varies from state to state. See, e.g., N.M. STAT. ANN. § 40-4-4.1(B) (Michie 1994) (fourteen years old); TENN. CODE ANN. § 36-6-106(7) (Michie 1996) (twelve years or older). Other states leave it to the discretion of the court. See *Rosson v. Rosson* (*In re Marriage of Rosson*), 224 Cal. Rptr. 250, 256-57 (Ct. App. 1986) (allowing ten and thirteen-year olds to testify); *Flaherty v. Smith*, 274 N.W.2d 72, 73 (Mich Ct. App. 1978) (finding error in trial court's refusal to allow seven year old to testify). See generally Cathy J. Jones, *Judicial Questioning of Children in Custody and Visitation Proceedings*, 18 FAM. L. Q. 43, 58-68 (1984) (examining principles of child development that courts should consider in determining whether children are mature enough to have preference considered in custody determinations).

⁷⁸ See MO. ANN. STAT. § 452.375(2)(2) (West 1997) (directing courts to consider child's preferences); MONT. CODE ANN. § 40-4-212(1)(b) (1995) (mandating court to consider child's choice); NEV. REV. STAT. § 125.480(4)(a) (Michie Supp. 1997) (stating wishes of a child old enough to form an "intelligent preference" shall be considered); N.M. STAT. ANN. § 40-4-9.1(A)(3) (Michie 1996) (requiring child's relationship with parents be considered); Lafferty, *supra*, note 76, at 565-66 (discussing standards for permitting child preferences). See generally Jones, *supra* note 77; Howard A. Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255 (1991) (discussing children's testimony in general).

instead must be considered along with other factors. The use of child preferences has been criticized because it requires that children choose between their parents, which may cause them to feel guilty, threatened, or pressured.⁷⁹ However, others salute it because it affords children an opportunity to express their feelings and desires regarding their own future.⁸⁰

Courts also adhere to a doctrine known as the "primary caretaker doctrine."⁸¹ Under this theory, the parent that was primarily responsible for the children's upbringing and care during the marriage receives custody.⁸² One court has defined the primary caretaking parent as the one who has "tended to the child's physical needs and has exhibited love, affection, concern, tolerance, discipline and a willingness to sacrifice."⁸³ Because it is viewed as an unbiased standard that awards custody based upon which parent accepted and fulfilled certain child-raising responsibilities and duties, this doctrine has garnered considerable support from judges and legislatures.⁸⁴ Furthermore, the stan-

⁷⁹ See *Beran v. Beran*, 450 N.W.2d 688, 692 (Neb. 1990) (recognizing that testifying in a divorce proceeding can be traumatic to a minor). Others assert that custody proceedings become confused when the children's preferences are considered, since children are typically "vague and indecisive" in such situations. See Lafferty, *supra* note 76, at 566 (discussing new California law prohibiting child testimony in custody hearings where emotional damage to child will be too great).

⁸⁰ See TERKEL, *supra* note 14, at 53-54; Don R. Ash, *Bridge Over Troubled Water: Changing the Custody Law In Tennessee*, 27 U. MEM. L. REV. 769, 794 (1997) (discussing advantages of the child's preference doctrine).

⁸¹ *Seibert v. Seibert*, 584 N.E.2d 41, 43 (Ohio Ct. App. 1990) (stating that a parent's role as primary caretaker is a relevant factor in determining custody); *Haag v. Haag*, 485 A.2d 1189, 1192 (Pa. Super. Ct. 1984) ("[W]here the natural parents are both fit, and the child is of tender years, the trial court must give positive consideration to the parent who has been the primary caretaker.") (citing *Jordan v. Jordan*, 448 A.2d 1113 (Pa. Super. Ct. 1982)); *Gurney v. Gurney*, 899 P.2d 52, 55 (Wyo. 1995) (finding that consideration as to which parent is the primary caretaker is an important factor in determining the best interests of the child).

⁸² See *Riddle v. Riddle*, 775 S.W.2d 513, 515 (Ark. Ct. App. 1989) (finding the father was the primary caretaker where he prepared meals, dressed, bathed, and otherwise cared for the child during the day); *Figler v. Figler*, No. FA-950374849S, 1996 WL 636479, at *3 (Conn. Super. Ct. Aug. 2, 1996) (noting that mother was the primary caretaker because, for six years, she fed, clothed, bathed, and planned activities for the child).

⁸³ *Commonwealth ex rel. Jordan v. Jordan*, 448 A.2d 1113, 1115 (Pa. Super. Ct. 1982). This definition fails to recognize that both parents may exhibit these positive characteristics in a more contemporary relationship, where both parents work.

⁸⁴ See generally Gary Crippen, *Stumbling Beyond Best Interests of the Child: Re-examining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427 (1990) (detailing the development of the doctrine).

dard is fairly predictable and it ensures that the children's needs continue to be met after divorce since the children will reside with the parent who was primarily responsible for performing those important tasks during the marriage.⁸⁵

The primary caretaker doctrine is less discretionary than the best interests of the child standard because it has some definitive criteria. However, some suggest that it further promotes gender stereotypes.⁸⁶ On its face, the primary caretaker doctrine appears gender-neutral, but in reality it may merely be a more modern version of the tender years doctrine.⁸⁷ Although child-care responsibilities are more frequently shared by both parents today, in many cases, it is still the woman who performs the majority of these tasks.⁸⁸ Therefore, judges typically find that the mother has been the child's primary caretaker and award her custody, even if the father also significantly participated in the rearing of the child.⁸⁹ One analyst suggests that the primary caretaker doctrine also promotes traditional gender-role stereotypes by rewarding those women who decide not to work outside the home by awarding them custody in the event of a divorce.⁹⁰ It also excuses fathers from fulfilling their parental commitments; since they did not take on childcare responsibilities during the marriage, they are free from performing them afterwards, as well. In addition to excusing some fathers, the doctrine also punishes others for doing what society dictated that they should—work outside the home.⁹¹

The primary caretaker standard also assumes that there is a primary caretaker, which may not always be true in modern so-

⁸⁵ See *Jordan*, 448 A.2d at 1115; see also Kearney, *supra* note 41, at 557-58 (citing Martha Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 773 (1988)); Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291, 302-03 (1992). The standard assumes, however, that the primary caretaker has formed a closer emotional bond with the children than has the other parent. See Kearney, *supra* note 41, at 558 (citing Crippen, *supra* note 84, at 441 and n.53).

⁸⁶ See Goldberg, *supra* note 8, at 51.

⁸⁷ See *id.*; see also *Haag*, 485 A.2d at 1192 (recognizing that the primary caretaker doctrine is a "sort of tender years doctrine in disguise").

⁸⁸ See Kearney, *supra* note 41, at 558; see also Goldberg, *supra* note 8, at 51.

⁸⁹ See Kearney, *supra* note 41, at 558. The primary caretaker doctrine also fails to address how to award custody when the care-taking responsibilities are fairly equally divided between the parents. See *id.*

⁹⁰ See *id.* at 559.

⁹¹ See *id.*

ciety where both parents frequently work outside the home and contribute equally to child-rearing responsibilities.⁹² This standard also fails to account for the child's relationship with the other parent, which may actually be stronger than that with the primary caretaker.⁹³ Furthermore, the amount of time that a parent spends with his or her children does not necessarily indicate the quality of the children's relationship with that parent.⁹⁴

Parental fitness is a final consideration in custody matters, and is the one standard that permeates all the others. This factor attempts to ensure that the children will reside with the parent most able to meet their needs and raise them in a manner that will allow them to contribute effectively to society.⁹⁵ In determining parental fitness, courts examine several factors, most importantly, the parent's ability to adequately provide for the children emotionally, physically, and intellectually.⁹⁶ Courts also evaluate each parent's sense of morality and determine which parent they believe can better provide for the children.⁹⁷

Parental unfitness means that there exists "a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detri-

⁹² See *id.* at 558.

⁹³ See *id.* at 558-59.

⁹⁴ See Levy, *supra* note 64, at 5. Many times, both parents act as primary caretakers, but in different ways. See *id.* One may spend more time with the children than the other, but both may provide the same quality of time. See *id.*

⁹⁵ See, e.g., MO. ANN. STAT. § 452.375(2)(5) (West 1997) (authorizing consideration of the mental and physical health of the parties); MONT. CODE ANN. § 40-4-212(1)(e) (1995) (addressing mental and physical health of the parties); NEV. REV. STAT. ANN. § 125.480(5) (Michie Supp. 1997) (denying custody to any parent who engaged in acts of domestic violence); N.M. STAT. ANN. § 40-4-9.1(B)(2) (Michie 1994) (examining whether parents are capable of providing adequate care for child); see also Ruyle v. Ruyle, 928 S.W.2d 439, 442 (Tenn. Ct. App. 1996) (employing fitness approach); TERKEL, *supra* note 14, at 56 (defining fit parent as one who is "healthy, mature, and capable of raising children"). Terkel also suggests that judges examine each parent's own thoughts on how they discipline and indoctrinate values in their children. See *id.*

⁹⁶ See Ruyle, 928 S.W.2d at 442 (delineating factors used to determine parental fitness).

⁹⁷ See Fletcher v. Fletcher, 526 N.W.2d 889, 896 (Mich. 1994). Courts must look at the effect a parent's conduct will have on the parent-child relationship. See *id.* The question is not who is a more moral person, but given each party's moral disposition, who can better provide for the children and their needs. See *id.* Terkel also notes that courts will examine which parent is more likely to put the children's interests before his or her own. See TERKEL, *supra* note 14, at 56.

ment to a child's well-being."⁹⁸ Finding a parent to be fit does not necessarily dictate that such parent should receive custody. Instead, the trial judge must choose who would be the better of the two, or, alternatively, whether joint custody would be the best option.⁹⁹ Once again, inherent in such decisions are judicial beliefs and biases.

Today, courts have available several methods to determine how to award custody of children after a divorce. At their own discretion, courts may incorporate all or some of these considerations into a custody decision.

B. Types of Child Custody

The most common form of child custody is sole custody.¹⁰⁰ Here, either the mother or father is the sole custodial parent of the children, while the other parent maintains visitation rights.¹⁰¹ Under sole custody, the custodial parent has the right to make decisions regarding the children without acquiring the other parent's approval or consent.¹⁰² Legally, the sole custodial parent is responsible for the children's well-being, behavior, and affairs.¹⁰³

Sole custody is popular for several reasons; it is the traditional custodial arrangement and it perpetuates the traditional

⁹⁸ *Ritter v. Ritter*, 450 N.W.2d 204, 210 (Neb. 1990). Extramarital affairs do not necessarily determine a child custody issue, but such sexual conduct may be considered in the custody determination. See *Fletcher*, 526 N.W.2d at 896; *Ritter*, 450 N.W.2d at 210.

⁹⁹ See, e.g., *Jones v. Ard*, 219 S.E.2d 358, 359 (S.C. 1975) (stating fitness does not guarantee custody); *Bah v. Bah*, 668 S.W.2d 663, 666 (Tenn. Ct. App. 1983) (holding that finding that a mother is fit does not automatically entitle her to custody).

¹⁰⁰ See *TERKEL*, *supra* note 14, at 19.

¹⁰¹ See *id.*

¹⁰² See *id.* One exception to the rule denying the right of consultation is that, in some states, the custodial parent needs the consent of the other parent to move with the children to another state. See *id.*; *Stout v. Stout*, 560 N.W.2d 903, 906 (N.D. 1997) (discussing a statutory requirement that the custodial parent seek a court order to change the child's residence when the noncustodial parent objects to the removal). But see *Cook v. Cook*, 898 P.2d 702, 707 (Nev. 1995) (finding that best interest of child would be served by allowing the mother and child to move despite the father's objection).

¹⁰³ See *CIIJ WARE, SHARING PARENTHOOD AFTER DIVORCE* 16 (1982). This, of course, means that the children must be appropriately cared for or the non-custodial parent may go to court to have the custody arrangement modified. See *id.* at 15; see also *MICHAEL WHEELER, DIVIDED CHILDREN: A LEGAL GUIDE FOR DIVORCING PARENTS* 83 (1980).

notion that mothers, not fathers, are essential parents. Furthermore, most states, while permitting joint custody awards, do not encourage them. Finally, some parents, particularly fathers, do not request or dispute custody, thereby making sole custody awards even more commonplace.¹⁰⁴ While sole custody arrangements continue to enjoy great favor, in most situations it is actually detrimental to both children and parents.¹⁰⁵ Unfortunately, however, until joint custody becomes a widely utilized and encouraged custody arrangement, it appears that sole custody will remain the most common form of child custody, and mothers the most common recipients.

As suggested, joint custody is another type of custody agreement. Parents, judges, and child experts are becoming increasingly aware of the necessity of having both parents involved in children's lives; this can be made possible by joint or shared custody.¹⁰⁶ Courts and legislatures define joint custody as "an

¹⁰⁴ See MACCOBY & MNOOKIN, *supra* note 3, at 99 tbl.5.1 (noting that nearly 30% of fathers surveyed did not want physical custody). Sometimes parents do not request child custody because they were not the primary caretakers during the marriage and believe that after divorce their children need them even less than they appeared to during the marriage. See *id.* at 102; TERKEL, *supra* note 14, at 19. Or, these people may be too involved in their own new lives, careers, or families to properly care for the children they left behind. See MACCOBY & MNOOKIN, *supra* note 3, at 102; TERKEL, *supra* note 14, at 19. Other times, parents are simply unable to care for their children emotionally, physically, or financially. See *id.* at 19-20. Still other parents, who did not assume large care-taking roles during their married lives, feel that they would be overwhelmed and overburdened if they had to begin assuming such responsibilities once the marriage is dissolved. See MACCOBY & MNOOKIN, *supra* note 3, at 102; TERKEL, *supra* note 14, at 20. Some parents honestly believe that sole custody granted to the other parent is the best situation for their children or believe that there would be too many logistical problems associated with shared or joint custody. See MACCOBY & MNOOKIN, *supra* note 3, at 102; TERKEL, *supra* note 14, at 20-21. Perhaps a parent's most persuasive argument for requesting sole custody of the children is the fear, unfounded or not, that the children will be abused by the other parent. See *id.* at 21. However, all of these arguments ignore the fact that joint custody arrangements, involving both parents, are often beneficial for the parents and the children. See *infra* notes 319-50 and accompanying text (discussing joint custody as the best option).

¹⁰⁵ See *Beck v. Beck*, 432 A.2d 63, 65 (N.J. 1981) ("Sole custody tends both to isolate children from the noncustodial parent and to place heavy financial and emotional burdens on the sole caretaker, usually the mother . . .").

