

The Modern Application of the "Best Interests of the Child" Theory in Custodial Law

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INTRODUCTION

In its traditional sense, family law (aka domestic relations law) involves the legal relationships between husband and wife, parent and child, as a social, political, and economic unit. Recently, the boundaries of family law have to grown to encompass relationships among persons who live together but are not married, so-called non-traditional families. The legal aspects of families, whether they are traditional or non-traditional, include principles of constitutional law, property law, contract law, tort law, civil procedure, statutory regulations, equitable remedies, and marital property and support rights. Most family law statues are drafted as general guidelines.

Consequently, state court judges normally have broad discretion in resolving many family law disputes. Moreover, a particular judge's interpretation of family law issues will be guided by the law of the state whose family law governs the case, and the underlying law is rarely uniform from state to state. A judge may be bound by a state's traditional family law statutes and judicial precedents, a more modern approach, or a combination of the two. ¹

Narrowly defined, a family can mean a group of individuals related by blood or marriage.² Broadly defined, a family may include one of a group living in the same household.³ The traditional English family almost exclusively was found in the narrow definition of a family. This tradition is what was carried forward to America by the early English settlers and became the common occurrence in the colonies. Even after the American Revolution in 1776, the traditional family remained intact when the Constitution was drafted. Slowly over the years, the traditional family eroded until it became the exception, not the rule. At the present time, the traditional American family is at risk and the trend towards the non-traditional family arrangements has generated a reevaluation of the basic premises underlying the traditional family. ⁴

In 2001, the Law Commission of Canada (participants in this study included both Canadian and American respondents) concluded that:

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Marriage is no longer a sufficient model to respond to the variety of models that exist today. Whether we look at older people living with adult children, adults with disabilities living with their caretakers, or siblings that cohabit in the same residence, the marriage model is inadequate. Some of these other relationships are characterized by emotional and economic interdependence, mutual care and concern and the expectation of some duration. All of these adult relationships could also benefit from alternative legal frameworks to support peoples' need for certainty and stability.⁵

Individual states traditionally have regulated important family law relationships such as marriage and divorce.⁶ Even within a single state, child custody courts are often organized on a county basis and different courts use principles of local autonomy to implement the same statutes differently. Accordingly, on various occasions, The United States Supreme Court has reiterated the "domestic relations exceptions" rule – that federal courts do not have the jurisdictions to grant divorces, award spousal support, or determine child custody issues, even though there may in fact be diversity of citizenship and even though the required amount of controversy for federal jurisdiction is met.⁷ This means that there is no higher power than the state when dealing with family law matters and an individual will have to go through a lengthy appeal process if any, if they are unhappy with the decision.

The prevailing social opinion of the area is the primary driving force behind the application and interpretation of family law in that area. For example, the interpretation of a custody statute varies across states and is applied differently to the same situations. Therefore, American family law is constantly in a state of flux and transition based upon the interplay of three interrelated factors: state and federal legislatures that regulate many important family relationships, courts that interpret these regulations or determine equitable remedies in the absence of such statutes, and family law practitioners who must ultimately decide what strategic alternatives exist in favor of their client, and who must plead and prove these alternative remedies before the courts, and before the legislatures, based upon the law, facts, and social

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needs of each individual case. Each of these factors will be discussed throughout the rest of this paper.

HISTORY OF FAMILY LAW

The substantive rules courts use to determine which parent is awarded sole custody have varied over time according to changes in morality, in child-rearing practices, and in the relative social and economic positions of mothers and fathers.⁸ The rules guiding custodial law have a history of explicit gender bias. Under early English common law, the father had an absolute right to physical and legal custody of his child. The court in *Ex Parte Devine* explained the reasoning behind this concept:⁹

At common law, it was the father rather than the mother who held a virtual absolute right to the custody of their minor children. This rule of law was fostered, in part, by feudalistic notions concerning the "natural" responsibilities of the husband at common law. The husband was considered the head or master of his family, and, as such, responsible for the care, maintenance, education and religious training of his children. By virtue of these responsibilities, the husband was given a corresponding entitlement to the benefits of his children. It is interesting to note that in many instances these rights and privileges were considered dependent upon the recognized laws of nature and in accordance with the presumption that the father could best provide for the necessities of his children. Undoubtedly, the father has primarily, by law as by nature, the right to the custody of his children. This right is not given him solely for his own gratification, but because nature and the law ratifying nature assume that the author of their being feels for them a tenderness which will secure their happiness more certainly than any other tie on earth. Because he is the father, the presumption naturally and legally is that he will love them most, and care for them most wisely. And, as a consequence of this, it is presumed to be for the real interest of the child that it should be in the custody of its father, as against collateral relatives, and he, therefore, who seeks to withhold the custody against the natural and legal presumption, has the burden of showing clearly that the father is an unsuitable person to have the custody of his child.

Judicial definitions of fitness evolved over the years as social morals evolved. For example, most courts started to view adultery only in the context in which it affected the child rather than making an automatic equation between adultery and morality.¹⁰

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In the early 20th century, courts increasingly began to focus on the child's emotional interests rather than on the parent's moral state. With the development of psychological science, most jurisdictions completely transformed this presumption of paternal custody, instead imposing the so-called "tender years" doctrine which held that absent extraordinary circumstances, young children should always be placed in the custody of their mothers. The tender years doctrine awarded the custody of young children to the mother unless she was seriously unfit. The court in *Freeland v. Freeland* states that "Mother love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and, moreover, a child needs a mother's care even more than a father's. For these reasons, courts are loathe to deprive the mother of the custody of her children and will not do so unless it be shown clearly that she is so far an unfit and improper person to be entrusted with such custody as to endanger the welfare of the children."¹¹ The Washington Supreme Court, affirming the judgment of the Court of Appeals in *Freeland*, expressed the view that the statute infringed on the fundamental right, under the Federal Constitution, of parents to rear their children. Justice O'Connor, announced the judgment of the court and, in an opinion joined by Chief Justice Rehnquist, and Justices Ginsburg and Breyer, expressed the view that the Fourteenth Amendment's due process clause protected the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

