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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

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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. 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. Yet, there remain glaring discrepancies between the number of divorced mothers and fathers awarded custody. 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. Unfortunately, such progress has lagged in the realm of parenting, especially with regard to child-rearing after divorce. 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. The belief that children belong with their mothers is firmly ingrained within this country's social and legal tenets. Such mores need to change, how-

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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).


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

Before the 1970s, "divorce laws required a party to assert [sufficient] grounds [for divorce] such as adultery, cruelty, or desertion." 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.

Stark, supra note 14, at 1489.

"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."

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.

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.\textsuperscript{20} This typically meant that the innocent spouse received a more beneficial divorce settlement than he or she might have otherwise.\textsuperscript{21} The stringency of these laws resulted in disrespect for both the law and lawyers, and contempt for judges and courts.\textsuperscript{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.\textsuperscript{23}

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

\begin{itemize}
\item \textsuperscript{20} See Stark, supra note 14, at 1490.
\item \textsuperscript{21} See id.
\item \textsuperscript{22} See NO FAULT GUIDE, supra note 15, at 10.
\item \textsuperscript{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.
\item \textsuperscript{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.
\item \textsuperscript{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).
\end{itemize}
but, generally, these bases no longer require that one party be at fault. 28 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.

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 irremovable 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. 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.

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.

See Horton v. Horton, 519 P.2d 1131, 1132 (Alaska 1974) (“Child custody determinations are among the most difficult in the law.”); see also TEREKEL, 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.

See WARSHA, 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. 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. This parent presumably makes the majority of the "decisions regarding the child's upbringing, schooling and discipline." Ideally, the two parents should continue making major decisions regarding their children, but the custodial parent alone addresses daily problems. 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. Yet,
custody agreements are increasingly providing for shared custody and fathers are more frequently requesting sole custody of their children.\footnote{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 WARSHA\textsuperscript{i}K, supra note 1, at 17.}

A. Standards Used in Awarding Child Custody

In early British and Roman times, fathers had complete control over their children.\footnote{See WARSHA\textsuperscript{i}K, supra note 1, at 28-29.} Children were part of their father’s property and performed services for him.\footnote{See id.} Upon divorce, fathers were automatically given custody of their children who, it was reasoned, continued to be property essential to their father’s livelihood.\footnote{See id.}

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.\footnote{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).} 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.\footnote{See WARSHA\textsuperscript{i}K, supra note 1, at 29.} 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.\footnote{See WARSHA\textsuperscript{i}K, 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).} Paternal support was premised upon the theory that in return for such support, the father received the children’s labor, thereby
assisting him in making a living. 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.

Absolute paternal rights to child custody after divorce began to diminish, however, in the nineteenth century. 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. 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." This pre-

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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").
assumption 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.\(^4\)

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.\(^5\) Once the children reached the age of four or five, fathers regained custody.\(^6\) 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.\(^7\) 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.\(^8\) 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.”\(^9\) 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] children” 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.
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’ demeanors, 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. 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. Some courts do, however, continue to recognize the tender years doctrine as a factor to consider in determining child custody matters. Any continued
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-
standard considers numerous factors in attempting to ascertain which parent will be the best caregiver for the children.理论上，法院必须将儿童的利益置于父母的利益之前，并在做出决定时，忽略父母的性别。有些因素是法院在决定儿童的最佳利益时考虑的：(1) 情绪、社会、道德、物质和教育需要；(2) 每个父母提供的家庭环境；(3) 每个父母的特征，包括年龄、稳定性、精神和身体健康；(4) 儿童的偏好；以及(5) 专家的建议。 

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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). 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).

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); Ruyke, 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. 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.

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. Such a standard is more flexible than the rigid tender years doctrine and employs a case-by-case analysis. 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.

Another problem with the best interests of the child standard is that its subjective nature produces unpredictable results. 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. As a caretaker, the abilities of each parent, and the relationships between each parent and the child).

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

See Kearney, supra note 41, at 550.

See id. at 552.

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

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).

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.

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.\textsuperscript{76}

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

\textsuperscript{76} 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 753, 755 (Mo. Civ. 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).


\textsuperscript{78} 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).

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. However, others salute it because it affords children an opportunity to express their feelings and desires regarding their own future.

Courts also adhere to a doctrine known as the “primary caretaker doctrine.” Under this theory, the parent that was primarily responsible for the children’s upbringing and care during the marriage receives custody. 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.” 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. Furthermore, the stan-

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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).


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-95037449S, 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).
standard 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.

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. 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. Although childcare responsibilities are more frequently shared by both parents today, in many cases, it is still the woman who performs the majority of these tasks. 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. 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. 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.

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

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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 HAB. 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. 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”).