¹⁰⁶ See CONN. GEN. STAT. ANN. § 46b-56a (West 1995) (stating joint custody assures that children have continuing contact with both parents); IDAHO CODE § 32-717B(1) (1996) (recognizing that joint custody provides child with frequent and continuing contact with both parents); MO. ANN. STAT. § 452.375(2) (West 1997) (requiring that joint custody agreements afford children frequent and continuing contact with both parents); *In Re Marriage of Dunkerson*, 485 N.W.2d 483, 486

order that specifies either that 'the child shall reside alternately for specific periods with each of the parents,' or that 'the parents shall share decision-making authority as to the important decisions affecting the welfare of the child,' or both,"¹⁰⁷ thereby creating two types of joint custody—legal and physical.¹⁰⁸

In joint legal custody, the parents share the responsibility and decision-making power over major issues related to their children.¹⁰⁹ Occasionally, the parents divide this control so that each parent has their own domain in which to make decisions.¹¹⁰

(Iowa Ct. App. 1992) (discussing legal preference for joint custody "whenever reasonable and in the child's best interest"); see also TERKEL, *supra* note 14, at 21; Shirani B. Ponnambalam, *Relocation of the Custodial Spouse: Are We Really Seeing a Change in Judicial Attitudes?*, 19 WESTCHESTER B.J. 33, 40 (1992) (noting that New York courts have a policy of awarding both parents maximum contact with their children); Van Deusen, *supra* note 44, at 424 (stating that California's legislature declared it public policy to assure that minor children have frequent and continuing contact with both parents after divorce).

¹⁰⁷ Wellman v. Wellman, 512 N.W.2d 68, 69 (Mich. Ct. App. 1994) (quoting MICH. COMP. LAWS § 722.26a(7) (1996)); MICH. STAT. ANN. § 25.312(6a)(7) (Law. Co-op. 1992)); see also Hychko v. Hychko, No. FA95-032-04-66-S, 1995 WL 681303, at *1 (Conn. Super. Ct. Nov. 2, 1995) (discussing Connecticut's joint custody laws). In Idaho, joint custody is defined as: "an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with both parents." IDAHO CODE § 32-717B(1) (1996).

¹⁰⁸ Some states use the general term "joint custody" to refer to both joint legal and joint physical custody. See, e.g., CAL. FAM. CODE § 3002 (Deering 1994); MISS. CODE ANN. § 93-5-24(5)(a) (1994). Such usage, however, leads to some of the confusion surrounding joint custody.

¹⁰⁹ See, e.g., IDAHO CODE § 32-717B(3) (requiring that parents in joint legal custody agreements "share the decision-making rights, responsibilities and authority relating to the health, education and general welfare of a child"); IOWA CODE ANN. § 598.41(5) (West 1996) (stating that legal custodian has right to make decisions regarding child's education, health, religion, and extracurricular activities); LA. REV. STAT. ANN. § 9.336 (West Supp. 1998); MINN. STAT. ANN. § 518.003(3)(b) (West Supp. 1998) (stating that joint legal custody means both parents have equal rights to determine "child's upbringing, including education, healthcare, and religious training"); MISS. CODE ANN. § 93-5-24(5)(e) (1994) (defining joint legal custody as sharing of parties rights, responsibilities, and authority regarding child's health, education, and welfare); MO. ANN. STAT. § 452.375(1)(1) (West 1997) (defining joint legal custody as parents sharing the "decision-making rights, responsibilities, and authority relating to the health, education and welfare of the child"); see also TERKEL, *supra* note 14, at 23; WARSHAK, *supra* note 1, at 178.

It is also generally required that the parents confer with one another when exercising their decision-making rights, responsibilities, and authority, unless otherwise agreed. See, e.g., LA. REV. STAT. ANN. § 9.336; MISS. CODE ANN. § 93-5-24(5)(e); MO. REV. STAT. § 452.375(1)(1).

¹¹⁰ See WARSHAK, *supra* note 1, at 178. For example, one parent may agree to share decision-making authority regarding the children's medical care and educa-

Under joint legal custody, both parents remain legally responsible for their children and their children's actions.¹¹¹ Courts typically employ this type of arrangement when joint physical custody is simply impossible, or when the children or parents refuse to cooperate in joint physical custody situations.¹¹² Joint legal custody affords more rights to the non-custodial parent than sole custody situations.¹¹³ Under joint legal custody, the noncustodial parent may feel that he or she is more significant in his or her children's lives, and may, therefore, be more willing to accept emotional and financial responsibility.¹¹⁴ Some argue, however, that this type of arrangement fosters disagreement among divorced parents and gives an "unreasonable" parent too much power.¹¹⁵ Finally, while joint legal custody is an option available to both mothers and fathers, it is still typically the mother who receives physical custody.¹¹⁶

By contrast, in joint physical custody agreements, the children divide the time they spend living in each parent's home.¹¹⁷

tion, but insist that they be the sole decision-maker regarding religious worship. *See id.*

¹¹¹ *See id.*

¹¹² *See TERKEL, supra* note 14, at 22.

¹¹³ *See id.* at 23.

¹¹⁴ *See id.* Terkel also suggests that this type of situation helps to prevent non-custodial parents from feeling like "losers" after a custodial dispute. *Id.* at 23; *see also* Beck v. Beck, 432 A.2d 63, 66 (N.J. 1981) (noting that joint custody enables children to maintain their attachments to both parents by allowing both parents to be decision-makers).

¹¹⁵ *See TERKEL, supra* note 14, at 23. Parents in such cases may then wish to divide the decision-making authority so that each parent essentially maintains his or her own realm of authority. *See WARSHAK, supra* note 1, at 178.

¹¹⁶ *See WARSHAK, supra* note 1, at 178.

¹¹⁷ *See id.* (addressing joint physical custody agreements). Joint physical custody agreements typically mean that the children reside in two homes, one with each of their parents. *See id.* If their parents live in different geographical locations and school districts, such agreements may mean that these children possess two sets of friends or even attend two different schools. *See TERKEL, supra* note 14, at 21. For example, one statute provides that:

"[J]oint custody" means an order awarding legal custody of the minor child to both parents, providing for joint decision-making by the parents and providing that physical custody shall be shared by the parents in such a way as to assure the child of continuing contact with both parents. The court may award joint legal custody without awarding joint physical custody where the parents have agreed to merely joint legal custody.

CONN. GEN. STAT. ANN. § 46b-56a(a) (West 1995); *see also* IDAHO CODE § 32-717B(2) (defining joint physical custody as awarding each parent "significant periods of time in which a child resides with or is under the care and supervision of each of the parents"); IOWA CODE ANN. § 598.41(5) (addressing joint physical custody); MINN. STAT.

Such arrangements may divide custody in various ways, but the most typical type involves an approximately fifty-fifty split between the parents.¹¹⁸ Joint legal custody usually accompanies joint physical custody agreements.¹¹⁹

While this Note asserts that joint custody is the most favorable custody arrangement for the average divorced family, parent-child situations may vary. What may be the perfect solution for some, may not necessarily be the best for others. Therefore, careful examination of the personalities and capabilities of each person involved is imperative.

III. FATHERS AFTER DIVORCE

Although mothers still typically receive custody of the children after divorce, custody awards to fathers are increasing.¹²⁰ Fathers have begun to unite in fighting for greater custody rights, and for the privilege to maintain greater contact with their children.¹²¹ After a divorce, most fathers can, and should be considered as potential custodial parents on an equal plane with mothers, whether the custody awarded is sole or shared.

ANN. § 518.003(3)(d) (stating joint physical custody means that care, control and residence of the child is structured between parties); MISS. CODE ANN. § 93-5-24(5)(c) (requiring both parents to share custody so that the child maintains frequent and continuing contact with both parents); MO. REV. STAT. § 452.375(1)(2) (defining joint physical custody as awarding custody to each parent for significant periods of time, during which the child resides with or is under care and supervision of respective parent); Marygold S. Melli & Patricia R. Brown, *The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence*, 31 HOUS. L. REV. 543, 549 (1994) (explaining that children have dual residence in true joint custody situations).

¹¹⁸ See WARSHAK, *supra* note 1, at 178 (discussing possible joint custody divisions). For instance, the children may spend weekdays with one parent and weekends with the other, three days at one home and four days at the other, or they may spend the school year with one parent and vacations and summers with the other. See *id.* But see IDAHO CODE § 32-717B(2) (stating joint physical custody is to be shared by both parents in a way to ensure child has frequent and continuing contact with both parents, but does not necessarily mean child's time with each should be divided exactly equal, nor that child should be alternating back and forth between the two). In unusual cases, it is the parents who switch residences. See WARSHAK, *supra* note 1, at 178-79. Dr. Warshak warns that "[j]oint custody does not necessarily mean that both parents will be equally involved in their child's upbringing." *Id.* at 179.

¹¹⁹ See *id.* at 178.

¹²⁰ See *infra* note 155 and accompanying text (discussing increases in paternal custody awards).

¹²¹ See Goldberg, *supra* note 8, at 49; Terry Arendell, *Divorce*, 17 Fam. Advoc. 30, 33 (1994) (discussing gender politics of divorce).

A. Visitation and Child Custody

Non-custodial parents have a right to visitation—the right to see their children.¹²² Although custodial parents can require certain stipulations on the visitation, they cannot deny visitation completely or arbitrarily.¹²³ Visitation agreements must be reasonable and in the best interests of the children.¹²⁴ Typically,

¹²² See ANDREW *supra* note 15, at 54. "Courts have defined visitation . . . as 'the right of a parent denied custody.'" WHEELER, *supra* note 103, at 52. Courts have also stated that the parental right to visitation is not absolute. See, e.g., *Weaver v. Weaver*, 261 S.W.2d 145, 148 (Tenn. Ct. App. 1953) (noting that the child's welfare is paramount, and if visitation would negatively affect the child, it should be limited or eliminated). It is usually only in extreme circumstances, however, that a court will deny a parent's right to visitation. See WHEELER, *supra*, note 103, at 52. In some cases, even a parent who is evidently "unfit" to receive custody of the children may obtain visitation privileges. See *id.* Courts generally only deny visitation rights when the parent "clearly presents a significant danger to a child's physical or emotional health . . ." and even then courts first strive to permit some type of contact. *Id.*; see also *Weaver*, 261 S.W.2d at 148 (recognizing that visitation may be limited if there is definitive evidence that such a right may jeopardize a child). If a parent is denied all rights to visitation, he or she is, in effect, exiled from the child. See WHEELER, *supra*, note 103, at 52. As a result, courts go to extremes to protect parents' visitation rights—rights that benefit both the visiting parent and the children. See *id.*

Some experts, however, suggest that visitation should be granted only at the consent of both parties, and should never be ordered if the custodial parent opposes it. See *id.* at 52-53. These experts argue that if visitation is granted over the objections of the custodial parent, it will simply create unnecessary friction. See *id.* at 53. Such a belief could be quite harmful. It is true that parents may argue and dislike one another, but the children should not suffer as a result, which is what happens when visitation is denied. This Note asserts the need for the involvement of both parents in their children's lives, and concludes that this need can be met through joint custody arrangements when divorce occurs.

¹²³ See ANDREW, *supra* note 15, at 55.

¹²⁴ See WHEELER, *supra* note 103, at 54 (stating non-custodial parent's role is to have reasonable visitation with child); see also *Figler v. Figler*, No. FA-950374849S, 1996 WL 636479, at *2 (Conn. Super. Ct. Aug. 2, 1996) (holding best interests of child would be served by reasonable visitation); *Hychko v. Hychko*, No. FA95-032-04-66-S, 1995 WL 681303, at *1 (Conn. Super. Ct. Nov. 2, 1995) (granting liberal, flexible, and reasonable visitation); *Hankins v. Hankins*, 920 S.W.2d 182, 187 (Mo. Ct. App. 1996) (stating best interests of child is standard employed when awarding visitation); *Woodall v. Woodall*, 471 S.E.2d 154, 157 (S.C. 1996) (considering welfare and best interests of child in awarding visitation).

As with child custody, visitation decisions are made according to a judge's discretion, and should not be overturned without a showing of "an abuse of discretion." *Woodall*, 471 S.E.2d at 158. A parent must establish that their visitation schedule is "unduly restrictive" or, in the alternative, that there was an abuse of discretion by the judge. See *id.* Some courts have held that they will only reverse a visitation order where there is "unreasonable frequency or duration." *Hankins*, 920 S.W.2d at 187. The fact that a parent may be dissatisfied with the award, or finds it inconvenient, is not, however, sufficient grounds for reversal. See *id.* When awarding cus-

visitation agreements grant the non-custodial parent visitation rights on weekends, or on one day of the week.¹²⁵ Initially, visitation is a difficult situation to adjust to for all involved.

After divorce, many fathers become less involved with their children, and often fail to exercise their right of visitation.¹²⁶ One reason is that visitation, which often involves contact between two antagonistic parties, may create difficulties and cause friction between the parents, whose feelings can adversely affect the children.¹²⁷ Such difficulties tend to lead to an eventual withdrawal by the visiting parent.¹²⁸ Experts suggest that another reason why visitation is not prevalent is because men, typically the non-custodial parents,¹²⁹ are socialized without an apprecia-

tody, courts may also consider which parent they believe will be least likely to interfere with a visitation order, or which will be obliging of visitation. See TERKEL, *supra* note 14, at 57.

¹²⁵ See ANDREW, *supra* note 15, at 55. Some custodial parents may require that there be a written agreement defining the specified times when the non-custodial parent may visit the children. See *id.* Such requests are not deemed unreasonable by most courts. See, e.g., *Hankins*, 920 S.W.2d at 187; *Woodall*, 471 S.E.2d at 157.

¹²⁶ See WARSHAK, *supra* note 1, at 76-78 (explaining why men fail to visit their children).

¹²⁷ See *id.* at 78-80; WHEELER, *supra* note 103, at 54, 56. Parents tend to argue about what they believe is proper behavior and what is not, and as a result, some experts suggest that agreeing to reasonable visitation is not agreeing to anything. See *id.* at 54.

Parents who have lost custody of their children in a custody battle may want to strengthen their case for custody at a later date, and may, unfortunately, use their children as a pawn, visiting them simply to achieve this goal. See *id.* at 55-56. The custodial parent may then feel pressure to compete with the non-custodial parent, and the children simply become a toy that their parents cannot share fairly. See *id.* These situations are clearly not beneficial for the children, and do not foster an appropriate environment. Desiring custody of one's children simply to get revenge on one's ex-spouse is, of course, an inappropriate reason for engaging in a custody battle.

Custodial parents may want to attempt to increase their control over the children by limiting their ex-spouse's contact with them. Non-custodial parents, on the other hand, may try to gain their own level of control by seeking greater visitation rights. See *id.* at 57. Such problems may cause children to feel caught in the middle, and can then lead to significant difficulties in their development and well-being. See *id.* at 56.