The most notable attempt to create a workable mental health standard to guide courts in making custody determinations was Goldstein, Freud, and Solnit's "psychological parent" test. Their work helped to transform the role of mental health professionals in child custody determinations. The assumption was that mental health professionals were uniquely situated to providing a sound basis for determining the best child custody arrangements.¹² Working from a psychoanalytic framework, the test defined the task for the court as identifying the single parent with whom the child had primary psychological relationships. Stability of the child's emotional relationship with that parent was so important to the "psychological parent" test that it advocated granting the psychological parent the power to preclude the

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other parent from even visiting with the child if they feared it would cause emotional harm.¹³ Unfortunately, the "psychological parent" test never achieved widespread acceptance and featured the same gender discrimination featured in the tender years' doctrine.

Three developments challenged the assumptions of the tender years doctrine: the entry of women into the labor force, the drive for legal equality of the sexes, and the empirical evidence establishing the importance of the father's involvement in a child's life. The entry of women into the labor force was the main contributor to the erosion of the tender years doctrine. In 1900, only 6% of married women entered the work force. In 2000, that percentage had soared to 61%.¹⁴ Divorced mothers are even more likely to enter the workforce, 73.7% in 2000.¹⁵ The entry of women into the workforce undermined the assumption that the mother stays at home and raises the child, which is a central concept to the tender years doctrine.

In *Ex parte Devine*, the court concluded that the tender years presumption represented an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex.¹⁶ In *Fox v. Fox*, the Arkansas Court of Appeals noted the statutory abolition of gender based presumptions and emphasized that custody questions must be determined on an individual basis.¹⁷ In *Fox*, the chancellor erred in granting custody to the mother on the basis of her sex. The record shows that the chancellor conducted a hearing on child custody in which the parties presented evidence that would support a finding that either parent would be fit to exercise custody over their two girls, age four and ten. At the conclusion of the hearing, the chancellor made the following findings from the bench:¹⁸

I would not really worry and be troubled if these two girls were in the custody of either one of you. You've satisfied me that they would be well cared for by either one of you and I think both of you know that. I'm not saying that your relationship with Mr. Allen doesn't have any relevance here because it does. Moral attitudes and so forth do have some relevance and should be considered in trying

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to decide when the decision has to be made of where custody is, of which parent should have custody and I have taken that into account. But also involved, in my opinion, and people may differ on this. In my opinion, girls of the age of four and ten, maybe more with four than ten, have and should have a relationship with their mother that you can't give them, and that I don't think any father can give them. That's extremely important to me and has to be overcome to reach the conclusion that custody should not be with the mother. I haven't been able to get past that here today.

Ark. Code Ann. § 9-13-101 (1987) abolished any gender-based presumption or legal preference with respect to child custody actions. It is clear from the chancellor's remarks that his view that young girls should be raised by their mothers was given the force of a presumption in deciding the custody issue. This was contrary to Ark. Code Ann. § 9-13-101 (1987), which provides that in an action for divorce, the award of custody of the children of the marriage shall be made without regard to the sex of the parent but solely in accordance with the welfare and best interests of the children. This statute abolished any gender-based presumption or legal preference with respect to child custody actions. Under its terms, the chancellor must abandon generalizations and decide questions of custody on an individualized basis: the question is not whether young girls should, in general, be placed in the custody of their mothers, but rather whether the welfare and best interests of these particular children would be best served by granting custody to this particular mother or father. The best interests of the child were obviously prejudiced by the chancellor's remarks during this case and that type of discrimination is unconstitutional.

The dominant modern metaphor for describing the legal organization of the family is the partnership model. Under the partnership model, husbands and wives (boyfriends and girlfriends) are legal equals, although they might contribute in different ways and in different degrees to the total welfare of the family unit.¹⁹ Under the partnership model, the assumptions used to justify the tender years doctrine are undermined in their entirety. Eliminating the tender years assumptions required the

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courts to shift from a relatively simple issue, was the mother unfit?, to a wide-ranging, multi-faceted, "best interests of the child" theory in order to predict what custody arrangements were the best for the future of a particular child.²⁰

CURRENT TRENDS

Family courts usually operate behind closed doors, generally do not record their proceedings, and keep no statistics on their decisions. Yet they reach further into the lives of individuals and families than any other area of law. The court uses the same adversary procedure in family courts as in other civil cases. The court's function is to resolve the parents' dispute by choosing one as the custodial parent and awarding the other parent visitation. Custody is a parent's legal right to control his or her upbringing. 2 different functional concepts come under the term "custody". Physical custody, meaning residence, is a child's primary living arrangement. Legal custody, meaning decision-making, is a parent's right to make decisions for a child. The fundamental purpose of a sole custody award is to designate one parent as the primary decision-maker and focus of a child's emotional life. The state court, in whichever state you live, becomes the primary determinant of what your child's life will be like. After the court makes its decisions regarding the future of your child, you have no choice but to accept that some judge, who has only known your family for a short period and is basing their decision on the advice of others, is making a better decision than for your child than you could have and that their decision is the right one given the circumstances.