87 See id.; see also Goldberg, supra note 8, at 51.

88 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.

89 See id. at 559.

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

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.

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-

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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)(c) (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. 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. 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. Here, either the mother or father is the sole custodial parent of the children, while the other parent maintains visitation rights. Under sole custody, the custodial parent has the right to make decisions regarding the children without acquiring the other parent's approval or consent. Legally, the sole custodial parent is responsible for the children's well-being, behavior, and affairs.

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

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88 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.
89 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).
90 See id.
91 See supra note 14, at 19.
92 See id.
93 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).
94 See CIJI 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. While sole custody arrangements continue to enjoy great favor, in most situations it is actually detrimental to both children and parents. 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. 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,” thereby creating two types of joint custody—legal and physical.\textsuperscript{108}

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


\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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. 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. Joint legal custody affords more rights to the non-custodial parent than sole custody situations. Under joint legal custody, the non-custodial 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. Some argue, however, that this type of arrangement fosters disagreement among divorced parents and gives an "unreasonable" parent too much power. Finally, while joint legal custody is an option available to both mothers and fathers, it is still typically the mother who receives physical custody.

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

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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. Joint legal custody usually accompanies joint physical custody agreements.

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. Fathers have begun to unite in fighting for greater custody rights, and for the privilege to maintain greater contact with their children. 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).

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.

See id. at 178.

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

A. Visitation and Child Custody

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

122 See ANDREW, supra note 15, at 55.


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. 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. 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. Such difficulties tend to lead to an eventual withdrawal by the visiting parent. Experts suggest that another reason why visitation is not prevalent is because men, typically the non-custodial parents, are socialized without an appreciable understanding, 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.

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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. This tendency is further reinforced by the legal system, which grants fathers only minimal guaranteed contact with their children. Eventually, the burdens accompanying such limited visits cause many fathers to give up trying.

This withdrawal can cause mothers, courts, and children to mistakenly assume that non-custodial fathers decrease visitation because "[they] don't love their children." In most situations, however, it is not the father's lack of love, but the inherent limits of a non-custodial visiting relationship. Specialists cite several underlying problems with a non-custodial relationship. 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.

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. After divorce, however, when this conventional framework is broken and a father no longer resides with his children, this participation is lost. The father's role is diminished to simply that of an occasional visitor of his children. 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. In addition, since non-custodial fathers have only

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135 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. 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. As a result, these fathers become less aware of what is happening in their children's lives. While these encounters may be pleasant in the early stages of the non-custodial father-child relationship, this "Disneyland Daddy" phenomenon eventually diminishes as it becomes clear that something essential is missing in the relationship, namely, a sense of normalcy and realism. The father-child relationship is no longer as significant or gratifying for either party as it was before the divorce.

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. Angry mothers may attempt to restrict the father's con-

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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. Such antics can create too many hurdles for visiting fathers to maintain solid relationships with their children.

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. In re-

grounds of parenting plans in Washington state).

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.

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.

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
response 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 Knutti v. Knutti, 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).


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.

amount of custody awards to fathers, the number of such awards is still nowhere near the number granted to mothers. 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. 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.

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

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children as mothers, whether in the form of joint or sole custody.\footnote{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).}

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.\footnote{See Goldberg, supra note 8, at 50-51.} 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.\footnote{See id.}

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.\footnote{See supra note 155 and accompanying text (discussing several laws and judicial decisions awarding custody on gender-neutral terms).} 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.\footnote{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.} These organizations, however, each stress different beliefs as to the best course to follow to ensure that fathers are awarded custody more frequently.\footnote{See id.} 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.\footnote{See id. at 49-50.} Other groups focus on promoting sole paternal custody agreements,
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. 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." 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. Research suggests that children in paternal-custody homes are not disadvantaged when compared with children in maternal-custody homes. Divorce elicits the same types of behavior and feelings in children whether their father or mother obtains custody; children are hurt and depressed after divorce, regardless of with whom they ultimately reside.

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.
   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. Research is varied and controversial regarding the contributions of men and women in children's development. Some researchers contend that fathers play an important role in their children's mental and moral development. 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. Studies also show that a strong paternal presence assists children in reaching their intellectual potential. 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. 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.\textsuperscript{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.\textsuperscript{185} Fathers, typically more involved with their sons than their daughters,\textsuperscript{186} demand a great deal of sex role conformity.\textsuperscript{187} Fathers substantially influence their offspring by encouraging masculine behavior in their sons and feminine behavior in their daughters.\textsuperscript{188} In two-parent homes, children benefit from exposure to the functional diversity of each parent.\textsuperscript{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,\textsuperscript{190} and fathers as peripheral caretakers.\textsuperscript{191}

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

\textsuperscript{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.