¹²⁸ See WARSHAK, *supra* note 1, at 78-80; WHEELER, *supra* note 103, at 55. Dr. Warshak notes that "[o]ne-third of all children who live with their single mothers never see their fathers. One-quarter see their fathers less than once per month. One-fifth have monthly contact. A little fewer than one-fifth see their father weekly." WARSHAK, *supra* note 1, at 76 (emphasis omitted). Approximately one out of four children have weekly telephone conversations with their fathers. See *id.* Similarly, less than one third of children with paternal visitation consider their father's residence their own. See *id.*

¹²⁹ See *id.* at 76; WHEELER, *supra* note 103, at 54.

tion for the value of strong emotional bonds with their children.¹³⁰ This tendency is further reinforced by the legal system, which grants fathers only minimal guaranteed contact with their children.¹³¹ Eventually, the burdens accompanying such limited visits cause many fathers to give up trying.¹³²

This withdrawal can cause mothers, courts, and children to mistakenly assume that non-custodial fathers decrease visitation because "[they] don't love their children."¹³³ In most situations, however, it is not the father's lack of love, but the inherent limits of a non-custodial visiting relationship.¹³⁴ Specialists cite several underlying problems with a non-custodial relationship.¹³⁵ For instance, the limits placed on opportunities afforded to men to visit with their children dictate how much time they have to spend with their children, not a father's lack of love.¹³⁶

Inherent in the non-custodial relationship are the difficulties that arise with a change in the father's status. Typically before a separation, there exists a conventional family structure that facilitates a father's significant participation in his children's lives.¹³⁷ After divorce, however, when this conventional framework is broken and a father no longer resides with his children, this participation is lost.¹³⁸ The father's role is diminished to simply that of an occasional visitor of his children.¹³⁹ Professionals assert that due to this reduction of the father's role, he has difficulty maintaining the same intensity and variety in his relationship with his children that existed while he was living with them.¹⁴⁰ In addition, since non-custodial fathers have only

¹³⁰ See WARSHAK, *supra* note 1, at 76 (stating that society has written a script for how fathers are to behave; fathers have accepted their roles and it will take time and adjustments to alter these).

¹³¹ Courts are likely to grant two weekends a month or one day a week visitation schedules. See TERKEL, *supra* note 14, at 60-70 (providing examples of various visitation agreements).

¹³² See WARSHAK, *supra* note 1, at 78.

¹³³ *Id.* at 77. Due to these mistaken beliefs, however, courts may subsequently further cut-off a father's guaranteed contact, thereby creating even less incentive for the father to visit his children. See *id.*

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See generally *id.* at 77-78 (postulating reasons why fathers fail to visit their children).

¹³⁷ See *id.* at 77.

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ See *id.* The intact family allows a father to participate in activities with his

limited time with their children, they feel pressure to plan event-filled visits to maximize their children's amusement.¹⁴¹ Because fathers have little time and want the time they have to be enjoyable, fathers no longer concern themselves with aiding their children with their homework or enforcing their chore duties.¹⁴² As a result, these fathers become less aware of what is happening in their children's lives.¹⁴³ While these encounters may be pleasant in the early stages of the non-custodial father-child relationship, this "Disneyland Daddy"¹⁴⁴ phenomenon eventually diminishes as it becomes clear that something essential is missing in the relationship, namely, a sense of normalcy and realism.¹⁴⁵ The father-child relationship is no longer as significant or gratifying for either party as it was before the divorce.¹⁴⁶

In many cases, the ability to maintain a relationship with his children is not wholly within the father's control. It is true that non-custodial fathers, at least in theory, have control over the relationships they form with their children, and whether they will visit. However, it is not always their fault when they fail to visit their children, because, in some cases, the custodial mother may regulate the amount of visitation the father is allowed.¹⁴⁷ Angry mothers may attempt to restrict the father's con-

children such as eating together daily, assisting with their homework, driving them to after-school activities, encouraging them to perform their chores, enforcing house rules, watching television with them, and playing with them on a daily basis. *See id.*

¹⁴¹ *See id.*

¹⁴² *See id.* At the same time, children do not want to ruin the time they have with their fathers, and therefore they tend to mask any unhappiness. *See id.* Children also tend to avoid conflicts with their fathers, for fear that they will stop visiting them altogether. *See id.* Unfortunately, in many cases, these fears eventually ring true. *See id.*

¹⁴³ *See id.*

¹⁴⁴ *See id.*; *see also* Goldberg, *supra* note 8, at 49 (discussing fathers' rights groups' struggle against the "Disneyland Daddy" effect of the divorce process).

¹⁴⁵ WARSHAK, *supra* note 1, at 77 (recalling one man's comparison of the non-custodial father's involvement with his children to that of an ice-cream man "coming around . . . and stopping to give out all sorts of delights, then disappearing just as quickly [as he came]"); *see also* Bob St. John, *Starting Over and Over and Over*, DALLAS MORNING NEWS, Jan. 29, 1989, at 29A (discussing the difficulties of divorce, one father said "he felt like the proverbial ice cream man, passing the house and handing out bars and disappearing around the corner").

¹⁴⁶ *See* WARSHAK, *supra* note 1, at 77.

¹⁴⁷ *See id.* at 78-79. However, too much control by the mother may backfire. Some states recognize a parent's interference with visitation as sufficient grounds for ordering a modification of the custody arrangement. *See* Virginia A. Petersen, Note & Comment, *In re Marriage of McDole: Modifying Child Custody By Ignoring Statutory Standards*, 69 WASH. L. REV. 1143, 1143 (1994) (discussing modification

tact with his children, either through direct legal means, or indirectly through tactics such as intentionally creating scheduling conflicts or other distractions so that the children are unable to partake in a designated visit.¹⁴⁸ Such antics can create too many hurdles for visiting fathers to maintain solid relationships with their children.¹⁴⁹

All in all, it is the children who are hurt by dwindling visitation, either as a result of their father's own conduct, or that of their mother. Parents must recognize that children need both parents in their lives and need to develop significant relationships with both of them. In contrast to the sole custody/visitation arrangement, joint custody would eliminate the many problems associated with visitation because both parents would have the opportunity to be involved to a greater extent in their children's lives. Such arrangements afford parents the opportunity to form, maintain, and nourish parent-child relationships on a regular basis, rather create artificial situations that often end with the non-custodial parent abandoning his or her relationship with the children.

B. Increasing Awards of Custody to Fathers

In today's society, a father generally desires to be an intricate part of his children's lives, rather than simply a source of financial support or a mere visitor to the children's home.¹⁵⁰ In re-

grounds of parenting plans in Washington state).

¹⁴⁸ See WARSHAK, *supra* note 1, at 79. Sometimes mothers will arrange for the children to participate in an enjoyable activity during the time they were scheduled to be with their father, thereby cutting into the father's time. *See id.* Some mothers start an exciting activity just before the children are picked up by their father so as to undermine their ex-husband's time with his children. *See id.*

Mothers may interfere with paternal visitation for numerous reasons. Some may suspect abuse by the father, or unsafe conditions. Others may simply want to "erase" the children's father from their lives in order to distance them from the divorce. *See id.* Still other mothers are simply too angry or resentful to acknowledge the father to their children, or they desire to punish the fathers. *See id.* at 80. Often times, the hatred experienced by these mothers makes it impossible for them to realize that their children need to have meaningful contact with their father, and they are harming their children in the process. *See id.* While these reasons may seem somewhat selfish, it should be recognized that divorce is a painful experience that affects people in many different ways.

¹⁴⁹ *See id.* at 79. Often, these fathers are susceptible to suffering "involuntary child absence syndrome," a psychological disturbance triggered by a loss of contact with their children. *Id.*

¹⁵⁰ Levy, *supra* note 64, at 5. This increasing desire to be more involved in their children's lives has been partly attributed to the women's movement's altering of the

sponse to these desires, recent laws and changing standards demand that the gender of the parent play no part in determining who is awarded custody of the children.¹⁵¹ Furthermore, recent cases have granted fathers sole custody.¹⁵² In most of these cases, however, the mother was found unfit due to mental illness, severe personality disorders, abuse or addiction.¹⁵³ It appears that the unfitness of the mother is the primary reason courts have awarded fathers sole custody, rather than the belief that the father can better raise the children, or that paternal sole custody is in the children's best interests.¹⁵⁴

Societal views about men and parenting are changing, however, and, as a result, changes in laws and theories are allowing more fathers to gain custody of their children, even when the mother is fit.¹⁵⁵ Although there has been an increase in the

consciousness of both women and men. *See id.* It inspired women to force their husbands to play larger roles in their children's lives, so that women could leave the home and advance their own outside pursuits. *See id.* Men are still trying to carry out these parental responsibilities, yet courts and women seem to be rejecting their efforts when it comes to post-divorce situations.

¹⁵¹ As the Supreme Court of Utah so eloquently stated: "[w]e believe the time has come to discontinue our support, even in dictum, for the notion of gender-based preferences in child custody cases." *Pusey v. Pusey*, 728 P.2d 117, 119 (Utah 1986); *see also* *Kuutti v. Kuutti*, 645 So. 2d 80, 82 (Fla. Dist. Ct. App. 1994) (stating public policy requires there be no preferences given on the basis of gender); *In re Marriage of Dunkerson*, 485 N.W.2d 483, 485 (Iowa Ct. App. 1992) (holding parent's gender irrelevant in custody determinations); *Ritter v. Ritter*, 450 N.W.2d 204, 210 (Neb. 1990) (rejecting the notion that one parent may be presumed more fit than the other on the basis of gender); *Linda R. v. Richard E.*, 561 N.Y.S.2d 29, 32 (App. Div. 1990) (mandating that gender-neutral decisions be made in custody disputes); *Ruyle v. Ruyle*, 928 S.W.2d 439, 441 (Tenn. Ct. App. 1996) (holding gender-neutral determinations are to be made in deciding custody); *Murray v. Murray*, 622 P.2d 1288, 1290 n.4 (Wash. Ct. App. 1981) (cautioning courts not to attribute "mothering" only to females).

¹⁵² *See infra* note 155 and accompanying text (discussing several law and judicial decisions awarding custody on gender-neutral terms).

¹⁵³ *See* *Haag v. Haag*, 485 A.2d 1189, 1193 (Pa. Super. Ct. 1984) (finding mother unfit and awarding father custody); *Alligood v. Hunt*, 353 S.E.2d 699, 700 (S.C. 1987) (finding mother's adulterous relationship warranted custody award to father); *Jones v. Jones*, 348 S.E.2d 178, 179 (S.C. 1986) (finding mother unfit and giving custody to father).

¹⁵⁴ *See* *Goldberg*, *supra* note 8, at 50. Thus, although in theory courts apply gender-neutral standards, "[i]n practice, this mean[s] leaving the child in the mother's custody, absent proof of unfitness." *Id.*

¹⁵⁵ *See id.* at 49-50. Various states have enacted laws requiring that considerations made in custody decisions be gender-neutral. *See, e.g.*, ARK. CODE ANN. § 9-13-101 (Michie 1995); CAL. FAM. CODE § 3040 (West 1996); MO. ANN. STAT. § 452.375 (West 1996); MONT. CODE ANN. § 40-4-212 (1995); NEV. REV. STAT. § 125.480 (1995); N.M. STAT. ANN. § 40-4-9.1 (Michie 1996). In the past few years, the fact that fa-

amount of custody awards to fathers, the number of such awards is still nowhere near the number granted to mothers.¹⁵⁶ Nonetheless, due to the continuing shift in beliefs regarding men and their parenting abilities, and an increase in the quantity of literature discussing men's capabilities and desires, this disparity will presumably diminish. To effectuate a successful balance, courts must continue to increase both the number of sole custody awards to fathers and the amount of joint physical custody awards. To do so will afford divorced fathers greater contact with their children and ensure better father-child relationships.

The concept of "fathers' rights," with respect to their children, has emerged in recent years as a result of men's increased dissatisfaction with custody awards.¹⁵⁷ Although fathers' rights advocates espouse differing approaches, there is a shared belief in the importance of paternal involvement and in the idea that fathers have rights with respect to their children.¹⁵⁸

Some fathers' rights activists avow that fathers have historically possessed rights to their children and regularly assumed custody of them.¹⁵⁹ These individuals seem to conclude that fathers have just as much of a natural right to custody of their

thers have been awarded custody of their children, even when the mother is found to be fit, suggests that some courts are beginning to believe that men are capable of parenting. *See, e.g.,* R.W. v. D.W.W., No. 2950648, 1997 WL 37010, at *2 (Ala. Civ. App. Jan. 31, 1997) (stating parents on equal footing and awarding custody to father), *rev'd on other grounds sub nom. Ex parte D.W.W.*, No. 1961022, 1998 WL 81615 (Ala. Feb. 27, 1998); *Kuutti*, 645 So. 2d at 81 (granting father custody); *Sullivan v. Sullivan*, 668 So. 2d 329, 330 (Fla. Dist. Ct. App. 1996) (awarding father custody); *Vance v. Vance*, 436 N.W.2d 177, 178 (Neb. 1989) (finding both parties fit, but awarding physical custody to father); *La Valley v. La Valley*, 606 N.Y.S.2d 349, 350-51 (App. Div. 1993) (finding award of custody to father better met best interests of children, even though both parents were fit). *But see* *Milum v. Milum*, 894 S.W.2d 611, 613 (Ark. Ct. App. 1995) (denying father's request for custody); *Linda R.*, 561 N.Y.S.2d at 34 (finding both parents fit, but granting custody to mother).

Trying to diminish the effects of gender in custody battles, courts have also stated that the fact that a mother works outside of the home should not be a factor used to deny her custody of her children, just as it is not a factor used to deny a father custody. *See Linda R.*, 561 N.Y.S.2d at 33.

¹⁵⁶ *See* WARSHAK, *supra* note 1, at 178 (stating that nine out of ten divorce situations result in custody being awarded to the mother).

¹⁵⁷ *See* Goldberg, *supra* note 8, at 49.

¹⁵⁸ *See id.*

¹⁵⁹ *See id.* at 50. Until the late 19th century, children were considered the property of their fathers, and the rights of fathers were viewed as "natural and sacred." *Id.*; *see also* RICHARD COLLIER, *MASCULINITY, LAW AND THE FAMILY* 185-89 (1995); *supra* notes 40-45 (discussing children as property of father and father's entitlement to custody).

children as mothers, whether in the form of joint or sole custody.¹⁶⁰

In contrast, other groups focus their efforts upon fighting for fathers' rights to joint custody as the best way for fathers to maintain meaningful involvement with their children after separation. These advocates believe that traditional and contemporary gender stereotypes discriminate against men's custodial rights.¹⁶¹ To counter this, they urge courts and legislatures to recognize that men are equally as capable as women at raising children, and that fathers should be given the opportunity to do so.¹⁶²

In response, legislatures and courts have partially recognized these rights, and gender-neutral standards, laws, and decisions have evolved, giving fathers a greater chance of obtaining custody of their children.¹⁶³ Nevertheless, society is still a long way from fully recognizing the rights fathers have with respect to their children, and from applying truly gender-neutral standards in a systematic fashion.