Divorce was not a suit of a civil nature, at common law or equity, at the time the original Judiciary Act, which conferred jurisdiction on the federal courts, was passed.²¹ In the middle of the 20th century, divorce became a civil matter and the state obtained jurisdiction over them. State courts now retain sole power over custodial decisions within their state; federal courts now apply the domestic-relations exception, which forbids them from deciding family law matters. Widespread divorce law reform began in the United States in the 1960's.²² No-fault divorce legislation began in 1966 when a California Governor's Commission recommended that divorce grounds be limited to irremediable breakdown of the marriage and insanity of one or both of the parties.²³ Uncomplicated, no-fault divorce laws have also been charged with having a negative impact on children of divorced parents. Without significant safeguards, no-fault divorce laws may contribute to long-term psychological damage

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to the children of divorce.²⁴ The single strongest factor that seems to influence the rate at which women file for divorce is the probability that they will receive custody of their children after the divorce. The higher the probability, the more likely a woman will file.²⁵

In 1995, 25% of total civil filings, over 4.9 million, were domestic relations cases. The total number of domestic relations cases increased 4.1% since 1994 and 70% since 1984.²⁶ The main cause behind the increase in domestic relations cases is the rapidly increasing divorce rate. Each year in the United States, approximately 1.2 million marriages end in divorce. Most divorce filers today are women and most available evidence suggests that they are the primary initiators of divorce.²⁷ Between 1940 and 1998, the divorce rate in the United States rose from under 20% to 50%.²⁸ These divorces involve more than 1 million children.²⁹ From these statistics, it is plausible to infer that the majority of custody awards are given to females.

According to the Census reports, in 1970 approximately 12% of children lived with one parent; by 1990, about 25% of children lived with one parent, approximately 16 million children.³⁰ In 2001, 69% of American children lived with two parents, down from 77% in 1980.³¹ One in six children sees their parents divorce every year.³² Men now comprise 1/6 of the nation's 11.9 million single parents. Single father families make up 2.1% of all American households, and single mother families account for 7.2%.³³ Although the majority of single parents are still women, men have increasingly begun to fight for, and receive, custody of their children.

The average age of a female at first birth was 25.1 years in 2002, an all-time high in the United States. In 1970, the average age at first birth was 21.4 years.³⁴ The number of births to unmarried women reached a record high of 1,365,966 in 2002, up 1 percent from 2001. This increase reflected the growing number of unmarried women rather than an increase in the rate, which was stable at 44 births per 1,000 unmarried women.³⁵ The increase in births to unmarried women signals that divorce is not the only reason why children are raised by only one parent.

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Overall, 80% of family law cases involve at least one pro se litigant at some point during the case.³⁶ The pro se litigation displays the Catch-22 of the adversary system for parents in a child custody dispute. Divorcing or never-married parents must resort to a complicated legal system to settle their differences. Yet the system does not provide them with the lawyers they need to navigate it, treating quality representation as a privilege for the wealthy or a charity for the extremely poor. The sole custody system causes parents to behave like enemies rather than seek compromise for the benefit of their child. Without lawyers who are specially trained in dealing with these high-conflict disagreements, the parents enter into a drawn-out battle that emotionally injures both themselves and their children.

THE "BEST INTERESTS" OF THE CHILD

When the parents are unable to agree upon the allocation of parental rights and responsibilities, the court will make a decision on the basis of the "best interests of the child." This has become the legal standard for custody determinations. The new laws, being implemented by most states, specify in detail what factors will be considered to determine the best interests of a child. Among the long list of factors to be considered are:³⁷ the parent/child relationship; the ability of each parent to provide the child with nurture, love, affection, and guidance; the ability to provide a safe and healthy environment for the child; the child's various needs and the ability of each parent to meet them; the child's adjustment to his or her school and community and the potential effect of any change; and the ability of the parents to communicate, cooperate with each other, and make joint decisions concerning the child. Great emphasis is placed upon the ability of each parent to promote a healthy relationship between the child and the other parent. Circumstances such as the sex of the child, sex of the parent or financial resources of a parent are not appropriate considerations in determining the "best interests" of the child. Instead, the court will make an effort to review the circumstances relating to the "best interests" of each child and then establish a schedule which will serve the child's best interests. In addition, in the case of a child of sufficient maturity, usually children ages 14 and older, the court may also give substantial weight to the preference of the child, so long as the preference is not the product of undesirable or inappropriate influences.

Minnesota's statute is typical of the standard definition of the "best interests" of the child theory. The "best interests" of a child means all relevant factors to be considered and evaluated by the court including:

- 1) The wishes of the child's parent or parents as to custody
- 2) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference
- 3) The child's primary caretaker
- 4) The intimacy of the relationship between the parent and the child

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- 5) The interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests
- 6) The child's adjustment to school, home, and the community
- 7) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity
- 8) The permanence, as a family unit, of the existing or proposed custodial home
- 9) The mental and physical health of all individuals involved, except that of a disability . . . of a proposed custodian or the child shall not be determinative of the custody of the child, unless the proposed custodial arrangement is not in the best interests of the child
- 10) The capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any
- 11) The child's cultural background
- 12) The effect on the child of the actions of an abuser, if related to domestic abuse . . . that has occurred between parents or between a parent and another individual, whether or not the individual alleged to have committed domestic abuse is or ever was a family or household member of the parent; and
- 13) Except in cases in which a finding of domestic abuse . . . has been made, the disposition of each parent to encourage and permit frequent contact by the other parent with the child.

The court may not use one factor to the exclusion of all others. The primary-care taker factor may not be used as a presumption in determining the best interests of the child. The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child.³⁸ With a clearly defined set of measurable principles, the "best interests" of the child theory eliminates the gender discrimination that is inherent in the older doctrines which guided family law

VARIOUS STATE LAWS CONCERNING CUSTODY AWARDS

Although there is a modern consensus among most states that the “best interests” of the child theory should be considered in custody cases, there exists discrepancies in the ways in which these “best interests” are considered and weighted for importance. These discrepancies lead to a wide range of custodial processes and outcomes. Another problem of not having a uniform custodial model is that the state you live in will determine what type of relationship the new extended family will have to endure. Below are some examples of these discrepancies:

California's substantive child custody law has a detailed definition of joint physical and joint legal custody.³⁹ It presumes that it is in the best interests of the child for parents to agree on joint custody. It allows a court to order joint custody on the application of one parent, even if the other does not agree.⁴⁰ It explicitly requires courts that make sole custody awards to consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the non-custodial parent.⁴¹ California also has specific rules that require parents to attend educational programs. The program is mandatory and must be attended within four months of filing.