\textsuperscript{185} See Levy, supra note 64, at 5.

\textsuperscript{186} See id. at 6.

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

\textsuperscript{188} See id. at 6.

\textsuperscript{189} See id. at 5.

\textsuperscript{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).

\textsuperscript{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].

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. These mistaken beliefs typically place people at a disadvantage in spite of their individual capabilities or accomplishments. For example, fathers traditionally have been discriminated against in custody disputes as a result of stereotypical beliefs regarding their parenting skills. 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. 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, 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. The court further stated that children's best interests are not properly served by many

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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).
199 Id. at 65.
aspects of the sole custody arrangement.\textsuperscript{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.\textsuperscript{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."\textsuperscript{202} Children's self-esteem thrives when their parents bestow "warmth, understanding, and positive attention" upon them.\textsuperscript{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.\textsuperscript{204} Mothers tend to withdraw from their children when feeling depressed.\textsuperscript{205} This isolation can cause increased pain for children in mother-custody homes, who may have limited contact with their fathers.\textsuperscript{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.\textsuperscript{207} In addition, children reared in divorced homes suffer from depression and anxiety about the loss they have endured.\textsuperscript{208} Such children tend to fear that they will continue to lose things that are impor-

\textsuperscript{200} See id.
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{203} WARSHAK, supra note 1, at 56.
\textsuperscript{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.
\textsuperscript{205} See id.
\textsuperscript{206} See id.
\textsuperscript{207} See id. at 59-64.
tant to them. 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. Sole custodial parents experience greater levels of stress because they are forced to perform dual roles and take on a greater amount of responsibility. 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. These parents must simultaneously balance their own lives, their children’s well-being, and their careers, all alone. 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. Finally, sole custody can place large financial burdens on the custodial parent. Child-rearing responsibilities are more effectively balanced in joint custody arrangements, relieving any one parent from being or feeling overburdened.

The Uniform Marriage and Divorce Act 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.


216 See WARSHAK, supra note 1, at 184.

statute 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. 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.


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 . . .,"\textsuperscript{220} and "[t]he capacity . . . of the parties involved to provide the child with food, clothing, medical care . . . and other material needs,"\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{226} it remains unquestioned that ideally, children should be afforded the opportunity to mature under the care and supervision of both

\textsuperscript{220} Id. § 722.23(b).
\textsuperscript{221} Id. § 722.23(c).
\textsuperscript{223} See WARSHAK, supra note 1, at 129.
\textsuperscript{224} See Levy, supra note 64, at 7.
\textsuperscript{225} See Beck, 432 A.2d at 66.
\textsuperscript{226} See supra note 179 and accompanying text (discussing inconclusive evidence on the effects of gender roles on children's development).
parents.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{230} Just twenty years ago, this custody option was unavailable to divorcing couples.\textsuperscript{231} However, joint custody has become increasingly prevalent throughout the country; all states, except South Carolina, presently acknowledge it as a viable option.\textsuperscript{232}

A. Joint Custody Laws

A presumption for joint custody exists in a minority of


\textsuperscript{228} See WARSHAK, supra note 1, at 129-30.

\textsuperscript{229} See id. at 177.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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, \textit{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).
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. These states maintain that the joint custody presumption enables courts to make better custody arrangements for both parents and children. 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 Levens, 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. The presumption assumes that joint custody is in the best interests of the children. 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. 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.

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. 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. 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

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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.\footnote{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”).}

This is particularly true where the parents originally sought sole custody.\footnote{243 See id.}

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.\footnote{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).}

Courts may consider the parents’ animosity or reluctance as factors in their decision-making process.\footnote{245 See infra notes 278-79 and accompanying text (discussing parental conflict).}

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

B. Considerations for Awarding Joint Custody

Although increasing in frequency, joint custody is still not the norm in custody awards.\footnote{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).}

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.\footnote{248 See Van Deusen, supra note 44, at 424 (stating parents should share the rights and responsibilities of child-raising 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).}

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.\footnote{249 See Goldberg, supra note 8, at 51.}

Another important factor is the ability of the parents to cooperate and act amiably toward
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); Burkhardt 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).
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. 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. 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. 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. 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.


that the relocation is in the children's best interest. Several states also require that these steps be followed when a joint custodial parent seeks to relocate. 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.

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

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261 See Cook, 898 P.2d at 705 (discussing best interests of child and relocation); Stout, 560 N.W.2d at 804; 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. 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. 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. 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. Furthermore, children reap the benefits of having two people overseeing their best interests, typically leading to better results. Finally, both parents will likely be more committed to their children, emotionally and financially.