The emergence of the idea that a father has certain parental rights has spawned a "fathers' rights movement," consisting of various organizations advocating the rights of fathers with respect to their children.¹⁶⁴ These organizations, however, each stress different beliefs as to the best course to follow to ensure that fathers are awarded custody more frequently.¹⁶⁵ Some groups work to remedy the practice of gender discrimination in custody disputes, arguing that while existing laws theoretically prohibit gender discrimination, some courts still favor the mother as the parent merely because she is a woman.¹⁶⁶ Other groups focus on promoting sole paternal custody agreements,

¹⁶⁰ See Goldberg, *supra* note 8, at 50-51. With respect to the form of custody, some proponents advocate sole paternal custody as the best way for fathers to obtain their rights. See *id.* at 49. However, such custody is not as beneficial to the children or the parents. See *infra* notes 319-350 and accompanying text (discussing problems of sole custody and benefits of joint custody).

¹⁶¹ See Goldberg, *supra* note 8, at 50-51.

¹⁶² See *id.*

¹⁶³ See *supra* note 155 and accompanying text (discussing several laws and judicial decisions awarding custody on gender-neutral terms).

¹⁶⁴ See Goldberg, *supra* note 8, at 48-51. Some of these groups include "Dads Against Discrimination," "National Organization for Fathers and Children," and "Joint Custody Association." See *id.*

¹⁶⁵ See *id.*

¹⁶⁶ See *id.* at 49-50.

while still others firmly believe that joint custody is the answer to fathers' custody problems.¹⁶⁷

Some critics of these fathers' groups argue that, although united in their goals, the divided strategies of the groups may frustrate their purpose and cause observers to view them in a negative light.¹⁶⁸ Nevertheless, because they provide a united front and can lend moral support, fathers' groups are beneficial for men seeking greater parental rights after divorce.¹⁶⁹ Honest reform will be difficult to attain, but by joining together, fathers have a better chance to successfully lobby against well-established feminist adversaries.¹⁷⁰ These "fathers' groups" are united in the belief that the divorce process seems resolved to make fathers into "Disneyland Daddys," and these groups strive to overcome this unhappy and unnecessary fate.¹⁷¹

IV. WHY FATHERS SHOULD HAVE CUSTODY

Various studies demonstrate that children do not necessarily

¹⁶⁷ See *id.* at 49, 51. Dad's Against Discrimination, which has five branches across the country, typically advocates for sole custody because they believe there is too much post-divorce anger experienced by the parents for joint custody to work effectively. See *id.* at 49. The Joint Custody Association, however, promotes joint custody as the most beneficial situation for fathers and their children. See *id.* at 51. Other groups, like the National Organization for Fathers and Children, maintain that the primary goal is not achieving greater rights for fathers or mothers, but rather pursuing what is best for the children. See *id.* at 49.

¹⁶⁸ See *id.* Some leaders of fathers' groups are fearful about expanding their organizations throughout the country because they fear that they may not attract the quality of people they would prefer. See *id.* Instead, they elect to have a localized base and send out materials to interested parties. See *id.* at 51.

¹⁶⁹ See *id.* at 49.

¹⁷⁰ See Abraham, *supra* note 6, at 56. Abraham, however, suggests that although this may be an uphill battle, fathers have past and present discriminating divorce decisions on their side. See *id.* He also asserts that men who divorce must fight the biases against them individually, in addition to being members of a fathers' group. See *id.* Men must fight to have as many overnight visits as possible; to have temporary custody while awaiting final custody decisions; for unrestricted, ample phone time; and for substantial school vacation time. See *id.* Each time fathers fight for custody, they must educate the leery and traditional judges that they are capable and sincerely willing to assume the role of custodial parent. See *id.* In the end, such efforts will assist all men in their future custody battles. See *id.*

¹⁷¹ See Goldberg, *supra* note 8, at 49. Fathers' groups provide men an opportunity to discuss their pain or frustration, and the overall anger they feel towards a system and a society that denies them access to their own children. See *id.* Ironically, some suggest that the "fatherless America" phenomenon has put the fathers' movement in an extremely fortuitous position, awaking society to the realization of fathers as bettering society as a whole, in addition to being crucial factors in their children's lives and development. See *id.*

develop better in the care of one parent over the other. Instead, children's psychological development is comparable in both maternal-custody and paternal-custody homes.¹⁷² One study that examined approximately thirteen "reactions, attitudes, traits, and behavior[s]," reported that there were no "overall differences that favored father-custody or mother-custody homes."¹⁷³ These findings led to the conclusion that there are no discernible reasons for discriminating against fathers in custody decisions; there is no justification for concluding that maternal custody is superior to paternal custody.¹⁷⁴ Research suggests that children in paternal-custody homes are not disadvantaged when compared with children in maternal-custody homes.¹⁷⁵ Divorce elicits the same types of behavior and feelings in children whether their father or mother obtains custody;¹⁷⁶ children are hurt and depressed after divorce, regardless of with whom they ultimately reside.¹⁷⁷

¹⁷² See WARSHAK, *supra* note 1, at 133.

¹⁷³ *Id.* at 134. These include:

1. Sadness.
2. Distress.
3. Longing for the intact family.
4. Strong wishes for parental reconciliation.
5. Self-esteem.
6. Maturity.
7. Independence.
8. Anxiety.
9. Behavior problems.
10. Psychosomatic complaints.
11. Custodial parent-child relationships.
12. Teacher-child relationships.
13. Peer relationships." *Id.*

¹⁷⁴ See *id.* at 134. (citing studies assessing the psychological development of children of divorced families, the author called "striking" the similarities "between father-custody and mother-custody families").

¹⁷⁵ See *id.*; see also Levy, *supra* note 64, at 7 ("[C]hildren raised by men can be vigorous, competent and thriving infants who may be especially comfortable with [others and have] interest[s] in stimulation from the external environment.' ") (quoting Kyle D. Pruett, *Infants of Primary Nurturing Fathers*, 38 PSYCHOANALYTIC STUDY CHILD 257 (1983)).

¹⁷⁶ See WARSHAK, *supra* note 1, at 129. Regardless of whether children reside with their mothers or fathers, typical responses to divorce include "anger, confusion, worry, and grief." *Id.*

¹⁷⁷ See *id.* ("[D]ivorce is a major stressful life event for most children . . . [and] these reactions are no worse in father-custody homes than in mother-custody homes.").

A. Gender Role Stereotypes

While there are studies revealing no substantial difference in a child's development based on the gender of the parent granted custody, some advocate that the primary reason why fathers should obtain equal custodial rights is because men and women contribute different attributes to children's development, and children develop differently under the care of men and women.¹⁷⁸ Research is varied and controversial regarding the contributions of men and women in children's development.¹⁷⁹ Some researchers contend that fathers play an important role in their children's mental and moral development.¹⁸⁰ These specialists suggest that infant boys benefit intellectually if their fathers are good playmates, keep them interested in various games, and provide stimulating play, and that fathers enhance infant girls' mental development if they provide verbal stimulation.¹⁸¹ Studies also show that a strong paternal presence assists children in reaching their intellectual potential.¹⁸² Research further intimates that fathers play an important part in assisting their children in their transition from the security of the family home to life as an adult.¹⁸³ Finally, studies reveal that children who spend more time with their fathers are more empathetic towards

¹⁷⁸ See generally *id.* at 35-50. Carol Gilligan also suggests that men and women develop differently as a result of their gender and upbringing, especially in the area of morality. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 25-29 (1982). Studies suggest that male children approach moral dilemmas "impersonally through . . . logic" while female children seek resolution "through communication in relationship." *Id.* at 29.

¹⁷⁹ See Levy, *supra* note 64, at 6 (stating evidence of parental influence regarding "achievement and intellectual development is inconclusive"); compare Judy Auerbach et al., *Commentary, On Gilligan's In a Different Voice*, 11 FEMINIST STUDIES 149, 155 (1985) (criticizing Carol Gilligan's conclusions regarding men and women and moral development) with WARSHAK, *supra* note 1, at 35-50 (discussing various developmental processes that fathers affect). Some critics argue that other factors, such as class, race, religion, and ethnicity may be more important than gender. See Auerbach, *supra*, at 155.

¹⁸⁰ See WARSHAK, *supra* note 1, at 39, 45. However, paternal influence in these areas can be both advantageous and disadvantageous. See *id.* at 39.

¹⁸¹ See *id.* at 40.

¹⁸² See *id.* at 41-42 (noting that although the father may be successful, it is his availability and support that positively impacts his children's intellectual development). Warshak also cites successful women, such as Prime Minister Margaret Thatcher and Indira Gandhi, who credit their fathers as their inspiration. See *id.*

¹⁸³ See *id.* at 42. Children who had more contact with their fathers are more sociable, assertive and active. See *id.* at 42-43.

others.¹⁸⁴

Researchers have also identified differences in the way mothers and fathers approach their role as caretakers. Mothers tend to be more involved in the everyday care-taking responsibilities, and, as a result, do not engage in the stimulating contact and physical play attributed to fathers.¹⁸⁵ Fathers, typically more involved with their sons than their daughters,¹⁸⁶ demand a great deal of sex role conformity.¹⁸⁷ Fathers substantially influence their offspring by encouraging masculine behavior in their sons and feminine behavior in their daughters.¹⁸⁸ In two-parent homes, children benefit from exposure to the functional diversity of each parent.¹⁸⁹ However, custody determinations are influenced by stereotypes that portray women as the omnipotent parent, capable of tending to all of their children's needs,¹⁹⁰ and fathers as peripheral caretakers.¹⁹¹

Other researchers discount findings regarding the differences between male and female influences upon children.¹⁹² Instead, they espouse that gender has little effect upon children's

¹⁸⁴ See *id.* at 46. Possible reasons for this include: (1) fathers will have more time to model empathy for their children; (2) those children may already be more empathetic; and (3) these families may be more harmonious, thus developing empathy. See *id.*

¹⁸⁵ See Levy, *supra* note 64, at 5.

¹⁸⁶ See *id.* at 6.

¹⁸⁷ See *id.* "[T]heorists propose that fathers have a major impact on sex role development through modeling and identification." *Id.* at 5.

¹⁸⁸ See *id.* at 6.

¹⁸⁹ See *id.* at 5.

¹⁹⁰ See WARSHAK, *supra* note 1, at 30-31. Acknowledging the traditional deference to maternal custody, a 1921 decision stated:

[T]hat constant ministration required during the period of nurture that only a mother can give because in her alone is duty swallowed up in desire; in her alone is service expressed in terms of love. She alone has the patience and sympathy required to mold and soothe the infant mind in its adjustment to its environment. The difference between fatherhood and motherhood in this respect is fundamental . . .

Jenkins v. Jenkins, 181 N.W. 826, 827 (Wis. 1921).

¹⁹¹ See WARSHAK, *supra* note 1, at 31 (noting the traditional designation of the father as family "breadwinner"). Conversely, women have been subjected to employment discrimination due to unfavorable stereotypes categorizing them as "incompetent, weak, dependent, passive, uncompetitive and unconfident." Brief for Amicus Curiae American Psychological Association in Support of Respondent at 13, Price Waterhouse v. Hopkins, 825 F.2d 458 (D.C. Cir. 1987) (No. 87-1167) available in LEXIS, Genfed Library, US Plus File [hereinafter APA Brief].

¹⁹² See Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L & SOC. CHANGE 347, 356-57 (1996) (discussing studies that conclude mothers and fathers are equally competent to care for children).

overall development.¹⁹³ Gender role stereotypes should not be relied upon to pronounce the appropriate form of custody. Stereotypes create certain expectations about specific classes of people, and these expectations can lead to mistaken judgments regarding behavior.¹⁹⁴ These mistaken beliefs typically place people at a disadvantage in spite of their individual capabilities or accomplishments.¹⁹⁵ For example, fathers traditionally have been discriminated against in custody disputes as a result of stereotypical beliefs regarding their parenting skills.¹⁹⁶ Therefore, research discussing the unique benefits fathers bestow upon their children is insufficient to foster the support needed by fathers anxious to obtain custody and rear their children. Rather, this research merely reinforces stereotypes of mothers as nurturers and fathers as providers, regardless of some fathers' competence or potential to excel at parenting.¹⁹⁷ Children need contact with both of their parents after a divorce simply so that they may reap the benefits of having two people to love and care for them, not because research suggests that men and women provide different developmental contributions.

B. Other Factors

Despite the fact that research shows maternal and paternal custody homes are comparable, and that neither is more advantageous than the other, various problems exist in sole custody environments. In *Beck v. Beck*,¹⁹⁸ the New Jersey Supreme Court denounced sole custody as isolating children from their non-custodial parent and creating great economic and emotional burdens for the sole custodial parent.¹⁹⁹ The court further stated that children's best interests are not properly served by many

¹⁹³ See Linda K. Kerber et al., *On In a Different Voice: An Interdisciplinary Forum*, 11 SIGNS 304, 312 (1986) (critiquing Gilligan's analysis that boys and girls develop differently).

¹⁹⁴ See APA Brief, *supra* note 191, at 13 (discussing the impact of stereotypes on gender-based employment discrimination).

¹⁹⁵ See *id.*

¹⁹⁶ See *supra* notes 47-63 and accompanying text (discussing the tender years doctrine); see also *supra* notes 81-94 and accompanying text (discussing the primary caretaker doctrine and its effect on gender stereotyping).

¹⁹⁷ See WARSHAK, *supra* note 1, at 102-03 (noting that although men may have difficulty communicating their feelings, they are still able to acquire nurturing skills in order to respond to their children's emotional needs).

¹⁹⁸ 432 A.2d 63 (N.J. 1981).

¹⁹⁹ *Id.* at 65.

aspects of the sole custody arrangement.²⁰⁰

Since sole custody homes are typically headed by mothers, the problems associated with sole custody are frequently imbued on women. As previously noted, however, such problems are equally present in single-family homes headed by either gender.²⁰¹ Children living with only one of their parents often suffer from various psychological difficulties including, "insecure gender identity, impaired capacity for intimate relationships, depression, anxiety, poor self-control and . . . low self-esteem."²⁰² Children's self-esteem thrives when their parents bestow "warmth, understanding, and positive attention" upon them.²⁰³ These are assets in high demand and low supply after a divorce, when many parents, preoccupied with their own troubles, have difficulty responding to their children's potentially increased needs.²⁰⁴ Mothers tend to withdraw from their children when feeling depressed.²⁰⁵ This isolation can cause increased pain for children in mother-custody homes, who may have limited contact with their fathers.²⁰⁶ Children benefit from greater contact, warmth, and love when there are two parents available. Joint custody provides such benefits.

Children in sole custody homes have difficulty developing and maintaining intimate relationships with others.²⁰⁷ In addition, children reared in divorced homes suffer from depression and anxiety about the loss they have endured.²⁰⁸ Such children tend to fear that they will continue to lose things that are impor-

²⁰⁰ See *id.*

²⁰¹ See WARSHAK, *supra* note 1, at 128-29, 133, 135 (finding no difference in traits such as maturity, independence, and behavior existed between children living with their mothers or their fathers).

²⁰² *Id.* at 55; see also WARE, *supra* note 103, at 12 (noting diminished self-esteem in children results when non-custodial parent fails to visit).

²⁰³ WARSHAK, *supra* note 1, at 56.