New York's basic child custody statute requires only that the child custody courts make orders that are in the best interests of the child. It does not identify what factors the court should consider relevant in making a “best interests” determination, other than domestic violence.⁴² The court will typically restrict the relationship between the violent parent and the child. It makes no mention of the power of the court to award joint custody.

Massachusetts follows the "best interests of the child" theory, but even if a child expresses a preference, the judge will still consider factors such as the history of the primary care parent, health of the parents, lifestyles of the parents, sexual conduct of the parents, suitability of the parent's residences, locations of siblings, any incidents of domestic violence or abuse. The conditions for awarding custody in Massachusetts are described below:⁴³

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Section 10. (a) Upon or after an adjudication or voluntary acknowledgment of paternity, the court may award custody to the mother or the father or to them jointly or to another suitable person as hereafter further specified as may be appropriate in the best interests of the child. In awarding custody to one of the parents, the court shall, to the extent possible, preserve the relationship between the child and the primary caretaker parent. The court shall also consider where and with whom the child has resided within the six months immediately preceding proceedings pursuant to this chapter and whether one or both of the parents has established a personal and parental relationship with the child or has exercised parental responsibility in the best interests of the child.

(b) Prior to or in the absence of an adjudication or voluntary acknowledgment of paternity, the mother shall have custody of a child born out of wedlock. In the absence of an order or judgment of a probate and family court relative to custody, the mother shall continue to have custody of a child after an adjudication of paternity or voluntary acknowledgment of parentage.

(c) If either parent is dead, unfit or unavailable, or relinquishes care of the child, or abandons the child, and the other parent is fit to have custody, that parent shall be entitled to custody.

The fact that the official law of Massachusetts fails to specify what exactly is to be considered as the "best interests" of the child causes an enormous amount of controversy when actually deciding a custody case. Even worse than the failure to include a detailed, measurable description of the "best interests" of the child is the inclusion of the primary caretaker presumption. In the family arrangement where the man works and the woman stays home, the man has practically eliminated his chance of being awarded sole custody and significantly decreased his chances of being awarded joint custody. The primary caretaker presumption has its roots in the tender years doctrine and is a disguised form of gender discrimination that was supposed to be prohibited by the Constitution as held in *Fox v. Fox*.⁴⁴ The next section of the paper will analyze the effect of state statutes such as these on the custodial rights of men.

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FATHER'S RIGHTS

The decision of the Supreme Court of Appeals of West Virginia in *Garska v. Mccoy*⁴⁵ is the leading articulation of the primary caretaker presumption. The court held that there is a presumption in favor of the primary caretaker parent, if he or she meets the minimum objective of being a fit parent, regardless of sex. The primary caretaker presumption, while gender neutral on its face, may compel the same results as would be obtained under the tender years doctrine, which violates the equal protection clause of the Constitution. Nearly 25,000,000 children are growing up in America without fathers - making America the world's leader in fatherless families. In the Commonwealth of Massachusetts, over one-third of families have no father living at home - one of the highest rates in the country.⁴⁶

The fathers' rights movement arose in response to the perception that fathers were not being given equal treatment in child custody litigation. Fathers' advocacy groups typically focus upon some or all of the following goals:⁴⁷

- 1) Obtaining recognition that a "traditional" division of parental roles during a marriage does not necessarily mean that the father should not be considered as a custodian following divorce
- 2) Children are best served by being in the care of both parents, and thus there should be a legal presumption of joint physical custody and equal parenting time following divorce;
- 3) Fathers are at a disadvantage throughout the entire custody litigation process.

Fathers' rights groups assert that changes of this nature will create a family court environment where both parents are treated fairly and equally, and diminish the effects of legislation and, in some cases, of judicial bias which favors the mother. One of the leading advocacy groups of father's rights is Fathers & Families, based in Massachusetts and led by a man named Ned Holstein. This group petitions the state legislature to affect changes in the application of custodial law. They are currently

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trying to place a "shared parenting" bill on the next ballot as a binding resolution. The concept of shared parenting will be discussed in a later section.

The continuing trend of gender discrimination in family law has serious effects on the events that typically follow a custodial determination. In every state, county, or district in the United States of America, the non-custodial parent must pay support for their child to the custodial parent. In 1975, President Ford succumbed to pressures exerted from bar associations and feminist groups and created the Office of Child Support Enforcement (OSCE). However, even as President Ford created this office he warned the American public that it constituted an unwarranted federal intrusion into the lives of families and the responsibilities of states;⁴⁸ the size of the program increased tenfold from 1978 to 1998.⁴⁹ Welfare legislation promoted by the OSCE, and passed by Congress in 1984, required that all states adopt child-support guidelines. Then in 1988, without any warning or justification, the guidelines that had been created to help the children of welfare recipients was extended to include the 80% of child support orders to children not on welfare.⁵⁰ The majority of non-custodial parents are men and these new enforcement procedures directly affected the income and lifestyles of numerous men across the country. The U.S. law, commonly known as the Bradley Amendment, was passed in 1986 to automatically trigger a non expiring lien whenever child support becomes past-due. The Bradley Amendment contains the following provisions:⁵¹

The law overrides any state's statute of limitations.

The law disallows any judicial discretion, even from bankruptcy judges.

The law requires that the payment amounts be maintained without regard for the physical capability of the person owing child support (the obligor) to make the notification or regard for their awareness of the need to make the notification.