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. Still others contend, joint custody affords an unreasonable parent too much authority, and the opportunity

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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.\textsuperscript{272}

Joint physical custody can raise these same issues, as well as additional problems, unique to physical custody.\textsuperscript{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.\textsuperscript{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.\textsuperscript{275} Also, parents can evenly share the parental rights and more significantly, the responsibilities.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{279}

\textsuperscript{272} See Terkel, \textit{supra} note 14, at 23 (discussing some of the difficulties that may arise with joint legal custody).

\textsuperscript{273} See \textit{supra} notes 117-19 and accompanying text (discussing logistical difficulties of physical custody).

\textsuperscript{274} See Terkel, \textit{supra} note 14, at 22.

\textsuperscript{275} See id.

\textsuperscript{276} See Kearney, \textit{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.

\textsuperscript{277} See Warshak, \textit{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).


\textsuperscript{279} See Warshak, \textit{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. If the children's distress is extreme, joint physical custody may be inappropriate.

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. 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. 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. Joint custody arrangements allow men to spend more time with their children, decreasing the likelihood that shallow father-child relationships,
common to sole maternal custody awards will develop. Systematic contact permits fathers to be more involved in their children's overall life and growth. Fathers can continue to share routine activities, instead of being relegated to being a "Disneyland Daddy." Fathers' presence during their children's negative experiences helps to strengthen their relationship. Joint custody fathers also feel less loss, guilt, and loneliness than non-custodial fathers. 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.

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. 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. Similarly,

288 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.

289 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.

290 See id. at 180-81 (“The little pleasures of friendship and affection with a child pop up at any time . . . ”).

291 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.

292 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.”).

293 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. Despite these obstacles, fathers who choose to accept the challenge generally tend to be happy with their decision.

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. These women value their custody stronghold, and therefore disfavor joint custody arrangements. Women in shared custody arrangements relinquish some of the power and control they would have possessed under sole custody arrangements. 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. 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.

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.

See Goldberg, supra note 8, at 48.

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).

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.
could cause the father-child relationship to suffer irrevocably.\textsuperscript{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.\textsuperscript{300} Some women disfavor joint custody because the practical requirement that the father live nearby will limit their choice of residency.\textsuperscript{301} In other cases, women may fight joint custody simply to punish their ex-spouse,\textsuperscript{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.\textsuperscript{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.\textsuperscript{304} As a result, the woman's job qualifications and financial position may improve.\textsuperscript{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

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

\textsuperscript{300} See id. at 186. These mothers may feel that they have already lost their "status as wive[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.

\textsuperscript{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.

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

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

\textsuperscript{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.

\textsuperscript{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. In addition, women sharing custody acquire the benefit of another person's opinion when making child-rearing decisions. 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.

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. 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. 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. Joint custody parents tend to be more amiable toward each other, creating a better atmosphere for the children.

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. Children rec-

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206 See WARSHAK, supra note 1, at 183-84.
207 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.
208 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).
209 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).
210 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.
211 See id. ("Joint custody boys, in particular, had fewer negative experiences to report about the divorce and its aftermath than did mother-custody boys.").
212 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.
213 See id. at 199.
recognize that they can ask either parent for advice and regularly share good news with both. 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.

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. Another criticism is that joint custody actually confuses the children and "undermines their sense of security and stability." 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." 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-

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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. That legal presumption began, however, with the cultural belief that mothers belonged at home with the children and fathers at work. The legal presumption fostered these long-held beliefs, and in essence perpetuated them.

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. 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. A legal presumption in favor of joint custody, however, would begin to correct this problem, making shared custody the appropriate post-divorce arrangement. Instituting such a legal presumption could lead to a cultural belief that parents should continue in their co-parenting roles after divorce. 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. 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.

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

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.

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.

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

See Goldberg, supra note 8, at 49.

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
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. It is arguable, however, that joint custody tries to restore a family structure

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.”).


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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 that 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.
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-
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.\(^3\) Shared custody allows women to maintain contact with their children while creating the opportunity to achieve goals aside from child-rearing.\(^4\) 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.\(^5\) 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.\(^6\)

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.\(^7\) Others state that single fathers experience significant backlash from others, making their attempts at good parenting more difficult.\(^8\) Finally, critics argue that

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\(^3\) 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.

\(^4\) See Stark, supra note 14, at 1509. Even if the mother relinquishes custody for propitious reasons, it is viewed in a negative light. See id.

\(^5\) See Stark, supra note 14, at 1525.

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

\(^7\) Goldberg, supra note 8, at 49 (noting some fathers groups, such as Dads Against Discrimination, oppose joint custody arrangements).

\(^8\) 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. Such critics contend “that joint custody’s rhetoric of gender equality does not reflect the way that labor is divided between men and women.” 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.

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* 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.