²⁰⁴ See *id.* Divorced parents are typically absorbed in their own problems and emotions and have, for at least some time, difficulty responding to the needs of their children. See *id.* Divorced mothers are more likely to nag, discipline, and criticize their children than divorced fathers. See *id.* The more saddened a mother becomes, the less time she has for her children and the children's sense of themselves decreases. See *id.* Children may also develop low self-esteem because they are ashamed that their parents divorced in the first place, or because of the way they are treated by a non-custodial parent. See *id.* at 57.

²⁰⁵ See *id.*

²⁰⁶ See *id.*

²⁰⁷ See *id.* at 59-64.

²⁰⁸ See Samuel Roll, *How a Child Views the Move, The Psychology of Attachment, Separation, and Loss*, 20 FAM. ADVOC. 26, 28-29 (Fall 1997).

tant to them.²⁰⁹ Maintaining substantial, meaningful relationships with both parents may help to assuage those feelings.

Parents involved in sole custody arrangements also experience a variety of difficulties. Visitation problems typically arise, and, as previously noted, may eventually lead to infrequent contact between the non-custodial parent and the children.²¹⁰ Sole custodial parents experience greater levels of stress because they are forced to perform dual roles and take on a greater amount of responsibility.²¹¹ Parental responsibilities associated with sole custody can overwhelm and severely inhibit the sole custodial parent's ability to raise the children effectively by increasing his or her stress levels.²¹² These parents must simultaneously balance their own lives, their children's well-being, and their careers, all alone.²¹³ In sum, sole custody often deprives a custodial parent of cooperative support in raising children. Parents occasionally need a break from the pressures of child rearing, and in sole custody homes, such breaks are infrequent.²¹⁴ Finally, sole custody can place large financial burdens on the custodial parent.²¹⁵ Child-rearing responsibilities are more effectively balanced in joint custody arrangements, relieving any one parent from being or feeling overburdened.²¹⁶

The Uniform Marriage and Divorce Act²¹⁷ and a Michigan

²⁰⁹ See WARSHAK, *supra* note 1, at 66-70. "Once a parent leaves the home . . . many children never regain the sense of security they felt before the divorce. If you can't count on your parents—your bedrock of security—you can't count on anything. Life is no longer so safe, so predictable, so secure." *Id.* at 68. Children may believe that they can test their independence, either at home or at school, when their fathers are not in the home. *See id.* at 70. This tendency to act out has been attributed to cultural conditioning that reinforces the role of the father as the family's authority figure. *See id.* Particularly when fathers leave the family home, "children feel a weakening of the power structure." *Id.*

²¹⁰ *See supra* notes 122-149 and accompanying text (discussing visitation).

²¹¹ *See* WARSHAK, *supra* note 1, at 183, 184. These parents suffer from what can be termed "task overload," and have difficulty balancing different aspects of their lives such as children, housework, their careers, and social lives. *See id.* at 95. These overwhelming responsibilities can create tremendous stress, leaving the parent with no buffer between their children and themselves. *See id.*

²¹² *See id.* at 183.

²¹³ *See id.* at 95, 183.

²¹⁴ *See id.*

²¹⁵ *See* Beck v. Beck, 432 A.2d 63, 65 (N.J. 1981); Melli & Brown, *supra* note 117, at 549-50.

²¹⁶ *See* WARSHAK, *supra* note 1, at 184.

²¹⁷ UNIF. MARR. AND DIVORCE ACT, § 402, 9A U.L.A. 348 (1987).

statute²¹⁸ promulgate several ways to sharpen the focus of the equivocal "best interests of the child" standard. They set forth various criteria for courts to examine in determining a child's best interests.²¹⁹ However, they both imply that only one parent can better fulfill each criterion, and further suggest that a judge determine the better parent in each category and then tally up who has the most "points." Why, however, has the *best interests of the child* test come to mean the best *one* of the child's *two* parents, if both are qualified? It would be best for children to have

²¹⁸ MICH. COMP. LAWS ANN. § 722.23 (West 1997) (MICH. STAT. ANN. § 25.612(3) (Callaghan Supp. 1997)).

²¹⁹ The Uniform Marriage and Divorce Act requires the court to examine:
 . . . all relevant factors including
 (1) the wishes of the child's parent or parents as to his custody;
 (2) the wishes of the child as to his custodian;
 (3) the interaction and interrelationship of the child with his . . . parents, his siblings, and any other person who may significantly affect the child's best interest;
 (4) the child's adjustment to his home, school, and community; and
 (5) the mental health and physical health of all individuals involved.
 UNIF. MARR. AND DIVORCE ACT, § 402, 9A U.L.A. 348 (1987).

The Michigan statute is similar, but has a sharper focus on psychological considerations:

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
- (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the parties involved.
- (g) The mental and physical health of the parties involved.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
- (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
- (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
- (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

MICH. COMP. LAWS ANN. § 722.23.

two qualified parents working for their best interests rather than requiring that a court select only one.

The specific factors set forth in the Michigan statute, namely, "[t]he capacity . . . of the parties . . . to give the child love, affection and guidance . . .,"²²⁰ and "[t]he capacity . . . of the parties involved to provide the child with food, clothing, medical care . . . and other material needs,"²²¹ are provisions that should be received from both parents, and are qualities that two parents can provide, simultaneously. In fact, children would fare better having two people performing these tasks rather than just one.²²² Theoretically, both parents performed these tasks before divorce, which supports the proposition that they need not be mutually exclusive after divorce. It is the parents' relationship with each other that changes through divorce—their relationship with their children should not.

It is senseless that after subjecting children to a traumatic divorce,²²³ our society and court system presume that they need only one parent's care, while prior to this painful experience they needed two. Joint custody eliminates the requirement of a comparison of children's parents after divorce, as these Acts incorrectly propose.²²⁴ Under joint custody, a presumption arises that both parents are capable of meeting their children's best interests, and affords them the opportunity to do so. The children are also granted an opportunity to grow in an environment where all those desiring to care for and provide the best for them may do so, unhampered.²²⁵

Both fathers and mothers are important in child development. Their importance, however, is not solely a reflection of gender roles. Men and women are both capable of rearing children and meeting their needs. While evidence regarding the effects of gender roles on children's development is inconclusive,²²⁶ it remains unquestioned that ideally, children should be afforded the opportunity to mature under the care and supervision of both

²²⁰ *Id.* § 722.23(b).

²²¹ *Id.* § 722.23(c).

²²² *See Beck v. Beck*, 432 A.2d 63, 66 (N.J. 1981).

²²³ *See WARSHAK, supra* note 1, at 129.

²²⁴ *See Levy, supra* note 64, at 7.

²²⁵ *See Beck*, 432 A.2d at 66.

²²⁶ *See supra* note 179 and accompanying text (discussing inconclusive evidence on the effects of gender roles on children's development).

parents.²²⁷ Research has also concluded that men are as capable as women of rearing children, and that children do not develop more positively or negatively under the sole custody of one as opposed to the other.²²⁸ Men should, therefore, more frequently be awarded joint custody of their children after divorce. Providing children greater contact with both parents and giving divorced fathers a greater opportunity to parent, thereby sharing the responsibilities and the rewards of parenthood, are innate benefits of the joint custody arrangement.

V. JOINT CUSTODY

Historically, child custody has been defined by society as only one parent having custody of the children.²²⁹ The increased divorce rate, however, has caused people to begin recognizing the inherent problems attributable to sole custody, and to develop a solution—joint custody.²³⁰ Just twenty years ago, this custody option was unavailable to divorcing couples.²³¹ However, joint custody has become increasingly prevalent throughout the country; all states, except South Carolina, presently acknowledge it as a viable option.²³²

A. Joint Custody Laws

A presumption for joint custody exists in a minority of

²²⁷ See Martha Minnow, *Whatever Happened to Children's Rights*, 80 MINN. L. REV. 267, 282 (1995) (stating children need care from both parents).

²²⁸ See WARSHAK, *supra* note 1, at 129-30.

²²⁹ See *id.* at 177.

²³⁰ See *id.* Some of the problems associated with sole custody include overwhelmed custodial parents who may adversely affect their children's well-being, angry non-custodial parents who distance themselves from their children, and depressed children who yearn for more meaningful relationships with the non-custodial parent. See *id.*

²³¹ See Melli & Brown, *supra* note 117, at 548. Courts were required to award custody to only one parent upon divorce. See *id.* Prior to 1975, North Carolina was the only state with a statute authorizing joint custody. See HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 135 (1988). North Carolina's law, however, mainly addressed abuse and neglect situations. See *id.*

²³² See Goldberg, *supra* note 8, at 49, 51; see also TENN. CODE ANN. § 36-6-101 (1996) (stating that courts may award joint custody and have great discretion in doing so); Kyle Romminger, *Divorce* 34 U. LOUISVILLE J. FAM. L. 262, 266 (1996) (acknowledging that courts are recognizing joint custody more frequently); see also WARSHAK, *supra* note 1, at 177 (noting that while it seems that joint custody is "sweeping the nation," the proportion of children living with their mothers after divorce is still nine out of ten).

states, and is established by statute, case law, or habitual use.²³³ This presumption exists for several reasons, but primarily, because states have declared, through public policy mandates, that children be afforded the opportunity to have meaningful contact with both parents.²³⁴ These states maintain that the joint custody presumption enables courts to make better custody arrangements for both parents and children.²³⁵ It forces decision-makers to first look at joint custody arrangements as a possibil-

²³³ See Goldberg, *supra* note 8, at 49, 50. These include: California, Connecticut, Florida, Idaho, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, Oklahoma, Tennessee, and Texas. See *id.* It should be noted that Goldberg's use of the term joint custody means either joint physical or legal custody, either jointly or severally. See also CAL. FAM. CODE § 3040 (West 1996) (mandating awards to both parents is first in order of preference for custody decisions); CAL. FAM. CODE § 3080 (stating that there is a presumption that joint custody is in best interest of child); CONN. GEN. STAT. § 46b-56a (1995 & Supp. 1997) (same); IDAHO CODE § 32-717B (1996) (same); IOWA CODE § 598.41 (1995) (dictating that a court denying joint custody must cite clear and convincing evidence why); LA. REV. STAT. ANN. § 9:335 (West 1996) (requiring courts to render joint custody resolutions unless good cause shown); MISS. CODE ANN. § 93-5-24 (1996) (placing joint custody, both physical and legal, as first preference); MO. ANN. STAT. § 452.375 (West 1996) (requiring court to first consider joint custody); MONT. CODE ANN. §§ 40-4-222 (1995) (stating public policy of Montana that children maintain relationships with both parents), 40-4-223 (joint custody is first on list of considerations); NEV. REV. STAT. §§ 125.480 (1995) (joint custody is first preference to be considered), 125.490 (stating that there is a presumption that joint custody is in the best interests of child); N.H. REV. STAT. ANN. § 458:17 (1995) (same); N.M. STAT. ANN. § 40-4-9.1 (Michie 1996) (same); OKLA. STAT. ANN. tit. 43, § 109 (West 1996) (parents may request joint custody and joint custody is in best interests of child); TENN. CODE ANN. § 36-6-101 (1996) (presumption that joint custody is in best interests of child); *Hamlet v. Hamlet*, 583 So. 2d 654, 656 (Fla. 1991) (granting joint custody); *In re Marriage of Dunkerson*, 485 N.W.2d 483, 486 (Iowa Ct. App. 1992) (finding joint legal custody should be awarded unless unreasonable); *In re Marriage of Bradley*, 899 P.2d 471, 475 (Kan. 1995) (finding joint custody is in best interests of child); *Matthews v. Matthews*, 633 So. 2d 342, 347 (La. Ct. App. 1993) (holding presumption of joint custody can only be rebutted by sufficient evidence); *Rosenfeld v. Rosenfeld*, 529 N.W.2d 724, 725 (Minn. Ct. App. 1995) (holding joint legal custody is presumed in best interests of child); *Morton v. Stockdale*, 888 S.W.2d 362, 368 (Mo. Ct. App. 1994) (awarding joint custody); *Meigs v. Meigs*, 920 P.2d 1077, 1078 (Okla. Ct. App. 1996) (permitting courts to award joint custody); *In re S.A.V.*, 837 S.W.2d 80, 88 (Tex. 1992) (affirming joint custody). But see *In re Marriage of Levensen*, 510 N.W.2d 892, 894 (Iowa Ct. App. 1993) (disfavoring shared physical custody, except in unusual circumstances); *Hankins v. Hankins*, 920 S.W.2d 182, 186-87 (Mo. Ct. App. 1996) (finding option of joint custody, not presumption); *Woodall v. Woodall*, 471 S.E.2d 154, 158 (S.C. 1996) (stating presumption of joint custody is harmful).

²³⁴ See Ponnambalam, *supra* note 106, at 33 (finding children benefit from nurturing of both parents and New York's public policy favors maintaining contact with both parents); Van Deusen, *supra* note 44, at 421 (stating California public policy favors contact with both parents).

²³⁵ See Ponnambalam, *supra* note 106, at 33.

ity, before examining whether there are grounds for denying joint custody.²³⁶ The presumption assumes that joint custody is in the best interests of the children.²³⁷ However, recognizing the fact that every family situation is unique, all joint custody arrangements will not be identical, and the joint custody presumption does not pigeon hole all divorced families.²³⁸ The presumption of joint custody is also beneficial in encouraging the courts and the public to recognize the importance of both parents in children's lives.²³⁹

There are critics of the joint custody presumption, however, who argue that it continues to place fathers at a disadvantage. Such critics assert that the animosity between the parents does not cease upon completion of the divorce, and that these feelings are perpetuated by the joint custody arrangement, creating even further hardships for the children.²⁴⁰ These critics assert that if a father believes that seeking joint custody of his children will require continued contact with his ex-spouse, he will be less inclined to pursue this form of custody.²⁴¹ Furthermore, some argue that requiring parents to participate in joint custody arrangements will only serve to aggravate existing disputes and difficulties, which may have led the parents to divorce in the

²³⁶ See CAL. FAM. CODE §§ 3040 (West 1996); MISS. CODE ANN. § 93-5-24 (1996); MO. ANN. STAT. § 452.375 (West 1996); NEV. REV. STAT. §§ 125.480 (1995).

²³⁷ See *supra* note 233 and accompanying text (presenting various state laws finding joint custody to be in best interests of child).

²³⁸ See WARSHAK, *supra* note 1, at 202. All parents and families function differently and will continue to do so after a joint custody arrangement is awarded. See *id.* In fact, joint custody may allow for greater diversity than a sole custody arrangement, because the children's activities, which each parent has freedom to permit, can vary greatly depending upon which parent they are with at a given time. See *id.*

²³⁹ See *id.* at 201. Cultural expectations dictate the way in which individuals think and act. See *id.* The cultural presumption that sole maternal custody is the best solution to custody disputes has led to nearly ninety percent of all custody battles ending with the mother retaining sole physical custody of her children. See *id.* Society frowns upon women who relinquish custody of their children, due to the presumption that their rightful place is with their children. See *id.* A joint custody presumption might change what society views as the norm in child custody, and could give fathers a better chance of maintaining contact with their children after divorce. See *id.*

²⁴⁰ See Goldberg, *supra* note 8, at 49.