Deadbeat Dad is a pejorative term (primarily U.S.) that refers to men who have fathered a child but fail to pay child support ordered by a family law court or statutory

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agency such as the Child Support Agency.⁵² Many U.S. states have recently passed "deadbeat dad laws" that allows the Department of Motor Vehicles in the state to use its information to find the "deadbeat dad" and call him to account for his actions; possible sanctions include loss of license, fines, and imprisonment. The problem with this term is that it specifically uses the word "dad". If an individual were to conduct an extensive search of research materials currently available, they would strain to find mention of the term deadbeat mom. When in actuality, the percentage of "deadbeat" moms is actually higher than that of dads who won't pay, even though mothers are more consistently awarded custody of children by the courts. Census figures in 2001 show that only 57 percent of moms required to pay child support -- 385,000 women out of a total of 674,000 -- give up some or all of the money they owe. That leaves some 289,000 "deadbeat" mothers out there, a fact that has barely been reported in the media. That compares with 68 percent of dads who pay up, according to the figures. Men are naturally presumed to be guilty when entering a civil court with an allegation of being a deadbeat "dad". A father charged with civil contempt need not receive due process and may be legally presumed guilty until proven innocent. This form of discrimination is a blatant violation of the fundamental principles behind our legal process. A father may also be charged with criminal contempt for failing to abide by a civil order; not all child support contempt proceedings classified as criminal are entitled to a jury trial and due process.⁵³

Modern family courts are forcing fathers to choose between the workhouse and the jailhouse. A father who is currently unemployed is still obligated to pay his child support regardless of the circumstances involving his lack of work. There is no acceptable reason for not paying the support except for impending death or crippling sickness. Non-custodial fathers should be entitled to survive at a minimal standard, with the understanding that we all run upon tough times and that sometimes the rule of law should bend to the factual consequences of the human condition and a father who just might be a victim of circumstance. The majority of deadbeat "dads" are victims of inequity in the family law system. The real deadbeat dad is seldom a

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model citizen, but he is even more seldom the mythical monster described by politicians.

The Alliance for Non-Custodial parents describes most deadbeat “dads” as frightened, angry, and depressed men who fall into several overlapping categories:⁵⁴

Remarried Supporter – a large percentage of deadbeat dads are remarried and are supporting several step-children or biological children from a second marriage

Men in Poverty – many deadbeat dads are homeless, and an even greater percentage are poor

Fathers Helping Mothers – men who provide non-monetary support are deadbeat dads according to the child-support system. Mothers and fathers often work out agreements for child support that involve dad performing non-monetary favors; none of the non-monetary support counts, even if the mother and father want it to count and even if they agree in writing that it should count

Fathers Paying Child Support – Child support is "paid" only when it's paid in a bureaucratically acceptable form

Men with actual custody – if a court order says that the mother has custody and is entitled to child support, and if the mother gives the father the children because she cannot control them or has other problems, then he is still liable for child support.

Men who can't find their children – the mother may leave the state with their young children and not tell the father where she is for five years. The child-support system can, and does, go in and collect five years of delinquent child support from this deadbeat dad

Child-support resisters - mandatory child-support guidelines remove from the parties and the courts any power to determine what support is fair and reasonable, so some men just plainly refuse to pay

Although this discrimination is highly unfavorable to men, it can also be used to discriminate against women. There is a small segment of women that do not want to raise their children and voluntarily relinquish custody. These women are then

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impacted by the child-support guidelines explained previously. However, the courts do not pursue these female offenders as quickly or viciously as they do men. I was unable to locate any documented case in United States legal history where a female was imprisoned for failure to pay child support.

THE OTHER SIDE

No evidence exists that large numbers of fathers voluntarily abandon their children. In the largest federally funded study ever conducted on the subject, psychologist Sanford Braver demonstrated that very few married fathers abandon their children.⁵⁵ Overwhelmingly, it is mothers, not fathers, who are walking away from their marriages and separating children from their fathers.⁵⁶ Drawing a distinction between voluntary and involuntary non-resident motherhood is not an easy problem to tackle. Some potential reasons are:

Inadequate financial resources or emotional and/or psychological problems are commonly cited as major factors contributing to maternal non-residence⁵⁷

There are also those women who withdraw from the resident parent position because of fear and intimidation at the hands of an abusive partner⁵⁸

The father was a more natural parent; to pursue a career or further education; avoidance of a court battle; and children's choice⁵⁹

Most women regard non-residency as a temporary arrangement, and wish to have their children live with them when their lives become more regular and stable.⁶⁰ Mothers report having made the decision to become the non-resident parent in terms of the "best interests" of their child. Two studies which have examined women's subjective experience of non-resident motherhood found that women who volunteered to become the non-resident parent viewed residential stability to be in their child's "best interests" rather than continuity of maternal care.⁶¹ What an incredulous statement this is! A father that used this type of reasoning would be considered as abandoning his child and becoming the typical deadbeat "dad", a man who chose to pursue his own interests to the neglect of his child.

In contrast, mothers who lose residence to fathers, against their will, typically report that the enforced separation of mother and child goes against child welfare needs. These women tend to view the father's claim for residence as arising from self-serving needs rather than child welfare concerns.⁶² Moreover, these mothers who

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are deeply opposed to father residence appear to be consistently negative and unyielding in their attitude toward the arrangement.⁶³ Such a situation may have important implications for the children since the development of a cooperative co-parental relationship, which is known to be important for child well-being, would seem unlikely in the face of such enduring and hostile opposition. So the question becomes, what type of custodial arrangement is in the child's 'best interests'? In other words, what type of custodial arrangement would maximize the child's well-being, minimize the conflict between the separated parents, and be conducive to lasting tranquility?

JOINT CUSTODY VS. SOLE CUSTODY

A 2002 survey finds that 42 states allow for some form of joint custody.⁶⁴ However, this has not always been the case. Historical courts believed that ordering joint custody for conflicted parents created emotional instability and turmoil for the child that could only be avoided by awarding sole custody to one parent over the other. In 1934, the Maryland Court of Appeals denounced joint custody as an arrangement to be avoided whenever possible, an evil fruitful in the discipline of destruction, in the creation of distrust, and in the production of mental distress in the child.⁶⁵ Courts typically manifested their hostility to joint custody by allowing one parent to veto it, over the objection of the other, without investigating the underlying reasons for the veto. The courts would then order sole custody to one parent and leave the underlying conflict unresolved. As you can see from the previous examples, the level of conflict between parents is the most important factor in determining the custody arrangement. The main problem with this mode of thought is the tendency of human beings to repeat their actions over the course of time. If two parents are unable to get along while they are together, it seems very unlikely that they will get along after the separation. Critics respond to this by stating that the separation, and eventual dissolution of the emotional investment, will allow the parents to get along without the bitterness of the previous relationship. I believe that this is merely a fantasy of academics and philosophers. Leaving conflicted parents to resolve their own problems will lead to newly created problems and renewed feelings of hostility and anger between the parents. The level of conflict between the parents directly affects the emotional well-being of a child. By far, the most commonly awarded type of custody is sole maternal legal and residential custody, followed by joint legal custody and mother-residential custody.⁶⁶ The modern parent's rights movement stresses the mutual involvement of both parents in a child's life. The difficult decision is how, and in what capacity, the parents will be able to raise their child? What type of relationship will benefit their child the most, sole or joint custody? Should the parents make this decision themselves or let the court make it for them? There are pros and cons of both types of custodial decisions. Below is a list of several prominent factors in making the decision between sole custody and joint custody. Every one of these

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factors was clearly explained in the relevant case. All cases were researched on Lexis-Nexis between January 31, 2007 and April 11, 2007. Factors for awarding joint custody are:

Parents' History of Co-operating – Joint custody is intended to be imposed only on reasonably mature parents who have in the past both demonstrated an ability to act in the best interests of their children (Lee v. Albrecht).

Child's Relationship With Each Parent – In several court decisions, judges mention that children are happier and healthier when they have a relationship with both parents. (Dunham v. Dunham). Generally, judges state that when both parents show a commitment, love and a close relationship with their child then joint custody arrangements support this relationship and the child's best interest (Khoee-Solomonescu v. Solomonescu).

Child's Stability – Joint custody arrangements are preferred when they provide the child with an opportunity to have a relationship with both parents as well as have a stable environment when a primary residence is established (Kutasinski v. Kutasinski).

Child's Education – When both parents provide guidance and support, the child does well in school (Hager v. Hager).

Child's Extracurricular Activities – Joint custody was awarded in a case due to the parents' ability of helping in the transportation of the children to their activities (Richard v. Richard).

Similarities in the Parenting Philosophies – Both parents must respect each other as parents in order for joint custody to work. (Khoee-Solomonescu v. Solomonescu).

Complimentary Parenting Style – It was noted that respective strengths of each parent offset their respective weaknesses; also, the children were benefiting from the different parenting styles. (Salvador v. Salvador)

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History of Living Arrangements – When there is a proven history of an arrangement working, judges are reluctant to change the schedule (Houle v. Poulin).

Limited Parental Conflict – Joint custody is seen as viable when a judge has evidence that both parents can put aside the bitterness and disrespect that defined their relationship since the separation and begin to act in child's best interest (Dunham v. Dunham)

Parents' Availability for the Child – The court looks at the parents' availability for the child, including work schedules, flexibility of work, and support systems set up by each parent. (Tacit v. Drost).

Parents' Proximity to Each Other – Another factor which may be considered is the parents' proximity to each other, as well as proximity to daycare and schools or other venues that the child may need (Hager v. Hager)

Motivation of the Parents – Joint custody arrangements are only beneficial to the child if both parents are committed to continuing a close relationship with their child (Rosien v. McCulloch).

Recognition of the Importance of the Other Parent to the Child – Each parent must respect the other parent as an important person in their child's life if joint custody is going to work (Peterson v. Scalisi).

Ability to Communicate – Communication between parents' is a major factor which is relied upon to award joint custody. Parents must be able to communicate in a meaningful way in regards to their child as well as be receptive to other points of view from the other parent rather than being negative (Beatty v. Beatty).

Parental Responsibility – Both parents must be responsible, realistic and caring individuals for joint custody to be a consideration (Rosien v. McCulloch).

Length of Parental Relationship – When considering joint custody, the history of the relationship as well as the duration of the relationship plays a determining factor (Trolley v. Trolley).

Child's Views and Preferences – Most children do not object to a joint custody decision since it allows them to

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maintain a relationship with both parents (Salvador v. Salvador).

Joint Custody When One or Both Do Not Agree – Joint custody may still be awarded in these cases if the parents have demonstrated in the past that they can co-operate (; Kutasinski v. Kutasinski). Joint custody is ordered to ensure that both parents remain involved in the child's life and both parents have equal input in decision making (Buckholtz v. Lamey).

Factors for awarding sole custody are:

The Child as the Messenger – Joint custody may not be deemed appropriate when the parents are putting their child in this situation (Hendricken v. Douglas).

Lack of Parenting Skills – Joint custody may not be ordered if one or both parents demonstrate a lack of parenting skills, including: not informing the other parent of a change in scheduling plans; exposing the child to unrealistic expectations; unpredictable parenting routine; and using the child as a messenger (Muir-Lang v. Lang).

Lack of Communication and Cooperation – Joint custody requires a high degree of cooperation between the parents and should only be ordered where the parents have demonstrated an ability to cooperate (Johnson v. Cleroux).

Presence of Parental Conflict – In evaluating the feasibility of joint custody, a court will consider the history of the relationship. When there has been a history of distrust, conflict and multiple community services involved, joint custody is likely not considered (Casabina v, Niochet).

Parents Unable to Make Decisions – The parents' inability to cooperate may prevent them from making important decisions such as their child's medical needs or their child's surname. For joint custody to be awarded, these important decisions are usually made together (O 'Connor v. Kenney).