²⁴¹ See WARSHAK, *supra* note 1, at 202. This could be viewed as a benefit of a joint custody presumption, however, because painful custody litigation may decrease, thus preventing unnecessary exposure of parents and children to further psychological harm. See *id.* at 202-03.

first place.²⁴² This is particularly true where the parents originally sought sole custody.²⁴³

Nevertheless, judges are typically capable of determining whether joint custody is appropriate in a particular circumstance. Even in jurisdictions with a joint custody presumption, courts normally have discretion to deny joint custody, if necessary.²⁴⁴ Courts may consider the parents' animosity or reluctance as factors in their decision-making process.²⁴⁵ Furthermore, even if a statute provides for joint custody, courts may refuse such an award if it is not in the children's best interests.²⁴⁶

B. Considerations for Awarding Joint Custody

Although increasing in frequency, joint custody is still not the norm in custody awards.²⁴⁷ Courts award joint custody for virtually the same reasons as for creating a presumption of joint custody—namely that children need to maintain contact with both parents as part of their healthy development.²⁴⁸ Courts have enumerated various factors that they consider important in deciding whether to grant joint custody, the most important being the children's best interests.²⁴⁹ Another important factor is the ability of the parents to cooperate and act amiably toward

²⁴² See Goldberg, *supra* note 8, at 51 (questioning whether a presumption of joint custody "motivate[s] parents to mend their fences more quickly, or . . . aggravate[s] the conflict by throwing them together when they would rather be apart").

²⁴³ See *id.*

²⁴⁴ See, e.g., *Darnall v. Darnall*, 657 So.2d 387, 389 (La. Ct App. 1995) (rejecting the statutory presumption as not in the child's best interest); *Bergeron v. Bergeron*, 492 So. 2d 1193 (La. 1986) (finding that joint custody would be deleterious to the child).

²⁴⁵ See *infra* notes 278-79 and accompanying text (discussing parental conflict).

²⁴⁶ See *Darnall*, 657 So.2d at 389 (refusing to grant joint custody because it would create greater tension in the child's life).

²⁴⁷ See WARSHAK, *supra* note 1, at 177. Though joint custody awards are increasing in number, mothers still retain physical custody in nine out of ten cases, as a result of the bifurcated meaning of the term "joint custody." Typically, joint legal custody is awarded, not joint physical custody, and women receive physical custody more frequently. See *id.* at 177-78; Melli & Brown, *supra* note 117, at 551 (discussing statistics concerning joint physical and legal custody); *supra* note 75 and accompanying text (citing that statistically women receive joint and legal custody with more success than men).

²⁴⁸ See Van Deusen, *supra* note 44, at 424 (stating parents should share the rights and responsibilities of child-rearing after divorce or separation). For more in-depth analysis of the reasons why men are needed in children's lives and for their development, see WARSHAK, *supra* note 1, at 55-71 and *supra* notes 180-184 and accompanying text (discussing benefits fathers have in children's lives).

²⁴⁹ See Goldberg, *supra* note 8, at 51.

one another.²⁵⁰

It is imperative that children's parents are able to cooperate in a joint custody arrangement because they will have more contact with each other than under sole custody. Without this cooperation, a joint custody arrangement will not be in the children's best interests.²⁵¹ Existing problems may be overcome, however, through agreements minimizing the parents' contact with one another.²⁵² Since the children benefit tremendously in joint custody situations, some parents may try to put aside their own grievances and differences for their children's sakes. Some experts advocate that when both parents "bonded with their children" before a divorce, and formed relationships that they wished to maintain after a divorce, they will be less likely to be willing to settle for one day a week visits.²⁵³ To continue these parent-child relationships, the ex-spouses may be willing to maintain a more amiable relationship with each other.²⁵⁴ Experts also suggest that children understand their parents' efforts and desires to have contact with them, causing the children to feel secure in their relationships with both parents.²⁵⁵ For joint custody to be successful, parents must agree that they will communicate with one another regarding their children's best inter-

²⁵⁰ See *Figler v. Figler*, No. FA-950374849S, 1996 WL 636479, at *2, *6 (Conn. Super. Ct. Aug. 2, 1996) (awarding mother sole custody as parties were uncooperative); *Wellman v. Wellman*, 512 N.W.2d 68, 72 (Mich. Ct. App. 1994) (noting ample evidence existed to reject joint custody); *Rosenfeld v. Rosenfeld*, 529 N.W.2d 724, 726 (Minn. Ct. App. 1995) (holding joint custody should only be granted when parents can cooperate with one another); *Leone v. Leone*, 917 S.W.2d 608, 614 (Mo. Ct. App. 1996) (stating an important factor to consider is parties' ability to cooperate and function as a parental unit); *Alt v. Alt*, 896 S.W.2d 519, 521 (Mo. Ct. App. 1995) (finding communication problems not severe enough to deny joint custody); *Burkhart v. Burkhardt*, 876 S.W.2d 675, 680 (Mo. Ct. App. 1994) (stating that where record is lacking any evidence that parties have commonality of ideas about child-rearing, joint custody is inappropriate); *Gurney v. Gurney*, 899 P.2d 52, 55-56 (Wyo. 1995) (reversing joint custody order due to parents' inability to cooperate).

²⁵¹ See WARSHAK, *supra* note 1, at 192-93. Often, the parents' relationship may improve as a result of the joint custody arrangement. See *id.*

²⁵² For example, the father may have custody for one month and the mother for another. The parents may agree to simply drop the children off at the other parent's house. See *id.* (discussing parental conflict).

²⁵³ See Rozanne Friedman, *Joint Physical Custody Really Can Work*, 73 MICH. B.J. 650, 650 (1994) (stating that joint custody has had a positive effect on children because they can recognize and feel the warmth of both parents).

²⁵⁴ See *id.* (concluding that such parental relationships are in the best interests of children).

²⁵⁵ See *id.* (discussing various ways parents could establish channels of communication).

ests and welfare.²⁵⁶

In addition, courts examine various logistical factors when deciding whether to award joint custody. For example, sometimes joint custody is difficult during the school year if the parents live far away from each other.²⁵⁷ In such situations, the children may not be able to attend the same school during the year which may cause academic difficulties, thus, warranting a denial of joint custody.²⁵⁸ However, this situation could be resolved by creating a custody arrangement under which the children reside with one parent during the school year, and with the other during vacations.

Relocation of the parents, or a custodial parent's desire to move or change residences, is another factor courts consider.²⁵⁹ Most states require that parents in sole custody arrangements who wish to change the residences of the children must obtain either the consent of the non-custodial parent or judicial permission.²⁶⁰ Parents must then demonstrate, among other things,

²⁵⁶ See *id.* Some believe that attorneys should instruct and advise clients on the manner in which they communicate with their ex-spouses, and its importance if they desire joint custody. See *id.* Other experts believe that joint custody is inappropriate unless the parents request it, due to the need for "voluntary and mutual cooperation" by both to ensure success. See *id.*; Sam Margulies, *Sole, Joint (and Less) Custody*, 13 NO. 12 Fair\$hare 16 (1993) (asserting that courts can, and many times do, amend and approve joint custody agreements that have already been decided upon between parents).

²⁵⁷ See TERKEL, *supra* note 14, at 21-22. One such instance is where the parents reside in different states. In such situations, parents may decide that there can still be a joint custody arrangement, but one parent would have the children during the school year and the other during the summer and vacations, or some similar variation. See *id.* Regardless, if they have joint legal custody they are still both making decisions regarding the children's welfare, no matter where they live. See *id.*

²⁵⁸ See *id.* at 21. In rare cases, the courts will grant a joint custody arrangement anyway and the children may attend two different schools, or commute to one, or the other. See *id.*; see also WARSHAK, *supra* note 1, at 203-04 (commenting on the failure of joint custody when the parents live far apart). A parent's work schedule may also pose a problem, preventing them from participating in a joint custody arrangement. See *id.* at 202. If a particular state had a presumption favoring joint custody, couples and families with such logistical problems would be considered departures from the norm, and a judge would decide that joint custody was not beneficial for the parties involved, especially the children. See *id.*

²⁵⁹ See *In re Marriage of Burgess*, 913 P.2d 473, 476 (Cal. 1996) (discussing relocation of custodial parents in sole custody arrangements); *Cook v. Cook*, 898 P.2d 702, 705 (Nev. 1995) (same); *Stout v. Stout*, 560 N.W.2d 903, 904 (N.D. 1997) (same).

²⁶⁰ See *Cook*, 898 P.2d at 705; *Stout*, 560 N.W.2d at 904; Merrill Sobie, *Whatever Happened to the "Best Interests" Analysis in New York Relocation Cases? A Response*, 15 PACE L. REV. 685, 685-86 (1995) (discussing requirements for relocation of custodial parent and children).

that the relocation is in the children's best interest.²⁶¹ Several states also require that these steps be followed when a joint custodial parent seeks to relocate.²⁶² If a change in location is granted, there may be a need for a joint custody modification, but hopefully, it will be limited to when and how often the children will switch homes. Under these circumstances, it may be that more extended stays with each parent, or custody splits based on the school year, would be appropriate.²⁶³

Sometimes, the children cannot adjust and have difficulty alternating residences on a regular basis, as provided by the joint custody arrangement.²⁶⁴ This may present cause for a judge

²⁶¹ See *Cook*, 898 P.2d at 705 (discussing best interests of child and relocation); *Stout*, 560 N.W.2d at 904; *Sobie*, *supra* note 260, at 687-88 (addressing relocation and best interests of child). But see *In re Burgess*, 913 P.2d at 482-83 (holding parent seeking to relocate bears no burden of establishing that it is necessary to do so). The court in *Cook* set forth various factors that courts should examine when determining whether a parent should be permitted to relocate. Some of these include:

(1) the extent to which the move is likely to improve the quality of life for both the children and the custodial parent; (2) whether the custodial parent's motives are honorable, and not designed to frustrate or defeat the noncustodial parent's visitation rights; (3) whether, if permission to remove is granted, the custodial parent will comply with revised visitation orders issued by the court; (4) whether the noncustodial parent's motives are honorable in resisting permission to remove, or to what extent, if any, the opposition is intended to secure a financial advantage regarding ongoing support obligations or otherwise; and (5) whether removal will provide realistic opportunities for the noncustodial parent to have visitation rights that will adequately foster and preserve the noncustodial parent's relationship with the children.

Cook, 898 P.2d at 705 (citing *Schwartz v. Schwartz*, 812 P.2d 1268, 1271 (Nev. 1991)).

²⁶² See, e.g., NEV. REV. STAT. ANN. § 125A.350 (1997). The Nevada statute states, in pertinent part:

If custody has been established and the custodial parent or a parent having joint custody intends to move his residence to a place outside of [the] state and to take the child with him, he must, as soon as possible and before the planned move, attempt to obtain written consent of the other parent to move the child from the state. If the noncustodial parent or other parent having joint custody refuses to give that consent, the parent planning the move shall, before he leaves the state with the child, petition the court for permission to move the child.

Id.

²⁶³ See *WARSHAK*, *supra* note 1, at 192-96. Courts are also beginning to grapple with the issue of whether these requirements infringe upon the custodial parent's right to travel. See generally Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1 (1995-96) (discussing the constitutional implications of a custodial parent's decision to relocate to another state).

²⁶⁴ See *WARSHAK*, *supra* note 1, at 194-95.

to adjust the custody arrangement, but hopefully, only by modifying the joint custody, rather than merely awarding one parent sole custody. Of course, a judge can and should use discretion in examining the totality of the circumstances to determine whether a joint custody arrangement is appropriate.

VI. CRITICAL ANALYSIS OF JOINT CUSTODY

A. Benefits and Detriments of Joint Custody: Generally

Presently, a heated debate regarding the best type of custody arrangement exists.²⁶⁵ As with any debate, there are positives and negatives on both sides. One of the benefits of joint legal custody is that each parent has the opportunity to be involved in a meaningful manner in their children's lives and welfare.²⁶⁶ Non-custodial parents receive more rights and authority under a joint legal custody regime, which causes them to feel more worthwhile in their children's lives.²⁶⁷ Joint legal custody may also alleviate the frustration a non-custodial parent experiences when he or she is denied the ability to parent a denial which is often unwarranted because, as has been shown, both parents play a significant role in their children's lives and healthy development.²⁶⁸ Furthermore, children reap the benefits of having two people overseeing their best interests, typically leading to better results.²⁶⁹ Finally, both parents will likely be more committed to their children, emotionally and financially.²⁷⁰

As mentioned above, however, some argue that joint legal custody permits parents to continue arguing, which negatively impacts the children who are subjected to, and often the subject of, those arguments.²⁷¹ Still others contend, joint custody affords an unreasonable parent too much authority, and the opportunity

²⁶⁵ See *id.* at 177-205 (examining the advantages and disadvantages of joint custody arrangements from different perspectives).

²⁶⁶ See TERKEL, *supra* note 14, at 23; WARSHAK, *supra* note 1, at 178 (discussing different custody arrangements).

²⁶⁷ See TERKEL, *supra* note 14, at 23.

²⁶⁸ See *id.* at 22.

²⁶⁹ See WARSHAK, *supra* note 1, at 196-98.

²⁷⁰ See Kearney, *supra* note 41, at 555-56.

²⁷¹ See TERKEL, *supra* note 14, at 23; Goldberg, *supra* note 8, at 51. These children feel guilty and hurt by their parents' actions and words and this may add difficulties to an already trying situation. See WARSHAK, *supra* note 1, at 202-03. Children may also feel as if they are stuck between their parents and their problems. See Kearney, *supra* note 41, at 556.

to regulate the children and the other parent.²⁷²

Joint physical custody can raise these same issues, as well as additional problems, unique to physical custody.²⁷³ However, joint physical custody can be more beneficial than joint legal custody, particularly for the parent who would be the non-custodial parent if the alternative was sole custody.²⁷⁴ In joint physical custody, both parents have custody and feel as significant in the children's lives as the other because there is presumably no grave disparity between them regarding their authority.²⁷⁵ Also, parents can evenly share the parental rights and more significantly, the responsibilities.²⁷⁶ Therefore, such arrangements afford parents the opportunity to avoid the frustration and stress caused when one parent is overwhelmed performing the job formerly done by two.²⁷⁷

The problem of parental conflict remains and could be accentuated by joint physical custody, especially if the parents have frequent contact with one another.²⁷⁸ Nevertheless, with joint custody, neither party has an upper-hand, unlike sole custody arrangements, where the non-custodial parent is often forced to be deferential to the custodial parent, possibly in an attempt to minimize antagonism.²⁷⁹

²⁷² See TERKEL, *supra* note 14, at 23 (discussing some of the difficulties that may arise with joint legal custody).