Presence of a Power Imbalance – When one parent feels there is a power imbalance sole custody may minimize the power struggle (Dunham v. Dunham). A joint custody

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award may not be ordered where there is evidence of hostile, abusive and controlling behavior exhibited by one parent since it would place the other at disadvantage (Biamonte v. Biamonte).

Failure To Pay Child Support – The judge may view conflict regarding child support and a request for joint custody by one parent as a way of avoiding paying child support payments. When a financial reason is the main attraction to joint custody, sole custody is more likely to be ordered (Kearney v. Kearney).

History of Lack of Parental Involvement – Judges must decide whether the reason for the lack of parental involvement was legitimate and what effect this has or will have on the children (Roda v. Roda).

Child Thriving in Sole Custody Arrangements – A court may find that disturbing the current situation may not be beneficial to the child (Webster v. Webster).

Child Stress – When children are further stressed by their parents' inability to co-operate, sole custody may be ordered to separate the parents and prevent the children from suffering further stressful experiences (Trevino v. Kopyay).

The Child Needing Structure and Stability – In many cases, discipline techniques may be different in each parent's home resulting in confusion for the child because the consequences become unpredictable (Casabona v. Niochet). If the confusion becomes harmful to the child, a judge will typically order sole custody.

The solution being advocated by modern scholars is the concept of shared parenting. Shared parenting takes the emphasis off of winning and stresses cooperation over competition.

SHARED PARENTING

Before parents separate, the legal system views their responsibility to make decisions for their children as a joint one. A presumption of joint decision making after the dissolution simply extends that expectation to the reorganized family. Some states have moved beyond the concept of custody altogether and instead encourage parents to agree to, and the courts to award, "shared parenting" plans. In fact, the most appropriate rule for contested physical custody cases is to encourage parents to reach their own agreements by submission of parenting plans developed through education and mediation. A national commission recently recommended that all states adopt the parenting plan idea.⁶⁷

A parenting plan is a document created by the parties, or the court, which describes each parent's rights and responsibilities. It may be as specific or as basic as the parents wish. Parenting plans must address the following subjects:⁶⁸

- (a) decision-making responsibility
- (b) residential responsibility
- (c) information sharing and access, including telephone and electronic access
- (d) legal residence of the child for school attendance
- (e) parenting schedule including holidays, vacations, birthdays and weekends
- (f) transportation and exchange of the child
- (g) relocation of the parents
- (h) procedure for review and adjustment of the plan.

The parenting plan may address other subjects if the parents so desire, including how future disputes shall be resolved, how changes to the schedule will be made, what information should be communicated between the parents, and how medical or psychological issues relating to the child will be handled. A copy of the form for New Hampshire's parenting plan is located in the appendix.

For example, House Bill 2464 "An Act Relative to Shared Parenting" is being presented to the state of Massachusetts by the group Fathers & Families. The bill establishes a presumption favoring shared legal and physical custody in cases where the family court determines that both parents are fit to care for their children. After 23

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years of successful implementation in California, shared parenting would not be an experiment in Massachusetts. California has experienced increased numbers of satisfied parents, higher rates of child support compliance, and fewer returns to court.⁶⁹ Shared parenting is also the outcome most consistent with 80 years of Supreme Court rulings that hold that fit parents have a constitutionally protected right to raise their children. Currently, joint legal and physical custody is ordered in 8 percent of cases in Massachusetts.⁷⁰

Illinois House Bill 1286, which would significantly revise custody law, is based on a proposal from the Illinois State Bar Association and is currently opposed by The Chicago Bar Association. The measure would do away with the current concepts of custody and would create new classes of "parents," among other changes. The Chicago Bar Association claims that forcing parents to agree on controversial matters will simply cause greater conflict among the parents. But Illinois House Bill 1286 has the support of the Illinois population and will be voted on in the summer of 2007.

New Hampshire's shared parenting bill, House Bill 919, calls on judges to begin custody cases with a presumption of joint legal and physical custody unless a parent is deemed unfit. These proposed changes were recently codified in RSA Chapter 461-A. The changes are designed to make New Hampshire's family courts more approachable, less adversarial, and increase the focus upon the best interest of children.⁷¹ In many cases, parents have engaged in intense battles over primary physical custody. The new laws require courts to place an emphasis on alternative dispute resolution. Physical custody is now known as a parenting schedule and/or residential responsibility. As the parenting schedule does not have a win/loss connotation, the goal is to focus the parents upon the development of an appropriate schedule, rather than achieving victory over the other parent.

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INTERVIEW WITH PROFESSOR SCHEPARD

Professor Schepard is the director of the Family Law Center at Hofstra School of Law in New York. Professor Schepard has been working with issues relating to family law for quite some time. The following interview took place at Hofstra University on March 23, 2007.

What is your name? position? organization?

Professor Andrew Schepard, Hofstra University School of Law, Director of the Center for Children and Families.

How long have you been associated with family law?

I have been examining family law issues since 1980.

What are your experiences with family law?

I was a practicing lawyer for 10 years before I took over the Family Law Center at Hofstra University

Could you explain the best interests of the child theory as you understand it?

An individualized determination of what the court predicts will be the best parenting relationship for the child.

How is this theory applied to custodial law?

It is a projection of the psychological and emotional needs of a child

Do you consider this application proactive or reactive?

The theory is definitely reactive. It is a result of the family illusion prevalent in public thought. It stems from the failure of the parents to reach an agreement amongst themselves.

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Are most custody cases contested or does one parent voluntarily relinquish custody?

Nowadays, most custody cases are not contested. Parents typically reach agreements amongst themselves, especially in New York. Personally, I disagree with the term custody – it implies a possession. I prefer the primary decision maker for the custodial parent.

Which parent usually applies for custody after the separation?

I can't answer that question. That is not an area where data is accurately kept.

Does the mother have to apply or is it generally accepted?

There is no evidence to support the claim that mothers always get custody. Mothers tend

to be custodial by agreement.

How long does it take to finalize a custody case after the initial court visit?

Again, there are no accurate statistics on the subject.

Which parent usually obtains custody of the child after separation?

Mothers tend to be custodial, either by way of judgment or agreement. More men are beginning to obtain both joint and sole custody of their children. Joint custody is the most common occurrence in modern courts.

Does this differ in states other than yours?

Not that I know of.

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Professor Schepard then ended the interview with the recommendation that I review his book, *Children, Courts, and Custody: Interdisciplinary Models for Divorcing Families*. In the book, he explains what he hopes to see changed in the family courts of the future.

THE FUTURE OF FAMILY COURT

Professor Schepard states "In what for legal institutions is a remarkably short period of time, the paradigm of the child custody court has shifted from sole custody and adversarial courtroom combat to mediation, education, and self-determination that aim to involve both parents in the post-divorce life of their child. The conflict-management paradigm assumes that parents, not judges or mental health experts, should determine how a child of divorce is parented, both parents are important to the child's future, and that carefully structured interventions can encourage parents to place their children's interests above their anger and pain.

His suggestions for the improvement of family courts are listed below:⁷²

- 1) The structure of the child custody court should be unified and simplified
 - a. The court should be part of a unified family court that addresses all disputes involving parents children regardless of the legal label that their disputes receive
- 2) Committed, experienced judges should staff the child custody court
 - a. The all-important decisions regarding a child's future should only be made by the most experienced family law practitioners
- 3) The child custody court should make diversified education programs available to all divorcing parents and children
 - a. Parents need help to understand the court process, manage conflict for the benefit of their children, to avail themselves of helping services, to understand what the court system can and cannot do for them, and to gain access to information in order to make responsible choices for their families
- 4) The child custody court should develop special programs to meet the needs of pro se parents
 - a. The family law system is far too complicated and emotionally-involved to let parents fight amongst themselves with no mediation
- 5) The child custody court should make mediation and safety precautions available to all divorcing parents
 - a. A parent that is educated to the effects of their actions on their children is far less likely to pursue injurious means
- 6) The child custody court should create a plan for differential management of high-conflict cases
 - a. Parents need to realize that it is in their children's "best interests" that they work together at parenting; high-conflict parents are the neediest of individuals in family court
- 7) The child custody court should ensure that high-quality supervised visitation services are available to all families that need them

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- a. Highly-trained court professionals are well-equipped to handle the problems associated with supervised visitation
- 8) The child custody court should ensure accountability and quality control for court-mandated services
 - a. Written rules need to be developed
- 9) The child custody court should encourage lawyers who represent parents to incorporate conflict management and the welfare of children into their representation
 - a. The adversarial system must be left in the past; it is no longer about winning or losing. The goal is reach a productive decision that benefits all parties involved
- 10)The child custody court should reinforce the role of the lawyer for the child
 - a. Lawyers need to represent the children involved, rather than the combative parents
- 11)The child custody court should view its mission as one of developing parenting plans, not custody orders
 - a. Parenting plans serve as guidelines to the custodial decisions and can be used to mediate problems that arise later
- 12)The child custody court should receive adequate funding
 - a. The family court is overworked and understaffed; the states need to devote more resources to family law areas
- 13)The child custody court should encourage research and development to refine its operations for the benefit of the children of divorce
 - a. Family law is constantly in a state of transition and it is very important to stay ahead of the curve

CONCLUSIONS

Being a single father that traversed the complicated family law system in Massachusetts in order to obtain his son, I had some initial assumptions before this project began. The primary caretaker presumption was my biggest obstacle in proving my worth as a parent. In the end, it was the unfitness of the mother that helped me earn sole custody of my son and not my fitness as a parent. In the 5 years that we went to court, fighting over our son, it was rarely mentioned that we should try to cooperate and mediation was never used. In the end, although I gained custody, a significant wedge was driven between the mother and myself. It has been over 3 years since we have been in court and the relationship between us is still as bitter as it has ever been. All of these prior experiences have caused my son emotional harm and negated his chances of having a cohesive family unit.

This paper has shown me that a custodial process should not be a competition. It should be a cooperative effort on the part of both parents to see that the child's "best interests" are looked after. The court's continuing intervention, along with the cooperative spirit of both parents, should help to ensure that the conflict is kept at a reasonable level. A lot of undue hardships can be avoided for the parents and the emotional well-being of the child will be shielded from the bitterness of a failed relationship.

Family law has become a significant factor in the majority of people's lives in the United States. In accordance with this modern phenomenon, the family courts are in need of additional funding and extra staffing; family courts have become overwhelmed as more families dissolve than stay together. The role of the family court has shifted from a decision-maker to that of a mediator. The main goal of the family courts of the future should be to help parents help themselves. Constant vigilance and guidance on the part of the family court will result in the strengthening of the non-traditional family.

The most important change being practiced by the family court is their renewed belief in the ability of a parent to determine what is in the "best interests" of their child. It is

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extremely important to involve both parents in the life of their child. The new concept of shared parenting represents a shift in the prevailing social opinion in the United States. Although the non-traditional family has become the most common type of family arrangement, the line between the traditional and the non-traditional has become invisible; both types of families require the effort of both parents to succeed.

The information that I gained in this project will serve as the foundation of my legal philosophies to be carried forward. I will enter law school in the next few months and begin the final stages of educational career. In 3 short years, I will become a lawyer. The goal of my law career is to see the notions of gender equality appear in all areas of law, especially in the area of family law. The genders are equal and they both have the ability to pursue any lifestyle they choose. If a woman can have a career, a man can have a family. If the family courts continue to recognize this equality, and continue to push for shared parenting arrangements, the issues discussed in this paper will become a historical record of a confused society. Let's all hope for the best. I hope that you enjoyed reading this paper as much as I enjoyed writing it. Farewell.

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