²⁷³ See *supra* notes 117-19 and accompanying text (discussing logistical difficulties of physical custody).

²⁷⁴ See TERKEL, *supra* note 14, at 22.

²⁷⁵ See *id.*

²⁷⁶ See Kearney, *supra* note 41, at 560. Parents demand equal power to make decisions regarding the manner in which their children are raised, as well as the opportunity to see their children. See *id.*

²⁷⁷ See WARSHAK, *supra* note 1, at 95 (noting that such significant amounts of work can be oppressive for a parent starting a new single life, trying to balance a job, housework, and child care all alone).

²⁷⁸ See Carol S. Bruch and Janet M. Bowermasker, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM L. Q. 245, 262-63 n. 58 (1996) (citing FRANK F. FURTENBERG, JR. & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 107-08 (1991)); Holly L. Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27, 33 (1985) ("One argument is that joint custody increases the potential for parental conflict by requiring continued interaction between persons who have divorced.").

²⁷⁹ See WARSHAK, *supra* note 1, at 203-04. A structured and precise joint custody agreement could reduce the necessity for parents to communicate and negotiate on a regular basis, resulting in autonomy for each parent when the children are at that parent's home. See *id.* at 203-05. Dr. Warshak opines that joint custody is so beneficial that parents should work hard to overcome the difficulties that may exist. See *id.* at 203-05. He cites a study in which only one percent of those parents engaged in

As previously suggested, alternating homes on a frequent basis may also be difficult for children, suggesting that the arrangement should provide that they spend extended periods with each parent, rather than short alternating periods.²⁸⁰ If the children's distress is extreme, joint physical custody may be inappropriate.²⁸¹

Although there are difficulties associated with joint physical custody, especially the parents' relationship, its overwhelming benefits should be able to surmount these difficulties and make the arrangement work.²⁸² When a couple seeks a divorce, it is from one another, not their children. The law should recognize that both parents need to maintain contact with their children. Ideally, laws should encourage maximum fulfillment of a parent's responsibilities to their children and themselves. Implementing a joint custody regime as the norm in custody disputes may decrease the problems associated with fatherless children, who are prone to lead more dangerous lives.²⁸³ Implementing a joint custody approach may also encourage recognition that parental obligations do not end with divorce.

B. The Impact of Joint Custody Effects: Men, Women, and Children

Fathers increasingly favor joint custody, and some fathers' groups are working to increase recognition of joint custody across the United States to enhance paternal custody options and thus improve contact with their children.²⁸⁴ Joint custody arrangements allow men to spend more time with their children, decreasing the likelihood that shallow father-child relationships,

joint custody arrangements "dropped out of their children's lives" as compared to almost eighteen percent of parents who stopped seeing their children in sole custody arrangements. *Id.* at 203. Children of divorce need a great deal of encouragement and reassurance about their parents' love for them; ensuring that they maintain meaningful contact with both parents is one way to reinforce these feelings. *See id.*

²⁸⁰ *See id.* at 193-94 (discussing problems children have with alternating homes).

²⁸¹ *See* TERKEL, *supra* note 14, at 21-22 (depicting various difficult situations for children in a joint custody arrangement). Such children may experience confusion about their daily schedules and may leave belongings with one parent that they need when staying with the other. *See id.*

²⁸² *See* WARSHAK, *supra* note 1, at 201 (noting that social pressures significantly impact on parental decisions in such matters).

²⁸³ *See* Goldberg, *supra* note 8, at 49 (discussing the problems of fatherless children).

²⁸⁴ *See id.* at 51.

common to sole maternal custody awards will develop.²⁸⁵ Systematic contact permits fathers to be more involved in their children's overall life and growth.²⁸⁶ Fathers can continue to share routine activities, instead of being relegated to being a "Disneyland Daddy."²⁸⁷ Fathers' presence during their children's negative experiences helps to strengthen their relationship.²⁸⁸ Joint custody fathers also feel less loss, guilt, and loneliness than non-custodial fathers.²⁸⁹ Most fathers in these arrangements relish their ability to drive their children to various after-school activities, and to make decisions regarding their children's education, religion, and health issues.²⁹⁰

Of course, it is important to remember that joint custodial fathers normally possess more obligations than non-custodial fathers. Not all men (or women) are capable of performing, or willing to accept, these child-rearing obligations; however, those who are capable can become accustomed to the role.²⁹¹ Fathers who share in their children's custody may experience financial setbacks due to the cost of rearing the children, and may be forced to pass-up career advancement opportunities.²⁹² Similarly,

²⁸⁵ See WARSHAK, *supra* note 1, at 180 (stating that it is impossible to fit two weeks worth of someone's life into a two-day visit). Fathers are less likely to have quality conversations with their children if they are only together a few hours a week or month. *See id.*

²⁸⁶ See WARSHAK, *supra* note 1, at 180 ("A father with custody can tell you the difference between his son's mood on a school morning and a Saturday morning.")

²⁸⁷ *See id.*; Goldberg *supra* note 8, at 48 (discussing "Disneyland Daddys" and fathers' need to be social coordinators for children when they visit them for short durations in sole custody arrangements).

²⁸⁸ See WARSHAK, *supra* note 1, at 180. Fathers have stated that having a normal relationship with their children is impossible if they remain insulated from everyday obligations. *See id.* Fathers and children need to experience negative interactions as "a necessary part of any real relationship." *Id.*

²⁸⁹ *See id.* at 180-81 ("The little pleasures of friendship and affection with a child pop up at any time . . .").

²⁹⁰ *See id.* at 181. Fathers enjoy helping their children during times of despair, in addition to celebrating with them when they achieve their goals. *See id.* Dr. Warshak suggests that fathers engaged in joint custody will admit that the work they put forth is worth the rewards received. *See id.*

²⁹¹ *See id.* Fathers granted joint custody assume not only the benefits, but also the hindrances and duties of rearing their children. *See id.* ("[T]he rewards of child-rearing are often overshadowed by the daily hassles and conflicts.")

²⁹² *See id.* Fathers with shared custody may also be required to take-off from work more often, and arrange for child care when the children are home from school. *See id.* Fathers may need time and room to adjust to these lifestyle changes. *See id.* Most fathers undertaking the responsibilities of joint custody, learn to perform as effective parents by responding to their children's needs. *See id.*

joint custody fathers typically must rearrange their schedules to coincide with their children's.²⁹³ Despite these obstacles, fathers who choose to accept the challenge generally tend to be happy with their decision.²⁹⁴

Some women's groups favor the use of the primary caretaker doctrine and awards of sole custody over joint custody awards. Under the primary caretaker standard, women generally receive sole custody of the children.²⁹⁵ These women value their custody stronghold, and therefore disfavor joint custody arrangements.²⁹⁶ Women in shared custody arrangements relinquish some of the power and control they would have possessed under sole custody arrangements.²⁹⁷ Unfortunately, the frightening possibility of losing this power has led some women to refuse joint custody, or to make its operation impossible in cases where the court has granted it.²⁹⁸ This defeats the purpose of joint custody, i.e., it

Generally, joint custody costs more financially than sole custody. *See* Melli & Brown, *supra* note 117, at 554. This is primarily because joint custody requires double ownership of household items. *See id.* A father may experience greater financial hardship in a joint custody arrangement than if he was merely paying fixed child support in a sole custody arrangement. *See id.* at 554-56. This is because the joint custody father is responsible for the everyday expenses of his children when they are with him. *See id.* For a more in-depth discussion of the relationship between finances and joint custody, *see id.* at 553-71.

²⁹³ *See* WARSHAK, *supra* note 1, at 181-82.

²⁹⁴ *See id.* For the most part, fathers believe that the benefits of joint custody "far outweigh the drawbacks," offering greater happiness and satisfaction in their lives, and a sense that their children are benefiting as well. *Id.*

²⁹⁵ *See* Goldberg, *supra* note 8, at 48.

²⁹⁶ *See id.*; Abraham, *supra* note 6, at 50. These beliefs held by women's groups are quite contradictory to their overall platforms because they tend to perpetuate the very stereotypes that women have been fighting against for years—that women are the "nurturers" and men the "breadwinners." *See id.* at 48, 51. Although joint custody provides women with more freedom to pursue a career by allowing them to split the responsibility of raising their children with the children's father, women's groups generally oppose joint custody arrangements. *See id.* at 51. The groups took this stance to confront existing societal discrimination. *See id.* Specifically, the idea that women are superior at child rearing tends to provide women with an edge over men that is absent elsewhere in our society. *See id.* Additionally, women who decline custody frequently suffer a backlash for relinquishing their children. *See* WARSHAK, *supra* note 1, at 106-124. *But see* Levy, *supra* note 64, at 5 (considering that the woman's movement has led men to assume a greater role in child-rearing, as more women enter the workplace).

²⁹⁷ *See* WARSHAK, *supra* note 1, at 185. In sole custody arrangements, mothers are free to unilaterally decide about their children's education, religion, and medical treatment, in addition to overseeing the children's daily activities. *See id.* However, "[e]ven the mother who retains legal custody and shares only physical custody gives up authority over her children during the times they are not in her possession." *Id.*

²⁹⁸ *See id.*

could cause the father-child relationship to suffer irrevocably.²⁹⁹

Mothers who do not work outside the home feel the need to preserve their full time jobs as mothers, and sharing custody may cause them to experience a sense of loss during the time the children are with their father.³⁰⁰ Some women disfavor joint custody because the practical requirement that the father live nearby will limit their choice of residency.³⁰¹ In other cases, women may fight joint custody simply to punish their ex-spouse,³⁰² an unfortunate occurrence that may harm the children more than the ex-husband.

Nevertheless, women generally accept the idea of joint legal custody. Unlike a sole custodial parent arrangement, it offers relief from the overwhelming burdens associated with raising a child alone.³⁰³ Joint custody affords women greater opportunities to pursue goals outside the realm of wife, homemaker, and mother, which may include attending college or pursuing different career paths.³⁰⁴ As a result, the woman's job qualifications and financial position may improve.³⁰⁵ Raising children is physically and emotionally demanding, and the stress-level can escalate when the duties are performed alone. Women with joint custody often flourish during the time that their children are

²⁹⁹ See *id.* at 185-86. Some women simply want to ensure that the father acts subject to her discretion. See *id.*

³⁰⁰ See *id.* at 186. These mothers may feel that they have already lost their "status as wives[s]" and if forced to share their children, even for only a short time, they may lose their sense of place in society. *Id.* To overcome these barriers, it is suggested that women find other sources of fulfillment while caring for their children's well-being. See *id.*

³⁰¹ See *id.* at 187-88. Generally, for joint physical custody arrangements to succeed the parents need to live near each other. See *id.* at 204. In some circumstances, this may be a selfish attempt to retain sole custody, in other instances it may be a genuine fear that the father will hurt or kidnap the children. See *id.* at 188.

³⁰² See *id.* (noting this may occur in cases where the woman feels abandoned by her husband and consequently seeks revenge).

³⁰³ See *id.* at 183 (describing the child-rearing responsibilities that women in sole custody situations undertake).

³⁰⁴ See *id.* at 182, 184. Describing the benefits of joint custody, one mother was described as commenting, "I'm a better mother because I'm not a mother all the time." *Id.* at 184. Joint custody ensures that mothers will have assistance in rearing their children and that the children will have a more involved father. See *id.* Mothers may also have greater opportunities to develop social relationships with men. See *id.*

³⁰⁵ See Melli & Brown, *supra* note 117, at 554-55. Similar to the financial strains of shared custody on men, there may be increased expenses placed on women. Ordinarily, women who do not have sole custody of the children are not required to be financially responsible for the children's daily expenses. See *id.*

with their fathers, providing them with a needed break and a chance to regroup.³⁰⁶ In addition, women sharing custody acquire the benefit of another person's opinion when making child-rearing decisions.³⁰⁷ Joint custody increases the probability that women will receive assistance in the raising of their children, as well as a right to expect responsibility from the children's father.³⁰⁸

Finally, the effects that joint custody has on children warrants consideration. Research demonstrates that children in joint custody situations have greater self-esteem than those in sole-custody.³⁰⁹ Not only do these children experience fewer doubts about their father's lack of involvement, but they also feel less guilt for the divorce than children in sole custody arrangements.³¹⁰ Children in joint custody also feel less apprehensive about their parents' divorce, and they are typically more satisfied with their living arrangements than sole-custody children.³¹¹ Joint custody parents tend to be more amiable toward each other, creating a better atmosphere for the children.³¹²

Joint custody also permits children greater contact with both parents. Under joint physical custody, the bonds between parents and their children strengthen because the children actually live with both parents for some period of time.³¹³ Children rec-

³⁰⁶ See WARSHAK, *supra* note 1, at 183-84.

³⁰⁷ See *id.* at 184 ("Parents with joint legal custody continue to make . . . decisions together."). The mother is no longer solely responsible for the physical and emotional care of her children. See *id.* at 183-84.

³⁰⁸ See *id.* at 184; Abraham, *supra* note 6, at 50 (describing the results of a study that found that father's with shared custody proved to be significantly more reliable in meeting their child support obligations).

³⁰⁹ See WARSHAK, *supra* note 1, at 196-98 (accepting the findings of one study finding children's self-esteem higher in joint custody situations than in sole custody arrangements); Friedman, *supra* note 253, at 652 (considering the rewards for children's well-being from joint custody, in spite of the sacrifices parents must make to fulfill the arrangement).

³¹⁰ See WARSHAK, *supra* note 1, at 196-97. When a father fails to visit his children in a sole custody situation, many children believe their actions warded him off. See *id.* at 197.

³¹¹ See *id.* ("Joint custody boys, in particular, had fewer negative experiences to report about the divorce and its aftermath than did mother-custody boys.").

³¹² See *id.* (noting that children in joint custody were more satisfied with their living arrangements and that joint custody enables them to develop a close relationship with both parents). Additionally, "[j]oint custody children experience[] more cooperation between their parents, less violence, more contact with both parents, and more geographical stability." *Id.* at 198.

³¹³ See *id.* at 199.

ognize that they can ask either parent for advice and regularly share good news with both.³¹⁴ In some ways, the children's development will be unaltered, because there are two parents involved in their lives, as there was before the divorce.³¹⁵

Yet, some suggest that joint custody can create several problems for children. For example, some critics believe that joint custody will increase the hostilities between the parents, leaving the children in the middle of their parents' struggles for control and power.³¹⁶ Another criticism is that joint custody actually confuses the children and "undermines their sense of security and stability."³¹⁷ Those who advocate joint custody, however, argue that sole custody is more responsible for increasing children's senses of inconsistency by "disrupt[ing] the relationship between [the] child and noncustodial parent."³¹⁸ Joint custody arrangements are not the answer in all circumstances, but they presumably are for most families.

C. Suggestion That Joint Custody is the Best Option for All Those Involved

The benefits of a presumption for joint custody warrant that it should exist in all states. The presumption in favor of joint custody should be both cultural and legal, but in effect, the one creates the other. This was the case with the tender years doc-

³¹⁴ See *id.* at 196-98; see also Kearney, *supra* note 41, at 556 (noting that the trauma of divorce faced by the child is reduced by joint custody because the child may develop valuable relationships with both parents).

³¹⁵ See WARSHAK, *supra* note 1, at 196-98. Since joint legal custody permits children to have profound contact with both their parents, it provides children with greater affection and support. See Kearney, *supra* note 41, at 555-56.

³¹⁶ See WARSHAK, *supra* note 1, at 191; Goldberg, *supra* note 8, at 51. There are those, however, who contend that joint custody actually results in less hostility between the parents because they are sharing their rights and responsibilities somewhat equally. See WARSHAK, *supra* note 1, at 191-92.

³¹⁷ WARSHAK, *supra* note 1, at 193. Unfortunately, many judges and lawyers espouse this view, either discouraging joint custody or denying it altogether. See Abraham, *supra* note 6, at 50 (stating that many men who would prefer joint custody arrangements are dissuaded from pursuing them based on their attorney's advice).

Of course, some children would have a difficult time adjusting to the changes in environment, but these children have been found to be in the minority, and their reasons for anxiety and confusion may result from factors other than their custody arrangement. See WARSHAK, *supra* note 1, at 194-95. It is important to remember that all children are unique and handle situations differently. See *id.*

³¹⁸ WARSHAK, *supra* note 1, at 193. These people suggest that the consistence of the relationship, not the environment, is more crucial for children. See *id.*

trine. A legal presumption helped perpetuate the belief in American society that the mother was the nurturer and thus the proper caretaker of her children, and the father was the one who worked and earned money to support his family.³¹⁹ That legal presumption began, however, with the cultural belief that mothers belonged at home with the children and fathers at work.³²⁰ The legal presumption fostered these long-held beliefs, and in essence perpetuated them.³²¹

A presumption of joint custody could help society recognize, culturally and legally, that children need both parents present in their lives, and that such an arrangement is the natural result of a divorce.³²² That there is a strong presumption in favor of maternal custody today, and that such arrangements are considered the norm, is evidenced by the overwhelming number of sole maternal-custody homes in America.³²³ A legal presumption in favor of joint custody, however, would begin to correct this problem, making shared custody the appropriate post-divorce arrangement.³²⁴ Instituting such a legal presumption could lead to a cultural belief that parents should continue in their co-parenting roles after divorce.³²⁵ A joint custody presumption would not require all divorced parents to share custody, but would help joint custody to emerge as the predominant choice for custody arrangements, and eliminate society's suspicions about joint custody.³²⁶ Parents would still have the choice not to participate in a joint custody arrangement, but they would also have the opportunity to do so, without having to overcome burdensome hurdles.³²⁷

³¹⁹ See *supra* notes 57-58 and accompanying text (discussing legal presumption in favor of maternal custody).

³²⁰ See *supra* notes 48-49 and accompanying text (discussing tender years doctrine and its stereotypical ideals).

³²¹ See *supra* note 62 and accompanying text (discussing the current legal use of tender years doctrine).

³²² See WARSHAK, *supra* note 1, at 201.

³²³ See *id.* (noting that ninety percent of divorced families adhere to this presumption, resulting in mother-custody homes).

³²⁴ See *id.* at 201-02. "People who now censure the divorced mother who 'gives up her children' would instead criticize the mother who deprives her children of a meaningful relationship with their father . . ." *Id.* at 202.

³²⁵ See *id.* at 201.

³²⁶ See *id.* at 202 (noting that a presumption of joint custody could very well remove the issue of custody from the arsenal of divorce warfare).

³²⁷ See *id.* Families would also have the opportunity to arrange their agreements in the manner they see fit, and, of course, run their households as they wanted. See

Parents' and children's ability to maintain meaningful relationships that develop in a mutually-beneficial manner is extremely important.³²⁸ Logistical problems may cause difficulties, but these can, and should, be overcome to preserve these vital relationships.

Under a joint custody regime, children are not forced to choose between one of their parents, because they have the opportunity to maintain substantial contact with both.³²⁹ Furthermore, with joint custody presumed to be in the best interest of the children, judges would have fewer opportunities to inject their own biases, through application of the best interests or primary caretaker standards.

Moreover, joint custody may benefit society as well. Children who have more contact with their fathers tend to develop more favorably and are typically better able to contribute to society.³³⁰ Research indicates that there is a correlation between this lack of contact and increased rates of "teen suicide, substance abuse, crime, runaways," and other afflictions.³³¹ This would suggest that children under joint custody, whose fathers would be more present in their lives, would be less susceptible to these problems.

Additionally, research suggests that when they maintain contacts and involvement with their children, parents are more willing to assume financial responsibility for them.³³² Joint cus-

id. Joint custody would simply permit children to be raised jointly by both parents, but in different households. *See id.*

³²⁸ *See id.* at 134 (discussing factors that cushion the experience of divorce for children). Fathers are generally more involved in their children's lives and feel a greater sense of self-worth as a result of joint custody arrangements. *See id.* at 180-82. Mothers typically experience less stress and have broader opportunities than they would in sole custody arrangements. *See id.* at 183-84. The women's movement enabled women to pursue higher goals for themselves, and joint custody provides more freedom for them to continue doing so. *See id.*

³²⁹ *See* Friedman, *supra* note 253, at 652. Asking a child to decide which parent to live with creates an impossible situation for the child. *See id.*

³³⁰ *See generally* ROSS D. PARKE, FATHERS, 89-91 (1981) (exploring the importance of continuing paternal contact for the development of a child).

³³¹ Goldberg, *supra* note 8, at 49.

³³² *See* Abraham, *supra* note 6, at 50-51. *See generally* Melli & Brown, *supra* note 117, at 549-50 (discussing the economic reality of joint custody arrangements). Failure to pay child support is the most frequently committed crime in this country today. *See* CHAMBERS, *supra* note 2, at 17. In 1987 child support defaults exceeded \$4.6 billion, and the total amount of child support due was \$14.6 billion. *See id.* at 18. There presently exist both civil and criminal remedies for those who do not receive child support payments. *See* JOSEPH I. LIEBERMAN, CHILD SUPPORT IN

tody increases the likelihood of parents maintaining such contacts, and would presumably reduce the incidents of child support delinquencies. Others suggest that joint custody, by removing the burdens and expenses placed on mothers with sole custody, would help rid society of the single mother underclass that presently exists under the sole maternal custody regime.³³³

Joint custody agreements create a situation that is most comparable to the family structure before divorce. Children continue to maintain their relationships with both parents, and it is even possible that the increased one-on-one relationship they experience with each parent will nurture their parent-child relationships. Both parents remain responsible for their children, with each having a duty to both discipline and congratulate them. Perhaps the only real difference in the children's lives after divorce, and the imposition of joint custody, is that the children are less exposed to the arguing and hostility that was present before the divorce. Without such exposure, the children will mature in a more holistic family lifestyle, with two adults to care for them and to address their best interests.³³⁴ It is arguable, however, that joint custody tries to restore a family structure

AMERICA 18-19 (1986). For a thorough discussion of how better to enforce and receive money from delinquent child support payers, see LIEBERMAN, *supra*, at 77-90.

Understandably, non-custodial parents denied visitation may be reluctant to sign a support check. See Karen Czapanskiy, *Child Support and Visitation: Rethinking the Connections*, 20 RUTGERS L.J. 619, 619 (1989). However, this may backfire on the parent as courts could legally deny visitation to a parent who fails to pay the required child support. See *id.* For an in-depth discussion of the connections between child support and visitation, and several proposed solutions, see Czapanskiy, *supra*, at 658-665. In one study, it was found that over a five year period, fathers who had regular, satisfactory contact with their children were more likely to pay child support than those who did not. See *id.*; LIEBERMAN, *supra* at 17. Therefore, it may logically be concluded that granting non-custodial parents more access to their children increases their willingness to pay child support. It seems to follow that the more emotional contact the non-custodial parent has with the children, the more likely he or she will be to support them financially. See Goldberg, *supra* note 8, at 52 ("If you're not involved emotionally, there's no motivation to stay involved financially."). Joint custody allows parents to have greater contact with their children, therefore, theoretically, decreasing the potential for child support delinquency. See *id.*

³³³ See Stark, *supra* note 14, at 1526 ("Because of their assumption of devalued nurturing responsibilities, women lack the money, status, power, as well as the institutional or organizational support necessary for meaningful access to, and participation in, the public sphere.").

³³⁴ See Beck v. Beck, 432 A.2d 63, 65-66 (N.J. 1981) (stating that best interests of child are disserved by sole custody and discussing numerous benefits of joint custody).

that simply has ceased to exist.³³⁵ Divorce alters familial relationships, particularly that of the parents, but the argument that joint custody requires parents to create a facade that their broken relationship still exists, is unfounded.³³⁶

Another advantage of joint custody over sole custody arrangements is that it allows two parents, rather than just one, to contribute to the rearing of the children. Two parents brought the children into the world and two must help them survive in the world; both parents must retain responsibility for the children throughout their lives.³³⁷ There are things that one parent can bestow upon his or her children that the other cannot, and joint custody permits the children to reap the benefits of both parents' qualities, as well as to learn from both parents' mistakes.³³⁸

Joint custody can also be beneficial in reducing gender stereotypes that are often behind existing child custody decisions. It is true that statutes and judge-made laws dictate that custody decisions occur without reference to a party's gender,³³⁹ but in reality, gender is a factor in all aspects of our society, including custody decisions. The growing use of the primary caretaker standard is a reversion back to the tender years doctrine of the nineteenth century.³⁴⁰ It is a disguised attempt to award women custody simply because they are women. Society, in effect, encourages women to remain at home or to provide more of the care for their children than men, resulting in overwhelming custody awards to women under the primary caretaker regime.³⁴¹ Joint custody grants both parents meaningful contact with their children, regardless of their gender, and it relieves women of the scorn and criticism they would have experienced if they had relinquished their children to their father's sole custody.³⁴² By as-

³³⁵ See Kearney, *supra* note 41, at 561. Joint custody, it has been said, ignores the fact that a family structure fell apart and resulted in divorce. See *id.*

³³⁶ See *id.* Some have argued that joint custody refuses to recognize that "parents' attitudes and priorities change after [they] divorce." *Id.*

³³⁷ See Friedman, *supra* note 253, at 652.

³³⁸ See generally *supra* notes 140, 297 and accompanying text (discussing the needs of children that are met by their parents).

³³⁹ See *supra* note 59 and accompanying text (discussing gender-neutral laws and child custody).

³⁴⁰ See Goldberg, *supra* note 8, at 51; Kearney, *supra* note 41, at 558-59.

³⁴¹ See Kearney, *supra* note 41, at 558-59.

³⁴² See WARSHAK, *supra* note 1, at 121-22 (discussing double standard experienced by women who relinquish custody). From society's viewpoint, a husband who

suming both parents can equally provide for their children, regardless of gender, joint custody is truly a gender-neutral approach. Joint custody is the only custody arrangement that honestly recognizes that children need both parents involved in their lives and development, and affords them this opportunity.

Not only does joint custody remove gender barriers to men serving as effective fathers, it reduces the financial strain women experience as sole custody parents and permits them more autonomy.³⁴³ Shared custody allows women to maintain contact with their children while creating the opportunity to achieve goals aside from child-rearing.³⁴⁴ Furthermore, sole custody perpetuates the stereotypical ideas that men are not suited for child-rearing, and that women must stay at home with the children. Such stereotypes may inhibit young girls from pursuing various goals and gathering the necessary education and training, based on the belief that they have no place in the public sphere.³⁴⁵ Feminism promoted the belief that men need to assume more of the child-rearing responsibilities, but by promoting sole custody, feminism is releasing men from this responsibility, and again placing it exclusively on women. In effect, sole custody requires women to stay home full-time or take jobs that allow sufficient time for child care, which typically are less psychologically and/or financially satisfying.³⁴⁶

Critics argue, however, that joint custody is not entirely beneficial for men. Some believe that "residual animosity dooms most joint custody arrangements," and as a result, men should fight only for sole custody.³⁴⁷ Others state that single fathers experience significant backlash from others, making their attempts at good parenting more difficult.³⁴⁸ Finally, critics argue that

leaves his wife and family is deemed an "irresponsible child" that is "running away," while a mother who does the same is considered a "monster." Stark, *supra* note 14, at 1509. Even if the mother relinquishes custody for propitious reasons, it is viewed in a negative light. *See id.*

³⁴³ *See* WARSHAK, *supra* note 1, at 184. This is not to suggest, however, that women should simply relinquish all custodial responsibilities to better themselves or that children are detrimental to a woman's well-being or achievement. *See id.*

³⁴⁴ *See id.*

³⁴⁵ *See* Stark, *supra* note 14, at 1525.

³⁴⁶ *See* Abraham, *supra* note 6, at 51 (stating that feminist opposition to joint custody is actually contradictory to their original platforms and ideals).

³⁴⁷ Goldberg, *supra* note 8, at 49 (noting some fathers groups, such as Dads Against Discrimination, oppose joint custody arrangements).

³⁴⁸ *See* Levy, *supra* note 64, at 7. Fathers frequently encounter prejudice at

since a mother may have had more child-raising duties during the marriage, forcing her to share those duties after a divorce because the father now wants to participate in raising his children, is unfair.³⁴⁹ Such critics contend "that joint custody's rhetoric of gender equality does not reflect the way that labor is divided between men and women."³⁵⁰ Yet, such criticisms ignore the changing dynamics of familial relationships today.

VII. CONCLUSION

In an ideal world people would stay married forever, children would continue to live with both parents, and there would be no need for child custody decisions. Unfortunately, we do not live in an ideal world, and custody decisions are necessary. Societal changes have altered parental roles. Custody decisions should reflect those societal changes, and should no longer discriminate against fathers. Children should not lose the benefits of interacting with both parents and experiencing a more holistic family life simply because their parents divorce. Joint custody affords fathers the opportunity to maintain meaningful relationships with their children and provides needed assistance in reducing the existing disparity between custody awards to men and women. Furthermore, joint custody children are given the opportunity to mature with both parents' help, guidance, and love. Joint custody, despite its limited shortcomings, is a beneficial form of child custody that our courts should adopt with more frequency. Such custody arrangements may, in many situations, be the closest thing possible to utopia.

*Jo-Ellen Paradise**

childcare facilities as well as from other people informally assisting in the children's care. *See id.* They are often asked where the mother is, and some professionals keep a special lookout for "emotional disturbance, poor nutrition, and ill health" in children living with single fathers. *Id.*; *see also* WARSHAK, *supra* note 1, at 101 (discussing the social biases single fathers face).

³⁴⁹ *See* Kearney, *supra* note 41, at 556-57.

³⁵⁰ *Id.* at 557.

* Candidate for Juris Doctor, 1998. The author wishes to dedicate this piece to her parents, Vincent and Olga Paradise, and to thank them for their guidance, support, and wisdom which have helped her throughout her life. She attributes all of her achievements to both of them.

